

# 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



11 FEB 2020

Ross Francis

fyi-request-11933-dc8915c8@requests.fyi.org.nz

Dear Mr Francis

## Official Information Act 1982 request: Advice regarding the Peter Ellis case

I refer to your email of 22 December 2019 to my office requesting the following information under the Official Information Act 1982 ('the Act'):

*On 10 December 2019, you advised me that you had received legally privileged information about the Peter Ellis case. When did you receive the legally privileged information, from which agency did you receive it, what is the nature of the relationship between you and the other party, and what was the purpose – and context – for which the information was sought? Please provide me with an outline of the document's contents. How much money has this Government spent on advice in respect of the Ellis case? You referred to a briefing about the Royal Prerogative of Mercy. Please supply me with a copy of that briefing.*

In relation to your first request, the legally privileged information was an email update received from the Office of Legal Counsel at the Ministry of Justice in June 2019 notifying me of Mr Ellis' seeking leave to appeal to the Supreme Court against his convictions. There was no cost associated with this advice. Neither I nor the Ministry of Justice has sought any advice in respect of Mr Ellis' appeal to the Supreme Court

I have **attached** the briefing referred to in my previous response to you. Parts of the briefing have been withheld under sections 9(2)(h), 9(2)(f)(i) and 9(2)(ba) of the Act as confidential advice which relates to ongoing applications for the Royal prerogative of Mercy. I do not consider the need to withhold this information under section 9 is outweighed by any public interest in its disclosure.

You have the right under s 28(3) of the Act to complain to the Ombudsman regarding this response. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz).

Yours sincerely

A handwritten signature in blue ink, appearing to be 'A Little', written over the typed name.

Hon Andrew Little  
Minister of Justice



Hon Andrew Little, Minister of Justice

**Initial briefing on the Royal prerogative of mercy**

Date	9 November 2017	File reference	CON-34-21
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Action sought	Timeframe
Note the content of this report, which provides a brief overview of: <ul style="list-style-type: none"> <li>the exercise of the Royal prerogative of mercy;</li> <li>applications that are currently being examined by the Ministry;</li> </ul>	n/a
Read the report in conjunction with the associated briefing about <i>Establishment of a Criminal Cases Review Commission</i> ;	n/a
Note that officials are available to meet to discuss this area with you	n/a

**Contacts for telephone discussion (if required)**

Name	Position	Telephone		First contact
		(work)	(a/h)	
Jeff Orr	Chief Legal Counsel, Office of Legal Counsel	04 494 9755	027 221 6859	<input checked="" type="checkbox"/>
Jeremy Hammington	Special Counsel, Office of Legal Counsel	04 494 9923		<input type="checkbox"/>

**Minister's office to complete**

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input checked="" type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
<b>Minister's office's comments</b>		

## **Purpose**

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1. This paper provides a brief outline of the exercise of the Royal prerogative of mercy, and gives you an overview of current and recent applications. The paper also cites previous work on alternative organisational arrangements, including a Criminal Cases Review Commission, for reviewing miscarriages of justice.
2. A companion paper, *Establishment of a Criminal Cases Review Commission* summarises the main features of a Criminal Cases Review Commission and describes what would be involved in setting up such a body in New Zealand.

## **Reviewing miscarriages of justice in New Zealand**

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3. Determinations of criminal responsibility are made by the courts. They operate according to established rules of procedure and evidence, on the fundamental premise that the prosecution must prove its case beyond reasonable doubt. Judges preside over criminal trials and determine the law. In most serious cases, juries decide the facts. There is an appeal process supervised by the country's most senior judges.
4. The courts operate completely independently of the executive branch of government. Normally the decision of the last appeal court is final. However, in criminal cases, there is an exception.
5. In Commonwealth countries like New Zealand (e.g., United Kingdom, Canada and Australia), there is a constitutional or legal mechanism that enables a person's case to be referred back to the appeal courts for reconsideration where it appears that a miscarriage of justice may have occurred.
6. In New Zealand, the power to refer a person's conviction or sentence back to the courts is exercised by the Governor-General, on Ministerial advice, pursuant to the Royal prerogative of mercy. In Canada, the power of referral lies with the Minister of Justice. Both the United Kingdom and Scotland have established a Criminal Cases Review Commission to perform this function. The practice in Australian states and territories varies. Most Australian jurisdictions contemplate referral to the appeal courts under the Royal prerogative of mercy though some allow a convicted person to apply directly to the courts for reconsideration (in effect, a second appeal).

### *What is the Royal prerogative of mercy?*

7. The Royal prerogative of mercy is a constitutional power delegated by the Queen to the Governor-General in New Zealand under clause XI of the Letters Patent 1983.
8. The Court of Appeal said that the Royal prerogative of mercy had become "an integral element in the criminal justice system, a constitutional safeguard against mistakes."<sup>1</sup> It provides an avenue for convicted persons to seek a remedy in cases where a miscarriage of justice may have occurred.
9. Where it appears that a miscarriage of justice has or is likely to have occurred in a criminal case, the Royal prerogative of mercy can be exercised to:

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<sup>1</sup> *Burt v Governor-General* [1992] 3 NZLR 672.

- 9.1. grant a free pardon; or
  - 9.2. refer a person's conviction or sentence to the relevant appeal court under section 406(1) of the Crimes Act 1961 for a further appeal.
10. In New Zealand, convention dictates that the Governor-General acts on the advice of the Minister of Justice when considering applications for exercise of the Royal prerogative. The Minister in turn seeks advice from the Office of Legal Counsel in the Ministry of Justice.

*What are the relevant principles?*

11. While the Letters Patent impose no specific limits on the use of the prerogative powers, strong conventions have developed that reflect the respective roles of the judiciary and the executive branch of government:
  - 11.1. The Royal prerogative of mercy is an important adjunct to the criminal justice process but is not an alternative or parallel mechanism for determining criminal responsibility;
  - 11.2. Convicted persons are expected to exercise their rights to appeal against conviction or sentence before seeking the exercise of the Royal prerogative of mercy;
  - 11.3. The prerogative of mercy does not operate as a further right of appeal or an opportunity to repeat arguments or re-examine evidence that have already been considered by the courts. Applicants should not expect the executive branch of government to substitute its decision for that of the courts;
  - 11.4. It follows that what is normally required to justify reopening a case is "fresh evidence" – new information not available at the time of trial that is sufficiently credible and cogent to raise a serious doubt about a person's conviction or sentence. Other errors or irregularities that may have caused a miscarriage of justice may qualify, depending on the extent to which they were argued or could have been argued on appeal.
  - 11.5. The prerogative of mercy is now used exclusively as a remedy for apparent miscarriages of justice. It is no longer exercised purely for merciful reasons where a person has been properly convicted;
  - 11.6. The grant of a pardon is extremely rare and is usually contemplated only where there is compelling new evidence that a person could not properly have been convicted. If it appears that a miscarriage of justice may have occurred, the normal course is to refer the person's case back to the appeal courts for reconsideration under section 406(1) of the Crimes Act. It is then dealt with as if it were an appeal.
12. In assessing whether a case merits a referral to the relevant appeal court, the Ministry of Justice analyses whether the applicant would have a *reasonable prospect of success* on a further appeal. The Ministry does not endeavour to reach a conclusive opinion that a person has been wrongly convicted or sentenced as the appeal courts remain the final decision-maker.
13. Similar principles underpin the operation of referral mechanisms in Canada, the United Kingdom and Australia.

### *The Royal prerogative of mercy in practice*

14. A flow diagram of the process for considering applications for the exercise of the prerogative of mercy is attached at Appendix A.
15. Applications are received by Government House and referred to the Minister of Justice with a request by the Governor-General for formal advice. The Minister then refers the application to the Ministry. The Ministry reviews the information and submissions supplied in support of the application and all relevant court and police files. Where required, additional information will be gathered or further enquiries made. The Ministry often seeks assistance from an independent adviser such as a Queen's Counsel or retired Judge where the application is complex or, for example, a witness needs to be interviewed to test their evidence. The Ministry then prepares a comprehensive report for the Minister containing full legal analysis of the application.
16. The Minister of Justice provides formal advice to the Governor-General, with a copy of the Ministry's report, recommending that the application be granted or declined. When the Governor-General has considered the Minister's advice, the Official Secretary to the Governor-General will inform the applicant of the decision. The applicant will receive a copy of any report by the Ministry or independent adviser on which the decision is based.
17. If a decision is made to refer a person's case to the relevant appeal court, an Order in Council to that effect will be prepared.
18. Applications can be made by a convicted person or someone on their behalf. While applicants are eligible to apply for legal aid, many applications involve self-represented applicants.
19. Since 1 January 1995, there have been 166 applications at a rate of 7-8 applications a year over the whole period. There are currently 9 applications under active consideration.
20. About 9% of applications since 1995 have resulted in a referral to the High Court or the Court of Appeal. No applicant received an outright pardon in that time. Appendix B sets out the details of the 15 successful applicants since 1995 and the outcome of the referral.

### **Current and recent applications**

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21. Appendix C summarises the 9 applications that are currently under review and the 3 applications on which advice has been given this year. Though a small sample, it illustrates that:
  - 21.1. Applications fall into four main categories of offending: homicide; sexual offences; wounding, injuring and assault; dishonesty and fraud;
  - 21.2. A large proportion of applicants are unrepresented (6 of the 12 applications);
  - 21.3. A small but significant minority of applicants engage in ongoing relitigation of their cases, including the bringing of civil proceedings and private prosecutions (3 of the 12 applications);
  - 21.4. The majority of applications raise issues of factual, procedural or legal complexity;

- 21.5. Delays in dealing with some applications can occur where clarification and further information is sought from applicants, where responses are sought to allegations of counsel error by former lawyers and while applications are on hold awaiting action or decision by applicants.

#### *Current applications*

22.

[REDACTED]

23.

[REDACTED]

24.

[REDACTED]

#### **A Criminal Cases Review Commission**

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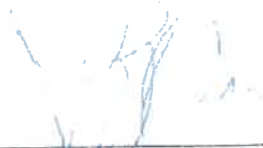
25. There is frequent public debate around whether an independent body, like the UK and Scottish Criminal Cases Review Commissions, should be established in New Zealand to consider alleged miscarriages of justice. The Labour-New Zealand First coalition agreement includes a commitment to establish a Criminal Cases Review Commission.
26. The associated briefing *Establishment of a Criminal Cases Review Commission* summarises the main features of a Criminal Cases Review Commission and what would be involved in setting up such a body.
27. The Ministry has also previously examined other legislative and non-legislative options to strengthen or reform the current organisational arrangements, including:
- 27.1. Strengthening the Ministry's own capacity and procedures, which may include making greater use of external counsel to review advice;
- 27.2. Formalising external peer review in a special adviser or panel to oversee the Ministry's function.
28. The Ministry has done some initial comparative work on how such options measure up alongside a Criminal Cases Review Commission and can supply additional briefing on the issues, if you wish.

#### **Recommendations**

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29. It's recommended that you:
1. **Note** the content of this report, which provides a brief overview of:
    - 1.1. the exercise of the Royal prerogative of mercy;
    - 1.2. applications that are currently being examined by the Ministry

2. **Read** this report in conjunction with the associated briefing about *Establishment of a Criminal Cases Review Commission*;
3. **Note** that officials are available to meet to discuss this area with you.



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Jeff Orr  
Chief Legal Counsel

APPROVED ( SEEN ) NOT AGREED



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Hon Andrew Little  
Minister of Justice

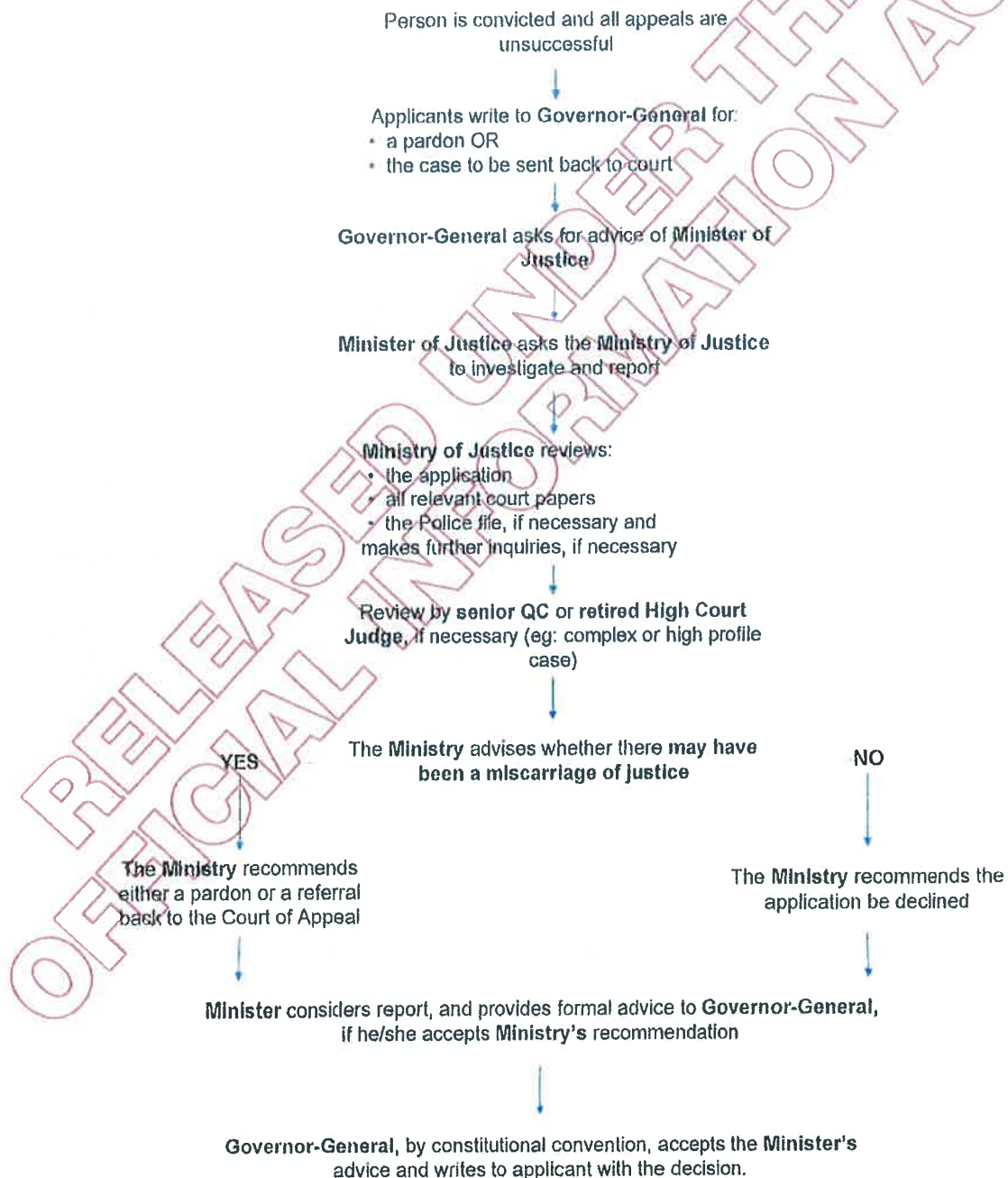
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**Attachments:**

- Appendix A – Flow diagram of the process for considering applications for the exercise of the prerogative of mercy
- Appendix B – Details of the successful applications for the exercise of the prerogative of mercy since 1995
- Appendix C – Summary of applications that are under review

## APPENDIX A

### Application for exercise of the Royal prerogative of mercy





## APPENDIX B

### ROYAL PREROGATIVE OF MERCY: SUCCESSFUL APPLICATIONS SINCE 1995

166 applications for the Royal prerogative of mercy have been made since 1995. This number includes applicants who have applied on more than one occasion in respect of the same or different convictions.

In 15 instances the prerogative of mercy was exercised to refer the applicant's case back to the courts for further consideration under section 406 of the Crimes Act 1961. No applicant received an outright pardon.

The following table gives details of the 15 successful applicants and the outcome of the referral.

APPLICANT	OFFENCES	COURT REFERRED TO	YEAR OF REFERRAL	OUTCOME OF APPEAL COURT HEARING
David Dougherty	Sexual violation	Court of Appeal	1996	Convictions quashed and new trial ordered
Stephen Collie	Wounding; threatening to kill	Court of Appeal	1996-97	Convictions quashed and acquittal entered
Robert Sims	Sexual violation	Court of Appeal	1997-98	Conviction quashed and new trial ordered
Peter Ellis	Sexual offences against children	Court of Appeal	1998	Appeal dismissed
Peter Ellis	Sexual offences against children	Court of Appeal (2 <sup>nd</sup> referral – wider terms of reference)	1999	
David Bain	Murder	Court of Appeal	2000	Appeal dismissed by Court of Appeal; conviction quashed by Privy Council and new trial ordered
Alec Waugh	Fraud	High Court	2002	Convictions quashed and acquittal entered
Benjamin Tultama	Aggravated robbery	High Court	2002	Sentence reduced
Michael Palmer	Assault	Court of Appeal	2002	Conviction quashed and new trial ordered
Name suppressed	Sexual violation	Court of Appeal	2002	Conviction quashed and new trial ordered
Rex Haig	Murder	Court of Appeal	2004	Conviction quashed and stay of proceedings ordered
Name suppressed	Sexual offences against child	Court of Appeal	2005	Convictions quashed and new trial ordered
Name suppressed	Sexual violation	Court of Appeal	2005	Convictions quashed and new trial ordered
Donald Hedges	Wounding	High Court	2009	Conviction and sentence quashed
Tyson Redman	Wounding; injuring	Court of Appeal	2012	Convictions quashed and stay of proceedings ordered

[REDACTED]

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OFFICE OF THE ATTORNEY GENERAL  
STATE OF NEW YORK  
IN SENATE  
JANUARY 12, 2011  
REPORT OF THE ATTORNEY GENERAL  
ON THE  
PROBATION ACT

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