

# The Challenges for England's Post-Conviction Review Body

## Deference to Juries, the Principle of Finality and the Court of Appeal

Carolyn Hoyle\*

### Abstract

Since 1997, the Criminal Cases Review Commission of England, Wales and Northern Ireland has served as a state-funded post-conviction body to consider claims of wrongful conviction for those who have exhausted their rights to appeal. A meticulous organisation that has over its lifetime referred over 700 cases back to the Court of Appeal, resulting in over 60% of those applicants having their convictions quashed, it is nonetheless restricted in its response to cases by its own legislation. This shapes its decision-making in reviewing cases, causing it to be somewhat deferential to the original jury, to the principle of finality and, most importantly, to the Court of Appeal, the only institution that can overturn a wrongful conviction. In mandating such deference, the legislation causes the Commission to have one eye on the Court's evolving jurisprudence but leaves room for institutional and individual discretion, evidenced in some variability in responses across the Commission. While considerable variability would be difficult to defend, some inconsistency raises the prospects for a shift towards a less deferential referral culture. This article draws on original research by the author to consider the impact of institutional deference on the work of the Criminal Cases Review Commission and argues for a slightly bolder approach in its work

**Keywords:** wrongful conviction, criminal justice, Criminal Cases Review Commission, Court of Appeal, discretion

## 1 Introduction

The vast majority of those who believe themselves to be wrongfully convicted do not find relief from a direct appeal. While in some countries a failed direct appeal would mark the end of the road, in England, Wales and Northern Ireland there is further opportunity for post-conviction review: the Criminal Cases Review Commission of England and Wales ('the Commission'; Scotland has its own Criminal Cases Review Commission). Over two decades since its establishment, this article focuses on that review body, considering its close relationship with the Court of Appeal.

\* Carolyn Hoyle is Professor of Criminology at the Faculty of Law, University of Oxford, UK.

Following a recommendation of the 1993 Royal Commission on Criminal Justice (known as the 'Runciman Commission'),<sup>1</sup> the Commission was established in 1997, by Article 8 of the Criminal Appeal Act 1995, to review a sentence or conviction following the exhaustion of first instance appeals. The first system of regular appeals against criminal conviction had been introduced in England and Wales by the Criminal Appeal Act 1907, which created the Court of Criminal Appeal – the forerunner of today's Court of Appeal established in 1966. Since 1908, the only further recourse for people convicted of criminal offences, who had been refused leave to appeal or whose appeals had been dismissed, had been to apply to the Home Secretary for executive intervention.<sup>2</sup> The Criminal Case Unit of the C3 (Criminal Policy) Division of the Home Office reviewed hundreds of petitions a year, few with legal representation, and asked the Home Secretary to refer meritorious cases where there was fresh evidence back to the Court. The quality of investigations was poor,<sup>3</sup> and subsequent appeals by referral were rare; just a handful each year.<sup>4</sup>

At the time, the English criminal justice system clearly valued the notion of finality.<sup>5</sup> Indeed, at the start of the twentieth century, opposition to the establishment of an appeal court centred on the risks posed to the finality of convictions, with critics focusing particularly on the inappropriateness of judges revising a jury's verdict without hearing the actual witnesses themselves.<sup>6</sup> The Criminal Appeal Act 1968 was understood to embrace the principle of finality of litigation and interpreted as requiring that only a single appeal against conviction

1. Royal Commission on Criminal Justice. 1993. Report (Cm 2263). London.
2. The only other option was to ask the Home Secretary to recommend that the Queen exercise the Royal Prerogative of Mercy; however, this provided little solace to those who believed themselves to be innocent as it started from the premise that the person was guilty.
3. Home Affairs Committee. *Miscarriages of Justice: Sixth Report from the Home Affairs Committee*, Session 1981-1982, Together with the Proceedings of the Committee, the Minutes of Evidence and Appendix HC421. London (1982).
4. C3 contributed to an annual average of five cases being quashed by the Court between 1980 and 1992, and before the 1980s references were even fewer (R. Pattenden, *English Criminal Appeals 1844-1994* (1996), at 363).
5. K. Maleson, 'Appeals against Conviction and the Principle of Finality', 21(1) *Journal of Law and Society* 151-64, at 151 (1994).
6. R. Nobles and D Schiff, 'Miscarriages of Justice: A Systems Approach', 58(3) *The Modern Law Review* 299-320, at 311 (1995).

was permitted, even when fresh evidence came to light after an appeal had been dismissed, as was confirmed in *R v. Pinfold*.<sup>7</sup>

Although C3 could refer cases back to the Court – indeed it was the only option for those who had already appealed – over the years that it operated, successive Home Secretaries demonstrated extreme reluctance to disturb jury verdicts, and the Court certainly expressed no inclination to hear more cases. Hence, the Runciman Commission was keen to establish an independent institution to review cases where the Court had not provided relief and the consensus, among even the Commission's harshest critics, is that whatever its faults, the Commission has undoubtedly outperformed C3. That said, the challenge for any post-conviction review process must be to balance the principle of finality and deference to the jury's decision with opportunities for rigorous post-conviction review.

This article describes the legislative framework of the Commission, discusses its work in practice and considers if it has got this balance right. In particular, it addresses the key criticism of the Commission, namely that as a gatekeeper or a filter to the Court, it is in an essentially dependent, even subordinate position, leaving it in the realm of having to anticipate how the Court may assess those cases that the Commission believes to be unsafe and making its referral decisions in light of this second-guessing.<sup>8</sup> It builds on rigorous empirical research conducted by the author over the past decade, with much of the empirical data gathered between 2013 and 2016, research that is analysed in greater detail elsewhere.<sup>9</sup> This focused on analysis of 146 cases: including examination of Court judgments; interviews with and surveys of caseworkers, commissioners and others working on these cases; quantitative analysis of working practices; and detailed review of Commission policy and internal guidelines, not publicly available. It considers these data through a theoretical lens that borrows from sociolegal scholarship on discretion, in particular, adopting Keith Hawkins' concepts of decision-making 'frames' that draw on 'decision fields' within social, political and legal 'surrounds'.<sup>10</sup>

## 2 Legal Framework for Post-Conviction Review

Those who believe themselves to be wrongfully convicted must apply to the Court of Appeal (Criminal Division) for leave to appeal,<sup>11</sup> and only if leave is granted

will their appeal be heard.<sup>12</sup> Appeals may be based on fresh evidence or a change of law, but in the former case, the appellant will need to have a good reason for not adducing this evidence at trial. Where a judge refuses leave to appeal, the appellant can renew his or her application, but if it is again unsuccessful, there is no further recourse for *direct* appeal. Similarly, there is no further remedy for those whose appeal is heard but conviction upheld by the Court of Appeal.

Leave to appeal is granted in only about 10% of approximately 700–800 applications for appeals against conviction each year.<sup>13</sup> However, about two-thirds of conviction appeals heard by the Court each year will be allowed (with those convictions being deemed to be 'unsafe' by the Court and therefore quashed). While the numbers differ each year, over the past five years, only about 7% of all applications received have been successful.<sup>14</sup> Given that forensic science may evolve to provide new evidence or expose the weak probative value of old science and that new witnesses may come forward or old ones may be discredited, a rigorous post-conviction review process, one that is not bound by strict time limits, is crucial. The Commission provides appellants who are unsuccessful at direct appeal with an opportunity to have their conviction reviewed by a rigorous independent body, the only authority with the power to take their case back to the Court.

However, while the Commission is expected to be independent of the executive and the courts,<sup>15</sup> there are limits to its independence. It is unable to quash convictions itself, having the power only to refer cases back to the Court for their consideration (though once referred, the Court is then obliged to hear the appeal). In giving the Commission power to refer cases to the Court,<sup>16</sup> Parliament set the parameters of the legislative test that was to be applied, the 'real possibility test' (Criminal Appeal Act 1995, section 13(1)(a)). Under this test, the Commission must be satisfied there is a real possibility that the Court will quash the trial verdict.<sup>17</sup> As the

defence solicitors will usually advise their client on whether there are reasonable grounds for appeal (and draft those grounds) immediately after the trial has concluded.

7. [1988] B.B. 462.

8. A. James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice', *Criminal Law Review* 140-53 (2000).

9. C. Hoyle and M. Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019), at ch. 2.

10. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002).

11. There are time limits for lodging an appeal (28 days from conviction or sentence, although applications for extensions can be made), so

12. While *permission* to appeal is usually given by a single judge, appeals against conviction and sentence are generally heard by three experienced judges. The Court hears appeals from the Crown Courts of England and Wales, while the Crown Courts typically hear appeals from the Magistrates' Courts.

13. The majority of the approximately 4,000 applications or appeals each year concern sentences.

14. Court of Appeal (Criminal Division) Annual Report 2018-19, <https://www.judiciary.uk/wp-content/uploads/2020/02/LCJ-18-to-19-FINAL-PDF-1-1.pdf>.

15. Home Office. 1994. *Criminal Appeals and the Establishment of a Criminal Cases Review Authority: A Discussion Paper*. London.

16. The jurisdiction of the Commission extends to the magistrates' court, for which a referral would be to the Crown Court, although most of its applications relate to convictions from the Crown Court, which are referred back to the Court.

17. Sections 9-12 of the Criminal Appeal Act 1995 give the Commission the power to refer if the case satisfies the section 13 real possibility test but do not impose a *duty* to do so. There are circumstances under which the Commission will choose not to refer a case back to the Court even if it meets the real possibility test. For example, it might be influenced by the age of the case or the fact that the applicant is deceased.

Commission is required to consider how the Court will respond to a referral, its decision-making is inextricably linked to the test subsequently applied by the Court. Set out in section 2 of the Criminal Appeal Act 1968, this test is simply whether or not the conviction is ‘unsafe’; the Court does not need to be satisfied that the applicant is innocent. These principles were stated most explicitly in the case of *Hickey* in 1997, the year the Commission was established:

This court is not concerned with guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for the courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. (per Roch U, *R v. Hickey*)<sup>18</sup>

In deciding which cases fit the criteria for a referral back to the Court, the Commission must work within both the 1968 (section 23) and the 1995 (section 13) Criminal Appeal Acts. Section 13 of the 1995 Act sets out the conditions for making a reference: most notably, that there is ‘new’ evidence or argument – for example, on a point of law – not previously raised at trial or appeal, that raises a *real possibility* that the Court will quash the conviction (though the Commission can refer a case without new evidence under ‘exceptional circumstances’) (section 13(1)(b)(i)). In other words, the case must pass a threshold; there must be something ‘fresh’ as well as persuasive. Similarly, if the application relates to a sentence there must be ‘an argument on a point of law, or information’ that has not been raised previously (section 13(1)(b)(ii).5). In all cases, an appeal should have been determined, or leave to appeal against it refused, before the convicted person applies to the Commission (section 13(1)(c)), although the Commission can consider an application that does not meet this criterion in ‘exceptional circumstances’.

The Court must consider that it is ‘necessary or expedient in the interests of justice’ to receive the new evidence within the criteria set out in section 23 of the 1968 Act: the evidence must be capable of belief, capable of forming a ground for allowing the appeal, and there must be a reasonable explanation for the failure to adduce the evidence at trial if the evidence had been available to the defence at the time (section 2d). By way of illustration, in the oft-cited case of *Steven Jones*, the Court clarified the application of section 23, warning against the presentation of better expert witnesses at appeal whose evidence could have been given at trial: [The appellant] is not entitled to hold evidence in reserve and then seek to introduce it on appeal following conviction. While failure to give a reasonable explanation for failure to adduce the evidence before a jury is

not a bar to reception of the evidence on appeal, it is a matter which the Court is obliged to consider in deciding whether to receive the evidence or not ... Expert witnesses, although inevitably varying in standing and experience, are interchangeable in a way in which factual witnesses are not. It would clearly subvert the trial process if a defendant, convicted at trial, were to be generally free to mount on appeal an expert case which, if sound, could and should have been advanced before the jury. (*Steven Jones*)<sup>19</sup>

Given that section 2(1) of the 1968 Act provides that the Court shall allow an appeal against conviction only if it thinks that the conviction is unsafe, meeting the real possibility test requires the Commission to assess whether the Court is likely to find the conviction to be unsafe when presented with new argument or new evidence. Hence, in deciding whether there is new evidence and whether that evidence gives rise to a real possibility that the Court will find the conviction to be unsafe, the Commission must consider not only the legislation, but also subsequent guidance from the Court – on cases referred by the Commission, as well as on direct appeal judgments – as well as decisions made by the Administrative Court in judicial reviews of the Commission’s decisions *not* to refer. This guidance – provided by judgments and occasional reprimands from the Court<sup>20</sup> – is regularly reviewed by the Commission and reproduced with analysis in Casework Guidance Notes; in internal memos on Court judgments; in the ‘Statements of Reasons’ either to refer or not to refer a case, prepared for applicants and the Court; and in informal communication between Commission staff. As Keith Hawkins might put it, these are the routine ways in which decision makers create ‘decision fields’ to make sense of evolving interpretations of the law.<sup>21</sup>

The first challenge to the Commission’s decision not to refer a conviction to the Court (in the case of *Pearson*)<sup>22</sup> led to an important judgment by Lord Bingham that elucidated the Commission’s role in deciding whether any particular case meets the real possibility test, having a lasting impact on the Commission’s decision-making: The real possibility test ... is imprecise but plainly denotes a contingency which, in the Commission’s judgement, is more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty ... The Commission is

19. [1997] 1 Cr App R 86. The Court has since demonstrated *some* flexibility on this matter. In *R v. Solomon* the fact that the evidence had been available and could have been raised at trial did not prove fatal to the appeal as the evidence was particularly strong ([2007] EWCA Crim 2633).

20. For example, the Court has sought to place limitations on the Commission in relation to referrals on ‘lurking doubt’, where there is no new evidence, and very old cases. Furthermore, it has reprimanded the Commission for certain referrals based on a change of law or on assertions of legal incompetence.

21. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002), at 50-1.

22. *R v. Criminal Cases Review Commission ex p Pearson* [1999] 3 All ER 498.

18. [1997] EWCA Crim. 2028.

entrusted with the power and the duty to judge which cases cross the threshold and which do not ... In a conviction case depending on the reception of fresh evidence, the Commission must ask itself a double question: do we consider that if the reference is made there is a real possibility that the Court of Appeal will receive the fresh evidence? If so, do we consider that there is a real possibility that the Court of Appeal will not uphold the conviction? The Commission would not in such a case refer unless it gave an affirmative answer to both questions.

Returning to the case in hand, *Pearson*, Lord Bingham continued:

The Commission had, bearing in mind the statutory threshold, to try to predict the response of the Court of Appeal if the case were referred and application to adduce the evidence were made. It could only make that prediction by paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions. It could not rationally predict the response of the Court of Appeal without making its own assessment, with specific reference to the material in this case, of the considerations to which the Court of Appeal would be obliged to have regard and of how it would be likely to exercise its discretion. (Lord Bingham, *R v. Criminal Cases Review Commission ex p Pearson*<sup>23</sup>)

Hence, the Administrative Court refused the application from *Pearson*, reluctant to usurp the function that Parliament had deliberately accorded to the judgment of the Commission.

With *Pearson* in mind, the Commission's internal guidance on the real possibility test makes clear that commissioners should give each case proper scrutiny before deciding whether the test is met. It reproduces Lord Bingham's words, noting that there must be more than an outside chance of success but that there does not have to be a probability; that referrals must be more than threadbare but that success need not be assured. It also makes clear that the Commission, in second-guessing the Court, must be cognisant of the Court's decisions in previous cases. Hence, the Commission regularly conducts careful analysis of the Court's reactions to its referrals to better predict its responses to future cases. In other words, it draws on its 'surround' to construct its own 'decision field'.<sup>24</sup>

Both the Court in its judgments and the Commission in its Statements of Reasons draw heavily on the House of Lords'<sup>25</sup> judgment in *Pendleton*.<sup>26</sup> Following a referral by the Commission, *Pendleton*'s conviction was upheld, with the Court asserting that the criminal justice system

requires trial by jury and not a second trial by judges in the Court. Notwithstanding deference to the jury, the Lords subsequently quashed the conviction. Drawing on prior case law, they argued that in making a judgment on whether a conviction is unsafe, the Court should test its provisional view by asking whether the evidence if given at trial might reasonably have affected the decision of the jury to convict. If it might, the conviction must be thought to be unsafe. While the House of Lords in *Pendleton* did not change the law, it reminded the Court that in difficult cases it should consider what doubts the jury might have had.

Since *Pendleton* the Commission, in deciding its cases, has asked itself whether the new evidence takes the case into the realms of 'difficulty', as discussed by Lord Bingham, and has not assumed that the prosecution at trial had made out an incontrovertible case. In other words, the Commission is guided by anticipation of how the judges might consider what a jury would have made of any new evidence, what the jury might have thought is sufficient to quash a conviction or order a retrial.

Post-*Pendleton* jurisprudence appears to set the bar somewhat higher for the Commission and, more recently, the Commission has found itself on the receiving end of sharp rebukes by the Court for its weaker referrals. Consequently, some have argued that the Commission has become somewhat 'timid' in deciding which cases meet the test for a referral 'without it adopting an explicit policy to that effect or even necessarily appreciating that its approach has been changing'.<sup>27</sup>

The legal framework of statute and evolving case law leave some room for discretion, for different approaches to cases, and for bolder or more cautious decisions on referring cases back to the Court. In considering post-conviction review in practice, the following section considers how the Commission's analysis of case law structures responses to applications from receipt through to the decision of whether or not to refer an applicant's case back to the Court and how different commissioners and caseworkers interpret and respond to cases in the gaps left for their discretion.

### 3 Understanding Post-Conviction Review in Practice

Since the Commission started work in 1997, when it inherited over 200 cases from C3, it has received 26,221 applications from people, often prisoners, who believe themselves to be wrongfully convicted and/or sentenced.<sup>28</sup> While applications to the Commission were typically fewer than 1,000 a year, since the launch of a

23. [1999] 3 All ER 498.

24. Hawkins, above n. 21.

25. In October 2009, the House of Lords was replaced by the Supreme Court as the final court of appeal in the UK for civil cases and for criminal cases from England, Wales and Northern Ireland.

26. *R v. Pendleton* [2001] UKHL 66 [2002] 1 WLR 72 (HL).

27. L. Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (2008), at 71.

28. This figure refers to applications received between April 1997 and March 2010 (retrieved from the Commission's website on 31 May 2020).

simplified application form in 2012 and a concurrent increase in prison ‘outreach’ visits by the Commission, that figure has risen to approximately 1,400 to 1,500 a year. The Commission has so far referred approximately 3% of cases (692 cases) back to the appeal courts; 670 cases have been heard by the appeal courts, and of these, appeals were allowed in 450 cases.<sup>29</sup> Given that most referrals are for serious offences,<sup>30</sup> the release from a conviction, and often a prison sentence for hundreds of people over the lifetime of the Commission, is to be commended. However, with a typical 3%-4% referral rate – which has in the past years dropped to a remarkably low referral rate of 0.8% in 2016–2017 and 0.9% in 2018–2019, almost all of those who apply to the Commission do not find relief.

Making difficult decisions about which cases, and when, to refer back to the Court requires the Commission to make sense of the Court’s likely approach to new cases by examining its response to past referrals. But it also necessitates the Commission being mindful of how it could, in turn, try to shape the Court’s evolving jurisprudence. This section considers how the Commission responds to its many applications. In so doing, it is attentive to ‘the space ... between legal rules where legal actors must exercise choice’<sup>31</sup> and draws on the work of sociolegal scholars who consider the interdependent roles of sociological and legal influences on discretionary decision-making within criminal justice institutions.<sup>32</sup> Analysis is cognisant of how legal frameworks structure decision-making but mindful too of the sociological factors that shape discretion, not least the values and beliefs of those who work in justice organisations. As Lacey makes clear, we must consider the ‘operational ideologies’, ‘frames of reference’ or ‘assumptive worlds’ that help decision makers to make sense of and to impose explanations on their cases.<sup>33</sup>

This approach does not necessarily mirror the perceptions of Commission staff who have somewhat positivist assumptions about their decision-making, believing it to be guided and restricted *only* by the relevant legislation, not least the real possibility test, and the evolving Court jurisprudence. As one Commissioner explained, ‘We have to look at each case distinguished on its own facts, and obviously, we need to read what’s coming out of the Court of Appeal so we understand their thinking [if] there’s a real possibility.’<sup>34</sup> Staff also recognise that they are influenced in their decision-making by policies imposed by the Commission in the form of Casework Guidance Notes and Formal Memoranda and in other institutional directives aimed at helping them to

recognise and review appropriately those cases that may meet the real possibility test. Although many do not recognise the role of culture or individual predispositions in decision-making, their assumptions are that decisions about whether to refer a case back to the Court are made simply on the merits of a case, and therefore that two different members of the Commission would likely come to the same conclusion if presented with the same evidence. As one interviewee told us, ‘when you refer a case ... You try and decide it on its merits’.<sup>35</sup> Except as David Nelken reminds us, ‘legal actors often have little grasp of the factors which shape “inputs” and “outcomes” of their decisions’.<sup>36</sup>

More helpful is a naturalist approach to understanding decision-making, one that recognises that decisions are not self-evident; that what is ‘merited’ is context sensitive and open to interpretation in each case.<sup>37</sup> In this regard, there will sometimes be different approaches and outcomes in apparently similar cases. Indeed, Hawkins questions what it might mean to consider a case ‘on its merits’. What merits self-evidently determine outcomes, and how are they determined?<sup>38</sup> Naturalistic approaches acknowledge the context and social world in which discretion is exercised.<sup>39</sup> In *Law as Last Resort*, Hawkins suggests that to understand the nature of discretionary decision-making, a connection ought to be made between a range of factors in the decision-making environment and the decision-making processes in which individuals engage.<sup>40</sup> His typology of ‘surround’, ‘decision fields’ and decision ‘frames’ allows this connection to be made:

Decisions about legal standards and their enforcement, like other legal decisions, are made, then, in a much broader setting (their “surround”) and within a context, or “field”, defined by the legal and organizational mandate. Decision “frames”, the interpretive and classificatory devices operating in particular instances, are influenced by both surround and field.<sup>41</sup>

Emerson and Paley similarly note that organisational horizons condition decision-making, as agents are expected to have a working knowledge of how other cases of the same nature would be approached, as well as the implications of allowing the case to proceed to the next stage of the criminal process.<sup>42</sup> In this regard, anal-

29. These figures were retrieved from the Commission’s website on 31 May 2020.

30. Approximately 22% for homicide; 18% for sexual offences; 12% for robberies and other serious, mostly indictable-only offences.

31. K. Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’, in K. Hawkins (ed.), *The Uses of Discretion* (1992) 11, at 11.

32. N. Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’, in K. Hawkins (ed.), *The Uses of Discretion* (1992) 361.

33. *Ibid.*, at 364.

34. Interview (74) with Commissioner.

35. Interview (40) with Commissioner.

36. D. Nelken, ‘Blind Insights? The Limits of a Reflexive Sociology of Law’, 25(3) *Journal of Law and Society* 407–26, at 407–8 (1998).

37. For a discussion of positivism and naturalism, and the key differences between them, see R. Keat, ‘Positivism, Naturalism, and Anti-Naturalism in the Social Sciences’, 1(1) *Journal for the Theory of Social Behaviour* 3–17 (1971).

38. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002), at 31.

39. K. Hawkins, ‘On Legal Decision-Making’, 43(4) *Lee Law Review* 1161–1242 (1986).

40. Hawkins, above n. 38.

41. *Ibid.*, at 47–8.

42. R.M. Emerson and B. Paley, ‘Organizational Horizons and Complaint-Filing’, in K. Hawkins (ed.), *The Uses of Discretion* (1992) 231–48.

ysis must look beyond the explicit rationales for referring cases back to the Court and be cognisant of how commissioners and caseworkers make sense of their knowledge about past cases in order to infer from those cases how the Court will respond to a referral in a particular case. They have first to work out what was ‘really going on’ in similar cases and what the implications are of that analysis for future cases.<sup>43</sup> Hence, while case law from the Court might be considered in terms of Hawkins’ ‘surround’, once the Commission reacts to evolving Court jurisprudence, by discussing such cases in its informal and formal guidance to Commission staff, those cases become an integral part of the decision field. By way of example, we turn to consider the Commission’s initial response to applications, what we might refer to as its ‘screening’ process before moving on to consider its decision-making in investigating applications concerning procedural irregularities. We see in both analyses that the field structures decision-making but leaves discretionary gaps for caseworkers to interpret and respond differently.

### 3.1 Application Screening: Variability in Decision Frames

The Commission’s case screening produces a high rate of attrition. It subjects just over half of its 1,400–1,500 applications a year to full and thorough investigation, rejecting the others with minimal review. This process causes some anxiety within the Commission, given that among those screened out there may be innocent people. Owing to limited resources, the Commission cannot conduct in-depth reviews of *all* applications and so relies on minimal information provided, or gathered, to make difficult judgments.

Many commissioners identified the real possibility test as the legal ‘field’ shaping their screening decisions: ‘We’re all independent commissioners from different backgrounds but there’s one job to do: to see, on the evidence and facts, if there’s anything new to give rise to a real possibility.’<sup>44</sup> Nonetheless, some acknowledged the influence of individual characteristics on how they framed the information received from applicants: ‘[Commissioners] bring a lot of their own previous experience with them, so ... you’re going to get different approaches, and that’s a good thing, in many respects ... But on the flip side of that, [it] can then lead to, obviously, different approaches and inconsistencies.’<sup>45</sup> Indeed, our interviews across the Commission identified a variety of decision-making styles, which ranged from ‘inflexible conservative’ to ‘very liberal’, from ‘exploratory’ to ‘decisive’, ‘slow’ to ‘fast’ and from ‘rigorous’ to ‘less careful’. Interviews with staff revealed concerns about inconsistency in approaches: ‘I get alarmed sometimes. All our commissioners are very individual people and they all have quite strong person-

alities, but that does lead to a measure of inconsistency of approach.’<sup>46</sup>

Although the legal framework is clear that the Commission is a last resort for those who have not found relief at direct appeal, applications from persons who have not already appealed are not uncommon, making up about 40% of applications each year. Section 13(2) of the Criminal Appeal Act 1995 allows the Commission to review such cases and to make a reference ‘if it appears to the Commission that there are exceptional circumstances which justify making it’. All otherwise eligible cases where there has been no direct appeal will be considered by commissioners and caseworkers responsible for screening, as the decision about whether there are ‘exceptional circumstances’ is complex. The Formal Memorandum states: ‘It is vital that the Commission does not, other than for compelling reasons, usurp the conventional appeals process,’ in recognition of the impact that will have on those who have already satisfied the previous appeal criterion and will be waiting in the queue. Hence, it claims, ‘[A] decision by the Commission to review or to refer any “no-appeal” case will be unusual.’

Commissioners involved in screening during the first years of my fieldwork appeared to interpret the guidelines liberally.<sup>47</sup> Furthermore, I found some variability among those responsible for screening, in that some cautious commissioners ‘screened in’ half of the cases, while others rejected most. For example, between 2010 and 2013, one commissioner, ‘Commissioner 1’, screened twenty-eight cases and found one case with potential exceptional circumstances, while another, ‘Commissioner fifteen’, screened twenty-eight cases and found fourteen cases with potential exceptional circumstances. No significant differences were found in the profile of cases these two commissioners were responsible for screening in terms of applicants’ gender, custody status, type of offence or when the applications were received. While wider analysis of screening decisions suggested that commissioners could be influenced by guilty pleas and by good legal representation at application, albeit to different degrees, the variability in practice, overall, was difficult to account for. Clearly, notwithstanding a coherent decision field, decision makers were influenced by individual decision frames – ways of making sense of the information – reflecting their particular personalities.

### 3.2 Investigating Cases: Variability in Decision Frames

The Commission commits considerable resources to searching for fresh arguments or evidence in those cases where the relatively superficial screening of an application suggests that there are reasons to doubt the safety of the conviction. Decisions about reviewing cases are not made in a vacuum; the Commission influences decision-making by creating and providing knowledge to

43. R.M. Emerson, ‘Case Processing and Interorganizational Knowledge: Detecting the “Real Reasons” for Referrals’, 38(2) *Social Problems* 198–212 (1991).

44. Interview (74) with Commissioner.

45. Interview (70) with Commissioner.

46. Interview (17) with Commissioner.

47. More recently, the Commission has become more restrictive in its interpretation of exceptional circumstances.

draw on, as set out, and regularly revised, in its internal guidelines for staff. Notwithstanding this clear decision field, my research found a wide range of investigative patterns and behaviours across the Commission, by way of different decision frames, that could not be accounted for by the types of cases or by the experience of the investigative staff.

Most applicants, even those with legal representation, do not have access to all the records from the trial, and so the first stage of any review is to collate and analyse relevant material for the investigation from public bodies, such as the health service, the police and the Courts, and – since 2016 – from private bodies and individuals.<sup>48</sup> Beyond these vital ‘desktop reviews’, in some cases it is considered to be advantageous to conduct empirical investigations: to interview the applicant, a witness or an expert and perhaps conduct other investigatory work, including commissioning forensic analysis.

Making sense of applications and deciding what investigations to carry out is a complex process, guided by more than the law; other structural and cultural variables, such as resources and even the personalities of the caseworkers, inform the process and introduce inevitable variability across cases. Analysis of investigatory behaviour over a particular year revealed that one caseworker conducted no empirical investigations, while another did fourteen separate empirical investigations in the same time, with a range of approaches between these two. Case analysis also revealed considerable differences in the speed of reviews at each stage of the process, variability that could only in part be accounted for by the nature or complexity of the case or by the responsiveness of persons external to the Commission. Those we interviewed felt that some of the variation could be accounted for by the intelligence and expertise of caseworkers and commissioners but also by their personalities, confidence and dynamism.

While guidelines cover all aspects of the commission’s work, of particular interest to us here is guidance on decision-making throughout reviews, principally on the question of whether the case satisfies the real possibility test. Discretion may be exercised by individual decision makers slightly differently for each case in the context of past judgments handed down by the Court as well as by the Commission’s interpretation of the factors that influenced those judgments and a set of ever-shifting understandings of the persuasiveness of certain evidence in a particular context at a particular time. By way of a case study of decision-making, we now turn to consider the Commission’s response to applications that raise concerns about police and prosecution procedural irregularities to show how this works in practice.

### 3.3 Decision-Making in Cases Raising Due Process Concerns

The three main issues raised in applications to the Commission are concerns about the credibility of the witness

or complainant, incompetent representation and claims of police or prosecutorial misconduct.<sup>49</sup> The criminal justice process is operated by fallible and sometimes prejudiced individuals, and criminal trials provide ‘imperfect procedural justice’.<sup>50</sup> Wrongful convictions are therefore inevitable. Indeed, to a greater or lesser extent, all applications to the Commission raise concerns about the reliability of the evidence presented to the trial court or about flaws in criminal procedure.

As the Commission must be mindful of the Court’s evolving jurisprudence in deciding how to investigate its cases and when a case is sufficiently strong for a referral back to the Court, it relies on Casework Guidance Notes to steer commissioners in their reviews: documents not publicly available but that I have analysed. As regards applications claiming procedural impropriety, the Commission is aware that the Court is becoming increasingly disinclined to quash convictions based solely on procedural irregularities. Evolving jurisprudence suggests a sea change in the Commission’s ‘surround’, to use Hawkins’ term, to a position whereby the Court seeks to establish whether procedural failures ‘caused any prejudice to any of the parties, such as to make it unjust to proceed further’.<sup>51</sup> In other words, the Commission knows that the approach of the Court is not to presume that breaches of due process are determinative in themselves and that it ‘routinely applies the safety test in the light of its overall sense of justice and not on the basis of technicalities’.<sup>52</sup> This inclination in the Commission’s surround inevitably influences its ‘decision field’, as the Commission tries to predict which cases may be accepted by the Court and which are likely to fail the test.

Drawing on the recent trends in the Court’s judgments, Casework Guidance Notes advise Commission staff on responding to cases of police misconduct or material non-disclosure (of potentially exculpatory evidence) that might undermine the credibility of a case to such an extent that it amounts to an abuse of process. They make clear that the primary concern of the Court is how evidence of misconduct might have affected the jury’s decision to convict the applicant, or the judge’s decision on a legal ruling. In other words, evidence of police misconduct ‘should not be viewed as determinative’ in itself but should rather be considered in light of the overriding question of how it impacts on the safety of the conviction; that had police investigated thoroughly and behaved with probity, the jury may not have convicted the applicant. In making those crucial decisions about whether evidence of improper policing is determinative – whether it is sufficiently strong to impact on the safety of the conviction – the Commission must inter-

48. Section 17 of the Criminal Appeal Act 1995; section 18A of the Criminal Cases Review Commission (Information) Act 2016.

49. S. Heaton, ‘A Critical Evaluation of the Utility of Using Innocence as a Criterion in the Post-Conviction Process’ (PhD Thesis, University of East Anglia), at 32 (2013).

50. J. Rawls, *A Theory of Justice* (1971), at 85.

51. *Clark and McDaid* Court judgment [2006] EWCA Crim 1196, cited in Criminal Cases Review Commission. 2006b. ‘Quashing Convictions’: The Responses of the Criminal Cases Review Commission (11 December 2006), para. 19.

52. *Ibid.*, para. 25.

pret each case, with its unique set of factors, in light of the evolving Court jurisprudence.

A few of the cases I examined involved breaches of due process of significant severity and import to justify a referral back to the Court. One applicant had been convicted of an attempted rape and of a burglary with intent to rape solely on his false confession, although there was no positive identification from either of the victims and no forensic evidence linking him to either the scene of crime or the victims. Moreover, there was an alternative suspect. Following an application to the Commission in 2000, an experienced forensic psychologist was commissioned to examine the applicant and could demonstrate that he was ‘highly suggestible’, casting doubt on the veracity of the confession. The Commission referred the case back to the Court with this fresh expert evidence – which afforded the information about the alternative suspect higher evidential status – and on the further ground that the police had acted without integrity. The Commission’s Statement of Reasons for a referral pointed out that the police had done very little investigation into the offences – indeed had failed to do the basics – and that the jury had been provided with an abridged version of the interview transcripts, which would have been misleading. Furthermore, the applicant had not been provided with a lawyer. The Court quashed the conviction on the basis of the expert witness’ ‘serious reservations about the reliability of the self-incriminating admissions [the applicant] made to the police’, despite the initial guilty plea. This was a reasonably straightforward case, and it is likely that any commissioner would have made the same decision about referral.

In many of those cases where the Commission refused to refer the case to the Court although applicants had raised concerns about police misconduct, evidence of misconduct or non-disclosure was not fresh, the defence had failed to adduce it at trial or the evidence was not determinative, the legal parameters that the Commission must operate within. The thrust of the advice in the Casework Guidance Note on non-disclosure is that the Commission should consider whether the undisclosed evidence may have been material to the issues in the case and seek to understand its significance in the context of the case as a whole. Hence, again, commissioners would be likely to respond fairly consistently to such cases. As one commissioner explained, ‘It’s not non-disclosure per se that makes something meritorious. It’s always the sort of back-story as to why it wasn’t used before. So, I can see where the Court of Appeal are coming from because it always is based on the significance of the material rather than the mechanics of how or why it didn’t come about.’<sup>53</sup>

In most cases, police misconduct identified by the Commission was not thought to meet the threshold whereby it could be said to impact on the safety of the conviction within a legal decision frame. As explicated by one Statement of Reasons not to refer, an application cannot

be referred simply on the basis that the investigation fell short of the standards, but the Commission ‘would have to be satisfied that if there was any inadequacy and/or misconduct in the investigation its effect impacted upon the safety of the conviction’. Similarly, in another case, the applicant’s claims of police incompetence were deemed to be insufficient: ‘Investigative failures would not be sufficient in themselves to cause the Court of Appeal to quash the conviction ... there would need to be specific matters arising from such failures that affected the trial process to a degree that rendered it unsafe. (Statement of Reasons)’ Case analysis in most such cases similarly made clear that to refer a case back to the Court, breaches of disclosure rules – like breaches of the police codes of practice – must be sufficiently egregious, or the Commission must be able to demonstrate that had the material been disclosed to the defence, it would have made a difference to the outcome of the case.

Within the wider decision field, Commission staff adopted different decision frames in order to make sense of cases and to arrive at difficult decisions about referrals. While a legal decision frame was dominant, they also adopted, in some cases, instrumental or moral decision frames. Although they referred back to the Court those cases demonstrating flagrant breaches of due process, there were a few examples of Commission decision-making that demonstrated variable levels of deference to police and prosecutors. Such cases suggested either a moral decision to trust in the integrity of the pre-trial process or moral values concerned with due process being trumped by common-sense understandings of the inevitable shortcomings inherent in an overburdened criminal justice system. Hence, one commissioner described the failings of a senior investigating police officer in one of his cases in terms of a heavy case-load: ‘I think it’s easy to sit back in our sort of ivory tower here and be hyper-critical. ... But I think [the senior investigating police officer] himself, you know, I do have a lot of sympathy for him because it was a difficult case.’

Other interviewees dismissed inadequate investigations by the police as merely ‘mistakes’, or ‘shortcomings in the investigation with no evidence of the police acting in bad faith’, with one Statement of Reasons suggesting ‘police officers might have *unknowingly* implanted incorrect information in the witnesses’ minds’ (emphasis added), and a commissioner in another case explaining:

There’s no sense that there’s been deliberate, you know, impropriety either on behalf of the police or the prosecution. In my experience, it’s just been a cock up, you know, that things have been missed and particularly that police ... have just not recognized the significance of a piece of information or material, generally to the case ... I think it’s just ... error, mistake ... incompetence ... negligence, whatever you want to call it.<sup>54</sup>

Few wanted to call it misconduct and were perhaps, therefore, less likely to see mischief when reviewing

53. Interview (1) with Commissioner.

54. Interview (29) with Commissioner.

police investigations. It is arguable that the Commission has been a little too complacent here, in assuming that institutionalised corruption and misconduct by police is rare.

In considering the Commission's response to these cases, we can see the relevance of Hawkins' work and that of other sociolegal scholars who have looked beyond the law in trying to understand the exercise of discretion at all stages of the criminal process. The Commission's decision-making demonstrates that the surround is not static. It shifts according to wider social and political changes beyond the institution, and when it does, the Commission will typically need to move with it. Case analysis demonstrated that developments in the surround require consequent paradigm shifts in the 'field' – in the policies and guidelines of the Commission developed to reflect both the dictates of and the latitude within the law – and, as we see above, in the 'frame', how commission staff make sense of information; how they interpret, classify and respond to evidence in their cases, with a few inclined to be rather forgiving of police and prosecution incompetence.<sup>55</sup>

My research in these cases, as in others, demonstrated that the Court's prior response to Commission referrals and to direct appeals clearly impacts on the Commission's decision-making. Hence, despite some room for different interpretations, and therefore for some variability in responses across the Commission, this inevitably locks the Commission into a close, deferential relationship with the Court. It requires the Commission, as an institution, to accurately interpret the Court's decisions in order to guide decision makers, and then Commission staff must correctly interpret the guidance and apply it appropriately. Notwithstanding this room for discretion, there is a close relationship between the Commission and the Court, and this creates certain challenges, to which we now turn.

## 4 Challenges: Jury Deference and Deference to the Court

While the Commission remains determined to examine each application thoroughly for post-conviction review, it does so with inadequate resources<sup>56</sup> and within a legislative framework that restricts its independence and a culture that I have observed to be somewhat risk averse. I explore the culture of the Commission elsewhere<sup>57</sup> but here return to the legislation that shapes the Commission's response to applications and creates an intractable challenge.

55. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002), at 49.

56. House of Commons Justice Committee. *Justice—12th Report: Criminal Cases Review Commission HC850* (2015), <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>.

57. Hoyle and Sato, above n. 9.

The real possibility test inevitably restricts the Commission's ability to refer a possible wrongful conviction back to the Court and obliges the Commission to decide whether the Court will likely find the conviction to be unsafe. Hence, indirectly, decisions within the Commission are influenced by the Court of Appeal and the Administrative Court, by way of evolving case law. For that reason, many criticisms of the Commission stem from the nexus created by section 13 of the Criminal Appeal Act 1995 because it creates the conditions whereby if the Court is wrong in its analysis or judgment, the Commission is required to sustain erroneous jurisprudence. Given that there is some evidence that the Court is becoming more reluctant to overturn juries' decisions, this must be of concern to critics who consider the Commission to be insufficiently bold in its referral decisions.

### 4.1 Court Deference to the Jury?

The Court has long harboured a deeply felt reluctance to overturn convictions,<sup>58</sup> in part because of its commitment to the supremacy of the jury.<sup>59</sup> This deference led the human rights organisation JUSTICE to criticise the Court's failure to overturn jury verdicts in its 1964 report, stressing 'the fallibility and inexperience of juries whose verdicts do not warrant such reverential treatment by appeal court judges'.<sup>60</sup> Thirty years later, Malleon reviewed the first 300 appeals against conviction of 1990 and found that in only very limited circumstances was fresh evidence admitted by the Court and that when admitted only rarely did it form the basis for a successful appeal.<sup>61</sup> The Court is reluctant to disturb a jury's verdict in part because it has not heard the evidence they heard nor seen the witnesses. Showing deference to the jury allows the Court to resist appeals based solely on the grounds that the jury could have reached a different verdict.<sup>62</sup>

New research suggests that the Court today may be more deferential to the jury than ever. Roberts – using the same research method as Malleon (analysing the first 300 available appeals considered in 2016) – found almost double the number of appeals based on fresh evidence, which may hint at a more liberal approach by the Court today.<sup>63</sup> However, in only 19% of her cases did the Court admit the fresh evidence, significantly lower than the 61% in 1990.<sup>64</sup> This suggests the Court is now more restrictive. Her research also found that the most common reason for rejecting fresh evidence under section 23 of the Criminal Appeal Act 1968 was that the

58. A. Zuckerman, 'Miscarriage of Justice and Judicial Responsibility', *Criminal Law Review* 492-500 (1991).

59. Nobles and Schiff, above n. 6, at 310.

60. JUSTICE cited in Nobles and Schiff, above n. 6, at 310.

61. K. Malleon, *Review of the Appeal Process*, RCCJ Research Study No 17 (1993).

62. R. Nobles and D. Schiff, 'The Right to Appeal and Workable Systems of Justice', 65(5) *Modern Law Review* 676-701, at 676 (2002).

63. S. Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal', 81(4) *The Journal of Criminal Law* 303-27 (2017).

64. *Ibid.*

evidence had been available at trial and there was no reasonable explanation as to why it was not adduced then (a challenge I saw the Commission grapple with in some cases). If the Court is deferential to the jury, this necessarily influences the Commission's decisions about fresh evidence.

#### 4.2 Commission Deference to the Court?

As the statutory grounds for referral 'provide strong *prima facie* evidence of an essentially dependent position',<sup>65</sup> concerns about deference are frequently expressed. Critics argue that the centrality of the real possibility test to the Commission's work compromises its claim to independence.<sup>66</sup> Some have argued that the Commission is circumscribed not only by the law, but also by a concern to please the Court.<sup>67</sup> On these points, some critics are more forceful than others. While some view the Commission as a filter to the Court,<sup>68</sup> others point out that 'accusations that the [Commission] is ... subordinate to the [Court] are truisms. That is the way that the system has been designed by Parliament'.<sup>69</sup> Nobles and Schiff see it as inevitable that the Commission would have developed this relationship even in the absence of a statutory restriction on its powers.<sup>70</sup> Given that the Commission has no independent power to quash convictions – but can only refer cases to the Court – it is deterred from making referrals that, in view of the Court's practices, would only fail.<sup>71</sup> It is always in the realm of second-guessing how the Court may assess a case following a referral and anticipating how readily the Court will accept its new arguments.<sup>72</sup>

Regardless of the legislative inevitability of the close predictive nexus between the Commission and the Court, friends and critics have worried about it being overly submissive:

[I]t has been suggested that the Commission has been somewhat intimidated in some cases by the Court's approach ... And has wrongly concluded that the Court would refuse to receive improved expert evidence on the basis of 'finality of trial' considerations. If

65. P. Duff, 'Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner', 72(5) *The Modern Law Review* 693-722, at 701 (2009).

66. The boldness of this claim should not be underestimated, given that the *raison d'être* of the Commission is to be independent; see R. Nobles and D. Schiff, 'The Criminal Cases Review Commission: Reporting Success?' 64(2) *The Modern Law Review* 280-99 (2001).

67. M. Naughton, 'No Champion of Justice', in J. Robins (ed.), *Wrongly Accused: Who Is Responsible for Investigating Miscarriages of Justice? The Justice Gap and Solicitors Journal* 20-3, at 21 (2012).

68. A. James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice', *Criminal Law Review* 140-53 (2000).

69. K. Kerrigan, 'Real Possibility or Fat Chance?' in M. Naughton (ed.), *The Criminal Cases Review Commission: Hope for the Innocent?* (2009) 166-77, at 174.

70. Nobles and Schiff, above n. 6.

71. R. Nobles and D. Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal', *Criminal Law Review* 173-89 (2005).

72. R. Nobles, 'The CCRC in 2012: An Academic's View'. Queen Mary University of London, School of Law, *Legal Studies Research Series* No. 119/20 (2012).

the Commission has, indeed, adopted that approach – rejecting exposed evidence that significantly improves upon the expert case at trial – that would be a serious criticism.<sup>73</sup>

Of course, a difficulty with Elks' point is with the notion of 'evidence that significantly improves upon the expert case at trial'. The Commission can struggle with that subjective judgement. Commissioners not only follow casework guidance but sometimes also await pending Court judgments in similar cases, or cases that raise analogous issues, before deciding whether new evidence is likely to be seen by the Court to significantly improve on the expert case at trial. In light of those cases, they decide whether to refer and, if so, on what grounds. This is unavoidable deference, but it could also be regarded as a pragmatic use of limited resources; learning from past judgments to identify evidence that is likely to be accepted by the Court and to play down factors that have not proven to be persuasive in the past. In other words, it is not always clear what is deference and what is pragmatism, nor is it always clear what is constrained by the real possibility test and what is shaped by a culture of caution or individual predispositions, as described previously. Of course, if the Court gets it right, the Commission does too; however, if the Court gets it wrong, this approach affords no opportunities for the Commission to correct that. While commissioners have told me that recent castigations by the Court for its referrals show that the relationship is not too cosy, its historically high success rate might demonstrate an insufficiently bold approach to referrals.

The question of an appropriate success rate has troubled the Commission for some time. When I began my research, I put it to commissioners that an almost 70% success rate was perhaps a little too high and that it suggested the Commission was somewhat risk averse in its referrals. Recent data – showing a declining referral rate but also a declining success rate – is therefore confounding. If the current reduced referral rate were to suggest increasing risk aversion, with the Commission not wishing to be rebuked for audacious referrals based on a more liberal interpretation of the real possibility test, we might expect to see a higher rate of referred cases quashed, regardless of the raw numbers. Instead, the reduced referral rate has coincided with a reduced success rate. In light of this, is it sensible to urge the Commission to be bolder in its referrals?

## 5 Conclusion: Should the Commission Be Bolder?

The inevitable 'second-guessing' built into the legislation causes the Commission to be somewhat deferential to the Court. At the same time, the Court would appear

73. Elks, above n. 27, at 77.

to be rather deferential to the jury, given its adherence to the principle of finality. The consistency of data demonstrating the Court's deference to the jury and the legislative interdependence of the Court and the Commission raises the question of what, if anything, the Commission can do to resist being too deferential to the Court. That may well be one of the key challenges of the coming decade.

On one level, it makes no sense to object to the Commission being somewhat subordinate to the Court; it is inevitable given its function as a review body, not a court of law. However, the Court's restrictions on admissibility of evidence (under its section 23 provisions) mean that some potentially unsafe convictions never get through its doors. Some of my cases were not referred because the Commission cannot submit evidence if it had been used at trial or at a prior appeal or had been available but not adduced at trial, and there is no adequate explanation for this failure. Although the principle of finality is important, this restriction causes some unease.

Although the Commission is institutionally deferential to the Court, it is not powerless to act in those difficult cases that cause disquiet. At the risk of a lower success rate, it can choose to be bolder in its referrals, making use of its powers to refer on 'lurking doubt' or bypassing the system and applying for a Royal Prerogative of Mercy, options that the Commission has expressed little appetite for in the past.<sup>74</sup> More significantly, the Commission could in certain cases push the boundaries of the real possibility test and make bolder, sometimes 'contrarian' referrals. It can do so because of the gaps in its decision framework that allow for discretion in interpretation and in response to evidence.

My research identified a few such difficult cases and an appetite for a less cautious approach to referral decisions among some commissioners.<sup>75</sup> While the Commission has expressed concern about the variability in its approach across cases, revealed by my research, and has made efforts to introduce measures to increase consistency, it must nonetheless embrace its limited discretion and encourage decision makers to take advantage of the gaps that can facilitate a more assertive approach to referrals. Although the Commission and the Court must maintain a reasonably harmonious relationship as the success of each requires the cooperation of the other, the relationship could be more challenging and occasionally combative without unduly compromising its symbiotic nature. It is not inevitable that the Commission must always follow the lead.

Currently, in England and Wales, there is considerable concern about the abilities of an overstretched and underfunded criminal justice system to protect defendants' due process rights. It is not unreasonable to assume that the coming years and decades will see a rise in the kinds of cases discussed previously, cases where ineptitude or insufficiency of resources by the police or

prosecution will introduce errors that can produce unsafe convictions. It may therefore be time for the Commission to test the boundaries of the Court's past jurisprudence by referring cases even when it cannot be demonstrated that the errors *were* determinative, so long as they are sufficiently disquieting to suggest they *may* be. The variation in approach we saw across the Commission suggests that at least some will have an appetite for this. As one commissioner told me, 'I think we could be bolder ... there are cut-and-dried cases, and there's a grey area. And I think in the grey area, we ought to lean more towards referring.' My research suggests that is a path worth taking.

74. Hoyle and Sato, above n. 9, at 334-5.

75. *Ibid.*, 335-7.