MINISTRY OF JUSTICE
Tāhū o te Ture

Minister of Justice
cc Associate Minister of Justice

Report Title: THORP PAPER: MISCARRIAGES OF JUSTICE

Date:	1 February 2006	**File Number:**	CON-34-22

Action Sought	**Timeframe**
For information	N/A
For your direction on next steps	N/A

Contacts for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Andrew Bridgman	Deputy Secretary, Policy and Legal	494 9707 (wk)	(a/h)	
Jeff Orr	Chief Legal Counsel	494 9755 (wk)	(a/h)	✓

Minister's office to complete

☐ Noted ☐ Seen	☐ Approved ☐ Withdrawn	☐ Overtaken by events ☐ Not seen by Minister	☐ Referred to:

Minister's office comments

MINISTRY OF JUSTICE
Tāhū o te Ture

THORP PAPER: MISCARRIAGES OF JUSTICE

Purpose of Report

1. The purpose of this report is to brief you on a recent paper by Sir Thomas Thorp titled "Miscarriages of Justice" in which he advocates the establishment of an independent authority to examine alleged miscarriages of justice and refer deserving cases back to the courts.

2. Sir Thomas' paper will be discussed at a Legal Research Foundation conference on **Miscarriages of Justice** in late February. The Ministry will be represented at the conference.

Executive Summary

3. In 2003, the Ministry released a discussion paper that canvassed the merits of establishing an independent body to examine alleged miscarriages of justice and refer deserving cases back to the courts. In his recent paper "Miscarriages of Justice", Sir Thomas Thorp strongly favours that option.

4. The paper is a comparative study examining how alleged miscarriages of justice have been dealt with in New Zealand and selected overseas jurisdictions, in particular the United Kingdom and Scotland, which have established independent bodies to review miscarriages. Extrapolating from UK figures, Sir Thomas considers that the number of miscarriages in New Zealand has been significantly underestimated. He also points to an apparently low rate of claims made by Maori and Pacific Islanders. The paper argues that the current NZ arrangements relating to the Royal prerogative of mercy are "reactive" and that a "more receptive" independent body is needed to ensure a higher volume of claims. He says a conservative forecast for such a body would allow for claims of miscarriage of justice to *treble* in number.

5. The Ministry queries whether Sir Thomas' assessment of the UK figures is an adequate basis for his conclusions about the frequency of miscarriages in New Zealand. There is not enough information to say what factors currently influence applications for the Royal prerogative of mercy or whether a system that sought to attract more claims would reveal more miscarriages or instead require a larger number of unmeritorious claims to be dealt with.

6. Sir Thomas' paper is a valuable study that raises a number of operational and policy issues for further investigation. The next stage of policy work would need to take a hard look at the strengths and weaknesses of different reform options against agreed policy objectives and cost the options in light of expected volumes and machinery of government implications. On the operational side, the Ministry

has already made significant improvements over the last 2½ years to its Royal prerogative of mercy processes and considers that it is currently managing the flow of applications to a high standard. As there seem to be no short term pressures requiring urgent reform of the current system, the Ministry's view is that in the meantime it might be best to place emphasis on further operational improvements. This paper seeks your direction on the next steps.

Background

7. Convicted persons who claim that they have been wrongly convicted but have exhausted their appeal rights may apply to the Governor-General for the exercise of the Royal prerogative of mercy. By constitutional convention, the Governor-General takes advice on these applications from the Minister of Justice, who in turn relies on the Ministry to investigate and provide a thorough report on each application. If the finding is that a miscarriage of justice has occurred or is likely to have occurred, the Governor-General may be advised to grant a pardon or, more likely, refer the person's case back to the courts for further consideration.

8. Prompted by an increase in the nature and complexity of these applications, the Ministry of Justice in 2003 released a discussion paper to a small target audience. It reviewed the New Zealand practice and identified areas for improvement. The paper said options for the future included strengthening organisational arrangements in the Ministry (eg, a dedicated unit with an external panel of reviewers) or establishing an independent body (possibly with Ministry support) to examine alleged miscarriages and decide which cases should be referred back to the courts.

9. Most responses to the discussion paper favoured a new body. The recent select committee report on the Ellis petition also supported an independent body. The next stage of policy work on possible reform options has been on the Ministry's agenda for some time but has not had a high priority. It is not on the current work programme.

10. Sir Thomas' interest in the topic is influenced in part by his involvement in assisting the Ministry on some high profile cases examined in recent years (Ellis, Bain, Waugh). When the Ministry's discussion paper was released, he decided to undertake some further work involving a study of several overseas jurisdictions, particularly the UK and Scotland (which have established independent bodies to review miscarriages). Sir Thomas visited both bodies. To get a picture of the type of cases arising in New Zealand, Sir Thomas also requested access to and reviewed 53 Ministry files on Royal prerogative applications made between 1995-2002. Sir Thomas' paper is the product of these inquiries.

Summary of Thorp Paper

11. The Thorp paper is a very valuable study, in particular for its examination of the operation of the United Kingdom experience and the operation of the Criminal Cases Review Commissions established in both the UK and Scotland to investigate claims of miscarriage of justice.

12. Comparing these jurisdictions with the New Zealand situation; Sir Thomas notes that one great difference is that, allowing for population size, about 6 times as many claims of miscarriage of justice are made to the UK authorities as are made in New Zealand by application for the Royal prerogative of mercy.

13. Sir Thomas believes this is largely due to two reasons. The first is the difference between what he describes as the "reactive" process of the current system in New Zealand and "more receptive" arrangements administered by an authority independent of the criminal justice system. Second, Sir Thomas says that Maori and Pacific Islanders appear to be markedly under-represented in applications for prerogative of mercy. He also comments that the UK authorities believe that the volume of claims they receive is directly related to the degree of confidence inmates have in the independence of their review processes.

14. In short, not enough claims of miscarriage are being made in New Zealand to get a true picture of the number that are justified. Extrapolating from the UK figures, Sir Thomas considers that the number of miscarriages in New Zealand has been significantly underestimated and that if UK figures translated to NZ, "up to 20 inmates" could be wrongly imprisoned.

15. He strongly favours the establishment in New Zealand of an independent authority to examine alleged miscarriages of justice and refer deserving cases back to the courts. He considers that the independent body should be proactive, ensuring all inmates are fully informed of the right to seek review of their case and, if necessary, facilitating applications. He makes a "conservative forecast" that with an independent, "receptive" authority claims of miscarriage of justice could at least *treble* in number.

16. Sir Thomas says the authority should be appropriately staffed and resourced, with particular emphasis on investigative expertise. He would also like to see such an authority have a long-term responsibility for collating information about and identifying the principal causes of miscarriage of justice.

17. Should an independent authority be established, Sir Thomas also recommends that decisions on payment of compensation to persons wrongly convicted could be made by the new body instead of by Cabinet under its current guidelines. (The Ministry's discussion paper said that if an independent body was established it could also consider applications for compensation, though the Ministry left it open whether such a body should have a power of recommendation (to the Minister) rather than decision.)

Comment on Thorp paper

18. We are very wary about Sir Thomas' conclusions about the likely frequency of miscarriages of justice in New Zealand. He acknowledges there is no reliable NZ data on the point. His estimate of "up to 20" persons (approximately 0.27% of the prison population) being unjustly imprisoned is theoretical only and is based on extrapolation from UK statistics. Further, it relies on untested assumptions about the relationship between the frequency of claims and actual miscarriages and the

reasons for the difference in claim volumes between New Zealand and the United Kingdom.

19. We simply do not have enough information to say what factors currently influence the use of the Royal prerogative of mercy system or whether a system that sought to attract more claims would reveal cases that need a remedy or instead result in a mass of unmeritorious claims.

20. Further, Sir Thomas also notes that Maori and Pacific Islanders appear to make few applications for the Royal prerogative of mercy. To the extent that this may reflect a general feeling of alienation from the criminal justice system, which Sir Thomas acknowledges, we cannot assume that Maori and Pacific Island inmates will necessarily relate more easily to a new official body.

21. In summary, it is valuable to query whether the frequency of miscarriages of justice may be underestimated in New Zealand and to examine how best to ensure that miscarriages are identified when they occur. However, there is not in our view a satisfactory factual basis for the conclusion that an independent body is needed to generate and investigate a much greater volume of claims.

22. Nevertheless, Sir Thomas' paper points to a number of areas for further investigation and possible action. These are discussed later in this report in light of the following summary of the Ministry's recent experience and current practice in dealing with Royal prerogative of mercy applications.

Current Practice in New Zealand

23. Quite a lot has changed since the 2003 discussion paper was released. In the last 2½ years, the Ministry has taken a range of initiatives to address organisational and process issues raised in the discussion paper and to strengthen its overall performance as the Minister's adviser on prerogative of mercy matters.

- Leadership of Royal prerogative work has been consolidated in the Office of Legal Counsel.
- The work is spread between an expanded pool of legal advisers, with additional support from external lawyers.
- A relatively simple 3-stage case management system for considering applications has been adopted.
- There is a written Procedures Guide for use by staff involved in considering Royal prerogative applications.
- There is regular communication with the applicant, commencing early in the process.
- Quarterly status reports are supplied to the Minister of Justice and Government House on progress with outstanding applications.

24. In addition, public information about the Royal prerogative of mercy is available in pamphlet form and on the Governor-General's website, with a link from the Ministry's website. When the Ministry first makes contact with applicants, it sends a copy of the pamphlet and explains the process that will be followed in their case.

People who make general complaints to the Minister or the Ministry about an injustice in their case are also told about the Royal prerogative process.

25. Receipt and disposal of Royal prerogative applications has been steady over the last 2-3 years. Approximately 10-12 applications are made each year. Many can be dealt with inside a year. Complex applications can take longer, particularly if comment is required from police, prosecutors or counsel involved in the case, if witnesses need to be interviewed, or if more information is required from an applicant.

26. The Ministry recognises the need, as required, to use external investigators and reviewers. In particularly difficult cases, the Ministry may engage Queens Counsel or a retired judge to investigate and report on an application or provide a second opinion. In appropriate cases, the Police may be asked to conduct further inquiries.

Quality and responsiveness

27. We note that Sir Thomas does not criticise the *quality* of the Ministry's advice. In an earlier report to the Ministry in 2003, he said after examining the 53 files that although he might have favoured deeper investigation in some cases, he had few disagreements with the conclusions reached by the Ministry. In his current report, he notes that the Ministry's reviews were significantly more comprehensive than those originally carried out by the English and Scottish Home Offices.

28. Further, there is no substance to a perception in some quarters that the Ministry is reluctant to disturb the decision of the courts in deserving cases. Since 1995, the proportion of applications that have resulted in referral back to the courts has fluctuated between 15% and 18%. This is much higher than the rates of referral given by Sir Thomas for the UK and Scottish Review Commissions – approximately 6% and 12% respectively.

Where to Next?

29. No system of criminal justice is perfect. Errors can occur that are only revealed after a case has run its course in the courts. A system of safeguards at the very end of the road should have the following objectives:

- To ensure that processes for investigating and remedying alleged miscarriages of justice are:
  - accessible;
  - enable competent and thorough consideration of possible miscarriages;
  - ensure possible miscarriages are addressed in a timely manner;
  - minimise the likelihood of a miscarriage of justice continuing.

- To maintain public confidence in the administration of justice, both in safeguarding the innocent from wrongful conviction and in upholding the convictions of the guilty.

- To be constitutionally appropriate and cost-effective.

30. It does not follow that the creation of a completely new body is the only way to achieve thorough consideration of possible miscarriages and maintain public confidence in the administration of justice. Moreover, the establishment of a new body would not be a universal panacea or extinguish public debate. The courts will still have to rule on cases referred back to them just as they have under the current system with cases like Ellis and Bain. There will always be cases where unsuccessful applicants and their supporters do not accept the outcome of review.

31. The current position is that there are no short term pressures requiring *urgent* action. The existing rate of applications (about 10-12 a year) is relatively low. While many are complex, they are being managed effectively to a high standard. With the significant improvements recently made to Ministry processes, the Ministry's overall performance stands up well against the objectives mentioned above. We are building up expertise in our staff, consolidating resources and looking at further improvements. For the time being, the Ministry is well placed to continue in its current role.

32. Against that background, there are broadly two directions in which further work could head.

Focus on operational improvements

33. The Ministry's Procedures Guide has now been in operation for about 2 years. In light of experience, we will be reviewing and updating the Ministry Guide during the first half of this year.

34. The Ministry agrees with Sir Thomas that there are several other areas where operational improvements could be looked at. The main ones include:

- Visibility of Royal prerogative process – there is scope for wider distribution of public information about the Royal prerogative. The legal profession and legal advisory services are probably the best targets because they can give applicants robust advice about their prospects and help ensure that applications are well prepared and documented. Complaints agencies that deal regularly with inmates (eg, the Ombudsmen, Visiting Justices) could also assist. We could also look at whether material could be better targeted to population groups, in particular Maori and Pacific Islanders. However, we are cautious about distributing material generally around courts and prisons because of the risk of generating high volumes of unmeritorious claims.

- The unrepresented applicant – these applications sometimes present special difficulties as applicants may not have properly identified or articulated grounds that could raise a possible miscarriage. While the Ministry takes extra care when assessing these applications, there is an outstanding question whether more could be done to assist potential applicants who do not have the benefit of legal advice. The Ministry would like to explore the options further.

- Better information base – as Sir Thomas pointed out, information about the use of the Royal prerogative of mercy has not been systematically collected to date. The Ministry agrees that it would be valuable to start building a database around records on ethnicity, offence category, type of claim, use of counsel and, where the courts find on a referral that a miscarriage has occurred, the cause of the miscarriage.

- Specialist expertise – as well as relying on external resources in appropriate cases, in upcoming recruitment rounds we will be looking to hire some staff with criminal law and/or litigation experience.

Further policy development

35. The broad policy issues and comparisons with overseas models have been well canvassed in the Ministry's discussion paper and Sir Thomas' paper and will be discussed at the February conference.

36. If further consideration was to be given to changing the organisational arrangements for dealing with alleged miscarriages, there are essentially four options that could be examined:

- Strengthen/increase the Ministry's capacity;
- Strengthen/increase the Ministry's capacity **and** increase external review of Ministry work, as required;
- Strengthen/increase the Ministry's capacity **and** set up an external panel or body with formal oversight;
- Establish an external panel or body with its own staff.

37. The next stage of policy work would need to take a hard look at the strengths and weaknesses of the different reform options against the policy objectives mentioned above and cost the options in light of expected volumes and machinery of government implications. The option of shifting decision-making responsibility to a new body would require legislation.

38. The constitutional implications would also need to be considered. While a new body could be given power to refer cases back to the Courts, the prerogative power to grant a pardon remains with the Governor-General. There must therefore remain at least a residual role for the Minister of Justice and the Minister's advisers. (Government House would need to be consulted.)

39. Legal aid is not currently available for Royal prerogative applications. The recent review of legal aid eligibility recommended no change on the basis that the issue would be decided as part of the Royal prerogative policy work, and in light of the shape of any future arrangements for dealing with miscarriages.

40. Other developments, such as the introduction of criminal appeals to the Supreme Court, should be factored in.

Conclusion

41. Sir Thomas' paper is a valuable addition to a modest knowledge base about the occurrence of miscarriages of justice in New Zealand and the operation of the Royal prerogative of mercy.

42. We do not consider that there is any pressing need for reform of the current arrangements for dealing with alleged miscarriages of justice. The Ministry has addressed most of the procedural issues that were identified 3 years ago, current volumes are relatively low and the Ministry considers it is managing the Royal prerogative process to a high standard. There are further operational improvements that should be examined, including those identified by Sir Thomas in his paper. In the short term, we think this is where the emphasis is best placed.

43. That does not rule out the possibility of moving towards an independent body in the future. It would be valuable at some point to resume detailed policy consideration of organisational options for reviewing alleged miscarriages of justice. We should continue to monitor developments. However, the Ministry could not at the moment offer you strong reasons for according this policy work a high priority at the expense of other policy projects.

Recommendations

44. It is recommended that you:

1 **note** the contents of this paper;

2 **agree** that the Ministry examine further operational improvements to its Royal prerogative of mercy processes, resources and knowledge base;
YES / NO

3 **agree** that the Ministry –

3.1 *undertake* further policy work on the organisational arrangements for dealing with alleged miscarriages; YES / NO

OR

3.2 *defer* for the time being further policy work on the organisational arrangements for dealing with alleged miscarriages. YES / NO

Andrew Bridgman
Deputy Secretary for Justice, Policy and Legal

APPROVED / SEEN / NOT AGREED

Hon Mark Burton
Minister of Justice
/ /2006

APPROVED / SEEN / NOT AGREED

Hon Clayton Cosgrove
Associate Minister of Justice
/ /2006