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)

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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☐ Seen ☐ Withdrawn ☐ Not seen by Minister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. 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] justice (per Scottish CCRC), and 9(2)(g)(i)

    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] Act 2011, s 232). 9(2)(g)(i)

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. 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)

61.1. 9(2)(f)(iv), 9(2)(g)(i)

61.2.

61.3.

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

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)

65.

66.

67.

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 [redacted] quorum of Commissioners will decide whether to make a reference.[9] 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 [redacted] confidence in it. 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.

[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)

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.

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.

Timeframes for policy and legislative development

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

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

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

121.

122. 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]

[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.