



21 AUG 2019

Ross Francis

fyi-request-10785-2a0388d9@requests.fyi.org.nz

Dear Mr Francis

Official Information Act request: Criminal Cases Review Commission

Thank you for your email of 22 July 2019 requesting, under the Official Information Act 1982 (the Act), information related to the establishment of a Criminal Cases Review Commission (the Commission). Your requests and my responses to each are set out below.

1. *On 28 June 2019, you informed me that you had consulted with various stakeholders about establishing a Criminal Cases Review Commission. Among those with whom you consulted were Sir Thomas Thorp, Sir Thomas Eichelbaum and Kristy McDonald. Please supply me with a copy of the comments made by of each of these individuals.*

I have appended to this letter copies of the submissions made by Sir Thomas Thorp, Sir Thomas Eichelbaum and Kristy McDonald, respectively.

2. *Among submissions received by the Justice Committee, a number of changes to the Criminal Cases Review Commission Bill have been proposed. What possible changes, if any, have been discussed by the Committee?*

I am not responsible for any Select Committee. In addition as the Criminal Cases Review Commission Bill is still before the Justice Committee. Standing Order 239(1) provides that proceedings of a select committee other than during the hearing of evidence remain strictly confidential to the committee until it reports to the House of Representatives. Divulging proceedings of a select committee contrary to the Standing Orders constitutes contempt of the House of Representatives (see Standing Order 410(q)). Consequently, I am refusing your request under section 18(c)(ii) of the Act as making the information available would constitute contempt of the House of Representatives.

3. *You advised me that the Court of Appeal is expected to treat any referral "as if it were the 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". Have you conveyed to the Court of Appeal your expectations about how it should treat referrals? If so, what was the court's response?*

In my previous letter of 28 June 2019, I outlined how I would expect the Court of Appeal to deal with referrals. However, that was simply my view of how I thought the Court would deal with referrals. It would be inappropriate for me to direct or seek to influence the courts in the exercise of their functions. It is a fundamental principle of our system of government that the courts operate independently of Ministers of the Crown. This is to ensure that there is no political interference in decisions by the courts.

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

10 February 2018

Stuart McGilvray
Manager
Criminal Law Policy Group
Ministry of Justice

By Email: stuart.mcgilvray@justice.govt.nz

Dear Stuart,

Confidential Consultation on Criminal Cases Review Commission

Thank you for your letter of 10 January 2018 enclosing the Confidential Issues Paper. Sir Thomas and I are grateful to have been consulted, and we have addressed the specific questions posed in the attached document.

By way of general comment, we emphasise what we believe to be the essential characteristics of a CCRC, namely:

- Independence from the political process and the criminal justice system;
- A high level of investigative and legal expertise;
- The ability to gain the confidence of potential claimants;
- Adequate powers and resources.

As to the first, we support the Independent Crown Entity model, and suggest that consideration be given to the appointment process and security of tenure for board members of the Commission.

As to the second, we believe the Commission should strive to get the services of highly experienced leaders in their respective fields, including the legal, scientific and public service fields. This will be possible only if board members are able to continue their careers while contributing to the work of the Commission as an adjunct. In part for this reason, we think there should be provision for a larger number of board members, who participate on a part-time basis.

We think the importance of gaining the confidence of potential claimants is such that there should be both Māori and if possible Pacific board members. Again, this requirement suggests that the current provision for "up to five" members should be reconsidered.

Both of the UK bodies were of course set up after high powered public inquiries that spent a considerable period of time considering the various issues. We have the advantage of being able to observe and learn from the operation of the UK bodies, and in our view it would be highly desirable that those involved in setting up the New Zealand body are able to spend time in the UK to learn directly from the CCRC and SCCRC.

Finally, on the question of resources, we again emphasise the importance of obtaining the services of leaders from the relevant professions to sit on the Commission's board. This will contribute not only those individuals' good judgment, expertise and sound decision-making, but will also help to ensure the Commission is held in high esteem in the Courts, which is vital to its success.

You will see in the attached responses that there are one or two areas where we have suggested time for further reflection would be helpful. We note the invitation to provide further feedback and would be happy to do so at an appropriate time in the development of the Commission.

We have no objection to any of our comments being released under the Official Information Act.

Yours sincerely

Two handwritten signatures in blue ink. The first signature is on the left and the second is on the right.

Simon Mount QC and Sir Thomas Thorp

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Criminal Cases Review Commission – questions for consultation

Responses of Sir Thomas Thorp and Simon Mount QC

10 February 2018

Functions

Statutory power of referral

1. Do you agree that the primary responsibility for determining the safety of a conviction should remain with the courts, **Yes** and that the CCRC be limited to referrals back to court only?
 - **Yes, with qualifications below.**

Promotion, education and monitoring of trends

2. Should the CCRC have explicit statutory responsibility for the promotion of, and education in relation to, its functions, and to monitor trends in relation to its investigations?
 - **Yes**
3. When and how do you think the CCRC should report to the relevant Minister(s) about trends in relation to its investigations?
 - **Our understanding is that it took several years before the UK Commissions were able to report meaningfully on trends. We think the same is likely to be true here. We agree with the principle expressed, and agree it should be a function of the CCRC to make such reports "from time to time", or some equivalent formula, leaving the timing to the Commission.**

No further secondary functions

4. Do you believe there is an additional statutory function the CCRC should perform? If so, what and why?
 - **We believe some consideration should be given to the CCRC having the power to assess or recommend compensation for miscarriage.**

Residual prerogative power

The next three are complex questions that deserve careful consideration, and we would be grateful for further time to reflect on them before commenting. In general, our provisional preference would be to adopt the Scottish arrangements.

5. How do you think the residual Royal prerogative power should be exercised?
 -
6. Do you agree that there should be an ability for the Governor-General to seek the CCRC's opinion on matters relating to the exercise of the prerogative of mercy?
 -

7. Do you see value in allowing the CCRC to recommend the Governor-General consider grant of a full pardon?

➤

Structure

Independent Crown Entity model

8. Do you believe the CCRC will be well served by the ICE model? If not, why and which model would you recommend?
- We support the independent Crown Entity model. Given the need for visible independence from political influence, we suggest consideration be given to some security of tenure and conditions for Commissioners, and to the way the appointment process is managed.

Structure of the CCRC

9. Do you agree with the proposed structure for the CCRC? If not, why and what structure would you recommend for the CCRC?
- The aim should of course be to get the best people engaged across all relevant fields. There should be a mix of expertise (legal / criminal justice, scientific, investigative, public sector, community) and cultural backgrounds. We do not believe that "up to 5" Commissioners will be sufficient given the likelihood that appointments will be less than full time, and note that the CCRC currently has 13 Commissioners. The SCCRC has 8 all part time with a full-time equivalent of 2-3. We suggest "not fewer than 7" as appropriate for New Zealand.

Decision-making process

10. Do you think this decision-making process will ensure decisions delivered by the CCRC are sufficiently robust? Would another process be more effective and appropriate?
- We believe the Commission should be free to develop its own process, no doubt informed by the UK precedents. We believe those establishing the UK bodies reached the same conclusion, namely that the Commissions should be left to develop their own processes.

Test for referral

11. Do you think the core principles underpinning the proposed test are the correct ones? Are there others you would include?
- We are comfortable with the broad principles as expressed.
12. Do you believe the proposed test is appropriate? If not, why?
- On balance we suggest directly adopting the Scottish test, namely that (i) a miscarriage of justice may have occurred, and (ii) it is in the interests of justice to make a reference. This is simpler and focuses more directly on the key question, miscarriage of justice, rather than on the predictive exercise of anticipating what the Court of Appeal will do. As the Scottish Commission's position paper points out, there may be instances where the Commission uncovers a form of miscarriage hitherto unrecognised by the Courts. Referral would seem appropriate in such a case, although the predictive exercise would be problematic.

- We believe the referral test should be mandatory rather than permissive, and we do not agree with the suggestion at the top of page 9 of the consultation paper that the Commission should be "satisfied" that a referral is capable of supporting an appeal. That would be too high a threshold in our view, and the roughly 2/3 success rate of Scottish referrals indicates that the lower threshold is appropriate.

13. Is there another test for referral that you would propose?

- As above.

Process

Who may apply

14. Do you think the ability to make an application should be extended beyond an convicted person or their representative? If so, who do you think should be able to make an application?

- We see no obvious case to extend beyond that category, except perhaps to ensure that applications can be made on behalf of those who lack capacity.

Applications on behalf of a deceased person

15. Do you agree that applications should not be permitted in circumstances where an appeal is not possible because the applicant is deceased? If not, what would you suggest that the outcome of an investigation would be?

- Yes

If a person dies during investigation

16. Do you think the CCRC should continue an investigation if the applicant dies during the process?

- No

Begin investigation on its own initiative

17. Do you think the CCRC should be able to begin investigations on its own initiative? If not, why?

- This appears to be a sensible discretion, although no doubt one to be exercised infrequently

Case handling procedures to be dealt with by internally developed policies

18. Do you agree that the CCRC should be given leave to develop these processes internally, or do you believe some should be outlined in statute? If so, which processes and why?

- As above, we support allowing the CCRC to develop its own processes.

Information-gathering powers

19. Do you think the CCRC should have the power to compel information from both public and private bodies?

In Confidence

Not Government Policy

- Yes. We add that the Commission should have an explicit power to obtain information notwithstanding any applicable privilege or confidentiality.
20. Do you agree with the different procedural requirements for the CCRC to satisfy depending on whom they are compelling information from?
- Yes.
21. What safeguards do you believe will be necessary to ensure that information requested by the CCRC adequately protected?
- We believe the CCRC should be permitted to develop appropriate safeguards, no doubt informed by the UK precedents, and relevant New Zealand public sector agencies.

Reasons for decisions on referral should be provided to relevant parties

22. Do you think disclosure of reasons for referral decisions should be made publicly available? If not, why?
- Yes, but with provision to withhold any information that cannot be disclosed in the public interest, including to preserve any applicable confidentiality.

No statutory right of appeal

23. Do you agree there should be no statutory right of appeal of CCRC decisions? If not, what types of review should be available in addition to judicial review and an internal complaints mechanism?
- Yes

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From: Tom s9(2)(a)
Sent: Wednesday, 7 February 2018 12:03 p.m.
To: McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: Re[2]: RE; CRIMINAL CASES REVIEW COMMISSION

Dear Mr McGilivray

The only issue where I think I could be helpful is No. 9, the structure of the Commission.

Composition of the membership of the CCRC I believe is a critical matter. Except in one respect however this will be more the responsibility of those making the appointments, than dependent on the statutory framework.

The exception is the question of inclusion of a person or persons having legal qualifications or expertise. The first issue is whether there should be a mandatory requirement that one member should be a retired Judge.

On balance I am against this. If there was such a requirement, it would be difficult not to appoint such person as the Chief Commissioner. Even if this were not so, the perception that the judiciary had a voice in the decision would weaken confidence in the institution. The question for decision would be widely perceived as being whether the judicial system had got it right, and the voice would be seen as a significant one.

The spadework of examining the record of the proceedings in the courts will be carried out by staff. However, at least to some extent the Commission members will have to look at the records themselves, otherwise they become a rubber stamp for the opinions of their staff. Identifying the critical pieces in what may be hundreds of pages of evidence and other written material is a skill acquired by those working in the field but one not necessarily held by persons of other backgrounds. I would therefore prefer the solution that at least one member be appropriately qualified.

By itself "legally qualified" would not be sufficient. Legal qualification without practical experience would add little if anything. "Appropriately qualified" should be defined along the lines of requiring substantial experience as a lawyer engaged in criminal trial and appellate work.

Yours sincerely, Thomas Eichelbaum

Criminal Cases Review Commission – questions for consultation

Functions

Statutory power of referral

1. Do you agree that the primary responsibility for determining the safety of a conviction should remain with the courts, and that the CCRC be limited to referrals back to court only?
 - Yes definitely.

Promotion, education and monitoring of trends

2. Should the CCRC have explicit statutory responsibility for the promotion of, and education in relation to, its functions, and to monitor trends in relation to its investigations?
 - Agree - re monitoring of trends and reporting on performance.
 - I have some reservations about a specific legislative responsibility for education, depending on how that is described as I think that might create opportunity for distraction from primary task. That said, I consider it would be relatively easy to draft a statutory provision that required the CCRC to, for example, develop consumer information concerning its role or something similar. That was done with the Real Estate Agents Authority when it was set up as a Crown Entity (I was in the inaugural Chair at that time and had some input into how that function was undertaken). It seemed to work well and allowed the Authority to disseminate relevant consumer information from time to time without creating an obligation for full scale education which would have become onerous. I can elaborate on this.
 -
3. When and how do you think the CCRC should report to the relevant Minister(s) about trends in relation to its investigations?
 - The standard performance reporting (reporting against KPIs and the annual report etc) will provide some information on an annual basis and this is likely to include trends. However, a specific requirement to report on trends after the first year and thereafter three years might be helpful. Although, to ensure this didn't become too onerous any such requirement could be required only for the early period of the CCRC's operation. The annual report should be adequate long term.

No further secondary functions

4. Do you believe there is an additional statutory function the CCRC should perform? If so, what and why?
 - No. I think it would be better to have the CCRC stay focussed on its primary function.

Residual prerogative power

5. How do you think the residual Royal prerogative power should be exercised?
 - I think it particularly important to have this issue clearly addressed and ensure there is no ambiguity about alternative or residual processes that might be available to applicants. That said, the prerogative power will inevitably remain in force.
 - I agree with the 3 bullet points at page 5 of the consultation paper. In particular I think it important that the CCRC is seen as the body that deals with miscarriage of justice

applications/allegations. There would be considerable potential for confusion and risk of the process being undermined if there is room for alternative avenues for remedy to be pursued.

- Happy to discuss further - this will be a difficult issue to address but I see it as perhaps the most important to get right.
6. Do you agree that there should be an ability for the Governor-General to seek the CCRC's opinion on matters relating to the exercise of the prerogative of mercy?
- Yes—may need to give thought to how this will work in practice. To discuss.
7. Do you see value in allowing the CCRC to recommend the Governor-General consider grant of a full pardon?
- Yes. In rare cases.

Structure

Independent Crown Entity model

8. Do you believe the CCRC will be well served by the ICE model? If not, why and which model would you recommend?
- Yes agree.

Structure of the CCRC

9. Do you agree with the proposed structure for the CCRC? If not, why and what structure would you recommend for the CCRC?
- Yes. Relevant legal experience on the CCRC (as decision maker) will be vital. I think both the Chair and Deputy should have a relevant legal background.
 - Agree it would also be important to have specialist skill on the Commission (eg scientific/forensic) as well as consumer representation. Important to ensure the overall quality of the Commission in terms of intellectual rigour and sound judgment. Commission members need to be independent. The task of the Commission will be a difficult one - especially in its early stages of operation so the Commission will need to be strong, credible and have an appropriate mix of skills.

Decision-making process

10. Do you think this decision-making process will ensure decisions delivered by the CCRC are sufficiently robust? Would another process be more effective and appropriate?
- Yes although I see potential for public criticism/concern in some cases where a referral is not recommended and it might therefore be desirable to have the ability for those matters to be decided/confirmed by more than just the Chair acting alone. This would strengthen the decision making and provide some protection to the Chair.
 - It might be advisable for the legislation to start from the position that the Commission makes all decisions but there exists a power for the Chair in certain cases (eg straight forward cases of non-referral) to decide. To discuss further.

Test for referral

In Confidence

Not Government Policy

11. Do you think the core principles underpinning the proposed test are the correct ones? Are there others you would include?
- Yes
12. Do you believe the proposed test is appropriate? If not, why?
- Yes
13. Is there another test for referral that you would propose?
- No

Process

Who may apply

14. Do you think the ability to make an application should be extended beyond an convicted person or their representative? If so, who do you think should be able to make an application?
- No

Applications on behalf of a deceased person

15. Do you agree that applications should not be permitted in circumstances where an appeal is not possible because the applicant is deceased? If not, what would you suggest that the outcome of an investigation would be?
- Yes agree

If a person dies during investigation

16. Do you think the CCRC should continue an investigation if the applicant dies during the process?
- Yes

Begin investigation on its own initiative

17. Do you think the CCRC should be able to begin investigations on its own initiative? If not, why?
- Yes

Case handling procedures to be dealt with by internally developed policies

18. Do you agree that the CCRC should be given leave to develop these processes internally, or do you believe some should be outlined in statute? If so, which processes and why?
- Yes. Internal protocols/guidelines etc are preferable. They can be regularly updated/modified. Suggest the legislation could contain a provision that the CCRC can, from time to time, develop Practice Rules or Operating Guidelines (eg similar to power in REAA Act).

Information-gathering powers

19. Do you think the CCRC should have the power to compel information from both public and private bodies?
- Yes. Thought may need to be given to the scope of any power. I assume any power would be subject to existing rights/protections? Eg I have had recent experience relating to sensitive information held at Corrections that was not necessarily covered by existing privacy provisions but the release of information raised significant public interest issues. To discuss further.
 - The CCRC must be able to manage and control wide ranging requests by applicant and others that it exercise its information gathering powers very extensively. This could become onerous. To discuss.
20. Do you agree with the different procedural requirements for the CCRC to satisfy depending on whom they are compelling information from?
- Yes--although this is a potentially complex issue in my view. I will reflect further on this and discuss.
21. What safeguards do you believe will be necessary to ensure that information requested by the CCRC adequately protected?
- I haven't considered this fully at this point but will reflect further. To what extent would existing statutory provisions provide enough protection eg- Privacy Act/OIA provisions etc. I doubt they provide the protection that may be necessary in certain situations so you may need to consider the extent to which it would be possible to create a "carve out" for particular categories of information that should be subject to a wider protection and not able to disclosed without order of the court.
 - To discuss further.

Reasons for decisions on referral should be provided to relevant parties

22. Do you think disclosure of reasons for referral decisions should be made publicly available? If not, why?
- Yes

No statutory right of appeal

23. Do you agree there should be no statutory right of appeal of CCRC decisions? If not, what types of review should be available in addition to judicial review and an internal complaints mechanism?
- Yes

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