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The Royal Prerogative of Mercy

A Review of New Zealand Practice

This paper was prepared by Mr Neville Trendle
in consultation with the Ministry of Justice

Please send submissions to:
Alison Stephens
Principal Adviser
Ministry of Justice
PO Box 180
WELLINGTON

Fax: 04 494 9917

Electronic copies to:
Alison.stephens@justice.govt.nz

We are happy to meet you to discuss the process.
Please ring Alison: 04 494 9745

Submissions due by 16 May 2003

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EXECUTIVE SUMMARY

The Royal Prerogative of Mercy is an important safeguard in our criminal justice system. It provides an avenue for convicted persons to petition the Crown for relief in cases where an injustice may have occurred. It is usually sought after all appeal rights have been exhausted. It enables the Governor-General to provide a remedy to pardon a convicted offender; to remit or grant respite from the sentence imposed; or to refer all or part of a case to the Court for further review. It is an exercise of clemency that acknowledges that the judicial process with its reliance on rules of evidence and procedure can occasionally be fallible.

An increase in the number and complexity of applications over the last five years prompted this review. Additionally, some overseas jurisdictions have introduced new procedures to deal with such cases. It is important for the maintenance of public confidence in the criminal justice system that the process for considering applications for the exercise of the Royal prerogative of mercy is reviewed on occasions to ensure that it remains relevant to society's socio-legal values.

The *Background* describes the status of the Royal prerogative of mercy. In New Zealand, the prerogative is exercised by the Governor-General by virtue of a delegation in the Letters Patent Constituting the Office of Governor-General. Sections 406 and 407 of the Crimes Act 1961 provide a statutory adjunct. Since 1945, Parliament has empowered the Governor-General, when considering an application for exercise of the prerogative of mercy, to refer the question of the applicant's conviction or sentence to the Court of Appeal or the High Court, or to seek the Court of Appeal's assistance on any point arising in the case. Since 1963 the Court of Appeal has considered on a number of occasions the scope of sections 406 and 407, and the procedure to be followed. The paper outlines the main points to emerge from the Court's decisions (see page 3).

How applications are considered is discussed under the heading *The Current Process*. The Governor-General receives applications for the exercise of the prerogative of mercy and refers them to the Minister of Justice for consideration. If the Minister of Justice recommends granting a pardon, or referring the case to the Court under section 406 Crimes Act, then the advice is accompanied by an Order in Council. If the Governor-General accepts the advice, the matter is formalised at a subsequent meeting of the Executive Council with the Governor-General signing the Order in Council.

Legal advisers at the Ministry of Justice analyse and consider all applications for the exercise of the prerogative of mercy. Each application is unique. In some cases it is apparent that the application does not reach the threshold for the prerogative of mercy to be exercised. Other cases raise complex or numerous issues that can take months to work through. Usually it will be necessary to obtain the relevant court file, and to seek further information from the applicant. Occasionally the advisers will seek the police investigation file; obtain specialist legal or non-legal advice, for example, from an independent barrister or a forensic scientist; or ask the Police or an independent barrister to interview or reinterview witnesses.

Since 1996, 63 applications for the exercise of the prerogative of mercy have been received. As at 30 June 2002, a decision had been made in 47 applications. Of those, 7 resulted in a reference to the Court in terms of s 406 Crimes Act 1961, the terms of reference of an existing reference were widened in one case, and a Ministerial inquiry held in another. No pardons were granted, and 38 applications were declined. As at 30 June 2002, 16 applications were still under consideration.

Under the heading of *Judicial Review* the paper notes that up to now the exercise of the Royal prerogative of mercy has not been judicially reviewed. It is, however, recognised that in principle there is no reason why the procedure followed in exercising the prerogative of mercy should not be open to judicial review.

What happens in overseas jurisdictions is the subject of *Overseas Models*. The framework for considering applications for the Royal prerogative of mercy in New Zealand is similar to that of other commonwealth countries such as Australia, Canada, England and Scotland. In these jurisdictions the delegated or common law prerogative to pardon has also been supplemented by a statutory scheme providing for reference by the Executive to the Court to revisit a conviction or sentence, or to provide an opinion on an aspect of the case to the Executive. We examined these countries' processes to see if they could provide some insights as to how to improve the way we do things here.

For example, a procedure unique to New South Wales allows the appointment of a judicial officer to conduct an inquiry with powers similar to a commission of inquiry. The inquiry can also refer the question of whether the conviction should be quashed to the Court, if the inquiry is of the opinion that there is a reasonable doubt as to the guilt of the convicted person.

In England, the Royal Commission on Criminal Justice (the Runciman Commission) was established in 1991, after a series of highly publicised cases arising during the 1980's in which miscarriages of justice occurred coupled with concerns about the efficacy of the prerogative of mercy process.

In its report to Parliament in 1993, the Commission recommended that the responsibility for reviewing allegations of a miscarriage of justice be removed from the Home Secretary and transferred to an independent authority to be established. The major consideration that led to this recommendation was the Commission's belief that the role assigned to the Home Secretary to refer cases to the Court was inconsistent with the separation of powers as between the courts and the executive. The "scrupulous" observance of constitutional principle led to a reluctance on the part of the Home Office to inquire deeply enough into the applications it received.

Effect was given to the Runciman Commission's recommendation with the passage of the Criminal Appeal Act 1995, and the establishment of the Criminal Cases Review Commission. Its responsibilities are discussed on page 10.

Until 1999, the process for considering applications for the exercise of the prerogative of mercy in Scotland was similar to the previous process followed in England. The Sutherland Committee was established in 1994 to look into procedures surrounding appeals and alleged miscarriages of justice. Like the Runciman Committee, this

Committee was influenced by the argument that the role of the executive in considering such cases was incompatible with the constitutional separation of powers between itself and the courts. It proposed the establishment of a new, independent body with powers to consider alleged miscarriages of justice and to refer deserving cases to the Appeal Court for determination.

Next, the paper identifies *Issues* relating to:

- the role of the Minister of Justice
- the Ministry's work practice, particularly in regard to investigations and inquiries
- the transparency of the Ministry's process, particularly as to how it applies the criteria for referral or for pardon to cases; how it determines case priority; and communication with applicants; and the
- the impact of unrepresented applicants.

Lynley Hood's critique of the Court of the Appeal and the Ministry's response is also outlined under *Issues*.

Under *Options* and *Proposal* the Ministry seeks views on the principles applied, and the strengths and weaknesses of the two options outlined. The options are a Ministry of Justice Unit, or a Board of three or four part time members, chaired by a former Judge and including members of high standing in the community. The Ministry indicates its preference for an independent board, but seeks views on this option.

Finally, the paper discusses the matter of compensation for the wrongfully imprisoned, noting that if a Board is established then it could have responsibility for the administration of compensation.

Submissions

Ministry welcomes comments on any aspect of the paper by ~~12 March~~ 16 May and most particularly on the following issues:

- The constitutionality of the role of the Minister of Justice providing the Governor General with advice on applications seeking the Royal prerogative of mercy
- The different approaches to determining the threshold applications have to meet in order to establish that a miscarriage of justice has taken place
- The proposals that relate to enhancing the administrative practices of the Ministry, and whether the process should have equivalent powers to Commissions of Inquiry
- The role of the Court of Appeal in the Royal prerogative process as queried by Lynley Hood's book *"A City Possessed"*
- The options proposed, that is: (i) to establish a small, dedicated unit in the Ministry of Justice; or (ii) to establish a Board of three i.e. one former Judge as Chair and two other members
- Whether an independent board should also be responsible for determining compensation matters, and if so whether it should be tasked with making the decision or making a recommendation to the Minister of Justice.

INTRODUCTION

The Royal Prerogative of Mercy is an important safety net in our criminal justice system. It provides an avenue for persons convicted in the Courts to petition the Crown for relief in cases where an injustice may have occurred. It enables the Governor-General to provide a remedy in one of three ways: firstly to pardon a convicted offender; secondly to remit or grant respite from the sentence imposed; and thirdly to refer the case itself, either in whole or in part, to the Court for further review.

The prerogative of mercy is not a final right of appeal from court decisions – indeed it is usually sought after all appeal rights have been exhausted. It is available in those rare cases where a miscarriage of justice may have arisen through the disposition of the case in the courts, or where there are other grounds for the exercise of mercy.

An increase in the number and complexity of applications over the past five years prompted this review. Additionally, new procedures in some overseas jurisdictions have been introduced to deal with cases where a miscarriage of justice may have occurred. It is important for the maintenance of public confidence in the criminal justice system that the process for considering applications for the exercise of the Royal prerogative of mercy is just, cognisant of society's changing socio-legal values, and efficient.

This paper provides a vehicle for discussion. Its objective is to provide:

- An overview of the law and practice in New Zealand
- A review of overseas models
- An overview of the issues the current processes in New Zealand gives rise to
- Options and proposals for enhancing current practice

Comments on the issues and the proposals for improvements outlined in this paper are welcome.

BACKGROUND

The nature of the Royal prerogative of mercy

The Royal prerogative of mercy is one of the prerogatives vested in the Queen as sovereign. It operates in two different ways. The first is the exercise of clemency either through the grant of a pardon or by ameliorating the penalty imposed by the court. The second is to correct mistakes; to provide an acknowledgement that the judicial process with its reliance on rules of evidence and procedure, does not always reach the correct result as to guilt or innocence. Notwithstanding appeal processes for convicted offenders, occasionally the judicial process is fallible. Cases may arise where, after appeal rights have been exhausted, new evidence is discovered that tends to throw doubt on the correctness of the conviction.

In New Zealand the prerogative has been exercised by the Governor-General by virtue of a delegation in the Letters Patent Constituting the Office of Governor-General [1]. In terms of Article XI of the Letters Patent the Governor General is empowered to exercise the prerogative of mercy by:

- Granting a free pardon (which has the effect of wiping the conviction and sentence)

[1] See Appendix

- Granting a pardon subject to conditions (substituting one form of punishment for another, leaving the conviction standing)
- Granting respite of the execution of any sentence (a reduction without a change in the nature of the sentence)
- Remitting the whole or part of any sentence, penalty or forfeiture

In addition, section 406 Crimes Act 1961 provides a statutory adjunct to the prerogative of mercy. Since 1945, Parliament has empowered the Governor-General, when considering an application for exercise of the prerogative of mercy, to refer the question of the applicant's conviction or sentence to the Court, or to seek the Court of Appeal's assistance on any point arising in the case. This referral process is intended to deal with possible miscarriages of justice. In substance it reflects the pattern of legislation in other jurisdictions.

Most applications for the exercise of the prerogative in New Zealand seek relief under section 406 Crimes Act 1961. Even in those cases where a pardon is sought, almost invariably the basis for the application is that a miscarriage of justice occurred. The infrequency of applications for clemency no doubt reflects the availability of other processes. These include the right to appeal against the sentence imposed in the trial court, and the ability for cases to be referred to the Parole Board for consideration for early release before a prisoner's parole eligibility date.

Pardon – section 407 Crimes Act 1961

The grant of a pardon is the exercise of the prerogative of mercy to extend clemency. By convention, it is exercised by the Governor-General on the advice of the Minister of Justice. There have been few instances in New Zealand where either a free or conditional pardon has been granted. The case of Arthur Allan Thomas is the most well known.

In terms of section 407 Crimes Act 1961, a convicted person who is granted a free pardon is deemed never to have committed the offence. In contrast to the position in England, a pardon is not granted on the basis that the Executive accepts the convicted person committed the offence, but forgives him or her. Nor can the convicted person ever again be charged with the offence in any court: *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252(CA). A pardon does not imply, however, that a person is necessarily innocent of the crime with which he or she was charged; it simply requires that for all legal purposes he or she is to be treated as if they were.

Applications for a conditional pardon are rare. In some jurisdictions conditional pardons are granted to commute the death penalty to life imprisonment, or provide a pardon "in advance" to a person implicated in a crime on the condition the person provides assistance to the prosecution: see *R v Milnes* (1983) 33 SASR 211, 216. The latter is facilitated in New Zealand by a Solicitor-General's undertaking to stay any proceedings that might be commenced as a result of disclosures made, or by the issue of a stay of proceedings.[2]

Miscarriages of justice - section 406 Crimes Act 1961

Though some applications for the exercise of the prerogative of mercy seek a pardon (see *Burt v Governor-General* [1992] 3 NZLR 672 (CA)), most applicants seek reference of their case

[2] See ss 77A and 173 Summary Proceedings Act 1957

to the Court of Appeal under section 406 Crimes Act 1961. The most common basis for such a request is the existence of new evidence that discloses a miscarriage of justice has occurred.

Section 406 provides as follows:

> **Prerogative of mercy** Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any Court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
> (a) Refer the question of the conviction or sentence to the Court of Appeal or, where the person was convicted or sentenced by a District Court acting in its summary jurisdiction or under section 28F(2) of the District Courts Act 1947, to the High Court, and the question so referred shall then be heard and determined by the Court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; or
> (b) If he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the Court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.

This provision allows the Governor-General in Council to either refer the applicant's conviction or sentence to the Court where the reference is heard and determined as if it were an appeal, or to refer one or more points arising from the application to the Court of Appeal for its opinion. The applicant need not have appealed against conviction or sentence, though it is usual for appeal rights to have been exhausted before an application for the prerogative is made.

A reference under section 406(a) leads to the Court hearing and determining the matters raised as if it were dealing with an appeal. This results in the prerogative application being effectively determined by the Court. In contrast, a reference under s 406(b) is designed to provide the Governor-General with the opinion of the Court on a point arising in the case. The prerogative application, informed by that opinion, is then determined by the Governor-General acting on ministerial advice: *R v Thomas* [1978] 2 NZLR 1, 5 (PC).

Since 1963 the Court of Appeal has considered the scope of the section and the procedure to be followed on a number of occasions. Some of the main points to emerge from the Court's decisions can be summarised as follows:

- The Court is assisted by being informed of the considerations that caused the Governor-General in Council to make the reference: *R v Morgan* [1963] NZLR 593 (CA); *Collie v R* [1997] 3 NZLR 653 (CA)
- The Court will not re-adjudicate a ground of appeal that has already been heard and disposed of on the merits unless some new matter has come to light that makes a reconsideration of the ground necessary or desirable: *R v Morgan* [1963] NZLR 593 (CA); *R v Ellis* (1999) 17 CRNZ 411 (CA)
- A second application for the exercise of the prerogative of mercy is not precluded: *Ellis v R* [1998] 3 NZLR 555 (CA)
- The hearing and determination of a reference under s 406(a) is confined to the grounds specified in the reference. The matters identified in effect become the points of appeal: *Ellis v R* [1998] 3 NZLR 555 (CA)

- The fundamental inquiry is whether taken individually or collectively, the grounds of appeal demonstrate that there has been a miscarriage of justice, requiring the conviction to be set aside: *R v Ellis* (1999) 17 CRNZ 411 (CA)
- Where the reference requires the consideration of new evidence, an application to the Court for leave to adduce fresh evidence is required. The practice regarding the reception of fresh evidence applies. The normal rule that fresh evidence will not be received unless it is shown that such evidence is new or fresh in the sense that it was not available at trial, however, is not always applied rigidly if there is reason to think that to do so might lead to injustice or the appearance of injustice: *Collie v R* [1997] 3 NZLR 653 (CA)
- In determining whether there was a miscarriage of justice in the applicant's conviction, the Court considers whether, had the fresh evidence been available at the trial, its cogency is such that it might reasonably have led the jury to return a different verdict: *R v Dougherty* [1996] 3 NZLR 257 (CA)
- The function of the Court is to decide the case on its true merits, but in doing so, in the overall interests of justice, it is required to apply established rules and principles: *R v Ellis* (1999) 17 CRNZ 411 (CA)
- The opinion given by the Court to the Governor-General under a section 406(b) reference is not reviewable: *R v Thomas* [1978] 2 NZLR 1 (PC)

THE CURRENT PROCESS

How applications are considered

In accordance with constitutional conventions the Governor-General receives applications for the exercise of the prerogative of mercy in the first instance. The Governor-General's Private Secretary acknowledges receipt of the application, and advises the applicant that the matter will be referred to the Minister of Justice for advice. The papers are then referred by the Minister's office to the Secretary for Justice for attention.

Once a Ministry legal adviser has considered the application (a process discussed below), a recommendation as to the outcome is forwarded to the Minister. If the recommendation is that the application be declined, a draft letter addressed to the Governor-General's Private Secretary setting out that advice and the reasons for it is considered by the Minister of Justice. The advice to the Governor-General is accompanied by a letter to the applicant. The Governor-General considers the advice, and if clarification of any issue is required the Minister's Office attends to it.

If the Minister of Justice recommends either the granting of a pardon, or a referral to the Court under section 406 Crimes Act, the letter to the Governor-General's Private Secretary containing the advice is accompanied by an Order in Council. Upon notification to the Minister that the Governor-General has considered the advice and accepted it, the matter is formalised at a subsequent meeting of the Executive Council with the Governor-General signing the Order in Council.

The Private Secretary to the Governor-General advises the applicant (or his or her lawyer) of the outcome.

Threshold for considering applications

The exercise of the prerogative of mercy is not conducive to the rigid application of precisely defined criteria. It is, however, appropriate for an identifiable threshold to be reached before miscarriage of justice applications can be considered.

When considering applications for a free pardon, the Ministry of Justice legal advisers consider first whether the applicant has exhausted all other remedies. Secondly the advisers look for compelling evidence that the petitioner was not properly convicted, that no reasonable jury apprised of all the relevant evidence could have found the petitioner guilty.

Two principal criteria guide the process of considering applications for reference to the Court pursuant to section 406 Crimes Act 1961. Firstly, the evidence raised by the application must be "fresh evidence" in the sense that it was not available at the time of trial, or, if not "fresh", is otherwise of such a nature that it would give rise to grounds for an appeal. Secondly, in addition, the evidence must be of sufficient weight and cogency that it is capable of pointing to a likely miscarriage of justice.

These two criteria are not applied rigidly as there is an overriding "interests of justice" consideration where a strict application of the principles might lead to an injustice or the appearance of injustice. Instances where this has occurred can be found in the references under section 406(a) Crimes Act in *R v Zaehan*, Court of Appeal, 11 August 1996, (CA 304/94) and *Sims v R*, Court of Appeal, 24 December 1997, (CA489/97).

Procedure within the Ministry of Justice

Legal advisers at the Ministry of Justice undertake the analysis and consideration of all applications for the exercise of the prerogative of mercy. One of the Ministry's senior managers is responsible for allocating, co-ordinating, and overseeing the process.

Each application is unique. In some cases it is apparent at an early stage that the application does not reach the threshold for the prerogative of mercy to be exercised. Some cases raise complex or numerous issues that can take months to work through. Despite the differences from case to case, the process followed can be generally described.

The Ministry's legal adviser who reviews the application makes an initial assessment of the issues raised and what additional information is required. Usually it will be necessary to obtain the relevant court file. It is often necessary to seek further information from the applicant and occasionally the police investigation file will be sought.

If it becomes apparent that the application does not raise issues that could amount to a miscarriage of justice, a draft memorandum recommending the application be declined is prepared. The case is further reviewed, usually by the Ministry's Chief Legal Counsel, then submitted to the Minister of Justice for consideration together with a letter setting out the basis for the Minister's advice to the Governor-General.

Some applications raise issues that cannot be resolved on the basis of the information available to the legal adviser reviewing the matter. Further inquiry may be necessary or specialist advice sought. In some cases it is appropriate to ask the Police to interview or reinterview a witness, or a report on forensic scientific issues is sought from Environmental Science and Research Ltd (ESR). On occasion an independent barrister is retained to

interview witnesses or to provide advice. It is not uncommon for further information to be sought from or provided by the lawyer for the applicant. Rarely do the Ministry's legal advisers undertake inquiries themselves.

In the more complex cases more than one legal adviser may be asked to assist with reviewing an application. Increasingly in these cases, a retired judge may also be requested to consider the application and provide a report, or review the Ministry's analysis of the case.

When the review of the application has been completed, the team member responsible for the review prepares a draft memorandum containing the recommendation to the Minister of Justice. The recommendation and the memorandum are critically peer reviewed and then signed off by the Ministry's Chief Legal Counsel before it is forwarded to the Minister's Office.

Analysis of applications since 1996

Since 1996, 63 applications for the exercise of the prerogative of mercy have been received. As at 30 June 2002, a decision had been made in respect of 47 applications. Of those, 7 of the applications received resulted in a reference to the Court in terms of s 406 Crimes Act 1961, the terms of reference of an existing reference were widened in one case and a Ministerial inquiry held in another. No pardons were granted and 38 applications were declined. A general analysis of applications received since 1 January 1996 is outlined in the appendix (page 31).

As at 30 June 2002, 16 applications were under consideration, with ministerial advice yet to be tendered to the Governor-General.

In nearly half the cases a decision is made within three months from the time the application is received. Some of the more recent applications, notably those in the *Bain* and *Ellis* cases, have taken much longer and involved issues of considerable complexity.

Counsel had assisted approximately 55% of applicants.

JUDICIAL REVIEW

The extent to which the exercise of the prerogative of mercy is judicially reviewable has been the subject of numerous court decisions and articles by legal scholars. For most of the twentieth century a long line of decisions of high authority held that the exercise of the prerogative of mercy was not reviewable in the courts essentially because the unique discretionary and extra legal nature of the power meant it was not amenable to the judicial process; see, for example, *Horwitz v Connor* (1908) 6 CLR 38 (HCA); *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol J 386; *de Freitas v Benny* [1976] AC 239 (PC); *Reckley v Minister of Public Safety and Immigration No 2* [1996] 1 All ER 562 (PC).

With the developments in administrative law over the last 25 years, it has become accepted that the exercise of a prerogative power is not necessarily immune from judicial review. The question of justiciability turns on whether the subject matter of the decision in question is amenable to review by the courts rather than the source or nature of the power that is being exercised. This has led to decisions such as *R v Secretary of State ex parte Bentley* [1993] 4 All ER 442 where a Divisional Court held, in the exceptional circumstances of the case, that the Home Secretary had given insufficient consideration to the grant of a posthumous

conditional pardon. More recently the Privy Council departed from a line of its earlier decisions with respect to the review of the exercise of the prerogative of mercy in capital cases. In *Lewis v Attorney-General of Jamaica* [2000] 3 WLR 1785, the Judicial Committee concluded that whilst the merits of the decision itself were not reviewable, the procedures by which the prerogative of mercy was exercised were justiciable.

Our Court of Appeal in *Burt v Governor-General of New Zealand* (1992) 8 CRNZ 499 had earlier recognised that in principle, there was no reason why the procedure followed in exercising the prerogative of mercy should not be open to judicial review. In that case, however, it declined to take such a step. The Court found that the Royal prerogative appeared to operate as an efficient safety net and when considered in the context of the other safeguards in the process, there was no pressing reason made out for altering the Court's approach to the justiciability of the pardon power in that case.

The Court in *Burt* was not called on to consider the situation with respect to a referral under section 406 Crimes Act 1961, but it is probable that the process is amenable to judicial scrutiny, at least with respect to the observance of the principles of administrative law.

OVERSEAS MODELS

The above framework for considering applications for the Royal prerogative of mercy in New Zealand has, historically, been similar to that of England and other commonwealth countries. In these jurisdictions the delegated or common law prerogative to pardon has also been supplemented by a statutory scheme providing for reference by the Executive to the Court to revisit a conviction or sentence, or to provide an opinion on an aspect of the case to the Executive.

To assist the consideration of possible improvement to the current process for considering cases where a miscarriage of justice may have occurred in New Zealand, the process in Australia, Canada, England, and Scotland were examined. Canada, England and Scotland have recently reviewed their processes, with the latter two making significant changes.

Australia

Applications for the exercise of the Royal prerogative of mercy are dealt with by State jurisdictions in Australia, and follow a broadly similar approach.[3] The common law pardoning power, the exercise of which is delegated to State Governors, is supplemented by State legislation providing for reference of either a conviction or a sentence to the Court, usually by the Attorney-General. If the whole case is referred it is determined as if it were an appeal. Alternatively, any point arising from the case may be referred to the Court for its opinion. The legislation and practice in Victoria illustrate the process.

Victoria

In Victoria, the provisions of section 584 of the Crimes Act 1958 follow the general pattern. The Department of Justice receives approximately six to seven applications each year. The

[3] Section 475(1) Crimes Act 1900 (ACT);); ss 474B and 474C Crimes Act 1900 and s 26 Criminal Appeal Act 1912 (NSW); s 433A Criminal Code (Northern Territory); ss 669A, 672A Criminal Code 1899 (Queensland); s 369 Criminal Law Consolidation Act 1935 (South Australia); ss 398, 419 Criminal Code (Tasmania); s 584 Crimes Act 1958 (Victoria); s 21 Criminal Code and Part 19 Sentencing Act 1995 (Western Australia)

cases fall into three categories, with applications alleging that a miscarriage of justice has occurred, seeking commutation of sentence, or raising "special circumstances" (that may also involve a miscarriage of justice). In this latter group extra-judicial considerations may arise (such as inadmissible evidence), or wider contextual factors which suggest that there has been a miscarriage of justice, or that intervention is otherwise required.

A senior departmental lawyer assesses each case. If there are no grounds for possible consideration, the application may be declined on advice from the Department. If there is an arguable case, the application is referred to either the Government Solicitor, or occasionally, an independent lawyer for assessment and recommendation. If there appears to have been a miscarriage of justice, the case will usually be referred to the Court under section 584(a) of the Crimes Act.

The majority of applications seek the commutation of sentence on compassionate grounds, as there is no statutory body to consider such cases. In cases involving the possibility of a miscarriage of justice, independent inquiries are only rarely made.

New South Wales

New South Wales has an additional feature in its procedure for the review of convictions and sentences. Since 1883, detailed provisions that were substantively amended in 1993 have supplemented the common law pardoning power. In terms of Part 13A of the Crimes Act 1900 a review of a conviction or sentence can follow:

- a petition to the Governor, who may direct an inquiry be held, or (through the Minister) refer the case to the Court of Criminal Appeal (section 474C); or
- an application to the Supreme Court requesting the Court to order an inquiry, or to refer the matter to the Court of Criminal Appeal to be dealt with as an appeal (section 474E).

In each case, a direction or reference can only be made if it appears that there is a question as to the convicted person's guilt, or to any mitigating circumstances in the case, or to any part of the evidence in the case. The Governor, the Minister, or the Court may refuse to consider an application if the matter has been dealt with in the trial or appeal process, or previously considered under Part 13A, and if they are satisfied that there are no special facts or special circumstances that justify the taking of further action.

The procedure unique to New South Wales concerns the appointment of a judicial officer to conduct an inquiry with powers similar to a commission of inquiry. The inquiry can also refer the question of whether the conviction should be quashed to the Court, if the inquiry is of the opinion that there is a reasonable doubt as to the guilt of the convicted person.

Canada

Canadian legislation relating to alleged miscarriage of justice cases followed the traditional pattern. Section 690 of the Criminal Code empowered the Canadian Minister of Justice to refer the case of an applicant for the prerogative of mercy to a court of appeal for hearing, or refer a question to the court. In addition, the Minister had the power to direct a new trial, an authority that in other jurisdictions was vested only in the Court.

In 1989, a Royal Commission recommended that provincial and federal Justice ministers consider creating an independent mechanism to facilitate the reinvestigation of alleged cases

of wrongful conviction. However, a working group established to examine the recommendation did not support the proposal and the ministers responsible for criminal justice took the proposal no further.

A Department of Justice Review in 1993 led to the establishment of the Criminal Conviction Review Group whose sole function was to investigate section 690 applications and report to the Minister of Justice. Criticism of the section 690 process, however, later led to the Department of Justice publishing a consultation paper in 1998, "*Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*". Options such as the English Criminal Cases Review Commission were discussed. Following the consideration of submissions, the Minister of Justice considered a number of options. The legislative response, which was passed in October 2001 as an amendment to the Criminal Code, repealed section 690 and inserted a new Part headed "Applications for Ministerial Review – Miscarriages of Justice".

The three remedies provided by the repealed section remain, but for the purpose of any investigation relating to the application, however, the Minister, or the Minister's delegate is vested with powers similar to those of a commission of inquiry.

In deciding whether to direct a new trial, or refer the case to a court of appeal for hearing and determination, the Minister must be "satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred."[4] In reaching that conclusion, the Minister is required to take account all relevant matters including:

- Whether the application is supported by new matters of significance that were not considered by the courts
- The relevance and reliability of information that is presented in connection with the application
- The fact that the process is not a further appeal and any remedy is an extraordinary remedy[5]

Details of the process for reviewing applications are prescribed by regulations.

The number of applications for the prerogative of mercy in Canada varies between 50 and 70 a year. There is also a separate process that results in the pardoning of people with historical convictions. This process is the responsibility of the Canadian Parole Board, and leads to the expungement of the convictions of some 14,000 people a year.

England

For centuries in England the Royal prerogative of mercy was the sole means to remedy an injustice. It was often used to ameliorate the harshness of sentences imposed by the Star Chamber in the 16th and 17th centuries. It afforded clemency to those convicted of capital offences through the early 19th century when there were over 220 offences on the statute books carrying the death penalty. In Queen Victoria's reign responsibility for determining petitions devolved to the Home Secretary.

[4] Section 696.3(a) Criminal Code
[5] Section 696.4 Criminal Code

An appeal against conviction in criminal cases became an accused's right in the early 20th century with the establishment of the Court of Criminal Appeal in 1907. This was due to the highly visible miscarriages of justice that occurred in the Adolf Beck and George Edalji cases and others.[6]

Despite the availability of appellate review, the Home Office continued to handle hundreds of petitions for the exercise of the prerogative of mercy each year. The Home Secretary had the power to refer cases to the Court, but there were concerns with the effectiveness of this process. These focused on the process within the Home Office to consider applications and the narrow approach of the Court of Criminal Appeal to the exercise of its power to order a new trial.[7] The Court's approach prompted ATH Smith to comment, "The court's own view of its constitutional role is that it exists to prevent error rather than to prevent injustice."[8]

In 1968, the British Section of the International Commission of Jurists ("JUSTICE") published a report[9] in which it recommended a number of improvements to the existing process that produced the advice to the Home Secretary. JUSTICE considered alternatives, such as the Danish Court of Complaints, a special court, which operated outside the machinery of the ordinary appeal system to deal with miscarriages of justice. However, it favoured a process of inquiry by an appointed commissioner or commissioners free from formal rules of evidence and procedure, with the commissioner reporting to the Home Secretary.

A series of highly publicised cases arising during the 1980's in which a miscarriage of justice occurred coupled with concerns about the efficacy of the prerogative of mercy process led to the establishment of the Royal Commission on Criminal Justice (the Runciman Commission) in 1991.

In its report to Parliament in 1993[10], the Commission recommended that the responsibility for reviewing allegations of a miscarriage of justice be removed from the Home Secretary and transferred to an independent authority to be established.

The most significant consideration that led to this recommendation was the Commission's conviction that existing arrangements were incompatible with constitutional principle. It found that the role assigned to the Home Secretary under the 1968 Act to refer cases to the Court was inconsistent with the separation of powers as between the courts and the executive. The "scrupulous" observance of constitutional principle led to a reluctance on the part of the Home Office to inquire deeply enough into the applications it received.

Effect was given to the Runciman Commission's recommendation with the passage of the Criminal Appeal Act 1995. This Act established the Criminal Cases Review Commission, an independent public body with 14 Commissioners and a staff of about 70. It has an annual budget of around 5.5m pounds.

The statutory responsibilities of the Criminal Cases Review Commission are:

- To review suspected miscarriages of justice

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[6] See Pattenden *English Criminal Appeals 1844-1994* (1996), 12-33
[7] See Rolph *The Queen's Pardon* (1978) 32-62
[8] "The Prerogative of Mercy, the Power of Pardon and Criminal Justice" (1983) PL 398
[9] Home Office Reviews of Criminal Convictions
[10] Cmd. 2263

- To refer a conviction, verdict, finding or sentence to the appropriate court of appeal when the Commission considers there is a real possibility it would not be upheld
- To investigate and report to the Court of Appeal on any matter referred to the Commission by the Court
- To consider and report to the Secretary of State on any matter referred to the Commission arising from consideration of whether or not to recommend the exercise of the prerogative of mercy in relation to a conviction

The Commission will only review cases where the applicant has effectively exhausted all appeal rights, unless exceptional circumstances exist. It can refer a conviction, verdict, or finding to a court of appeal if it considers that there is a real possibility the conviction, verdict or finding would not be upheld if the reference were made. As to "real possibility", the Commission looks for arguments not raised, or evidence not adduced in the proceedings that led to the conviction or at the hearing of an appeal.

Eligible cases are initially screened to identify those that offer little or no new evidence or argument. If the Commission member who reviews the case forms the preliminary view that it should not be referred to a court, the applicant is supplied with a provisional statement of reasons for the decision and given the opportunity to make further submissions, usually within 20 working days. If the applicant raises no substantial issues, the Commission member makes the final decision not to refer the case to the court.

Applications that raise new issues are allocated to caseworkers for an intensive review, and are monitored by a Commission member. In those cases that require further investigation, inquiries are carried out in any of four ways:

- Using the Commission's caseworkers
- Appointing an expert to investigate and report on a matter
- Requesting police to undertake minor inquiries such as interviewing a witness
- Requiring the police to formally appoint an investigating officer where the scale of the investigation is beyond the Commission's resources, or where inquiries may lead to the investigation of other crimes

When the review is completed, a committee of three Commission members considers the case. If the committee forms the provisional view not to refer the case to the court, the applicant is informed and given the opportunity to make further representations. If these are not substantial, a final decision is made.

If the Commission decides to refer the matter to a court, a statement of reasons is sent to the applicant, the court and the prosecuting authority.

In its first 4 years of operation the Criminal Cases Review Commission received 4830 applications, 94 (2%) of which resulted in referrals to the Court. Of the 94 referrals, convictions in 64 cases were quashed. The current level of applications received is about 800 a year.

Scotland

Until 1999, the process for considering applications for the exercise of the prerogative of mercy in Scotland was similar to the process followed in England. Petitions alleging a

miscarriage of justice were submitted to the Secretary of State and considered by the Scottish Office Home Department. Following the publication of a white paper on the delivery of justice, an independent committee was established in late 1994 to look into procedures surrounding appeals and alleged miscarriages of justice.

In respect of alleged miscarriage of justice cases the Committee on Criminal Appeals and Miscarriages of Justice Procedures (the Sutherland Committee) made a number of recommendations[11]. It proposed the establishment of a new, independent body with powers to consider alleged miscarriages of justice and to refer deserving cases to the Appeal Court for determination.

The Sutherland Committee considered and rejected four other options before recommending the establishment of an independent review body. It considered:

- Improvements to the status quo to speed up the process, enhance the rigour of the review and ensure better transparency and disclosure
- The introduction of an independent element to the existing system such as an inspector, an ombudsman or independent assessors
- Providing the appeal court with an investigating arm; and
- Establishing a formally constituted body making recommendations to the Secretary of State as to whether a case should be referred to the appeal court

Like the Runciman Commission, the Sutherland Committee was influenced by the argument that the role of the executive in considering such cases was incompatible with the constitutional separation of powers between itself and the courts. The Committee also felt that the exposure of the Minister to political and public pressures in individual cases outweighed the apparent advantages of existing checks and balances; that the decision to refer a case to the Court was one for which the Minister was publicly accountable; and that the decision itself was subject to judicial review.

In the Committee's view, the establishment of an independent body was the only way to properly address the constitutional issue. Accordingly, it recommended the Secretary of State be removed from the referral process.

Legislation followed. The Crime and Punishment (Scotland) Act 1997 amended the Criminal Procedure (Scotland) Act 1995 and established a body known as the Scottish Criminal Cases Review Commission of not fewer than three members. The Commission was empowered to consider the conviction or sentence of any person convicted on indictment and to refer the case to the High Court where the Commission believed that a miscarriage of justice may have occurred and that it was in the interests of justice that a reference should be made. The Commission could also refer any point arising from a case to the Court for the Court's opinion.

The Scottish Criminal Cases Review Commission has seven Board members. The Commission employs a Chief Executive, a Director of Administration and three administrative support staff. The initial complement of legal officers undertaking casework has increased from three to seven. The Commission's budget for the current year is 795,000 pounds.

[11] Report by The Committee on Criminal Appeals and Miscarriages of Justice Procedures (1995)

The Commission has the authority to make inquiries, or request others to make inquiries, and the power to obtain documents relevant to the case. Any referral to the Court is to be accompanied by a statement of reasons for making the reference. Where the Commission decides not to make a reference, it has a statutory obligation to provide the applicant with reasons for declining the application.

Before the establishment of the Commission (on 1 April 1999), the number of applications to the Secretary of State varied between 30 and 60 per year. In its first year of operation the Commission received 127 cases (including 19 cases transferred from the Secretary of State). A further 89 applications were received in the 2000-01 year and 88 for the year concluding 31 March 2002.

In its first three years of operation, the Commission referred 17 of the 164 concluded cases to the High Court. Of the four referrals determined by the Court, 2 convictions were quashed, in one the sentence was reduced and in one case the High Court refused the appeal.

ISSUES

As discussed in the *Introduction*, the increasing number and complexity of applications in recent years has prompted the Ministry to review its processes to ensure they are just, cognisant of society's changing socio-legal values, and efficient.

After reviewing overseas jurisdictions' experiences and models, the Ministry considers that there are issues about the role of the Minister and Ministry of Justice, the Ministry's work practices, the transparency of its processes (and most particularly the way we apply the criteria to the applications), and the impact of unrepresented applicants.

The Ministry also raises the issues in regard to the role of the Court of Appeal in the Royal prerogative process prompted by Lynley Hood's book *"A City Possessed"*.

The Ministry would particularly welcome comments on these issues and on any other issues that respondents to this discussion paper believe should be considered.

Role of the Minister and Ministry of Justice

Under present arrangements Ministry of Justice legal advisers review all applications seeking the exercise of the prerogative of mercy. In the case of applications for a pardon, or for remission of sentence, convention or common law requires the Governor-General to be advised by a Minister of the Crown, presently the Minister of Justice. Where the applicant's case is referred to the Court under section 406(a) Crimes Act, or where the Court's opinion is sought under section 406(b), the Minister provides the initial advice to the Governor-General, with the formalities completed at a meeting of the Executive Council as contemplated by the statute.

As the discussion on overseas models illustrate, this arrangement may give rise to difficulties of a constitutional nature:

- *Separation of powers considerations may influence the outcome.* There is a natural hesitancy for the Executive to be seen as becoming involved in decisions that have been arrived at through the judicial process. It impacts on the finality of decisions made and, in some cases, it may possibly be seen as impeaching the jury's verdict. Hence there may be undue caution in taking action.

- *There are risks to the constancy of the process where a minister, who is subjected to the scrutiny of parliament, the public and the media, is the source of advice to the Governor-General.* In contentious cases, it will be open to argument that the advice received and given by the minister was influenced by the expectations and pressures that can arise with intense public interest. In such an environment consideration of the application may not be perceived as impartial and devoid of political considerations.

Comment

The Ministry considers that it is preferable to be consistent with the constitutional conventions that provide that as far as is possible the Executive and Judicial branches of government should be separate.

Work practice issues

Currently, the work of the legal advisers is peer-reviewed by the Office of Legal Counsel. In an increasing number of applications, however, external assistance from either a retired Judge or senior counsel is sought.

Within the Ministry, the equivalent of 2.25 full time staff members are allocated to review applications and provide advice to the Minister of Justice. In addition, provision is made for a budget of approximately $50,000 to cover external costs. The overall cost of handling applications for the prerogative of mercy is currently approximately $300,000 per year.

The present structure and practice raise a number of issues:

- Each legal adviser handles a small number of applications. There is limited opportunity to build up expertise or experience.
- Whilst the Ministry's legal advisers are skilled lawyers, few have extensive experience of the trial process to assist with their assessment of the more complex cases
- Limited use is made of external resources. In the cases where an independent opinion is sought, particularly from former Judges, the advice received has invariably added value to the process.
- Accountability for the process is blurred with staff from different divisions having responsibility for different stages.

Investigations and Inquiries

One of the potential weaknesses with present arrangements is the uncertainty as to the depth and extent that matters raised in an application should be investigated.

In many cases the issue is clear. The material that is either provided in support of the application, or available elsewhere, is sufficient. In other cases, external resources are engaged: agencies such as ESR, the Police and senior counsel undertake inquiries or provide information. The applicant or the applicant's counsel is often able to provide additional material.

In other cases, however, the Ministry legal advisers do not have the knowledge, skills or experience to undertake any significant inquiry into matters that may be raised in an application. Lines of inquiry that would catch the eye, of say, an experienced forensic scientist or accountant may not be identified or pursued. This exposes the process to the risk

of a decision being made on the basis of incomplete or incorrect information. Further applications may result.

Neither is there a formal process for inquiries. This can raise potential difficulties if witnesses, who could materially contribute to an investigation, decline to become involved. Such a situation has not arisen in practice, but to avoid the difficulty, one option would be to adopt the New South Wales approach by vesting the person appointed to inquire into an application with the powers of a commission of inquiry.

There is no evidence that these issues have hindered the proper consideration of applications in the past. The Ministry considers, however, that the increase in the volume of work requires us to focus on clarifying the current lines of accountability, developing staff expertise and experience, and using legal and non-legal external resources appropriately. The role of investigation is particularly acute when applicants are unrepresented, and are unfamiliar with Police and other forensic practices. To meet these needs the Ministry may need to consider some restructuring of the way we currently undertake the work.

Investigations

It may be necessary that more a formal policy should be articulated as to when it is appropriate to initiate an external investigation. An external investigation should not be perceived as something that will happen as a matter of course. Investigations are expensive, not only to the Ministry but also to the agencies whose resources are being drawn upon (frequently the Police) and should only be instigated if the matters to be followed up are important and capable of being resolved.

The policy should therefore broadly indicate the situations when an external investigator may be required. The policy should also require clear instructions to be issued in regard to the task and timeframe.

The process does, however, need to engage the most authoritative sources of expertise. It is essential to make sure that experts whose opinions may be demolished on cross-examination are not engaged.

Inquiries

Under *Overseas Models* we noted that the Royal prerogative process in New South Wales provides for the appointment of a judicial officer to conduct an inquiry with powers similar to a commission of inquiry. The following briefly considers whether such a provision should be provided within our regime.

Currently Commissions of Inquiry are constituted under the Commissions of Inquiry Act 1908. Such an inquiry is generally considered when:

- There is considerable public anxiety about a particular matter or issue
- A major lapse in government performance appears to be involved
- Circumstances giving rise to the inquiry are unique with few or no precedents
- The issues cannot be dealt with through the normal machinery of government or through the criminal or civil courts

- The issue is in an area too new, complex, controversial for mature policy decisions to be taken.

Usually an inquiry is decided upon after discussions between the Ministers and officials with advice from Crown Law Office and the State Services Commission. The advantage of a Commission of Inquiry is that the process provides access to coercive powers. It has, for example, equivalent powers of a District Court in the exercise of its civil jurisdiction: it may inspect and examine, or require any person to produce papers, documents, records, things, or information; and it may on its own motion summon witnesses.

There are some statutes that include specific authority to establish inquiries. Often there is discretion vested in an individual as to when these inquiries are initiated. Such examples include the legislation governing the Law Commission, the Human Rights Commission and the Securities Commission.

It is possible to envisage the prospect of an investigation under the Royal prerogative process being unable to make progress without the power to require answers or information. There may be cases that also call for the power to offer immunity from prosecution to individuals such as witnesses who may be at risk to prosecution for perjury if they retract the evidence that they gave at trial.

On reflection, however, the Ministry does not consider the process needs the provisions provided in the New South Wales regime. Up until now the Ministry has not found itself in a situation where the lack of coercive powers prevented a proper assessment or determination of a case. We note that there is no limit of the number of times an applicant can apply for consideration of their case so there is always further opportunities to reinvestigate a matter. This access to further consideration provides some safeguards to the process. In a situation of heightened concern obviously the option of a Commission of Inquiry or a Royal Commission of Inquiry can be raised with the government.

The transparency of the Ministry's processes

In some respects, the present arrangements lack transparency. The processes of evaluation, investigation and consideration of advice on an application, are undertaken within the Ministry. There has, for example, been no public articulation by the Ministry on the application of the criteria when considering applications.

We consider the lack of transparency issue is also relevant to the prioritisation of cases, and communication with the applicants.

Determining when and how to exercise the Royal prerogative of mercy

As a constitutional safeguard, the Royal prerogative of mercy needs to take into account several competing considerations. It is important not to undermine the credibility of the criminal justice process; the prerogative should therefore be exercised sufficiently rarely to ensure that in most cases trial and appellate decisions are upheld, and care must also be taken not to impugn the jury's fact-finding role. On the other hand, the whole point of the Royal prerogative is to provide an effective and independent safeguard for the exceptional cases where, for a variety of reasons, a miscarriage of justice may have arisen from the judicial process. The criteria relied on to determine when and how the prerogative should be exercised need to balance these considerations, and be sufficiently flexible to cater for the many permutations of cases that may arise.

Criteria for deciding whether the exercise of the Royal prerogative is justified

The criteria presently relied on by the Ministry of Justice are informed by the Court of Appeal's own criteria for dealing with referrals back. There are probably two reasons for this: firstly, a paucity of any other sort of authority; and secondly, the need to ensure that any matters sent back to the Court are not subsequently found to be outside its jurisdiction.

Court of Appeal criteria

Under section 406(a), referrals back are to be dealt with in the same manner as an appeal against conviction. However, in *R v Morgan* [1963] NZLR 593, North P referred to the wide range of matters that may have been taken into account by the Executive in determining whether to refer a case back, and held that:

> the only rule that the Court can apply is to decide each application on its merits, the Court not treating itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice.

In *R v Sims* 19 December 1997, CA489/97, after considering the above passage from *Morgan*, Henry J held:

> Although that dictum could indicate a broad approach is to be adopted, [the Court will] still have regard to general requirements as to the reception of further evidence, although at the same time taking a less strict view than in an ordinary criminal appeal.

In *Collie v R* [1997] 3 NZLR 653; (1997) CRNZ 283, following *R v Morgan* [1963] NZLR 593, Eichelbaum CJ held that:

> The Court should be given information of the considerations which have caused the Governor-General in Council to make the reference. If, as would invariably be the case, the appellant wished to rely on the material placed before the Governor-General, an application for leave to adduce fresh evidence is required. The normal rule that fresh evidence will not be received unless it is shown that such evidence is new or fresh in the sense that it was not available at the trial is not always applied with rigidity if there is reason to think that to do so might lead to injustice, or the appearance of injustice.

Similarly, in *R v Zachan* 11/8/95, CA304/94, Hardie Boys J said:

> The Court has jurisdiction to allow an appeal on the ground of the discovery of fresh evidence by virtue of section 385(1)(c) of the Crimes Act 1961. This provides that an appeal against conviction is to be allowed if the Court is of the opinion that on any ground there has been a miscarriage of justice. The Court will normally require that the evidence be fresh in the sense that it was not available at the trial; and that it be credible and cogent in the sense that if given along with the other evidence in the case, the jury might reasonably have been led to return a different verdict. The overriding test however is the interests of justice.

In exceptional cases, even if evidence is not strictly fresh, it may be sufficient to show that an avenue of inquiry was not explored at the time of trial "because, for good reason, it had not occurred to [the defendant] or his advisors": *R v Su* 5 July 2000, CA407/00.

Apart from fresh evidence, other matters that would normally provide grounds for appeal are relevant, and the Court will take the same broad "interests of justice" approach in determining whether the necessary legal tests have been satisfied. For example, in *Sims*, where the issue was counsel incompetence:

> The same approach is appropriate where other principles which are generally applicable to an ordinary appeal are relevant. For the appellant Mr Scotter submitted that there has been a miscarriage of justice resulting from trial counsel's failure adequately to put before the jury matters favourable to the defence which may have led to a different verdict. This leads directly to such cases as *R v Pointon* [1985] 1 NZLR 109 ... where the description of "radical mistake" has been applied ... This being a section 406 reference however, care must be taken not to adopt a strict or rigid approach, but to consider whether overall in the particular circumstances, and having regard to the reasons for the reference, justice has been seen to be done.

Ministry of Justice criteria

In determining whether the exercise of the Royal prerogative is justified, the Ministry of Justice therefore takes into account the following matters:

- Whether there is fresh evidence. This means evidence that was unavailable at the time of the trial, or not reasonably discoverable by the exercise of due diligence, or for good reasons was not investigated or relied on
- The fresh evidence must be credible, and capable of pointing to a likely miscarriage of justice, in the sense that it might reasonably have led the jury to return a different verdict
- Deficiencies in the conduct of the trial that would provide grounds for a normal appeal may also be sufficient, depending on the extent to which they have been canvassed at any previous appeal
- The ultimate question is whether there has been "injustice, or the appearance of injustice"
- Petitioners asserting miscarriage of justice should as a general rule first have exhausted all their legal remedies.

These criteria are not significantly different from those applied by Criminal Cases Review Commissions in England and Scotland.[12] However, putting them into practice raises some difficult questions.

First, the authority relied on for determining Royal prerogative applications is drawn almost exclusively from Court of Appeal precedents on whatever grounds of appeal are relevant in the particular case. If the Ministry of Justice almost invariably scrutinises a case in the same way as would the Court of Appeal (albeit taking a less strict approach), does it call into

[12] The Scottish CCRC usually requires that normal appeal processes be exhausted, and looks for "new evidence or fresh considerations of substance which have not been before the courts" in deciding whether there may have been a miscarriage of justice. However, it does not restrict its grounds of referral to such evidence, and may take into account evidence that would normally be legally inadmissible. The English CCRC may refer cases back to the Court of Appeal if appeal rights have been exhausted, there is new evidence, and there is a "real possibility" that the original finding will be reversed. Cases that fail to satisfy these criteria may still be referred in exceptional circumstances. "New evidence" is an argument or evidence not raised in the proceedings, including evidence available at the original trial but not used. This is one of the leading reasons for referral back in England, along with breaches of police investigative procedures, non-disclosure of police information, and other prosecution failings.

question the value of its independent scrutiny? What is to be done where in a particular case Court of Appeal precedent and practice appear not to cater for deserving arguments?

Secondly, in practice, while "injustice or the appearance of injustice" is said to be the overriding consideration, this conclusion is rarely, if ever, reached in the absence of fresh evidence, or the kind of mistake or misconduct during the investigation or trial that would provide grounds for a normal appeal. This is probably because those are both concrete indications that the criminal justice process may have been flawed; a finding of possible miscarriage of justice in their absence raises the spectre of the Executive simply substituting its view for that of jury or judge.

Sir Thomas Thorp

Retired judge Sir Thomas Thorp has been asked to peer review advice given by the Ministry of Justice on several Royal prerogative applications, and in doing so has taken the following approach:

- The critical threshold question for all claims of miscarriage of justice is whether the material submitted raises "a serious doubt" as to the adequacy of proof of guilt
- Matters which taken severally may be insufficient to reach the threshold may do so if considered with other like matters
- The essential tasks at this stage are to bring into account all relevant information now available, whether it points towards or against the petitioner's guilt, and then to consider whether in totality that information raises a serious doubt
- It is not simply a matter of considering how far the arguments in the petition are made out. The test of whether or not there may have been a miscarriage of justice is in no way bound or restricted to matters considered in the petition.

It therefore appears that Sir Thomas takes the broad approach envisaged in *Morgan*, whereby considerations such as fresh evidence, or something that would normally be grounds for appeal, might be factors *among others* taken into account in the overall consideration of the merits of the petitioner's case. Views would be welcomed as to the value of a shift in emphasis of this kind.

The manner of intervention

Once an applicant has established good grounds for the exercise of the Royal prerogative, the second stage is determining the proper manner of its exercise.

The normal course will almost always be to refer the case back to the Court of Appeal. Executive clemency is a measure of last resort:

> Successive governments have taken the view that it is fundamental to our system of justice that questions of guilt or innocence are matters for the court to decide, free from interference from ministers. Juries are arbiters of fact and it is not for the Home Secretary to seek to set aside a verdict simply because he or others who have interested themselves in a case have drawn a different conclusion about a convicted person's guilt based on their own assessment of the evidence which was before the court. Similarly, questions of law are

> matters for the judge, not the Secretary of State; it is not for him to substitute his view on such questions.[13]

Criteria for Pardons

Regarding the rare occasions on which clemency might be appropriate, Sir Thomas Thorp noted that:

> it is in my view difficult to articulate sound reasons for distinguishing between the level of risk of miscarriage of justice which should persuade a court to quash and that which should persuade the Governor-General to pardon.[14]

The Court of Appeal would normally quash and (in most cases) order a retrial where the jury might reasonably have returned a different verdict.

In New Zealand, pardons have been granted in the course of settlements between Māori and the Crown, and in two cases to remove the stigma of minor unintentional offending (Spiller, the Secretary of a 1941 Patriotic Committee, who took the blame for the sale of beer with sandwiches at a meeting, and Brown, the salaried Chairman of a County Council, who voted unlawfully in an election). Apart from that, there have been only three pardons, with varying threshold tests applied.

In 1908, Commissioners appointed to investigate the conviction of John James Meikle for sheep stealing, after a trial witness was found guilty of perjury, concluded that they could not be certain of Meikle's innocence, or even entertain a reasonable presumption of innocence. However, a pardon was granted on the basis that "the evidence of his guilt is so far from conclusive that it would … have been proper to acquit the claimant". On its face, the Commissioners' finding is a contradiction in terms: giving Meikle the benefit of the doubt in the way that a jury would have been required to do is a manifestation of the presumption of innocence. It may be that in fact the Commissioners meant that they could not be certain of Meikle's innocence nor even that this was reasonably likely, but nonetheless it seems that in their view the pardon threshold was no higher than the normal criminal standard.

Arthur Allan Thomas was pardoned in 1979, after Adams-Smith QC was asked by the Prime Minister of the day to conduct an inquiry. Adams-Smith believed that the case should be considered on the basis of "a man accused of a crime as opposed to a man convicted of it", meaning presumably that the threshold, whether before or after conviction, remains the same. Ultimately this was borne out in the recommendation for pardon: even though there was "nothing arising as the result of [the] investigation which established … that Arthur Allan Thomas is innocent of the murders", there was "real doubt whether it can properly be contended that the case against Arthur Allan Thomas was proved beyond all reasonable doubt".

Atenai Saifiti, convicted for assaulting a prison officer in a prison brawl, was pardoned in 1972 after the Chief Ombudsman concluded that "there are substantial grounds for believing that Atenai Saifiti was innocent of the offence for which he was convicted". Sir Thomas Thorp considered this a higher threshold than those in *Meikle* and *Thomas*[15] and there does

[13] Home Office, describing pre-CCRC review procedure.
[14] "Opinion for the Secretary of Justice re petitions for the exercise of the royal prerogative of mercy by Peter Hugh McGregor Ellis", p 11.
[15] "Opinion for the Secretary for Justice re petitions for the exercise of the royal prerogative of mercy by Peter Hugh McGregor Ellis", p 10.

appear to be a valid distinction between substantial grounds for a belief in innocence as opposed to doubt about one's guilt. However, the fact that a higher threshold was reached in *Saifiti* does not answer the question whether a lower threshold should suffice.

The Ministry of Justice has hitherto expressed the view that "a full pardon is normally entertained only … in cases where no reasonable jury, apprised of all the relevant evidence, could have found the accused guilty".[16] This has been described as a "high threshold" and "a higher level of justification for the granting of a pardon than for referring a case to the Court of Appeal".[17] In reality it may not be: on one view no reasonable jury could find the accused guilty where there remains a reasonable doubt, so that prima facie this test is no different from the *Thomas* and *Meikle* standards. However, it may be that the need to respond conservatively to calls for the exercise of the Royal prerogative power has led to an interpretation more akin to substantial likelihood of innocence.

The following considerations seem to support Sir Thomas' conclusion about the appropriateness of a comparatively low threshold:

- The need to exercise Executive clemency only rarely and sparingly is a different consideration from the threshold test that might justify granting it.
- One reason sometimes given for a higher threshold for pardon is that a pardon determines proceedings; referral back does not. However, if a case is referred back, and the conviction quashed, it will not always result in retrial. Whether the Court of Appeal considers retrial appropriate in the circumstances of the case may have more to do with fairness, or the impracticality of ordering a retrial after a long delay, than with the appellant's guilt or innocence
- Similarly, it may not be possible to refer a case back, independent of its merits. Examples are "relevant and credible material not admissible in evidence"[18], "the time which has elapsed since the incident, the difficulties that would be encountered in gathering together the witnesses for a new trial"[19], the need to "respect the role of an appellate court and … not include matters more appropriate for consideration by a commission of inquiry"[20]. If the threshold for clemency is higher, applicants in these admittedly rare cases will be arbitrarily disadvantaged.
- A high threshold such as "substantial grounds for belief in innocence" excludes cases in which there has been an abuse of process serious enough to warrant rectification independent of the applicant's apparent guilt.

We therefore propose that the criteria for granting a pardon should be no higher than that which might lead the Court of Appeal to quash, which in turn is the same as the threshold sufficient to trigger the exercise of the Royal prerogative. The issue, once a decision is made that the exercise of the Royal prerogative is justified, is what form this intervention should take. In almost all cases, it will be appropriate to refer the case back to the Court of Appeal under section 406(a). However, the following circumstances may justify the grant of a pardon:

[16] Ministry of Justice advice on petitions by Peter Ellis.
[17] "Principles governing the exercise of the royal prerogative to correct miscarriages of justice", 9 March 1999.
[18] Sir Thomas Thorp, "Opinion for the Secretary of Justice re a petition for the exercise of the royal prerogative of mercy by David Cullen Bain", p 5.
[19] Chief Ombudsman's report to the Minister of Justice regarding Atenai Saifiti.
[20] *R v Ellis* [1998] 3 NZLR 555.

- The evidence available goes beyond raising a doubt as to sufficiency of evidence of guilt and amounts to affirmative evidence of innocence. According to Sir Thomas Thorp, this is a recognised exception to the general rule that legal remedies must first be exhausted
- The case is not susceptible to determination by a court, for the kinds of reasons discussed above
- Various tribunals have so fully considered the case that there is no avenue of redress left apart from pardon. Whether there should still be a residual Executive discretion in such cases is open to debate. However, arguing that there is not implies that the courts will always reach the right result, which in turn calls into question the existence of the prerogative power

Case priority

Applications for the exercise of the Royal prerogative of mercy are treated as matters of priority by Ministry staff. There are, however, no formal guidelines for deciding priority among cases. This may result in applications being treated the same regardless of their substance, and time and effort being accorded to an application that lacks merit. It also enables the pressure of other duties to intrude, with consequential delays in the completion of consideration of an application by the adviser to whom the case has been allocated.

The peer review stage, while providing a valuable check and quality assurance, can also result in delay.

In England, a policy for assigning priority to applications has assisted the handling of cases considered by the Criminal Cases Review Commission.[21] The Commission's practice includes the following steps:

- A screening process to identify cases that either do not meet the threshold for consideration, or meet the threshold, but appear to offer little new evidence or argument
- Priority ranking of cases taking into account:
  - Whether the applicant is in custody
  - Factors such as the age and ill health of applicants or witnesses
  - The possibility that evidence might deteriorate
  - Whether the case is of particular significance to the criminal justice system
- Where priority is not assigned, cases are usually reviewed in order of receipt

A policy that provides assistance in determining the priority of cases may assist in streamlining the process and enhancing efficiency.

Communication with applicants

There is usually only limited contact with the applicant, or the applicant's lawyer. Regular progress reports are not routine. Full reasons for the decision are invariably provided to the applicant and access to the advice given to the Governor-General is available after the decision on the application is made. The opportunity is not, however, routinely provided to the applicant or counsel to comment on the advice before it is forwarded to the Minister of Justice.

[21] Criminal Cases Review Commission, *Annual Report 2000-2001* p 8

It is doubtful if there is any obligation on the Ministry to disclose the basis of its advice and recommendation before it is considered by either the Minister or the Governor-General, but it would be consistent with natural justice principles to do so in each case. The timeframes in which applications are processed would inevitably be affected, but the accuracy and quality of the advice should be enhanced in most cases.

This proposal may suggest that the Ministry would have to develop broad stages of the consideration in order to keep the applicant informed about progress.

Comment

The Ministry considers that policies in regard to the criteria, priority, and advice to applicants should be clearly established and articulated. We would appreciate any comments on:

- The usefulness of Sir Thomas's approach to determining the threshold applications have to meet in order to establish that a miscarriage of justice has taken place
- The priorities for ranking cases as implemented by the Criminal Case Review Commission in England
- The need to keep applicants more informed about the consideration of their case.

The impact of unrepresented applicants

Nearly half of the applications received over the last five years have been prepared without the benefit of legal advice. This presents two issues. One is that some applications simply rehearse grounds that have already been dealt with at trial or on appeal. The other is that it presents the risk that the unrepresented applicant may not have either identified or articulated grounds that could raise a possible miscarriage of justice.

Ministry of Justice legal advisers are particularly alert to the latter risk and take care when reviewing the application to ensure that any supporting grounds are considered, whether or not they are identified or expressed inappropriately. Additional time and effort is therefore applied to these applications, compared with those that have been prepared by or submitted through a lawyer.

As the prerogative process is an administrative task undertaken in the executive branch of government, legal aid is currently not available to otherwise eligible applicants. This appears to be the case in other jurisdictions as well, where the percentage of applications that have been prepared by a lawyer is less than in New Zealand. Arguably, the availability of legal aid could enhance the process through the earlier screening of unmerited applications and improve the quality of those that meet the threshold.

Comment

The extension of legal aid to applicants seeking the exercise of the prerogative of mercy is one of the issues to be considered in the review of eligibility for legal aid. The matter will be addressed in that context.

The Role of the Court of Appeal – *"A City Possessed"*

In her book *A City Possessed* (2001)[22] Lynley Hood critiqued the role of the Court of Appeal in the Royal prerogative process, and particularly in regard to the *Ellis* case. Ms Hood concluded that despite the view of the highly regarded jurist, Sir Robin Cooke, New Zealand justice system has trouble recognising and correcting its own mistakes.

Ms Hood noted that once an appeal has been heard and dismissed by the Court of Appeal, no further appeals are possible with the one exception of resorting to the Privy Council. The Privy Council, however, has seldom agreed to hear appeals in the criminal jurisdiction. This means that the only access to redress for most of the wrongly convicted is to seek the Royal prerogative of mercy. However, in her view, there are problems with this option, and provided the following examples[23]:

- There is no information on how a pardon from the Governor-General may be obtained. Since the 1961 Crimes Act came into force three pardons have been granted - none as a result of a petition lodged under the Crimes Act 1961

- The petitions to the Governor-General are referred to the Ministry of Justice for consideration. Since the essence of any such petition is that the justice system has failed, allowing officials of the justice system to assess the worth of a petition is arguably a breach of natural justice

- Procedures for the consideration of such petitions are informal and opaque. Sir Robin Cooke had stated that "independent lawyers of standing are appointed to investigate petitions that may have substance". There are, however, no established procedures for determining whether a petition has substance, for selecting a suitable independent lawyer, or for evaluating the quality of that lawyer's advice

- According to section 406(a) of the Crimes Act 1961 the Governor General may refer the question of the conviction or sentence to the Court of Appeal … and the question so referred shall then be heard and determined by the Court … as in the case of an appeal by that person against conviction or sentence or both. However, in successive judgments the court has ruled that, no matter what the terms of the referral from the Governor-General, when the Court of Appeal hears a case for the second time, it will consider only new evidence and overturn its earlier judgment only if that evidence indicates that a miscarriage of justice has occurred. In Ms Hood's view the "new evidence" rules makes a nonsense of Cook's claim that referrals from the Governor General to the Court of Appeal are a "safeguard against mistakes"

In the Ministry's view, the reforms mooted in this review would address Ms Hood's concerns about the uncertainty regarding the availability of pardons, the role of the Ministry, and the informality and opaqueness of its procedures. However, Ms Hood's criticism of the narrow approach taken by the Court of Appeal following a referral under section 406(a) is somewhat misleadingly stated.

As has already been said (above page 17), the Court does not consider itself bound by a requirement for new evidence if there is reason to think that this might lead to injustice or the

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[22] A *City Possessed – the Christchurch Civic Creche Case – Child Abuse, Gender Politics and the Law* by Lynley Hood, Published 2001 by Longacre Press

[23] Pages 583 and 584

appearance of injustice. However, it generally expects new evidence because, in the absence of a concrete indication of a mistake, it would simply be substituting its own opinion for that of the jury or judge. The Ministry has sought views on the emphasis which should be placed on fresh evidence in determining its response to royal prerogative applications (above, page 19). However, it does not accept that Ms Hood's view that the current approach taken by either the Ministry or the Court means that "not only does the Court of Appeal never have to correct its mistakes, it never has to own up to having made any mistakes in the first place".

OPTIONS

In considering how to enhance the process for considering applications for the Royal prerogative of mercy we clearly should ensure that the above issues relating to the Ministry's role, structure, processes and resources are addressed.

We note further that the Sutherland Committee identified a number of criteria that it believed were essential for any system established to consider applications for the exercise of the prerogative of mercy.[24] Drawing on these, and the above issues, the Ministry has adopted the following principles to guide the assessment of the options to improve the current situation in New Zealand:

- Consistency with constitutional principle
- Impartial and thorough consideration of applications
- A transparent process that can be understood by applicants
- Effective communication with and disclosure to the applicant
- The decision in each case to be accompanied by reasons
- Attention to complaints without delay
- Effective investigative procedures
- Appropriate use of resources
- A process that retains public confidence, even in difficult cases

The first option reflects present arrangements but with enhancements to address some of the key issues – and weaknesses – of the process. This option reflects the Canadian and Australian approach to the consideration of cases where a miscarriage of justice may have occurred.

Overseas research and experience suggests that an independent body charged with receiving, investigating and considering applications in cases of possible miscarriage of justice and with the authority to refer cases to the Court is a model that addresses many of the shortcomings perceived with a process for which the Executive is solely responsible. Such a model has been successfully introduced in England and Scotland. It provides the basis for the second option.

Other models, including those considered and rejected by the Sutherland Committee (see page 12), do not appear to offer serious alternatives in the New Zealand environment.

[24] Report by The Committee on Criminal Appeals and Miscarriages of Justice Procedures (1995), para 5.30

Option One - Ministry of Justice Unit

Proposal

This option would establish a small, dedicated unit, mainly from existing resources in the Ministry of Justice, which would have the specific function of handling applications for the exercise of the prerogative of mercy. The manager, to whom the unit reported, would have the responsibility for ensuring that appropriate policies were documented and followed, and that regular contact was maintained with the applicant or the applicant's lawyer.

The establishment of such a unit would be accompanied by several other measures:

- The establishment of a small panel of former Judges with a member of the panel overseeing the consideration of each application. The panel member would also provide a written opinion on the application to accompany the advice to the Minister and the Governor-General
- Enhanced investigation strategies. For example, training in enforcement investigation techniques; arranging with law enforcement agencies short term secondments to assist with specific applications; and entering into co-operative arrangements with other agencies with staff who have significant investigation expertise (such as the Police Complaints Authority)
- Documented policies, practices and procedures with respect to the process
- Better communication with applicants or the applicant's lawyer including a regular progress report. A face-to-face interview may be appropriate on some occasions
- Furnishing the applicant or the applicant's lawyer with a copy of the proposed advice to the Minister and providing an opportunity to comment. Any comments would be taken into account before the formal advice was forwarded to the Minister and the Governor-General.

Advantages

The establishment of such a unit combined with the other changes proposed would offer a number of advantages:

- Transparency would be brought to the process
- An external independent review of each application would be undertaken
- The experience of the panel member would guide the investigation and consideration process
- The Minister and the Governor-General would have the comfort of an independent authoritative review accompanying the advice they receive
- The increase in resources and cost would not be great
- This option would require no legislative amendment
- Better accountability for the quality and timeliness of advice would be achieved.

This option may be more appropriate for the workload. The number of cases (historically never more than 14 in any one year) is low and even if an increase in applications should occur they could be handled with little difficulty.

Disadvantages

The weakness of this option is that it perpetuates some of the existing tensions arising from Executive intervention in the judicial process. Commentators in favour of this option, however, would argue that an application for the exercise of the Royal prerogative is in essence a plea to the Crown to provide relief from an injustice after the judicial process has been exhausted. It begins where legal rights end. By its very nature, the advice given or the decisions made are provided by the executive branch of government. The prerogative of mercy process is part of the regime of constitutional checks and balances and a well-established integral part of our criminal justice system. Except for the rare cases where a free pardon is granted, if there are grounds for thinking a miscarriage of justice may have occurred the matter is returned to the Court for determination.

The existing process has not given rise in practice to significant difficulties of a constitutional nature in New Zealand and there is no reason for thinking that would change with the refinements proposed with this option.

Option Two - Independent Board

This option would establish a Board of three members, i.e one former Judge as Chair and two other members of high standing in the community. Legal qualifications should not be necessary for all members, and possibly the members may be part time.

The Board would receive and consider all applications for the exercise of the Royal prerogative of mercy, and initiate its own inquiries. If the Board concluded that a miscarriage of justice might have occurred in respect of a particular application, it would have the sole right to refer the case to the Court for determination. If it formed the view that the prerogative of mercy might be exercised in some other respect, such as the grant of a free pardon, the Board would refer the case to the Minister of Justice for consideration with recommendations.

The Ministry of Justice would service the Board. The Ministry would not be seen as having a stake in the criminal justice process that had been involved with the case to that point. An increase in resources would be required to provide a suitably skilled investigative capacity. While a significant increase in existing staff numbers would not be needed, it would be necessary to retain and possibly recruit people with the special skills needed to carry out a range of inquiries and to analyse complex cases.

It is difficult, however, to predict the number of applications an independent board would receive. The establishment of the Supreme Court will provide an additional avenue for possible miscarriage of justice cases to be handled within the judicial process. Fewer applications for the prerogative of mercy may result. On the other hand, as the existence of the Board became known, there could be an increase in applications as has been the case in Scotland. There would inevitably be a risk of some applicants treating the process as simply a further right of appeal.

Advantages

The establishment of an independent board would bring a number of advantages to the consideration of applications for the exercise of the prerogative of mercy:

- Applications would be assessed independently of the Executive, thus avoiding any constitutional or separation of powers issues
- Transparency would be brought to the process
- The existence of (and publicity given to) an independent Board may encourage applications to be filed early, enabling cases where a miscarriage has occurred to be more speedily resolved
- Possible increased public confidence in the criminal justice system with respect to reducing the chances for miscarriages of justice to occur

Disadvantages

- Legislation would be required to establish and empower the Board
- The Board would be unlikely to consider more than a quarter of the number of applications received by the Scottish Commission
- Existing resources would provide much of the support needed, but increased expenditure would be incurred through Board member stipends and enhancing the investigative skills of the team servicing the Board (the latter aspect is, however, equally applicable to a separate unit in the Ministry). Some additional set up costs and ongoing operating overheads would also be expected.

PROPOSAL

The independent board option is preferred as it offers two important advantages over the first option. Firstly, the advantage of the Board option is the independent perspective it would bring to the process. The constitutional tension and the pressures associated with ministerial decision making in cases of high public interest could be avoided. These consequences may not necessarily alter the substantive outcome of applications, but the perception of justice being transparently and independently done would be improved. Secondly, the option offers greater rigour and transparency with respect to the consideration of applications and avoids ministers effectively having to make decisions in cases of intense public interest that fall more appropriately in the judicial arena.

Establishing the board, will, however, require legislative change. Until the legislative amendments are made the changes to present arrangements that have been identified can be implemented. This could involve the forming a small unit in the Ministry of Justice with responsibility for the process in the interim. The unit would then assume the role of servicing the Board once it was established.

COMPENSATION FOR PERSONS WRONGLY CONVICTED

The issue of compensation arises in situations when an application for the exercise of the Royal prerogative has been referred to the Court of Appeal and the conviction is quashed, or the person is pardoned.

In 1998, the Law Commission finalised its *Report 49 - Compensating the Wrongly Convicted.* As a result of the recommendations of this report it was decided by the then current government that independent QC's should perform the assessment function rather than the Minister of Justice. This decision was made to enhance public perception of the integrity of the assessment process, and to ensure that the overall process contributes to the wider goal of enhancing public confidence in the criminal justice system.

This report, however, also recommended establishing a Compensation Tribunal to determine whether, and if so how much, compensation should be paid. The report noted that an independent tribunal would have the advantage of being separate from both the executive and the courts. Ministers may be perceived as susceptible to public opinion, and departments and ministries as potentially subject to political pressure; while courts may be perceived as reluctant to interfere with matters which have apparently been settled by another trial or appeal court.

The report noted that the disadvantages of a tribunal would be the costs involved in its administration and the likely creation of a separate procedure after the conclusion of criminal proceedings, which is largely avoided under the current ex gratia scheme.

The report envisaged a tribunal of three members, including at least one retired judge or a barrister or solicitor of appropriate experience and one lay person. The Minister of Justice would appoint the members, and the Department for Courts would be responsible for providing administrative and secretarial services.

The Law Commission noted that the tribunal could be established either in the exercise of the prerogative or by statute. Most submissions received by the Law Commission favoured a tribunal by statute.

The Ministry considers the Law Commission's proposal for an independent tribunal with transparent processes and objective criteria for eligibility is compatible with the independent board proposal described above. Further advantages include the fact that the Board will already know the facts and will have a "head start" on assessing innocence; it vests responsibilities for all aspects of miscarriages of justice in a single agency; and it will secure consistency and certainty in decision-making.

Both the Crown and the applicant would have appeal rights, or would be able to seek a judicial review of the tribunal's decision on compensation.

As the number of compensation claims is low (ranging from 1-4 claims per year since 1996) if this proposal was adopted we consider that the transactions costs incurred for the Department for Courts to be involved in servicing the tribunal are unnecessary. This means that the Ministry of Justice would service both the tribunal and the board.

The Ministry considers the Law Commission proposal for a tribunal as appropriate. It may be, however, that compensation matters could be perceived as a matter for executive rather than judicial decision making. Therefore, the independent board could be required to make recommendations only on compensation to the Minister of Justice. Judicial review of the process would be open to the Crown and applicants who are dissatisfied with the decision.
We seek your view as to whether the independent board should also be responsible for determining compensation matters, and if so whether it should be tasked with making the decision or should it make a recommendation to the Minister of Justice.

APPENDIX

Clause XI of the LETTERS PATENT CONSTITUTING THE OFFICE OF GOVERNOR-GENERAL OF NEW ZEALAND

Exercise of the Prerogative of Mercy

We do further authorise and empower Our Governor-General, in Our name and on Our behalf, to exercise the prerogative of mercy in Our Realm of New Zealand, except in any part thereof where, under any law now or hereafter in force, the prerogative of mercy may be exercised in Our name and on Our behalf by any other person or persons, to the exclusion of Our Governor-General; and for greater certainty but not so as to restrict the authority hereby conferred, Our Governor-General may:

(a) Grant, to any person concerned in the commission of any offence for which he may be tried in any court in New Zealand or in any other part of Our said Realm to which this clause applies or to any person convicted of any offence in any such court, a pardon, either free or subject to lawful conditions; or

(b) Grant, to any person, a respite, either indefinite or for a specific period, of the execution of any sentence passed on that person in any court in New Zealand or in any other part of Our said Realm to which this clause applies; or

(c) Remit, subject to such lawful conditions as he may think fit to impose, the whole or any part of any such sentence or of any penalty or forfeiture otherwise due to Us on account of any offence in respect of which a person has been convicted by any court in New Zealand or in any other part of Our said Realm to which this clause applies.

Section 406 Crimes Act 1961

Prerogative of mercy Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any Court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—

(a) Refer the question of the conviction or sentence to the Court of Appeal or, where the person was convicted or sentenced by a [District Court] [acting in its summary jurisdiction or under section 28F(2) of the District Courts Act 1947], to the [High Court], and the question so referred shall then be heard and determined by the Court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; or

(b) If he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the Court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.

Section 407 Crimes Act 1961

Effect of free pardon Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence:

Provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted.

APPENDIX

Table 1 – Analysis of Applications

Year	Number of applications	Nature of application	Result (NB not necessarily resolved in the same year)
1996	7	3 [illegible]r pardon; 4 [illegible]or referrals under s 406	2 references under s 406; 5 declined
1997	[illegible]	1 for pardon or referral under s 406; 7 for referral under s 406	2 references under s 406; 6 declined
1998	10	1 pardon; 1 to widen terms of reference; 8 for referral under s 406	Terms of reference for 1 s 406 application widened; 1 reference under s 406; 8 declined
1999	14	3 for pardon or referral under s 406; 1 pardon; 10 for referral under s 406	1 Ministerial inquiry held; 13 declined
2000	7	2 pardon; 1 for pardon or referral under s 406; 4 for referral under s 406	2 reviews in progress; 5 declined
2001	10	1 pardon; 1 for pardon or referral under s 406; 8 for referral under s 406	1 reference under s 406; 8 reviews in progress; 1 declined
2002 (to 30 June)	7	1 for pardon or referral under s 406; 6 for referral under s 406	1 reference under s 406; 6 reviews in progress