Te Kāhui Tātari Ture
Criminal Cases Review Commission

Position Paper | Fresh Evidence

Version	1.0
Date	18 April 2024

Te Aronga | Purpose

1. This Position Paper sets out, in broad terms, the approach the Criminal Cases Review Commission | Te Kāhui Tātari Ture (Te Kāhui) will take when considering if an application raises fresh evidence that proves there has been a miscarriage of justice.

2. This Paper is designed to provide a summary of the key legal principles Te Kāhui will generally apply to applications that fall within the scope of this Paper.

Te Tūranga | Position

Overview

3. In general, appellate courts consider evidence as "fresh" if it is fresh, credible and cogent.[1] If the evidence is credible but not fresh, the question is what potential impact the evidence may have on the safety of the conviction or the sentence.[2] The evidence may be considered if there is a risk of a miscarriage of justice or manifestly excessive sentence caused by its exclusion, even if it is not fresh.[3] The overriding consideration is what is in the interests of justice.[4]

4. These considerations are relevant to both fresh evidence about convictions[5] and sentence.[6]

5. However, the fresh evidence test (referred to above) is applied less rigidly in relation to referrals by Te Kāhui.[7] Although the above considerations are still relevant,[8] each case is to be decided on its merits.[9]

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[1] *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [26]; *Bain v R* [2007] UKPC 33 at [34].
[2] *Lundy v R* [2013] UKPC 28 at [119].
[3] *Lundy v R* [2013] UKPC 28 at [119]; *Mark v R* [2019] NZCA 121 at [16].
[4] *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
[5] *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [26]; *Bain v R* [2007] UKPC 33 at [34].
[6] *Mark v R* [2019] NZCA 121 at [16].
[7] This was confirmed in *G v Police* [2024] NZHC 189 at [27]. This was also the approach appeal courts took in Royal Prerogative of Mercy referrals. For example, see *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596; *R v Dick* [1973] 2 NZLR 669 at 670; *Sims v R* CA489/97, 19 December 1997 at 4-5; *R v Ellis* [2000] 1 NZLR 513 at [18]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28]; *R v Haig* (2006) 22 CRNZ 814 at [53]; *Redman v R* [2013] NZCA 672 at [25]; *Re Farmer* [1991] 3 NZLR 450 at 456.
[8] *G v Police* [2024] NZHC 189 at [29]; *R v Dick* [1973] 2 NZLR 669 at 670; *R v Ellis* [2000] 1 NZLR 513 at [18]; *R v Bain* [2004] 1 NZLR 638 at [18].
[9] *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596.

The key consideration is what is in the interests of justice[10] and whether there has been a miscarriage of justice.[11]

Role of Te Kāhui

6. The primary function of Te Kāhui is to investigate and review convictions and sentences to decide whether to refer them to an appeal court.[12]

7. A conviction or sentence may only be referred to an appeal court if Te Kāhui considers that it is in the interests of justice to do so.[13]

8. In deciding whether it is in the interests of justice to refer the case to the appeal court, the law requires Te Kāhui to consider the following matters:[14]

    a. whether the eligible person has exercised their rights of appeal against the conviction or sentence;

    b. the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence;

    c. the prospects of the court allowing the appeal; and

    d. any other matter that Te Kāhui considers relevant.

9. This Position Paper effectively relates to the second and third matters: the extent to which the application relates to evidence already dealt with in proceedings and the prospects of the court allowing the appeal.

Fresh evidence

10. Because Te Kāhui must consider the prospects of an appeal court allowing an appeal, it is important to set out the approach appeal courts take when determining fresh evidence applications. The same principles apply to both conviction appeals[15] and sentence appeals.[16]

11. Generally, for evidence to be admitted on appeal it must be fresh, credible, and cogent.[17]

12. In considering whether to admit fresh evidence, courts apply a sequential series of tests.[18] The first question is whether the evidence is credible, meaning trusted or believable.[19] If the evidence is not credible, it should not be admitted. If the evidence is credible, the next question is whether the evidence is fresh. Evidence will be fresh if it could not, with reasonable diligence, have been produced at trial.[20]

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[10] *G v Police* [2024] NZHC 189 at [29]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28].
[11] *R v Haig* (2006) 22 CRNZ 814 at [55].
[12] Criminal Cases Review Commission Act 2019, section 11.
[13] Section 17(1).
[14] Section 17(2).
[15] *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [26]; *Bain v R* [2007] UKPC 33 at [34].
[16] *Mark v R* [2019] NZCA 121 at [16].
[17] *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [26]; *Bain v R* [2007] UKPC 33 at [34].
[18] *Lundy v R* [2013] UKPC 28 at [119].
[19] Peter Spiller *Dictionary of New Zealand Law* (LexisNexis New Zealand).
[20] *Bain v R* [2007] UKPC 33 at [34].

The final question is whether the evidence is cogent, meaning that, in combination with the other evidence at trial, it might reasonably have led to a finding of not guilty if called at the trial.[21]

13. If the evidence is fresh, credible, and cogent, the court should admit the evidence as "fresh evidence".[22]

14. If the evidence is credible but not fresh, the question is what potential impact the evidence may have on the safety of the conviction or the sentence.[23] The evidence may be admitted if there is a risk of a miscarriage of justice or manifestly excessive sentence caused by its exclusion, even if it is not fresh.[24] The overriding consideration is what is in the interests of justice.[25]

15. However, this test is somewhat modified in the context of referrals by Te Kāhui[26] – as it was in relation to Royal Prerogative of Mercy referrals.[27] In the Royal Prerogative of Mercy context, the test was not always applied with rigidity[28] if there was reason to think it might lead to injustice, or the appearance of injustice.[29] Although the above considerations are still relevant,[30] each case is to be decided on its merits.[31] The key consideration is what is in the interests of justice,[32] and whether there has been a miscarriage of justice.[33]

Evidence not heard due to counsel error

16. Evidence that was not heard at trial due to counsel error should be treated as fresh evidence.[34] The appeal court may treat the evidence as fresh if it is satisfied that counsel error was the reason the evidence was not admitted, and that the evidence would been led at trial if not for counsel error.[35]

17. For a summary of appellate courts' approach to allegations of trial counsel error, and the approach Te Kāhui will follow when an applicant raises this in their application, see the Te Kāhui Position Paper "Counsel Conduct".[36]

Expert evidence not presented at trial

18. Generally, "new" expert evidence must relate to a matter which could not reasonably be expected to have required such evidence at trial; otherwise, the question becomes why that evidence was not obtained prior to trial. However, where a case against an accused rests exclusively or principally on

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[21] *Lundy v R* [2013] UKPC 28 at [119]; *R v Bain* [2004] 1 NZLR 638 (CA) at [26].
[22] *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [26]; *Bain v R* [2007] UKPC 33 at [34].
[23] *Lundy v R* [2013] UKPC 28 at [119].
[24] *Lundy v R* [2013] UKPC 28 at [119]; *Mark v R* [2019] NZCA 121 at [16].
[25] *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
[26] *G v Police* [2024] NZHC 189 at [27] and [29].
[27] For example, see *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596; *R v Dick* [1973] 2 NZLR 669 at 670; *Sims v R* CA489/97 at 4-5, 19 December 1997; *R v Ellis* [2000] 1 NZLR 513 at [18]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28]; *R v Haig* (2006) 22 CRNZ 814 at [53]; *Redman v R* [2013] NZCA 672 at [25]; *Re Farmer* [1991] 3 NZLR 450 at 456.
[28] *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596; *R v Dick* [1973] 2 NZLR 669 at 670; *Sims v R* CA489/97 at 4-5, 19 December 1997; *R v Ellis* [2000] 1 NZLR 513 at [18]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28]; *R v Haig* (2006) 22 CRNZ 814 at [53]; *Redman v R* [2013] NZCA 672 at [25]; *Re Farmer* [1991] 3 NZLR 450 at 456.
[29] *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596.
[30] *G v Police* [2024] NZHC 189 at [29]; *R v Dick* [1973] 2 NZLR 669 at 670; *R v Ellis* [2000] 1 NZLR 513 at [18]; *R v Bain* [2004] 1 NZLR 638 at [18].
[31] *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596.
[32] *G v Police* [2024] NZHC 189 at [29]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28].
[33] *R v Haig* (2006) 22 CRNZ 814 at [55].
[34] *Fairburn v R* [2010] NZSC 159 at [33]; *Loffley v R* [2013] NZCA 579 at [58]; *Mohamed v R* [2023] NZCA 143 at [38].
[35] *Loffley v R* [2013] NZCA 579 at [58].
[36] Te Kāhui "Position Paper | Counsel Conduct".

scientific evidence, the appeal court should not exclude new scientific material that significantly challenges that evidence solely because it might have been obtained before the trial.[37] Even where expert evidence is not fresh, it may be admitted if it is credible and had a potentially significant impact on the safety of the conviction.[38] However, the courts do not permit "post-trial shopping" for another expert to directly challenge expert evidence admitted at trial.[39]

Recantation

19. Where an appellant alleges that a complainant or witness has recanted their evidence given at trial, the courts will consider the following principles:[40]

    a. The fact that a complainant or witness recants does not necessarily make their trial testimony unreliable or mean that there must be a re-trial.

    b. The key question is why the complainant or witness recanted. Was it because their earlier evidence was untrue or were there other pressures leading to the recantation?

20. If the court is satisfied that the recantation is not true, the appeal will be dismissed. If there is a doubt, the court should order a re-trial. If the court considers the recantation is true, the court may enter an acquittal, although this is very rare.[41]

Position of Te Kāhui

21. The prospects of the court allowing the appeal is one of the mandatory considerations that Te Kāhui must take into account when deciding whether it is in the interests of justice to refer a conviction or sentence to an appeal court.[42] Therefore, where an applicant raises potentially fresh evidence in support of their application, Te Kāhui will apply the approach set out below.

22. In the context of referrals by Te Kāhui, the fresh evidence test may be applied less rigidly than by the Courts.[43] Each case is to be decided on its merits.[44] The key consideration is what is in the interests of justice[45] and whether there has been a miscarriage of justice.[46] However, the considerations of freshness, credibility and cogency are still relevant.[47] Te Kāhui will therefore have regard to them, with the ultimate consideration being the interests of justice. These considerations apply to both conviction[48] and sentence.[49]

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[37] *Lundy v R* [2013] UKPC 28 at [122].
[38] *Pora v R* [2015] UKPC 9.
[39] *Wallace v R* [2010] NZCA 46 at [76].
[40] *Hamon v R* [2013] NZCA 540 at [62].
[41] At [62].
[42] Criminal Cases Review Commission Act 2019, section 17(2)(c).
[43] *G v Police* [2024] NZHC 189 at [27]. This was also the case in relation to Royal Prerogative of Mercy referrals - see *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596; *R v Dick* [1973] 2 NZLR 669 at 670; *Sims v R* CA489/97, 19 December 1997 at 4-5; *R v Ellis* [2000] 1 NZLR 513 at [18]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28]; *R v Haig* (2006) 22 CRNZ 814 at [53]; *Redman v R* [2013] NZCA 672 at [25]; *Re Farmer* [1991] 3 NZLR 450 at 456.
[44] This was the case in relation to Royal Prerogative of Mercy referrals. See *Collie v R* [1997] 3 NZLR 653 at 657; *R v Morgan* [1963] NZLR 593 at 596.
[45] *G v Police* [2024] NZHC 189 at [29]; *Palmer v R* CA373/02, 9 December 2002; *R v Bain* [2004] 1 NZLR 638 at [28].
[46] *R v Haig* (2006) 22 CRNZ 814 at [55].
[47] *G v Police* [2024] NZHC 189 at [29]; *R v Dick* [1973] 2 NZLR 669 at 670; *R v Ellis* [2000] 1 NZLR 513 at [18]; *R v Bain* [2004] 1 NZLR 638 at [18].
[48] *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [26]; *Bain v R* [2007] UKPC 33 at [34].
[49] *Mark v R* [2019] NZCA 121 at [16].

23. An applicant should endeavour to state in their application why the evidence they seek to raise is "fresh" – that is, why it was not raised at trial. The applicant should also state the significance of the evidence, including the potential impact it could have on the safety of the conviction(s).

24. Where possible, an applicant should provide any fresh evidence to Te Kāhui with their application. Alternatively, if the applicant does not hold the information, they should provide good reasons for why they believe the evidence exists and where, or from who, it may be obtained.

25. The overall consideration for Te Kāhui is whether it is in the "interests of justice" to refer a case to an appeal court. Any fresh evidence provided by the applicant will be considered as part of this wider test.

26. This Position Paper will not be applied in isolation. There may be other relevant considerations that affect the decision of Te Kāhui to accept or progress an application, including other Position Papers that may be applicable.

Assistance with preparing an application

27. Applications may be submitted by an applicant or their representative (such as a lawyer or support person).

28. If a potential applicant or their representative requires any assistance in preparing an application, or have any questions, Te Kāhui staff are available to help. The applicant and/or representative can contact Te Kāhui by:

    a. Calling – 0800 33 77 88 (this is a freephone call, please call Monday to Friday, 9am-5pm)

    b. Email – info@ccrc.nz

29. While an applicant does not need a lawyer to apply to Te Kāhui, they may wish to engage a lawyer to assist them with preparing their application. Legal Aid may be available to an applicant who wishes to engage a lawyer when applying to Te Kāhui. Applicants who wish to access Legal Aid should call the Ministry of Justice on 0800 2 LEGAL AID (0800 253 425) for assistance with making an application for Legal Aid.