Hon Andrew Little

Minister of Justice
Minister for Courts
Minister for Treaty of Waitangi Negotiations
Minister Responsible for the NZSIS
Minister Responsible for the GCSB
Minister Responsible for Pike River Re-entry

24 MAY 2018

Ross Francis
fyi-request-7552-9f332cd2@requests.fyi.org.nz

Dear Mr Francis

Official Information Act 1982 Request

I refer to your Official Information Act 1982 (the Act) request of 29 April 2018. You have sought the following information under the Act:

> *... copies of all communication you have had with Justice Ministry officials and others in regards to establishing a Criminal Cases Review Commission (CCRC). The period covered by this request is 19 October 2017 to 31 March 2018 (inclusive). Information includes (but is not limited to) texts, file notes, memos, faxes, letters, emails, Cabinet papers, feedback from interested parties.*

The appendix to this letter lists the documents within the scope of your request. The appendix notes that some information has been withheld under section 9 of the Act. Once policy decisions have been made, I anticipate more information on these matters will be made publicly available.

The personal information of some individuals has been withheld under section 9(2)(a) of the Act in order to protect the privacy of natural persons.

Certain information has been withheld from these documents under section 9(2)(f)(iv) of the Act in order to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials. The information withheld is considered advisory in nature and has been tendered by the Ministry of Justice. Releasing the information at present would prejudice the Government's ability to receive and consider the advice in an effective and orderly manner.

Some information has also been withheld under section 9(2)(g)(i), in order to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty.

I note that the responses to targeted consultation undertaken by my officials also fall within the scope of your response. I have withheld these in full, including the names of those consulted with, under section 9(2)(a) and section 9(2)(f)(iv) of the Act. Again, releasing this information at present would prejudice the Government's ability to receive and consider advice on establishing the CCRC in an effective and orderly manner.

+64 4 817 8707 Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand a.little@ministers.govt.nz beehive.govt.nz

I am satisfied that there are no other public interest considerations that render it desirable to make the information available.

You also asked when I anticipate the CCRC will be established, and what I consider the benefits of establishing a CCRC to be. The Government work to establish the CCRC is ongoing. I hope to be making public announcements about progress establishing a CCRC in the coming months. The benefit of a CCRC is there is a more systematic and transparent approach taken to examining claims of miscarriages of justice.

If you are dissatisfied with this response, you may complain to the Ombudsman under section 28(3) of the Act. The contact details for the Office of the Ombudsman are:

Office of the Ombudsman
PO Box 10152
Wellington 6143
Phone: 0800 802 602
Email: info@ombudsman.parliament.nz

Yours sincerely

Hon Andrew Little
Minister of Justice

Appendix – Documents within scope of request of 29 April 2018 from Mr Ross Francis

No	Document Title	Date	Type of document	Comments
1	Establishing a Criminal Cases Review Commission	09/11/2017	Briefing	Some information has been withheld under s 9(2(a), s (9)(2)(f)(iv) and s 9(2)(g)(i).
2	Weekly Report for Minister of Justice and Minister for Courts	17/11/2017	Weekly Report	Some information has been withheld under s (9)(2)(a) Information also withheld as out of scope of the request.
3	Proposed model for establishing a Criminal Cases Review Commission	11/12/2017	Briefing	Some information has been withheld under s 9(2)(a), s (9)(2)(f)(iv) and s 9(2)(g)(i).
4	[Title withheld under s 9(2)(f)(iv)]	12/01/2018	Briefing	Withheld in full under s 9(2)(f)(iv).
5	Weekly Report for Minister of Justice and Minister for Courts	19/01/2018	Weekly Report	Some information has been withheld under s (9)(2)(a). Information also withheld as out of scope of the request.
6	Weekly Report for Minister of Justice and Minister for Courts	26/01/2018	Weekly Report	Some information has been withheld under s (9)(2)(a) and s (9)(2)(f)(iv). Information also withheld as out of scope of the request.
7	Weekly Report for Minister of Justice and Minister for Courts	23/02/2018	Weekly Report	Some information has been withheld under s (9)(2)(a) and s (9)(2)(f)(iv). Information also withheld as out of scope of the request.
8	Supplementary advice on the Criminal Cases Review Commission model	09/03/2018	Briefing	Some information has been withheld under s 9(2(a), s (9)(2)(f)(iv) and s 9(2)(g)(i).
9	Establishing a Criminal Cases Review Commission	09/03/2018	Draft Cabinet paper	Withheld in full under s 9(2)(f)(iv).
10	Criminal Cases Review Commission: areas for further discussion	28/03/2018	Aide memoire	Some information has been withheld under s (9)(2)(f)(iv).

MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Andrew Little, Minister of Justice

Establishing a Criminal Cases Review Commission

Date	9 November 2017	File reference	CON-34-22

Action sought	Timeframe
Note the content of this briefing, which summarises: • the main features of a Criminal Cases Review Commission; and • the key considerations for the establishment of a New Zealand CCRC	n/a
Read the report in conjunction with the associated briefing entitled *Initial Briefing on the Royal Prerogative of Mercy*.	n/a
Discuss the content of this briefing with officials.	n/a

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Jeff Orr	Chief Legal Counsel, Office of Legal Counsel	04 494 9755	9(2)(a)	☒
Ruth Fairhall	Deputy Secretary, Policy	04 498 2399	9(2)(a)	☐

Minister's office to complete

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

Minister's office's comments

Purpose

1. This briefing:

   1.1. Describes the purpose and main features of a Criminal Cases Review Commission (CCRC);

   1.2. Summarises the key considerations for the establishment of a New Zealand CCRC; and

   1.3. Seeks direction on next steps.

Executive summary

2. The Government has a coalition agreement commitment to establish a CCRC. A CCRC is an independent public body set up to review suspected miscarriages of justice and refer deserving cases back to the appeal courts. In New Zealand, the Royal prerogative of mercy performs the same function.

3. A number of other jurisdictions have established a CCRC, including the United Kingdom (for England, Wales and Northern Ireland), Scotland and Norway. These models provide valuable experience to draw upon in considering the design of a CCRC for New Zealand.

4. The international models indicate some of the main issues for further consideration, which include the:

   4.1. Reasons for a CCRC;

   4.2. Functions and powers of a CCRC;

   4.3. Structure and cost; and

   4.4. Legislation required.

5. We seek discussion of this paper and the next steps in providing substantive advice on the options for implementing the coalition agreement to establish a CCRC.

Reviewing miscarriages of justice – the current system

6. In New Zealand, a person who believes they have suffered a miscarriage of justice may apply to the Governor-General for the exercise of the Royal prerogative of mercy. By convention, the Governor-General acts on the formal advice of the Minister of Justice. Work on prerogative of mercy applications is undertaken by lawyers in the Ministry's Office of Legal Counsel, and assistance is sought, where required, from an independent adviser such as a Queen's Counsel or retired Judge.

7. Where it appears that a miscarriage of justice has or is likely to have occurred in a criminal case, the Royal prerogative of mercy can be exercised to:

   7.1. Grant a free pardon; or

   7.2. Refer a person's conviction or sentence to the relevant appeal court under section 406(1) of the Crimes Act 1961 for a further appeal.

8. The ability to refer a case back to the appeal courts is the constitutional mechanism by which the executive branch of government can intervene in criminal cases in a manner compatible with the separation of powers.

9. Strong conventions, reflecting the separation of powers, underpin the exercise of the prerogative of mercy. Applicants are expected to use their appeals before applying for the prerogative of mercy. The prerogative of mercy is not an opportunity to repeat arguments or re-examine evidence that have already been considered by the courts.

10. What is normally required to justify referring a case back to the appeal courts is "something new" – for example, fresh evidence – that has not been properly considered by the courts and is sufficiently cogent to raise a real doubt about the safety of the conviction. We have provided you with a companion briefing on the Royal prerogative of mercy that describes in more detail the principles and process for consideration, and provides information about applications currently under consideration.

11. The grant of a pardon is extremely rare and would be contemplated only where there is compelling evidence that the person could not properly have been convicted and the case is no longer susceptible to consideration by the courts. The last person to be pardoned on the basis of a wrongful conviction was Arthur Allan Thomas.[1]

12. It is the power to refer a person's conviction or sentence back to the courts for reconsideration that has real operational significance for those convicted persons who have used their appeals and remain dissatisfied with the outcome. That power has been exercised on 15 occasions since 1995, which represents about 9% of the 166 applications for the prerogative of mercy lodged in that time.

What is a CCRC?

13. A CCRC is a public body set up to review suspected miscarriages of justice and, like the operation of the Royal prerogative of mercy, refer deserving cases back to the appeal courts. Therefore, this is not a new function in the criminal justice system. What the establishment of a CCRC represents is a change in who performs the function and how.

14. While a CCRC may undertake such investigations as it considers necessary to inquire into an alleged miscarriage of justice, it is not an advocate or crusader for an applicant. Its statutory role requires it to make a considered legal judgement about whether an application has sufficient merit that an appeal court should reconsider the person's conviction or sentence.

15. Consistent with the separation of powers, CCRCs do not determine guilt or innocence. Determinations of criminal responsibility, including any decision to quash a conviction or order a new trial, remain with the appeal courts. The CCRC's role is complete at the time it refers a case to the courts. When a case is referred back, it is dealt with as an appeal and the applicant is represented by counsel in the normal way. The CCRC does not appear in court.

[1] Arthur Allan Thomas, convicted of murder, was given a free pardon in 1979 following a report by a Queen's Counsel that queried the safety of his conviction. This did, however, follow two prior referrals to the Court of Appeal, the first of which resulted in a new trial at which Mr Thomas was convicted for a second time.

International examples of a CCRC

16. As noted above, several jurisdictions have established a CCRC, including the United Kingdom, Scotland, and Norway. These models provide valuable experience to draw upon in considering the design of a CCRC for New Zealand.

17. In 1997, a CCRC (referred to in this briefing as the UK CCRC) was set up to investigate suspected miscarriages of justice in England, Wales and Northern Ireland. Its establishment was recommended by the Report of the Royal Commission on Criminal Justice[2], otherwise known as the *Runciman Report*.

18. In Scotland, a special committee, the *Sutherland Committee*[3], recommended that a similar body (referred to in this briefing as the Scottish CCRC) be set up in that jurisdiction. It was established in 1999.

19. The UK and Scottish CCRCs are state-funded but operate independently of the core public service and Ministers of the Crown. The CCRCs are bodies corporate, whose members (Commissioners) are appointed by the Queen on ministerial advice. They comprise a Board, a senior management team and employed staff. Decisions on applications are made by the appointed Commissioners.

20. Norway established a CCRC in 2004 following amendment to the Criminal Procedure Act 1981. The Norwegian Commission is a state-funded independent body, consisting of five permanent members and three alternate members.

21. Each CCRC is established by statute, which provides for:

    21.1. The constitution and membership of the Commission;

    21.2. The authority of the CCRC to refer a person's conviction or sentence to the appeal courts and the grounds on which a referral may be made;

    21.3. Any powers to obtain documents or information or to require investigations to be carried out;

    21.4. Any rules about non-disclosure of information held by or provided to the Commission.

22. Table One below outlines key elements of CCRCs in the United Kingdom, Scotland and Norway. We have included a more detailed summary of arrangements in those jurisdictions in **Appendix One**.

[2] Cm 2263 (1993).
[3] *Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures* Cm 3245 (1996).

Table One – The key elements of CCRCs in the UK, Scotland and Norway

	United Kingdom	Scotland	Norway
What triggers a review by the CCRC?	Application from a convicted person or request from the Court of Appeal	Application from a convicted person	Application from a convicted person or prosecution authorities
What are the criteria for a referral back to the courts?	If there is a 'real possibility' that the conviction or sentence will be set aside, there is new argument or evidence, and the applicant has exhausted the appeal process	If a miscarriage of justice may have occurred and referral is in the interests of justice	If there is new evidence, misconduct by a person involved in the case, or an international body has found the decision contravenes international law
Which court is the referral made to?	Court of Appeal	High Court	Court of equal standing to the one that made the original decision
What powers does the Commission have during a review?	• Obtain documents from any public office. • A court order for information from a private person. • Require police to appoint an investigating officer.	• Obtain documents from any person or public office. • A court order to summon witnesses to testify	• Require police to investigate new evidence • Summon witnesses to testify.
Commission structure	• Independent body • At least 11 members; one third must have legal experience, and two-thirds must have knowledge or experience with the justice system • 5-year terms, 2-term limit	• Independent body • At least 3 members; one third must have legal experience, and two-thirds must have knowledge or experience with the justice system • 5-year terms, 2-term limit	• Independent body • 5 permanent members, 3 of whom must be from the legal profession; 3 deputy members • Chairman serves 5-year terms, 1-term limit; other members, 3-year terms, 2-term limit
2016 Budget (NZD)	$11.35 million	$1.96 million	$2.85 million
2016 case volume	1,397 cases (2.3 per 100,000 people)	150 cases (2.8 per 100,000 people)	161 cases (3.1 cases per 100,000 people)
Cases referred back to the courts	3.3% overall	5.7% overall	13% overall

Referral arrangements in other jurisdictions

23. Most Australian jurisdictions still rely on the Royal prerogative of mercy to refer cases back to the appeal courts. In Canada, the statutory power of referral lies with the Minister of Justice, who is supported by a dedicated departmental unit and an independent Special Adviser. We can provide further information about these arrangements, if you wish.

Main issues for consideration

24. This section provides a high-level summary of the main issues for consideration in establishing a CCRC, including contextual information about the intended purpose of a CCRC. We propose to provide you with more detailed analysis before the end of the year on the elements described below.

Reasons for establishing a CCRC

25. Overseas CCRC models have generally been established in response to public concern about the functioning of the criminal justice system, including perceptions that existing post-appeal mechanisms were not sufficiently independent or were not functioning effectively.

26. These concerns may be addressed by the establishment of a CCRC. However, some public expectations probably cannot be met. In New Zealand, commentators have also suggested that some high-profile cases would have been resolved differently if a CCRC had existed, often overlooking that the role performed by a CCRC had in fact been carried out pursuant to the Royal prerogative of mercy.[4]

Function of the CCRC

27. As discussed earlier in the paper, the core function of CCRCs in other jurisdictions is to review suspected miscarriages of justice and refer deserving cases back to the appeal courts.

Basis for referral back to the Court

28. If it followed the overseas models, a CCRC would have the statutory power to refer a conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred. This would replace section 406 of the Crimes Act 1961, under which the referral power is currently exercised by the Governor-General on Ministerial advice.

29. The statute would need to specify the ground or grounds on which referral to the court was permitted. This would ensure a clear statement of the CCRC's principal function and ensure that the body maintained a constitutionally appropriate relationship with the courts. The formula for referral would likely have regard, as the UK and Scottish statutes do, to the statutory criteria for an appeal to be allowed by the appeal court.

[4] Contentious cases like David Bain, Peter Ellis and Rex Haig were referred back to the appeal courts, as would have occurred if a CCRC had been in force. The existence of a CCRC would not have led to a different outcome.

Residual role for Royal prerogative of mercy

30. As with the CCRC models in the UK and Scotland, the Governor-General, acting on Ministerial advice, would continue to have the constitutional authority to exercise the prerogative powers to grant a pardon and remit a sentence. That is because those powers are delegated by the Queen to the Governor-General in the Letters Patent. However, as use of these powers has already been largely eclipsed by the power to refer a matter back to the courts, in practice the independent body would take over responsibility for investigating alleged miscarriages of justice. A fresh convention would develop where any applicants for a pardon would be directed instead to the CCRC.

31. There might however, regardless of the existence of a CCRC, be a very small residual role for the Governor-General and the Minister of Justice. That would arise where applicants who are unsuccessful before the CCRC or who are successful in having their case referred back to the courts but are dissatisfied with the outcome then apply to the Governor-General for an outright pardon (e.g. Peter Ellis).

Powers of the CCRC

32. For the Royal prerogative of mercy process, the Ministry relies mainly on the co-operation of the courts and Police for access to official documents, and on an applicant's current and previous lawyers for information about the case and how it was handled. Witness interviews are undertaken with their consent. The lack of coercive powers has not been an obstacle in practice.

33. Nevertheless, if a new body was established by statute, it may be advisable to specify certain information-gathering powers, even if it is not strictly necessary to rely on them. Examples include:

    33.1. Authority to obtain relevant documents from the courts – section 15(4)(b), Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004;

    33.2. Authority to request relevant information from the Police – section 21(2), Independent Police Conduct Authority 1988; 9(2)(g)(i) [redacted]

    33.3. Power to require any person to provide relevant information or documents – section 24, Independent Police Conduct Authority 1988.

Structure and cost

34. A New Zealand CCRC could take one of several forms, principally:

    34.1. An Independent Crown Entity (ICE) – a state-funded legal entity operating independently of Ministers but within the strategic direction settled with the responsible Minister;

    34.2. An independent statutory office – a new office, with administrative support from government, with the task of exercising specific statutory functions or powers independently of Ministers; 9(2)(g)(i) [redacted]

34.3. A senior departmental officer required by statute to exercise specific statutory responsibilities, independently of Ministers and departmental Chief Executives.

35. The Justice sector has examples of all three types. The Independent Police Conduct Authority and the Human Rights Commission are two of several Crown entities funded through Vote Justice. The office of the Judicial Conduct Commissioner is an example of an independent statutory office. And the Legal Services Commissioner is a statutory officer who by law is a Ministry employee but is required to perform certain statutory functions independently.

36. The cost of establishing and running a CCRC is difficult to estimate, largely because of the unpredictable workload. We would expect to see an increase in applications with the creation of a CCRC.[5] Cost would be impacted further depending on your choice of structure, and the functions and powers of the CCRC.

37. For example, the Independent Police Conduct Authority[6] is an example of a high workload ICE which carries out a complaints-based investigative function. It currently has a full-time chair, two part-time members who sit on the board, and approximately 25-27 staff. Its budget for the 2017/18 year is $4.111m.

38. Legal aid is currently available for applications for the Royal prerogative of mercy and would continue if applications were directed instead to a CCRC. A projected increase in the number of applications could therefore be expected to lead to a rise in legal aid costs.

Legislation required

39. The establishment of a CCRC would require legislation covering the matters outlined above. Other matters that the legislation would likely need to provide for include:

39.1. The procedure for receipt and consideration of applications;

39.2. Any rules on confidentiality of information held or received by the CCRC;

39.3. The ability to prescribe forms and procedures;

39.4. Transitional arrangements regarding existing applications.

Timeframe for policy and legislative development

40. This briefing provides an outline of the key considerations for the establishment of a New Zealand CCRC. For completeness, we note that the Ministry has previously done some initial work, since 2002, on other options that could strengthen arrangements for reviewing miscarriages of justice, including:

40.1. Bolstering the Ministry's capacity, including greater use of external counsel;

40.2. Establishing a special unit within the Ministry;

40.3. Formalising external peer review in a special adviser or panel to oversee the Ministry's function.

[5] The introduction of the Scottish CCRC saw applications increase from approximately 20-30 a year (for the Royal prerogative of mercy) to an average of 165 a year over the last 5 years

[6] Established by section 4 of the Independent Police Conduct Authority 1988.

41. Should you wish, we can provide additional information about that previous work.

42. As post-appeal review is only one part of the system for addressing miscarriages of justice, and is largely reactive, you may also wish to consider whether there are options that could help address or prevent wrongful convictions at earlier stages of the criminal justice process. 9(2)(g)(i) [redacted]

43. Detailed policy work on establishing a CCRC remains to be done. We propose to provide you with substantive advice and seek your decisions on these matters before the end of the year. That work will include advice on the estimated cost of establishing a CCRC.

44. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

Recommendations

45. It is recommended that you:

1. **Note** the content of this report, which summarises:

   1.1. the main features of a Criminal Cases Review Commission;

   1.2. the key considerations for the establishment of a New Zealand CCRC

2. **Read** this report in conjunction with the associated briefing entitled *Initial Briefing on the Royal Prerogative of Mercy*;

3. **Note** that officials plan to provide further advice to you before the end of the year on key considerations for the establishment of a New Zealand CCRC, including estimated costs;

4. **Discuss** the contents of this briefing with officials; YES / NO

5. **Indicate** any specific areas you would like officials to cover in future briefings. YES / NO

Jeff Orr
Chief Legal Counsel

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date 13 / 11 / 17

Attachments: Appendix One – International CCRC models

Appendix One: International CCRC models

United Kingdom CCRC

1. The UK CCRC was established by section 8 of the Criminal Appeal Act 1995. The Commission must have no fewer than 11 members, of whom at least one third must have specified legal experience and two thirds knowledge or experience of the criminal justice system. Members are appointed for terms of up to 5 years and may be reappointed, provided that the maximum continuous period of office is 10 years.

2. The Commission currently has 14 Commissioners and 3 non-executive directors who sit on its board. Its Annual Report for the 2015/16 year stated that it had 83 permanent members of staff representing 76 Full Time Equivalent (FTE) positions.

3. The Commission is funded by a Grant in Aid from the UK Ministry of Justice. Its budget for the 2016/17 year was £5.906m.

4. Section 13 of the Criminal Appeal Act 1995 describes the criteria for referring a conviction or sentence back to the appeal court. Under subsection (1), three requirements must normally be met:

   4.1. The CCRC must consider there is a "real possibility" that the conviction or sentence will be set aside if the reference is made;

   4.2. The argument or evidence supporting the reference must be one that has not previously been raised in the proceedings; and

   4.3. The applicant has previously appealed or been refused leave to appeal.

5. Subsection (2) provides that the second and third requirements do not prevent a reference if there are exceptional circumstances that justify making it.

6. Information for potential applicants on the Commission's website stresses the need for "significant new evidence or new legal argument" – something that has not previously been heard by a court – to justify a reference. The Commission adds that it is very rare that "exceptional circumstances" will warrant a reference in the absence of a prior appeal. Additional guidance for legal representatives underlines that an application should contain all the points that an applicant wants considered:

   > "We expect to receive (from legal representatives) clear and targeted submissions that address why a conviction is unsafe or sentence manifestly excessive or wrong in law. We cannot simply re-investigate a case from the beginning in the hope of finding a flaw that has not previously come to light.
   >
   > We expect you to have considered the information provided by your client and to forward only those submissions that you believe may form, possibly with investigation by us, the basis of a referral."

7. The CCRC has two additional functions:

   7.1. In respect of a matter that is already before the Court of Appeal, it can undertake an investigation at the request of that Court (section 15);

   7.2. In relation to the potential exercise of the Royal prerogative of mercy, it can provide an opinion to the Secretary for State (section 16).

8. In performing its functions, the CCRC has special information-gathering powers. It can direct any "public body", such as the Police or another government department, to produce documents or material that may be relevant to the Commission's work (section 17). A 2016 amendment now enables the Commission to seek a court order to obtain access to information from a private body or person. In addition, the CCRC has power to require the Police to appoint an investigating officer to work with the Commission and carry out investigations for it (section 19). 9(2)(g)(i)

9. Over 20 years, to 31 March 2017, the CCRC had received and closed 21,093 applications and made 631 referrals to the appeal courts, at a rate of 3.30% of completed cases. It currently receives about 1,400 applications a year but its referral rate has fallen. The CCRC's Annual Report for 2016/17 year gives a referral rate of 0.8% for that year, and 1.8%, 2.2%, 2.7%, 1.6%, and 2.5% for the previous five years.

Scottish CCRC

10. The Scottish CCRC was established by section 194A of the Criminal Procedure (Scotland) Act 1995. In form, it is like a small-scale version of the UK body.

11. The Commission must have no fewer than 3 members. Like the UK CCRC, at least one third of the members must have specified legal experience and two thirds knowledge or experience of the criminal justice system. Also like the UK body, members are appointed for terms of up to 5 years and can serve for a maximum continuous period of 10 years.

12. The Commission currently has a board of 8 members. Its permanent staff of a Chief Executive and 13 others, including 8 legal officers, is much smaller than the UK CCRC.

13. The Commission receives "grant in aid" funding from the Scottish Government's Justice Directorate. The Commission's budget for the 2016/17 year was approximately £1.019m, a little more than 17% of the UK CCRC.

14. Its power to refer cases back to the appeal courts is expressed in more general terms than the UK statute. Section 194C of the Criminal Procedure (Scotland) Act provides that a case may be referred back if the Commission believes that:

    14.1. A miscarriage of justice may have occurred; and

    14.2. It is in the interests of justice to make the reference.

15. Guidance on the Commission's website explains that applicants are expected to appeal against their conviction or sentence first and that the CCRC generally will not accept a case that simply repeats grounds previously argued on appeal or in a previous application to the Commission. What the CCRC is looking for are "grounds of review that are both statable and plausible".

16. Website guidance also explains that the reference in the statutory test to a possible "miscarriage of justice" is because that is the sole ground of appeal under Scottish criminal law. In effect, section 194C requires the Commission to focus on whether a case could be referred back on grounds capable of succeeding in the appeal courts. As to the "interests of justice" requirement, the CCRC takes into account the interests of finality and certainty in criminal proceedings without giving them undue prominence.

17. The Scottish CCRC's mandate is limited to the referral function. Unlike the UK body, it does not have ancillary functions of providing assistance to an appeal court or to a government Minister in relation to the Royal prerogative of mercy.

18. Like the UK body, the Scottish CCRC has power to obtain documents or material from any "public body", such as the Police or another government department (section 194I). In addition, where it believes that an individual may hold relevant information but the person refuses to make a statement, the CCRC can apply for a warrant requiring the person to appear before a sheriff and have their evidence taken on oath (section 194H).

19. In the 18 years to 31 March 2017, the Scottish body had received and completed the review of 2264 cases. Of these, 130 had been referred to the appeal courts, at a rate of 5.74% of completed cases. In the last 5 years, the CCRC has received about 165 applications a year. Consistent with the overall statistics, it made 11 referrals in 2012/13. But there were just 12 more referrals in the next four years, at a much lower referral rate of 1.91%.

Norwegian CCRC

20. Norway established a Criminal Cases Review Commission in 2004 following amendment to the Criminal Procedure Act 1981. The Commission is a state-funded independent body, consisting of five permanent members and three alternate members. The Commission has an operating budget of approximately NZ$2.85 million.

21. The Commission's principal functions are to receive petitions for the re-opening of criminal cases and, like the UK and Scottish CCRCs, refer meritorious cases back to the courts.

22. In one respect, the Commission appears to have substantially broader powers to reopen court decisions than the British bodies. Petitions may be lodged not only by convicted persons but also by prosecution authorities. The grounds for referring cases back to the courts encompass fresh evidence, criminal conduct or misconduct by a person connected with the case and a new legal interpretation by the Supreme Court, Norway's highest court.

23. The Commission has statutory powers to obtain information and summons witnesses to be examined. Both parties to a criminal case are entitled to be heard by the Commission on any petition. Where the Commission decides to reopen a case, the case is to be referred for retrial to a court of equal standing to the court that made the ruling being challenged.

24. The number of petitions fluctuates from year to year. According to the Commission's most recent annual report, to December 2016, it received 161 petitions to reopen cases in that year, compared to 152 in 2015. A total of 162 cases were concluded in 2016, and 11 cases were reopened.

(2)

MINISTRY OF JUSTICE
Tāhū o te Ture

Weekly Report

For Minister of Justice and Minister for Courts
10 November 2017

IN CONFIDENCE

Out of scope

Out of scope

Government Priorities

Out of scope

Criminal Case Review Commission - Policy

2. On 9 November 2017, we provided you with a briefing describing the purpose and main features of a Criminal Case Review Commission (CCRC) and summarising the key considerations for the establishment of a New Zealand CCRC.

3. The briefing also suggests we discuss timing of the work as part of our discussions with you later this year on what Justice Bills to include in the Government's 2018 Legislation Programme.

Contact: Stuart McGilvray, Policy Manager, Criminal Law. Ph s 9(2)(a)
Brendan Gage, General Manager, Criminal Justice. Ph s 9(2)(a)

Out of scope

Out of scope

Out of scope

3

MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Andrew Little, Minister of Justice

Proposed model for establishing a Criminal Cases Review Commission

Date	11 December 2017	File reference	CON-34-22

Action sought	**Timeframe**
Direct officials to consult with departments, the judiciary, members of the legal profession, academics and other key stakeholders to test and refine the proposals in this briefing.	15 December 2017
Direct officials to draft a Cabinet paper, in consultation with other agencies, on the basis of advice in this briefing.	15 December 2017
Direct officials to provide further substantive advice on a proposed test for referral to the courts, and other residual policy issues, early in the New Year.	15 December 2017
Forward a copy of this briefing to the Minister of State Services.	15 December 2017

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Ruth Fairhall	Deputy Secretary, Policy	04 498 2399	9(2)(a) [redacted]	☐
Stuart McGilvray	Policy Manager, Criminal Law	04 918 8812	9(2)(a) [redacted]	☒
Andrew Goddard	Senior Policy Advisor	9(2)(a) [redacted]		☐

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events

☐ Referred to: _____

☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

Purpose

1. This briefing outlines a proposed model for a New Zealand Criminal Cases Review Commission (CCRC), including timeframes for policy and legislative development.

2. We seek your agreement to consult with departments and experts on the proposals in this paper, and to begin drafting and consult on a Cabinet paper 9(2)(f)(iv)

Executive summary

3. The success of the CCRC will depend primarily on the perception of its independence, its ability to resolve case reviews in a timely manner, and transparency in its processes. These objectives have influenced our design choices, along with comparisons to CCRCs in other jurisdictions and comparable investigative bodies in New Zealand.

4. The CCRC's function would be to refer a conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred. The design of the CCRC is constrained in some respects by this function, as referral has significant constitutional implications. There is, however, an opportunity to include some new developments in the exercise of this function that we believe will enhance public perceptions of independence, timeliness and effectiveness. 9(2)(g)(i)

5. 9(2)(f)(iv)

6. The design of the CCRC is complex and the issues can be resolved in different ways. Targeted consultation with departments, the judiciary, representative leaders of the law profession, academics and other key stakeholders on these proposals will enable us to test, refine and amend the model ahead of a Cabinet paper 9(2)(f)(iv)

Background

7. The Government has a coalition agreement commitment to establish a CCRC. A CCRC is an independent public body set up to review suspected miscarriages of justice and refer appropriate cases back to the appeal courts. In New Zealand, this function is currently performed through the Royal prerogative of mercy.

8. On 9 November 2017, the Ministry of Justice provided you with initial briefing on establishing a CCRC which:

   8.1. described the purpose and main features of a CCRC

   8.2. provided an overview of international CCRC models in the United Kingdom (England and Wales), Scotland and Norway

   8.3. summarised the key considerations for the establishment of a New Zealand CCRC, and sought direction on next steps.

9. Officials undertook to provide you with substantive advice and seek your decisions on the key considerations for establishing a CCRC matters before the end of the year, including advice on the estimated cost of establishing a CCRC.

10. 9(2)(f)(iv) [redacted]

Relevant considerations in the design of the CCRC

11. This section examines the objectives and relevant considerations in establishing a CCRC that inform its design.

Enhancing public confidence should be the key design consideration

12. Every miscarriage of justice has the potential to undermine confidence in the justice system and robust systems to identify and address them are vital.

13. In New Zealand, a person who believes they have suffered a miscarriage of justice may apply to the Governor-General for the exercise of the Royal prerogative of mercy.

14. As in other jurisdictions that ultimately established a CCRC, concerns have been raised regarding the independence, timeliness and capacity of mechanisms for investigating possible miscarriages of justice in New Zealand. In response, over the years successive reports have made a case for establishing a CCRC-like body.[1] A summary of these reports is attached as **Appendix One**.

15. The principal benefit cited for establishing such a body is that greater organisational independence from Ministers is likely to help to address some negative perceptions about the way the function is currently exercised. Indeed, in our view, the primary advantage that a CCRC offers is the perception of independence, including the ability for Ministers to maintain an arms-length distance from involvement in criminal cases.

16. Further, a CCRC with dedicated resource and appropriate investigative powers could also improve the timeliness of and capacity to undertake reviews into possible miscarriages of justice. There is no evidence to suggest that advice on Royal prerogative applications is not of a high quality, however, the nature of the current process means there will always be competing priorities that affect timeliness.

17. A lack of dedicated resource also means fewer opportunities to specialise in handling potential miscarriages of justice. Reliance on cooperation alone to obtain documents, without the power to compel parties to comply with officials' requests, can also lead to delays.

18. There is also an opportunity to increase public awareness about miscarriages of justice and the review process. International CCRCs appear to have developed more, and more detailed, public information, including case statistics, formal casework policies, and research reports than are available in New Zealand.

There are several features of the current system that a CCRC should retain

19. To help achieve public confidence and constitutional legitimacy, there are aspects of the current system that should not change. For example, the principles that reflect our

[1] See, for example, Neville Trendle, *The Royal Prerogative of Mercy: A Review of New Zealand Practice* (Ministry of Justice, 2003); Sir Thomas Thorp, *Miscarriages of Justice* (Legal Research Foundation, 2005).

constitutional arrangements and good practice in dealing with suspected miscarriages of justice, including:

19.1. criminal responsibility is decided by the courts

19.2. convicted persons should generally have exhausted their appeal rights before seeking intervention from the executive

19.3. intervention by the executive should be compatible with the constitutional relationship between the executive and the judiciary

19.4. referral back to the court should normally be based on new information or argument that is capable of giving rise to a successful appeal, and

19.5. applicants should have a fair opportunity to make their best case for intervention and to an adequate statement of reasons for a decision.

20. In our view, the legitimacy and effectiveness of the CCRC will be enhanced if it is based on these principles. However, we also consider there will be a need to change some aspects of the current system in order to enhance public confidence in the justice system.

How the CCRC's success is defined will also influence design

21. A clear idea of what constitutes success for the CCRC is important, particularly for questions of institutional design.

22. As above, in our view the success of the CCRC will depend primarily on the perception of its independence, its ability to resolve case reviews in a timely manner, and transparency in its processes. These objectives will therefore influence design choices.

23. Measuring success will be complex, however. For example, a broad test for referral to the courts would increase the volume of applications and cases referred to the courts, which could be viewed as a success. In this regard, we note the conclusion of the UK House of Commons Justice Committee that "... if a bolder approach leads to 5 more failed appeals but one additional miscarriage being corrected, then that is of clear benefit."[2]

24. Equally, it is not clear the *rate* of referral or number of convictions set aside will increase. Many applications are likely to be refused and the rate of referral may, therefore, actually drop from its current level of about 9 percent.[3]

25. CCRCs in the United Kingdom and Scotland, for example, refer fewer of their total applications than New Zealand does under the Royal prerogative, and a lower percentage of convictions referred are set aside by the courts. If these figures are repeated in New Zealand, the CCRC may be subjected to criticism that it has failed to produce a quantitively better outcome than the status quo.

Proposed model for establishing a CCRC

26. This section provides initial substantive advice on a proposed model for the establishment of a New Zealand CCRC, including the:

[2] Refer House of Commons Justice Committee 'Criminal Cases Review Commission' Twelfth Report of Session 2014-15, pg. 12.
[3] By comparison, the UK CCRC and Scottish CCRC have about a 3.3 percent and 5.7 percent referral rate respectively.

26.1. functions, structure and powers of the CCRC

26.2. process for reviewing decisions made by the CCRC

26.3. residual role for the Royal prerogative of mercy, and

26.4. financial implications of establishing a CCRC.

27. In general, we have tried to propose initial options that provide sufficient procedural flexibility for the CCRC to carry out its core function so that all appropriate convictions can be referred back to the Courts in a timely manner.

28. We propose to undertake consultation with departments, complaints bodies, and academic and legal experts to test and refine the proposals below ahead of seeking Cabinet decisions in March 2018.

9(2)(f)(iv) [redacted]

29. As with overseas models, the CCRC should have the statutory power to refer any conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred. This would replace section 406 of the Crimes Act 1961, under which the referral power is currently exercised by the Governor-General on Ministerial advice.

30. 9(2)(f)(iv) [redacted]

31. [redacted]

32. For example, it clearly acknowledges the proper role of the courts as determinants of criminal responsibility and, therefore, precludes the possibility of the CCRC acting as a body which effectively reinvestigates criminal cases or determining liability. We do not propose any changes to the status quo in this regard. 9(2)(f)(iv) [redacted]

9(2)(g)(i) [redacted]

9(2)(f)(iv) [redacted]

33. The primary means of triggering a review by the CCRC will be on application. [redacted]

9(2)(f)(iv) [redacted]

34. [redacted]

9(2)(g)(i) [redacted]

35. The UK CCRC can make a reference to the courts in relation to a deceased person's case. However, this is possible because the UK appeals system enables someone to be approved by the Court of Appeal to represent the deceased.

[4] 9(2)(f)(iv) [redacted]

36. There is no comparable provision in New Zealand's general criminal law for an appeal to be held where a person is deceased. 9(2)(f)(iv) [redacted]

9(2)(f)(iv) [redacted]

37. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

38. [redacted]

39. 9(2)(f)(iv) [redacted] Given the resources the State puts into securing a conviction, there may be a reasonable expectation that some resource and initiative will be expended by a CCRC to help identify and address wrongful convictions. Having an independent body that has the ability to review convictions that are a source of public disquiet is likely to enhance public confidence, and respond to the concern that the current system is solely reactive.

40. 9(2)(f)(iv) [redacted]

41. [redacted]

42. [redacted]

9(2)(f)(iv) [redacted]

43. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

44. None of the international CCRC models appear to have express statutory grounds to refuse to undertake a review. Rather, the international CCRCs have all developed and published some form of guidance to assist people in preparing an application and understanding the process. The UK CCRC, for example, has released a particularly

comprehensive set of formal memoranda setting out their approach to their casework, including a two-stage decision-making process on applications

45. Conversely, complaints bodies in New Zealand often have an explicit power to decide to take no action on an application. The grounds for exercising such a power include, for example, that the application is vexatious or minor in nature. We understand complaints bodies find this useful, and it may give confidence to the CCRC not to pursue applications that clearly have no merit.

46. 9(2)(f)(iv) [redacted]

9(2)(f)(iv) [redacted]

47. Disclosure of the reasons underpinning a decision is vital for the principles of transparency and natural justice. Currently:

47.1. the applicant gets a copy of the full report from the Ministry to the Minister, on which the Governor-General's decision is based, and

47.2. where there is a referral, the reasons for the referral are set out in the Order in Council which effects the referral and this is published in the Gazette.

48. Reasons for declining an application are not made public under the present system.

49. 9(2)(f)(iv) [redacted]

50.

9(2)(f)(iv) [redacted]

51. 9(2)(f)(iv) [redacted]

Further work is required to recommend a test for referral to the courts

52. Legislation to establish the CCRC will need to specify the ground or grounds on which referral to the court is permitted. We have not yet reached a view on the appropriate test, though we have identified a number of options including:

    52.1. where there is a 'real possibility' that a conviction or sentence will be set aside (per UK CCRC)

    52.2. if a miscarriage of justice may have occurred and referral is in the interests of [redacted] 9(2)(g)(i) justice (per Scottish CCRC), and

    52.3. where satisfied that a miscarriage has occurred due to an unreasonable jury verdict, or a miscarriage has occurred for any reason (per Criminal Procedure [redacted] 9(2)(g)(i) Act 2011, s 232).

53. The test for referral is arguably the most important element of the CCRC's remit – the threshold set will inform the number of referrals. Any concerns or critics of the test are likely to be a main cause of any lack of public confidence in a CCRC. For example, the statutory test for case referral for the UK CCRC, and how the test is applied, has been the subject of ongoing debate.[5]

54. Part of this question is whether there is a need for a statutory requirement that applicants should be expected to exhaust all their appeals before a referral to the courts may be made.

55. Strong conventions, reflecting the separation of powers, underpin the exercise of the Royal prerogative of mercy. By convention, applicants are expected to use their appeals before applying for the prerogative of mercy. This is because the prerogative of mercy is not an opportunity to repeat arguments or re-examine evidence that have already been considered by the courts.

56. It is also not the Executive's role to substitute its judgement for that of an appellate court, particularly when the court has yet to be given an opportunity to exercise that judgement. This is the position in the UK, Scotland and NZ.

57. Section 406 of the Crimes Act, however, makes it explicit that the Governor-General may make a reference 'at any time' regardless of whether the applicant has exercised their rights of appeal. The Scottish CCRC may also make a reference at any time, regardless of appeal.[6] The UK CRRC may only make a reference if an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused; though this does allow for exceptional circumstances.[7]

58. Explicitly limiting the ability of the CCRC to make a reference only to where appeal rights have been exhausted would lead to a lower workload. It would be a rare case, if any, that might legitimately lend itself to a review by the CCRC prior to appeals being exhausted. Creating a firm statutory rule that appeals must be exhausted, meanwhile, could lead to inflexibility.

[5] See, for example, House of Commons Justice Committee, Twelfth Report of Session 2014-15.
[6] Refer Criminal Procedure (Scotland) Act 1995, s 194B(1).
[7] Refer Criminal Appeal Act 1995 (UK), s 13. Processes

59. Given the importance of settling on a test that is effective and constitutionally appropriate, we propose to consult on the test for referral in the New Year and provide you with further advice. [redacted] 9(2)(g)(i)

There will be a residual Royal prerogative of mercy role for the Governor-General

60. The CCRC will essentially inherit the responsibility from the Governor-General for examining miscarriages of justice and enabling them to be corrected, where necessary, by the courts. However, as the Royal prerogative of mercy remains in force via the Letters Patent, the CCRC reforms will need to address the relationship between the CCRC and any residual role for the prerogative of mercy.

61. 9(2)(f)(iv) [redacted]

61.1. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

61.2. [redacted]

61.3. [redacted]

62. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

63. There is further work to do on how cases already being considered under the Royal prerogative should be handled once the CCRC has been established. We will provide further advice on this, and other transitional arrangements, in our subsequent briefing.

Some additional functions may also be required

64. 9(2)(f)(iv) [redacted]

65. [redacted]

66. [redacted]

67. [redacted]

68. 9(2)(f)(iv) [redacted]

69. Some stakeholders may raise the possibility of the CCRC having an advocacy function, as some other independent bodies in New Zealand do.

70. 9(2)(f)(iv) [redacted]

71. [redacted]

9(2)(f)(iv) [redacted]

72. The composition of the membership of the CCRC will be critical in promoting confidence in its decision-making abilities and independence.

9(2)(f)(iv) [redacted]

73. 9(2)(f)(iv), 9(2)(g)(i) [redacted] The international CCRC models also require a portion of their membership to have legal qualifications.[8]

74. 9(2)(f)(iv) [redacted] The UK and Scottish CCRCs also require that a portion of members have some particular knowledge or experience in the criminal justice system. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

75. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

76. Representative membership of the CCRC, with the attendant broader range of skills and experience, may reinforce perceptions of its independence. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

77. 9(2)(f)(iv) [redacted]

[8] One third of members in the UK and Scotland, and two thirds in Norway.

78. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

9(2)(f)(iv) [redacted]

79. 9(2)(f)(iv) [redacted]

80. 9(2)(f)(iv) [redacted]

81. The process of decision-making on a case review is largely the same across the UK, Scottish and Norwegian CCRC models. The reviews are carried out by CCRC staff and a recommendation is made to the members of the Commission. Cases where a reference is not recommended will usually be closed on decision of a single Commissioner (usually the Chair). Where a reference is recommended, or arguments are made both ways, a quorum of Commissioners will decide whether to make a reference.[9] [redacted] 9(2)(g)(i)

82. 9(2)(f)(iv) [redacted]

9(2)(f)(iv) [redacted]

83. Given the value placed upon independence in the rationale for establishing a CCRC, finding the appropriate organisational structure is critical.

84. 9(2)(f)(iv) [redacted]

85. An ICE is typically a quasi-judicial or investigative public body that is generally considered to be an appropriate model where, for example:[10]

85.1. its activities are part of executive government

85.2. it does not have clear commercial objectives, and

85.3. there is a need for greater independence from Ministers to preserve public confidence in it. [redacted] 9(2)(g)(i)

86. 9(2)(f)(iv) [redacted] The Royal prerogative is an executive function, and one of the key objectives in establishing a CCRC is to achieve independence from the core Executive.

87. There are, however, some disadvantages to the ICE model. For example, while Ministers are prevented from directing the body how to perform its functions, the relevant Minister can exert indirect influence through budget monitoring and the Statement of Intent process.

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[9] In the UK CCRC and Scottish CCCRC quorum is no fewer than three members, at least one of whom must have legal qualifications.

[10] See, for example, Legislation Advisory Committee Guidelines (2001 Edition), Chapter 9; Legislation Advisory Committee Guidelines (2014 Edition), Chapter 17.

88. Establishing the CCRC as an independent statutory officer along the lines of the Inspector-General of Intelligence and Security (the IGIS) may also be appropriate. The IGIS model would allow for the development of a completely bespoke office with, for example, tailored reporting requirements rather than the relatively intensive ICE reporting requirements.

89. 9(2)(f)(iv) [redacted]

Consultation with State Services Commission on CCRC structure is required

90. The State Services Commissioner has particular responsibility for advising Ministers on proposals to establish, merge, or disestablish State sector agencies (other than State-owned enterprises). The Minister of State Services must also be consulted on Cabinet papers proposing to establish a new public body.

91. We therefore propose to specifically consult the State Services Commission as part of the preparation of a draft Cabinet paper and the Regulatory Impact Statement. We also recommend that you forward a copy of this briefing to the Minister of State Services to enable early consultation ahead of submission to Cabinet. 9(2)(g)(i) [redacted]

9(2)(f)(iv) [redacted]

92. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

93. Currently, the Ministry of Justice relies on cooperation for access to official documents, and on an applicant's current and previous lawyers for information about the case and how it was handled. Witness interviews are undertaken with their consent and the provision of court files is at judicial discretion.

94. While the lack of statutory information-gathering powers has not proved an obstacle in practice, relying on cooperation alone can cause delays. For example, there may be competing priorities for the body or person information is being sought from and therefore information may not be provided in a timely manner.

95. New Zealand complaints bodies will generally have some powers to request information from public or private persons and bodies. Further, all international CCRC models have powers to compel information from a public or private body. These powers appear to have been helpful in those CCRCs' work, including where failure to disclose information at trial was a key element in the apparent miscarriage of justice.[11]

96. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

[11] See, for example, Lissa Griffin, 'International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission' 21 *The William and Mary Bill of Rights Journal*, 1153,1214 (2013).

9(2)(f)(iv) [redacted]

97. 9(2)(f)(iv) [redacted] Cooperation is generally a more effective method of engagement than more coercive means that involve the delays and costs associated with court procedures. However, there are circumstances where reasonably constructed information-gathering powers may be necessary as a tool of last resort.

98. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

9(2)(f)(iv) [redacted]

99. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

100. [redacted]

9(2)(f)(iv) [redacted]

101. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

102. 9(2)(f)(iv) [redacted] The Chair of the UK CCRC, which is not able to require information from private bodies, has stated that:

"you can be confident that there are miscarriages of justice that have gone unremedied because of the lack of that power." [15]

103. Further, the power is seen as increasingly necessary there due to privatisation of some criminal justice services, including in forensic analysis.[16]

104. 9(2)(f)(iv) [redacted]

[12] District Courts (Access to Court Documents) Rules 2017 and Senior Courts (Access to Court Documents) Rules 2017.
[13] See, for example, Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, cl 16.
[14] We do not propose overriding legal professional privilege – so access to any privileged material could only be on receipt of a waiver from the lawyer's client.
[15] House of Commons Justice Committee, Twelfth Report of Session 2014-15, 40 – 45.
[16] *Ibid* at [42].

9(2)(f)(iv) [redacted] Scotland requires a court order be sought when obtaining information from any person, while the UK CCRC need not seek an order to obtain information in any case.

105. 9(2)(f)(iv) [redacted]

106. [redacted]

9(2)(f)(iv) [redacted]

107. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

108. [redacted]

109. [redacted]

9(2)(f)(iv) [redacted]

110. 9(2)(f)(iv) [redacted]

Internal reviews are an effective way of identifying and correcting mistakes without the cost and publicity that an appeal to an external body or judicial review may attract.[18]

111. 9(2)(f)(iv) [redacted]

112. Decisions of the CCRC will also be judicially reviewable, unless otherwise provided. Judicial review is an essential mechanism for maintaining the rule of law important, in that it ensures a person with an interest in a decision can challenge the lawfulness of that decision.

113. Judicial review actions of decisions made by the UK CCRC and the Scottish CCRC have been rare. Decisions from judicial review cases against the CCRCs in both

[17] Section 14 (freedom of expression) of the New Zealand Bill of Rights Act 1990 has been interpreted as including the right not to be compelled to say certain things or to provide certain information; see, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

[18] Legislation Design and Advisory Committee, LAC Guidelines (2014 Edition), Chapter 25.

Scotland and the UK have emphasised that the courts will not override the CCRC judgement on a case.[19] Even if the Court objects to a decision to not refer a case by the Commission on the merits, they may only rule on whether the decision was legally tenable and, if not, will rule that the CCRC should reconsider the case. Judicial review is not excluded in respect of other New Zealand complaints bodies either.

114. 9(2)(f)(iv), 9(2)(g)(i) [redacted]

9(2)(f)(iv) [redacted]

115. 9(2)(f)(iv) [redacted] As the success of this body is dependent on its ability to process applications in a timely manner adequate resourcing is crucial.

116. Policy decisions relating to the structure, function, powers and workload of the CCRC will impact the cost of the CCRC. 9(2)(f)(iv) [redacted]

117. 9(2)(f)(iv) [redacted]

118. [redacted]

Timeframes for policy and legislative development

119. 9(2)(f)(iv) [redacted]

9(2)(f)(iv) [redacted]

120. 9(2)(f)(iv) [redacted]

121. [redacted]

122. [redacted] We therefore propose to undertake targeted consultation with the

[19] See, for example, *Regina v CCRC, ex parte Pearson* [2001].
[20] We have estimated an increase in the number of applications per year increase from an overage of 8 to an average of 125 based on international models.
[21] On average, it takes 67 working days (approximately 3 months) for a 50 clause Bill of medium complexity.
[22] Refer Standing Order 290(2).

judiciary, other complaints bodies, representative leaders of the law profession, academics and other key stakeholders to test and refine the proposals in early 2018. This targeted consultation will take place alongside departmental consultation prior to seeking Cabinet approvals. Given consultation with the judiciary, we recommend you forward a copy of this briefing to the Attorney-General. 9(2)(g)(i)

123. We note that people's availability over this timeframe may be limited, particularly for members of the judiciary and legal profession. 9(2)(f)(iv) [redacted]

9(2)(f)(iv) [redacted]

124. As part of the Regulatory Impact Analysis, the Ministry will need to develop an implementation plan for the establishment of a CCRC. Key elements of the implementation will include making appointments to the CCRC, procuring office space and IT services, hiring staff, and developing internal policies and case handling procedures.

125. We anticipate that management of the implementation phase will gradually transition from the Ministry to the CCRC itself. 9(2)(f)(iv) [redacted]

Next steps

126. If you agree, we will undertake stakeholder consultation to test the proposals in this paper and begin to draft a Cabinet paper and Regulatory Impact Statement for submission to Cabinet. 9(2)(f)(iv) [redacted] We will also provide you with a further substantive briefing on a proposal for referral to the courts, and other residual policy issues, early in the New Year. 9(2)(g)(i)

127. Consultation would be kept confidential, and would include a variety of people with relevant experience and expertise. We anticipate producing a document summarising the proposals in this paper to these experts and request comment on the design. Their feedback will then help us to refine and, where necessary, recommend changes to the model proposed above. 9(2)(g)(i)

128. Should you agree, we will provide you with updates about the progress of consultation, including with whom we have spoken, and a summary of their comments when available.

Recommendations

129. It's recommended that you:

1. **Direct** officials to draft a Cabinet paper on the basis of the advice in this paper on a proposed model for establishing the Criminal Cases Review Commission — YES / NO
2. **Direct** officials to proceed to departmental consultation in order to test and refine the proposals in this paper — YES / NO
3. **Direct** officials to also undertake targeted consultation with the judiciary, representative leaders of the law profession, academics and other key stakeholders to discuss the CCRC — YES / NO
4. **Direct** officials to provide further substantive advice early in the New Year after consultation — YES / NO
5. **Forward** a copy of this briefing to the Minister of State Services and Attorney-General for their information — YES / NO

Ruth Fairhall

Deputy Secretary, Policy

APPROVED SEEN NOT AGREED

Hon Andrew Little

Minister of Justice

Date 17/12/15

Attachments: Appendix One – Previous reports on miscarriages of justice

Appendix One – Previous reports on miscarriages of justice

1. Several reports have recommended that New Zealand establish an independent body to investigate claims of miscarriages.

2. In 2003, a report titled *The Royal Prerogative of Mercy: A Review of New Zealand Practice* (the 2003 Report), recommended the creation of an independent board to investigate and refer appropriate cases to the Court of Appeal. The 2003 Report concluded the key benefits of such a body would be that:[23]

   2.1. applications would be assessed independently of the Executive, thus avoiding any constitutional or separation of powers issues

   2.2. transparency would be brought to the process

   2.3. 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, and

   2.4. possible increased public confidence in the criminal justice system with respect to reducing the chances for miscarriages of justice to occur.

3. In terms of disadvantages, the 2003 Report noted that such a body would increase costs, may receive few complaints and would require legislation to establish it.

4. The conclusions of a 2005 Select Committee report,[24] and a report by Sir Thomas Thorp[25] were largely consistent with the findings of the 2003 Report.[26]

5. In considering the information available at the time relating to New Zealand and international experiences with miscarriages of justice, Sir Thomas Thorp noted:[27]

   5.1. The frequency of miscarriages of justice had likely been underestimated in New Zealand

   5.2. "front end" reforms designed to reduce the occurrence of a miscarriages should take priority, but no system can totally prevent them occurring, and

   5.3. identification of errors that do occur is not easy and requires significant expertise.

6. The report concluded that an independent body to address suspected miscarriages of justice would be more appropriate than an authority based in the Ministry of Justice.[28] Further, no other arrangement would be more effective in gathering information on the frequency and causes of miscarriages of justice.

7. Sir Thomas Thorp also recommended that an independent body was an opportunity to address the "gross underutilisation" of the Royal prerogative process by Māori and Pasifika.[29]

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[23] Neville Trendle, *The Royal Prerogative of Mercy: A Review of New Zealand Practice* (Ministry of Justice, 2003).
[24] New Zealand House of Representatives, *Report of the Justice and Electoral Committee: Petition 2002/55 of Lynley Hood, Dr Don Brash and 807 others and Petition 2002/70 of Gaye Davidson and 3346 others* (2005) 2.
[25] Sir Thomas Thorp is a former High Court Judge, Chairman of the Parole Board and Crown Solicitor.
[26] Sir Thomas Thorp, *Miscarriages of Justice* (Legal Research Foundation, 2005).
[27] Ibid, pg. 77.
[28] Ibid, pg. 86.
[29] Ibid.

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MINISTRY OF JUSTICE
Tāhū o te Ture

Weekly Report

For Minister of Justice and Minister for Courts

19 January 2018

IN CONFIDENCE

Out of scope

Out of scope

Other Government Priorities

Criminal Cases Review Commission

8. This item updates you on the progress of the work to establish a Criminal Cases Review Commission (CCRC).

9. As indicated in our briefing of 11 December 2017, we are currently undertaking confidential consultation with the judiciary, other complaints bodies, representative leaders of the law profession, academics and other key stakeholders to test the proposed model for a CCRC. We are also consulting with agencies that have a particular interest in aspects of the model, including the State Services Commission, on the organisational form of the CCRC.

10. We have asked for feedback by 15 February 2018. In the interim, we will begin to prepare a draft Cabinet paper and Regulatory Impact Analysis (RIA), recognising that both may be subject to change.

11. Our intention is to provide you with a summary of the feedback from consultees by 22 February 2018, along with an indication of areas we may need to provide further advice.

12. We then propose to provide you with a draft Cabinet paper and the RIA by 9 March 2018 for your consideration, which will enable Ministerial consultation from 17-26 March 2018. Following any necessary changes, we would then aim to lodge the Cabinet paper and RIA on 28 March 2018 for consideration at the Cabinet Social Wellbeing Committee on 4 April 2018.

13. We have provided a letter to your office for you to send to the Attorney-General that seeks his agreement to begin drafting of a Bill ahead of Cabinet decisions. This will help ensure the Bill can be introduced as soon as practicable, and enacted before the end of the year so the Commission is operational in early 2019.

14. Officials are available to discuss this timeframe with you. We will also provide updates on any significant issues raised during the targeted consultation ahead of 15 February 2018.

Contact: Stuart McGilvray, Policy Manager, Criminal Law. Ph s 9(2)(a)
Ruth Fairhall, Deputy Secretary, Policy. Ph s 9(2)(a)

Out of scope

Out of scope

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6

MINISTRY OF JUSTICE
Tāhū o te Ture

Weekly Report

For Minister of Justice and Minister for Courts
26 January 2018

IN CONFIDENCE

Out of scope

Out of scope

Government Priorities

Out of scope

Criminal Cases Review Commission

4. This item updates you on the progress of the work to establish a Criminal Cases Review Commission (CCRC).

5. As indicated in our briefing of 11 December 2017, we are currently undertaking confidential consultation with the judiciary, other complaints bodies, representative leaders of the law profession, academics and other key stakeholders to test the proposed model for a CCRC. We are also consulting with agencies that have a particular interest in aspects of the model, including the State Services Commission, on the organisational form of the CCRC.

6. We have asked for feedback by 15 February 2018. In the interim, we have begun preparing a draft Cabinet paper and Regulatory Impact Analysis (RIA), recognising that both may be subject to change.

7. Our intention is to provide you with a summary of the feedback from consultees by 22 February 2018, along with an indication of areas we may need to provide further advice.

8. We then propose to provide you with a draft Cabinet paper and the RIA by 9 March 2018 for your consideration, which will enable Ministerial consultation from 17-26 March 2018. Following any necessary changes, we would then aim to lodge s 9(2)(a)
s 9(2)(a)

9. We have provided a letter to your office for you to send to the Attorney-General that seeks his agreement to begin drafting of a Bill ahead of Cabinet decisions. This will help ensure the Bill can be introduced as soon as practicable, and enacted before the end of the year so the Commission is operational in early 2019.

10. Officials are available to discuss this timeframe with you. We will also provide updates on any significant issues raised during the targeted consultation ahead of 15 February 2018.

Contact: Stuart McGilvray, Policy Manager, Criminal Law. Ph s 9(2)(a)
Ruth Fairhall, Deputy Secretary, Policy. Ph s 9(2)(a)

Out of scope

Out of scope

Out of scope

7

MINISTRY OF JUSTICE
Tāhū o te Ture

Weekly Report

For Minister of Justice and Minister for Courts

23 February 2018

IN CONFIDENCE

Out of scope

Out of scope

Government Priorities

Out of scope

Coalition Agreement

Criminal Cases Review Commission: consultation and next steps

2. On 10 January 2018, the Ministry began consulting on the proposed model for the Criminal Cases Review Commission (the Commission) with external legal experts, academics, government agencies and entities with similar functions (including the British and Scottish Commissions). At the close of consultation on 16 February 2018 we had received responses, written and in person, from 19 submitters. We have provided copies of the written submissions, and a summary spreadsheet, to your office.

3. There was universal support for the establishment of the Commission and consensus on much of the proposed design. However, there were areas of disagreement in relation to the proposals:

   a. s 9(2)(f)(iv)

   b.

   c.

4. Some submitters favoured the Commission having a broader range of powers and functions that can be exercised on its own initiative and flexibly to address possible miscarriages. Others favoured a more tightly constrained and prescribed Commission that is focused on referring deserving applications from convicted persons back to the courts.

5. s 9(2)(f)(iv)

6. The other main area that requires further consideration is the recommended form of the Commission

   s 9(2)(f)(iv)

   We are engaging with the State Services Commission on this question.

7. We will provide you with a briefing outlining our recommended approach to these issues and a draft Cabinet paper seeking agreement to the policy in the week of 12 March 2018. s 9(2)(a) s 9(2)(a) s 9(2)(a) . You are visiting the Scottish Commission on 19 March, which will provide

an opportunity for you to test specific matters with them. s 9(2)(a) s 9(2)(a)

8. Budget bids and implementation planning for the Commission are progressing. We have begun preliminary drafting with PCO.

Contact: Stuart McGilvray, Policy Manager, Criminal Law. Ph s 9(2)(a)
Rajesh Chhana, Deputy Secretary, Policy. Ph s 9(2)(a)

Out of scope

Out of scope

Out of scope

Out of scope

8

MINISTRY OF JUSTICE
Tāhū o te Ture

Hon Andrew Little, Minister of Justice

Supplementary advice on the Criminal Cases Review Commission model

Date	9 March 2018	File reference	CON-34-22

Action sought	Timeframe
Note the contents of this briefing	16 March 2018
Indicate any amendments you wish made to the draft Cabinet paper enclosed with this briefing	
Direct officials to arrange for formal Ministerial consultation on the draft Cabinet paper	
Direct officials to undertake any further targeted consultation that is necessary to test elements of the proposed model for the Criminal Cases Review Commission	
Forward a copy of this briefing to the Minister of State Services and Attorney-General for their information	

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Brendan Gage	General Manager, Criminal Justice	04 494 9908	s 9(2)(a)	☐
Stuart McGilvray	Policy Manager, Criminal Law	04 918 8812	s 9(2)(a)	☒
Andrew Goddard	Senior Policy Advisor	s 9(2)(a)		☐

Minister's office to complete

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

Minister's office's comments

Purpose

1. This briefing provides supplementary advice on the proposed model for a New Zealand Criminal Cases Review Commission (CCRC), in response to views raised during targeted consultation with key stakeholders.

2. We seek your agreement to proceed with Ministerial and further departmental consultation on the attached draft Cabinet paper.

Executive summary

3. Targeted consultation undertaken in early 2018 on the proposed model for a CCRC indicated strong support on the general approach. Responses also provided valuable critique of areas of the model and identified new issues for consideration.

4. We have considered the responses to targeted consultation carefully and have undertaken further analysis on a range of important issues, including the test for referring suspected miscarriages of justice to the courts, the CCRC's powers to obtain information, and whether the CCRC should have an own-motion inquiry power.

5. The design of the CCRC is complex and the issues can be resolved in different ways. However, we think the advice below helps to strike a balance between the different views put forward during consultation, and will contribute to establishing an effective CCRC.

6. We have also prepared a draft Cabinet paper that reflects our advice on these issues. The draft paper is enclosed for your consideration.

7. Subject to your agreement on the matters in this paper, we will work with your office to arrange for Ministerial consultation on the draft Cabinet paper. We will also undertake further departmental consultation during this period. Similarly, subject to your agreement, we will continue to test some of the newer proposals with some of the experts who took part in targeted consultation.

Background

8. In late 2017, we provided you with an initial briefing on the key considerations for establishing a CCRC and advice on a proposed model. Officials also sought agreement to consult with the judiciary, complaints bodies such as the Independent Police Conduct Authority, representative leaders of the law profession, academics, and other key stakeholders to test and refine the proposed model.

9. The consultation period has now closed, and we provided you with copies of the feedback received on Friday 23 February 2018. The feedback was generally supportive of the proposed model, but submitters did raise questions about several aspects of the proposals and raised additional issues to consider.

Proposed model for establishing a CCRC

10. This section provides supplementary advice on issues raised during consultation, or identified by officials, specifically:

10.1. the organisational form of the CCRC

10.2. the test for referral to the courts

10.3. the secondary functions of the CCRC

10.4. the residual role for the Royal prerogative of mercy

10.5. the scope and process for the CCRC's information-gathering powers

10.6. a mechanism for testing claims of confidentiality and privilege

10.7. protections for information gathered by the CCRC

10.8. an explicit statutory power for the CCRC to regulate its own procedure

10.9. allowing the CCRC to take no further action in respect of an application

10.10. an ability to co-opt specialist advice, and

10.11. the power to initiate a review on the CCRC's own initiative.

11. Our advice on these issues is reflected in the draft Cabinet paper enclosed for your consideration. We will amend the draft Cabinet paper in line with your directions prior to any Ministerial consultation.

The organisational model for the CCRC [redacted]

12. [redacted] s 9(2)(f)(iv) [redacted]. As indicated in our previous briefing, we have also discussed the ICE model and other possibilities, with the State Services Commission.

13. We also further considered alternative models of an independent statutory officer[1] and a senior departmental officer.[2] [redacted] s 9(2)(f)(iv) [redacted]

14. [redacted]

15. On balance, we remain of the view [redacted] s 9(2)(f)(iv) [redacted]

[1] A new office, with administrative support from government, with the task of exercising specific statutory functions or powers independently of Ministers.

[2] A senior departmental officer will generally be required by statute to exercise specific statutory responsibilities independently of Ministers and departmental Chief Executives.

[3] Some examples of an independent statutory officer include the Inspector-General of Intelligence and Security and the Judicial Conduct Commissioner. In the justice sector, the Legal Services Commissioner is an example of a senior departmental officer.

16. [redacted] s 9(2)(f)(iv) [redacted]

17. [redacted] s 9(2)(f)(iv) [redacted] recommend you forward this briefing to the Minister for State Services for his consideration. Further consideration of these issues will serve to address the concerns raised above in a [redacted] s 9(2)(f)(iv) [redacted]

18. [redacted] s 9(2)(f)(iv) [redacted]

Confirming the approach to the test for referral [redacted] s 9(2)(g)(i) [redacted]

19. As noted in our previous briefings, the test for referral is arguably the most critical and complex element of the design of the CCRC.

20. The test we consulted on captures the essential principles underpinning the exercise of the referral power, on which there was general agreement. However, there were matters highlighted in submissions that suggest the test can be refined and clarified further. We suggest you seek Cabinet approval to adopt, in principle, the test we consulted on and for officials to test the drafting with select experts before introduction. Our reasons for recommending this approach are set out below.

We consulted on a proposed test informed by core constitutional principles and overseas experience

s 9(2)(g)(i)

21. The CCRC's primary function will be to refer any conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred. This will replace section 406 of the Crimes Act 1961, under which the referral power is currently exercised by the Governor-General on Ministerial advice.

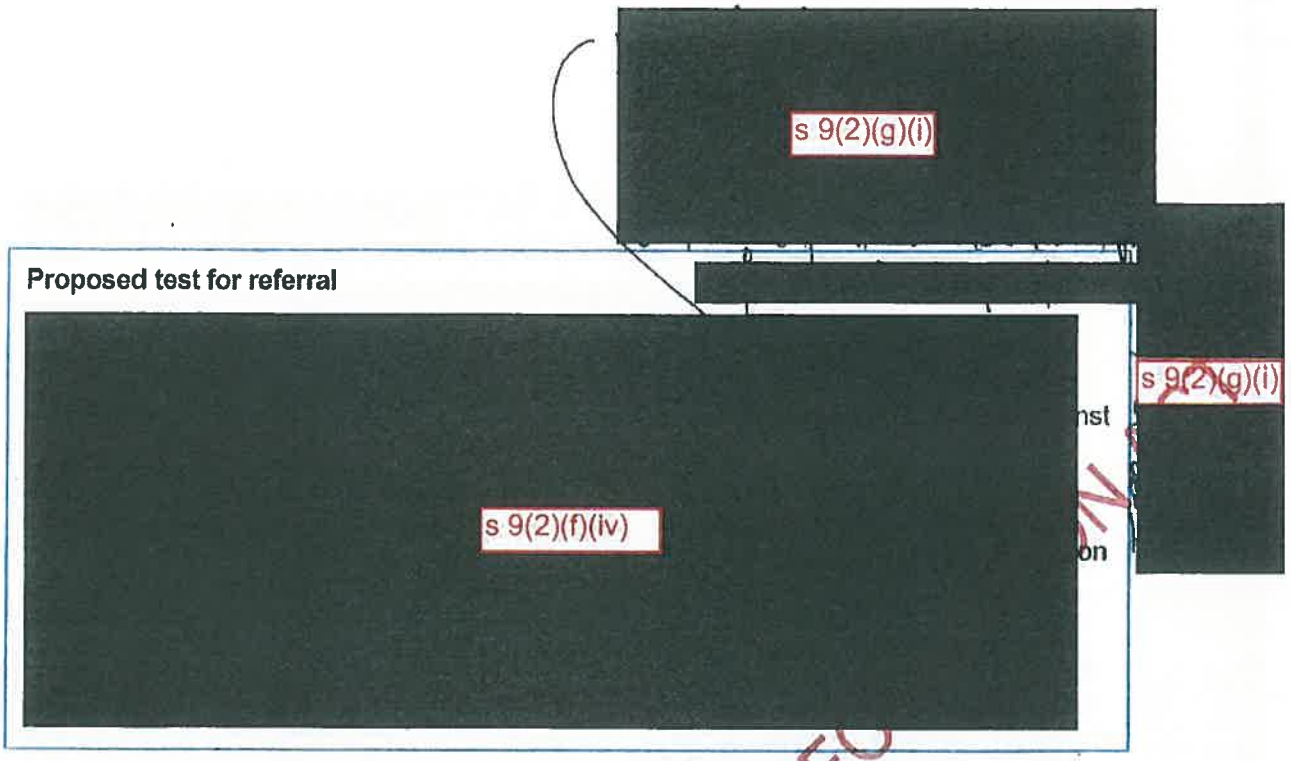
22. The tests in the legislation for the United Kingdom (England, Wales and Northern Ireland) CCRC and the Scottish CCRC are:

    22.1. **United Kingdom** – that there is a 'real possibility' that the conviction or sentence will be set aside, there is new argument or evidence, and the applicant has exhausted the appeal process, and

    22.2. **Scotland** – that a miscarriage of justice may have occurred and that the reference is in the interests of justice.

23. We put forward the following test for referral during targeted consultation:

[redacted] s 9(2)(f)(iv) [redacted]



24. This proposed test was informed by the core principles underlying the Royal prerogative of mercy and the referral mechanisms exercised by the UK and Scottish CCRCs, including that:

    24.1. the courts should have an opportunity to reconsider a person's conviction or sentence if a miscarriage of justice may have occurred

    24.2. convicted persons are normally expected to exercise their rights to appeal against conviction or sentence before asking the CCRC to intervene

    24.3. the referral process is not an opportunity to simply repeat arguments or re-examine evidence that have already been considered by the courts

    24.4. what is normally required to justify re-opening a case is "something new" – evidence or argument – that has not previously been examined by the courts

    24.5. the referral test should be permissive, not mandatory, so a referral is not made where it would be contrary to the interests of justice, and

    24.6. the CCRC should be satisfied that the case to be referred is capable of supporting an appeal.

25. Submitters broadly agreed with these underlying principles. However, there were differing views on whether the proposed test sufficiently reflected these principles and several responses opposed the construction of the test for the reasons outlined below.

[redacted]

26. [redacted] s 9(2)(f)(iv)

27. [redacted] s 9(2)(f)(iv)

[redacted] s 9(2)(f)(iv)

27.1. [redacted] s 9(2)(f)(iv)

27.2. s 9(2)(f)(iv) [redacted]

27.3. [redacted] s 9(2)(f)(iv) [redacted]

28. [redacted] s 9(2)(f)(iv) [redacted]

29. [redacted] s 9(2)(f)(iv) [redacted]

30. [redacted] s 9(2)(f)(iv) [redacted]

Officials' comment on overseas tests

31. [redacted]

32. [redacted] s 9(2)(f)(iv) [redacted]

33. In our view, the overseas tests capture the same principles outlined above in paragraph 24, albeit by different means.

34. Both tests are inherently predictive, in that the CCRC must consider whether there will be grounds for a court to uphold an appeal if a case was referred back. Both tests provide means for the Commissions to insist on applications being able to point to "something new" that has not been considered in the Courts. The distinction essentially lies in the extent to which the statutory language encapsulates these principles *explicitly*.

[5] D. Nobles and R. Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship With the Court of Appeal* [2005] Crim LR 173 at 189).

Recommended approach

35. [redacted] s 9(2)(f)(iv)

36. We therefore propose that the Cabinet paper:

36.1. **seeks agreement** to adopt, in principle, the test we consulted on ([redacted] s 9(2)(f)(iv) [redacted])

36.2. **notes** that submitters raised matters which suggest the proposed test can be further refined and clarified to ensure it reflects the core principles, specifically to:

36.2.1. [redacted] s 9(2)(f)(iv) [redacted]

36.2.2. [redacted] s 9(2)(f)(iv) [redacted]

36.2.3. [redacted] s 9(2)(f)(iv) [redacted]

37. Because of the importance of the test, and the precise wording that is used, [redacted] s 9(2)(f)(iv) [redacted]

More limited secondary functions may be preferable

38. We heard a range of views on the value of including secondary functions for the CCRC. [redacted] s 9(2)(f)(iv) [redacted]

39. [redacted] s 9(2)(f)(iv) [redacted]

40. [redacted] s 9(2)(f)(iv) [redacted] agree

41. [redacted] s 9(2)(f)(iv) [redacted]

[redacted] s 9(2)(f)(iv)

[redacted] s 9(2)(f)(iv)

42. It was also suggested during targeted consultation that the CCRC should have a statutory function to advise on compensation claims relating to miscarriages of justice.

43. [redacted] s 9(2)(f)(iv)

44. [redacted] s 9(2)(f)(iv)

Residual role for the Royal prerogative

45. In our last briefing, we indicated that there would be a residual role for the Royal prerogative of mercy. [redacted] s 9(2)(f)(iv)

45.1. [redacted] s 9(2)(f)(iv)

45.2. [redacted] s 9(2)(f)(iv)

45.3. [redacted] s 9(2)(f)(iv)

45.4. [redacted] s 9(2)(f)(iv)

46. On balance, responses to targeted consultation tended to agree that it was vital for the legislation to clearly articulate the relationship with the residual powers under the Royal prerogative, and that the proposed approach was an appropriate way of doing so.

47. [redacted] s 9(2)(f)(iv)

48. [redacted] s 9(2)(f)(iv)

s 9(2)(f)(iv)

s 9(2)(f)(iv)

49. s 9(2)(f)(iv)

50. s 9(2)(f)(iv)

51. s 9(2)(f)(iv)

52. s 9(2)(f)(iv)

53. s 9(2)(f)(iv)

54. s 9(2)(f)(iv)

Existing privileges retained in relation to information sought by the CCRC

55. Some submitters raised questions about whether the CCRC would be able, in exercising its information gathering powers, to override any existing privileges in relation to information. s 9(2)(f)(iv)

56. s 9(2)(f)(iv)

[6] s 9(2)(f)(iv)

56.1. s 9(2)(f)(iv)

56.2. s 9(2)(f)(iv)

57. s 9(2)(f)(iv)

Statutory protection for information gathered by the CCRC

58. Adequate protections for information obtained by the CCRC was consistently raised during targeted consultation as an important area to address.

59. s 9(2)(f)(iv)

60. s 9(2)(f)(iv)

60.1. s 9(2)(f)(iv)

60.2. s 9(2)(f)(iv)

60.3. s 9(2)(f)(iv)

60.4. s 9(2)(f)(iv)

60.5. s 9(2)(f)(iv)

61. s 9(2)(f)(iv)

62. s 9(2)(f)(iv) s 9(2)(g)(i)

[7] [8] s 9(2)(f)(iv)

63. s 9(2)(f)(iv)

64. s 9(2)(f)(iv)

65. s 9(2)(f)(iv)

s 9(2)(f)(iv)

66. s 9(2)(f)(iv)

67. s 9(2)(f)(iv)

68. s 9(2)(f)(iv)

s 9(2)(f)(iv)

69. s 9(2)(f)(iv)

70. Investigative bodies in New Zealand generally have an explicit power to decide to take no action on an application.[11] s 9(2)(f)(iv)

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[9] [redacted]

[10] s 9(2)(f)(iv)

[11] See, for example, Independent Police Conduct Authority Act 1988, s 18; Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 15A.

71. s 9(2)(f)(iv) :

71.1. s 9(2)(f)(iv)

71.2. s 9(2)(f)(iv)

71.3. s 9(2)(f)(iv)

71.4. s 9(2)(f)(iv)

71.5. s 9(2)(f)(iv)

71.6. s 9(2)(f)(iv) .

72. s 9(2)(f)(iv) .

Enabling the CCRC to co-opt specialist advice

73. s 9(2)(f)(iv)

74. s 9(2)(f)(iv)

75. s 9(2)(f)(iv)

s 9(2)(f)(iv)

76. s 9(2)(f)(iv) .

77. s 9(2)(f)(iv) :

77.1. [redacted] s 9(2)(f)(iv)

77.2. [redacted] s 9(2)(f)(iv)

77.3. [redacted] s 9(2)(f)(iv)

77.4. [redacted] s 9(2)(f)(iv)

78. We understand that the other CCRCs have found proactive investigations to be necessary and desirable, albeit in limited circumstances, despite having no explicit statutory authority for this power. Some situations where this arises include where:

78.1. an investigation indicates that an issue with a particular conviction may have ramifications for a co-accused's case, the co-accused has not made an application[12], or

78.2. thematic issues[13] are brought to the attention of the CCRC.

79. [redacted] s 9(2)(f)(iv)

80. [redacted] s 9(2)(f)(iv)

81. [redacted] s 9(2)(f)(iv)

[redacted] s 9(2)(f)(iv)

82. [redacted] s 9(2)(f)(iv)

[12] For an example of this, see *Johnston & Allison v HMA* 2006 SCCR 236.
[13] Thematic issues could include matters such as widespread material non-disclosure, advances in forensic science, or investigative practices.
[14] Department of Corrections, 'Prison facts and statistics – September 2017'.
[15] [redacted]
[16] [redacted] s 9(2)(f)(iv)

83. It is not intended that the CCRC should operate as a further right of appeal, simply to allow the rulings of the courts to be challenged. Referrals to the appeal courts under the Royal prerogative of mercy nearly always turn on the availability of "fresh" evidence that, for some reason, has not been previously examined by the courts. Sometimes, there is a related question about whether trial counsel was in error in not discovering or adducing such evidence. Other matters that could support a successful appeal may arise for consideration but they are usually dealt with via the normal appeal process, s 9(2)(f)(iv) .

84. Existing conventions will be reflected in the design of the CCRC and the statutory test for referral. s 9(2)(f)(iv) .

85. s 9(2)(f)(iv)

86. s 9(2)(f)(iv)

Timeframes for Cabinet approvals

87. You have indicated that you intend to have a CCRC operating in early 2019, with enabling legislation passed in 2018.

88. We have previously recommended that, if you wish to pass the necessary legislation for a CCRC in 2018, Cabinet approvals take place in late March with a view to introducing a Bill in late June or early July.[17]

89. In light of your schedule and early engagement with the Parliamentary Counsel Office, we now propose to aim for Cabinet approvals in early April. Specifically, we suggest lodging the Cabinet paper in time for consideration by the Social Wellbeing Committee in April 2018.

90. Introduction at this point would allow for the minimum period of four months at select committee.[18] Second Reading, Committee of the Whole House, Third Reading, and the Royal Assent would then occur across November and December 2018.

Next steps

91. If you agree, we will work with your office to arrange for Ministerial consultation on the draft Cabinet paper, with any necessary modifications. We will also undertake further departmental consultation during this period. Similarly, subject to your agreement, we will continue to test some of the newer proposals with some of the experts who took part in targeted consultation.

92. Given the machinery of government and broader constitutional implications, we also suggest you forward a copy of this briefing to the Minister of State Services and the Attorney-General. We will also consult further with the State Services Commissioner about s 9(2)(f)(iv) .

[17] On average, it takes 67 working days (approximately 3 months) for a 50 clause Bill of medium complexity.
[18] Refer Standing Order 290(2).

Recommendations

93. It is recommended that you:

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

2. **Agree** that the Cabinet paper:

2.1. **seek agreement** to adopt, in principle, the test we consulted on (s 9(2)(f)(iv)) – YES / NO

2.2. **note** that submitters raised matters which suggest the proposed test can be refined and clarified to ensure it reflects the core principles YES / NO

2.3. **seek agreement** for officials to consider the test further in light of submitters' concerns and test options with selected experts YES / NO

3. **Indicate** your preferred approach to the scope of the CCRC's information-gathering powers, namely whether to:

3.1. s 9(2)(f)(iv) YES / NO

3.2. s 9(2)(f)(iv) YES / NO

4. **Indicate** to officials any amendments you wish to see made to the draft Cabinet paper s 9(2)(g)(i)

5. **Direct** officials to work with your office to arrange for Ministerial consultation on the draft Cabinet paper YES / NO

6. **Direct** officials to undertake any further targeted consultation with the judiciary, representative leaders of the law profession, academics and other key stakeholders that is necessary to test elements of the proposed model for the CCRC YES / NO

7. s 9(2)(f)(iv) YES / NO

s 9(2)(g)(i)

8. **Forward** a copy of this briefing to the Minister of State Services and Attorney-General for their information YES / NO

Stuart McGilvray

Policy Manager, Criminal Law

APPROVED SEEN NOT AGREED

Hon Andrew Little

Minister of Justice

Date 14/3/18

Attachments: Draft Cabinet paper – Establishing a Criminal Cases Review Commission

10

MINISTRY OF JUSTICE
Tāhū o te Ture

Criminal Cases Review Commission: areas for further discussion

Hon Andrew Little
28 March 2018

Purpose

1. This paper provides information on several issues arising from your comments on our briefing of 9 March 2018 with a view to confirming the approach you wish to take in the Cabinet paper. We are available to meet and discuss any matter should you wish.

The test for referral

2. You have indicated that you wish to specifically discuss the test for the CCRC to use in deciding whether to refer a person's conviction or sentence back to the courts.

3. This section provides some additional background information in response to your comments on our briefing of 9 March 2018, including on the extent to which the test may require the CCRC to predict the outcome of the referral.

Proposed test for referral

[redacted] s 9(2)(f)(iv)

Tests for referral are aligned with grounds of appeal

4. As indicated in our previous advice, the tests for referral for overseas CCRCs are aligned to those jurisdictions' statutory grounds of appeal. For example, in Scotland, 'miscarriage of justice' is the sole ground of appeal against conviction and sentence. Therefore, when the Scottish CCRC referral test mentions a 'miscarriage of justice', it is referring directly to the ground for a successful appeal.

5. [redacted] s 9(2)(f)(iv)

Grounds for appeal against conviction in New Zealand

6. Section 232 of the Criminal Procedure Act 2011 provides the court must allow an appeal against conviction if satisfied that:

   a. in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable

   b. in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred, or

   c. in any case, a miscarriage of justice has occurred for any reason.

Approved by: Brendan Gage, General Manager, Criminal Justice, Policy Group
File number: CON-34-22

7. Most appeals are concerned with whether "a miscarriage of justice has occurred for any reason". Under section 232(4) miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that:

   a. has created a real risk that the outcome of the trial was affected, or

   b. has resulted in an unfair trial or a trial that was a nullity.

8. This definition gives rise to two broad categories of error that can constitute a miscarriage of justice; matters that could have affected the *result* of the trial, and matters that could have affected the overall *fairness* of the trial.

Grounds for appeal against sentence in New Zealand

9. Section 250 of the Criminal Procedure Act codified the 'error principle' that has long governed sentence appeals. A sentence appeal may be allowed if, for any reason, there is an error in the sentence imposed on conviction, and the appeal court considers that a different sentence should be imposed.

10. As with conviction appeals, there is scope for a successful Royal prerogative of mercy (RPM) application relating to sentence based on 'fresh evidence' – an important matter of fact that was not before the sentencing judge but, had it been, would likely have affected the sentence.

11. However, sentence appeals are frequent and the normal appeals process deals with virtually all substantive issues about the length and / or terms of a person's sentence. RPM applications on sentence are correspondingly rare.

Meaning of 'reasonable prospect' that the court will allow an appeal

12. The idea that a person's case should be capable of supporting a successful appeal underpins the proposed test for referral, as it has informed the Ministry's approach to the RPM.

13. [redacted] s 9(2)(f)(iv)

14. 'Reasonable prospect of success' is not an expression of certainty or even probability. An adviser does not have to be sure that an appeal will succeed or be satisfied on the balance of probabilities that an appeal will succeed. There should, however, be a viable basis for appeal, supported by sufficiently persuasive evidence and/or argument that it could be entertained by the appeal court.

15. The 'reasonable prospect' test is similar in this regard to the United Kingdom (England, Wales and Northern Ireland) CCRC's 'real possibility' test. The courts have held that a 'real possibility' means:[1]

    "... more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty."

16. On current exercise of the 'reasonable prospect of success' test, where there is a real issue of substance but the Ministry is not sure of the outcome, it will recommend referral.

17. If it is abundantly clear that there is no sound basis for an appeal (that is, if the Ministry is sure), then it will recommend that the application be declined. In the uncommon case where

[1] *R v Criminal Cases Review Commission (ex parte Pearson)* [1999] 3 All ER 498 per Lord Bingham.

there is no obvious precedent in existing case law, the Ministry would revert to core principles, as the appeal courts do.

18. In short, the 'reasonable prospect of success' test need not limit the scope for assessment of and referral of a case raising an issue yet to be addressed by the appeal courts. If, on the Ministry's assessment of the matter, a miscarriage of justice may have occurred, referral to the court would be both permissible and warranted.

Inherently predictive nature of tests for referral

19. The test for referral is inherently predictive, as the courts are the ultimate decision-maker on whether an appeal for conviction or sentence should be allowed. As we noted in our previous advice, the relevant policy question may therefore be [redacted] s 9(2)(f)(iv) [redacted]

20. The 'real possibility' test is what might be characterised as *explicitly* predictive – it is clear on the wording of the statue that the CCRC must cast its mind to the outcome in the relevant appeal court. Such a test clearly reflects the principle that the CCRC should not refer cases where there is little or no realistic prospect of success, which would be undesirable given the attendant costs and possible impact on victims.[2]

21. Conversely, section 406 of the Crimes Act 1961, which regulates the Governor-General's referral power, contains no explicit statutory test for referral. The exercise of the referral power is governed by strong conventions, including that a person's case should be capable of supporting a successful appeal. In this sense, our current statutory framework might appropriately be characterised as *implicitly* predictive.

22. Scotland's test for referral might also be characterised as *implicitly* predictive, in that it does not refer directly to the possible outcome of the referral. However, as the Scottish CCRC notes, it must still consider the relevant case law and endeavour to apply the appropriate legal tests in deciding whether to make a referral. The result is that the Scottish CCRC considers it is not "constrained absolutely by the approach that the [courts have] taken in the past to the case under review or to similar cases."[3]

23. In practice, while there are some broad trends, the rates of referral do not appear to indicate any significant difference between the outcomes of the Scottish and UK tests. For example, the Scottish test appears to have produced a slightly higher rate of referrals, though with a somewhat lower rate of success in court, than with the 'real possibility' test used by the UK CCRC.[4] In any case, it is far from clear that any difference in the rate of referrals, or their ultimate success, is a result of the statutory language of the test for referral, or whether it is simply a correlation.

24. [redacted] s 9(2)(f)(iv)

[2] [redacted] s 9(2)(f)(iv)

[3] Scottish Criminal Cases Review Commission, 'Position Paper: Referrals to the High Court: The Commission's Statutory Test'.

[4] The SCCRC has referred approximately 5.7 percent of its total applications, of which approximately 65 percent have resulted in the conviction being quashed or sentence reduced. By comparison, the UK CCRC has referred approximately 3.3 percent of its total applications, of which around 69 percent have been successful.

[5] For example, where the Commission uncovers a form of miscarriage hitherto unrecognised by the courts, or where the CCRC considers a miscarriage of justice has occurred but is not confident the court will ultimately agree. See D. Nobles and R. Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship With the Court of Appeal* [2205] Crim LR 173 at 189.

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[redacted] s 9(2)(f)(iv)

Approach in the draft Cabinet paper

25. [redacted] s 9(2)(f)(iv) We seek to confirm this approach with you in light of the discussion above.

[redacted] s 9(2)(f)(iv)

26. [redacted] s 9(2)(f)(iv)

27. [redacted] s 9(2)(f)(iv)

28. [redacted] s 9(2)(f)(iv)

29. [redacted] s 9(2)(f)(iv) We propose to amend the Cabinet paper accordingly.

[redacted] s 9(2)(f)(iv)

30. [redacted] s 9(2)(f)(iv)

Access to information held by Police

31. [redacted] s 9(2)(f)(iv)

32. [redacted] s 9(2)(f)(iv)

33. There are several possible ways an extension to the CCRC's information-gathering powers vis-à-vis Police could be framed, including a:

a. right to access any information held by Police[7]

b. general duty for any state sector organisations, including Police, to provide all reasonable assistance to the CCRC[8]

[redacted] s 9(2)(f)(iv)

[6] [redacted]

[7] Similar to the general rights of access to court documents for the public in the District Court (Access to Court Documents) Rules 2017 and the Senior Courts (Access to Court Documents) Rules 2017.

[8] See, for example, Health and Safety at Work Act 1995, s 176.

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c. right for the CCRC to access relevant information held by Police and a duty for Police to provide reasonable assistance,[9] or

d. requirement that Police, or any state sector organisation, must provide information.[10]

34. [redacted] s 9(2)(f)(iv) [redacted] while there have been delays in obtaining information from sources in the past, there is no evidence to suggest Police do not, or will not, cooperate with investigations.

35. [redacted] s 9(2)(f)(iv) [redacted]

Access to court records

36. [redacted] s 9(2)(f)(iv) [redacted] District Court (Access to Court Documents) Rules 2017 and the Senior Courts (Access to Court Documents) Rules 2017 (the Rules).

37. Under the Rules every person has a general right to access court documents, subject to any enactment, court order, or direction limiting or prohibiting access or publication. Specifically, in relation to a criminal proceeding, every person has a right to access:

a. the permanent court record and any published list providing notice of a hearing

b. any judgment, order, or minute of the court given in the proceeding, including any records of the reasons given by a judicial officer, and

c. any judicial officer's sentencing notes.

38. There is also a general right of access to any information relating to any appeal.

39. However, some categories of information relating to a criminal proceeding may be obtained only if a judge permits it.[11] For any information not covered by general rights of access, there are specified matters for the judge to consider in determining whether to release the information.[12]

40. [redacted] s 9(2)(f)(iv) [redacted]

41. [redacted] s 9(2)(f)(iv) [redacted]

[9] Similar to Oranga Tamariki (Residential Care) Regulations 1996, s 16(5) where "[a]ny person acting as an advocate for a child or young person under this regulation shall be afforded reasonable assistance and access to records concerning the child or young person that are relevant to the complaint"
[10] See, for example, State Sector Act 1988, s 9.
[11] Including, for example, electronically recorded documents of interviews with a defendant, or any document received, or any record of anything said, in a proceeding while members of the public are excluded from the proceeding.
[12] District Court (Access to Court Documents) Rules 2017, Rule 12; Senior Courts (Access to Court Documents) Rules 2017, Rule 12.

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[redacted] s 9(2)(f)(iv)

42. [redacted] s 9(2)(f)(iv)

Factual innocence and procedural fairness

43. You have indicated you also wish to discuss our recommendation [redacted] s 9(2)(f)(iv) This section provides further information on what constitutes 'fresh evidence' to support that discussion.

44. 'Fresh evidence' is something that was not reasonably available at trial. To support a successful appeal, it must also be credible, and it must be sufficiently cogent that, when considered alongside the evidence given at the trial, it might reasonably have led the jury to return a verdict of not guilty.[14] Where the evidence is strong and demonstrates a real risk of miscarriage of justice, the appeal court may relax its requirement that it be fresh. The freshness criterion may also be relaxed where the evidence relied on was not heard at trial because of serious error by trial counsel.[15]

45. There are two main kinds of potential 'fresh evidence':

    a. evidence relating to guilt – for example, the evidence of witnesses, physical and forensic evidence, the opinions of experts that go towards proving or resisting guilt, and

    b. evidence relating to trial integrity – for example, evidence about the actions or omissions of trial participants that have a bearing on the conduct and fairness of the trial.

46. Procedural errors are normally apparent at the time of appeal and are corrected at that point. However, while many RPM applications focus on fresh evidence relating to guilt, applications alleging there is new evidence about the integrity of the trial also arise. For instance, the Ministry is currently assessing an application alleging that evidence has emerged long after a person's trial of conduct by jury members that could have prejudiced the applicant's trial.

47. [redacted] s 9(2)(f)(iv)

Next steps

48. We seek confirmation on the direction of the Cabinet paper, and available to discuss these issues with you further.

[13] [redacted] s 9(2)(f)(iv)
[14] *R v Bain* [2004] 1 NZLR 639.
[15] *R v Fairburn* [2011] 2 NZLR 63 at [33].

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