Position Paper | Guilty Plea

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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 the applicant has previously entered a guilty plea.

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. As a general rule, Te Kāhui is unlikely to progress an application for review of conviction where the applicant has pleaded guilty, unless the applicant can demonstrate that there were exceptional circumstances surrounding their plea. In most cases, an application for review of an applicant's sentence will be unaffected by a previous guilty plea.

Role of Te Kāhui

4. The primary function of Te Kāhui is to investigate and review convictions and sentences to decide whether to refer them to an appeal court.[1]

5. 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.[2]

6. 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:[3]

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

   6.2. 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;

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

[2] Section 17(1).

[3] Section 17(2).

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

6.4. any other matter that Te Kāhui considers relevant.

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

Appeals following a guilty plea

8. 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 appeals brought by appellants who entered a guilty plea.

9. An appeal against conviction following entry of a guilty plea will only be entertained in "exceptional circumstances".[4] An appellant must show that a miscarriage of justice will result if the conviction is not overturned.[5]

10. Underlying this approach is the principle of finality. There is public interest in preserving the finality of verdicts and sentences. Complainants in criminal cases depend on finality for closure and recovery.[6] The principle also recognises the resources required in reopening cases, and the difficulty of rehearing cases long after the event.[7]

11. While Te Kāhui exists as an exceptional remedy to the principle of finality, finality remains a relevant consideration in the wider "interests of justice" test.[8]

12. The Court of Appeal in *R v Le Page* set out three broad categories of relevant exceptional circumstances where a miscarriage of justice might be established following a guilty plea:[9]

12.1. where the defendant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;

12.2. where on the admitted facts the defendant could not in law have been convicted of the offence charged; or

12.3. where the plea was induced by a ruling which embodied a wrong decision on a question of law.

13. A fourth category was added in *R v Merrilees*:[10]

13.1. where trial counsel errs in the advice given as to the non-availability of certain defences or potential outcomes.

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[4] *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

[5] At [16].

[6] *Lyon v R* [2019] NZCA 311, [2019] 3 NZLR 421 at [12].

[7] *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259 at [32].

[8] Criminal Cases Review Commission Act, section 17.

[9] *R v Le Page,* above n 4, at [17].

[10] *R v Merrilees* [2009] NZCA 59 at [34].

14. The list of categories of exceptional circumstances is neither closed nor complete.[11] However, the categories do provide a useful starting point.

15. The test for establishing a miscarriage of justice is not satisfied where a guilty plea is made freely, as a result of proper and careful legal advice, where an offender knows what they are doing and the implications of their actions, and is aware of the legal significance of the facts alleged by the Crown.[12]

Where the defendant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge

16. An appeal will rarely succeed on this ground where it is shown that the defendant had competent legal advice before pleading guilty.[13]

17. In considering whether a miscarriage of justice has occurred in these circumstances, the appeal court may have regard to any prior experience the appellant may have of the criminal justice system.[14]

18. This category may also include cases where it was likely the defendant was unfit to stand trial when they entered their guilty plea.[15] For example, in *Reynolds v Police,* the Court allowed an appeal on the basis that the defendant did not fully understand the implications of the guilty plea due to her mental state at the time.[16]

Where on the admitted facts the defendant could not in law have been convicted of the offence charged

19. In this category, a miscarriage of justice may be established where:[17]

    19.1. There was a legal barrier to conviction such as a lack of jurisdiction or a time limit on prosecution;

    19.2. the necessary preconditions for bringing a prosecution had not been fulfilled; or

    19.3. the form of the charge was fundamentally flawed.

20. Another potentially relevant area is the law surrounding party liability. In *McIntyre v R*, the defendant pleaded guilty to a charge of accessory after the fact, but the alleged primary offender was successfully acquitted, claiming self-defence.[18] The consequence of this was that the alleged offence did not occur, and so on appeal, the Court noted that this case fell in this second category of exceptional circumstances. The conviction was set aside.

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[11] *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

[12] *R v Merrilees*, above n 10, at [34]

[13] *R v Le Page,* above n 4, at [17]; and *R v Stretch* [1982] 1 NZLR 225 (CA).

[14] *Mitchell v R* [2017] NZCA 184 at [13].

[15] *Wilkinson v Police* [2017] NZHC 1737; and *Paraha v Police* [2017] NZHC 2001.

[16] *Reynolds v Police* [2020] NZHC 2419.

[17] Simon France (ed) *Adams on Criminal Law* (online ed, Thomas Reuters) at [CAS385.17].

[18] *McIntyre v R* [2017] NZCA 579.

Where the plea was induced by a ruling which embodied a wrong decision on a question of law

21. The most common situation in the third category occurs where a judge has mistakenly ruled that a particular defence is not open to a defendant on the facts,[19] or has made an erroneous ruling on the admissibility of evidence.

22. There must be no legal avenue left to a defendant other than to plead guilty—it is not enough that their chances at trial have suffered a "body blow", or that their chances of successfully defending a charge have been greatly diminished.[20]

Where trial counsel errs in the advice given as to the non-availability of certain defences or potential outcomes

23. In *Whichman v R*, the Court of Appeal set out a number of thresholds that must be met for an appeal based on trial counsel error in advising as to outcomes to succeed:[21]

    23.1. The advice given must be erroneous. The advice must go to the core of the guilty plea;[22]

    23.2. there must be or have been a genuine prospect of acquittal at trial had the plea not been entered; and

    23.3. there must be credible evidence that but for the erroneous advice, the guilty plea would not have been entered.

24. The mere existence of a possible defence at the time the plea was entered is insufficient on its own to amount to a miscarriage of justice.[23]

25. A miscarriage of justice resulting from erroneous advice as to "outcomes" implicitly includes erroneous advice as to sentencing outcomes.[24] For example, in *Tuira v R* the Court held that the absence of advice that preventive detention was a possible sentencing outcome gave rise to a miscarriage of justice.[25]

Pressure to plead guilty

26. Individuals charged with serious offences will inevitably be under pressure to a greater or lesser extent during criminal proceedings. The fact that an accused may be stressed and feel under pressure when making a decision to plead guilty is rarely sufficient to amount to a miscarriage of

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[19] *R v Clarke* [1972] 1 All ER 219, (1972) 56 Cr App R 225 (CA).

[20] *R v Le Page,* above n 4, at [23]; and *Banbrook v R* [2013] NZCA 525 at [20].

[21] *Whichman v R* [2018] NZCA 519 at [41].

[22] *Walker-Oaariki v Police* [2020] NZHC 1087 at [15].

[23] *Penniket v R* [2016] NZCA 154 at [8]; and

[24] *Su'a v R* [2017] NZCA 439 at [11].

[25] *Tuira v R* [2018] NZCA 43.

justice.[26] Something more is required. However, the Court of Appeal has acknowledged that improper pressure to plead guilty may also fall within this ground.[27]

27. Where an allegation is advanced that a guilty plea was made as a result of pressure being brought to bear on an accused, the question is whether any pressure was undue or improper.

Position of Te Kāhui

28. One of the mandatory considerations Te Kāhui must consider when deciding whether to refer a conviction or sentence is whether the eligible person has exercised their rights of appeal.[28] Te Kāhui will therefore take into account the existence, or otherwise, of any attempts made by the applicant to set aside their guilty pleas.

29. The prospects of the court allowing the appeal is another mandatory consideration.[29] Therefore, the courts' approach to appeals against conviction following a guilty plea will be a relevant factor informing whether Te Kāhui accepts and progresses an application.

30. However, the likelihood of success on appeal is not the only factor, nor is it determinative. It is part of a wider "interests of justice" test. Te Kāhui recognises that in some instances a miscarriage of justice can result from the entry of a guilty plea. For this reason, if an applicant provides compelling reasons capable of establishing that the circumstances in which they pleaded guilty were exceptional, Te Kāhui may accept the application for initial assessment.

31. Te Kāhui will also acknowledge the different comprehension levels of applicants, particularly youth, as part of our consideration of the interests of justice test and whether exceptional circumstances relating to the entry of plea exist.

32. In general, Te Kāhui will require information to understand the circumstances under which the guilty plea is made. Accordingly, Te Kāhui may make inquiries into the circumstances surrounding the plea and the reasons provided. That information will inform the overall assessment of the application, and any decisions made by Te Kāhui relating to it, with reference to the courts' requirement for exceptional circumstances. Depending on the assessment by Te Kāhui of the circumstances around the guilty plea, additional enquiries into other matters may be required.

33. Even where Te Kāhui is satisfied that the circumstances surrounding the guilty plea were exceptional, this is not the only factor to be considered. Te Kāhui is required to look at an application as a whole with reference to the "interests of justice" assessment.[30] Any issues surrounding the guilty plea will inform this assessment but will not necessarily be a deciding factor.

34. 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

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[26] *Keegan v R* [2010] NZCA 247 at [60].

[27] *T v R* [2010] NZCA 486 at [23]; *McCready v R* [2010] NZCA 596 at [12]

[28] Criminal Cases Review Commission Act 2019, section 17(2)(a).

[29] Section 17(2)(c).

[30] Section 17(1).

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

36. 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

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

38. 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.