

Draft for internal  
discussion

Outside  
Scope

**Options**

Option 5: Independent Criminal Cases Review Commission (independent crown entity)

**Objectives**

Objective 1: 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;
- achieve the right outcome.

Objective 2: 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.

Objective 3: To be constitutionally appropriate

Objective 4: To be cost-effective.

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Objective 1	<p><b>Option 4</b>      <b>Option 5</b></p> <p><i>Med-high</i></p> <p>accessibility; Application process and test for referral in legislation; high profile of separate corporate identity (high competency; three member board (with term of appointment that ensures retention) will provide robustness and consistency to consideration of applications. Competency will depend on ability to hire and retain support staff. Possible increase in susceptibility of this work to judicial review increases pressure for assessments to be prompt, transparent, and able to withstand critical examination (med-high)</p> <p>timely; the commission will have dedicated staff to analyse applications and the governing board will oversee the progression of application. UK experience is that judicial review proceedings impact on ability of body to consider cases</p> <p>Although Scottish CCRC has had only one judicial review proceedings taken against them (med)</p> <p>achieves the right outcome: UK experience is that many more cases are referred to the courts than under the previous system. In 2005/06, in 79% of the Court of Appeal's determinations on referred convictions found the convictions were unsafe. However, there have also been an increasing number of re-applications to the CCRC. The statutory test for referral, and the way it is applied by the board, will influence the likelihood of the "right outcome" (med-high)</p>
Objective 2	<p><i>Med-high to High</i></p> <p>Applications are assessed at arm's length from Executive – will lessen perception that process is unduly conservative because of separation of powers concerns, or influenced by political opinion</p> <p>This option was recommended by Sir Thomas Thorp and JESC</p> <p>Final result of applications are still in the hands of the courts – Inevitably, there will be cases that attract ongoing public debate</p>

	<p><del>Option 4</del> Option 5</p> <p>if turned down by the Court of Appeal following a reference, as has occurred in cases like Ellis and Bain</p> <p>Will be able to promote itself as being independent from government and judicial system</p>
<p>Objective 3</p>	<p>Med-low</p> <p>Replacing decision-making under s406 with more formalised process set out in legislation. Residual power of pardon remains with Governor-General.</p> <p>There is a potential for conflicts between the courts and a new body with the power to refer cases to them (see discussion on relationship between the UK CCRC and the Court of Appeal)</p> <p>Applications are assessed at arm's length from the political Executive.</p>
<p>Objective 4</p>	<p>Med-low</p> <p>Cost of establishing crown entity and operating costs (amount not yet certain). Evidence from Scottish CCRC is that the unit cost per concluded case (total expenditure divided by total number of concluded cases) is relatively low – between 5,000 and 7,000 pounds since 2002 – although the unit cost was high in the initial set up year (38,571 pounds)</p> <p>Potential increased risk of judicial review when process formalised. The UK CCRC has experienced challenges to decision by judicial review (a great majority ill-founded), and that time and resources required to deal with challenges reduce ability to address applications (see 2005/2006 Annual Report). Scottish CCRC has only had one judicial review proceeding taken against them</p> <p>Requires legislative change</p> <p>There is a risk that applicants will treat the process as simply a further right of appeal.</p>

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Option 4 Option 5
<p>Likely to be a significant increase in the number of applications (both UK and Scotland have experiences increases in volume). In the UK the creation of the CCRC has resulted in many more referrals to the Court of Appeal than under the previous system. This has increased the workload of the Court of Appeal and its ability to manage its role within the criminal justice system.</p> <p>Formal body and process in legislation may lead to calls for legal aid assistance in applications</p>

Note SSC guidelines: if the between a departmental form and a non-company Crown entity is not clear-cut, there is a presumption in favour of the departmental form. Where constitutional considerations indicate a need for direct ministerial responsibility, there is a presumption in favour of the departmental form.

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