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# POST-CONVICTION REVIEW: QUESTIONS OF INNOCENCE, INDEPENDENCE AND NECESSITY

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**Abstract:** *Alongside a growing recognition of the existence of miscarriages of justice, there has been a parallel development of schemes to address wrongful convictions after the normal appeals process has been exhausted. This paper addresses the question of what constitutes the proper role for such schemes, drawing on a comparative examination of the respective schemes in Canada, Scotland and North Carolina. It puts forward four arguments. First, it argues that there is a clear need for post-conviction review schemes to operate outside of the courts, supported by investigative resources and the power to compel the production of evidence, and for them to be independent from government. Secondly, it argues that such schemes should not restrict their remit to cases in which fresh evidence emerges, but should be empowered to refer cases back to the court of appeal where there has been a procedural impropriety that casts doubt on guilt. They should not, however, be permitted to refer cases back to the court where there is overwhelming evidence of guilt, however serious the procedural breach concerned. While there is a good argument that a court should overturn a conviction where a serious breach of procedure calls into question its moral authority to adjudicate, this argument does not extend to a post-conviction review body, that sits one step removed from the conviction process and that is likely to lose public confidence if it refers cases where there is overwhelming evidence that the convicted person is factually guilty. Thirdly, it argues that while there is no reason in principle to restrict review to serious cases or to cases where the convicted person is living, these are not unreasonable restrictions to place on a scheme if there exist limited resources. Finally, it argues that post-conviction review bodies concerned primarily with the review of individual applications are not ideally constituted for playing a wider role in systemic reform, which would be more effectively undertaken by an affiliated body with a broader based membership.*

(16,521 words, including footnotes.)

## I. INTRODUCTION

In recognition of the reality of wrongful conviction, a number of jurisdictions have developed post-conviction review<sup>2</sup> schemes aimed at addressing such mistakes. Our aim in this paper is to address the question of how such schemes should ideally operate. Although a range of examples of post-conviction review will be discussed, we do so primarily by a comparative study of the post-conviction review schemes in Scotland, Canada and North Carolina. Scotland and North Carolina are two of a very limited number of jurisdictions that have established independent criminal case review commissions, although the scope of the respective

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<sup>2</sup> By post-conviction review, we mean the system for conviction review that takes place outside the normal criminal appeals process – usually (but not always) after the appeals process has been exhausted.

commissions is very different. Canada retains a system whereby claims of wrongful conviction are adjudicated by a government minister, assisted by an advisory body.

To date, analysis has tended to focus on particular post-conviction review schemes in isolation, but by bringing together for the first time the accumulated experience of these three bodies (and other examples where appropriate) we argue that there is a clear case for the existence of an independent body to undertake post-conviction review. Such a body, we argue, should not restrict its remit to cases in which fresh evidence emerges, but should be empowered to refer cases where there has been a procedural impropriety that casts doubt on guilt. Such a body should not, however, be permitted to refer cases where there is overwhelming evidence of guilt, however serious the procedural breach concerned. We then go on to argue that, in principle, there are no good reasons for restricting the ambit of post-conviction review to serious cases or to cases where the applicant is living (although political or resource constraints might serve as practical considerations here). Finally, we argue that a post-conviction review body charged with the review of individual cases is not best placed to engage in law reform work aimed at preventing wrongful conviction at a systemic level. Doing so might compromise its relationship with the courts and would require a membership different to that best suited to the review of individual cases.

## **II. POST-CONVICTION REVIEW SCHEMES**

It has long been recognised that there is a need for some sort of procedure by which convictions can be reviewed outside of the normal criminal appeals process. A number of notorious examples where factually innocent individuals have initially failed to overturn their convictions on appeal demonstrate that the criminal courts do not always get it right first – or even second – time.<sup>3</sup> There is also ample evidence, stemming primarily from DNA exoneration projects in the US,<sup>4</sup> that conviction of the factually innocent is a real and pressing problem. As a result of this evidence, we can state with certainty that wrongful conviction does occur and we can even confidently identify the main causes.<sup>5</sup> Perhaps most importantly for the purposes of this paper,

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<sup>3</sup> To take an example from Canada, David Milgaard was wrongly convicted for the murder of Gail Miller in 1970. His initial appeal against conviction was unsuccessful and he served almost 23 years in prison until he was freed in 1992 and later fully exonerated through DNA forensic analysis in 1997: see THE HONOURABLE MR JUSTICE EDWARD P MACCALLUM, REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2008).

<sup>4</sup> See in particular the work of the Innocence Project and the National Registry of Exonerations (NRE). The Innocence Project ([www.innocenceproject.org](http://www.innocenceproject.org)) was founded in 1992 and is based at Cardozo Law School. It focuses purely on DNA based exonerations and, at the time of writing (February 2017), listed 348 of these. The NRE ([www.law.umich.edu/special/exoneration/Pages/about.aspx](http://www.law.umich.edu/special/exoneration/Pages/about.aspx)) is part of the University of Michigan Law School and has a slightly wider remit, providing detailed information on every known exoneration in the US since 1989; at the time of writing 1,976 exonerations were listed. For a detailed analysis of the Innocence Project's first 250 DNA exonerations, see BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). For analysis of the NRE exonerations, see SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS (2012).

<sup>5</sup> There is a remarkable consensus that the main evidential causes of wrongful conviction are mistaken eyewitness identification, false confessions, misleading forensic evidence and the evidence of accomplices or informers (or

we also know that in many cases that have subsequently been shown to be instances of wrongful conviction, an initial appeal against conviction was unsuccessful.<sup>6</sup>

This recognition has led some jurisdictions to establish criminal cases review commissions – independent bodies which can review convictions and in appropriate cases refer them back to the courts for re-consideration. The first and best known of these is the Criminal Cases Review Commission for England, Wales and Northern Ireland,<sup>7</sup> which was established in 1997 following a series of notorious miscarriages of justice, mostly relating to terrorist cases.<sup>8</sup> Other jurisdictions followed, with independent criminal case review commissions also being set up in Scotland, Norway and North Carolina.<sup>9</sup> For the sake of completeness, mention should also be made of the DNA Review Panel that operated in the Australian jurisdiction of New South Wales between 2007 and 2014, an independent body that had the power to refer cases to the appeal court but that was disbanded after making no referrals.<sup>10</sup> Other jurisdictions – such as Canada and Australia – retain a variation of the system that existed prior to the establishment of the English CCRC whereby post-conviction review is in the hands of a government minister.<sup>11</sup>

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others who have a motivation to lie): see GARRETT, CONVICTING THE INNOCENT, *supra* note 4, at 165-167; GROSS & SHAFFER, *supra* note 4, at 40. Other environmental and psychological factors also play a role, such as a culture of incentivising guilty pleas and the psychological phenomenon of tunnel vision that can affect those investigating and prosecuting cases: see GARRETT, CONVICTING THE INNOCENT, *supra* note 4, at 150-153, 165-170, 265-268; Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of the Justice System*, 31 MANITOBA L.J. 403, 436 (2006). There is a vast literature devoted to identifying safeguards that might be put in place to combat some of these factors: see e.g. Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age Of Innocence*, 47 GA. L. REV. 723 (2012-2013); Lisa D. Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 QUEEN'S L.J. 261 (2008); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010); Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation*, 49 CREIGHTON L. REV. 555 (2016); Richard A. Wise, Kirsten A. Dauphinaise & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807 (2007).

<sup>6</sup> See the discussion in GARRETT, CONVICTING THE INNOCENT, *supra* note 4, chapter 7.

<sup>7</sup> The establishment of the Commission was recommended by THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT (Cmnd. 2263, 1993) ch.11. It will subsequently be referred to as 'the English CCRC' to distinguish it from its Scottish counterpart. Within the overall jurisdiction of the United Kingdom of Great Britain and Northern Ireland, there are three separate and distinct legal systems – those of Scotland; England and Wales; and Northern Ireland.

<sup>8</sup> In particular the so-called 'Birmingham Six' and 'Guildford Four': see the detailed account in John Weeden, *The Criminal Cases Review Commission (CCRC) of England, Wales and Northern Ireland*, 48 CLQ 191, 191-194 (2012).

<sup>9</sup> The Scottish and North Carolina Commissions are discussed in detail later in this paper. For discussion of the Norwegian Commission, see Ulf Stridbeck & Svein Magnussen, *Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission*, 80 U. CIN. L. REV. 1373 (2012); Ulf Stridbeck & Svein Magnussen, *Opening Potentially Wrongful Convictions: Look to Norway*, 58 C.L.Q. 267 (2012).

<sup>10</sup> See David Hamer, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, 37 U. NEW SOUTH WALES L.J. 270, 292-295 (2014); Lynne Weathered, *Reviewing the New South Wales DNA Review Panel: Considerations for Australia*, 24 CURRENT ISSUES IN CRIMINAL JUSTICE 449 (2013).

<sup>11</sup> Canada is discussed in detail later in this paper. For discussion of the Australian system, see Bibi Sangha & Robert Moles, *Mercy or Right: Post-Appeal Petitions in Australia*, 14 FLINDERS L.J. 293 (2012); Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia*, 17 CURRENT ISSUES IN CRIMINAL JUSTICE 203 (2005).

The existence of these different forms of post-conviction review raises a number of questions about the proper scope of such bodies. We address these questions by examining three schemes for post-conviction review in more detail – those of Scotland, Canada and North Carolina – chosen because they offer a range of approaches to the issues concerned.<sup>12</sup>

The schemes do, of course, have to be seen in the wider legal and political context of the jurisdiction in question, but examination of their accumulated experience does generate a number of important insights about the appropriate role of a post-conviction review body in relation to claims of innocence and the implications this has for the contours of review schemes. Before proceeding to discuss the three schemes, however, it is necessary to consider the meaning of innocence and how this affects eligibility for exoneration.

### III. THE MEANING OF INNOCENCE

The ultimate aim of a post-conviction review body is to offer a remedy to those who are innocent of the crime of which they have been convicted, but that raises the question of precisely what is meant by innocence. While there is considerable confusion over terminology,<sup>13</sup> a useful distinction can be made between legal and factual innocence.<sup>14</sup> Broadly speaking, factual innocence refers to the conviction of someone who did not commit the crime in question, either because it was perpetrated by someone else or because no crime was ever committed.<sup>15</sup> Legal innocence refers to the conviction of someone who should not, under the rules of the legal system in question, have been convicted.<sup>16</sup> While legal innocence might incorporate cases of factual innocence, it would also encompass those who are (or may be)

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<sup>12</sup> In this paper, the Scottish Criminal Cases Review Commission is selected for detailed analysis over its more well-known counterpart, the English CCRC, on the basis that it has not yet been the subject of academic discussion to anything like the same extent as the English CCRC. This is despite the fact that the SCCRC has been favourably compared to the English CCRC in terms of the greater resources it has at its disposal and the wider powers it has to obtain evidence: see e.g. Peter Duff, *Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner*, 72 MODERN L. REV. 693, 694 (2009); Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission* (2013) 21 WM. & MARY BILL RTS. J. 1153, 1212 (2013). For detailed analysis of the English CCRC, see e.g. LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE? TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION (2008); MICHAEL NAUGHTON, ED., THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT (2012); Weeden, *supra* note 8; David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 DRAKE L. REV. 657 (2004).

<sup>13</sup> For differing perspectives, see e.g. Cathleen Burnett, *Constructions of Innocence*, 70 U.M.K.C. L. REV. 971 (2002); Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2010); Steven Greer, *Miscarriages of Justice Reconsidered*, 57 MODERN L. REV. 58 (1994).

<sup>14</sup> Although within these two broad categories there are many subtle distinctions. It lies beyond the scope of the paper to discuss these, but see the more detailed categorisations in e.g. MICHAEL NAUGHTON, THE INNOCENT AND THE CRIMINAL JUSTICE SYSTEM: A SOCIOLOGICAL ANALYSIS OF MISCARRIAGES OF JUSTICE, 16-17 (2013); Clive Walker, *Miscarriages of Justice in Principle and Practice*, in MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 31, 31-37 (eds. Clive Walker & Keir Starmer, 1999).

<sup>15</sup> Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 45 (1987).

<sup>16</sup> *Id.* at 45.

factually guilty but should not have been convicted because there was a procedural irregularity during the process that led to conviction.<sup>17</sup>

The term miscarriage of justice is sometimes used to describe the conviction of a factually innocent person, but it is also the legal test for appeal against conviction in some jurisdictions.<sup>18</sup> In other words, it has a legal meaning (which normally encompasses convictions where there has been a procedural irregularity as well as those where fresh evidence casts doubt on guilt) but that legal meaning does not necessarily correspond with the way it is understood outside the narrow confines of the law.<sup>19</sup>

It should also be said that factual innocence is something that is often very difficult to establish conclusively. The increased sophistication of DNA testing has meant that there does now exist a growing number of cases – especially in the US – in which it can be said with absolute certainty that a factually innocent person has been wrongly convicted.<sup>20</sup> In cases where no physical evidence exists, however, the extent to which factually innocent people have been wrongly convicted is impossible to determine.<sup>21</sup> The extent to which post-conviction review bodies should confine themselves to cases of factual innocence and the difficulties that arise in defining and identifying this are considered later in the paper,<sup>22</sup> which now turns to a brief account of the post-conviction review schemes in Canada, Scotland and North Carolina.

#### IV. THE POST-CONVICTION REVIEW SCHEMES

##### A. THE CRIMINAL CONVICTION REVIEW GROUP (CANADA)

In Canada the primary remedy for those who, following an exhaustion of the appeals process still believe their conviction is in error, is ministerial review,<sup>23</sup> the provisions of which are found in Part XI.1 of the *Criminal Code*.<sup>24</sup> The right to review a conviction was first introduced in law in 1923. After many years of ad hoc review, in 1993 the Criminal Conviction Review

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<sup>17</sup> There are many types of procedural irregularities that might justify quashing a conviction, such as trial judge misdirection, jury misconduct or evidence admitted that was obtained via an irregular procedure. A procedural irregularity may or may not cast doubt on the guilt of the accused: see *infra* notes 151-172 and accompanying text.

<sup>18</sup> Including Scotland: see *infra* note 55 and accompanying text.

<sup>19</sup> See e.g. Sion Jenkins, *Miscarriages of Justice and the Discourse of Innocence: Perspectives from Appellants, Campaigners, Journalists, and Legal Practitioners*, 40 J. OF LAW AND SOCIETY 329 (2013).

<sup>20</sup> See the examples uncovered by the Innocence Project and the NRE, *supra* note 4.

<sup>21</sup> Zalman has established a generally accepted ‘estimate’ of wrongful convictions in the US of between 0.5% and 1% for felony convictions (see Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221 (2012)), but the extent to which these figures translate to other contexts and jurisdictions is an open question.

<sup>22</sup> See *infra* notes 134-148 and accompanying text.

<sup>23</sup> It is also possible to appeal to the Royal Prerogative of Mercy, but such appeals have waned since the abolition of the death penalty in Canada in 1976. The Royal Prerogative is not discussed in detail here but see Gary T. Trotter, *Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review*, 26 QUEEN’S L.J. 339 (2001).

<sup>24</sup> R.S.C., 1985, c C-46

Group (CCRG), comprised of a group of lawyers within the Department of Justice, was formed, reporting directly to the Assistant Deputy Minister of Justice. In 2002, the conviction review process was again amended legislatively, in part due to dissatisfaction with procedural delays, secrecy and lack of accountability.<sup>25</sup> Changes included *inter alia* clearer criteria regarding remedies, increased investigative powers, movement to a physically separate building from the Department of Justice, and the appointment of a Special Advisor.<sup>26</sup> While some of these changes were in response to criticisms that the CCRG should resemble more the independent English CCRC,<sup>27</sup> they did not result in any major shift in the way that the CCRG operates.

As it stands today, ministerial review is available for convictions for both indictable and summary offences.<sup>28</sup> Applicants must have exhausted all avenues of appeal, both at the provincial appeals court and Supreme Court levels.<sup>29</sup> The information presented in support of the application must represent new and significant information that was not previously considered by the courts and is reasonably capable of belief.<sup>30</sup> Guidelines from the Department of Justice in 2003 listed a number of examples of new and significant information that would support a conviction review application, namely information that would establish or confirm an alibi; another person's confession; information that identifies another person at the scene of the crime; scientific evidence that points to innocence or another's guilt; proof that important evidence was not disclosed; information that shows a witness gave false testimony; and information that substantially contradicts testimony at trial.<sup>31</sup>

When the CCRG assesses whether information is new and significant, the test applied is similar to that used by the courts in determining the admissibility of new or "fresh" evidence on appeal: it must be relevant, reasonably capable of belief and such that, if taken with the other evidence presented at trial, it could reasonably be expected to have affected the verdict.<sup>32</sup> The applicant must, however, also satisfy the Minister that there is a reasonable basis to conclude that "a miscarriage of justice likely occurred",<sup>33</sup> given the new and significant information. This is not part of the normal test for an appeal against conviction and means that the standard applied to conviction review is higher than the test that would be applied at the subsequent court hearing, should the case be referred.<sup>34</sup> Problematically, no further guidance or precedent is available as

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<sup>25</sup> Patricia Braiden & Joan Brockman, *Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code*, 17 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 3, 20-28 (1999).

<sup>26</sup> MINISTER OF JUSTICE, APPLICATIONS FOR MINISTERIAL REVIEW: MISCARRIAGES OF JUSTICE, ANNUAL REPORT, 3 (2015).

<sup>27</sup> See Canada Gazette, *Regulations Respecting Applications For Ministerial Review – Miscarriages of Justice* Part 1, Vol 136, No 39, 28 September 2002.

<sup>28</sup> DEPARTMENT OF JUSTICE, APPLYING FOR A CONVICTION REVIEW, 3 (available at <http://justice.gc.ca/eng/cj-jp/ccr-rc/rev.pdf>).

<sup>29</sup> Criminal Code, section 696.1(1).

<sup>30</sup> Annual Report, *supra* note 26, at 6.

<sup>31</sup> These are re-produced in APPLYING FOR A CONVICTION REVIEW, *supra* note 26, at 2.

<sup>32</sup> Annual Report, *supra* note 26, at 6.

<sup>33</sup> Criminal Code, section 696.3(3)(a).

<sup>34</sup> HERSH WOLCH AND JOANNE MCLEAN, IN THE MATTER OF THE COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID EDGAR MILGGARD: SUBMISSIONS (2008) at para 79.

to what might constitute a miscarriage of justice – it is purely a matter of policy for the Minister, who does not publish reasons for his or her decisions. As a result applicants have little or no idea what might suffice.<sup>35</sup>

The CCRG’s investigations can involve interviewing witnesses, forensic testing and analysis of evidence, and consultation with lawyers, police and prosecutors.<sup>36</sup> The CCRG has the authority to compel the production of documents as well as the appearance and testimony of witnesses.<sup>37</sup> The CCRG completes an investigative report, which is viewed by the applicant and forwarded to the Minister of Justice.<sup>38</sup> If the Minister is “satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”<sup>39</sup> he or she may either order a new trial or refer the matter to the Court of Appeal of a province or territory as if it were an appeal by the convicted person.

At this stage, Crown Counsel of the originating province have a number of remedies available to them to move forward, including conducting a new trial, withdrawal of the charges, offering no evidence (resulting in a not guilty verdict) or entering a stay of proceedings.<sup>40</sup> In the case of the last of these, the charges are “on hold” for one year and the Crown retains the power to recommence the proceedings on the same indictment.<sup>41</sup>

## **B. THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION**

In Scotland, post-conviction review is undertaken by the Scottish Criminal Cases Review Commission (SCCRC). The SCCRC was established in 1999, two years after the English CCRC, on the recommendation of the Sutherland Committee.<sup>42</sup> Before the SCCRC existed, convicted persons who had exhausted the normal appeal process had to apply to the Secretary of State for Scotland (a Government Minister) to have their convictions reconsidered, a scheme similar to that presently operating in Canada.<sup>43</sup> Since its establishment, anyone who has been convicted of a criminal offence in Scotland can apply to the SCCRC.<sup>44</sup> It can review sentences

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<sup>35</sup> Which might explain the low numbers of applicants – see *infra*, table 1.

<sup>36</sup> DEPARTMENT OF JUSTICE, APPLYING FOR A CONVICTION REVIEW, *supra* note 28, at 3.

<sup>37</sup> Annual Report, *supra* note 26, at 3.

<sup>38</sup> DEPARTMENT OF JUSTICE, APPLYING FOR A CONVICTION REVIEW, *supra* note 28, at 4.

<sup>39</sup> Criminal Code, section 696.3(3)(a).

<sup>40</sup> Kent Roach, *Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, Appendix F to THE HONOURABLE MR JUSTICE PATRICK J LESAGE, REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL, 21 (2007).

<sup>41</sup> This has been described as “not a satisfactory remedy”: see Le Sage, *supra* note 40, at 129. See also KATHRYN CAMPBELL, MISCARRIAGES OF JUSTICE IN CANADA: CAUSES, RESPONSES, REMEDIES (University of Toronto Press, forthcoming 2017).

<sup>42</sup> SUTHERLAND COMMITTEE: CRIMINAL APPEALS AND ALLEGED MISCARRIAGES OF JUSTICE, Cm.3245, para 5.50 (1996).

<sup>43</sup> *Id.* at paras 5.3-5.23.

<sup>44</sup> As in Canada, the option of applying to the Royal Prerogative of Mercy still exists alongside the SCCRC but applications are very rarely – if ever – now made: see Peter Duff, *Criminal Cases Review Commissions and Deference to the Courts: The Evaluation of Evidence and Evidentiary Rules*, CRIM. L. REV. 341, 352-355 (2001).



and convictions<sup>45</sup> and it is empowered to deal with both solemn and summary cases.<sup>46</sup> A claim does not have to be made by the convicted person – it can be made in respect of a deceased person in order to posthumously clear their name.<sup>47</sup> The applicant does, however, need to have a legitimate connection with the convicted person – victims of the crime or relatives of victims do not have standing to apply.<sup>48</sup>

The SCCRC has nine full time legal officers,<sup>49</sup> an annual budget of over £1 million<sup>50</sup> to conduct investigations and extensive legal powers to compel other parties (both public bodies and private individuals) to provide information it deems necessary.<sup>51</sup> One third of the SCCRC Commissioners must be solicitors or advocates of at least ten years standing and a further third must have knowledge or experience of the criminal justice system.<sup>52</sup> In practice there have been between six and eight Commissioners and two have always been lay members, such as academics and figures from the church.<sup>53</sup>

The SCCRC has no power to quash a conviction but can refer a case back to the court and it is then for the court to determine the appeal. The grounds upon which the SCCRC can refer a case are that it believes (a) “a miscarriage of justice may have occurred”; and (b) “it is in the interests of justice that a reference should be made”.<sup>54</sup> The phrase miscarriage of justice is a reference to the legal test for determining appeals against conviction in Scotland,<sup>55</sup> not to the factual innocence of the applicant. In order for a conviction to be quashed in Scotland, the court must be satisfied that there has been a miscarriage of justice based on a legally recognised factor. Two are specified in legislation: the existence of evidence that was not heard at the original proceedings<sup>56</sup> and an unreasonable jury verdict.<sup>57</sup> Others are set out in case law and all relate to some sort of procedural irregularity such as evidence wrongfully admitted or excluded, trial judge misdirection or defective legal representation.<sup>58</sup> This does mean that, unlike in

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<sup>45</sup> Approximately one fifth of applications are for sentence review: see SCOTTISH CRIMINAL CASES REVIEW COMMISSION, ANNUAL REPORT 2014-15, 14 (2016). For discussion of the Commission’s sentence review function, see James Chalmers & Fiona Leverick, *The Scottish Criminal Cases Review Commission and its Referrals to the Appeal Court: The First Ten Years*, CRIM. L. REV. 608, 615-620 (2010).

<sup>46</sup> In Scotland, cases can be prosecuted under solemn or summary procedure. Solemn procedure is reserved for the most serious cases (known as “indictable” cases) and involves the use of a jury to determine guilt. Summary procedure (where cases are prosecuted on a “complaint”) is used for less serious cases. Around a fifth of applications relate to summary cases: ANNUAL REPORT 2014-15, *supra* note 45, at 17.

<sup>47</sup> Criminal Procedure (Scotland) Act 1995, section 194B(4).

<sup>48</sup> Scottish Criminal Cases Review Commission v. Swire, 2015 S.L.T. 556, at para 23 (Scottish High Court of Justiciary, 2015).

<sup>49</sup> ANNUAL REPORT 2014-15, *supra* note 45, at 49.

<sup>50</sup> ANNUAL REPORT 2014-15, *supra* note 45, at 59. At the time of writing, this equates to approximately \$1.25 million.

<sup>51</sup> Criminal Procedure (Scotland) Act 1995, sections 194H, 194I and 194IA.

<sup>52</sup> Criminal Procedure (Scotland) Act 1995, section 194A.

<sup>53</sup> Duff, *supra* note 12, at 694.

<sup>54</sup> Criminal Procedure (Scotland) Act 1995, section 194C.

<sup>55</sup> Criminal Procedure (Scotland) Act 1995, section 106.

<sup>56</sup> Criminal Procedure (Scotland) Act 1995, section 106(3)(a).

<sup>57</sup> Criminal Procedure (Scotland) Act 1995, section 106(3)(b).

<sup>58</sup> For a comprehensive list see FIONA LEVERICK, JAMES CHALMERS, SARAH ARMSTRONG & FERGUS MCNEILL, SCOTTISH CRIMINAL CASES REVIEW COMMISSION 10TH ANNIVERSARY RESEARCH, 18-20 (2009).

Canada or North Carolina, the SCCRC is not restricted to looking at cases in which additional evidence has emerged – its references can span the whole range of grounds for appeal.

### C. THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION

The North Carolina Innocence Inquiry Commission (NCIIC) was established in 2006,<sup>59</sup> on the advice of the North Carolina Actual Innocence Commission, a body set up in 2002 to make recommendations aimed at reducing the risk of wrongful conviction.<sup>60</sup> The NCIIC has eight commissioners<sup>61</sup> and these must include a superior court judge, a prosecuting attorney, a victim advocate, a defence attorney, a sheriff, a person who is not an attorney or employed by the judicial department and two others.<sup>62</sup>

The NCIIC will only consider applications from those who have been convicted of a felony in a North Carolina state court<sup>63</sup> and – unlike the CCRG and SCCRC – where the applicant is alive.<sup>64</sup> Most significantly, the statutory criteria require that the applicant be asserting “complete innocence of any criminal responsibility for the felony”.<sup>65</sup> Claims of secondary involvement, or of a reduced level of culpability, are not considered claims of complete factual innocence. Furthermore, credible and verifiable evidence of innocence must exist,<sup>66</sup> and this must not have been previously heard at trial or in a post-conviction hearing.<sup>67</sup>

If, after a preliminary review, the Executive Director determines that the statutory criteria are met, the case moves into a formal inquiry phase. Priority is given to cases where the claimant is currently incarcerated.<sup>68</sup> The investigation phase is a “detailed and lengthy process that involves interviewing witnesses, obtaining affidavits, seeking court orders for evidence, testing of physical evidence, and compiling of documentation”.<sup>69</sup> The NCIIC has substantial powers of investigation – it can for example issue subpoenas and compel the attendance of witnesses.<sup>70</sup>

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<sup>59</sup> By Article 92 of the North Carolina General Statutes (subsequently ‘NCGS’). The NCIIC is discussed in depth in Kent Roach, *An Independent Commission to Review Claims of Wrongful Convictions: Lessons From North Carolina?*, 58 C.L.Q. 283 (2012); Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345 (2007).

<sup>60</sup> Christine C. Mumma, *North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647 (2004).

<sup>61</sup> NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, ANNUAL REPORT TO THE 2015-16 REGULAR SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA AND THE STATE JUDICIAL COUNCIL (2015) at ii.

<sup>62</sup> N.C.G.S. section 15A-1463.

<sup>63</sup> N.C.G.S. section 15A-1460(1).

<sup>64</sup> N.C.G.S. section 15A-1460(1).

<sup>65</sup> N.C.G.S. section 15A-1460(1).

<sup>66</sup> N.C.G.S. section 15A-1460(1).

<sup>67</sup> N.C.G.S. section 15A-1460(1).

<sup>68</sup> N.C.G.S. section 15A-1466(2).

<sup>69</sup> THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, REPORT TO THE 2009-2010 LONG SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 3 (2009).

<sup>70</sup> N.C.G.S. section 15A-1467(d)-(f).

It also has the power to compel the testimony of witnesses who invoke their privilege against self-incrimination.<sup>71</sup>

If, during the formal inquiry, credible and verifiable new evidence of actual innocence is uncovered, the case progresses to a hearing before the eight commissioners.<sup>72</sup> Like the SCCRC and CCRG, the NCIIC cannot itself quash convictions but can refer a case back to the courts. The test that must be met for it to do so is that there is “sufficient evidence of factual innocence to merit judicial review”.<sup>73</sup> The panel of eight commissioners do not have to agree. A majority decision is permissible,<sup>74</sup> the exception to this being in cases where the applicant pled guilty, which can only be referred by a unanimous decision.<sup>75</sup> Unlike the SCCRC or the CCRG, the NCIIC has the discretion to make its hearings public<sup>76</sup> and even where it does not hold a public hearing a transcript of proceedings is made which must be released if the case is referred to the courts.<sup>77</sup>

If the NCIIC refers a case, the Chief Justice of the North Carolina Supreme Court then appoints a special three judge panel to hear it.<sup>78</sup> A more stringent standard applies to referred cases than to appeals against conviction generally.<sup>79</sup> All three judges must be unanimous that there is “clear and convincing evidence of the claimant’s innocence”<sup>80</sup> in order for the convicted person to be exonerated.

## V. THE SCHEMES IN PRACTICE

As might be expected, given their different constitutions and remits, the three different post-conviction review bodies differ considerably in terms of key measures such as the number of applications they receive, the proportion of these that are referred back to the courts and the ‘success rate’ of the referred applications. Table 1 summarises these differences.

**Table 1: The Post-Conviction Review Bodies Compared**

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<sup>71</sup> N.C.G.S. section 15A-1468(a1). The Commission Chairperson (a Superior Court Judge), may provide limited immunity to the person against a prosecution for perjury.

<sup>72</sup> N.C.G.S. section 15A-1468.

<sup>73</sup> N.C.G.S. section 15A-1468(c).

<sup>74</sup> N.C.G.S. section 15A-1468(c).

<sup>75</sup> N.C.G.S. section 15A-1468(c). This is significant as 40% of applications have been from those who pled guilty: see NC Innocence Inquiry Commission Case Statistics, available at: <http://www.innocencecommission-nc.gov/stats.html>. For the first two years of its existence the NCIIC did not allow claims from defendants who pled guilty at all: see Maiatico, *supra* note 59, at 1360.

<sup>76</sup> N.C.G.S. section 15A-1468(a). This is also possible at the Norwegian Criminal Cases Review Commission: see Stridbeck and Magnussen, *supra* note 9, at 271.

<sup>77</sup> N.C.G.S. section 15A-1468(e). For transcripts of the cases that have been referred to date, see <http://www.innocencecommission-nc.gov/cases.html>

<sup>78</sup> N.C.G.S. section 15A-1469.

<sup>79</sup> Roach, *supra* note 59, at 286.

<sup>80</sup> N.C.G.S. section 15A-1469(h).

Statistics	NCIIC	SCCRC	CCRG
Applications	1724 (2007-2015)	1594 (1999-2015)	272 (2002-2015)
Applications annually (approx.)	205 (0.7% of convicted persons)	100 (0.1% of convicted persons)	21 (0.008% of convicted persons)
Referral rate	11 convictions (0.64%)	71 convictions (4.5%)	16 convictions (5.8%)
Success rate (of determined cases) <sup>81</sup>	9 convictions quashed (90%)	33 convictions quashed (48%)	13 convictions overturned (93%)

## A. APPLICATION RATES

The highest application rate of the three bodies is that of the NCIIC, which is perhaps not surprising, given that a number of the factors known to contribute to wrongful conviction – such as ineffective defence representation and substantial incentives offered to induce guilty pleas – are particularly pervasive in the US.<sup>82</sup> In its most recent annual report, the NCIIC reported that it had received 1837 applications, 1724 of which had concluded,<sup>83</sup> an average of around 205 claims each year<sup>84</sup> (an annual application rate of approximately 0.7 per cent of convicted persons).<sup>85</sup> The SCCRC's application rate is considerably lower. As of 31 March 2015, the SCCRC had received 1594 applications for review of a conviction,<sup>86</sup> which over the 16 years of the SCCRC's operation is roughly 100 applications for conviction review per year (an annual application rate of 0.1 per cent of convicted persons).<sup>87</sup> The CCRG, however, has by far the lowest application rate of the three bodies. In the 13 year period between 2002 and 2015,<sup>88</sup> the CCRG received 272 applications, which equates to around 21 applications per year (an annual application rate of approximately 0.008 per cent of convicted persons).<sup>89</sup> The reasons for the low rate of applications cannot be known for sure, but a lack of awareness or sufficient knowledge about the scheme, the opaqueness of the criteria for review and a lack of confidence in the impartiality of the Minister are all likely to be factors.

<sup>81</sup> The percentage figures in this row do not take account of cases that are yet to be determined.

<sup>82</sup> See James Chalmers & Fiona Leverick, *Causes of Wrongful Conviction*, in POST-CORROBORATION SAFEGUARDS REVIEW: REPORT OF THE ACADEMIC EXPERT GROUP 30, 39 (James Chalmers, Fiona Leverick & Alasdair Shaw eds., 2014).

<sup>83</sup> NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, 2015 ANNUAL REPORT, 7 (2016).

<sup>84</sup> This figure was provided in the previous year's annual report (see ANNUAL REPORT, *supra* note 61, at 9). It was omitted from the latest report but remains broadly similar.

<sup>85</sup> The number of persons convicted of a felony in North Carolina was 28,130 in 2013-14 (NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS, FISCAL YEAR 2013/14 (2015) at 13).

<sup>86</sup> ANNUAL REPORT 2014-15, *supra* note 45, at 14.

<sup>87</sup> The number of persons convicted in the Scottish courts in 2013-14 was 105,549: see SCOTTISH GOVERNMENT, CRIMINAL PROCEEDINGS IN SCOTLAND 2013-14, para 2.1.2 (2014).

<sup>88</sup> It is not possible to obtain figures on applications prior to 2002.

<sup>89</sup> For 2013/2014, approximately 360,000 cases were concluded in the Canadian adult criminal courts. Of that number, about two-thirds (63%) resulted in a finding of guilt: see Ashley Maxwell, *Adult Criminal Court Statistics, 2013/2014*, JURISTAT, 28 September 2015.

## B. REFERRAL RATES

While it has by far the lowest application rate, the CCRG has the highest rate of referral of the three bodies. Of the 272 applications, 16 resulted in the Minister concluding that a miscarriage of justice likely occurred, a referral rate of 5.8 per cent. The referral rate for the SCCRC is similar to that of the CCRG, although it is based on a far greater number of applications. Of the 1580 of the SCCRC's conviction review applications that had had concluded at the time of writing, the SCCRC has referred 71 of these to the court, a rate of 4.5 per cent.<sup>90</sup> It is the NCIIC that has by far the lowest referral rate, although given the far more stringent standard of review operated by the NCIIC this is hardly unsurprising. At the time of writing, eleven convictions had been referred to the court by the NCIIC,<sup>91</sup> a referral rate of 0.64 per cent.

## C. THE OUTCOME OF REFERRED CASES

The NCIIC might refer very few cases but of the cases it does refer, the vast majority result in the conviction being quashed by the courts. Of the eleven NCIIC referrals, at the time of writing one was still awaiting a hearing. Of the remaining ten, nine convictions were quashed at the court stage.<sup>92</sup> This equates to a 90 per cent success rate,<sup>93</sup> although the small numbers involved make the statistic of limited value. All of the exonerated individuals had served at least ten years in prison prior to exoneration. Four had served over thirty years.<sup>94</sup>

While very few cases ever make it through the CCRG process, most cases that are referred back to the provincial/territorial courts of appeal are successful. Of the sixteen cases<sup>95</sup> referred back to the courts over a sixteen-year period (1999-2015), four involved the applicant being acquitted at the Court of Appeal or Supreme Court. In the remaining twelve cases, a new trial was ordered by the courts, but in only one of these was the applicant re-convicted (and that was of a lesser charge). Of the remainder, in five cases the proceedings were stayed by the Crown,

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<sup>90</sup> ANNUAL REPORT 2014-15, *supra* note 45, at 25. It should be noted that the Annual Report refers to 74 convictions having been referred, but personal correspondence with the SCCRC indicated that this figure was an error and that 71 was the correct figure and the SCCRC's website now reflects this: see the list of referred conviction cases at <http://www.sccrc.org.uk/conviction#>

<sup>91</sup> Nine cases had been referred but two of these involved two co-accused: see <http://www.innocencecommission-nc.gov/cases.html>. In line with the Scottish analysis, the figures for individual convictions are used here rather than the case figures.

<sup>92</sup> NC Innocence Inquiry Commission Case Statistics, available at: <http://www.innocencecommission-nc.gov/stats.html>. Seven of the referred cases were dealt with by the appeal court as appeals against conviction and three by the original trial court as motions for appropriate relief. The distinction is unimportant here, as the outcome in all nine instances was that the applicant was exonerated.

<sup>93</sup> The one unsuccessful case was the only one where the referral decision was not unanimous. See *State v. Reeves*, transcripts available at <http://www.innocencecommission-nc.gov/reeves.html>.

<sup>94</sup> See the cases of Willie Womble, (38 years), Joseph Sledge (37 years), Leon Brown (30 years) and Henry McCollum (30 years): transcripts available at <http://www.innocencecommission-nc.gov/cases.html>.

<sup>95</sup> Information on these sixteen cases came from Campbell (forthcoming), *supra* note 39, and the MINISTER OF JUSTICE, APPLICATIONS FOR MINISTERIAL REVIEW: MISCARRIAGES OF JUSTICE, ANNUAL REPORT, 2010 (2011), with additional help from Nathalie Vautour, CCRG.

one had the charges withdrawn and three cases resulted in an acquittal.<sup>96</sup> Overall, this translates into a 93 per cent success rate,<sup>97</sup> although again such small numbers make generalizations difficult.

The figures relating to North Carolina and Canada stand in contrast to those for the SCCRC. Of the 71 cases referred to the court by the SCCRC, two appeals were abandoned and must be discounted from the analysis. Of the remaining 69 cases, 33 resulted in the conviction being quashed, a ‘success rate’ of only 48 per cent.<sup>98</sup> While this is considerably lower than the relevant figure for either the North Carolina NCIIC or the Canadian CCRG, it does need to be understood in the context of the higher number of referred cases and the wider terms of reference of the SCCRC compared to the other two bodies.<sup>99</sup> Unlike the NCIIC and the CCRG, the SCCRC is not limited in its referrals to cases where fresh evidence emerges post-conviction. This is the most frequent ground for referral, but it still accounts for only 35 per cent of cases.<sup>100</sup> Even adding ‘failure to disclose’ cases to this (a ground of referral that relates closely to the existence of new evidence) gives a figure of only 50 per cent.<sup>101</sup> Half of the referred cases are referred on other grounds – most commonly errors of law or trial judge misdirection at the original trial<sup>102</sup> – grounds that would not meet the criteria for referral at the Canadian CCRG or the North Carolina NCIIC.

## VI. THE APPROPRIATE ROLE OF A POST-CONVICTION REVIEW BODY

### A. IS POST-CONVICTION REVIEW NECESSARY?

An initial question is whether there is a need for post-conviction review at all. Finality is an important value in the legal system and the existence of post-conviction review clearly reduces this.<sup>103</sup> Closure is delayed and increased demands are made on the public purse.<sup>104</sup> But in the modern era, with the advent of DNA exonerations,<sup>105</sup> to the best of our knowledge no-one has seriously argued against the need for *some* form of post-conviction review. It has sometimes been suggested that its role should be very limited,<sup>106</sup> but the need for ‘closure’ is a very weak

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<sup>96</sup> In the two remaining cases, the outcome is unknown as they are still before the courts.

<sup>97</sup> This does not include the case where the applicant was convicted of a lesser charge as a ‘success’. If this case was included the ‘success rate’ would be 100 per cent.

<sup>98</sup> This rate has fluctuated over time – over the first ten years, the proportion of conviction referrals where the court quashed the conviction was 60 per cent: see Chalmers & Leverick, *supra* note 45, at 616.

<sup>99</sup> See *supra* note 151 and accompanying text.

<sup>100</sup> ANNUAL REPORT 2014-2015, *supra* note 45, at 20-21.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Kate Malleson, *Appeals against Conviction and the Principle of Finality*, 21 J. OF LAW & SOCIETY 151, 159 (1994).

<sup>104</sup> The Honourable Mr. Justice Peter H. Howden, *Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process*, 21 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 569, 583-586 (2002).

<sup>105</sup> See *supra* note 4 and accompanying text.

<sup>106</sup> See e.g. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1081 (2010); Maiatico, *supra* note 59, at 1373.

argument when put against clear and convincing evidence that someone is suffering a deprivation of liberty for a crime they did not commit.<sup>107</sup> Such evidence sometimes emerges many years later after the normal appeals process has been exhausted<sup>108</sup> and justice dictates that there needs to be some sort of right of redress for wrongly convicted persons when this happens.

One such route might be through an executive system of pardons, like the Royal Prerogative of Mercy.<sup>109</sup> But it is not appropriate to operate a system where this is the *only* way to deal with claims of wrongful conviction.<sup>110</sup> It is a discretionary (and therefore potentially inequitable)<sup>111</sup> remedy that lacks transparency<sup>112</sup> and is exercised by a member of the executive.<sup>113</sup> In addition, and perhaps most significantly, the effect of a pardon is not to remove the conviction, and thus its effect is still to imply that the person concerned has done something wrong.<sup>114</sup> But, as Smith put it, “[w]here a person has been wrongly convicted he seeks justice and not mercy”.<sup>115</sup> If an error has been made by the criminal courts, the legitimate and just response is that the error is rectified by the court quashing the conviction in question.

The question then arises of whether post-conviction review is something that can be effectively achieved by the courts alone. In South Australia, the introduction of an independent criminal cases review commission was considered, but ultimately the decision was made to establish a new process for out of time appeals where fresh evidence of innocence emerges.<sup>116</sup> The convicted person, instead of applying to an independent body or to a Minister, simply applies to the courts: the Statutes Amendment (Appeals) Act 2013 amended the Criminal Law Consolidation Act 1935 to give convicted persons a second or subsequent appeal in cases where there is “fresh and compelling” evidence of a wrongful conviction and it is in the interests of

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<sup>107</sup> As noted earlier (see *supra* note 94 and accompanying text), in North Carolina, where clear and convincing evidence of innocence is a pre-requisite for exoneration after an application to the NCIIC, two of the exonerated applicants had served over 35 years in prison.

<sup>108</sup> In Canada, for example, Steven Truscott was wrongly convicted for the rape and murder of Lynn Harper in 1959. He received the death penalty, which was later commuted to life imprisonment. Truscott’s conviction was finally overturned in 2007 following a conviction review of his case. The Ontario Court of Appeal heard new forensic entomological evidence that indicated a different time of death for Harper, effectively ruling out Truscott as her killer. See *Re Truscott* O.N.C.A. 575 (Ontario Court of Appeal, 2007).

<sup>109</sup> The Royal Prerogative of Mercy still exists in some form in most common law jurisdictions, including those that have established independent criminal cases review commissions: see Jennifer Schweppe, *Pardon Me: The Contemporary Application of the Prerogative of Mercy*, 49 *IRISH JURIST* 211, 211 (2013).

<sup>110</sup> Whether the Royal Prerogative of Mercy might still play a useful role alongside another method of dealing with wrongful conviction claims is a separate issue: for an argument that it does, see Schweppe, *supra* note 109, at 226.

<sup>111</sup> Trotter, *supra* note 23, at 343.

<sup>112</sup> Sue Milne, *The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review*, 36 *ADELAIDE L. REV.* 211, 212 (2015).

<sup>113</sup> The importance of independence will be discussed further below: see *supra* notes 122-131 and accompanying text.

<sup>114</sup> Trotter, *supra* note 23, at 344.

<sup>115</sup> Antony T.H. Smith, *The Prerogative of Mercy, the Power of Pardon and Criminal Justice*, *PUBLIC LAW* 398, 421 (1993).

<sup>116</sup> Rachel Dioso-Villa, *Out of Grace: Inequity in Post-Exoneration Remedies for Wrongful Conviction*, 37 *UNIVERSITY OF NEW SOUTH WALES L.J.* 349, 374 (2014).

justice.<sup>117</sup> But, as critics of the South Australian legislation have pointed out,<sup>118</sup> this is to ignore the difficulties that convicted persons face in trying to obtain fresh evidence of innocence, especially when they are incarcerated. As we have seen, the CCRG, SCCRC and NCIIC all have considerable powers of investigation and resources to investigate claims. This is an important strength of the system in all three jurisdictions and serves to counter – at least in part – the disadvantage the wrongly convicted person faces in terms of having the time, money and legal powers needed to collect evidence.<sup>119</sup> It might be countered that such assistance can be provided by volunteer innocence projects, but that is to ignore the superior legal powers that the CCRG, SCCRC and NCIIC have to compel the production of evidence from individuals and organisations.<sup>120</sup> Proving innocence is a daunting task and if a post-conviction review body is to operate effectively, it needs to have the power and resources to investigate individual cases.<sup>121</sup>

## B. IS INDEPENDENCE REQUIRED?

The next question, if it is accepted that there is a case for a post-conviction review body, is what form that body should take and, in particular, whether its effectiveness requires it to be independent of government. As we have seen, post-conviction review is carried out by an independent body in North Carolina and Scotland, but in Canada the ultimate decision on referral is made by the Minister of Justice, albeit advised by the CCRG and its special advisers.

The need for independence is certainly the basis on which some have argued for the establishment of criminal cases review commissions in jurisdictions where they do not yet exist, such as Australia,<sup>122</sup> most US states<sup>123</sup> and Canada.<sup>124</sup> Further, this lack of independence

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<sup>117</sup> See section 7 of the Statutes Amendment (Appeals) Act 2013, inserting section 353A into the Criminal Law Consolidation Act 1935. For discussion, see Milne, *supra* note 112.

<sup>118</sup> Lynne Weathered, *Wrongful Conviction in Australia*, 80 U. CIN. L. REV. 1391, 1410 (2012); Bibi Sangha, Robert Moles & Kim Economides, *The New Statutory Right of Appeal in South Australian Criminal Law: Problems Facing an Applicant - Unanticipated Interpretive Difficulties*, 16 FLINDERS L.J. 145, 185 (2014).

<sup>119</sup> Barry C. Scheck & Peter J. Neufeld, *Towards the Formation of Innocence Commissions in America*, 86 JUDICATURE 98, 104 (2002).

<sup>120</sup> On the question of whether there is still a useful role to be played by Innocence Projects in a jurisdiction with an independent post conviction review scheme, see Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. OF LEGAL STUDIES 43 (2009) (arguing that there is); Hannah Quirk, *Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer*, 70 MODERN L. REV. 759 (2007) (arguing that there is not).

<sup>121</sup> As is illustrated by the case of Kenneth Kagonyera, who was exonerated after almost ten years imprisonment, following an application to the NCIIC. He had worked with other agencies in an attempt to secure DNA testing prior to his application, but it was only following his application to the NCIIC that this testing (which was to prove his innocence) was carried out: see NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, REPORT TO THE 2011-2012 SHORT SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 5 (2012).

<sup>122</sup> Hamer, *supra* note 10, at 311.

<sup>123</sup> Robert C. Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?* JUDICATURE 122 (2004).

<sup>124</sup> Four of the six independent commissions of inquiry into the wrongful conviction of individuals held in Canada to date have recommended the establishment of an independent entity such as a criminal case review board to replace the current system: see Clive Walker & Kathryn Campbell, *The CCRC as an Option for Canada:*



has been proffered as the reason for the low numbers applying to the CCRG in Canada,<sup>125</sup> as potential applicants with genuine claims may lack confidence that these will be impartially reviewed.<sup>126</sup> Wrongful conviction can sometimes be the result of State malpractice and it is important that a post-conviction review body is free from political pressures in investigating such claims. That said, there is no obvious evidence of actual bias in Canada, where the CCRG has referred cases involving errors on the part of police officers and Crown Attorneys.<sup>127</sup>

Even if no actual bias exists, though, perception is still important. As the Sutherland Committee put it, a post-conviction review body needs to “command public confidence: justice should not only be done, but be seen to be done”.<sup>128</sup> There is a danger that the Canadian system does not command the same level of confidence in potential applicants (or the wider public) as an independent commission would, with the result that some with genuine claims of innocence are put off applying.<sup>129</sup> The appearance of independence is especially important because post-conviction review bodies are almost certainly going to reject the vast majority of claims they receive, given their stringent application criteria (as is evidenced by referral rates in Canada, North Carolina and Scotland of 5.8 per cent, 0.64 per cent and 4.5 per cent respectively). Independence helps to secure public confidence that the rejected claims were in fact lacking merit, whereas rejection by a government minister might leave a lingering suspicion that claims are being rejected in order to cover up state impropriety.<sup>130</sup> It can also contribute to public confidence not just in the post-conviction review body itself, but also in the wider criminal justice system. If the vast majority of claims are rejected by a genuinely independent body, this is credible evidence that should reassure the public that the police, prosecutors and courts do get it right most of the time.<sup>131</sup>

### C. THE TEST FOR REFERRAL AND CONCEPTIONS OF ‘INNOCENCE’

As we have seen, the three post-conviction review bodies employ very different tests for referral of a case back to the court of appeal. At one end of the spectrum, the NCIIC refers cases only where there is sufficient evidence of factual innocence. What is more, it limits such claims to those who had no involvement in the crime – convicted persons cannot apply on the basis they performed the act but lacked mens rea, that they had a recognised defence (such as self-defence), or that they should have been convicted of a lesser offence. This narrow

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*Forwards or Backwards?*, in *THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT?* (Michael Naughton ed., London, Palgrave MacMillan, 2010).

<sup>125</sup> As noted earlier, the CCRG has received only 272 applications over a sixteen-year period (see *supra*, table 1), far fewer in comparative terms than the SCCRC or NCIIC.

<sup>126</sup> Walker and Campbell, *supra* note 124.

<sup>127</sup> See e.g. *Re Walsh*, 2008 NBCA 33 (New Brunswick Court of Appeal, 2008).

<sup>128</sup> SUTHERLAND COMMITTEE, *supra* note 42, at para 5.30.

<sup>129</sup> Roach, *supra* note 59, at 288.

<sup>130</sup> Mary Kelly Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 MAINE L. REV. 531, 552 (2012); Scheck and Neufeld, *supra* note 119, at 100.

<sup>131</sup> Graham Zellick, *The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective*, CRIM. L. REV. 937, 950 (2005).

conception has resulted in a referral rate of only 0.64 per cent, by far the lowest of the three jurisdictions, but a success rate of 90 per cent when the cases reach court. In Canada the test is wider. Cases are referred where there exists new and significant information that was not previously considered by the courts and which creates a reasonable belief that a miscarriage of justice likely occurred. This would include cases of prosecution non-disclosure, but would not encompass claims of errors of law or procedure (such as trial judge misdirection or wrongful admission of evidence). The referral rate there is 5.8 per cent and most referrals have resulted in the conviction being quashed, with a success rate of 93 per cent, although all of this does have to be placed in context of the extremely low number of applications.<sup>132</sup> In Scotland the test is wider still. Cases can be referred by the SCCRC on the basis that any arguable ground of appeal exists, including but not limited to the existence of new evidence. The referral rate there is 4.5 per cent and half of these cases been referred on the basis of procedural errors (something that would not be possible in either North Carolina or Canada).<sup>133</sup> However, less than half of the cases referred resulted in the conviction being quashed when the case reached court, with a success rate for referrals at 48 per cent<sup>134</sup> a figure far lower than that of North Carolina or Canada.

What then should the test for referral be? There is no ‘correct’ answer to this question and to a certain extent the answer must depend on the prevailing legal and political culture.<sup>135</sup> The test used in North Carolina is about as narrow as it is possible to envisage, though, and does run the risk of considerable injustice. Those who acted without mens rea or who had a recognised justification defence such as self-defence cannot apply but it is difficult to see how they are any less innocent in moral terms than those who can demonstrate that they were not involved in the incident at all.<sup>136</sup> The NCIIC test would also rule out referral if the applicant had fresh evidence supporting a partial defence (such as diminished capacity) and excluding these cases is also an injustice (although perhaps not to the same extent as excluding those cases where the applicant should not have been convicted at all).<sup>137</sup> It is not just the fact of a conviction that is important but also what the conviction is for, both in terms of fair labelling<sup>138</sup> and in terms of ensuring proportionality of punishment.<sup>139</sup>

The focus on *demonstrable* factual innocence is also problematic. As Roach has pointed out, on one level it is appealing, because of the “clear injustice”<sup>140</sup> of convicting the factually innocent. Wolitz claims that it “serves an important signalling function to the wider public: it

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<sup>132</sup> See *supra*, table 1.

<sup>133</sup> See *supra*, table 1.

<sup>134</sup> See *supra*, table 1.

<sup>135</sup> Scheck & Neufeld, *supra* note 119, at 101.

<sup>136</sup> Christopher Sherrin, *Declarations of Innocence*, 35 QUEENS L.J. 354, 469 (2010).

<sup>137</sup> By contrast the SCCRC has referred a number of cases on this basis: see e.g. *Lilburn v. H.M. Advocate* [2015] H.C.J.A.C. 50 (Scottish High Court of Justiciary, 2010); *Kalyanjee v. H.M. Advocate* [2014] H.C.J.A.C. 44 (Scottish High Court of Justiciary 2014). This is also true of the Norwegian Commission (see *Stridbeck & Magnussen*, *supra* note 9, at 1386) and the English CCRC (see *ELKS*, *supra* note 12, at 188).

<sup>138</sup> James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MODERN L. REV. 217 (2008).

<sup>139</sup> ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW*, 19 (7th edn, 2013).

<sup>140</sup> Roach, *supra* note 59, at 299.

assures state citizens that only the most worthy petitioners, those with clear and positive evidence of innocence, will be exonerated”.<sup>141</sup> It also acts to protect the public, by minimising the risk of factually guilty and possibly dangerous applicants being released into the community.<sup>142</sup> But, as evidenced by the fact that only eleven convictions have been referred by the NCIIC since its inception,<sup>143</sup> this does need to be balanced against considerations of justice to individual applicants. Conclusive proof of factual innocence can be very hard to come by even for those who fall into this category, requiring as it does proof of a negative.<sup>144</sup> Innocence is, as a former English CCRC Commissioner stated, “damnable difficult to prove”.<sup>145</sup> A test requiring proof of innocence benefits primarily those who have DNA evidence at their disposal,<sup>146</sup> but this will not exist in the majority of cases.<sup>147</sup> The NCIIC itself even recognises this, stating that in 20 per cent of the applications it rejects there would have been no possible way of demonstrating factual innocence.<sup>148</sup> It may be, of course, that this test was the only one that was politically acceptable in North Carolina and that if a wider test had been contemplated there would have been no way to secure the political agreement needed for the NCIIC’s establishment.<sup>149</sup> A Commission with a very narrow test is better than having no Commission at all, but in terms of securing justice in individual cases it leaves a justice deficit that is difficult to defend in principled terms.

A more inclusive test is that of the Canadian CCRG where the focus is on fresh evidence that indicates a miscarriage of justice likely occurred (and within that would be included cases of prosecutorial non-disclosure). The formulation of the test can be criticised for its vagueness and the fact that it is a more difficult test to meet than that applied by the court.<sup>150</sup> But it also gives rise to a broader question – should a post-conviction review body restrict its ambit to cases where there is fresh evidence or should it also be possible to refer cases on the grounds that there was a procedural error (such as a trial judge mis-direction or other error of law) affecting the fairness of the applicant’s trial? This distinction is illustrated starkly by contrasting the Canadian CCRG with the Scottish SCCRC: 50 per cent of the latter’s referrals were referred not because of new evidence emerging but because of a procedural error.<sup>151</sup>

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<sup>141</sup> Wolitz, *supra* note 106, at 1081.

<sup>142</sup> Maiatico, *supra* note 59, at 1373.

<sup>143</sup> Cf. Zalman’s estimate of a 0.5-1% rate of wrongful conviction in the US (see *supra* note 21 and accompanying text).

<sup>144</sup> Roberts & Weathered, *supra* note 120, at 58; Weeden, *supra* note 8, at 198.

<sup>145</sup> David Jessel, *Innocence or Safety: Why the Wrongly Convicted are Better Served by Safety*, THE GUARDIAN 15 December 2009.

<sup>146</sup> Roach, *supra* note 59, at 301.

<sup>147</sup> Quirk, *supra* note 120, at 769.

<sup>148</sup> NC Innocence Inquiry Commission Case Statistics, available at: <http://www.innocencecommission-nc.gov/stats.html>.

<sup>149</sup> For a discussion of the role of politics in wrongful conviction related law reform, see Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955, 964-974 (2014).

<sup>150</sup> See *supra* note 34 and accompanying text.

<sup>151</sup> The English CCRC, where the test for referral is broadly similar to that of the SCCRC, also refers a considerable number of cases on ‘procedural’ grounds: see ELKS, *supra* note 12, at 186-190 (the review of homicide referrals).

While there may be political considerations that play to restricting the ambit of a post-conviction review body to fresh evidence cases, there are two principled arguments for preferring the approach of the SCCRC. The first is that procedural errors, while they cannot provide the proof of factual innocence required by the NCIIC, can certainly cast doubt over the guilt of the person concerned.<sup>152</sup> If, for example, the case against the applicant was based primarily on a confession obtained without the suspect being offered legal assistance and there exists little else by way of evidence, then the applicant's guilt is no longer as clear as it was.<sup>153</sup> Likewise if the jury was not given a clear instruction about how to evaluate identification evidence against the accused in a case where the identification evidence was weak, this too casts some doubt on the issue of guilt.<sup>154</sup>

The second reason, however, is unrelated to guilt. Permitting a conviction to stand where there is convincing evidence of guilt but there has been a serious error of procedure would, it has been argued, harm the integrity of the criminal justice process.<sup>155</sup> Integrity and legitimacy are both important if the criminal justice system is to retain its moral authority to punish and for the public to retain confidence in the system.<sup>156</sup> As Spencer puts it:<sup>157</sup>

the criminal appeals process exists not only to ensure that the factually innocent are not punished, but also to uphold the rule of law ... [A] criminal conviction is only acceptable if it carries moral authority, and a decision reached in defiance of basic rules that society prescribes for criminal investigations and criminal trials does not.

It is not our intention here to enter the debate about whether a conviction should ever be quashed on the basis of a procedural irregularity where there is overwhelming evidence of guilt.<sup>158</sup> There is certainly a case to be made for the *courts* to be able to quash the conviction of a factually guilty person where the procedural irregularity that took place was so serious it calls the integrity of the criminal justice system into question.<sup>159</sup> But it does not necessarily follow that it should be the role of a *post-conviction review body* to do so.

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<sup>152</sup> Roberts & Weathered, *supra* note 120, at 55; Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J. OF LAW AND SOCIAL CHANGE 315, 324 (2010).

<sup>153</sup> See e.g. *M. v. H.M. Advocate* [2012] H.C.J.A.C. 157 (High Court of Justiciary, Scotland, 2014), a case referred by the SCCRC on this basis.

<sup>154</sup> See e.g. *Docherty v. H.M. Advocate* [2014] H.C.J.A.C. 94 (High Court of Justiciary, Scotland, 2014), a case referred by the SCCRC on this basis. On the importance of jury instructions concerning eyewitness identification evidence, see Leverick, *supra* note 5.

<sup>155</sup> See e.g. Findley, *supra* note 12, at 1185; BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES AND REMEDIES* (New York, Cambridge University Press, 2004).

<sup>156</sup> IAN DENNIS, *THE LAW OF EVIDENCE*, 54 (5th edn, 2013); Quirk, *supra* note 120, at 761.

<sup>157</sup> John R. Spencer, *Quashing Convictions for Procedural Irregularities*, CRIM. L. REV. 835, 836 (2007).

<sup>158</sup> For a collection of essays on this subject, see JILL HUNTER, PAUL ROBERTS, SIMON M.N. YOUNG & DAVID DIXON, EDS., *THE INTEGRITY OF CRIMINAL PROCESS: FROM THEORY INTO PRACTICE* (2016).

<sup>159</sup> Specifically in the classes of case identified in Spencer, *supra* note 157, at 842-846.

On one hand, Weeden (a former English CCRC Commissioner) has argued that there *is* a role for the English CCRC in protecting “the general integrity of the criminal justice system”.<sup>160</sup> According to Weeden, the English CCRC:<sup>161</sup>

works to overturn not only the wrongful convictions of those who others believe to be innocent, but also the wrongful convictions of those who only may be innocent (although others doubt it) and even, indeed, *of those who, though they seem clearly guilty, have been convicted only after substantial systemic error or wrongdoing.*

By contrast, the SCCRC, in *Cochrane*,<sup>162</sup> took the stance that it is not appropriate for a post-conviction review body to refer a case where a procedural error makes no difference to the strength of the evidence against the applicant. Cochrane had applied to the SCCRC claiming that the indictment on which he was convicted was invalid as the facts specified did not constitute a crime.<sup>163</sup> The SCCRC agreed, but declined to refer the case. Relying on the second limb of its test for referral,<sup>164</sup> the Commission argued that it was not in the interests of justice, given the overwhelming evidence that Cochrane had been involved in a criminal conspiracy. Cochrane responded by petitioning the nobile officium, an equitable remedy of last resort in Scotland where no other legal options are available. His case was unsuccessful on a technicality, although the court stated that it would also have refused the case on its merits.<sup>165</sup> More significant is the explanation of Peter Duff – one of the commissioners involved in the case – as to why the decision was taken to reject it:<sup>166</sup>

First, the Commission’s primary function is to prevent factually innocent people from being punished for offences they had not committed. This was not such a case. Second, an important task of the Commission is to foster confidence in the Scottish criminal justice system and this would not be accomplished by referring, on a pure technicality, the case of someone who was clearly guilty.

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<sup>160</sup> Weeden, *supra* note 8, at 199.

<sup>161</sup> *Id.* (emphasis added).

<sup>162</sup> *Cochrane v. H.M. Advocate* 2002 S.L.T. 1424 (High Court of Justiciary, Scotland, 2002) (original appeal against conviction); *Cochrane* (Petitioner) [2006] H.C.J.A.C. 27 (High Court of Justiciary, Scotland, 2006) (petition to the nobile officium).

<sup>163</sup> He was charged (along with two co-accused) with conspiring to break into a house while his two co-accused went on to break into the property and commit a robbery. Housebreaking on its own is not a crime in Scotland – it only becomes criminal if committed “with an intent to steal”, but this was not specified on the indictment.

<sup>164</sup> See *supra* note 54 and accompanying text.

<sup>165</sup> The application was refused as incompetent because in applying to the SCCRC the applicant had already used his remedy of last resort (*Cochrane* (Petitioner), *supra* note 162, at para 14). The court noted that it would also have refused the application on its merits at para 15. The case is discussed in detail by Duff, *supra* note 53, at 706-709.

<sup>166</sup> Duff, *supra* note 53, at 707. Although cf. *Carberry v. H.M. Advocate* [2013] HCJAC 101 (High Court of Justiciary, Scotland, 2013) where the SCCRC did refer on the basis of a procedural irregularity (the jury in the original trial had accessed potentially prejudicial information about the applicant online), despite noting the strength of evidence against the applicant. The case might be distinguished from *Cochrane*, though, in that the error was one that related to the evidence available at the original trial. It was not, in the words of Duff, a “pure technicality”.

It is argued here that the approach taken in *Cochrane* is the correct one. While it is undoubtedly true that an important role of a post-conviction review body is to foster public confidence in the criminal justice system, this is not going to be achieved by the referral of cases where there is overwhelming evidence of the applicant's guilt.<sup>167</sup> A Commission – or other post-conviction review body – sits outside the court system and acts as a body of last resort. It plays a role in fostering public confidence and in upholding integrity in the narrow sense of minimising the extent to which the system makes mistakes. It does not, however, bear the responsibility of securing the integrity of the criminal justice system where to do so would mean the release into society of a probably guilty (and possibly dangerous) person.<sup>168</sup> It might be said in response that integrity – in the broad sense – can be upheld without necessarily releasing the person concerned. A referral could result in the conviction being quashed but a retrial (untainted by the original breach) being ordered.<sup>169</sup> But this will not always be possible or appropriate. The breach might have occurred prior to trial (in which case a fresh trial can hardly be said to 'cure' it)<sup>170</sup> or the passage of time or other factors may make retrial impossible.<sup>171</sup> But all practical considerations aside, the principled argument playing in favour of a court quashing the conviction of a guilty person where there has been a serious procedural impropriety – that it has lost the moral authority to convict – simply does not apply to a post-conviction review body. A post-conviction review body sits outside the court system. It does not lose moral authority in the same way and by referring such cases runs the risk of serious damage to public support for and confidence in the institution.<sup>172</sup>

#### D. THE CASES ELIGIBLE FOR REVIEW

A further question is the scope of a post-conviction review body in terms of whether it considers cases regardless of their seriousness or whether restrictions are placed on its remit.<sup>173</sup> There are no formal limits on the types of case that can be reviewed by the SCCRC or the Canadian CCRG,<sup>174</sup> although in practice the CCRG has referred only cases on indictment (mostly murder and sexual assault)<sup>175</sup> whereas the SCCRC's referrals have included summary cases and covered a broader range of offence categories.<sup>176</sup> The NCIC is formally restricted to considering applications from those who have been convicted of a felony.

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<sup>167</sup> Hamer, *supra* note 10, at 309.

<sup>168</sup> Duff, *supra* note 44, at 360.

<sup>169</sup> Spencer, *supra* note 157, at 837.

<sup>170</sup> Spencer, *supra* note 157, at 837 (giving the example of Mullen, a case where the British authorities brought the defendant back into the jurisdiction for trial unlawfully, bypassing the legal extradition procedure).

<sup>171</sup> James Chalmers & Fiona Leverick, *When Should a Retrial be Permitted after a Conviction is Quashed on Appeal?*, 74 MODERN L. REV. 721, 726-728 (2011).

<sup>172</sup> This is aside from any questions as to whether this is an acceptable use of scarce resources.

<sup>173</sup> There is also the question of whether a post-conviction review body should consider claims relating solely to sentence, but this lies outside the scope of our paper.

<sup>174</sup> Initially the CCRG could only review cases originally prosecuted on indictment, but the 2002 amendments to the Criminal Code allowed those convicted of summary offences to request conviction review.

<sup>175</sup> See Campbell (forthcoming), *supra* note 41.

<sup>176</sup> See the list of referrals on the SCCRC's website: <http://www.sccrc.org.uk/conviction.asp>.

There is a strong argument in favour of permitting a post-conviction review body to consider all types of case, regardless of their seriousness. Mistakes in summary cases are not necessarily of less impact – conviction for *any* criminal offence carries with it considerable stigma: it is the “the strongest formal censure that society can inflict”.<sup>177</sup> As Hamer puts it:<sup>178</sup>

For one defendant a first summary conviction may be extremely damaging to career, family and relationships, whereas for another, already in prison on other unchallenged convictions, an additional indictable conviction may make little difference.

Having said that, while there is no principled reason for restricting the ambit of a post-conviction review body, where limited resources are available priorities have to be placed somewhere. Both the Scottish SCCRC and the English CCRC have been permitted to investigate summary and indictable cases from the outset,<sup>179</sup> but it is notable that, in the face of “serious funding constraints”, the UK Parliament’s House of Commons Justice Committee recommended in 2015 that the English CCRC be given a statutory discretion to refuse to investigate cases dealt with summarily.<sup>180</sup> Politics also come into play here. When a post-conviction review body is first being contemplated, there may be something to be said for giving it a narrow scope because this is more politically palatable.<sup>181</sup>

There is also the question of whether a post-conviction review body should be able to investigate cases where the convicted person is dead and the application is made by other interested parties such as his or her relatives. This would be ruled out in North Carolina, but it is possible in Scotland and Canada. While no Scottish referrals have been made in such cases to date,<sup>182</sup> in Canada the CCRG has begun (but not completed) a conviction review on the case of Wilbert Coffin.<sup>183</sup> There are, perhaps, two possible arguments in favour permitting this. The first is that the impact of a wrongful conviction can be considerable for the family of a wrongly

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<sup>177</sup> ASHWORTH & HORDER, *supra* note 139, at 1. On the effect of a criminal conviction on subsequent employment prospects, see Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387 (2016).

<sup>178</sup> Hamer, *supra* note 10, at 309.

<sup>179</sup> This was the case for the SCCRC despite the Sutherland Commission recommending that it be restricted initially to only dealing with solemn cases to ensure the new body was not “overwhelmed”: Sutherland Committee, *supra* note 40, at para 5.59.

<sup>180</sup> HOUSE OF COMMONS JUSTICE SELECT COMMITTEE, CRIMINAL CASES REVIEW COMMISSION, 12TH REPORT OF 2014-15, para 39 (HC Paper No 850, 2015). For discussion, see Michael Zander, *The Justice Select Committee’s Report on the CCRC – Where Do We Go From Here?* CRIM. L. REV. 473, 486 (2015).

<sup>181</sup> Hamer, *supra* note 10, at 310.

<sup>182</sup> Cf. the English CCRC, which has referred cases of deceased people on the application of surviving family members: see Zellick, *supra* note 131, at 942-944.

<sup>183</sup> Wilbert Coffin was hanged in Montreal, Quebec in February 1956 following a conviction for a triple homicide. The conviction rested largely on circumstantial evidence, including the fact that Coffin was the last person to be seen with one of the victims and had many items belonging to them in his possession: see Campbell, forthcoming, *supra* note 41.

convicted person.<sup>184</sup> Although perhaps not as directly stigmatising in terms of being physically incarcerated or the direct impact on being able to obtain employment, there is likely to be indirect stigma and lingering effects on family members of the wrongly convicted that persist after the conviction and also the death of the person concerned.<sup>185</sup> Extending the remit to cases where the convicted person is dead can, however, raise difficult issues. As a former chair of the English CCRC noted,<sup>186</sup> the investigation might reveal evidence against another family member<sup>187</sup> or other information that is embarrassing to the family.<sup>188</sup> It may also be the case that family members disagree about whether an application should be made.

The second argument is that there may be a wider public interest in acknowledging and correcting mistakes made by the justice system, as the Court of Appeal accepted in the case of James Hanratty,<sup>189</sup> referred by the English CCRC after his death. But Hanratty was a notorious case: the public interest is less clear if the case has long since faded from the public memory.<sup>190</sup> The public interest argument is also weaker where the case is not one where the factual innocence of the defendant is clear, for example where the basis for the reference is that the defendant should have been convicted of a lesser charge, rather than not convicted at all.<sup>191</sup> The existence of difficulties such as those referred to above are not in themselves sufficient reason as a matter of principle to exclude cases involving deceased applicants from a post-conviction review body's remit.<sup>192</sup> They do, however, add weight to the argument that if there are scarce resources, they may be better directed at exonerating those still imprisoned or living under the stigma of a wrongful conviction, rather than focusing on cases involving the deceased.

## E. A ROLE IN SYSTEMIC REFORM?

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<sup>184</sup> As the Court of Appeal for England and Wales acknowledged in *R v. Matten*, *The Times*, 5 March 1998 at 7 (cited in Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, CRIM L. REV. 173, 179 (2005)).

<sup>185</sup> Adrian T. Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. OF CRIMINOLOGY AND CRIMINAL JUSTICE 165 (2004); Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CANADIAN JOURNAL OF CRIMINOLOGY AND CRIMINAL JUSTICE 139 (2004).

<sup>186</sup> Zellick, *supra* note 131, at 942-944.

<sup>187</sup> As it did in *R. v. Knighton* (deceased) [2002] EWCA Crim 2227 (Court of Appeal for England and Wales, 2002).

<sup>188</sup> This might of course also happen if the convicted person is the applicant, but here the personal benefit to the applicant of his conviction being quashed would be likely to vastly outweigh any of these other consequences.

<sup>189</sup> *R. v. Hanratty* (deceased) [2002] EWCA Crim 1141 (Court of Appeal for England and Wales, 2002).

<sup>190</sup> See e.g. *R. v. Knighton* (deceased) [2002] EWCA Crim 2227 (Court of Appeal for England and Wales, 2002), where the Court of Appeal was critical of the English CCRC for referring the case, given that 75 years had passed since the conviction (and execution) of the defendant.

<sup>191</sup> See e.g. *R. v. Ellis* [2003] EWCA Crim 3556 (Court of Appeal for England and Wales, 2002), where the CCRC referred the case of Ruth Ellis, the last woman to be hanged in England, on the basis she should have been convicted of manslaughter, not murder. The appeal was refused by the Court of Appeal, who questioned whether the referral was "a sensible use of the limited resources of the Court of Appeal" (para 90). The English CCRC remains convinced it was right to make the reference: see Zellick, *supra* note 129, at 942.

<sup>192</sup> A third possible argument for allowing the review of cases where the convicted person is dead surrounds the notion of human dignity. Given that legal rules can and do affect dead persons, which are in turn influenced by cultural norms and human dignity arguments, it stands to reason that permitting the exoneration of a dead convicted person should be a consideration. See Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763 (2009).



Thus far the discussion has focused on the role of a post-conviction review body in relation to individual cases. It has sometimes been suggested, however, that such a body should play a wider role in terms of lobbying for systemic reform.<sup>193</sup> None of the CCRG, SCCRC or NCIIC have played a substantial role in law reform to date. In North Carolina, there exists a separate body with a remit to make recommendations for systemic reform, the North Carolina Actual Innocence Commission,<sup>194</sup> although the NCIIC does cite some examples where its search for missing evidence has led to the identification and rectification of systematic flaws.<sup>195</sup> In Scotland, there is no standing body charged specifically with making recommendations about the prevention of wrongful conviction, although such recommendations have been made in the context of specific enquiries.<sup>196</sup> The SCCRC has occasionally contributed to policy debates, but only to those that have a direct impact on its operations.<sup>197</sup> In Canada there is also no permanent body charged with making systemic reform recommendations, but there have at the time of writing been seven major ad hoc enquiries into the causes of wrongful conviction in specific cases,<sup>198</sup> as well as two broad reviews,<sup>199</sup> all of which have made recommendations for reform.

It was never envisaged that any of the CCRG, SCCRC or NCIIC would have a systemic reform role,<sup>200</sup> but such a role was envisaged for the English CCRC by the Royal Commission report

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<sup>193</sup> See e.g. Maiatico, *supra* note 59, at 1375.

<sup>194</sup> See Mumma, *supra* note 60.

<sup>195</sup> THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, REPORT TO THE 2011-12 LONG SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA AND THE STATE JUDICIAL COUNCIL (2011) at 5. In one case, the Commission's investigation uncovered a systemic problem with a North Carolina police department routinely destroying evidence in violation of statute. In another, the Commission's search for evidence found that evidence collection and storage in a particular Sheriff's Department was in disarray and items were not being properly stored.

<sup>196</sup> See e.g. those made by the body tasked with identifying safeguards against wrongful conviction in the context of government proposals to remove the requirement for corroboration in criminal cases: THE POST-CORROBORATION SAFEGUARDS REVIEW: FINAL REPORT, *supra* note 82.

<sup>197</sup> For example, it intervened in a debate over whether the court of appeal should be given the power to refuse to hear a Commission reference: see James Chalmers & Fiona Leverick, *Substantial and Radical Change: A New Dawn for Scottish Criminal Procedure*, 75 MODERN L. REV. 837, 860-862 (2012).

<sup>198</sup> Six focused primarily on the lessons that could be learned from individual cases: ROYAL COMMISSION ON THE DONALD MARSHALL JR PROSECUTION, DIGEST OF FINDINGS AND RECOMMENDATIONS (1989); THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN, REPORT (1998); MANITOBA JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW (2001); THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN, REPORT AND ANNEXES (2006); THE HONOURABLE MR JUSTICE PATRICK J LESAGE, REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007); THE HONOURABLE MR JUSTICE EDWARD P MACCALLUM, REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2008). The seventh was an investigation of forensic paediatric pathology services in Ontario following a number of wrongful convictions caused by evidence given by a particular expert witness: THE HONORABLE STEPHEN T GOUDGE, REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO (2008).

<sup>199</sup> Both undertaken by the Federal/Provincial/Territorial (FPT) Heads of Prosecutions Committee Working Group: FPT HEADS OF PROSECUTIONS COMMITTEE WORKING GROUP, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE (2005) and FTP HEADS OF PROSECUTIONS SUBCOMMITTEE ON THE PREVENTION OF WRONGFUL CONVICTIONS, THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS (2011).

<sup>200</sup> The issue was not addressed in the Sutherland Report, *supra* note 42 (the report of the body that recommended the establishment of the SCCRC) and there would have been no real need for this in North Carolina where a body devoted to systemic reform already existed.

that led to its introduction. While the Royal Commission was clear that the “primary function” of the English CCRC should be to consider and investigate individual cases,<sup>201</sup> it recommended that it should also “be able to draw attention in its report to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for change it thinks fit”.<sup>202</sup> In reality, the English CCRC has done very little in this respect,<sup>203</sup> primarily due to limited resources,<sup>204</sup> although a 2015 parliamentary enquiry recommended that this be rectified and that resources be injected to enable it to do so.<sup>205</sup>

Resources aside, is it a good idea as a matter of principle for a post-conviction review body to play a role in systemic reform? Working to improve the safeguards against wrongful conviction in a particular jurisdiction is certainly important and a body charged with reviewing individual cases might be seen as well placed to develop an understanding of the factors contributing to this.<sup>206</sup> But the insights likely to be generated should not be over-stated. All of the cases seen by a post-conviction review body are historic and some of them will stem from a considerable time ago. As such, the legal issues they raise may already be well known and may have been addressed.<sup>207</sup>

There are also other reasons why a post-conviction review body might not be best placed to engage in systemic reform work. If such a body intervenes too readily in policy issues this might pose a threat to its impartiality that affects its relationship not only with the courts,<sup>208</sup> but also with the police and prosecutors who might perceive the review body as biased towards the interests of the defence. It may also be the case, as Roach has argued,<sup>209</sup> that the ideal membership of an error correction body is not the same as that of a body concerned with achieving systemic reform. Error correction, Roach suggests, requires at least some degree of legal expertise as there is little or no point in referring cases that the appeal court will simply reject.<sup>210</sup> Ensuring such groups have quasi-judicial membership may also be important to add legitimacy to the many rejected cases.<sup>211</sup> Systemic reform, on the other hand, is easier to achieve if there is broad based membership from the range of bodies involved in the criminal

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<sup>201</sup> THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, Cmnd. 2263, 184 (1993).

<sup>202</sup> *Id.* at 185.

<sup>203</sup> Carole McCartney & Stephanie Roberts, *Building Institutions to Address Miscarriages of Justice in England and Wales: Mission Accomplished*, 80 U. CIN. L. REV. 1333, 1359 (2012).

<sup>204</sup> Zellick, *supra* note 131, at 939.

<sup>205</sup> HOUSE OF COMMONS JUSTICE SELECT COMMITTEE, *supra* note 178, at para 53. It may well be taking heed of this. Since this report was published, it has responded to a consultation on the appropriate sentence where a defendant has pled guilty: see SENTENCING COUNCIL (FOR ENGLAND AND WALES), REDUCTION IN SENTENCE FOR A GUILTY PLEA GUIDELINE (2016) and RESPONSE BY THE CRIMINAL CASES REVIEW COMMISSION (available at <http://www.ccrc.gov.uk/wp-content/uploads/2016/06/CCRC-Sentencing-Council-consultation-April-2016.pdf>).

<sup>206</sup> HOUSE OF COMMONS JUSTICE SELECT COMMITTEE, *supra* note 180, at para 53.

<sup>207</sup> Weeden, *supra* note 8, at 203.

<sup>208</sup> Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT. L. REV. 89, 114 (2010).

<sup>209</sup> *Id.* at 121.

<sup>210</sup> Although cf. Duff, *supra* note 53, at 719-720.

<sup>211</sup> Roach, *supra* note 208, at 121.

justice system – police, prosecutors, defence representatives and victim groups.<sup>212</sup> Politically this helps build consensus to see the proposals through in practice.<sup>213</sup> But such broad-based membership is, Roach states, inappropriate for error correction as it opens up the possibility of real or perceived conflicts of interest. For rejected applicants in particular it is important that the body is seen as genuinely independent and not partisan towards police, prosecutors, crime victims or even the judiciary.<sup>214</sup> This is, perhaps, a little over-stated. Some reform exercises have certainly stalled due to a failure to build political consensus,<sup>215</sup> but this does not necessarily mean that a reform group must itself always have broad based membership. There are plenty of examples of reform projects undertaken by narrowly constituted groups that have successfully achieved change.<sup>216</sup> Likewise there are also examples of bodies charged with individual conviction review that have broad based membership and are generally perceived as successful. The SCCRC, for example, has had an ex-police officer as a commissioner without this posing any obvious threat to its relationship with the courts or its perception as an independent institution.<sup>217</sup> The present chair of the English CCRC is a former Chief Executive of the Crown Prosecution Service and while there was some disquiet on his initial appointment,<sup>218</sup> there is no suggestion that this has caused any ongoing difficulties.<sup>219</sup>

That said, a body concerned primarily with the review of individual applications is perhaps not ideally placed to keep the entire system under review. Roach is correct to suggest that this is better achieved at one step removed, by a body or advisory panel affiliated to a post-conviction review body.<sup>220</sup> Such a body could advocate for change without undermining the error correction work undertaken by its sister organisation.<sup>221</sup> This approach is an attractive one, although given that a post-conviction review body may come across systemic problems in the course of its review of individual cases,<sup>222</sup> it would make sense for the two bodies to work side by side and inform each other's operations. In taking precisely this approach, despite its other flaws, the system in North Carolina has much to be said for it. What is also important, though,

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<sup>212</sup> *Id.* at 121.

<sup>213</sup> *Id.* at 121; See also James Chalmers, Fiona Leverick & Shona Wilson Stark, *The Process of Criminal Evidence Reform in Scotland: What Can We Learn?*, in SCOTTISH CRIMINAL EVIDENCE IN THE 21ST CENTURY: EVOLUTION OR REVOLUTION? (Peter Duff and Pamela Ferguson eds., Edinburgh University Press, forthcoming 2017).

<sup>214</sup> Roach, *supra* note 208, at 122.

<sup>215</sup> In the Scottish context, a good example is the attempt to abolish the requirement for corroboration of evidence in criminal cases. This recommendation stemmed from a review of the law of evidence in Scotland led by Lord Carloway, a senior Scottish judge: see THE CARLOWAY REVIEW: REPORT AND RECOMMENDATIONS (2011). The recommendation was accepted by the Scottish Government but, at the time of writing, six years on, it still has not been implemented. For discussion of Lord Carloway's failure to build political consensus and the impact this had on the progress of the reforms, see Chalmers at al, *supra* note 213.

<sup>216</sup> For example the work of the Law Commissions in the UK: see SHONA WILSON STARK, THE WORK OF THE BRITISH LAW COMMISSIONS: LAW REFORM ... NOW? (Hart, forthcoming 2017).

<sup>217</sup> See the broad support for the SCCRC among legal practitioners (including defence solicitors) reported in Leverick et al, *supra* note 58, chapter 5.

<sup>218</sup> See e.g. Michael Naughton, *Justice Must Be Seen to Be Done*, THE GUARDIAN, 20 November 2008.

<sup>219</sup> No mention of it was made, for example, in evidence given to the 2015 House of Commons Justice Select Committee review of the English CCRC, *supra* note 180.

<sup>220</sup> Roach, *supra* note 59, at 296.

<sup>221</sup> Roach, *supra* note 208, at 119.

<sup>222</sup> As the examples from North Carolina illustrate: see *supra* note 195 and accompanying text.

is that whatever approach is taken there is some mechanism for monitoring the extent to which any recommendations made are put into practice. Much is already known about the causes of wrongful conviction<sup>223</sup> and none of the three jurisdictions examined here are immune from criticism in terms of practices they continue to engage in that have been shown to increase the risk of wrongful convictions occurring despite recommendations having been made to the contrary.<sup>224</sup>

## VII. CONCLUSION

Post-conviction review is a necessary part of the criminal justice system when it is faced with wrongful convictions. The DNA revolution of the previous three decades has clearly demonstrated that the police, prosecutors, juries and judges do sometimes get it wrong; the National Registry of Exonerations, for example, lists 1729 known exonerations of convicted persons across the US, many of which have been exonerated years (or even decades) after the original proceedings concluded.<sup>225</sup> These numbers alone underscore the importance of having some sort of process, operating outside of the regular court system, to address such miscarriages of justice. While one option might simply be to permit out of time appeals where fresh evidence of innocence emerges, as has been done in South Australia, this neglects the need for a body with the power and resources to uncover such evidence in the first place.

Establishing that there is a need for some form of post-conviction review body is, however, only the starting point. The three post-conviction review schemes examined in this paper differ in a number of important respects and comparing these different approaches has allowed us to draw several conclusions about the proper role of such bodies. The first is that independence from government is fundamental – ideally outright independence, but if not, then certainly some form of externality. While actual bias has not been demonstrated at the CCRG (which is in effect a government body amongst the three schemes discussed), the perception of independence is particularly important and its absence, it is suggested here, is a real barrier to justice in the Canadian context, and may account for the very low numbers of applications for review compared to those at the independent SCCRC and NCIIC. To be effective, it is also important that a post-conviction review body is sufficiently resourced, so that it can undertake its own independent investigations, and has wide powers to compel evidence. All three of the post-conviction review schemes examined here have the resources to investigate claims and also have considerable powers to obtain evidence. This is an important strength of the system

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<sup>223</sup> See the discussion *supra* note 5.

<sup>224</sup> In Scotland, see e.g. the use of dock (in court) identification: Pamela Ferguson, *Eyewitness Identification Evidence*, in POST-CORROBORATION SAFEGUARDS REVIEW: REPORT OF THE ACADEMIC EXPERT GROUP 44, 50-53 (James Chalmers, Fiona Leverick & Alasdair Shaw, eds., 2014). In Canada, see e.g. the use of coercive interrogation techniques when interviewing suspects: Lesley King & Brent Snook, *Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, And Coercive Strategies*, 36 CRIMINAL JUSTICE AND BEHAVIOR 674 (2009); Brent Snook, Joseph Eastwood, Michael Stinson, John Tedeschi & John C. House, *Reforming Investigative Interviewing in Canada*, 52 CANADIAN JOURNAL OF CRIMINOLOGY AND CRIMINAL JUSTICE 215 (2010).

<sup>225</sup> See *supra* note 4 and accompanying text.

in all three jurisdictions and serves to counter – at least in part – the disadvantage the wrongly convicted person faces in terms of having the time, money and legal powers needed to challenge a wrongful conviction.

The second conclusion is that restricting the ambit of a post-conviction review body to cases in which fresh evidence of innocence emerges is to unjustly narrow its ambit. The three schemes examined here operate different tests for referral, which in turn affect their respective referral rates (0.64 per cent at the NCIIC, 4.5 per cent at the SCCRC, 5.8 per cent for the CCRG). The narrowest is that of the NCIIC, which requires proof of actual innocence and which excludes cases in which the applicant lacked *mens rea*, had a justification defence or should have been convicted of a lesser offence. Unsurprisingly it refers only 0.64 per cent of the applications it receives. It is not difficult to see that such narrow criteria are a cause of injustice, although they may have been necessary to achieve the political consensus to establish the scheme at all. The CCRG's test for referral is wider, but is still limited to cases in which fresh evidence emerges, a limitation we argue is also unjust, given that procedural irregularities can themselves cast doubt on the safety of a conviction. The SCCRC can refer cases where there has been a procedural irregularity – such as a trial judge misdirection about the definition of the crime or the manner in which the evidence should be evaluated – and it is right that it is able to do so. This should not, however, extend to the referral of cases where the procedural error casts no doubt on the safety of the conviction. It is not, we argue, the proper role of a post-conviction review body to uphold the integrity of the criminal courts. Such a body sits outside the court system and its concern should be with factual innocence – procedural errors are relevant only to the extent that they suggest an applicant might have been wrongly convicted.

It also has to be said that the test for referral cannot be considered entirely in isolation. In referring cases all three of the schemes are bound by what the courts will accept as evidence of innocence. While the referral rate for each of the schemes is relatively low, the 'success rates' for the cases actually referred to the courts following review are much higher. The NCIIC and CCRG have a success rate of over 90 per cent, which is perhaps not surprising given the stringent tests that cases must satisfy to be referred by these two bodies (indeed the test applied by the CCRG is more difficult to satisfy than that for the subsequent appeal against conviction). The SCCRC's success rate is lower, at 48 per cent, but aside from one referral from the early days of its operation,<sup>226</sup> there is no evidence that it is doing anything other than attempting to apply the same test as the court would in determining the appeal.<sup>227</sup> It is just that the wider basis on which it can make referrals means that it is harder to predict the attitude the courts will take to a case. All of this, however, raises much broader questions about whether the system of appeals against conviction is expansive enough to provide justice to all those who deserve it or

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<sup>226</sup> See *Harper v. H.M. Advocate* 2005 S.C.C.R. 245 (High Court of Justiciary, Scotland, 2005) and the discussion of the case in Duff, *supra* note 12, at 714-718.

<sup>227</sup> See Chalmers and Leverick, *supra* note 45, at 621.

whether some of the strict rules governing, for example, the admissibility of fresh evidence ought to be relaxed.<sup>228</sup>

The third conclusion is that the harm of wrongful conviction is not limited to those who are currently incarcerated, those who have committed serious offences or even those who are no longer living. (Wrongful) conviction for even a minor offence can have a seriously stigmatising effect on one's life and on the integrity of the criminal justice system. It can continue to blight the lives of relatives of a wrongfully convicted person even after his or her death. There is a principled case to be made for these errors to be within the remit of a post-conviction review body too, although practical considerations of cost and the scarce use of limited resources may mean that this is not always achievable.

Finally, the fourth conclusion drawn here is that while these schemes have a specific mandate to investigate wrongful convictions, they may not be best placed to engage in systemic reform work. Post-conviction exoneration, while onerous and limited, serves an important function for addressing wrongful convictions. This is not to neglect the parallel need to identify and implement reforms within the criminal justice system to minimise the potential for wrongful convictions to occur in the first place.<sup>229</sup> The causes of wrongful conviction are well known, but there is still work to be done in all three of the jurisdictions examined here to 'bullet proof' the system to guard against these. This work, while it would benefit from being informed by the work of a post-conviction review body, may be better suited to a separate institution with a broader based membership.

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<sup>228</sup> See, for example, the strict conditions governing admissibility of new evidence in section 106(3A)-(3D) of the Criminal Procedure (Scotland) Act 1995. This broader question lies beyond the scope of this paper, which is concerned with the operation of post-conviction review bodies rather than the system of appeals against conviction more generally, but see e.g. McCartney & Roberts, *supra* note 202, at 1352; Michael Naughton, *The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System*, 58 C.L.Q. 207 (2012).

<sup>229</sup> See e.g. McCartney & Roberts, *supra* note 203, 1359.