ACCESSING JUSTICE AFTER CONVICTION: A REVIEW OF THE *CRIMES (APPEAL AND REVIEW) ACT 2001* (NSW) PART 7 DIVISION 3

KYLIE LINGARD*

After exhausting legal avenues, individuals who believe they have suffered a miscarriage of justice can petition the executive arm of government for a conviction or sentence review. This pathway has been criticised for lacking accountability and transparency. Part 7 division 3 of the Crimes (Appeal and Review) Act 2001 Act (NSW) offers a less-studied remedy to people convicted of a crime in New South Wales. Part 7 allows direct application to the Supreme Court for a conviction or sentence review. A judge, acting in a non-judicial capacity, determines the application and publishes reasons for the decision. The decision is then open to judicial review. This article examines part 7 decisions from 2014 to 2023. It finds that applications prepared without legal assistance often lack clarity. This can affect decision-making and potentially leave the applicant feeling unheard. Involving law students in drafting part 7 applications could improve the overall efficiency of this unique administrative remedy.

I INTRODUCTION

This article explores the remedies available to a person who remains dissatisfied with their conviction or sentence after exhausting their appeal rights. In such cases, relief may be sought from the executive arm of government. Common executive remedies include pardons, judicial inquiries and referrals back to the relevant Court of Appeal. While legal researchers have scrutinised these remedies, little attention has been paid to the *Crimes (Appeal and Review) Act 2001* (NSW) ('*CARA*') part 7 division 3. This article addresses this gap by analysing division 3 decisions from 2014 to 2023. Part I contextualises division 3 within the post-conviction landscape of New South Wales ('NSW') and outlines the research methodology. Part II

* Senior Lecturer in Law, University of Wollongong.
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provides historical context and operational details. Part III analyses division 3 decisions, informing the exploration of strategies to enhance its effectiveness in Part IV.

A The Post-conviction Landscape in NSW

In a criminal case, the prosecution must prove the defendant's guilt beyond a reasonable doubt.[1] While the rules regulating police investigations, legal professional conduct, evidence admissibility and the conduct of the trial aim to avoid wrongful convictions,[2] errors nevertheless can and do occur.[3] Moreover, a fair justice system should allow access to effective remedies if new evidence arises that casts doubt on a conviction.

Every Australian jurisdiction allows a convicted person to appeal to a higher court within that jurisdiction.[4] However, constraints on the exercise of this right may hinder the ability of the relevant Court of Appeal to identify a wrongful conviction. Key constraints stem from the principle of finality, which provides that at some stage, proceedings must end and the verdict must stand.[5] Verdict finality 'provides a degree of closure to victims and society'[6] and 'contains the cost of appeals and retrials'.[7] However, the rules safeguarding finality can sometimes prevent a fair outcome.[8] For example, in NSW, the principle of verdict finality underpins the rule that a person has to secure leave from the court to appeal a finding of fact by a jury.[9] While this helps protect the integrity of the jury system and prevent frivolous cases from proceeding, it presents a challenge for convictions based on factual errors, especially when an applicant lacks the resources necessary to access materials that could prove the error.[10] This hurdle is compounded by the fact that a person must lodge a notice of intention to appeal within 28 days of being convicted.[11] An extension of time may not be sufficient to gather evidence to contest the verdict's

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1 *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [52] (French CJ); *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

2 See, eg, NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (Code of Practice, January 2012); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW); Office of the Director of Public Prosecutions (NSW), 'Prosecution Guidelines' (Guidelines, March 2021); *Evidence Act 1995* (NSW).

3 See generally Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia: First Steps toward Estimating Prevalence and Causal Contributing Factors' (2015) 17(2) *Flinders Law Journal* 163.

4 See, eg, *Criminal Appeal Act 1912* (NSW) ss 5, 6 ('*Criminal Appeal Act*').

5 David Hamer, 'The *Eastman* Case: Implications for an Australian Criminal Cases Review Commission' (2015) 17(2) *Flinders Law Journal* 433, 455–9 ('The *Eastman* Case').

6 Ibid 461.

7 Ibid.

8 *Kentwell v The Queen* (2014) 252 CLR 601, 614 [32] (French CJ, Hayne, Bell and Keane JJ).

9 *Criminal Appeal Act* (n 4) s 5(1)(b).

10 Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203, 207 <https://doi.org/10.1080/10345329.2005.12036350>; Jacqueline Fuller, 'The David Eastman Case: The Use of Inquiries to Investigate Miscarriages of Justice in Australia' (2020) 45(1) *Alternative Law Journal* 60, 61 <https://doi.org/10.1177/1037969X19886348>.

11 *Criminal Appeal Act* (n 4) s 10(1)(a). See also New South Wales Court of Criminal Appeal, *Practice Note SC CCA 1: General*, 22 July 2021.

safety.[12] The interpretation of statutory appeal rules as generally only permitting a single appeal poses a significant challenge, particularly when new evidence emerges after the initial appeal.[13] As noted by the majority in *Burrell v The Queen*, '[l]ater correction of error is not always possible. If it is possible, it is often difficult and time-consuming, and it is almost always costly.'[14] Self-represented applicants face additional hurdles because they are often incarcerated and dealing with various personal challenges like education, mental health, and substance abuse issues.[15]

Following an unsuccessful appeal to a relevant Court of Appeal, a person could seek special leave to appeal to the High Court of Australia.[16] However, the likelihood of success in obtaining such leave is low.[17] Reasons for this include resource constraints within the High Court and the requirement that cases involve significant legal questions of public importance.[18] While Michael Kirby, writing extra-judicially, argues that the public interest in correcting miscarriages of justice justifies greater involvement of the High Court in criminal appeals,[19] the reality is that many people lack the necessary legal and financial resources to pursue or succeed in a special leave application to the High Court.[20] Additionally, the High Court 'has uniformly refused to receive fresh evidence' in criminal appeals from state or territory courts.[21]

A significant response to the challenge posed by the limitation of a single right of appeal to the relevant Court of Appeal, and the High Court's stance on receiving fresh evidence, is the introduction of a second or subsequent appeal pathway in South Australia,[22] Tasmania,[23] Victoria[24] Western Australia,[25] the Australian Capital Territory ('ACT')[26] and Queensland.[27] This legislation signifies a departure from the finality principle that better aligns with the individual and social consequences of leaving wrongful convictions uncorrected. However, an aspiring applicant must seek leave to appeal and have (a) fresh and compelling evidence that (b) proves

12 Weathered (n 10) 207–8; Fuller (n 10) 61.
13 *Grierson v The King* (1938) 60 CLR 431.
14 (2008) 238 CLR 218, 223 [16] (Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ).
15 Hamer, 'The *Eastman* Case' (n 5) 457–8.
16 *Judiciary Act 1903* (Cth) s 35A.
17 Pam Stewart and Anita Stuhmcke, 'Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia' (2019) 41(1) *Sydney Law Review* 35, 35.
18 Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 4.
19 Justice Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23(1) *Australian Bar Review* 4, 20–1.
20 Stewart and Stuhmcke (n 17) 40.
21 *Mickelberg v The Queen* (1989) 167 CLR 259, 274 (Brennan J). See also at 271 (Mason CJ), 298–9 (Toohey and Gaudron JJ).
22 *Criminal Procedure Act 1921* (SA) s 159 ('*SA CPA*').
23 *Criminal Code Act 1924* (Tas) s 402A ('*Tas Criminal Code*').
24 *Criminal Procedure Act 2009* (Vic) s 326A ('*Vic CPA*').
25 *Criminal Appeals Act 2004* (WA) s 35E ('*WA CAA*').
26 Supreme Court Amendment Bill 2023 (ACT), in effect from 15 May 2024.
27 See *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2024* (Qld) s 14. The relevant part is awaiting proclamation.

a substantial injustice has occurred that (c) is in the public interest to remedy.[28] Further, while the legislation creates an opportunity for an unsuccessful appellant to apply for special leave to appeal to the High Court, the practical constraint of limited resources may prevent many applicants from effectively accessing these appeal avenues.[29]

For these applicants, and for those convicted in NSW or the Northern Territory where there is no access to a second or subsequent appeal, the person must instead seek relief from the executive arm of government. Executive remedies offer potential redress for 'a person who will, apart from exceptional cases, have exhausted judicial remedies'.[30] However, although executive petitions for pardons, inquiries, and referrals are free to lodge, academic research highlights issues with the capacity of these pathways to remedy wrongful convictions.

The Governor's prerogative power to grant pardons on the grounds of mercy is appropriate for a convicted person seeking relief from a penalty due to compassionate circumstances that have arisen since sentencing.[31] However, the Governor does not have the judicial power to expunge the conviction itself. As such, a pardon is not appropriate for a person seeking to have a wrongful conviction removed from their record.[32]

In NSW, a person seeking to challenge their conviction after exhausting legal avenues must initiate the process with an administrative application under part 7 of the *CARA*. Part 7 'is designed to overcome injustices that sometimes arise in the course of the criminal justice system'.[33] Part 7 divisions 2 and 3 establish two distinct remedial pathways (see Figure 1).

Division 2, titled 'Petitions to Governor', allows a convicted person or their representative to petition the Governor for a review of the conviction or sentence or the exercise of the Governor's pardoning power.[34] Alongside a pardon (discussed above), there are five potential outcomes:

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28 *SA CPA* (n 22) s 159; *Tas Criminal Code* (n 23) ss 402A(5)(ii), (6); *Vic CPA* (n 24) s 326A; *WA CAA* (n 25) ss 35E, 35F.

29 Pascale Chifflet and Meribah Rose, 'The New Post-appeal Review Provisions in Victoria: How Appealing Are They Really?' (2022) 48(3) *Monash University Law Review* 191, 211, 227 <https://doi.org/10.26180/22644259.v2>; David Hamer and Gary Edmond, 'Forensic Science Evidence, Wrongful Convictions and Adversarial Process' (2019) 38(2) *University of Queensland Law Journal* 185; Sue Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-conviction Review' (2015) 36(1) *Adelaide Law Review* 211, 212.

30 *A-G (Cth) v Huynh* (2023) 408 ALR 684, 709 [104] (Gordon and Steward JJ) ('*Huynh*').

31 *Crimes Act 1914* (Cth) s 21D; *Crimes (Sentence Administration) Act 2005* (ACT) s 314; *Crimes (Appeal and Review) Act 2001* (NSW) s 76 ('*CARA*'); *Criminal Code Act 1983* (NT) ss 431, 433 ('*NT Criminal Code*'); *Criminal Code Act 1899* (Qld) s 672A ('*Qld Criminal Code*'); *SA CPA* (n 22) s 173; *Sentencing Act 1997* (Tas) s 97; *Sentencing Act 1991* (Vic) s 106; *Sentencing Act 1995* (WA) s 137.

32 See generally Catherine Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *University of New South Wales Law Journal* 1328 <https://doi.org/10.53637/NTUF6904>; Joseph Azize, 'The Prerogative of Mercy in NSW' (2007) 1(1) *Public Space* 6:1–36 <https://doi.org/10.5130/psjlsj.v1i1.539>.

33 *Application by Svanda* [2021] NSWSC 1061, [5] ('*Svanda Application*'). See also *Eastman v DPP (ACT)* (2003) 214 CLR 318, 338–44 [64]–[75] (Heydon J).

34 *CARA* (n 31) s 76.

1. The Governor may direct that an inquiry be conducted by a judicial officer.[35]
2. The Attorney-General may refer the whole case back to the Court of Criminal Appeal ('CCA').[36]
3. The Attorney-General may seek an opinion from the CCA on any point.[37]
4. The Governor or Attorney-General may decline to deal with the petition.[38]
5. The Governor or Attorney-General may defer consideration of the petition.[39]

Decisions 'by the Governor or the Attorney General under s[ection] 77(1) are clearly administrative, being taken by the executive'.[40] In line with the principle of responsible government, the Governor acts upon advice from the Attorney-General in deciding whether to initiate an inquiry.[41] Inquiries can serve as valuable tools in remedying wrongful convictions because they are generally open and transparent,[42] unconstrained by formal rules of evidence,[43] and the findings are subject to judicial review.[44] Importantly, inquiries are often equipped with the resources 'to pursue new investigatory leads'.[45] This can provide vital support to applicants who lack the power or resources to conduct their own investigation.[46]

However, in NSW, the Attorney-General rarely supports inquiry or referral requests, with only two inquiries (for the same person)[47] and one referral since 2018.[48] This reluctance may stem from a combination of statutory and practical considerations. Firstly, the statutory power of the executive to order an inquiry

35 Ibid s 77(1)(a).

36 Ibid s 77(1)(b). For a similar power in other jurisdictions, see *NT Criminal Code* (n 31) s 431(a); *Qld Criminal Code* (n 31) s 672A; *SA CPA* (n 22) s 173; *Tas Criminal Code* (n 23) s 419.

37 *CARA* (n 31) s 77(1)(c).

38 Ibid s 77(3).

39 Ibid s 77(3A).

40 *Huynh v A-G (NSW)* (2021) 107 NSWLR 75, 87 [33] (Basten JA) ('*Huynh Review 1*').

41 See *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ); *Holzinger v A-G (Qld)* (2020) 5 Qd R 314, 325 [22] (Sofronoff P, Morrison and Mullins JJA) ('*Holzinger*'); *Von Einem v Griffin* (1998) 72 SASR 110, 129–30 (Lander J) ('*Von Einem*').

42 Milne (n 29) 212.

43 Fuller (n 10) 64.

44 See, eg, *Folbigg v A-G (NSW)* (2021) 391 ALR 294 ('*Folbigg Review*').

45 Fuller (n 10) 64. See also Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' (2015) 17(2) *Flinders Law Journal* 381, 414.

46 Fuller (n 10) 64.

47 *Report of the Inquiry into the Convictions of Kathleen Megan Folbigg* (Report, July 2019); Thomas Bathurst, *2022 Report of the Inquiry into the Convictions of Kathleen Megan Folbigg* (Report, 8 November 2023). Folbigg was convicted of three counts of murder and one count of manslaughter in 2003. The first inquiry found that new medical evidence did not raise a reasonable doubt. The second inquiry found that the new medical evidence, in conjunction with scientific support, created a reasonable doubt. She was pardoned in June 2023 and acquitted in December 2023: *Folbigg v The King* [2023] NSWCCA 325 ('*Folbigg Appeal*').

48 *Honeysett v DPP (NSW)* [2023] NSWCCA 215. Honeysett was charged in 1987 for maliciously wounding a police officer and supplying a prohibited drug. He plead not guilty but, after another police officer gave evidence affirming the offences, Honeysett plead guilty to two reduced charges. In 1994, the Wood Royal Commission found that the police had fabricated evidence concerning both charges. The CCA set the plea aside for fraud: at [37]–[44] (Beech-Jones CJ, Fagan J agreeing at [64], Dhanji J agreeing at [65]). The CCA subsequently acquitted Honeysett.

or referral into a conviction is only enlivened if there is a doubt or question as to the convicted person's guilt, or any part of the evidence in the case.[49] The power is only activated for a sentence if there is a doubt or question as to any mitigating circumstances.[50] Secondly, the discretion to reject a petition is broad, allowing refusal for various reasons including that the matter has been previously dealt with and there are no special facts or special circumstances warranting further action.[51] While these provisions empower the executive to dismiss unwarranted petitions, they may disadvantage meritorious petitioners who lack the means to prepare a clear and concise petition, the importance of which is supported by the fact that the lone successful inquiry petitioner had legal assistance in preparing their application.[52] The financial burden on the government, as evidenced by the approximately $12 million cost of the Eastman inquiry in the ACT, presents another deterrent to the use of the inquiry power.[53]

Other challenges also exist. For instance, the Court of Appeal in South Australia and Queensland have held that executive decisions on referral petitions are outside the scope of judicial review.[54] One reason for this immunity is that the statutory power of the Attorney-General is tied to the Governor's prerogative power, which falls outside the realm of review.[55] While there is some indication that the construction of *CARA* part 7 division 2 might allow for a different outcome,[56] the prevailing understanding is that Attorney-General decisions on referral petitions in NSW are similarly not open to review. This lack of oversight not only precludes the correction of potential errors or biases in the decision-making process but also obviates the need for the executive to provide written reasons for its decisions, further eroding transparency and accountability. These gaps are particularly troubling given the role of the Attorney-General, a political office holder, in the decision-making process. While the Attorney-General may consider factors that a court cannot,[57] the absence of review introduces the risk of decisions being influenced by undisclosed political and public pressures,[58] potentially limiting relief to cases that attract positive media attention or public sympathy.[59] Together,

49 *CARA* (n 31) s 77(2).
50 Ibid.
51 Ibid s 77(3).
52 See generally Rhanee Rego, 'A Critical Analysis of Post-conviction Review in New South Wales, Australia' (2021) 2(3) *Wrongful Conviction Law Review* 305 <https://doi.org/10.29173/wclawr61>.
53 Fuller (n 10) 64.
54 *Von Einem* (n 41); *Holzinger* (n 41). See also Fuller (n 10); Milne (n 29); Bibi Sangha and Robert Moles, 'Mercy or Right? Post-appeal Petitions in Australia' (2012) 14(2) *Flinders Law Journal* 293.
55 *Von Einem* (n 41) 114 (Prior J); *Holzinger* (n 41) 333 [50] (Sofronoff P, Morrison and Mullins JJA), citing *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 298 [47] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).
56 *Folbigg Review* (n 44) 301–3 [28]–[38] (Basten, Leeming and Brereton JJA).
57 David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312, 318; Milne (n 29) 221.
58 Caruso and Crawford (n 57) 317–18.
59 John Nader, 'Miscarriages of Justice and Extracurial Inquiries: A Judicial View from the Northern Territory' (1993) 5(1) *Current Issues in Criminal Justice* 99, 100 <https://doi.org/10.1080/10345329.1994.12036593>.

these concerns make executive relief 'a challenging landscape for individuals seeking exoneration'.[60]

Since 2018, efforts have been made to improve the transparency of petition decision-making in NSW through the annual publication of division 2 data.[61] The data summarises the petitions received each year and the grounds asserted. However, in the continued absence of written reasons or judicial review, this initiative does not address the concern of erroneous or biased decision-making. The introduction of a legislated second or subsequent appeal pathway in NSW may address some of these concerns because the appeal is heard in a public forum,[62] decisions are based on law not politics, written reasons are provided for decisions, and an unsuccessful appellant may seek special leave to appeal the judgment to the High Court.[63] However, despite these markers of transparency and accountability, the success of a subsequent appeal, like the initial one, hinges on access to substantial investigative and legal resources.[64] What may help fill the justice gap is a review mechanism that is itself transparent, accountable, and accessible. Part 7 division 3 of the *CARA* may provide that pathway.

Division 3, titled 'Applications to Supreme Court', provides a unique avenue for individuals convicted of an offence in NSW or their representative to apply directly to the Supreme Court for a conviction or sentence review.[65] There are similarities between divisions 2 and 3. Firstly, while division 3 applications are made directly to the Supreme Court and decided by a judge of the Court, the proceedings are not judicial.[66] Both division 2 and 3 decision-makers act in a non-judicial capacity, with no judicial power to overturn a conviction.[67] Secondly, the steps which may be taken in relation to a division 3 application closely resemble those under division 2 (see Figure 1). That is, division 3 decision-makers can direct inquiries, refer cases back to the CCA, defer applications, or refuse to consider them.[68] Thirdly, divisions 4 and 5 regulate the conduct of an inquiry or referral directed under either division. Fourthly, the precondition for the exercise of power under division 2 or 3 is the same – for conviction reviews, there must be the appearance of a doubt or question as to the convicted person's guilt or any part of the evidence – for sentence reviews, there must be the appearance of a doubt

60 Fuller (n 10) 63. See also Milne (n 29) 226.

61 See, 'Reviews of Convictions and Sentences: *Crimes Appeal and Review Act 2001*', *NSW Department of Communities and Justice* (Web Page, 9 January 2024) <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/reviews-of-convictions-and-sentences.html> ('Reviews of Convictions').

62 Milne (n 29) 212.

63 Ibid 215, 239; Justice and Community Safety Directorate (ACT), 'Wrongful Conviction: Reforms to the Right to Appeal and Right to Compensation' (Discussion Paper, 6 April 2022).

64 David Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37(1) *University of New South Wales Law Journal* 270, 286–98 ('Wrongful Convictions'); Chifflet and Rose (n 29) 211; Hamer and Edmond (n 29) 195–6, 232.

65 *CARA* (n 31) s 78.

66 Ibid s 79(4).

67 *Huynh* (n 30) 689 [17] (Kiefel CJ, Gageler and Gleeson JJ).

68 *CARA* (n 31) s 79.

or question as to any mitigating circumstances.[69] Fifthly, the broad discretion to refuse to consider an application is also consistent across both divisions, including factors such as the matter having already been dealt with and a lack of special facts or special circumstances warranting further action.[70] Sixthly, there is no limit to the number of petitions or applications that a person can make,[71] nor time constraint on when such petitions or applications can be made. A referral back to the CCA 'bypasses' the requirement for appellants to seek leave to appeal out of time.[72]

Despite these similarities, significant differences exist between the two pathways, most notably, division 3 decisions are subject to judicial review and decision-makers publish written reasons for their decisions. While researchers have illustrated the accessibility, transparency and accountability issues with executive pathways like those in *CARA* part 7 division 2, there is limited academic analysis of division 3. This article seeks to contribute to that research gap by analysing division 3 decisions from 2014–23.

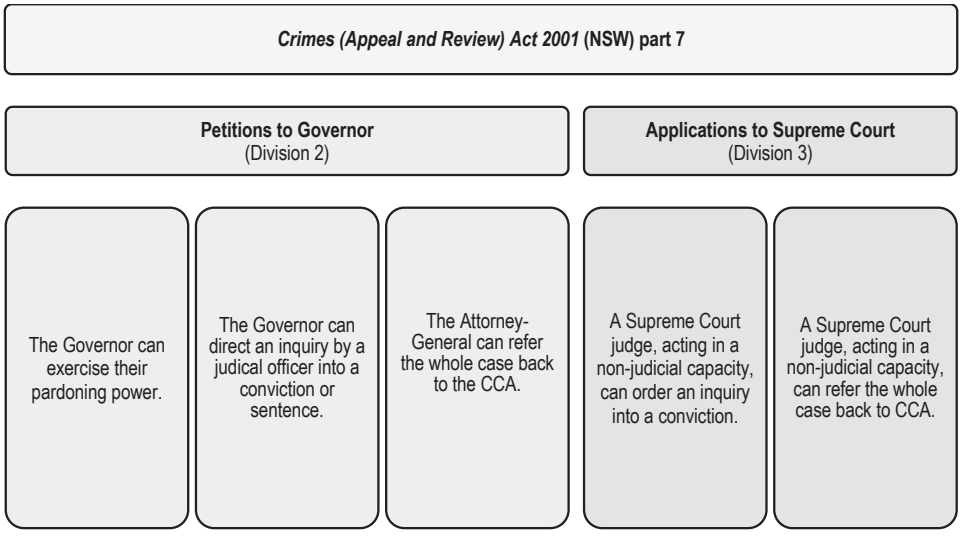

Figure 1: *Crimes (Appeal and Review) Act 2001* (NSW) part 7

B Research Methodology

This study was initiated following visits to 'Innocence Projects' in Canada, the United States, the United Kingdom ('UK'), and Ireland in 2020. Conversations with project directors revealed their primary role as assisting people who have evidence that casts doubt on a conviction to investigate and prepare an executive petition for review. Upon returning home to Australia, the focus turned to exploring

69 Ibid s 79(2); *Huynh* (n 30) 690 [23] (Kiefel CJ, Gageler and Gleeson JJ).
70 *CARA* (n 31) s 79(3).
71 *Application by Hussein* [2015] NSWSC 1855, [38] (Wilson J) ('*Hussein Application*').
72 *Carlton v The Queen* [2014] NSWCCA 14, [9]–[38] (Hulme J).

post-appeal remedies in NSW, with part 7 identified as the primary remedial pathway, particularly division 3, which had received limited attention despite the publication of written reasons for decisions. After this identification, the analysis of written reasons for division 3 decisions published between January 2014 and May 2023 commenced. This period was selected due to difficulties in locating some decisions made before 2014. To ensure an accurate analysis of annual trends, decisions prior to 2014 were excluded. The data collection ended in May 2023 to commence analysis.

Decisions were sourced using the Noteup Reference feature on the Australasian Legal Information Institute ('AustLII') database, a public database founded in 1995 and run jointly by the University of Technology Sydney and University of New South Wales.[73] Additional decisions were located on AustLII and NSW Caselaw using citations in the already-sourced decisions and keyword searches, such as 'doubt or question', 'conviction review', 'sentence review', and 'inquiry into conviction'. All written reasons falling within the study period were included, regardless of content.

The cover page of the written reasons typically included details such as the decision-maker, date, publication restrictions, catchwords, legislation and case references, and party representation. Content within the substantive section encompassed discussion on the legal principles pertinent to division 3, previous legal and administrative actions, the grounds for review and the decision, attached supporting materials, and summaries of submissions. No original applications were reviewed but quotes from original applications were often included in the written reasons.

There are six limitations arising from the data, the impact of which is noted in Part III, where relevant:

1. The outcome of two sentencing appeals could not be found.[74] These were counted as referred sentence review applications but not as referrals allowed on appeal.
2. It is unclear whether the two conviction referrals had legal assistance.[75] These were excluded from the count of legally assisted applications.
3. One conviction review application was deferred pending the outcome of legal proceedings.[76] As the application was never pursued, this was counted as an unsuccessful application.
4. One combined review application that was prepared without legal assistance was deferred, but only in relation to submissions on sentencing (the conviction review request was refused).[77] After deferral, the applicant secured legal aid support to make submissions on sentencing. Given that

73 *Australian Legal Information Institute* (Web Page) <http://www.austlii.edu.au/>.

74 *Further Application of Buttrose* [2015] NSWSC 1851 ('*Buttrose Application 2*'); *Application of Cvetkovic [No 2]* [2016] NSWSC 1301 ('*Cvetkovic Application 2*').

75 *Application of Chidiac* [2015] NSWSC 157 ('*Chidiac Application 2*'); *Application by Jimenez* [2016] NSWSC 635 ('*Jimenez Application*').

76 *Dacich v DPP (NSW)* [2020] NSWSC 1179, [9] (Basten J) ('*Dacich*').

77 *Application of Cvetkovic* [2016] NSWSC 260 ('*Cvetkovic Application 1*').

Button J 'regarded the submissions of the applicant … as having been superseded by those of his counsel',[78] the application was counted as both a combined application and a sentence review application.

5. The outcome of one conviction referral and one conviction inquiry are pending.
6. Of the 108 written reasons identified during the 10-year period, only 42 disclosed an application filing date.

II *CARA* DIVISION 3: OPERATION

The two distinct courses of action open to a division 3 decision-maker 'have different historical roots'.[79] Before 1912, there was no statutory right to appeal a conviction or sentence in NSW. However, 'the need for a mechanism to resolve doubts or questions as to the soundness of a conviction or sentence, so as to avoid an unremediable miscarriage of justice, called for statutory intervention'.[80] Consequently, in 1883, legislation conferred upon both the NSW Governor and a Justice of the Supreme Court the authority to initiate an inquiry into a conviction.[81] This power is now codified in *CARA* divisions 2 and 3. When appeal rights were legislated in 1912, 'that mechanism was not removed but was, indeed, improved upon and made more readily accessible'.[82] Specifically, in 1912, the Attorney-General gained the power to refer a whole case to the CCA.[83] This power is now mirrored in *CARA* division 2. In 1996, the Supreme Court gained the power to refer matters back to the CCA.[84] The intent was to ensure that the same outcomes were available regardless of whether an applicant pursued a remedy with the executive or Supreme Court.[85] In 2006, all of these provisions were transferred from part 13A of the *Crimes Act 1900* (NSW) to *CARA* part 7.[86]

The division 3 process begins with an application filed under section 78 of *CARA*. The application is submitted to the Registrar of the Supreme Court by either a person convicted of a crime in NSW, or their representative.[87] The Registrar then provides a copy of the application to the Attorney-General and invites them to make a written submission.[88] The Attorney-General may choose to make a submission or inform the Registrar of their decision not to do so. If a submission is provided, the

78 *Cvetkovic Application 2* (n 74) [22].
79 *Huynh* (n 30) 691 [26] (Kiefel CJ, Gageler and Gleeson JJ).
80 *Sinkovich v A-G (NSW)* (2013) 85 NSWLR 783, 796 [52] (Basten JA) ('*Sinkovich Review*'). See also *GAR v A-G (NSW) [No 3]* [2020] NSWCA 179, [125] (McCallum JA) ('*GAR No 3*').
81 *Huynh* (n 30) 691 [27] (Kiefel CJ, Gageler and Gleeson JJ), discussing *Criminal Law Amendment Act 1883* (NSW) ss 383–4.
82 *Sinkovich Review* (n 80) 796 [52] (Basten JA), quoted in *GAR No 3* (n 80) [125] (McCallum JA).
83 *Crimes Amendment (Review of Convictions and Sentences) Act 1996* (NSW) sch 1 items 7, 11.
84 Ibid.
85 New South Wales, *Parliamentary Debates*, Legislative Council, 12 September 1996, 4096 (Jeffrey Shaw, Attorney-General). See also *Huynh* (n 30) 691–2 [31] (Kiefel CJ, Gageler and Gleeson JJ).
86 *Huynh* (n 30) 691 [29] (Kiefel CJ, Gageler and Gleeson JJ).
87 *CARA* (n 31) s 78(1).
88 Ibid ss 78(2), 79(5).

Registrar invites the applicant to provide a written submission in reply. Following this, the Registrar sends the application and submissions to the Chief Justice of the Supreme Court, who assigns the application to a judge of the Supreme Court. The judge evaluates the application based on the documents provided ('on the papers'), and makes a determination under section 79, being to direct an inquiry, refer the case back to the CCA, defer consideration, or refuse to consider the application. Then, similar to the requirement that the Attorney-General provide a report to the Registrar of the Supreme Court on any action taken under division 2,[89] the Registrar must inform the Attorney-General of any action taken under division 3. Figure 2 provides a simplified outline of the division 3 application process.

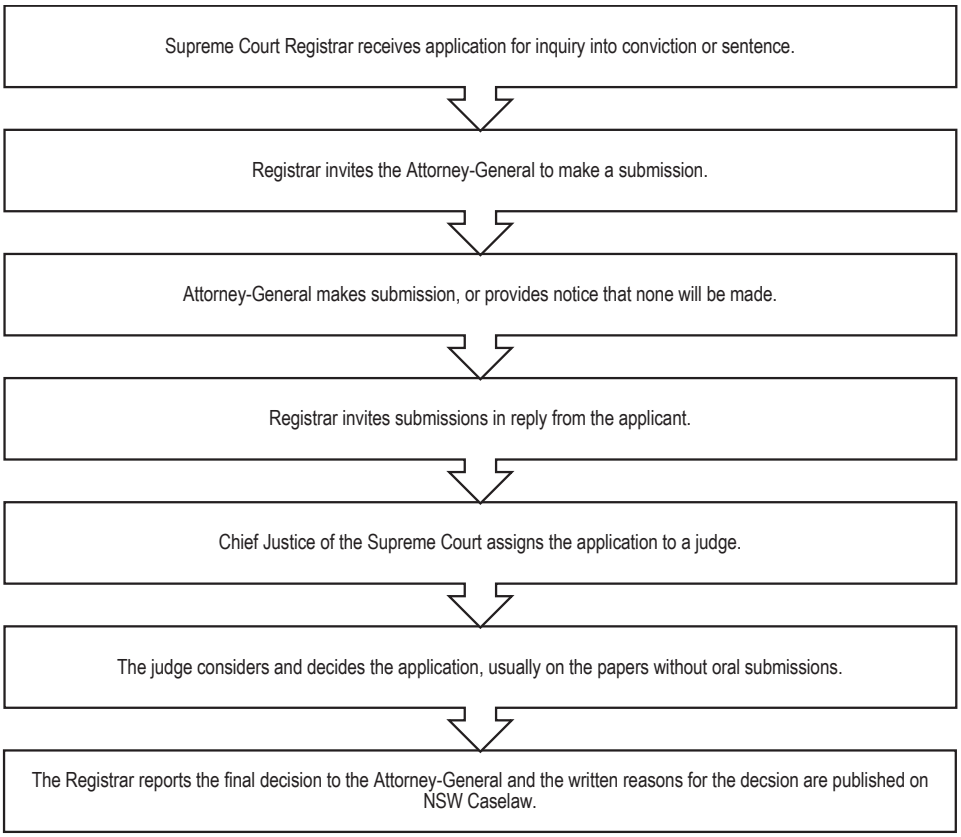

Figure 2: Division 3 application process

The publication of written reasons for division 3 decisions has enabled the development of a body of principles to guide the decision-makers' application of jurisdiction, power and discretion.

89 Ibid s 77(4).

A Jurisdiction

Three key principles guide the jurisdiction of division 3 decision-makers. Firstly, section 78(1) states that '[a]n application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person'. The use of the term 'inquiry' does not restrict the actions available to a decision-maker under section 79(1), being to direct an inquiry, refer the case to the CCA, dismiss the application, or defer consideration.[90] Secondly, and unlike division 2, division 3 contains no statutory permission to interpret an application 'that does not expressly seek a review of a conviction or sentence … as if it did'.[91] Although Wright J has suggested that jurisdiction might not arise if the application seeks a review of other matters, such as 'the conduct of counsel' at trial,[92] division 3 reasons indicate that decision-makers do strive to interpret such requests as applications for review.[93] Finally, a person convicted of a Commonwealth offence in a NSW court may seek some relief under division 3. While this provides a remedial pathway otherwise unavailable to a person at the federal level,[94] the High Court has held that when dealing with such an application, the decision-maker can only *refer* the case back to the CCA; they cannot order an inquiry.[95]

B Power: The 'Gateway' Test

While section 78 is the entry point for Supreme Court review, section 79(2) contains the precondition to the exercise of the power to direct an inquiry, refer the case to the CCA, dismiss the application, or defer consideration pending any judicial proceedings or further information.[96] The gateway test stipulates that the decision-maker can only order a referral or inquiry if they are satisfied that there appears to be a doubt or question as to the applicant's guilt, any part of the evidence, or any mitigating circumstance.[97] The decision-maker does not have to be satisfied that there is an *actual* doubt or question on any of these matters, only the *appearance* of one.[98] This is not a 'demanding' test,[99] but decision-makers do seek to ensure that the power is exercised 'responsibly and, no doubt, sparingly'.[100] Importantly, the test does not 'put the bar so high as to require an applicant to establish the appearance of a doubt or question as to the convicted person's guilt; it is enough (to satisfy the gateway) if the application concerns the evidence in the case'.[101] However, as McCallum JA has noted, when an application hinges on

90 *Huynh* (n 30).
91 *CARA* (n 31) s 77(5).
92 *Application of Doyle* [2019] NSWSC 1029, [20] ('*Doyle Application 2*').
93 See, eg, *Application of Armand-Iskak* [2018] NSWSC 928 ('*Armand-Iskak Application*').
94 *Huynh* (n 30) 727–8 [178], [182] (Edelman J).
95 Ibid 702 [76]–[77] (Kiefel CJ, Gageler and Gleeson JJ), 757 [297] (Jagot J).
96 *CARA* (n 31) s 77(1); *GAR No 3* (n 80) [127] (McCallum JA).
97 *Sinkovich Review* (n 80) 796 [51]–[53] (Basten JA).
98 *Buttrose v A-G (NSW)* (2015) 324 ALR 562, 566 [16] (Beazley P and Leeming JA) ('*Buttrose Review*').
99 *GAR v A-G (NSW) [No 2]* [2017] NSWCA 314, [137] (Payne JA) ('*GAR No 2*').
100 *Sinkovich Review* (n 80) 796 [53] (Basten JA).
101 *GAR No 3* (n 80) [130] (McCallum JA).

new material allegedly casting doubt on a part of the evidence, 'some evaluative judgment' is necessary concerning the credibility of that material and its relevance to the 'soundness' of the conviction.[102] Applicants who plead guilty at trial are not prohibited from submitting a section 78 application, but they must additionally establish the appearance of a doubt or question regarding the validity of the plea.[103]

C Discretion: The 'Screening' Power

Section 79(3) sets out the scope of the decision-maker's discretion to refuse to consider the application. The section lists instances in which the decision-maker may exercise this discretion, such as when the decision-maker considers that the matter has been fully dealt with in earlier legal or administrative proceedings or appeal rights have not been exhausted, and the decision-maker is 'not satisfied that there are special facts or special circumstances that justify the taking of further action'.[104] Whether there are special facts or special circumstances that justify further action requires an 'evaluative assessment … guided by fairness'.[105] An example of such a special fact or circumstance is 'the emergence of new evidence'.[106] McCallum JA has affirmed that the list of matters in section 79(3) is non-exhaustive, with the discretion 'not conditional upon the establishment of any particular matter'.[107] The purpose of section 79(3) 'is tolerably clear: it is to ensure that the court has appropriate powers to dispose summarily of applications which might otherwise be described as frivolous, vexatious, misconceived or lacking in substance'.[108] This accords with the consensus that

> power is to be exercised having regard to the purpose of s[ection] 79 … as being a mechanism to resolve doubts or questions as to the soundness of a conviction or sentence, or to avoid an irremediable miscarriage of justice, or which raises doubt about the integrity of the process by which a guilty verdict has been arrived at.[109]

It is important to recognise that the principles guiding division 3 jurisdiction, power and discretion apply specifically to division 3 decision-making. They do not regulate executive decision-making under division 2. However, the two pathways reconverge in the regulation of inquiries and referrals in divisions 4 and 5. Division 4 outlines the procedural framework for inquiries directed under division 2 or 3. The inquiry must be conducted as soon as practicable after a direction.[110] If the inquiry is directed by the Governor, a judicial officer appointed by the Governor conducts the inquiry, and, if directed by the Supreme Court, the inquiry is conducted by a judicial officer appointed by the Chief Justice.[111] The officer has the powers,

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102 Ibid.
103 *Application by Gillies* [2021] NSWSC 1392 ('*Gillies Application*').
104 *CARA* (n 31) s 79(3)(b). See generally at s 79(3).
105 *GAR No 3* (n 80) [143] (McCallum JA).
106 *Application by AZ* [2020] NSWSC 1048, [21] (Cavanagh J) ('*AZ Application*').
107 *GAR No 3* (n 80) [129] (McCallum JA).
108 *Clark v A-G (NSW)* [2020] NSWCA 70, [5] (Basten JA) ('*Clark Review 1*').
109 *GAR No 3* (n 80) [80] (White JA), citing *Sinkovich Review* (n 80) 796 [52] (Basten JA). See also *GAR No 2* (n 99) [64]–[65] (Simpson JA).
110 *CARA* (n 31) s 80.
111 Ibid s 81(1).

protections and immunities granted to commissioners under the *Royal Commissions Act 1923* (NSW).[112] Upon concluding the inquiry, the judicial officer must submit a report on its findings to either the Governor (if directed by the Governor) or the Chief Justice (if directed by the Supreme Court).[113] Where a report is provided to the Chief Justice, the Supreme Court must review it and furnish its own report on the matter, along with a copy of the judicial officer's report, to the Governor.[114] The Governor may then take any action they deem as just.[115] Additionally, the judicial officer may refer the matter to the CCA for consideration of whether the conviction should be quashed (if the officer is of the opinion that there is a reasonable doubt regarding guilt), or the sentence reviewed (if the officer is of the opinion that there is a reasonable doubt as to the nature or severity of the sentence).[116]

Division 5 outlines the functions and jurisdiction of the CCA following the grant of a pardon after an inquiry, referral to the CCA after a division 4 inquiry, and direct referral under division 2 or 3. If a person receives a free pardon following an inquiry directed under division 2 or 3, section 84 allows that person or their representative to apply to the CCA to have their conviction quashed. Although the rules of evidence do not apply to such proceedings,[117] the provision does not give rise to a right to have the conviction quashed and the CCA can only exercise the power if the application is accompanied by an inquiry report.[118] Where a judicial officer has exercised their discretion following a division 4 inquiry to refer the matter to the CCA for consideration as to whether the conviction should be quashed or the sentence reviewed, the CCA must deal with the matter in the same way as if an application had been made under section 84(3) to quash a conviction following the grant of a pardon.[119] Where the Attorney-General or Supreme Court refers a whole case to the CCA, the CCA must deal with the case in the same way as if the convicted person had appealed against the conviction or sentence.[120]

In summary, the jurisdiction, power, and discretion granted to the Supreme Court under division 3 is unique in the Australian post-appeal landscape. Its closest analogy is section 424 of the *Crimes Act 1900* (ACT) that grants the ACT Supreme Court the authority to direct an inquiry into a conviction. Since 2001, the ACT Supreme Court has ordered one inquiry.[121] Unlike division 3, the ACT Supreme Court cannot refer a case back to the Court of Appeal or direct an inquiry into a sentence. Additionally, since 2001, the power only enlivens if there is a doubt or question as to the guilt of the person, not whether there is the appearance of a doubt

112 Ibid s 81(2).
113 Ibid s 82(1).
114 Ibid s 82(3).
115 Ibid s 82(4).
116 Ibid s 82(2).
117 Ibid s 85(2).
118 *GAR No 3* (n 80) [130] (McCallum JA).
119 *CARA* (n 31) s 88(1).
120 Ibid s 86.
121 See *Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester* (Report, 2014).

or question about any aspect of the evidence.[122] Section 422 further deviates from division 3 by imposing mandatory criteria that limits the discretion of the Supreme Court to direct an inquiry, including the requirement that the doubt or question cannot be properly addressed through an appeal. It will be interesting to see how this mandatory consideration operates alongside the second or subsequent appeal legislation that took effect in the ACT on 14 May 2024.

D Beneficial Features of Division 3

There are many similarities between divisions 2 and 3. Both divisions authorise the executive and Supreme Court to order inquiries and referrals. Divisions 4 and 5 provide the framework for conducting these inquiries and referrals. Both divisions require the decision-maker to be satisfied there is the appearance of a doubt or question as to guilt, the evidence, or any mitigating circumstances. Both decision-makers have 'an (almost) absolute discretion' in refusing to consider or otherwise deal with an application.[123] However, there are key differences in the operation of these divisions that make division 3 a more accountable and transparent pathway than the executive petition process, and more accessible than legal alternatives.

Firstly, it is 'uncontroversial' that division 3 decisions are subject to judicial review in the supervisory jurisdiction of the Court of Appeal.[124] Although the proceedings are not legal proceedings and thus do not carry a statutory right to appeal, they are administrative actions that are subject to review for jurisdictional error.[125] White JA has opined that

> [i]t is doubtful that an order in the nature of certiorari to quash a decision for error of law on the face of the record or an order in the nature of mandamus to compel performance of a duty under s[ection] 79(1) could be made … but in an appropriate case a declaration could be made identifying a matter that may create a doubt or question as to the correctness of a conviction or sentence.[126]

Judicial review provides a level of accountability that is absent in executive decisions that have, to date, not been deemed amenable to judicial review in Australia.[127] While the findings of judicial officers in a division 2 or 3 inquiry are open to judicial review,[128] no such challenge exists for decisions tied to the

122 *DPP (ACT) v Martin* (2014) 9 ACTLR 1, 15–16 [43] (Murrell CJ, Katzmann and Wigney JJ).

123 *GAR No 3* (n 80) [136] (McCallum JA).

124 Ibid. See also *Yenuga v A-G (NSW)* [2023] NSWCA 227, [29] (Griffiths AJA) ('*Yenuga Review*'); *Patsalis v A-G (NSW)* (2013) 85 NSWLR 463, 469–70 [23]–[24] (Basten JA, Bathurst CJ agreeing at 465 [5], Beazley P agreeing at 465 [7]) ('*Patsalis Review*').

125 *Patsalis Review* (n 124) 473 [35] (Basten JA).

126 *Armand-Iskak v A-G (NSW)* [2019] NSWCA 145, [8] ('*Armand-Iskak Review*'). See also *Yenuga Review* (n 124) [29] (Griffiths AJA). But see *Patsalis Review* (n 124) 473 [35] (Basten JA, Bathurst CJ agreeing at 465 [4], Beazley P agreeing at 465 [7]).

127 *Holzinger* (n 41). But see *Folbigg Review* (n 44) 301–3 [28]–[38] (Basten, Leeming and Brereton JJA). Note that this compares to the executive petition pathway in Canada, where the federal Attorney-General provides draft reasons prior to the making of any determination and final written reasons after the making of a determination.

128 See, eg, *Folbigg Review* (n 44) 295 [4], 297 [10] (Basten, Leeming and Brereton JJA).

prerogative power of the Governor, such as executive decision regarding petitions for pardon or review.[129]

The availability of judicial review may explain the provision of detailed written reasons for division 3 decisions and the lack thereof for executive decisions, because the provisions of sufficient reasons better enable a reviewing court to assess whether the decision-maker acted within jurisdiction.[130] Providing written reasons enhances accountability and is ethically justified by the individual and social harms created by a wrongful conviction, which warrant transparency in dealing with inquiries into criminal convictions.[131] As Brereton JA has opined, justice must be 'seen to be done. And … in this field, appearances matter'.[132] Functionally, written reasons enable future decision-makers to understand whether the matter has been dealt with in an earlier application.[133] This understanding is essential to the transparent exercise of discretion under section 79(3). Further, if a division 3 decision-maker directs a referral or inquiry, written reasons 'allow an understanding of the circumstances giving rise to the doubt or question'.[134] Importantly, the detailed reasons provided by division 3 decision-makers offer clarity to applicants and society.

However, it is crucial to consider the impact of judicial review on the resources of the Court of Appeal, as dissatisfied applicants do not require the Court's leave to initiate proceedings.[135] Judicial review of division 3 decisions must be heard in the Court of Appeal, as they are made by a Supreme Court judge who cannot judge fellow judges. The absence of a leave requirement means the Court of Appeal has no ability to refuse permission to 'a determined or obstinate litigant' intent on abusing the court system.[136] Further, the Court of Appeal has expressed concerns about the absence of a clear legislative power for division 3 decision-makers to provide brief reasons in appropriate situations,[137] for example, 'where an application should be summarily dismissed on the grounds that it is … repetitive and raises no new matter'.[138] This, coupled with the absence of a leave requirement, may lead to the misuse of strained court resources. However, these considerations must be weighed against the fact that judicial review provides genuine applicants with a democratic safeguard that is absent from the executive pathway.

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129 *Holzinger* (n 41). But see *Folbigg Review* (n 44) 301–3 [28]–[38] (Basten, Leeming and Brereton JJA).

130 See *Holland v A-G (NSW)* [2022] NSWCA 17, [12] (McCallum JA) ('*Holland Review*'); *Li v A-G (NSW)* (2018) 99 NSWLR 630, 645 [61] (Basten JA) ('*Li Review 1*'). See also at 654 [104] (Brereton JA, dissenting): '[R]easons will be inadequate … if justice is not seen to have been done. … [J]ustice will not be seen to have been done – if the "reasons" are such as to leave the unsuccessful party with a justifiable sense of grievance'.

131 *Clark Review 1* (n 108) [8] (Basten JA).

132 *Li Review 1* (n 130) 667 [144].

133 *Application by Holland* [2021] NSWSC 384, [18] (Davies J) ('*Holland Application 3*').

134 Ibid [19].

135 *Armand-Iskak Review* (n 126) [35] (White JA).

136 Ibid.

137 *Application by Clark* [2021] NSWSC 1364 ('*Clark Application 2*'). See also *Holland Application 3* (n 133) [14]–[20] (Davies J).

138 *Clark Review 1* (n 108) [8] (Basten JA), quoted in *Holland Application 3* (n 133) [16] (Davies J). See also *Holland Review* (n 130) [12] (McCallum JA).

Division 3 is also notable for minimising accessibility issues that affect legal remedies. For example, applications are free to lodge, making the pathway financially accessible to individuals seeking a review of their conviction or sentence. This contrasts with potential financial barriers that could hinder access to justice in traditional appeal pathways. Division 3 decision-makers are not bound by formal rules of evidence.[139] This recognises the challenges faced by unrepresented individuals in navigating complex legal procedures by reducing the burden on applicants to adhere strictly to formal evidentiary standards.

The beneficial features of accountability, transparency, and accessibility make division 3 an attractive review pathway for people seeking a conviction or sentence review. However, the division has attracted little academic analysis.[140] Part III of this article helps close that knowledge gap by undertaking a comprehensive exploration of the challenges faced by applicants and decision-makers from January 2014 to May 2023. The exploration combines quantitative data with qualitative analysis to find systemic issues and recurring challenges for division 3 decision-makers and applicants. By combining empirical data analysis with scholarly inquiry, this article aims to contribute valuable insights to the understanding of division 3, potentially paving the way for improvements and refinements in a critical area of justice. The approach aligns with the best practices in legal scholarship and policymaking, grounding recommendations in an examination of real-world challenges and experiences.

III DIVISION 3 ANALYSIS

This Part begins by sharing the quantitative data collected on division 3 decisions from January 2014 to May 2023. It then draws on that data, and a qualitative analysis of reasons for decisions, to pinpoint specific challenges that have affected its operation over the past decade.

A Summary of Division 3 Data from January 2014 to May 2023

Research undertaken for this article found 108 division 3 decisions published during the study period. Table 1 presents a summary of the data. The following section provides context for that data and makes initial observations.

139 *CARA* (n 31) s 79(4).
140 See Azize (n 32); Rego (n 52).

Table 1: Summary of Division 3 Applications from January 2014 to May 2023

	Conviction	Sentence	Combined	Total
Total applications	59	42	7	108
Referred	6	17	0[a]	23
Sent to inquiry	1	0	0	1
Allowed on appeal	3[b]	7[c]	0	10

[a] In *Application by Cvetkovic*,[141] the conviction review was denied, and the sentence review deferred pending further submissions. The determination on the sentence review is counted as a sentence review application because the applicant secured legal assistance in the deferral period.

[b] The outcomes on appeal of *Application by Bebic*[142] and *Application by Adanguidi*[143] are pending. These applications were counted as referred/sent to inquiry but excluded from the count of referrals allowed on appeal. If they are ultimately allowed on appeal, this increases the number of conviction review referrals allowed on appeal to five.

[c] The appeal outcomes of *Further Application of Buttrose*[144] and *Cvetkovic Application [No 2]*[145] could not be located. These applications were counted as referred but excluded from the count of allowed on appeal. If they were allowed on appeal, this increases the number of sentence review referrals allowed on appeal to nine.

1 Categories of Applications

The largest number of division 3 decisions related to conviction review applications (n=59). Conviction review applications remained steady over the study period, with an average of six per year. There were 42 sentence review decisions. However, it is important to note that 26 of these sentence review applications were submitted between 2014–17, in response to the High Court decision in *Muldrock v The Queen* ('*Muldrock*') that identified an erroneous approach to sentencing in NSW from 2003–11.[146] From 2018, sentence review applications averaged two per year.

2 Application Outcomes

A total of 23 applications were referred back to the CCA, with one conviction review application securing an inquiry.[147] Six of the 23 referrals concerned convictions,[148] with the remaining 17 relating to sentences. Nine of the 17 sentence referrals concerned a *Muldrock* error.

141 *Cvetkovic Application 1* (n 77).
142 [2022] NSWSC 1153 ('*Bebic Application*').
143 [2022] NSWSC 442 ('*Adanguidi Application*')
144 *Buttrose Application 2* (n 74).
145 *Cvetkovic Application 2* (n 74).
146 (2011) 244 CLR 120 ('*Muldrock*').
147 *Bebic Application* (n 142). The inquiry began on 4 December 2023.
148 *Application by JB* [2014] NSWSC 1714 ('*JB Application*'); *Application by Duncan* [2014] NSWSC 847; *Chidiac Application 2* (n 75); *Jimenez Application* (n 75); *Adanguidi Application* (n 143); *Application by Cartman* [2022] NSWSC 308 ('*Cartman Application*').

The outcomes for one conviction appeal and the lone inquiry are pending. Two sentence appeal outcomes could not be located. These were excluded from the count of allowed appeals. Of the 20 known appeal determinations, 10 secured a favourable outcome. Although conviction review applications had a lower referral rate than sentence review applications, they did have a higher success rate on appeal, with three of five conviction appeals being allowed compared to 7 of the 15 known sentence appeals being allowed.

In summary, division 3 facilitated the correction of at least 10 injustices from January 2014 to May 2023, with a further two outcomes pending and two unknown. The pending outcomes create an opportunity for future monitoring and analysis as more information becomes available.

3 Legal Assistance

A total of 55 applications were identified as having been prepared with legal assistance. The significant contrast between the proportion of conviction (n=17) and sentence review applications (n=37) prepared with legal assistance is largely attributable to the legal aid assistance provided to 20 sentence review applicants from 2014–17, to correct potential sentencing errors following the High Court decision in *Muldrock*.

Overall, legal aid assisted 24 of the 55 assisted applicants. That included the 20 *Muldrock* errors applications and 3 sentence review applications concerning Commonwealth offences.[149] The latter applications helped clarify the jurisdictional question regarding the applicability of division 3 to people convicted of a Commonwealth offence in a NSW court, a matter finally determined by the High Court in May 2023.[150]

The data highlights a link between applicants who had legal assistance to prepare their application and applicants who secured a referral or inquiry (Table 2). Among the 23 applications referred back to the CCA, and the one conviction review application sent to inquiry, 22 were confirmed to have been prepared with legal assistance.[151] All sentence applications referred to the CCA were assisted. The written reasons for two conviction referrals that were ultimately allowed on appeal did not specify whether the applicant had legal assistance. These decisions were excluded from the count of assisted applications and allowed appeals. If they did indeed have assistance, that would mean 100% of all applications securing a referral or inquiry had legal assistance. This data underscores the need for further exploration of the specific ways in which legal assistance contributes to the effectiveness of division 3.

149 *Application by Chen* [2021] NSWSC 1024 (‘*Chen Application*’); *Aboud v The Queen* [2020] NSWSC 1648 (‘*Aboud Application*’); *Application by Bae* [2019] NSWSC 1413 (‘*Bae Application*’).

150 *Huynh* (n 30).

151 The cover sheet and written reasons for *Chidiac Application 2* (n 75) and *Jimenez Application* (n 75) do not clarify whether these two applicants were assisted.

Table 2: Outcomes for Legally Assisted Applicants

	Conviction	**Sentence**	**Combined**	**Total**
Total applications	59	42	7	108
Prepared with assistance	16	37	2	55
Referred/sent to inquiry	7	17	0	24
Referred/sent to inquiry and prepared with assistance	5[a]	17	0	22

[a] *Application of Chidiac*[152] and *Application by Jimenez*[153] secured a referral but the written reasons do not clarify whether the applicants were legally assisted. Thus, these were excluded from the count of applications prepared with assistance and applications referred.

4 Types of Offences

Sexual offences were the basis of most conviction review applications (n=15), followed by homicide (n=10) and assault (n=7). Drug offences formed the basis of most sentence review applications (n=13), followed by sexual offences (n=10) and homicide (n=7). Most applications concerned serious offences but some sought review of summary offences. The primary summary offence was breach of an Apprehended Violence Order ('AVO') (n=2).

Table 3: Types of Offences[a]

	Conviction	**Sentence**	**Combined**	**Total**
Sexual offences	15	10	2	27
Drug offences	5	13	0	18
Homicide and related offences	10	7	0	17
Assault and related offences	7	1	1	9
Weapons offences	1	3	0	4
Financial deception offences	2	1	0	3
Robbery	1	1	0	2
Breach of AVO	2	0	0	2
Miscellaneous offences[b]	0	1	1	2
Abduction and related offences	1	0	0	1

152 *Chidiac Application 2* (n 75).
153 *Jimenez Application* (n 75).

	Conviction	Sentence	Combined	Total
Stalking	0	0	1	1
Attempted prison escape	1	0	0	1
Conspiracy to bomb	1	0	0	1

[a] This table excludes repeat applications during the study period, to ensure that the category is only counted once.

[b] This category included a dog attack (*Application by Fennell*)[154] and various offences committed by a police officer (*Application by Laycock*).[155]

5 Grounds for Review

The grounds for review varied considerably. Review grounds, where discernible, included claims of procedural unfairness stemming from poor representation, violations of obligations to provide representation at trial,[156] systemic police bias against men in domestic violence matters,[157] judicial errors or misconduct,[158] factual errors at trial,[159] and the destruction of evidence.

6 Time from Application to Decision

In total, 32 conviction review decisions, 6 sentence review decisions and 5 combined decisions included a filing date. The average time to decide applications with a filing date varied, with conviction review applications averaging 11.5 months,[160] sentence review applications averaging 6 months and combined applications taking 10 months to decide.

7 Multiple-Use Applicants

A total of 26 applicants who applied during the study period had accessed a part 7 pathway (or its predecessor)[161] at least once before (see Table 4). This indicates a pattern of repeated engagement with the part 7 administrative review system by certain individuals. Repeat applicants had some success, with 8 of the 26 multiple-use applicants securing an inquiry or referral on a subsequent attempt,

154 [2016] NSWSC 307 ('*Fennell Application*').

155 [2015] NSWSC 1429 ('*Laycock Application*').

156 See, eg, *Application by Alexander* [2023] NSWSC 449 ('*Alexander Application*'); *Application by Kostov* [2022] NSWSC 489 ('*Kostov Application*').

157 *Application by Gibson* [2022] NSWSC 1577 ('*Gibson Application*').

158 *Application by Li* [2021] NSWSC 544 ('*Hai Li Application*'); *Application by Mosegaard* [2014] NSWSC 1661 ('*Mosegaard Application*').

159 *Svanda Application* (n 33).

160 Two conviction reviews applications for the same applicant spanned eight years, due to a delay by the applicant in filing submissions: *Application by Cheney [No 1]* [2015] NSWSC 291 ('*Cheney No 1*'); *Application by Cheney [No 2]* [2015] NSWSC 293 ('*Cheney No 2*'). This anomaly was excluded from the count.

161 *Crimes Act 1900* (NSW) ss 474B, 474D, as repealed by *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* sch 2 item 1.

as indicated by the outcomes in Table 4. However, 16 of the 26 had no success on any application but remained undeterred.

Table 4: Total Applications from Multiple-Use Applicants January 2014 to May 2023

Applicant	Part 7 (or its predecessor) applications and judicial review	Success
Bebic	Multiple conviction review applications (1991–94, 2022)[162] 1 conviction review application (2022) inquiry order (outcome pending)[163]	✓
Bum Yun	1 sentence review application refused (2014)[164] 1 sentence review application referred (appeal dismissed)[165]	✓
Buttrose	1 sentence review application refused (2014)[166] 1 successful judicial review (2015)[167] 1 sentence review application referred (2015)[168] (outcome unknown)	✓
Chidiac	1 conviction review application refused (1996) 1 conviction review application referred (2015) (appeal dismissed)[169]	✓
Cvetkovic	1 unsuccessful petition (2007) 1 unsuccessful combined review application (conviction) (2016)[170] 1 sentence review application (2016)[171]	✓
Des Rosiers	1 sentence review application refused (2014) 1 sentence review application referred (2016) (appeal allowed)[172]	✓
Feng Wang	1 sentence review application refused (2014) 1 sentence review application referred (2017) (appeal allowed)[173]	✓
Majid	1 sentence review application refused (2014)[174] 1 sentence review application referred (2016) (appeal allowed)[175]	✓
Beckett	1 petition referred (2001) (appeal allowed on 7/9 counts)[176] 1 unsuccessful petition (2007) 1 unsuccessful conviction review application (2014)[177]	--

162 *Bebic Application* (n 142).
163 Ibid.
164 *Application by Bum Yun* [2014] NSWSC 824.
165 *Yun v The Queen* [2017] NSWCCA 317.
166 *Application by Buttrose* [2014] NSWSC 826 (‘*Buttrose Application 1*’).
167 *Buttrose Review* (n 98).
168 *Buttrose Application 2* (n 74).
169 *Chidiac Application 2* (n 75); *Chidiac v The Queen [No 2]* [2016] NSWCCA 120.
170 *Cvetkovic Application 1* (n 77) (conviction review refused, sentence review deferred).
171 *Cvetkovic Application 2* (n 74) (sentence review referred).
172 *Des Rosiers v The Queen* [2016] NSWCCA 196.
173 *Wang v The Queen* [2017] NSWCCA 61.
174 *Application by Majid* [2014] NSWSC 709 (‘*Majid Application 1*’).
175 *Application by Majid* [2016] NSWSC 561 (‘*Majid Application 2*’); *Majid v The Queen* [2016] NSWCCA 289.
176 *R v Catt* [2005] NSWCCA 279.
177 *Application by Beckett* [2014] NSWSC 1773 (‘*Beckett Application*’).

Applicant	Part 7 (or its predecessor) applications and judicial review	Success
GAR	1 conviction review application referred (2009) (appeal dismissed)[178] 3 unsuccessful conviction review applications (2014–19)[179] 2 unsuccessful judicial reviews (2017, 2020)[180]	--
MLP	1 sentence review application referred (2014) (appeal dismissed)[181] 1 sentence review application refused (2015)[182]	--
Boege	1 unsuccessful petition (2012) 5 unsuccessful conviction review applications (2012–17)[183]	X
Cheney	2 unsuccessful petitions (2006) 3 unsuccessful conviction review applications (2004–15)[184] 1 unsuccessful combined application (2017)[185]	X
Clark	1 unsuccessful petition (2016) 3 unsuccessful conviction review applications (2019–23)[186] 2 unsuccessful judicial reviews (2020, 2022)[187]	X
Coles	1 unsuccessful petition (2019) 1 unsuccessful conviction review application (2019)[188]	X
Doyle	2 unsuccessful conviction review applications (2002, 2019)[189]	X
FD	2 unsuccessful sentence review applications (2015, 2017)[190]	X
Gonzales	4 unsuccessful conviction review applications (2018–23)[191]	X

178 *GAR v The Queen [No 1]* [2010] NSWCCA 163.
179 *Application by GAR* [2014] NSWSC 1734 (‘*GAR Application 1*’); *Application by GAR* [2016] NSWSC 1205 (‘*GAR Application 2*’); *Application by GAR* [2019] NSWSC 982 (‘*GAR Application 3*’).
180 *GAR No 2* (n 99); *GAR No 3* (n 80).
181 *Application by MLP* [2014] NSWSC 390 (‘*MLP Application 1*’); *MLP v The Queen* [2014] NSWCCA 183.
182 *Application by MLP* [2015] NSWSC 349 (‘*MLP Application 2*’).
183 *Further Application of Boege* [2015] NSWSC 1925 (‘*Boege Application 2*’); *Application by Boege [No 3]* [2016] NSWSC 729 (‘*Boege Application 3*’); *Boege v A-G (NSW)* [2016] NSWSC 1469 (‘*Boege Application 4*’); *Application by Boege* [2017] NSWSC 935 (‘*Boege Application 5*’).
184 *Cheney No 1* (n 160); *Cheney No 2* (n 160).
185 *Application by Cheney [No 3]* [2017] NSWSC 210 (‘*Cheney No 3*’).
186 *Clark v A-G (NSW)* [2019] NSWSC 1277 (‘*Clark Application 1*’); *Clark Application 2* (n 137); *Application by Clark* [2023] NSWSC 445 (‘*Clark Application 3*’).
187 *Clark Review 1* (n 108); *Clark v A-G (NSW)* [2022] NSWCA 231 (‘*Clark Review 2*’).
188 *Application by Coles* [2019] NSWSC 797 (‘*Coles Application*’).
189 See *Doyle Application 2* (n 92).
190 *Application of FD* [2015] NSWSC 285 (‘*FD Application 1*’); *Application by FD [No 2]* [2017] NSWSC 869 (‘*FD Application 2*’).
191 *Application by Gonzales* [2018] NSWSC 787 (‘*Gonzales Application 1*’); *Application by Gonzales [No 2]* [2019] NSWSC 1412 (‘*Gonzales Application 2*’); *Application by Gonzales [No 3]* [2021] NSWSC 263 (‘*Gonzales Application 3*’); *Application by Gonzales [No 4]* [2023] NSWSC 323 (‘*Gonzales Application 4*’).

Applicant	Part 7 (or its predecessor) applications and judicial review	Success
Holland	3 unsuccessful conviction review applications (2008–21)[192] 1 unsuccessful judicial review (2022)[193]	X
Kostov	1 unsuccessful petition (2020) 1 unsuccessful conviction review application (2022)[194]	X
Li	2 unsuccessful sentence review applications (2018, 2020)[195] 2 unsuccessful judicial reviews (2019, 2020)[196]	X
Milat	7 unsuccessful conviction review applications (2005–17)[197]	X
Patsalis	1 unsuccessful petition (2012) 2 unsuccessful conviction review applications (2012, 2015)[198] 1 unsuccessful judicial review (2013)[199]	X
Reznitsky	2 conviction review applications (2004 (withdrawn), 2019 (unsuccessful))[200]	X
Svanda	1 unsuccessful petition (date unknown) 1 unsuccessful combined application (2021)[201]	X
TDP	1 unsuccessful combined review application (2018)[202] 1 unsuccessful conviction review application (2022)[203]	X

✓ = secured a referral or inquiry on last application
-- = secured a referral on the first application but not subsequent application/s
X = no success on any application

8 Judicial Review

Of the 11 judicial review judgments delivered by the Court of Appeal from January 2014 to May 2023, only one was successful.[204] Notably, only three judicial review applicants were represented, including the successful applicant. There was some evidence that the judicial review process may be vulnerable to misuse. For example, of the four conviction review applications filed between January 2023

192 *Application of Holland* [2008] NSWSC 251 (‘*Holland Application 1*’)*; Application by Holland* [2017] NSWSC 462 (‘*Holland Application 2*’); *Holland Application 3* (n 133).
193 *Holland Review* (n 130).
194 *Kostov Application* (n 156).
195 *Li v A-G (NSW)* [2018] NSWSC 674 (‘*Li Application 1*’); *R v Li* [2020] NSWSC 59 (‘*Li Application 2*’).
196 *Li Review 1* (n 130); *Li v A-G (NSW)* [2020] NSWCA 302 (‘*Li Review 2*’).
197 See *Milat v A-G (NSW)* [2017] NSWSC 1378 (‘*Milat Application 7*’).
198 *Re Patsalis* [2012] NSWSC 1597 (‘*Patsalis Application 1*’); *Re Patsalis [No 2]* [2015] NSWSC 177 (‘*Patsalis Application 2*’).
199 *Patsalis Review* (n 124).
200 *Application by Reznitsky* [2019] NSWSC 1600 (‘*Reznitsky Application 2*’).
201 *Svanda Application* (n 33).
202 *Application by TDP* [2018] NSWSC 1698 (‘*TDP Application 1*’).
203 *TDP v A-G (NSW)* [2022] NSWSC 730 (‘*TDP Application 2*’).
204 *Buttrose Review* (n 98).

and May 2023, two promptly filed for judicial review.[205] One of these applicants did the same thing immediately following two previous applications.[206] The challenges associated with managing court resources and preventing potential abuse of the judicial review process are acknowledged. While these issues extend beyond the scope of this article, they underscore the ongoing need for evaluation and potential reforms in the administration of division 3. Despite the challenges, judicial review decisions play a crucial role in developing jurisprudence and refining the operation of division 3. The data as a whole reveals a review pathway that involves a complex interplay of legal, procedural, and individual factors. The range of applications, offences and outcomes emphasises the multifaceted nature of division 3 applications and diversity of individuals trying to navigate the system. Understanding why certain individuals repeatedly access the system can contribute to improvements in the review process. The following section aims to identify key challenges faced by applicants and decision-makers on the division 3 pathway, with a view to improving pathway efficiency for applicants and decision-makers.

B Challenges Affecting Division 3 Applicants and Decision-Makers

Division 3 offers a potential avenue for addressing wrongful convictions, yet its structure is far from 'straightforward'.[207] This section delves into the data to identify the key challenges faced by both applicants and decision-makers, with the aim of then identifying strategies that may be of practical assistance in improving the capacity of division 3 to address wrongful convictions. The analysis of written reasons for division 3 decisions reveals the challenge to informed decision-making when applications lack clarity and legal understanding. This section explores those areas in detail.

1 Clarity

The lack of clarity in applications prepared without legal assistance presents significant challenges in the review process. A key clarity concern arises from the legibility of handwritten applications,[208] particularly when the applicant is not proficient in English.[209] For example, as Adams J lamented in *Application by Li*:

> The applicant has prepared her application herself from custody. English is not her first language and her application is handwritten. It was difficult to read her handwriting and even more difficult to follow her arguments.[210]

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205 These fall outside the study period ending in May 2023 but are useful for highlighting a potentially emerging pattern: *Yenuga Review* (n 124); *Clark v A-G (NSW)* [2023] NSWCA 212, [2] (White JA).

206 *Clark Review 1* (n 108); *Clark Review 2* (n 187).

207 *Huynh Review 1* (n 40) 87 [31] (Basten JA).

208 See, eg, *AZ Application* (n 106); *Patsalis Application 2* (n 198). See also *Mosegaard Application* (n 158); *Re Milat* [2015] NSWSC 209 ('*Milat Application 6*'); *Alexander Application* (n 156); *Cheney No 1* (n 160).

209 See, eg, *Reznitsky Application 2* (n 200); *Li Application 2* (n 195); *TDP Application 1* (n 202); *Hai Li Application* (n 158).

210 *Hai Li Application* (n 158) [7] (N Adams J).

Verbosity, excessive detail, and unique writing styles can also make applications difficult to follow. An example is provided in *Application of Doyle*:

> In the Application, the applicant sought an "INQUIRY FOR A REVIEW" into what was described as a "FRAUD COMMITTED ON BOTH THE NSWCCA AS WELL AS MYSELF" … "THE COURT HAD ALREADY MADE UP ITS MIND WITHOUT GIVING ME THE CHANCE TO REFUTE THESE EGREGIOUS, CONCOCTED CALUMNIES." The Application also referred to "AN EVEN MORE OUTRAGEOUS FALSE CRIMINAL HISTORY … [being] PRESENTED TO A COURT" … "THANKFULLY MR JUSTICE HULME OF THE NSWCCA RECOGNISED THE VILLAINY BEING PERPETRATED ON DOYLE AND CALLED A HALT TO THIS CALUMNY!"[211]

Decision-makers may struggle to distil the essential points from lengthy and convoluted submissions, impacting their ability to understand the applicant's assertions and address the core issues raised.[212] For example, as Fagan J noted in *Application by Fennell*:

> The inordinate detail, frequent irrelevance and general verbosity of the applicant's submissions is such that one cannot identify from them any point or points which would clearly demonstrate a lack of competence or of integrity on the part of the defendant's representative at the hearing.[213]

A combination of legibility, verbosity and writing styles made some applications 'difficult to read … and even more difficult to follow'.[214]

Despite the challenges presented by these applications, division 3 decision-makers do try to fairly interpret each request.[215] This is a difficult and time-consuming task when the application is illegible or incoherent.[216] Unclear applications pose the risk of incorrect analysis, potentially resulting in decisions that do not accurately reflect the applicant's concerns. This can lead to applicants feeling unheard and filing subsequent applications on similar grounds. Decision-makers may be compelled to rely on interpretations provided by the Attorney-General when faced with unclear applications.[217] This reliance can lead to a 'legitimate sense of grievance that [the applicant's] submissions had not been fully absorbed and analysed and transmuted'.[218] This can lead to judicial review summonses that put stress on a resource-stretched court system.[219]

Addressing these challenges is crucial to maintaining the fairness and effectiveness of the division 3 review process. Clear applications enhance the

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211 *Doyle Application 2* (n 92) [3]–[5], [7] (Wright J). See also *Reznitsky Application 2* (n 200) [58]–[59] (Ierace J); *TDP Application 1* (n 202) [25]–[26] (N Adams J).

212 See, eg, *Holland Application 2* (n 192); *Holland Application 3* (n 133); *Doyle Application 2* (n 92); *Gibson Application* (n 157); *Li Application 2* (n 195). See also *Fennell Application* (n 154); *Svanda Application* (n 33); *Application by Potier* [2018] NSWSC 768 ('*Potier Application*'); *Gonzales Application 2* (n 191); *Application by Vaughan* [2022] NSWSC 920 ('*Vaughan Application*'); *Alexander Application* (n 156); *Reznitsky Application 2* (n 200); *Yenuga v A-G (NSW)* [2023] NSWSC 107 ('*Yenuga Application*'); *Application by Glasby* [2018] NSWSC 130 ('*Glasby Application*').

213 *Fennell Application* (n 154) [46]. See also *Holland Application 2* (n 192); *Gibson Application* (n 157).

214 See, eg, *Hai Li Application* (n 158) [7] (N Adams J).

215 See, eg, *Li Application 2* (n 195); *Armand-Iskak Application* (n 93).

216 See, eg, *Holland Application 2* (n 192); *Gibson Application* (n 157).

217 See, eg, *Holland Review* (n 130).

218 *Li Review 1* (n 130) 648 [78] (White JA).

219 See, eg, *Holland Review* (n 130).

understanding of the applicant's concerns, facilitate timely decision-making, and contribute to the development of jurisprudence in division 3 cases. While increasing legal aid funding may be an ideal solution, acknowledging its unlikelihood prompts the need to explore alternative strategies in Part IV of this article.

2 Understanding of Legal Requirements

Although it is free to apply, a lack of legal assistance in preparing a division 3 application can result in significant challenges for the applicant, particularly in addressing the legislative matters that decision-makers must consider. The following analysis identifies key comprehension concerns associated with unassisted applications.

(a) Understanding the Purpose of Division 3

When making a decision under division 3, the 'Court is exercising an administrative power. It is not hearing an appeal against the applicant's conviction.'[220] However, division 3 is titled 'Applications to Supreme Court' and self-represented applicants may mistakenly interpret this as another appeal pathway.[221] For example, as Cavanagh J mentioned in *Application by Clark*: 'The applicant appears to treat this further application for review as another step in the appeal process. Indeed, his final submissions … take the form of an appeal to the High Court.'[222]

Other evidence of misconception includes requests to review something other than a conviction or sentence,[223] or to challenge a previous division 3 decision.[224] Although the jurisdiction test (outlined in Part II) empowers decision-makers to refuse to consider such applications, they do tend to reframe these errors to benefit the applicant. For example, as Cavanagh J noted in *Application by AZ*:

> The applicant requests that the verdicts of the jury be overturned. He does not seek any other action. However, I would have due regard to the fact that he is not legally represented and assume that he seeks an inquiry into his conviction.[225]

Although decision-makers often overlook these errors, they still face the challenge of interpreting unclear requests.

(b) Understanding the Need to Clearly Articulate the Grounds for Review

The gateway test (outlined in Part II) requires applications to 'clearly articulate' the matters giving rise to an 'apparent doubt or question' as to guilt, any part of the evidence or any mitigating circumstances.[226] An additional hurdle for applicants who plead guilty is the need to clearly articulate the grounds giving rise to an

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220 *AZ Application* (n 106) [9] (Cavanagh J) (citations omitted).
221 See, eg, *Doyle Application 2* (n 92). See also *TDP Application 1* (n 202); *Holland Application 1* (n 192); *Dacich Application* (n 76); *Holland Review* (n 130).
222 *Clark Application 2* (n 137) [84]. See also *Holland Application 2* (n 192); *Dacich Application* (n 76); *Holland Review* (n 130); *Clark Review 2* (n 187).
223 See, eg, *Doyle Application 2* (n 92); *TDP Application 1* (n 202).
224 See, eg, *Further Application of Des Rosiers* [2016] NSWSC 365.
225 *AZ Application* (n 106) [12].
226 *Li Application 1* (n 195) [21] (Harrison J).

apparent doubt or question concerning the plea.[227] Unassisted applications often failed to indicate the matters giving rise to a doubt or question,[228] were 'wrong as a matter of law',[229] or contained irrelevant or unclear arguments.[230] The lack of clarity can hinder the decision-maker's ability to understand the applicant's assertions and may result in rejection due to insufficient articulation of apparent doubts or questions. A lack of clarity can also compel the decision-maker to try to interpret the grounds.[231] For example, as Harrison J noted in *Li v Attorney-General (NSW)*:

> Mr Li does not clearly articulate the apparent doubt or question as to mitigating circumstances in this case, nor does he identify any specific legal error. This may be the result of the fact that he is legally unrepresented, and English is not his first language. His lack of clarity therefore necessitates a degree of interpretation to determine the bases of the application.[232]

Repeat applicants seem particularly confused by the gateway test. As Davies J observed in *Application by Holland* ('*Holland Application 3*'):

> The failure of the applicant to take on board what Fagan J said, and in particular what it was necessary for him to do under the legislation, suggests that he is either unable or unwilling to address himself to what needs to be shown, to result in the Court dealing with the matter in the first place.[233]

(c) Understanding the Need to Clarify Special Facts or Circumstances

The third and largest area of applicant confusion surrounds the use of discretion in the division 3 decision-making process. Section 79(3) allows the decision-maker to refuse to consider an application on almost any grounds, including if the applicant fails to articulate a new ground of review or special facts or circumstance that warrant reopening the case.[234] Unassisted applicants are more likely to misunderstand this provision, with some simply resubmitting their appeal submissions without any explanation of the special facts or circumstances meriting reconsideration.[235] As Fagan J noted in *Application by Holland* ('*Holland Application 2*'):

> Mr Holland has misconceived the present application as a form of appeal from or review of Johnson J's decision whereas in fact he either has to identify some new matter which was not put to Johnson J or identify special facts or circumstances

227 *AZ Application* (n 106).
228 See, eg, *Alexander Application* (n 156).
229 *Li Application 2* (n 195) [45] (Button J).
230 See, eg, *Gibson Application* (n 157); *Svanda Application* (n 33); *Jimenez Application* (n 75); *Mosegaard Application* (n 158); *TDP Application 1* (n 202); *Groundstroem v A-G (NSW)* [2019] NSWSC 58 ('*Groundstroem Application*'); *Armand-Iskak Application* (n 93).
231 See, eg, *Li Application 2* (n 195).
232 *Li Application 1* (n 195) [21]. See also *Armand-Iskak Application* (n 93).
233 *Holland Application 3* (n 133) [29]. See also *Milat Application 7* (n 197); *Boege Application 3* (n 183); *Boege Application 4* (n 183).
234 *CARA* (n 31) s 79(3). See, eg, *Holland Application 2* (n 192).
235 See, eg, *Application by Olivieri* [2017] NSWSC 1394 ('*Olivieri Application*'). See also *Application of Huynh* [2020] NSWSC 1356 ('*Huynh Application*'); *Application by Klewer* [2021] NSWSC 1225 ('*Klewer Application*'); *Clark Application 1* (n 186); *Gibson Application* (n 157); *Hai Li Application* (n 158).

> under s[ection] 79(3) which would warrant reopening the matters previously considered by his Honour.[236]

The failure to identify new grounds for review, or special facts or circumstances that justify reopening the case, is the reason most applications are rejected.[237] As Wright J found in *Application by Kostov*: '[N]one of the facts and circumstances raised has sufficient merit to justify the expenditure of further judicial resources on consideration of the application for inquiry.'[238]

Repeat users face a particular hurdle in identifying grounds not covered in the appeal or previous part 7 application. For example, as Harrison J observed in *Application by GAR*:

> I have not been able to identify any issue or contention that even comes close to raising a new issue, or a significant variation of an old issue, that causes me to pause and reflect upon the question of GAR's guilt.[239]

Repeat applications also highlight the potential for misuse of division 3. As Schmidt J observed in the fifth application by Boege to overturn an assault conviction in which she was fined $500:

> Like Harrison J, I consider that Ms Boege's refusal to accept the rejection of her repeated applications and her pursuit of a fifth application to be frivolous and vexatious, a monumental waste of this Court's time and in any other litigious context, unarguably amounting to an abuse of the process of the Court.[240]

(d) Understanding the Need to Provide Relevant Support Material

As Johnson J said in *Application of Holland*:

> The jurisdiction which a judge is exercising under Part 7 *Crimes (Appeal and Review) Act 2001* … may be activated when the criminal justice system has run its course … and, in almost every case, *where additional evidence has come to light which is said to raise a doubt or question as to guilt or sentence*.[241]

Where 'no such additional evidence is relied upon … the applicant must show that, based on material that has already made its way through the criminal justice system', that their application gives rise to the appearance of a doubt or question. 'This is a high bar.'[242]

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236 *Holland Application 2* (n 192) [75]. See also *Holland Application 3* (n 133); *TDP Application 2* (n 203); *AZ Application* (n 106); *Gibson Application* (n 157); *Hai Li Application* (n 158).

237 See, eg, *Holland Application 2* (n 192); *Holland Application 3* (n 133); *TDP Application 2* (n 203); *AZ Application* (n 106); *Gibson Application* (n 157); *Hai Li Application* (n 158); *Olivieri Application* (n 235); *Huynh Application* (n 235); *Klewer Application* (n 235); *Clark Application 1* (n 186); *Svanda Application* (n 33); *Gonzales Application 2* (n 191); *Gonzales Application 4* (n 191); *Kostov Application* (n 156); *Boege Application 3* (n 183).

238 *Kostov Application* (n 156) [125(2)].

239 *GAR Application 3* (n 179) [8].

240 *Boege Application 5* (n 183) [15].

241 *Holland Application 1* (n 192) [10] (emphasis added). See also *Huynh v A-G (NSW) [No 2]* [2023] NSWCA 268, [9] (Bell CJ, Kirk JA and Simpson AJA) ('*Huynh Review 2*').

242 *Huynh Review 2* (n 241) [9] (Bell CJ, Kirk JA and Simpson AJA), quoting *Huynh Application* (n 235) [13] (Garling J).

Successful applications often clearly articulate new grounds for review and support these claims with fresh evidence that cast doubt on the conviction.[243] Unassisted applicants may fail to provide any supporting material, or struggle to articulate the relevance of the material they submit.[244] For example, as Ierace J noted in *Application by Reznitsky*: 'By letter dated 2 April 2019, the applicant replied that he required an extension of time to reply "due to my medical conditions, supported by the medical evidence", although no material as to his health was attached.'[245]

Another applicant directed the decision-maker on how the decision-maker could locate material. As Button J replied: 'I do not consider it my role to pursue those documents that may be relevant to the application.'[246]

Decision-makers also face challenges in interpreting and understanding voluminous or unclear submissions.[247] For example, one application was over 400 pages with references leading to another 870 pages of material when the 'substantive content could have been set on no more than five'.[248] Another comprised 151 pages of initial submissions, an additional 31 pages, a later document consisting of 21 pages, 43 pages of further additional submissions, 46 pages of submissions in reply and 11 pages concerning potential jurisdictional error.[249] The impact of this was clearly stated by Lonergan J in *Application by Glasby*, who had been asked to decide a 120-page application 'of closely typed, unparagraphed written submissions … followed by a further tranche of submissions … [with] [a] great deal of the second tranche of submissions repeat[ing] the initiating submissions':[250] 'Whilst this judgment is not long, a large amount of time was required to read, dissect, and extract relevant issues from the material put forward in support of this application.'[251]

3 Access to Legal Assistance

The analysis strongly supports the NSW government recommendation that applicants seek legal advice before pursuing a division 3 review.[252] The benefits of legal assistance are evident in cases where professionally prepared submissions are more focused and address specific legal issues. As Button J highlighted in *Application of Cvetkovic [No 2]*:

> [T]he further submissions prepared by the applicant personally were received on 13 May 2016. The submissions prepared by his counsel were received on 14 June

243 See, eg, *Cartman Application* (n 148); *Bebic Application* (n 142); *Adanguidi Application* (n 143); *Chidiac Application 2* (n 75); *JB Application* (n 148).

244 See, eg, *Alexander Application* (n 156); *Glasby Application* (n 212); *Doyle Application 2* (n 92); *Cheney No 1* (n 160); *Cvetkovic Application 1* (n 77); *TDP Application 1* (n 202); *Yenuga Application* (n 212); *Mosegaard Application* (n 158); *GAR Application 2* (n 179).

245 *Reznitsky Application 2* (n 200) [53] (emphasis omitted).

246 *Cvetkovic Application 1* (n 77) [18]. See also *TDP Application 1* (n 202); *Yenuga Application* (n 212).

247 See, eg, *Alexander Application* (n 156); *Jimenez Application* (n 75); *Glasby Application* (n 212).

248 *Holland Application 2* (n 192) [9] (Fagan J). See also *Fennell Application* (n 154); *Svanda Application* (n 33); *Potier Application* (n 212); *Gonzales Application 2* (n 191); *Cheney No 1* (n 160).

249 *Holland Application 3* (n 133) [21]–[22] (Davies J). See also *Armand-Iskak Application* (n 93).

250 *Glasby Application* (n 212) [2]–[3].

251 Ibid [44].

252 'Reviews of Convictions' (n 61).

> 2016. As one would expect, the latter focus more tightly upon the particular legal issue that was the solitary matter about which I invited further submissions.[253]

That does not mean that assisted applications are free from challenges. For example, in *Application of Uusimaki*, despite the application being prepared with legal assistance, Wilson J found that '[i]t is not entirely clear what, if anything, the applicant asks the Court to do with respect to the finding of guilt … since no conviction was recorded'.[254] Another example is found in *Adanguidi Application*, where Dhanji J queried why the legal representatives had requested an inquiry and not a referral, or, given the appeal process had not been exhausted, why there had been no direct application for an appeal out of time.[255] Dhanji J referred the matter to the CCA on his own motion, 'given … the questionable benefit of holding an inquiry'.[256] This demonstrates that legal professionals themselves may grapple with the intricacies of division 3, raising questions about the clarity of the requirements. The uncertainty faced by legal professionals in understanding division 3 emphasises the potential impact on unassisted applicants who lack the benefit of such expertise.

The above data-driven findings on the challenges facing division 3 applicants corresponds closely to those in the broader access to justice literature, namely investigatory resources, legal costs, limited legal aid funding, English language requirements and the complexity of the system. These issues particularly impact vulnerable and disadvantaged populations. Australians who experience disadvantage can find it more difficult to get access to justice for a multitude of reasons, including education and literacy levels, language barriers, financial constraints, and hesitation to engage in complex legal processes.[257] While the aim of administrative remedies is to alleviate barriers to justice, the above analysis clearly finds similar issues impacting the division 3 administrative review pathway. Addressing these challenges is crucial for ensuring a fair and effective post-appeal review process.

IV STRATEGIES TO ADVANCE A FAIR AND EFFECTIVE REVIEW

Before exploring strategies to improve the clarity of division 3 applications, it is worthwhile exploring the capacity of the most frequently recommended model to deliver a fair and effective review process for people convicted of a crime, namely, a Criminal Case Review Commission ('CCRC'). CCRCs serve as an alternative or addition to executive inquiry or referral pathways in countries that

253 *Cvetkovic Application 2* (n 74) [22]. See also *Bebic Application* (n 142); *Cartman Application* (n 148); *JB Application* (n 148).

254 [2020] NSWSC 1019, [42]. See also *Application by Daghagheleh* [2016] NSWSC 1868; *Coles Application* (n 188); *Cartman Application* (n 148); *JB Application* (n 148).

255 *Adanguidi Application* (n 143) [19]–[21]. For example, at [19]:

> In the present context, the fact that the applicant has not exhausted his avenues of appeal with respect to his conviction suggests the Court should refuse to deal with the application unless 'satisfied that there are special facts or special circumstances that justify the taking of further action' …

256 Ibid [54].

257 See generally Law Council of Australia, *The Justice Project* (Final Report, August 2018).

do not have an equivalent to division 3.[258] The following discussion compares the CCRC model to division 3.

A CCRC

The Law Council of Australia supports the introduction of a CCRC to redress the access to justice barrier created by placing the 'entire burden … of identifying, locating, obtaining and analysing further evidence' on an incarcerated person who lacks access to investigative resources and powers.[259] CCRCs are independent statutory bodies with the power and resources to investigate potential injustices and refer cases with a 'real possibility' of success back to the appeal court.[260] The first CCRC was established in England, with responsibilities for England, Wales and Northern Ireland, in 1997. It emerged from national reviews of the executive petition pathway and public outcry following the overturning of several '[p]articularly egregious wrongful convictions'.[261] CCRCs, such as in the UK, Scotland, and New Zealand ('NZ') are free to access and provide a transparent alternative to the executive petition pathway, with the availability of written reasons contributing to transparency.[262] CCRCs are also considered more cost-effective than inquiries. For instance, the entire annual budget for the UK CCRC is approximately AUD13.5 million,[263] compared to the reported $12 million it cost to run the single Eastman Inquiry.[264]

CCRCs have proved to be a popular conviction review avenue for applicants, with the NZ CCRC receiving 386 applications in less than four years compared to 172 executive petitions over 25 years.[265] In 2023 alone, the UK CCRC received 1,424 applications and made 25 referrals.[266] This number may reflect the larger population that the UK CCRC serves (approximately 61 million) compared to

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258 For example, in England, Wales and Northern Ireland, only the CCRC can send cases back to the appeal court: see 'Our Powers and Practices', *Criminal Cases Review Commission* (Web Page) <https://ccrc.gov.uk/our-powers-practices> ('Our Powers and Practices').

259 Law Council of Australia, 'Policy Statement on a Commonwealth Criminal Cases Review Commission' (Policy Statement, 21 April 2012) 2 <https://www.lawcouncil.asn.au/publicassets/9b40d8f6-bdd6-e611-80d2-005056be66b1/120421-Policy-Statement-Commonwealth-Criminal-Cases-Review-Comission.pdf>.

260 'Our Powers and Practices' (n 258). See generally Criminal Cases Review Commission (UK), *Annual Report and Accounts 2022/23* (Report, 2023) ('*UK CCRC Annual Report*'). See also 'How the Process Works', *Criminal Cases Review Commission* (Web Page) <https://www.ccrc.nz/how-it-works> ('How the Process Works'); 'Making an Application', *Scottish Criminal Cases Review Commission* (Web Page) <https://www.sccrc.co.uk/making-an-application-old>.

261 Carolyn Hoyle, 'The Shifting Landscape of Post-conviction Review in New Zealand: Reflections on the Prospects for the Criminal Cases Review Commission' (2020) 32(2) *Current Issues in Criminal Justice* 208, 210 <https://doi.org/10.1080/10345329.2020.1735924>.

262 For example, the NZ CCRC is legally obliged to make the reasons for decisions available to applicants and the public: see 'How the Process Works' (n 260). See also Hoyle (n 261) 220; Sangha and Moles (n 54) 296–7.

263 *UK CCRC Annual Report* (n 260) 42.

264 Fuller (n 10) 64.

265 Mike White, 'Hundreds Tell New Wrongful Conviction Body That They're Innocent', *Stuff* (online, 1 July 2021) <https://www.stuff.co.nz/national/crime/125579598/hundreds-tell-new-wrongful-conviction-body-that-theyre-innocent>; Te Kāhui Tātari Ture Criminal Cases Review Commission, *Rīpoata ā-Tau: Annual Report 2022/2023* (Report, 2023) 10.

266 *UK CCRC Annual Report* (n 260) 9.

Scotland (approximately 5.4 million),[267] NZ (approximately 5.2 million)[268] and NSW (approximately 8.4 million).[269] It may also reflect the number of people serving sentences in England, Wales, and Northern Ireland (approximately 79,000)[270] compared to Scotland (approximately 5,800),[271] NZ (approximately 5,200)[272] and NSW (approximately 7,500).[273]

The primary advantage of a CCRC lies in their investigative powers, allowing them to compel material and conduct thorough investigations.[274] This power distinguishes them from 'applicants, legal representatives or campaign groups, who typically will not have access to material that may reveal proof of non-disclosure, police malpractice, false allegations made by complainants or exculpatory forensic evidence'.[275] While CCRCs are resourced and have the power to investigate, they are susceptible to budget constraints and political influences in the same way that legal aid funding is affected in Australia.[276] For example, the UK CCRC budget 'was almost halved in the 15 years to 2019'.[277] The NZ CCRC was granted $4 million a year for three years, 'but that was based on dealing with 125 cases a year – not well over 200'.[278] Efforts to address drafting challenges, provide support to applicants, and enhance the quality review applications could contribute to a more effective and accessible post-appeal review process. As Commission Member David Kyle of the UK CCRC notes:

> It is certainly the case that if an applicant is … represented by a person who is acting on his or her behalf and is able to identify relevant issues and present them in a developed way, that is of great assistance to us, simply because it will speed up the process of review which we undertake. To that extent, representation which is provided at that sort of level is beneficial to the applicant because it is likely to result in a speedier review and decision by the Commission.[279]

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267 'Population of the United Kingdom in 2022 by Region', *Statista* (Web Page) <https://www.statista.com/statistics/294729/uk-population-by-region/>.

268 'Population, Total', *World Bank Group* (Web Page) <https://data.worldbank.org/indicator/SP.POP.TOTL>.

269 'National, State and Territory Population', *Australian Bureau of Statistics* (Web Page) <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release>.

270 'United Kingdom: England and Wales', *World Prison Brief* (Web Page) <https://www.prisonstudies.org/country/united-kingdom-england-wales>; 'United Kingdom: Northern Ireland', *World Prison Brief* (Web Page) <https://www.prisonstudies.org/country/united-kingdom-northern-ireland>.

271 'United Kingdom: Scotland', *World Prison Brief* (Web Page) <https://www.prisonstudies.org/country/united-kingdom-scotland>.

272 'New Zealand', *World Prison Brief* (Web Page) <https://www.prisonstudies.org/country/new-zealand>.

273 'Prisoners in Australia', *Australian Bureau of Statistics* (Web Page) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

274 Hamer, 'The *Eastman* Case' (n 5) 460; Jacqueline Hodgson and Juliet Horne, *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC)* (Report, May 2008) 8–9; *UK CCRC Annual Report* (n 260) 10–11.

275 Hoyle (n 261) 213.

276 Lisa Davies, 'Funding Shortfall Is Denial of Justice', *The Sydney Morning Herald* (online, 7 August 2019) <https://www.smh.com.au/national/nsw/funding-shortfall-is-denial-of-justice-20190806-p52eh3.html>.

277 White (n 265).

278 Ibid.

279 Evidence to Select Committee on Home Affairs, Parliament of the United Kingdom, London, 27 January 2004 (David Kyle) <https://publications.parliament.uk/pa/cm200304/cmselect/cmhaff/289/4012704.htm>. See also Hamer, 'The *Eastman* Case' (n 5) 460; Hodgson and Horne (n 274) 8–9.

Accordingly, it is worthwhile to explore mechanisms aimed at addressing drafting challenges faced by applicants in any administrative review model.

Table 5: CCRC Average Annual Data

	UK CCRC[a]	Scottish CCRC[b]	NZ CCRC[c]	Division 3[d]
Applications received	1,153	125	129	11
Reviews completed	1,119	124	45	11
Applications referred	31	6	1	2
Appeals heard	30	6	0	2
Appeals allowed	21	4	N/A[e]	1

[a] Average annual data from 1997–2023.[280]
[b] Average annual data from 1999–2022.[281]
[c] Average annual data from June 2020 – June 2023.[282]
[d] Average annual data from 2014–23.[283]
[e] The lone appeal is pending.

B Innocence Clinics

One strategy proposed to address drafting challenges during the application stage is to 'increase the resources and scope' of university innocence clinics.[284] University innocence clinics, a concept pioneered by Barry Scheck and Peter Neufeld in 1992,[285] have been established globally to assist individuals in proving their factual innocence, often through DNA evidence.[286] Today, there are over 70 official Innocence Projects around the world, collectively known as the 'Innocence Network',[287] and many similar clinics unaffiliated with the official network. These clinics manage their scarce resources judiciously through strict screening criteria, such as focusing on murder convictions and assessing the likelihood of sourcing DNA evidence.[288] Due to limited resources, most clinics can only support a few cases over an extended period.[289]

280 'Facts and Figures', *Criminal Cases Review Commission* (Web Page, 2023) <https://web.archive.org/web/20230727184002/https://ccrc.gov.uk/facts-figures/>. Figures accurate as at July 2023.
281 'Case Statistics', *Scottish Criminal Cases Review Commission* (Web Page, 2022) <https://www.sccrc.co.uk/case-statistics>. Figures accurate as at July 2023.
282 'Application Statistics', *Criminal Cases Review Commission* (Web Page, 2022) <https://www.ccrc.nz/news/application-statistics/>. Figures accurate as at July 2023.
283 Sourced from AustLII and NSW Caselaw.
284 Robert Bohm, 'Miscarriages of Criminal Justice: An Introduction' (2005) 21(3) *Journal of Contemporary Criminal Justice* 196, 199 <https://doi.org/10.1177/1043986205278811>.
285 'The Innocence Project', *Cardozo Law* (Web Page) <https://cardozo.yu.edu/innocence-project>.
286 Ibid.
287 'Who We Are', *The Innocence Network* (Web Page) <https://innocencenetwork.org/category/who-we-are>.
288 Fuller (n 10) 62.
289 As shared with the author on a field trip in 2020.

Research undertaken for this article identified four university innocence-type projects in Australia, at the University of Sydney (NSW), Griffith University (Queensland), Royal Melbourne Institute of Technology (Victoria), and the University of Newcastle (NSW).[290] The websites for these projects advise a focus on investigating claims of factual innocence. Notably, the University of Newcastle Legal Centre, associated with the University of Newcastle Justice Project, played a crucial role in assisting Kathleen Folbigg with two executive petitions for an inquiry into her conviction for the murder of three of her children and manslaughter of another, ultimately resulting in a full acquittal in 2023.[291] Despite their impactful work, the written reasons analysed in this article did not indicate any assistance from these clinics in the preparation of division 3 applications. Expanding the resources and scope of these existing projects could bridge this gap and offer crucial support to applicants navigating the complexities of the review process. This strategy aligns with the objective of addressing challenges at the application stage, ultimately enhancing the fairness and efficacy of the post-appeal review system.[292]

C Engaging Law Students

Drawing on the skills and interests of law students to provide support to potential review applicants is a practical and constructive strategy to address the drafting challenges impacting the review process. Under appropriate supervision, law students can play a valuable role in simplifying complex legal processes and enhancing the overall quality of review applications. For example:

- Law students can create plain English tip sheets outlining essential aspects of the review process and the key considerations that executive and division 3 decision-makers must consider. Clinic staff and students can collaborate with affected people and industry experts to ensure the tip sheets are widely accessible, such as in different languages and multimedia formats.
- Law students could draw on their communication skills to help refine the clarity and conciseness of draft applications. This may involve reviewing and revising the language used in the application, eliminating ambiguity, correcting grammatical errors, and ensuring that the grounds for review are clearly articulated.
- Students can examine earlier appeal submissions and division 3 applications to identify whether similar grounds have been addressed in

290 'Not Guilty: The Sydney Exoneration Project', *The University of Sydney Faculty of Science* (Web Page) <https://www.sydney.edu.au/science/our-research/research-areas/psychology/not-guilty-project.html>; 'Innocence Project', *Griffith University* (Web Page) <https://www.griffith.edu.au/arts-education-law/griffith-law-school/learning-teaching/innocence-project>; 'Bridge of Hope Innocence Initiative', *RMIT University* (Web Page) <https://www.rmit.edu.au/about/schools-colleges/global-urban-and-social-studies/our-teaching-areas/criminology-and-justice-studies/bridge-of-hope>; 'The University of Newcastle Justice Clinic', *The University of Newcastle* (Web Page) <https://www.newcastle.edu.au/school/law-and-justice/justice-centre> ('Newcastle Justice Clinic').

291 Rego (n 52); *Folbigg Appeal* (n 47).

292 'Newcastle Justice Clinic' (n 290).

earlier proceedings. This analysis can help applicants avoid redundancy and focus on presenting new and relevant information.

- Students can guide applicants in clarifying the relevance of any supporting material and ensure that the appropriate documents are attached to the application.

Assisting applicants in presenting clear and coherent requests can minimise the risks associated with interpreting unclear applications. This support can save time for decision-makers and reduce the likelihood of misinterpretation. By involving law students in these roles, the legal community can contribute to a fairer and more accessible post-appeal review system. This strategy aligns with the goal of improving application clarity and access to justice within the existing framework.

V CONCLUDING REMARKS

The access to justice issues surrounding post-appeal conviction reviews in Australia, particularly the challenges faced by wrongly convicted individuals, are a critical concern for the legal system. Constraints on the appeal resulting from the principle of finality, and accountability and transparency issues surrounding executive pathways, have led five Australian jurisdictions to introduce a second or subsequent appeal. The second appeal is especially important in these jurisdictions because they do not have a provision like division 3. The unique combination of features in division 3 adds an interesting layer to the post-appeal review landscape, including the publication of written reasons for decisions and the availability of judicial review. These features align with transparency and accountability principles, which are essential for a fair and just legal system.

Through a combination of quantitative data and qualitative analysis, this article sought to provide a preliminary understanding of the challenges faced by division 3 decision-makers and applicants. The evidence-based approach revealed challenges with application clarity and strength, and the value of legal assistance in preparing an application. Part IV revealed the important investigative role of CCRCs, a role akin to the inquiry pathway in NSW, and ways to engage law students to help make post-appeal pathways more accessible, transparent, and accountable. This, in turn, can positively impact the overall fairness and efficacy of the legal system in dealing with wrongful convictions in Australia.

This article was the first step in bridging the knowledge gap on division 3. Future research in this area might gather perspectives from applicants, legal professionals, and decision-makers involved in division 3 applications. This information is key to exploring strategies to streamline the application and decision-making processes. There is also scope for research on the wording of division 3, to enhance clarity and the process for judicial review, to avoid misuse. Such research would be invaluable to the broader goal of identifying a suite of feasible, evidence-based strategies that improve access to justice for the wrongly convicted in NSW.