MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Rick Barker
Associate Minister of Justice

Organisational arrangements for miscarriages of justice

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Contacts for telephone discussion (if required)

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(s 9(2)(a) protection of privacy natural persons)

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events
☐ Referred to: _____
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Minister's office comments

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ORGANISATIONAL ARRANGEMENTS FOR MISCARRIAGES OF JUSTICE

Purpose

1. The purpose of this paper is to:
   - summarise the Ministry's policy work on organisational arrangements for considering alleged wrongful convictions or sentences (i.e. miscarriages of justice); and
   - seek your direction on that policy work.

Executive summary

2. The previous Minister of Justice asked the Ministry to review options to improve the system for considering claims of wrongful convictions and sentences (i.e. miscarriages of justice). Currently, convicted persons who claim a miscarriage of justice 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 from the Minister of Justice, who in turn relies on the Ministry of Justice to investigate and provide a thorough report on each application.

3. The Ministry has reviewed various legislative and non-legislative options, including:
   - strengthening the processes of the current system;
   - introducing an independent and formal review element to the current system (i.e. a special adviser to the Minister of Justice or a panel of senior lawyers or retired judges to oversee consideration of applications); and
   - establishing an independent body to consider claims of miscarriage of justice.

4. The Ministry recommends that further work proceed on the basis that:
   - the current system be retained;
   - the Ministry introduce measures to increase awareness of the system and strengthen the capacity of the Ministry;
   - the Ministry do further policy work on the special adviser and panel options; and
   - an independent body to consider alleged miscarriages of justice is not warranted at this stage.

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Background

The Royal prerogative of mercy

5. The Royal prerogative of mercy provides an extraordinary remedy for persons who may have been wrongly convicted or sentenced. In general terms, the test for exercising the prerogative of mercy is whether the applicant raises new evidence (or sometimes argument) not previously before the courts that raises doubt about his/her conviction or sentence. 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, reduce the person's sentence or, more likely, refer the person's case back to the courts for further consideration.

6. The Royal prerogative of mercy is not an additional form of appeal, nor is it an avenue to re-litigate matters properly determined by the courts.

Nature of Royal prerogative applications

7. Approximately 10-12 applications for the Royal prerogative of mercy are received each year. Applications with real substance are few. Since January 2006 only 3 applications raised substantive issues. Most applications have little or no merit at all. Often applications provide no evidence to back up assertions of innocence. These applications are relatively straightforward to decide and do not require external specialist advice. They are, however, still time consuming as a full report is made on every application.

8. Complex applications or applications with real substance do require specialist skills and knowledge. Often Queen's Counsel or retired judges are engaged to provide advice on, or peer review, complex or controversial applications. These are the applications in mind when questions are raised about the appropriate system for investigating alleged miscarriages of justice.

Scope of policy project on organisational arrangements for addressing miscarriages of justice

9. The Ministry has considered a range of organisational arrangements in which the executive branch of government (in one form or another) considers claims of wrongful convictions or sentences, and refers deserving cases back to the courts for further consideration. The policy project does not cover other issues relating to preventing or identifying wrongful convictions or sentences, such as appeal rights and structures or police investigatory procedures.

Objectives for organisational arrangements for addressing miscarriages of justice

10. We consider that a system to identify and remedy miscarriages of justice should have the following 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 claims are addressed in a timely manner;

- result in sound decisions.

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 (for example, consistent with overseas systems, the New Zealand system should not be seen as a further right of appeal that operates outside the judicial system or a mechanism that authorises the Executive to second-guess a decision rendered by the courts or substitute its judgment for that of the courts).

Objective 4: To be cost-effective.

Should an independent body be established?

2003 discussion paper

11. In 2003 the Ministry released a discussion paper to a small target audience. The discussion paper reviewed New Zealand's practice for handling prerogative of mercy applications and identified areas for improvement. The paper said options for the future included strengthening organisational arrangements in the Ministry or establishing an independent board to examine alleged miscarriages and refer deserving cases back to the courts. Most submitters on the 2003 discussion paper (including the Office of the Chief Justice, the New Zealand Law Society and the Crown Law Office) supported the establishment of an independent board.

12. The previous Minister of Justice recently asked the Ministry to review options to improve the system for considering claims of wrongful convictions and sentences.

Calls for independent body to examine miscarriages of justice

13. Several recent developments have revived interest in the establishment of an independent body to investigate alleged miscarriages of justice. These developments include:

- Sir Thomas Thorp's paper "Miscarriages of Justice", published in 2006, that proposed the establishment of an independent commission;
- the 2005 report of the Justice and Electoral Select Committee on the Christchurch Civic Creche (Peter Ellis) case, which recommended an independent commission; and
- the Privy Council's decision in May 2007 to overturn the murder convictions of David Bain and order a new trial. This came about after Bain's case had been referred back to the courts by the Governor-General exercising the prerogative of mercy.

14. In addition, Dr Richard Worth has placed a "Criminal Cases Review Tribunal Bill" in the Member's ballot. The Bill proposes to establish a Tribunal to consider alleged miscarriages of justice and refer deserving cases back to the courts. The Tribunal would also be able to recommend a pardon and award compensation to persons who are wrongly convicted and imprisoned. The Bill has not yet been drawn.

The UK system

15. The UK Criminal Cases Review Commission ("the CCRC") is often cited as a model for New Zealand. The CCRC is an "executive non-departmental public body" (crown entity) with its functions and powers governed by statute. The CCRC reviews any new factors that might be relevant to a person's conviction or sentence. The CCRC does not re-investigate the original case.

16. Before the CCRC was established in the UK, the Home Office was responsible for considering whether a particular conviction should be referred back to the Court of Appeal. Criticism of the criminal justice system in general peaked during the early 1990s after a string of high profile convictions were overturned (including the "Guilford four" and "Birmingham six" cases). In 1993 a Royal Commission on Criminal Justice recommended the establishment of an independent body to consider alleged miscarriages of justice.

17. Appendix A includes a comparison of the current UK and New Zealand systems.

Analysis of reasons for establishing an independent body

18. Calls for an independent body to consider alleged miscarriages of the justice are often triggered by:
    - perceived issues about the role of the Executive in the current system;
    - concerns about the capability of the current system; or
    - particular high profile cases.

Perceived issues about the role of the Executive

19. In essence, issues raised about the Executive's role in the prerogative of mercy system go to whether the system is effective or constitutionally appropriate. The table below sets out our analysis of these issues. When analysed, these issues appear to be more about public confidence in the system's independence rather than any evidenced problems. Public confidence is, however, vital for the efficacy of the system.

Perception	Analysis
The Executive's role is inconsistent with the constitutional principle of separation of powers between the Executive and the Judiciary	The prerogative of mercy is inherently a constitutional power, and is exercised by the Governor-General according to established principles that recognise and respect the separation or balance of powers.
The Executive is reluctant to overturn convictions or refer them back to the courts because of a vested interest in the outcome of applications and in preventing criticism of the criminal justice system	This perception is unfounded. In contrast with the UK situation prior to the CCRC, the Ministry of Justice is independent from the Police, Crown prosecutors and Solicitor-General. The referral rate to the courts suggests that the New Zealand Executive is not unduly hesitant to disturb judicial decisions in deserving cases. Since 1995, the proportion of applications that have been referred back to the courts has been around 12%. This proportion is higher than that of the CCRC (approximately 5%).

Perception	Analysis
In high profile cases, the Minister's advice to the Governor-General may be influenced by political and public opinion	There is no evidence to support this perception. The Minister's decisions are based on legal advice from politically neutral public service lawyers, with retired judges or QCs often being engaged to assist in high profile or complex applications.

Concerns about the capability of the current system

20. An independent body is sometimes seen as a way to address concerns about the capability of the current system. For example, advocates for an independent body suggest that such a body would:

    - improve the public profile of this extraordinary remedy and improve accessibility for potential applicants;
    - ensure that staff who deal with applications have the requisite experience and investigative expertise;
    - improve the timeliness of advice on applications and transparency in decision-making; and
    - improve the availability of information about the cause and frequency of miscarriages of justice in New Zealand.

21. The ability to achieve these objectives is, however, dictated more by available resources and robust processes than the independence or otherwise of the body that refers cases back to the courts for further consideration.

22. The 2003 discussion paper raised a concern that the lack of powers to compel evidence in the current system could affect assessment of an application if, for example, a potential witness refuses to be interviewed or to produce papers. In practice, however, we are not aware of any case where the lack of coercive powers has prevented a proper assessment of an application.

High profile cases

23. Calls from members of the public for an independent body are often in response to particular high profile cases in which there is general feeling that "the system" did not get the "right" outcome. Recent New Zealand cases that have sparked debate include Peter Ellis, David Bain and Rex Haig – all cases that have been referred back to the courts by the exercise of the prerogative of mercy (i.e. where the existing system has played its part in allowing the courts to reconsider a case). This type of criticism exists in all jurisdictions (including the UK) and appears to have more to do with achieving the perceived "right" outcome in high profile cases than the nature of the body that can refer cases back to the courts for further consideration. In some cases, it reflects a gap between legal tests for miscarriages of justice and public opinion on particular convictions.

Assessment of merits of an independent body

24. Appendix B sets out a proposed model for an independent body for New Zealand and its likely financial implications. Overall, we consider the increased level of resources required to establish and run an independent body would outweigh benefits because of:

    - the nature and number of applications the independent body would consider (overseas experience has shown that the establishment of an independent body may result in significantly more applications, but that the large majority still remain meritless);
    - the increased likelihood of judicial review proceedings resulting from formalising the system in statute. The CCRC faces a high number of judicial review proceedings (normally instigated by an applicant who disagrees with the CCRC's decision not to refer) which occupy the CCRC's resources at the expense of progressing applications; and
    - the risk that applicants would treat the new system as simply a further right of appeal (although this risk has not been realised in the UK).

25. In addition, the reasons usually presented in support of an independent body do not stand up to scrutiny. Instead, our analysis shows that:

    - the current system is constitutionally appropriate and there are no evidenced problems with the role of the Executive;
    - capability has more to do with the available resources than independence; and
    - any system will face criticism where the outcome of a particular case does not accord with commonly held views on the person's innocence or guilt.

26. The establishment of a body that is independent from the political Executive and the courts is likely to initially improve public confidence in the system. Increased susceptibility to judicial review increases pressure for the body's assessments to be prompt, transparent and able to withstand critical examination. However, as with all options we have considered, maintaining public confidence may be more dependent on the resources available to it and managing applicants' or public expectations. Consistent with the CCRC and policy objective 3 (at paragraph 10), an independent body would not be an additional avenue of appeal operating outside of the judicial system, or a body that re-investigates original evidence and substitutes its judgment for that of the courts. People seeking a "commission of inquiry" style investigation are likely to be disappointed in a process which investigates only new evidence or argument not previously before the courts and only refers a successful case back to the courts that have already previously dismissed the case. The final result of cases will remain with the courts and within the parameters of criminal procedure law. There will continue to be controversial cases that focus criticism on the criminal justice system if turned down by the independent body, or the courts following a referral, like Ellis and Bain.

27. We consider that the case for establishing an independent body is not strong, and that some of the perceived issues can be better addressed by improvements to the existing Royal prerogative of mercy system. For these reasons, the remaining part of this paper considers measures for strengthening the existing system.

Recommendation

We consider that establishing an independent body is not warranted at this stage.

Strengthening the Royal prerogative of mercy system

28. For the current system to be a viable option, improvements are needed to address capability concerns and to ensure public confidence in the system.

Addressing concerns about system capability

29. The Ministry proposes to address the system capability concerns in the following ways:

Capability concern	Proposed measure	Anticipated outcome
Public profile and accessibility of the system Information about the cause and frequency of miscarriages of justice in New Zealand	More widely disseminate information about the prerogative of mercy system, including information on: • principal reasons for cases to be referred • the role of the prerogative of mercy: what it is and is not Consider publication of examples of cases that have been referred, and information on the number, progress and outcome of applications Seek advice on how best to target information to prison population Introduce an application form and more detailed direction about the information and documents needed to support an application	• greater awareness and understanding of the role of the prerogative of mercy • dispel some negative perceptions • manage expectations of the system • discourage unmeritorious applications
Experience and investigative expertise of Ministry staff	Build Ministry staff expertise through training and team processes that encourage knowledge sharing Continue to use senior counsel or retired judges as required in complex or controversial applications	Strengthen capacity and expertise of Ministry
Timeliness of advice and transparency in decision-making	Dedicate additional Ministry resources to prerogative work	Strengthen capacity of Ministry

Ensuring public confidence: further options considered

30. While improvements to the system's capability can enhance public confidence, the challenge will be to address confidence issues regarding the role of the Executive, especially when dealing with high profile or complex applications. For this reason, we have gone on to consider non-legislative options for introducing an independent and formal review element. Currently, the Ministry will often engage Queen's Counsel or retired judges to provide advice on, or peer review, complex or controversial applications (for example, Barlow). We have looked at two options in which this sort of role would be formalised and mandatory for all applications:

- a special adviser to the Minister of Justice (modelled on the Canadian Special Adviser on Miscarriages of Justice); or
- a panel of senior lawyers or retired judges.

31. For both options:
    - the Ministry would continue to consider and investigate applications, and provide advice on applications to the Minister of Justice;
    - the special adviser or panel member would provide an overview of the Ministry's management, consideration and investigation of all applications, and could have input into matters of practice; and
    - additional funding would be required.

	Special Adviser	Panel
Structure	One non-statutory position	Non-statutory panel of 3-4 retired judges or senior lawyers. The panel would assign a member (or members) to each application.
Role	To provide independent advice and non-binding recommendations to the Minister on applications. The special adviser would not be bound by the Ministry's advice and recommendations, and would be able to provide advice to the Minister that differs from that of the Ministry.	To provide expert scrutiny of the Ministry's advice to the Minister on applications. For some applications, a panel member might provide legal advice to the Ministry on aspects of the application prior to review if necessary.
Cost Estimate	Approximately $125-175,000 in fees per annum based on a half-time position. Administrative costs (including office space) would be additional.	Approximately $250,000 in fees per annum based on 10 to 12 applications per year. Administrative costs would be additional.

32. Both options would be expected to improve confidence in the quality and independence of the advice to the Minister. The formal oversight provided by these options, and involvement in matters of practice, could also strengthen the Ministry's processes and expertise. However, the oversight would occur even for the most straightforward of applications and so in some cases may not be cost effective.

33. Appointing persons whose skills, experience and neutrality are widely accepted would be crucial to the success of both options. As with all options we have considered, there will continue to be controversial cases that negatively affect public confidence in the system if the outcome of those cases does not accord with popularly held opinions on the applicant's/defendant's innocence.

34. Combined with the Ministry's proposals for improving system capability, we consider that the Special Adviser and Panel options could satisfy the policy objectives at paragraph 10. The element of independence in both options could help address confidence issues. However, more analysis of the practical implications (for example, the relationship between a Special Adviser or Panel with the other actors in the system) and benefits of these options is needed. We therefore propose that the Ministry do further research and analysis on the viability of the Special Adviser and Panel options.

Recommendation

We recommend that the Ministry do further research and analysis on the viability of the Special Adviser and Panel options.

Recommendations

35. It is recommended that you:

1. **Note** that the Ministry has reviewed various legislative and non-legislative options for improving the system for considering alleged miscarriages of justice, including:

   1.1 strengthening the processes of the current system;

   1.2 introducing a Special Adviser to the Minister of Justice or a Panel of senior lawyers or retired judges to oversee consideration of claims; and

   1.3 establishing an independent body;

2. **Note** that the Ministry proposes a range of measures to improve awareness of the Royal prerogative of mercy system and to strengthen the capacity of the Ministry;

3. **Agree** that the Ministry does further research and analysis on the viability of the Special Adviser and Panel options; and **YES / NO**

4. **Agree** that further policy work proceed on the basis that establishing an independent body to consider alleged miscarriages of justice is not warranted at this stage. **YES / NO**

Jared Mullen
Deputy Secretary, Policy & Legal

APPROVED / SEEN / NOT AGREED

Hon Rick Barker
Associate Minister of Justice
Date:

APPENDIX A

Comparison of current UK and New Zealand systems

	UK system (CCRC)	New Zealand system (Royal prerogative of mercy)
What can be considered?	Criminal convictions and sentences where appeal processes have been exhausted (or there are exceptional circumstances)	Criminal convictions and sentences where appeal processes have been exhausted (or there are exceptional circumstances)
Number of applications	The Home Office received between 700 and 800 applications a year. The CCRC now receives 900 to 1,000 applications a year	10-12 applications received a year
What can be done if there is doubt about a conviction or sentence?	The CCRC can refer the conviction or sentence to the Court of Appeal. The CCRC can also advise the Home Secretary on whether a pardon is appropriate (although the CCRC's advice is not binding)	The Governor-General can refer the conviction or sentence to the courts, or grant a pardon
Test for referral	The CCRC may refer a case where it considers there is a "real possibility" that the conviction will be quashed or the sentence altered because of new evidence or argument.	In essence, the test is whether there is a real possibility that the courts could find a miscarriage has occurred. The Minister considers whether: the applicant has raised new information that for some reason was not able to be properly examined in court; and that evidence is relevant, credible, and of such a cogent nature that it is capable of pointing to a likely miscarriage of justice. The overriding question is the interests of justice.
Publicity: steps taken to raise profile and understanding of system	The CCRC has its own website with detailed information about its role, its processes and how to apply to get your case considered. The CCRC also takes proactive steps to raise its profile with prisoners and the public, including prison visits to talk with prisoners about the CCRC's role and functions.	The Governor-General's website contains basic information about the prerogative of mercy system, including information about making an application. This information is also available in pamphlet form, and is sent to people who write to the government or Governor-General with concerns about their convictions or sentences.

APPENDIX B

What would a New Zealand Criminal Cases Review Commission look like?

A New Zealand body based on the CCRC would be an independent crown entity with the power to:

- refer a case back to the courts for reconsideration where it considers that a miscarriage of justice has or might have occurred;
- refer a case and the commission's recommendations to the Minister where the commission considers that the prerogative of mercy might be exercised in a way other than a referral to the courts (e.g. a pardon);
- refer a question to the Court of Appeal for an opinion.

The Governor-General would retain the other prerogative powers (for example, pardons and the power to remit a sentence).

An independent body is likely to see a higher volume of applications than currently received. Sir Thomas Thorp has estimated that these options could expect a trebling in the number of applications (between 30 and 36 applications per annum) and an initial surge in historical claims. A comparison with overseas experience shows the volume may be even higher. The Scottish Criminal Cases Review Commission, which services a population size similar to New Zealand (roughly 5 million), receives between 3 and 4 times the annual number received before the Commission was established[1]. These estimates relate to the volume of applications rather than estimating the real occurrence of miscarriages of justice in New Zealand. As at present, the large majority of applications are likely to be found to be unmeritorious.

Financial implications

We estimate that such a body, with 3 Commissioners and 6-7 staff, would cost between $2 to 4 million per annum (not including initial set-up costs). The body's small size means that per annum costs are likely to be closer to $2 million, although this will depend on the body's workload. Additional funding may be required to help the court system cope with a potential increase in the number of referrals to courts.

The independent crown entity model could be modified to reduce costs while still retaining an element of structural independence. For example, the 2003 discussion paper suggested a statutory board of commissioners located within the Ministry of Justice for administrative services and staff. Staff would be Ministry employees but under the day-to-day control of the board. This option would still require significant funding to cover salaries, accommodation and administrative costs. We would expect a full time commissioner's salary to be about $250-350,000 per annum.

[1] The number of applications received by the Scottish CCRC per annum has varied considerably (from 95 applications in 2002/03 to 165 in 2005/06). However, an analysis of the number of claims received since 2000 shows that the Scottish CCRC can expect around 100 applications per year. Before the Scottish CCRC was established, approximately 20 to 30 claims were received per year.