MINISTRY OF JUSTICE
Tāhū o te Ture

Minister of Justice

Miscarriages of Justice: Organisational arrangements and availability of legal aid

Date:	17 July 2007	**File Number:**	CON-34-22

Action Sought	**Timeframe**
Agree to proposed direction in policy work. Note Ministry's initial views on policy work.	

Contacts for telephone discussion (if required)

Name	**Position**	**Telephone**		**1st Contact**
Jeff Orr (for organisational arrangements)	Chief Legal Counsel, Office of Legal Counsel	494 9755 (wk)	(a/h)	√
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s9(2)(a) protect privacy of natural persons

Minister's office to complete

☐ Noted ☐ Seen	☐ Approved ☐ Withdrawn	☐ Overtaken by events ☐ Not seen by Minister	☐ Referred to:

Minister's office comments

MINISTRY OF JUSTICE
Tāhū o te Ture

MISCARRIAGES OF JUSTICE: ORGANISATIONAL ARRANGEMENTS AND AVAILABILITY OF LEGAL AID

Purpose of Report

1. This report briefs you on the policy work to date on:
   - organisational arrangements for addressing miscarriages of justice; and
   - availability of legal aid for applications for the exercise of the Royal prerogative of mercy.

Executive Summary

2. The Ministry is considering six options for organisational arrangements for addressing miscarriages of justice. We seek your agreement for the Ministry to do further policy work on the following options:
   - retaining the current system, and introducing new measures to strengthen processes (the Ministry's preferred option);
   - retaining the current system, and establishing a formal panel of retired judges or senior lawyers to scrutinise the Ministry's consideration of applications; and
   - establishing an independent commission or statutory board, with a similar function to that of the UK Criminal Cases Review Commission.

Outside of scope 3.

Background

The current process

4. Convicted persons who claim a miscarriage of justice (i.e. that they have been wrongly convicted or sentenced) but have exhausted their appeal rights may apply to the Governor-General for the exercise of the Royal prerogative of mercy. By constitutional convention, the Governor-General takes advice on these applications from the Minister of Justice, who in turn relies on the Ministry to investigate and provide a thorough report on each application. Most applications are dealt with by solicitors in the Ministry's Office of Legal Counsel, who also have other competing work and priorities

to manage. If the finding is that a miscarriage of justice has occurred or is likely to have occurred, the Governor-General may be advised to grant a pardon, reduce the person's sentence or, more likely, refer the person's case back to the courts for further consideration.

5. The Royal prerogative of mercy is not an additional form of appeal. Its purpose is to provide an extraordinary remedy for persons who may have been wrongly convicted or sentenced.

Nature of Royal prerogative applications

6. We attach a brief analysis of Royal prerogative applications completed in the last year to illustrate the nature of the applications (Appendix A). Applications with real substance are few. Most applications have no merit at all. Often applications provide no evidence to back up assertions of innocence. Although a full report is made on every application, these applications are relatively straightforward to deal with and do not require a specialist independent body to consider them.

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

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

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

Impetus for independent body to examine miscarriages of justice

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

10. Renewed interest was sparked by Sir Thomas Thorp's paper "Miscarriages of Justice" in February 2006. Sir Thomas strongly supports the establishment of an independent commission to examine alleged miscarriages and refer deserving cases back to the courts. This option was also supported by the Justice and Electoral Select Committee in its 2005 report on the Christchurch Civic Crēche (Peter Ellis) case.

11. Calls from members of the public for an independent body are often in response to particular high profile cases in which there is general feeling that "the system" did not get the "right" outcome. Recent New Zealand cases that have sparked debate include

Peter Ellis, David Bain and Rex Haig – all cases that have been referred back to the courts by the exercise of the prerogative of mercy. This type of criticism exists in all jurisdictions (including the UK where an independent body considers alleged miscarriages of justice) and appears to have more to do with achieving the perceived "right" outcome in high profile cases than the nature of the body that can refer cases back to the courts for further consideration. In some cases, it reflects a gap between legal tests for miscarriages of justice and public opinion on particular convictions.

Objectives for organisational arrangements for addressing miscarriages of justice

12. A system to identify and remedy miscarriages of justice should have the following objectives:

Objective 1: To ensure that processes for investigating and remedying alleged miscarriages of justice:

- are accessible;
- enable competent and thorough consideration of possible miscarriages;
- ensure claims are addressed in a timely manner;
- result in sound decisions.

Objective 2: To maintain public confidence in the administration of justice, both in safeguarding the innocent from wrongful conviction and in upholding the convictions of the guilty.

Objective 3: To be constitutionally appropriate (for example, the prerogative of mercy system is not, and should not be seen as, a further right of appeal that operates outside the judicial system or a mechanism that authorises the Executive to second-guess a decision rendered by the courts or substitute its judgment for that of the courts).

Objective 4: To be cost-effective.

UK Criminal Cases Review Commission

13. The UK Criminal Cases Review Commission ("the CCRC") is often cited as a model for an independent body in New Zealand.

14. Before the CCRC was established in the UK, the Home Office was responsible for considering whether a particular conviction should be referred back to the Court of Appeal. The Home Office received between 700 and 800 applications a year. Criticism of the criminal justice system in general peaked during the early 1990s after a string of high profile convictions were overturned (including the "Guilford four" and "Birmingham six" cases). In 1993 a Royal Commission on Criminal Justice recommended the establishment of an independent body to consider alleged miscarriages of justice. It was thought that the Home Secretary had shown too great a constitutional deference to the Court of Appeal and as a result had investigated and referred too few cases. The Royal Commission also considered that the Home

Secretary's responsibility for the police was at odds with his responsibility to consider and investigate alleged miscarriages of justice.

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

Comparison of UK and New Zealand models

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

Main options being considered for organisational arrangements

Option 1: current system retained, with new measures to strengthen processes

Features of option 1

16. The current process described at paragraph 4 would be retained. The following new measures would be introduced to improve and strengthen the system:

    - dedicate additional resources to prerogative work;
    - build Ministry staff expertise through training, appointments and secondments;
    - more widely disseminate information about the prerogative of mercy system; and
    - introduce an application form and more detailed direction about the information and documents needed to support an application.

Brief discussion on option 1

17. Perceived issues about the Executive's role in the current system are often cited as the rationale for establishing an independent body.

18. The prerogative of mercy is inherently a constitutional power, and is exercised by the Governor-General according to established principles that recognise and respect the separation or balance of powers. In contrast with the UK experience prior to the CCRC, the referral rate to the courts suggests that the New Zealand Executive is not unduly hesitant to disturb judicial decisions in deserving cases. Since 1995, the proportion of applications that have been referred back to the courts has been between around 12%. This proportion is higher than that of the CCRC (approximately 5%).

19. Perceptions that the Executive is reluctant to overturn convictions or refer them back to the courts because of a vested interest in the outcome of applications and in preventing criticism of the criminal justice system are unfounded. Again in contrast with the UK situation prior to the CCRC, the Minister of Justice is entirely independent from the Police, Crown prosecutors and Solicitor-General. There is also no evidence to support perceptions that, in high profile cases, the Minister's advice to the Governor-General may be influenced by political and public opinion. The Minister's decisions are based on advice from politically neutral public servants, with retired judges or QCs often being engaged to assist in high profile or complex applications.

20. Issues relating to the role of the Executive appear to be more about public confidence in the system's independence rather than any evidenced problems. Public confidence is vital for the efficacy of the system. The challenge for option 1 would be to enhance public confidence in the independence of the system, especially when dealing with high profile or complex applications. One way of achieving this is to address capability issues in the current system by raising the profile of the system, and strengthening the capacity and expertise of the Ministry. Robust processes for considering applications and a greater understanding of the role of the prerogative of mercy and the Ministry's use of expert advisers should help ensure confidence in the system. The Ministry's capability would, however, remain subject to the competing workloads of staff. There would inevitably be times where staff cannot devote time to progressing applications because of other pressing work.

21. No legislation would be required to implement this option. Funding would be required for additional resources.

Option 2: independent criminal cases review commission

Features of option 2

22. An independent criminal cases review commission would be established as an independent crown entity. The commission would be able to:

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

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

Brief discussion of option 2

24. Setting up an independent commission and formalising the system in statute is likely to result in a significant increase in applications. This in turn may affect the workload of the courts. There is a risk that applicants would treat the new system as simply a further right of appeal.

25. More formalisation also increases the likelihood of judicial review proceedings. The CCRC faces a high number of judicial review proceedings (normally instigated by an applicant who disagrees with the CCRC's decision not to refer). These proceedings occupy the CCRC's resources at the expense of progressing applications. Increased susceptibility to judicial review also increases pressure for the body's assessments to be prompt, transparent and able to withstand critical examination.

26. The establishment of a body that is independent from the political Executive and the courts is likely to initially improve public confidence in the system. As with all options being considered, maintaining that confidence will depend on the resources available to it and managing applicants' or public expectations. The CCRC's resourcing issues have resulted in backlogs and delays in considering applications.

27. The final result of cases remains with the courts and within the parameters of criminal procedure law. There will continue to be controversial cases that focus criticism on the criminal justice system if turned down by the commission, or the courts following a referral, like Ellis and Bain.

28. This option would require legislation. Significant funding would be required to implement and maintain an independent commission. The court system may require additional funding to cope with a potential increase in the number of referrals to courts.

Other options being considered for organisational arrangements

Option 3: a new dedicated unit within the Ministry to advise on applications

29. The current process described at paragraph 4 would be retained. The Ministry would establish a dedicated unit to consider and advise on applications. The unit would have an identity that is separate from the Ministry. Staff in other parts of the Ministry could be seconded to the unit on a part time basis. A dedicated unit would improve the Ministry's management of applications and allow for an independent identity to be associated the prerogative of mercy work.

30. No legislation would be required to implement this option. Funding would be required for additional FTEs.

Option 4: a panel of retired judges or senior lawyers

31. The current process described at paragraph 4 would be retained. In addition, a panel of 3-4 retired judges or senior lawyers would be established. The panel would bring expert scrutiny to the Ministry's consideration of applications. A panel structure allows the members to share expertise, views and accountability for the robustness of scrutiny. One member would be engaged on each application regardless of complexity or merits of the application, and would provide guidance or assistance in the Ministry's consideration of that application as required. In each case, the assigned panel member would review the Ministry's advice to the Minister on the application. The Ministry remains responsible for the final advice on the application. This option does not address issues with the Ministry's capability for considering applications.

32. No legislation would be required to implement this option. Additional funding would be required.

Option 5: a special adviser

33. The current process described at paragraph 4 would be retained. In addition, the Minister of Justice would establish a non-statutory position to advise him or her on applications (a special adviser), modelled on the Canadian Special Adviser on Miscarriages of Justice. The position would be independent from the Ministry and public service.

34. This option does not address issues with the Ministry's capability for considering applications. The Ministry would retain responsibility for considering and investigating applications, and providing advice on applications to the Minister. The special adviser would maintain an overview of the Ministry's consideration and investigation and provide independent advice and non-binding recommendations to the Minister on applications. The special adviser would not be bound by the Ministry's advice and recommendations, and would be able to provide advice to the Minister that differs from that of the Ministry. Appointing a person whose skills, experience and neutrality are widely accepted would be crucial to the success of the special adviser position.

35. No legislation would be required to implement this option. Additional funding would be required.

Option 6: an independent criminal cases review board serviced by the Ministry

36. An independent criminal cases review board would be established by statute with similar powers as the independent commission in option 2. The Ministry would provide the board members with administrative support and legal/investigatory staff. The staff would be employees of the Ministry, but under the day-to-day control of the board.

37. Option 6 was outlined in the 2003 discussion paper and supported by most submitters. The discussion of option 2 (independent commission) at paragraphs 24 to 28 applies equally to this option. The Ministry's role in providing administrative and specialist support would, however, contain the overall costs of this option in comparison to option 2.

Favoured options for organisational arrangements

38. When assessing the options against the policy objectives, it is important to keep in mind the nature and number of applications currently received. As noted above, a very small number of applications with substance are received each year. The majority of applications are relatively straightforward to deal with and do not require expert skills or knowledge in addition to that currently provided by the Ministry.

39. Option 1 (status quo with new measures) will have the least financial and operational implications. We consider that option 1, with recourse to retired judges or Queen's Counsel where necessary, can provide a competent and efficient system for considering applications. At this stage, option 1 is our preferred option. Option 3 (dedicated Ministry unit) is unlikely to provide any significant advantage to option 1 and so we do not propose to do any further policy work on option 3.

40. Our initial view is that the resources required to establish and run an independent commission (option 2) or independent board (option 6) would be disproportionate to the nature and number of applications the independent body would consider. While overseas experience has shown that the establishment of an independent body may result in more applications, the large majority are still without merit. Both options would require significant funding for set-up and ongoing expenses such as stipends, accommodation and operating costs. We propose, however, to do more policy and costing work on these two options.

41. Option 4 (panel of retired judges or senior lawyers) and option 5 (special adviser to Minister) are similar in that they both add formal expert oversight to the current system. This formal oversight would occur even for the most straightforward of applications and so in some cases may not be cost effective. Of the two options, we consider option 4 would better achieve the policy objectives. We therefore propose to discount option 5, but do further policy work on option 4 because it provides a more formal elaboration of option 1.

Availability of legal aid for Royal prerogative applications

42. Outside of scope

Outside of Scope

43.

44.

45.

46.

Recommendations

It is recommended that you:

Organisational arrangements for addressing miscarriages of justice

1 **agree** that further policy work should be done on:

1.1 option 1 (status quo with new measures);

YES / NO

1.2 option 2 (independent commission);

YES / NO

1.3 option 4 (panel of retired judges or senior lawyers);

YES / NO

1.4 option 6 (independent board);

YES / NO

2 **agree** that the following options should be discounted:

2.1 option 3 (dedicated unit within the Ministry);

YES / NO

2.2 option 5 (special adviser to the Minister of Justice);

YES / NO

3 **note** that option 1 (status quo with new measures) is at this stage the Ministry's preferred option.

Availability of legal aid for applications for the Royal prerogative of mercy

Outside of scope

4

5

6

YES / NO

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

APPROVED / SEEN / NOT AGREED

Hon Mark Burton
Minister of Justice
/ /2007

Outside of Scope

Appendix A

Outside of Scope

12

Outside of Scope

13

Outside of Scope

14