MINISTRY OF JUSTICE
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Hon Simon Power, Minister of Justice

Royal prerogative of mercy: organisational options

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Royal prerogative of mercy: organisational options

Purpose

1. This paper advises you on organisational options for reviewing alleged miscarriages of justice (the Royal prerogative of mercy).

Executive summary

2. The recent acquittal of David Bain has resulted in renewed calls for an independent body to consider claims of wrongful convictions. Currently, convicted persons who claim a wrongful conviction or sentence (i.e. miscarriage of justice) but have exhausted their appeal rights may apply to the Governor-General for the exercise of the Royal prerogative of mercy. The Governor-General receives approximately 10-12 such claims each year.

3. Calls for an independent body to consider alleged miscarriages of 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
   - misconceptions about what an independent body would do.

4. Establishing an independent body is one of several options for improving the current system. Both legislative and non-legislative options exist, including:

   - strengthening the processes of the current system;
   - introducing an independent and formal review element to the current system; and
   - establishing an independent body to consider claims of miscarriage of justice.

5. Further policy work would be required if reform is to be pursued. This work is not currently on the Ministry's work programme. In the meantime, the Ministry of Justice aims to continually improve its procedure and performance in assessing applications for the Royal prerogative of mercy.

Background

The Royal prerogative of mercy

6. 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

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prerogative of mercy is whether the applicant raises new evidence (or sometimes argument) not previously before the courts that creates 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.

7. 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

8. Advice on applications for the Royal prerogative of mercy is managed within the Ministry's Office of Legal Counsel, which also has other competing work and priorities. Approximately 10-12 applications are received each year. Applications with real substance are few. Most applications have little or no merit at all. Often applications provide no evidence to back up assertions of innocence. Such 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.

9. 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.

2003 discussion paper

10. In 2003 the Ministry released a discussion paper to a small target audience. The discussion paper reviewed New Zealand's practice for handling prerogative 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. The paper indicated a preference for an independent board, with three or four part time members, serviced by Ministry of Justice employees. 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.

Overseas models

England, Wales and Northern Ireland

11. The Criminal Cases Review Commission ("the CCRC") was established in 1997 to consider possible miscarriages of justice in England, Wales and Northern Ireland and to refer appropriate cases back to the appeal courts. 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.

12. 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.

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13. The CCRC is often cited as a model for New Zealand. Appendix A includes a comparison of the CCRC and the New Zealand system.

Scotland

14. The Scottish Criminal Cases Review Commission ("the SCCRC") was established in 1999 with a broadly similar constitution and mandate to the CCRC. Where the SCCRC decides to refer a case back to the courts, the case is heard and determined as a normal appeal.

15. Scotland and New Zealand have similar sized civilian and prison populations. Prior to the SCCRC's establishment, the Scottish Office received approximately 20-30 claims of miscarriage of justice annually. The SCCRC now receives approximately 100 claims a year.

Canada

16. Canada has opted for a model where claims of alleged miscarriages of justice are made to the federal Minister of Justice, whose powers to review convictions are set out in statute. If the Minister considers a miscarriage of justice may have occurred, the Minister can order a new trial or refer the case to the relevant provincial court of appeal. The Minister's powers can only be exercised where a person presents new and significant information that casts doubt on the correctness of that person's conviction.

17. A dedicated unit within the Canadian Department of Justice advises the Minister of Justice on claims. The procedure for reviewing claims is set out in regulations. In 2003, a Special Adviser was appointed as an independent adviser to the Minister. The Special Adviser's main role is to make recommendations to the Minister once the Department of Justice's investigation is complete. The Special Adviser also works closely with the Department of Justice in its investigation of claims and provides independent advice at other stages of the process.

Calls for an independent body to examine miscarriages of justice

18. In recent years there has been high profile support for the establishment of an independent body to investigate alleged miscarriages of justice, including:

- Sir Thomas Thorp's paper "Miscarriages of Justice", published in 2006, that strongly advocated for the establishment of an independent commission to examine alleged miscarriages and refer deserving cases back to the courts;
- the 2005 report of the Justice and Electoral Select Committee on the Christchurch Civic Creche (Peter Ellis) case, which recommended an independent commission;
- Simon Mount (a lawyer in the Auckland firm of Meredith Connell) presented a paper at the 2008 Criminal Law Symposium arguing for an independent commission modelled on the Scottish Criminal Cases Review Commission;
- in 2008 the Auckland District Law Society issued a press release indicating its support for an independent authority to deal with miscarriages of justice; and
- following David Bain's acquittal, the Green Party has renewed its call for an independent body.

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Analysis of reasons for establishing an independent body

19. Calls for an independent body to consider alleged miscarriages of 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
- misconceptions about what an independent body would do.

Perceived issues about the role of the Executive

20. 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 analyses 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 13%. This proportion is higher than that of the CCRC (approximately 4%).
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

21. 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;

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- 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.

22. 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.

23. 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.

Misconceptions of what an independent body would do

24. Some recent commentary supporting an independent body has suggested that such a body could resolve or overturn wrongful convictions itself, thus preventing costly appeals or retrials. The CCRC and SCCRC do not, however, decide guilt or innocence. Their role is to refer likely miscarriages of justice to the courts for final determination. This means that an independent body will not prevent costly appeals or retrials. It also means that establishing an independent body will not address concerns about the approach of courts on appeal.

25. 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.

Options for reform

Objectives for organisational arrangements for addressing miscarriages of justice

26. 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.

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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.

Overview of options

27. Various legislative and non-legislative options for reform exist. The options we have identified fall into three general categories:

- strengthening the processes of the current system;
- introducing an independent and formal review element to the current system; and
- establishing an independent body to consider claims of miscarriage of justice.

28. Consistent with policy objective 3, all options outlined below are ones in which the executive branch of government (in one form or another) would refer potential wrongful convictions and sentences back to the courts for further consideration. None of the options would act as an additional avenue of appeal operating outside of the judicial system, or a system that re-investigates original evidence and substitutes its judgment for that of the courts.

29. People seeking a "commission of inquiry" style investigation are likely to be disappointed in any system which only refers successful cases back to courts that have already previously examined the case. The final result of cases will remain with the courts and within the parameters of criminal procedure law. No matter which option is adopted, there will continue to be controversial cases that focus criticism on the criminal justice system if turned down by the body tasked with considering alleged miscarriages of justice, or the courts following a referral (e.g. Peter Ellis).

30. All options would require additional resources to differing degrees.

Strengthening the Royal prerogative of mercy system

31. This option is essentially the status quo with new measures to address capability concerns and to ensure public confidence in the current system. Such measures include:

- more widely disseminating information about the Royal prerogative of mercy system;
- introducing an application form and more detailed direction about the information and documents needed to support an application;
- dedicating additional Ministry resources to prerogative work;
- continuing to use senior counsel or retired judges as required in complex or controversial applications; and

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- building Ministry staff expertise through training and team processes that encourage knowledge sharing.

32. Extra funding would be required for any additional dedicated Ministry resources.

33. This option can provide a competent system for considering applications. The challenge would be to ensure public confidence in the independence of the system, especially when dealing with high profile or complex applications. Raising the profile and understanding of the system, and strengthening the capacity and expertise of the Ministry, should help improve confidence in the system. The Ministry's capability would, however, remain subject to the competing workloads of staff. There would inevitably be times where staff cannot devote time to progressing applications because of other pressing work. This option is unlikely to satisfy those who believe that independence from the Executive is paramount for a robust system.

Introducing an independent and formal review element to the current system

34. Currently, the Ministry will often engage Queen's Counsel or retired judges to provide advice on, or peer review, complex or controversial applications. 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.

35. 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 $250-400,000 in fees per annum based on a half-time position. Administrative costs (including office space) would be additional.	Approximately $300-500,000 in fees per annum based on 10 to 12 applications per year. Administrative costs would be additional.

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36. 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. As with all options, 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.

Establishing an independent body

37. Two main models for an independent body have been mooted:

- a statutory board, with administrative and specialist/legal support supplied by the Ministry of Justice (the Ministry's 2003 discussion paper); or
- an independent crown entity similar to the UK CCRC (Sir Thomas Thorp).

38. Under both models, the body would be able 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.

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

40. Both models would require significant funding to implement and maintain the independent body. Of the two models, the statutory board model would be the more cost and resource efficient as existing Ministry resources could provide much of the support needed.

41. The principal advantages of establishing an independent body are said to be that it would boost the perception of independence and transparency, and thus increase public confidence in decision-making. However, as with all options, maintaining public confidence may be more dependent on the available resources and managing applicants' or public expectations.

42. More formalisation also increases the likelihood of judicial review proceedings. 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). Increased susceptibility to judicial review increases pressure for the body's assessments to be prompt, transparent and able to withstand critical examination, but can also occupy resources at the expense of progressing applications.

Compensation for persons wrongly convicted and imprisoned

43. There is some synergy between applications for the Royal prerogative of mercy and claims for compensation for wrongful conviction and imprisonment. The Ministry's Office of Legal Counsel currently provides advice on both areas of work.

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44. The Ministry's 2003 discussion paper raised the possibility that, if an independent board was established, the board could also have responsibility for making recommendations on compensation for persons wrongly convicted and imprisoned. In 2006 Sir Thomas Thorp envisaged that an independent crown entity with responsibility for considering alleged miscarriages of justice would have sole responsibility for decisions on compensation claims, thus removing the area entirely from the Executive's control.

45. Compensation payments for wrongful conviction and imprisonment are ex gratia (there is no legal right to compensation) and significant amounts of money are involved. For these reasons, there are strong policy grounds for the Government retaining decision-making responsibility in compensation claims. In the UK, the CCRC does not deal with claims for compensation and claims continue to be dealt with at government departmental level.

46. The synergy between the two areas of work means that policy work on reform options for the Royal prerogative of mercy will need to consider the inter-relationship with arrangements for compensation claims.

Next Steps

47. Ministry officials are available to discuss the various options raised in this briefing. Further policy work would be required before any option is pursued. This policy work is not currently on the Ministry's work programme.

Recommendations

48. It is recommended that you:

    1. **Note** the contents of this briefing;

    2. **Note** that officials are available to meet with you to discuss the contents of this briefing.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

APPROVED / SEEN / NOT AGREED

Hon Simon Power
Minister of Justice
Date:

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APPENDIX A

Comparison of the New Zealand system and the Criminal Cases Review Commission for England, Wales and Northern Ireland

	Criminal Cases Review Commission	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 of justice 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.

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