Te Kāhui Tātari Ture
Criminal Cases Review Commission

Position Paper | Counsel Conduct

Version	1.0
Date	20 September 2022

Te Aronga | Purpose

1. This paper sets out, in broad terms, the approach the Criminal Cases Review Commission | Te Kāhui Tātari Ture (**Te Kāhui**) will take when dealing with applications where it becomes apparent that there are concerns relating to the conduct of trial or appeal counsel:

2. The 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. Allegations against the conduct of trial counsel form a significant proportion of criminal appeals before the Court of Appeal.[1] Equally, Te Kāhui receives a large number of applications that either directly raise concerns relating to the conduct of trial or appellate counsel, or where these concerns become apparent during the review of the application.

4. The ultimate question in any case involving an allegation against the conduct of counsel is whether a miscarriage of justice has occurred.[2] The focus is therefore on the trial process and its outcome, rather than on the characterisation of counsel's conduct.[3] It is not an enquiry into the competence of counsel, but whether the verdict is unsafe through any deficiency in the trial.[4] The focus is on the outcome. The cause – conduct of counsel – provides context for the outcome.[5]

5. The correct approach involves asking two questions:

    5.1. was there an error or omission on the part of counsel; and

    5.2. is there is a real risk that the error or omission affected the outcome of the trial.

---

[1] *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [1] and [6].

[2] At [70].

[3] *Scurrah v R* CA159/06, 12 September 2006, at [13].

[4] *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [7].

[5] At [69]

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.[6]

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.[7]

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:[8]

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

    8.2. 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;

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

    8.4. any other matter that Te Kāhui considers relevant.

9. This position paper effectively relates to the third matter: the prospects of the court allowing the appeal.

Counsel conduct appeals

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 considering claims against counsel conduct.

11. Counsel incompetence is not a legislated ground of appeal. In appeals concerning trial counsel conduct, the ultimate question is whether there has been a miscarriage of justice.[9] This involves a consideration of whether there has been an error or irregularity on the part of counsel, and, if so, whether there is a real risk it affected the outcome of the trial by rendering the verdict unsafe.[10]

12. The circumstances where trial counsel error will give rise to a miscarriage of justice are narrow. The mere fact of an error or irregularity will not necessarily result in a verdict being set aside.[11] The departure from good practice must be of such magnitude that it contributed to an unsafe verdict.

13. Tactical decisions made by counsel are unlikely to give rise to a miscarriage of justice, provided the decision was reasonable in the circumstances and judged to be in the interests of the defendant at the time.[12] This is the case even if the decision adversely affected the outcome of the trial.

---

[6] Criminal Cases Review Commission Act 2019, section 11.

[7] Section 17(1).

[8] Section 17(2).

[9] *R v Sungsuwan*, above n 4, at [70]; Criminal Procedure Act 2011, section 232(2)(c).

[10] *R v Sungsuwan*, above n 4, at [70]; *Scurrah v R*, above n 3, at [17]; Criminal Procedure Act, section 232(4).

[11] *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78]; *Andrews v R* [2021] NZCA 412 at [25].

[12] *R v Sungsuwan*, above n 4, at [66]; *Scurrah v R*, above n 3, at [18]; *Andrews v R*, above n 11, at [24].

14. It is insufficient to argue that different counsel may have adopted another approach to an issue, even if that other approach may have been more effective,[13] provided the approach or decision taken was one a reasonable counsel could have made.

Fundamental trial decisions

15. There are three fundamental decisions on which trial counsel's failure to follow instructions will generally give rise to a miscarriage of justice:[14]

    15.1. decisions relating to plea;[15]

    15.2. the accused electing whether to give evidence; and

    15.3. advancing a defence based on the accused's version of events.

16. Where an appeal is advanced on the failure to follow one of the fundamental decisions, the question for the appellate court is whether, as a matter of fact, there was a failure to follow instructions.

17. The following paragraph set out what is meant by "instructions", as well as further detail on the three fundamental decisions listed above at [15].

Instructions

18. Instructions means a clear direction as to how the trial, or an aspect of it, is to be run.[16] It is not sufficient for an accused to express their views on particular matters. Instructions to counsel refers specifically to directions to be observed and implemented by counsel.[17] There is a distinction between clear instructions and mere suggestions. Counsel must comply with instructions that do not breach any professional obligation, even if these may be to their client's disadvantage,[18] but may disregard suggestions if there are good reasons for doing so and no miscarriage results. Although it is always best practice for counsel to obtain written instructions, there is no specific form that instructions must take.

19. There may be instances where a failure to follow instructions on one of the above fundamental decisions will not give rise to a miscarriage, but they will be rare.[19]

20. In general, counsel has no right to disregard their client's instructions on a fundamental decision. Their duty, following the giving of advice, is to either act on the instructions received or withdraw from the case.[20]

---

[13] *Waswo v R* [2012] NZCA 461 at [34].

[14] *Hall v R*, above n 1, at [65].

[15] See Te Kāhui Tātari Ture "Position Paper | Guilty Plea" (September 2022).

[16] At [69].

[17] At [69].

[18] *Lavery v R* CA342/95, 14 February 1996, at 5.

[19] *Hall v R*, above n 1, at [68].

[20] *R v McLoughlin* [1985] 1 NZLR 106 (CA).

Plea

21. While the accused has the right to decide what plea to enter, counsel has a duty to advise on options, including a realistic assessment of the discount a guilty plea may attract on sentencing.[21]

Giving evidence

22. The decision whether to give evidence is a decision for the accused, but it is counsel's responsibility to ensure it is an informed decision, and to provide their client with comprehensive advice and information.[22] The obligation on counsel is to advise the defendant so that when the time to make the decision to give evidence or not arises in a particular case, the decision is a properly informed one.[23] The time when that decision needs to be made will vary depending on the circumstances of the case, and it may occur during the course of the trial. Where the defence challenges the prosecution case in such a way that indicates the defendant will be giving evidence, a miscarriage, or mistrial, may arise if the defendant is not then called as a witness.

23. This advice necessarily includes an explanation of the advantages and disadvantages of giving evidence. A miscarriage of justice may arise where the accused, notwithstanding their counsel's advice, wishes to give evidence, but counsel does not follow their instructions or prepare for trial on this basis.[24] However, where the accused accepts the advice not to give evidence, with full appreciation of the risks, it will be difficult to prove a miscarriage has occurred.[25]

Defence based on the accused's version of events

24. Counsel cannot refuse to follow the accused's instructions because they do not believe the accused's account of events. Counsel must put forward a defence that is consistent with the accused's version of events, as long as that does not conflict with counsel's overriding duty to the court.[26] Aspects of trial, including examination of witnesses, must be done in a way that is consistent with that account of events.

Non-fundamental trial decisions

25. There is a distinction between the fundamental decisions listed above at [15] and other trial decisions or tactics, set out below at [30] to [34], in which there is some discretion for trial counsel.[27]

26. Many tactical decisions involve finely balanced issues and reasonable minds can differ about the best course of action. Where there is an exercise of judgement by counsel on a matter that is not a fundamental trial decision, or if counsel fails to follow instructions in respect of matters that are not fundamental trial decisions, a miscarriage of justice will generally only arise if:[28]

---

[21] *Merrilees v R* [2009] NZCA 59 at [24]. See Te Kāhui Tātari Ture "Position Paper | Guilty Plea" (September 2022).

[22] *Chambers v R* [2011] NZCA 218 at [5]; *Tarring v R* [2016] NZCA 452 at [26].

[23] *Weston v R* [2019] NZCA 541 at [25].

[24] *Tarring v R*, above n 223.

[25] *Palmer v R* [2007] NZCA 113 at [17]; *R v Pointon* [1985] 1 NZLR 109 (CA) at 114; *R v Sungsuwan*, above n 9, at [45].

[26] Lawyers have an absolute duty of fidelity and honesty to the court. They must not mislead or deceive the court. See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.1.

[27] *Hall v R*, above n 1, at [70]–[74].

[28] At [77].

26.1. the decision was not one a competent lawyer would have made; and

26.2. what occurred may have affected the outcome.

27. This recognises the reality that counsel must make decisions before and during a trial that require the exercise of their best judgement in the circumstances as they exist at the time.[29] A miscarriage does not arise simply because another decision is thought, in hindsight, to have offered a better prospect at a more favourable outcome.[30]

28. A miscarriage of justice is unlikely to result if the decision was deliberately judged to be in the best interests of the defendant, and the advice was reasonable in the circumstances of the case.[31]

29. The courts have refrained from providing explicit guidance on all types of trial decisions on which an accused person will be bound by the decisions of their counsel, as this will depend on the factual context of the specific case.[32] Therefore, a case-by-case assessment of the matters at [25] is necessary.

Common grounds in applications to Te Kāhui

30. The following grounds are those that Te Kāhui currently commonly encounters in applications relating to counsel conduct. This is not an exhaustive list and applicants are not restricted to raising grounds listed in this Position Paper. These grounds are distinct from the fundamental decisions set out at [15]–[23] above.

Calling witnesses

31. Where an applicant alleges that their trial counsel erred in calling or not calling witnesses to give evidence, the approach to determine whether a miscarriage of justice arises is to ask whether there was a reasonable explanation for the decision, and, if not, whether the jury would have been likely to entertain a reasonable doubt about guilt if the evidence had or had not been led.[33]

32. The instructions to call a witness must be clear. It is not enough, for example, for an accused to tell trial counsel that they "want" or "wish" a particular witness to be called.[34] Instead, an accused must clearly direct their counsel to call a witness.

Calling expert witnesses

33. The decision whether to call an expert to give evidence for the defence is a tactical one for counsel to make, and generally no miscarriage of justice will arise from this decision if it was one a competent lawyer would have made.[35]

---

[29] *Scurrah v R*, above n 3, at [18].

[30] At [17] – [20].

[31] *R v Sungsuwan,* above n 4, at [66].

[32] *Hall v R,* above n 1, at [77].

[33] *Dalhousie v R* [2011] NZCA 486 at [26]–[27].

[34] *R v Accused* (1998) 15 CRNZ 611 at 613–614.

[35] *Haward v R* [2018] NZCA 506 at [46].

Cross-examination

34. In general, the approach to cross-examination is a matter for the judgement of trial counsel.[36] For example, an argument that trial counsel's cross-examination could have been "stronger" is not a proper basis for establishing trial counsel error.[37] An error will only arise if the decision was not one a competent lawyer would have made, and where there is a real risk that it affected the outcome.[38]

Preparation for trial

35. What is considered adequate preparation for trial will depend on the circumstances of a case. A failure to follow best practice, or to prepare in a different way from another counsel, does not in itself amount to incompetence.[39] It must be shown that, as a consequence of the lack of preparation, the accused did not have a fair opportunity to put their defence forward, or their chances of obtaining a different verdict were prejudiced.[40]

Appellate counsel

36. The approach to assessing the conduct of appellate counsel involves the same key considerations as the assessment of trial counsel conduct. The focus should be on the appeal process and its outcome rather than simply on the conduct itself.

37. To sustain a complaint against the conduct of appellate counsel, an applicant must demonstrate that:[41]

    37.1. there has been a fundamental error in the appellate process; and

    37.2. that error has resulted in a substantial miscarriage of justice.

38. The obligation on a litigant to fully prepare for and present their best case extends to the conduct of an appeal. Appellate counsel must follow a client's instructions on significant decisions regarding the conduct of the appeal, but this is subject to counsel's overriding duty to the court. Appellate counsel cannot be expected to present unmeritorious or frivolous arguments without prospect of success simply because their client has instructed them to do so.

39. A tactical decision by appellate counsel that is reasonable and was deliberately judged to be in the best interests of the appellant is unlikely to provide a legitimate basis for establishing a miscarriage of justice.

Procedural steps in appeals against the conduct of counsel

40. The Court of Appeal has provided procedural guidance on the correct approach to advancing an allegation against the conduct on counsel. In summary, the approach generally requires the

---

[36] *Hall v R*, above n 1, at [74]–[75]; *Kumar v R* [2019] NZCA 669 at [4]; *W v R* [2018] NZCA 11 at [15].

[37] *Hall v R*, above n 1, at [75].

[38] *Kumar v R,* above n 36, at [4].

[39] *Andrews v R,* above n 11, at [36]; *O'Donnell v R* [2010] NZCA 352 at [15].

[40] *O'Donnell v R*, above n 39, at [16].

[41] *McGeachin v R* [2020] NZCA 72 at [81].

appellant to waive legal professional privilege so that the counsel complained of can respond to the allegations, which in turn allows the appeal court to assess them.[42]

41. There may be cases where the allegations can be dealt with on the basis of the trial court record, or by an agreed statement of facts submitted to the court by the parties to the appeal.[43]

Position of Te Kāhui

42. If trial counsel conduct has already been unsuccessfully raised as a ground of appeal, Te Kāhui will typically require applicants to raise fresh matters of evidence relating to their counsel's conduct that have not already been considered on appeal. If nothing new is raised in the application to Te Kāhui, the applicant will need to attempt to show that there has nevertheless been a miscarriage of justice. This may include demonstrating that the appeal court did not correctly deal with the ground as a matter of law or appropriately assess the evidence.[44]

43. If trial counsel conduct has not previously been raised on appeal, Te Kāhui will consider whether a miscarriage of justice has arisen as a result.

44. It is unlikely that complaints relating to appellate counsel conduct will have been previously raised on appeal. Te Kāhui will treat these complaints in the same manner as those against trial counsel conduct which have not previously been raised on appeal. The ultimate question remains whether a miscarriage of justice has arisen through any fundamental error in the appellate process.

45. Te Kāhui may require information to understand the circumstances of the case, including information from trial or appellate counsel. If Te Kāhui considers that there may be a risk of a miscarriage of justice due to counsel conduct, a similar approach will be followed to that set out by the Court of Appeal in *R v Clode* and *Hall v R*. This may include contacting counsel, setting out the issues and allegations raised by the applicant, and asking for a response. Any response, when received, will form part of the assessment of the application. In situations where counsel is no longer practising, Te Kāhui may contact their former firm or chambers for assistance.

46. While a waiver of privilege is required in the majority of appeals involving allegations against the conduct of counsel, a waiver of legal professional privilege is required as part of an application to Te Kāhui.

47. Te Kāhui will not contact counsel in every case where suggestions of counsel misconduct arise. After a preliminary assessment, if it is considered that there may have been a risk of a miscarriage of justice because of counsel conduct, Te Kāhui may contact counsel to put the allegations to them and seek their response.

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

Assistance with preparing an application

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

---

[42] *Hall v R,* above n 1, at [26] – [30]; *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312 at [29].

[43] *Hall v R,* above n 1, at [33].

[44] Te Kāhui Tātari Ture "Position Paper | No New Grounds" (August 2021) at [8].

50. If you have any questions, please contact us by:

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

51. Alternatively, if you require any assistance in preparing an application, Te Kāhui staff are available to help.

52. 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 (253 425) for assistance with making an application for Legal Aid.