Hon Andrew Little

Minister of Justice
Minister for Courts
Minister for Treaty of Waitangi Negotiations
Minister Responsible for the NZSIS
Minister Responsible for the GCSB
Minister Responsible for Pike River Re-entry

Ross Francis
fyi-request-10386-d52f6296@requests.fyi.org.nz

Dear Mr Francis

Official Information Act request: Criminal Cases Review Commission

Thank you for your email of 26 May 2019 requesting, under the Official Information Act 1982 (the Act), information relating to the Criminal Cases Review Commission (CCRC). I have detailed your specific requests and my response to each below.

1. Please provide me with a copy of all of your comments regarding the Justice Ministry's briefings in regards to the establishment of a Criminal Cases Review Commission. (You provided me with none of your comments in your recent response to me.)

I have appended to this letter a copy of the briefing entitled *Supplementary advice on the Criminal Cases Review Commission model* dated 9 March 2018. Some information has been withheld under section 9(2)(a) of the Act to protect the privacy of natural persons. Some information, including my comments, has also been withheld under section 9(2)(g)(i) of the Act to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty. I am satisfied that there are no other public interest considerations that render it desirable to make the information withheld under section 9 available.

2. With which defence lawyers (if any) did you consult in 2017 and 2018 in regards to the establishment of a Criminal Cases Review Commission?

I have appended to this letter a list of all experts consulted in 2017/18.

3. Who was the Chief Justice in July 2003, and did this individual advise the Justice Ministry in July 2003 that where possible miscarriages of justice are referred to the Court of Appeal, that "competing public interests are best balanced by a requirement that the court consider, on the whole of the evidence, whether a reasonable jury properly directed would now come to any other conclusion but conviction"? Is it your expectation that where a possible miscarriage of justice is referred to the Court of Appeal by the (soon to be established) Criminal Cases Review Commission, the court will consider the whole of the evidence before delivering its decision?

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Dame Sian Elias was the Chief Justice in 2003. As you will know from my response to your Official Information Act request of 5 November 2018, the then Chief Justice provided the advice quoted in question three of your request to the Ministry of Justice in her 2003 submission.

I expect that where the Criminal Cases Review Commission refers a conviction back to the appeal courts, the relevant court will treat the referral as if it were a first appeal. In doing so, I expect the relevant court would consider all relevant evidence, including new evidence, in making a decision on that case.

If you are not satisfied with my response to your request, you have the right to complain to the Ombudsman under section 28(3) of the Act. The Ombudsman may be contacted by email at info@ombudsman.parliament.nz.

Yours sincerely

Hon Andrew Little
Minister of Justice

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MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Andrew Little, Minister of Justice

Supplementary advice on the Criminal Cases Review Commission model

Date	9 March 2018	File reference	CON-34-22

Action sought	**Timeframe**
Note the contents of this briefing	16 March 2018
Indicate any amendments you wish made to the draft Cabinet paper enclosed with this briefing	
Direct officials to arrange for formal Ministerial consultation on the draft Cabinet paper	
Direct officials to undertake any further targeted consultation that is necessary to test elements of the proposed model for the Criminal Cases Review Commission	
Forward a copy of this briefing to the Minister of State Services and Attorney-General for their information	

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Brendan Gage	General Manager, Criminal Justice	04 494 9908	s9(2)(a)	☐
Stuart McGilvray	Policy Manager, Criminal Law	04 918 8812	s9(2)(a)	☒
Andrew Goddard	Senior Policy Advisor	04 494 9964		☐

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events

☐ Referred to: _____

☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

Purpose

1. This briefing provides supplementary advice on the proposed model for a New Zealand Criminal Cases Review Commission (CCRC), in response to views raised during targeted consultation with key stakeholders.

2. We seek your agreement to proceed with Ministerial and further departmental consultation on the attached draft Cabinet paper.

Executive summary

3. Targeted consultation undertaken in early 2018 on the proposed model for a CCRC indicated strong support on the general approach. Responses also provided valuable critique of areas of the model and identified new issues for consideration.

4. We have considered the responses to targeted consultation carefully and have undertaken further analysis on a range of important issues, including the test for referring suspected miscarriages of justice to the courts, the CCRC's powers to obtain information, and whether the CCRC should have an own-motion inquiry power.

5. The design of the CCRC is complex and the issues can be resolved in different ways. However, we think the advice below helps to strike a balance between the different views put forward during consultation, and will contribute to establishing an effective CCRC.

6. We have also prepared a draft Cabinet paper that reflects our advice on these issues. The draft paper is enclosed for your consideration.

7. Subject to your agreement on the matters in this paper, we will work with your office to arrange for Ministerial consultation on the draft Cabinet paper. We will also undertake further departmental consultation during this period. Similarly, subject to your agreement, we will continue to test some of the newer proposals with some of the experts who took part in targeted consultation.

Background

8. In late 2017, we provided you with an initial briefing on the key considerations for establishing a CCRC and advice on a proposed model. Officials also sought agreement to consult with the judiciary, complaints bodies such as the Independent Police Conduct Authority, representative leaders of the law profession, academics, and other key stakeholders to test and refine the proposed model.

9. The consultation period has now closed, and we provided you with copies of the feedback received on Friday 23 February 2018. The feedback was generally supportive of the proposed model, but submitters did raise questions about several aspects of the proposals and raised additional issues to consider.

Proposed model for establishing a CCRC

10. This section provides supplementary advice on issues raised during consultation, or identified by officials, specifically:

10.1. the organisational form of the CCRC

10.2. the test for referral to the courts

10.3. the secondary functions of the CCRC

10.4. the residual role for the Royal prerogative of mercy

10.5. the scope and process for the CCRC's information-gathering powers

10.6. a mechanism for testing claims of confidentiality and privilege

10.7. protections for information gathered by the CCRC

10.8. an explicit statutory power for the CCRC to regulate its own procedure

10.9. allowing the CCRC to take no further action in respect of an application

10.10. an ability to co-opt specialist advice, and

10.11. the power to initiate a review on the CCRC's own initiative.

11. Our advice on these issues is reflected in the draft Cabinet paper enclosed for your consideration. We will amend the draft Cabinet paper in line with your directions prior to any Ministerial consultation.

The organisational model for the CCRC should be an independent Crown entity

12. Submitters generally agreed with the organisational model proposed, including that the CCRC be established as an Independent Crown Entity (ICE) with a full time Chief and Deputy Chief Commissioner and up to three part-time Commissioners. However, some submitters raised concerns that the ICE model would not allow the CCRC sufficient independence from Ministers. As indicated in our previous briefing, we have also discussed the ICE model, and other possibilities, with the State Services Commission.

13. We also further considered alternative models of an independent statutory officer[1] and a senior departmental officer.[2] In our view, while existing examples of these types of officer[3] operate effectively and with independence, the levels of administrative support required for these models, including funding from within departmental budgets, will not address the specific concerns over the perception of independence in the context of the CCRC.

14. Further, in New Zealand, these types of independent officer do not tend to be established with a broader membership.

15. On balance, we remain of the view that the ICE model will enable the CCRC to operate within a coherent, well-established framework that is sufficiently independent of Ministers, the courts, and relevant state sector organisations including, for example, the Ministry of Justice, Police, and the Crown Law Office.

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[1] A new office, with administrative support from government, with the task of exercising specific statutory functions or powers independently of Ministers.

[2] A senior departmental officer will generally be required by statute to exercise specific statutory responsibilities independently of Ministers and departmental Chief Executives.

[3] Some examples of an independent statutory officer include the Inspector-General of Intelligence and Security and the Judicial Conduct Commissioner. In the justice sector, the Legal Services Commissioner is an example of a senior departmental officer.

16. As an ICE, the CCRC would not be subject to Ministerial direction on matters of government policy under the Crown Entities Act 2004, including in relation to its statement of intent and statement of performance expectations. The only directions to which it would be subject are whole of government directions or any specific powers of direction that were inserted into its own legislation. We do not propose that any such powers of direction would be included.

17. To minimise compliance costs we propose the CCRC should be exempted from preparing a Statement of Intent. We will also consult further with the State Services Commissioner about the proposal to exempt the CCRC from preparing statements of performance expectations under the Crown Entities Act, and recommend you forward this briefing to the Minister for State Services for his consideration. Further consideration of these issues will serve to address the concerns raised above in a manner that does not depart unnecessarily and inappropriately from the well-established model for ICEs provided in the Crown Entities Act.

18. We also recommend specifying that there be a *minimum* of three Commissioners, including the Chief and Deputy Chief Commissioner.[4] This will help to ensure that there is a sufficient quorum of Commissioners to robustly consider decisions on referral.

Confirming the approach to the test for referral

19. As noted in our previous briefings, the test for referral is arguably the most critical and complex element of the design of the CCRC.

20. The test we consulted on captures the essential principles underpinning the exercise of the referral power, on which there was general agreement. However, there were matters highlighted in submissions that suggest the test can be refined and clarified further. We suggest you seek Cabinet approval to adopt, in principle, the test we consulted on and for officials to test the drafting with select experts before introduction. Our reasons for recommending this approach are set out below.

We consulted on a proposed test informed by core constitutional principles and overseas experience

21. The CCRC's primary function will be to refer any conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred. This will replace section 406 of the Crimes Act 1961, under which the referral power is currently exercised by the Governor-General on Ministerial advice.

22. The tests in the legislation for the United Kingdom (England, Wales and Northern Ireland) CCRC and the Scottish CCRC are:

    22.1. **United Kingdom** – that there is a 'real possibility' that the conviction or sentence will be set aside, there is new argument or evidence, and the applicant has exhausted the appeal process, and

    22.2. **Scotland** – that a miscarriage of justice may have occurred and that the reference is in the interests of justice.

23. We put forward the following test for referral during targeted consultation:

[4] See, for example, Transport Accident Investigation Commission Act 1990, s 5(1).

Proposed test for referral

On the consideration of an application, the Commission may refer the question of a person's conviction or sentence [to the relevant appeal court] if the Commission considers that:

- there is a reasonable prospect that [the relevant appeal court] will allow an appeal against conviction or sentence, as the case requires, if the reference is made; and
- it is in the interests of justice that the reference be made.

In considering whether it is in the interests of justice that a reference be made, the Commission must consider whether or not the person has used his or her opportunities to appeal or seek leave to appeal against conviction or sentence, as the case requires.

The question so referred shall be heard and determined by the relevant appeal court as in the case of an appeal against conviction, sentence or both, as the case requires.

24. This proposed test was informed by the core principles underlying the Royal prerogative of mercy and the referral mechanisms exercised by the UK and Scottish CCRCs, including that:

    24.1. the courts should have an opportunity to reconsider a person's conviction or sentence if a miscarriage of justice may have occurred

    24.2. convicted persons are normally expected to exercise their rights to appeal against conviction or sentence before asking the CCRC to intervene

    24.3. the referral process is not an opportunity to simply repeat arguments or re-examine evidence that have already been considered by the courts

    24.4. what is normally required to justify re-opening a case is "something new" – evidence or argument – that has not previously been examined by the courts

    24.5. the referral test should be permissive, not mandatory, so a referral is not made where it would be contrary to the interests of justice, and

    24.6. the CCRC should be satisfied that the case to be referred is capable of supporting an appeal.

25. Submitters broadly agreed with these underlying principles. However, there were differing views on whether the proposed test sufficiently reflected these principles and several responses opposed the construction of the test for the reasons outlined below.

Some submitters' raised concerns on the proposed test

26. Some submitters expressed general support the proposed test for referral. However, several of the responses were strongly opposed to the proposed test, or to part of the proposed test.

27. The reason for this opposition was predominantly focussed on the predictive nature of the 'reasonable prospect' test. The concern is that the test literally requires the CCRC to assess what a court will or will not do, rather than whether the CCRC believes a

miscarriage of justice may have occurred. Possible consequences of this approach were seen to include that:

27.1. the CCRC's independence from the courts would be called into question

27.2. it would be inconsistent with the structure of the CCRC which will include 'lay' Commissioners, and

27.3. it would hinder referral where to do so would 'strain at the standards of the court'[5], i.e. where the Commission uncovers a form of miscarriage hitherto unrecognised by the courts, or where the CCRC considers a miscarriage of justice has occurred but is not confident the court will ultimately agree.

28. It was also suggested that the "reasonable prospect of success" threshold was set too high, possibly higher than that used in the United Kingdom.

29. Other concerns with the proposed test included that the 'reasonable prospect' and 'interests of justice' tests may overlap. It was suggested the two-stage test seems counterintuitive, in that it would never not be in the interests of justice to refer a case with a 'reasonable prospect of success'. Some submitters also considered that the Scottish test may be more readily comprehensible than the predictive model, in that it focuses squarely on the question of a possible miscarriage of justice.

30. Lastly, there was some concern about the explicit inclusion of a requirement to consider the status of appeals in determining whether reference was in the interests of justice. Some submitters considered that it would be preferable to leave this element of the test undefined, as to cite any factors would give the issue undue prominence and, potentially, inhibit a referral which arguably ought to be made.

Officials' comment on overseas tests

31. We do not consider it is appropriate to simply adopt the overseas tests in New Zealand.

32. For example, adopting the Scottish test wholesale would present its own issues, as the term 'miscarriage of justice' does not align neatly with the statutory framework for appeals on conviction, and does not align with the test for appeal on sentence at all. While the legislation could possibly take account of this by, for example, creating a separate test for sentence applications, this may lead to unnecessary complexity. In our view, capturing the same conceptual balance requires tailored drafting for the New Zealand context.

33. In our view, the overseas tests capture the same principles outlined above in paragraph 24, albeit by different means.

34. Both tests are inherently predictive, in that the CCRC must consider whether there will be grounds for a court to uphold an appeal if a case was referred back. Both tests provide means for the Commissions to insist on applications being able to point to "something new" that has not been considered in the Courts. The distinction essentially lies in the extent to which the statutory language encapsulates these principles *explicitly*.

[5] D. Nobles and R. Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship With the Court of Appeal* [2005] Crim LR 173 at 189).

Recommended approach

35. Our overall assessment is that the test we consulted on is likely to represent a sound expression of the principles. The test is tailored in practice to New Zealand's appeals framework (which is different from the British jurisdictions). The 'reasonable prospect' test has never, to date, been thought to present any difficulty to referral of a deserving case to the appeal courts. However, we consider there is merit is investigating whether the wording can be refined in drafting, and to further test the precise statutory wording.

36. We therefore propose that the Cabinet paper:

    36.1. **seeks agreement** to adopt, in principle, the test we consulted on ('reasonable prospects of success' and referral is in the interests of justice)

    36.2. **notes** that submitters raised matters which suggest the proposed test can be further refined and clarified to ensure it reflects the core principles, specifically to:

        36.2.1. clarify that the CCRC must make its own assessment of the merits of an appeal

        36.2.2. ensure a reference can be made in finely balanced cases where, for example, the courts have not previously ruled on questions arising but where the CCRC considers the application should be referred, and

        36.2.3. allow appropriate scope for an interests of justice assessment.

37. Because of the importance of the test, and the precise wording that is used, we also suggest that you seek Cabinet's approval for officials to consider the test further in light of submitters' concerns identified in paragraph 27 and test options with selected experts.

More limited secondary functions may be preferable

38. We heard a range of views on the value of including secondary functions for the CCRC. Some people were of the view that including secondary functions of education and promotion of the CCRCs role, and reporting on trends and systemic issues, were valuable adjuncts to the CCRC's primary function. Others were of the view that there was no need to enumerate these functions specifically in the statute, and that to do so may risk distracting from the CCRC's core role.

39. We recommend retaining the proposed secondary function that the CCRC promote, by way of education and discussion, its primary function. Promotion of the work of the CCRC and the application process will help to increase the number of viable applications and the quality of the information contained in applications. It will also help to set clear expectations about how the process works and potentially increase overall satisfaction with the CCRC as a result.

40. However, we do not suggest proceeding with the secondary function of monitoring and reporting on trends and systemic issues relating to miscarriages of justice.

41. An explicit ability to report on systemic issues, for example to the House of Representatives, would be a powerful means of bringing critical issues to the public's attention. However, the anticipated volume of cases would be unlikely to generate reportable trends or 'systemic issues'. In any case, the CCRC would be able to bring

such matters to the relevant authorities' attention through informal channels, or via its annual report.

Should the CCRC advise on compensation claims?

42. It was also suggested during targeted consultation that the CCRC should have a statutory function to advise on compensation claims relating to miscarriages of justice.

43. We understand you do not propose that the CCRC have a role in recommending compensation for wrongful conviction and imprisonment. There is no legal right to compensation for wrongful conviction and imprisonment in New Zealand. It is paid by the Government as a matter of discretion. Cabinet makes these decisions because they involve *ex gratia* payments of public money. Changes to this framework would require separate consideration and advice. We also note that you have directed officials to provide a detailed briefing outlining improvements that can be made to the current Guidelines governing compensation for wrongful conviction and imprisonment.

44. On this basis, we have included a section in the draft Cabinet paper noting this issue has been raised, but that you do not propose to proceed with the suggestion at this time.

Residual role for the Royal prerogative

45. In our last briefing, we indicated that there would be a residual role for the Royal prerogative of mercy. We advised that the legislation for the CCRC would need to be drafted in a way that:

    45.1. makes it plain that the CCRC is the body to which miscarriage of justice allegations should be made and that applicants should not see the prerogative of mercy simply as an additional or alternative remedy;

    45.2. enables the Governor-General (or Minister of Justice) to refer applications for the prerogative of mercy that allege a miscarriage of justice direct to the CCRC for it to deal with under its statutory authority

    45.3. preserves the authority of the Governor-General to exercise the prerogative powers delegated by the Letter Patent, albeit that the occasion for exercise of those powers will be extremely rare, and

    45.4. enables the Minister of Justice, to request the opinion of the CCRC on a matter related to the possible exercise of the prerogative of mercy, for example on an application for a free pardon.

46. On balance, responses to targeted consultation tended to agree that it was vital for the legislation to clearly articulate the relationship with the residual powers under the Royal prerogative, and that the proposed approach was an appropriate way of doing so.

47. In targeted consultation, we also tested the idea of enabling the CCRC to recommend to the Governor-General that they consider granting a full pardon. The Governor-General would then seek advice from the Minister of Justice, as is current practice.

48. We do not recommend proceeding with that proposal. The principal risk in providing the CCRC with a power to recommend a pardon is that it could encourage applicants to believe that the path to a pardon is to apply not to the Governor-General but to the CCRC. This could give the remedy more prominence than is warranted, complicate

decision-making and draw the CCRC away from its core function. In addition, the fact of a formal recommendation from the CCRC could place undue pressure on the Minister of Justice and Governor-General to adopt the recommendation.

Adjusting the scope and process for the CCRC's information-gathering powers

49. Responses received in targeted consultation were generally supportive of providing the CCRC with information-gathering powers. However, some concerns were raised about the proposal for a court order to compel information from private individuals, and the ability to summons people to, for example, give evidence on oath.

50. Specifically, respondents were concerned that requiring a court order to compel information from private individuals could create unnecessary procedural complexity, and pointed to the fact that other broadly comparable bodies and legislation in New Zealand do not generally make this distinction. More importantly, some respondents noted that requiring a court order could potentially undermine the perceived independence of the CCRC from the courts, as well as the constitutional principle of comity.

51. On balance, we are of the view that the CCRC's information-gathering powers should use the same test proposed for both public and private persons, namely that the CCRC have reasonable grounds to believe the information is necessary for the purposes of reviewing a case, and that it is not able to obtain the information in any other manner. We therefore do not propose to proceed with the proposal to require a court order.

52. There was also concern that a power to issue summons, or give evidence on oath, was unlikely to be necessary and would be overly intrusive into individuals' privacy. It was suggested that it was also unclear that a statutory power to compel a person to give evidence on oath would have any real utility if they did not wish to cooperate.

53. Conversely, exclusion of an ability to compel evidence on oath would take the CCRC's powers out of alignment with those generally provided to investigative bodies in New Zealand, and inquiries under the Inquiries Act 2013. Limiting the CCRC's investigative powers to documents or exhibits only may also prevent the CCRC obtaining the best information to assist its inquiries.

54. We seek your direction on whether the CCRC should have an ability to summon witnesses and require people to give evidence on oath.

Existing privileges retained in relation to information sought by the CCRC

55. Some submitters raised questions about whether the CCRC would be able, in exercising its information gathering powers, to override any existing privileges in relation to information. We do not believe that overriding existing privileges or confidentiality would be appropriate.

56. However, it may be worthwhile to establish a mechanism to test claimed privilege or confidentiality. For example, the Inquiries Act 2013 provides that an inquiry may examine any document or thing for which privilege or confidentiality is claimed, or refer the document or thing to an independent person or body, to determine whether:[6]

[6] Section 20(c) refers.

56.1. the person claiming privilege or confidentiality has a justifiable reason in maintaining the privilege or confidentiality, or

56.2. the document or thing should be disclosed.

57. In our view, this mechanism would help to ensure that existing privileges are protected, but also enables the veracity of claims to be tested with a view to ensuring that any information that may shed light on a possible miscarriage of justice is not unjustifiably withheld from the CCRC.

Statutory protection for information gathered by the CCRC is necessary

58. Adequate protections for information obtained by the CCRC was consistently raised during targeted consultation as an important area to address.

59. We propose a general prohibition on the disclosure of information held by the CCRC. Specifically, a person who is or has been a member or employee of the Commission shall be prohibited from disclosing any information obtained by the CCRC in the exercise of any of its functions unless the disclosure of the information is authorised by the CCRC on limited grounds.

60. The exceptions to the prohibition on disclosure should include where the CCRC discloses, or authorises disclosure:[7]

60.1. for the purposes of any criminal, disciplinary or civil proceedings[8]

60.2. in order to assist in dealing with an application for compensation for wrongful conviction and imprisonment

60.3. in order to assist in dealing with an application to the Governor-General for the exercise of the residual powers under the Royal prerogative of mercy

60.4. in any statement or report required by the legislation establishing the CCRC, and

60.5. in or in connection with the exercise of any of the CCRC's functions.

61. The exception from the prohibition on disclosure would also naturally cover disclosure made by a person who is a member or an employee of the CCRC to another member or an employee of the CCRC, and where a person consents to their information being disclosed.

62. Lastly, the CCRC should be able to disclose information for the purposes of the investigation of an offence, or deciding whether to prosecute a person for an offence, unless the disclosure is or would be prevented by an obligation of secrecy, confidentiality, privilege, or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise.

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[7] See, for example, Criminal Appeal Act 1995 (UK), s 24; Criminal Procedure (Scotland) Act 1995, s 194K.

[8] The UK CCRC cites examples of this including information about a witness which could be of assistance to the prosecution or defence in separate criminal proceedings, where material is relevant to disciplinary proceedings brought by a professional regulatory body, such as the Independent Police Conduct Authority, or where an applicant is seeking to bring a civil action for damages against his legal representative and/or against the police; see Criminal Cases Review Commission, 'Formal Memorandum – Disclosure by the Commission', pg. 4 – 5.

63. These protections are modelled off those used in relation to the UK and Scottish CCRCs,[9] and recognise that the CCRC will be gathering information that needs to be held in confidence and with appropriate protections. However, it also recognises that disclosure of information will, in a range of circumstances, be necessary.

64. Again, the ability to authorise disclosure is permissive; it would not require the CCRC to make such a disclosure simply because a request had been received where that disclosure would be unreasonable, inappropriate, or harmful.

65. In this regard, we consider that the Official Information Act 1982 should not apply in respect of information contained in any correspondence or communication that has taken place between the CCRC and any person in relation to an investigation by the CCRC. This is a common feature for investigative bodies in New Zealand to protect the integrity of the investigative process. It would also affirm that material would be accessible at the discretion of the CCRC. The provisions of the Privacy Act 1993 would apply as normal.

The CCRC should be given explicit statutory power to regulate its own procedures

66. In our previous briefing, we suggested that the CCRC should be allowed to develop its own case-handling policies. Submitters were highly supportive of this and, indeed, suggested that this ability be codified in the legislation. The legislation for the UK and Scottish CCRCs both contain a similar provision.[10]

67. Providing the CCRC with the explicit statutory ability to regulate its own procedure would provide it the necessary independence and flexibility to ensure it can fully regulate procedures to keep pace with any changes in its operational context. The legislation could require that these procedures be published publicly.

68. We suggest this power include the ability to regulate the CCRC's decision-making process on referrals. This is in response to concerns raised by submitters that our proposal that decisions to refuse to make a referral should be made by a single Commissioner may not be robust enough to ensure an appropriate and fair decision is made. We think allowing the CCRC to regulate its procedure in this regard would enable the development of robust decision-making procedures, without unnecessarily trying to predict and codify how the CCRC should best approach its decisions on referral.

The CCRC should be explicitly permitted to take no further action on an application

69. In our previous advice, we noted that our initial view was that it may be preferable not to specify grounds to refuse an application in statute.

70. Investigative bodies in New Zealand generally have an explicit power to decide to take no action on an application.[11] Consultation indicated that giving the CCRC this ability would be useful in triaging applications, and it may give confidence to the CCRC not to pursue applications that clearly have no merit. This is necessary to ensure that the CCRC can fully exercise its functions and powers in respect of deserving cases, including those begun on its own initiative.

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[9] Refer Criminal Procedure (Scotland) Act 1995, s 194K; Criminal Appeal Act 1995 (UK), s 24.
[10] Refer Criminal Procedure (Scotland) Act 1995, Schedule 9A, s 6; Criminal Appeal Act 1995 (UK), Schedule 1, s 6.
[11] See, for example, Independent Police Conduct Authority Act 1988, s 18; Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 15A.

71. We propose that the CCRC may take no further action where, for example:

71.1. the identity of the convicted person is unknown and investigation of the application would thereby be substantially impeded

71.2. the subject matter of the application does not relate to an alleged miscarriage of justice

71.3. the complaint is frivolous or vexatious or is not made in good faith

71.4. the convicted person does not desire that action be taken or, as the case may be, continued

71.5. the applicant has died in the course of the investigation, or

71.6. in the course of the investigation, it appears that any further action is unnecessary or not in the interests of justice.

72. The ability to take no further action where the applicant has died during the investigation recognises that, in New Zealand, a referral is not possible without an appellant. Because the ability to take no further action is permissive, the CCRC could, where it considered it was appropriate, complete a review notwithstanding an applicant had died during the investigation. As we noted in our previous briefing, this could help to meet expectations and wishes of the deceased's family or friends, who may have a strong desire to see the investigation concluded.

Enabling the CCRC to co-opt specialist advice

73. During targeted consultation, it was suggested that the CCRC be given a power to co-opt specialist advice to assist with its function. Broadly comparable models for this power exist in the New Zealand Public Health and Disability Amendment Act 2010 for the Health Quality and Safety Committee, and in the Contraception, Sterilisation and Abortion Act 1977 for the Abortion Supervisory Committee.

74. We consider that this power could support the policy objectives of ensuring that relevant expertise, and a diversity of experience, is available to the CCRC Board. For example, where the Commissioners felt that particular expertise would be beneficial in considering whether to make a referral, they could invite a specialist advisor to provide additional advice to the Board. The specialist advisor would not participate in the decision-making process. The CCRC would also, as a matter of course, be able to contract specialist advice for its investigations.

75. The same confidentiality requirements and prohibitions on disclosure that apply to the CCRC would apply to any advisors appointed to assist the CCRC in its work.

Limiting the proposed power to begin investigation on the CCRC's own initiative

76. Some submitters raised concerns about the proposal for the CCRC to be able to begin an investigation on its own initiative.

77. The concerns about own-motion investigations included that:

77.1. taking on investigations where the convicted person did not wish to take an appeal would be a waste of public resources and an unwarranted intrusion into the lives of private citizens

77.2. it could undermine the independence of the judiciary if, without any complaint from the defendant, the CCRC began to assess a miscarriage that it perceived had gone uncorrected by the courts

77.3. it is hard to envision a situation where the CCRC would have sufficient information to initiate an investigation without an application, and

77.4. there is a risk that the CCRC could become an advocate for the person concerned, rather than an impartial assessor of the facts.

78. We understand that the other CCRCs have found proactive investigations to be necessary and desirable, albeit in limited circumstances, despite having no explicit statutory authority for this power. Some situations where this arises include where:

78.1. an investigation indicates that an issue with a particular conviction may have ramifications for a co-accused's case, the co-accused has not made an application[12], or

78.2. thematic issues[13] are brought to the attention of the CCRC.

79. We also note our initial view that proactive investigation would assist individuals who lack the resources to make an application, and may have no recourse to legal assistance or someone to champion their cause to the CCRC. These issues are likely to be more acute for Māori and Pasifika, who comprise 60 percent of the prison population[14] but have only been estimated as making between 11 – 16 percent of applications for the Royal prerogative of mercy.[15]

80. On balance, we therefore favour retaining an ability for own-motion inquiries, but consider the power should be limited in scope.

81. First, we consider the power should be limited to making *initial* inquiries, rather than launching a full investigation. Second, to ensure it is used only where necessary and appropriate, we recommend that such initial inquiries only take place where the CCRC is satisfied that there are reasonable grounds to carry out an investigation in the public interest.[16] Lastly, the CCRC should inform the affected person as soon as reasonably practicable and ascertain whether they wish to pursue an application.

Responding to the proposal to limit the CCRC's focus to factual innocence

82. In targeted consultation, the Chief Justice suggested that the CCRC should only focus on cases of factual innocence, and should not be tasked with reviewing procedural and legal rulings, as these are more appropriately dealt with on appeal.

[12] For an example of this, see *Johnston & Allison v HMA* 2006 SCCR 236.
[13] Thematic issues could include matters such as widespread material non-disclosure, advances in forensic science, or investigative practices.
[14] Department of Corrections, 'Prison facts and statistics – September 2017'.
[15] Mount (2009) pg. 474.
[16] See, for example, Independent Police Conduct Authority Act 1988, s 12(1)(b).

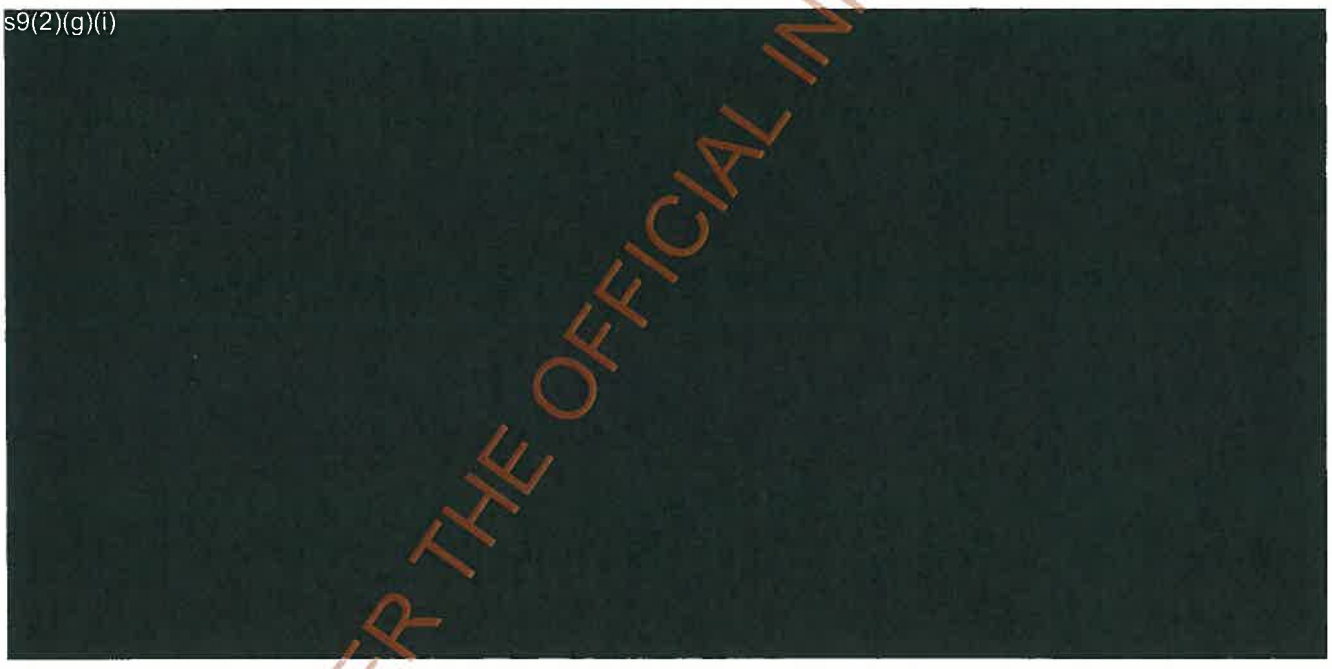
83. It is not intended that the CCRC should operate as a further right of appeal, simply to allow the rulings of the courts to be challenged. Referrals to the appeal courts under the Royal prerogative of mercy nearly always turn on the availability of "fresh" evidence that, for some reason, has not been previously examined by the courts. Sometimes, there is a related question about whether trial counsel was in error in not discovering or adducing such evidence. Other matters that could support a successful appeal may arise for consideration but they are usually dealt with via the normal appeal process, as the Chief Justice indicates.

84. Existing conventions will be reflected in the design of the CCRC and the statutory test for referral. Concerns about the CCRC being seen as a further right of appeal will continue to be addressed by the general expectation for fresh evidence or new arguments to warrant a referral being made.

85. We do not consider there is a need to expressly limit the scope of the CCRC's focus, and recommend you write to the Chief Justice explaining reasons for not focussing the proposed legislation specifically, or solely, on factual innocence.

86. Should you agree, we will prepare a draft response to the Chief Justice for your review.

s9(2)(g)(i)



91. If you agree, we will work with your office to arrange for Ministerial consultation on the draft Cabinet paper, with any necessary modifications. We will also undertake further departmental consultation during this period. Similarly, subject to your agreement, we will continue to test some of the newer proposals with some of the experts who took part in targeted consultation.

92. Given the machinery of government and broader constitutional implications, we also suggest you forward a copy of this briefing to the Minister of State Services and the Attorney-General. We will also consult further with the State Services Commissioner about the proposal to exempt the CCRC from preparing statements of performance expectations under the Crown Entities Act.

[17] On average, it takes 67 working days (approximately 3 months) for a 50 clause Bill of medium complexity.
[18] Refer Standing Order 290(2).

Recommendations

93. It is recommended that you:

1. **Note** the contents of this briefing

2. **Agree** that the Cabinet paper:

   2.1. **seek agreement** to adopt, in principle, the test we consulted on ('reasonable prospects of success' and referral is in the interests of justice) YES / NO

   2.2. **note** that submitters raised matters which suggest the proposed test can be refined and clarified to ensure it reflects the core principles YES / NO

   2.3. **seek agreement** for officials to consider the test further in light of submitters' concerns and test options with selected experts YES / NO

3. **Indicate** your preferred approach to the scope of the CCRC's information-gathering powers, namely whether to:

   3.1. require that a court order be sought to compel information from private individuals (not recommended) YES / NO

   3.2. include the ability to summon witnesses and require persons to give evidence on oath YES / NO

4. **Indicate** to officials any amendments you wish to see made to the draft Cabinet paper

5. **Direct** officials to work with your office to arrange for Ministerial consultation on the draft Cabinet paper YES / NO

6. **Direct** officials to undertake any further targeted consultation with the judiciary, representative leaders of the law profession, academics and other key stakeholders that is necessary to test elements of the proposed model for the CCRC YES / NO

7. **Direct** officials to draft a response to the Chief Justice in response to feedback received during targeted consultation YES / NO

8. **Forward** a copy of this briefing to the Minister of State Services and Attorney-General for their information YES / NO

Stuart McGilvray

Policy Manager, Criminal Law

APPROVED SEEN NOT AGREED

Hon Andrew Little

Minister of Justice

Date / /

Attachments: Draft Cabinet paper – Establishing a Criminal Cases Review Commission