

Coversheet: Criminal Cases Review Commission

Advising agencies	Ministry of Justice
Decision sought	This analysis has been prepared for the purpose of informing final decisions to be taken by Cabinet regarding the establishment of the Criminal Cases Review Commission.
Proposing Ministers	Minister of Justice

Summary: Problem and Proposed Approach

<p>Problem Definition</p> <p>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</p>
<p>The Government has committed to establishing a Criminal Cases Review Commission.</p> <p>Currently, if a person who has been convicted of an offence believes they have suffered a miscarriage of justice they may apply to the Governor-General for the exercise of the Royal prerogative of mercy (RPM). The RPM can be exercised to:</p> <ul style="list-style-type: none"> • Grant a free pardon; or • 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. <p>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 (OLC).</p> <p>Establishing the CCRC is an opportunity to enhance this system by giving an independent body with dedicated staff focused the mandate to identify and respond to possible miscarriages of justice. Indeed, arguably 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.</p> <p>Several jurisdictions have established a CCRC, including the United Kingdom (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.</p> <p>Government intervention is required because this is an Executive function affecting the criminal justice system.</p>

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

The proposed approach is to establish a Criminal Cases Review Commission (“CCRC”) an independent public body set up to investigate suspected miscarriages of justice and refer deserving cases back to the appeal courts.

The CCRC would replace the referral function currently performed by the Governor-General as part of the RPM, under section 406 of the Crimes Act 1961.

A CCRC brings about the desired change as it provides a mechanism to address the concerns with the current process and enhance the scrutiny of alleged miscarriages of justice. Specifically, the CCRC has the following benefits:

- a CCRC is an independent body
- through dedicated resourcing and additional powers to access information it is likely to be more efficient than the current process
- the specialist skill of the CCRC staff, and Commissioners will ensure investigations are of a high quality, and
- the CCRC can be designed in a way that makes it more accessible and transparent than the current system.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

The specific individuals who will benefit from the establishment of the CCRC are those people who may have suffered a miscarriage of justice. Applicants generally will benefit directly from the establishment of the CCRC as applications will likely be addressed more promptly with a CCRC.

The Government, and New Zealand society, will also benefit indirectly from the CCRC as it is expected to increase public trust and confidence in the criminal justice system as a result of being an effective and transparent system, compared to the status quo.

Where do the costs fall?

The initiative’s implementation and administration will be a monetised cost to Government. Currently, establishing a CCRC is estimated to cost approximately \$2.3 million to establish and \$3.9 million per year in operating expenditure. Further detail on the assumptions underlying these cost estimates and the distribution of the costs are included below in Section 1 and Section 5.2.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

The likely risks and unintended impacts of the proposal (and mitigation methods) are:

- 1) The public may not believe the CCRC is independent. There is a possibility that the CCRC will face the same issues regarding its perceived independence as the current process. It will be difficult to determine if this risk has come to fruition because as it is difficult to measure public perceptions, and a change in attitude (recognising the independence of the CCRC) may take time. A public perception of a lack of independence may manifest in low application numbers, or in criticism (e.g. in the media) of the CCRC’s approach to applications (for example, if the CCRC does not refer cases that are considered by particular groups to be meritorious).

The main method of mitigating this risk is to ensure the form and structure for CCRC is as independent as possible, including appointment of Commissioners. Further, educating the public, and those in prison, with information about the CCRC and how it functions independently is another tool to mitigate this risk. People are more likely to have faith in an institution that is transparent, and that they understand.

- 2) Applications, and investigations may take just as long, or longer, to be resolved through the CCRC as under the status quo. Investigations into possible miscarriages of justice are complex and often time consuming. There could therefore, be a risk that the CCRC is not perceived as more efficient than the current system if some cases still require significant time to complete. Likewise, if the CCRC receives a large number of applications that do not have viable prospects of success, its efficiency in dealing with meritorious cases could be diminished.

The main method of mitigating this risk will be to ensure that adequate resource and powers are provided to the CCRC. For example, providing the CCRC with the powers to compel information from public and private bodies will be another mechanism that protects against unnecessary delay.

3) The CCRC takes longer than expected to become operational. This may cause people to believe the CCRC is ineffective from its inception. The main causes of delay in getting the CCRC up and running are likely to be through the time required to draft and enact legislation, and the time needed to establish the CCRC (for example, getting Commissioners appointed, and staff trained, housed and ready to investigate cases).

The Government can take steps to minimise the delay associated with the legislative process. The Ministry will minimise implementation risks through early and ongoing planning, set-up, and procurement processes.

Identify any significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.

Establishing a CCRC, the preferred option, complies with the Government’s ‘Expectations for the design of regulatory systems’ (the Expectations). There are no significant incompatibilities with the Expectations. Further, allowing the CCRC to develop its own policies and practices will enable it to be flexible and innovative to ensure that it is able to evolve in response to its experience and the needs of applicants.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

The nature of the analysis is predominantly qualitative. It is informed by academic commentary, the experience of CCRCs internationally and feedback officials have received during consultation.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Ministry of Justice

Quality Assurance Assessment:

The Ministry of Justice's internal Regulatory Impact Analysis ('RIA') Quality Assurance Panel has reviewed the RIA and associated material prepared by the Ministry of Justice. The Panel considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

Reviewer Comments and Recommendations:

In reaching this conclusion, the Panel notes there are some constraints on the analysis and that the RIS focuses on a comparison between the status quo and options for the Government’s proposed approach.

Impact Statement: Criminal Cases Review Commission

Section 1: General information

Purpose
<p>The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement. This analysis and advice has been produced for the purpose of informing:</p> <ul style="list-style-type: none">• key (or in-principle) policy decisions to be taken by Cabinet, and• final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.

Key Limitations or Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- No data exists about how many unaddressed miscarriages of justice have occurred in New Zealand. This limits the ability to assess the scale of the problem, i.e. the extent to which the status quo is effective in identifying miscarriages of justice.
- A lack of empirical evidence about the nature of the current process or issues that exist with it. For example, the amount of time or resources an application takes to investigate is not systematically measured, it also varies greatly dependent on the nature of the case and with such a small sample size of case reviews it is difficult to make informed assessments.
- Consultation was carried out based on the favoured option, the establishment of the CCRC. Therefore, analysis of the alternative options and the counterfactual has not had the same level of comment as the CCRC.
- The recommended CCRC model provides the CCRC with the power to determine its own process, policies and procedures to provide the CCRC with the flexibility to adapt to the environment. However, this does to some extent limit analysis as these processes, policies and procedures cannot be analysed.

There have been assumptions made about the following matters:

Increase in application numbers

- Our estimates for the volume of applications the CCRC will receive are based on the experience of other countries.¹ As a result, the analysis has been carried out on the assumption that there will be a significant increase in the number of applications made for review of cases under the CCRC model than are made through the current procedure.
- Specifically, we assume an increase to 125 applications per year from 8 per year, with 38 applications leading to full investigations.
- This assumption is based on the following:
 - On average, CCRCs in the United Kingdom (England, Wales and Northern Ireland), Scotland and Norway receive an average of 2.7 applications per 100,000 people (2.3, 2.8 and 3.1 respectively) per year. Approximately 30 percent of applications to the UK and Scottish CCRCs lead to a full investigation.
 - We have assumed approximately the average of the referral rates in other jurisdictions (UK 3.3%, Scotland 5.7% and Norway 13%) This equates to 7.3% of applications, or around 25% of applications that go to full investigation.
- Other relevant factors have also been considered, including the different systems for criminal appeals and the different rates of imprisonment across jurisdictions. It has not, however, been possible to identify the extent these factors might impact the estimates above and, in any case, the factors are likely to balance each other out to some degree.
- Due to estimated volumes of applications, we have also assumed the CCRC will have similar staffing levels to the Scottish CCRC.

¹ A CCRC was established for England, Wales and Northern Ireland ("the English CCRC" in 1997 following the *Runciman Report*. The Scottish CCRC was established in 1999. Norway established a CCRC in 2004.

Responsible Manager (signature and date):

Stuart McGilvray

Policy Manager, Criminal Law

Criminal Justice

Ministry of Justice

26 July 2018

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

Status quo

Currently, if a person who has been convicted of an offence believes they have suffered a miscarriage of justice they may apply to the Governor-General for the exercise of the Royal prerogative of mercy. Applications can be made by individuals who have concerns regarding both their conviction and sentence.

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 of Justice’s Office of Legal Counsel.

The Ministry reviews the information and submissions supplied in support of the application and all relevant court and Police files. Where required, additional information will be gathered or further enquiries made. Assistance is sought, where required, from an independent adviser such as a Queen’s Counsel or retired Judge. The Ministry then prepares a comprehensive report for the Minister containing legal analysis of the application.

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:

- Grant a free pardon; or
- 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.

In this context, the term “miscarriage of justice” refers to an unjustified conviction; a conviction in breach of the law, or where the total available evidence leaves serious doubt as to the adequacy of proof of guilt.²

The power to refer a person’s conviction or sentence back to the courts has been exercised on 15 occasions since 1995, which represents about 9 percent of the 166 applications for the prerogative of mercy lodged in that time.

There is significant public and media interest in cases of possible miscarriage of justice, whether or not a case is ultimately referred.

Counterfactual

The counterfactual (that is, the future state where no additional action is taken) will see the status quo process continue and the concerns will also continue, creating a risk to the criminal justice system and New Zealand’s international reputation. Furthermore, not taking any action on this matter will forgo the benefits of establishing a CCRC, and the opportunity it provides to make improvements to various aspects of the process of identifying miscarriages of justice currently operating in New Zealand.

2.2 What regulatory system, or systems, are already in place?

The Royal prerogative of mercy is exercised by the Governor-General. The prerogative is exercised on advice of the Minister of Justice, who seeks advice from the Ministry of Justice. The Governor-General may refer the matter to the Court of Appeal.

² Sir Thomas Thorp, *Miscarriages of Justice* (Legal Research Foundation, 2005), pg. 3.

2.3 What is the policy problem or opportunity?

Concerns have been expressed about the independence, timeliness, quality and transparency of reviews into miscarriages of justice by the RPM process.

These concerns have been expressed regularly over more than a decade by members of Parliament, journalists, academics, members of the legal profession, and civil society groups (including the New Zealand Innocence Project).

A perceived lack of independence

Ministry lawyers who provide advice on Royal prerogative of mercy applications are entirely independent of the Police, the prosecution and the courts. The Ministry and successive Ministers of Justice have consistently applied the same longstanding principles that underpin the operation of the UK and Scottish CCRCs.

There is a perception, however, that the current process is not adequately independent of the Minister, or the Ministry, of Justice.³ While there has not been any evidence of political influence on previous advice or decisions, the perception has endured. This is likely because Ministers are the subjects of public and political lobbying. Further, the appearance of bias may be increased by the fact that the events under scrutiny are likely to have occurred within the Minister's portfolio.

Concerns regarding independence extend to officials who currently produce the advice provided to the Minister for the Governor-General. It is likely that people with concerns about their treatment by the criminal justice system have reservations about the independence of those considering their application when they work within the same system.

Actual or perceived a lack of independence will negatively impact public confidence in a system, and may be reflected in an unwillingness to engage with the process.

Timeliness and quality

Currently, officials who review applications do so alongside their other work, assessment of RPM applications must, therefore compete with other priorities.⁴ This competition can lead to delays in application, and case reviews.

Further delays may be attributed to the lack of coercive power officials have. Access to information from both public and private persons relies on their cooperation with Ministry officials.

The RPM process has been criticised for its reactive jurisdiction, as it is reliant on the applicant to provide information and make out the case for the exercise of the RPM.⁵

This reliance reflects the advisory role of officials, and their lack of investigative training or powers.

The significant onus on applicants has led observers to suggest that well-resourced applicants with access to professional assistance are advantaged in the current process. Meanwhile, possible applicants without such resources, and who do not qualify for legal aid,

³ Bridget Irvine, "New Zealand Criminal Cases Review Commission" *Access to Justice*, 2017, pg. 56.

⁴ Jeremy Hammington, *Royal Prerogative of Mercy: Practices and Procedures in the Ministry of Justice* (Ministry of Justice, 2003) pg. 18.

⁵ Simon Mount, "A Criminal Cases Review Commission for New Zealand", *New Zealand Law Review*, 2009, pg. 472.

are less likely to be able to make out an application, let alone one of sufficient quality to secure a referral. If applicants are successful and their case is referred to the appeal courts they may be eligible for legal aid.

Transparency

The current process has developed through convention. While explanatory information about the Royal prerogative of mercy has been posted on the Governor-General's website since 2005, it may not be a process that is clear to the general public and potential applicants.

Reasons for the Governor-General's exercise of discretion are provided to an applicant but are not proactively made public.

People are less likely to trust, or have confidence in a system they do not understand. Therefore, the lack of transparency of the RPM process may contribute to the low number of applications or a lack of faith in decisions.

Engagement with the existing process by Māori and Pacific people are disproportionately low

The proportion of applications from Māori and Pasifika has been estimated at between 11 – 16 percent,⁶ despite making up over 60 percent of the prison population.⁷ The relatively low levels of applications despite disproportionate rates of imprisonment suggests the status quo may be failing to encourage applications from vulnerable populations.⁸

The main barriers for Māori under the status quo have been identified as including the relatively low visibility of the process, the burden placed on the applicant in terms of both proof and cost, and a lack of confidence in the criminal justice system.⁹ For Pacific peoples, in addition to these barriers, anecdotally it is understood that there may also be difficulties in fully understanding the process and also self-advocacy, both of which are likely to suppress the number of applications.

A CCRC cannot address, on its own, a sense of alienation or dissatisfaction with the criminal justice system. It is not certain that Māori and Pasifika will relate more easily to the CCRC than they do to the Royal prerogative process.

However, an independent, well-designed and properly resourced CCRC could make material improvements in encouraging and resolving meritorious applications that, at present, may not be being put forward. Specifically, a clear focus on identifying and addressing miscarriages of justice can reasonably be expected to lead to the CCRC undertaking dedicated outreach and attempts to build trust with disproportionately affected communities.

2.4 Are there any constraints on the scope for decision making?

The Government has a coalition agreement to establish a CCRC. Proposals have been restrained by this commitment, and the important constitutional separation of powers between the judiciary and the executive.

⁶ Mount (2009) pg. 474.

⁷ Department of Corrections, 'Prison facts and statistics – September 2017'.

⁸ Thorp (2005) pg. 53 – 54; Mount (2009) pg. 474.

⁹ *Ibid*; see also the New Zealand Public Perceptions of Crime Survey 2016 for information on levels of confidence in the criminal justice system.

2.5 What do stakeholders think?

The primary stakeholders are:

- convicted individuals, as they are potential applicants to the CCRC
- the Governor-General
- Police and the courts as investigations frequently will require case files or evidence they hold
- Māori and Pasifika people as the proportion of Māori and Pasifika people in prisons is not reflected in applications in the current system
- academics and civil society
- lawyers, members of the judiciary and others integrally involved in the criminal justice system, and
- the public, wrongful convictions undermine the integrity of our criminal justice system.

In January and February 2018 Justice officials undertook targeted consultation with the judiciary, investigative bodies (Independent Police Conduct Authority, Office of the Privacy Commissioner and the Inspector-General of Intelligence and Security), representative leaders of the law profession, academics and other key stakeholders to test the proposed model for a CCRC. Targeted consultation also included consulting with agencies that have an interest in aspects of the model, including the State Services Commission, on the organisational form of the CCRC.

The general tone of their comments was positive and favourable to the establishment of a CCRC. Strong differences of opinion were reserved for complex technical matters such as the test for referral, and on matters where the proposed model goes beyond the current system and approach to identifying potential miscarriages of justice, such as the educational function, and own initiative investigations.

As this work continues there will also be further opportunities for consultation with stakeholders. For example, the public will be able to submit their views during select committee consideration of legislation scheduled for later this year.

Section 3: Options identification

3.1 What options are available to address the problem?

The options we have considered in the analysis below are:

- option 1 – amending the existing process, and
- option 2 – establishing a CCRC.

Both options have key features which could be modified to wholly or partly achieve the objectives of this project.

Option 1: amending the existing process

This non-regulatory option would involve providing additional resourcing within the existing system. This option would aim to build on the process as it currently exists, targeting resources where they are most needed to support applicants and complete reviews in a more timely manner. There are a range of different ways this could be delivered, these features could each be adopted individually, or in combination:

Additional resourcing to the Office of Legal Counsel

Currently, RPM work is only part of OLC staff’s work, and therefore, must compete with other priority work. Additional resourcing may allow OLC staff to prioritise, or solely focus on reviewing applications.

Implementing key performance indicators

The current process is not measured in any specific or well reported manner, introducing key performance indicators (KPIs), or recording this work in an effective way may provide a mechanism to determine the extent of any problem, and then use this evidence to determine how to resolve it. KPIs may measure things such as the timeliness of a review.

Increasing public awareness (specifically in prisons) of the existing process

A special unit could also be tasked and resourced with an educative function. This could be resourced to extend beyond educating individuals to assisting them with their applications.

Option 2: establishing 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. As noted above, several jurisdictions have established a CCRC, including the United Kingdom, Scotland, and Norway.

There are a number of design questions in the establishment of a CCRC. These include:

Structure of the CCRC

The CCRC could be established as an:

- Independent Crown Entity (ICE) – is typically a quasi-judicial or investigative public body, it is a governed by a board who are appointed (and removed “for just cause”) by the Governor-General on the advice of the responsible Minister, there is no Ministerial power to direct, however generally ICEs are subject to “whole of government” direction. The responsible Minister’s role is prescribed in the Crown Entities Act.
- Independent Statutory Officer – there are options to the degree of operational autonomy an ISO has but generally they are an individual employee within a Government department with a direct line of accountability to the Chief Executive. They are appointed

(and removed) by the Chief Executive unless otherwise stated in the statute.

- Commission of Inquiry – Generally these bodies are established to inquiry into a specific matter, their powers to investigate come from the Inquiries Act. Governance arrangements vary, however generally terms of reference are set by Government with the Commission determine its own procedures and process.

Function

The CCRC could be established with a single function, or multiple functions. The primary function of a CCRC would be to investigate alleged miscarriages of justice and refer deserving cases back to court. However, the CCRC could also have secondary functions that include public education, reporting on trends in their work and any “systemic issues” found during investigations.

The publication of the CCRC’s decisions may also be a relevant function, with either the whole report presented by the CCRC being made public, or a summary of the CCRC’s findings.

The Governor-General would continue to exercise all other Royal prerogative powers, specifically the power to grant a full pardon. There are some variations in the way that the relationship between the RPM and CCRC function could be implemented. For example, the Governor-General could transfer cases to the CCRC, or seek (via the Minister of Justice) the CCRC’s opinion on the exercise of the RPM where there has been an application for a pardon.

Powers

There are also options in the amount of discretion the CCRC has to regulate its own procedure and set its own policies. If processes and procedures are outlined in statute they are in a single public locality. However, modifying statute requires action by the Ministry and this may negatively impact the public perception of the independence of the CCRC.

Further, requiring legislation to change processes or procedures severely limits the ability to be responsive to experience.

The CCRC may be limited to only investigate where there has been an application, it could also be able to carry out investigations or make own initiative inquiries into convictions or sentences. Internationally CCRCs have the power to compel information from individuals and agencies. If the CCRC is granted this power, a decision will need to be made about how the CCRC will compel information, how this relates to privilege and what information can be shared with other agencies.

Commissioners

There are choices about the size of the decision-making body, desirable skills and the qualifications of the people who make up the CCRC. A larger decision-making body may have greater associated costs, however would have the benefit of having a greater number of views represented.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

The criteria against which we have analysed the options are:

1) Independence

- Independence, and the perception of independence, are important for the success of this process as it contributes to the public's trust and confidence in the fairness of referral decisions. Further, as this process inherently involves Executive involvement in the judicial process, it is critical that there is as much independence from political influence as possible.

2) Timeliness

- It is important that the system be free of unreasonable delays to ensure that applicants, their families, and victims do not spend long periods of time without certainty. However, because of the complex nature of many applications and the need for investigations to be thorough, speed of reaching a decision or carrying out reviews should not be the sole measure of success.

3) Quality

- It is crucial for the quality of reviews that there is adequate resourcing of any process. Further, it is important that the people carrying out those reviews have adequate powers and skills to do so.
- Whether there is an investigative, rather than the current review based approach is also likely to improve the quality of the work this body produces.

4) Transparency

- The public are more likely to trust and engage with a system they understand, transparency is therefore an important consideration of any option.

3.3 What other options have been ruled out of scope, or not considered, and why?

The ability for the CCRC to consider and provide recommendations on the sum of compensation to be provided to people who have suffered a miscarriage of justice was recommended by a number of experts during consultation. This was determined to be beyond the scope as the nature of this advice is a fundamentally different from referral decisions.

Section 4: Impact Analysis

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?

Key:

- ++** much better than doing nothing/the status quo
- +** better than doing nothing/the status quo
- 0** about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Option 1: Amending the existing system

	Independence	Timeliness	Quality	Transparency
Additional resourcing	<p>0</p> <p>It is possible that additional resourcing could take the form of establishing an identifiable group within the Ministry who carry out reviews, or extending the mandate of a pre-existing entity. However, even with significant public education about how reviews are carried out (emphasising the separation of analysis from the Minister) it is unlikely that perceptions would shift significantly. The process would therefore continue to face a challenge regarding its perceived independence from the Minister.</p>	<p>+</p> <p>With additional resource it is likely that the timeliness of reviews will improve.</p> <p>This option does not overcome the challenge of officials being reliant on cooperation to be provided with the necessary information.</p>	<p>+</p> <p>Providing people with more time to and resource is likely to improve the quality of work being produced. If the role was also changed from an advisory to more investigative one it would allow the Ministry to hire people with a more diverse, and relevant skillset which may improve the quality of reviews.</p>	<p>+</p> <p>If resourcing is used to educate the public about the existing process it will improve public understanding of the existing process to some extent.</p> <p>While there may be an increase in public understanding of the process, the process remains complex and decisions to refer are not accessible to the public.</p>

	Independence	Timeliness	Quality	Transparency
Increasing public awareness	<p>+</p> <p>Increasing public awareness of the existing system may improve the perception of independence concerns as the public will understand the procedural independence of the existing process. Dedicated outreach activities to disproportionately affected communities could also help to build trust, though this would depend on the entity carrying out those efforts.</p>	<p>0</p> <p>This option does not address the concerns regarding review’s timeliness.</p> <p>This option also does not overcome the challenges of officials being reliant on cooperation to be provided with the necessary information.</p>	<p>0</p> <p>This change also does not propose to improve resourcing, nor amend the existing advisory, as opposed to investigative approach of responding to applications.</p>	<p>+</p> <p>This change would improve the transparency of the existing process by increasing public understanding of the system.</p>

Option 2: Establish a CCRC

Key feature 1: Structure of the CCRC

	Independence	Timeliness	Quality	Transparency
ICE	<p>+ +</p> <p>Commissioners likely appointed by the Governor-General on the advice of the Minister.</p> <p>Removal of Commissioners is limited to circumstances where there is “just cause”.</p> <p>There is no power for the Minister to direct the ICE on policy. But ICE’s are generally subject to “whole of Government” direction.</p>	<p>0</p> <p>This option does not have consequences for the timeliness of investigations. However, during consultation many agencies who are currently ICE’s expressed concern that the reporting and auditing obligations of an ICE may be overly onerous on the CCRC.</p>	<p>+</p> <p>The ICE model will enable an investigative as opposed to review based role.</p> <p>The board structure of an ICE provides an opportunity to incorporate people with a broader range of knowledge and experience than currently involved</p> <p>The ICE structure does not innately improve resourcing, however, if employees are not working with competing priorities they are more likely to be able to produce timely, and quality work.</p> <p>Furthermore, staff are likely to be hired for specific roles and as such are more likely to have specialist skills than those currently reviewing applications.</p>	<p>+</p> <p>The reporting and auditing obligations that come with an ICE provide operational transparency. The annual report is an example of one such reporting tool.</p> <p>Further mechanisms could be built in that provide greater transparency with regard to the CCRCs decisions as this is not inherent in the model itself.</p>

	Independence	Timeliness	Quality	Transparency
Independent statutory officer	<p>+</p> <p>There are a range of legislative options for the degree of operational independence for an ISO.</p> <p>Appointment and removal is generally carried out by the Chief Executive.</p> <p>The officer being an employee of a Government agency is unlikely to contribute positively to the perception of independence.</p>	<p>0</p> <p>This option does not have consequences for the timeliness of investigations.</p>	<p>+</p> <p>There is nothing inherent in the ISO structure that could be used to improve the quality of the review process.</p> <p>However, the choice could be made to adopt an investigative as opposed to review based approach using this model. Staff employed by the ISO could be specialists hired for the specific task of investigating applications.</p> <p>The ISO structure does not innately improve resourcing, however, if employees are not working with competing priorities they are more likely to be able to produce timely, and quality work.</p>	<p>0</p> <p>The ISO model could be structured to be more transparent than the current process. However, there is nothing inherent in the model that provides this.</p>

	Independence	Timeliness	Quality	Transparency
Commission of Inquiry	<p>+ +</p> <p>The standing inquiry model is independent of Ministers. Appointment of Commissioners is carried out by the responsible Minister.</p> <p>The Government establishes the terms of reference, which sets out which subjects are to be investigated, however the Government cannot interfere in the direction taken by an inquiry or influence the findings.</p>	<p>0</p> <p>This option does not have direct consequences for the timeliness of investigations. However, subsequent decisions about resourcing and the powers the Commission has could improve the timeliness of reviews.</p>	<p>+</p> <p>The Commission of Inquiry model does not innately improve resourcing, however, if employees are not working with competing priorities they are more likely to be able to produce timely, and quality work.</p> <p>There is nothing inherent in the Commission of inquiry that could be used to improve the quality of the review process.</p> <p>However, the choice could be made to adopt an investigative as opposed to review based approach using this model. Staff employed by the ISO could be specialists hired for the specific task of investigating applications.</p>	<p>0</p> <p>If information about the Commission is made public it could be more transparent than the current process, however, there is nothing inherent in the model that provides this.</p>

Key feature 2: Function of the CCRC

	Independence	Timeliness	Quality	Transparency
Sole referral function	<p>+ +</p> <p>Having a sole function clearly defines the role of the CCRC as independent of other processes.</p>	<p>+ +</p> <p>Having a sole function, to investigate and refer deserving cases back to the appeal courts would likely improve the timeliness of investigations.</p>	<p>+ +</p> <p>Having a sole function would likely improve the quality of the process as staff would be specialists hired to do a very specific role.</p> <p>This function provides the opportunity to address the approach to investigating applications as the expression of the CCRC's function in the statute could be done in such a way that indicates that it is an investigative as opposed to advisory organisation.</p>	<p>0</p> <p>Having a sole function would not necessarily improve the transparency of the process. However, it may make it more accessible to the public as they may be able to understand more easily how the process works.</p>

	Independence	Timeliness	Quality	Transparency
Second educative function	<p>+</p> <p>Establishing a CCRC with a second, educative function is unlikely to detract from the actual or perceived independence of the CCRC.</p> <p>However, during consultation some submitters raised concerns that a second educative function would need to be cast narrowly to ensure that there was not the public perception that the CCRC was an advocacy body or innocence project.</p>	<p>0</p> <p>Concerns were raised during consultation that having a secondary function may detract from the CCRC's core purpose. This concern could be addressed if adequately resourced the educative function should not detract from the CCRCs performance.</p> <p>This feature also does not address the challenge of officials being reliant on cooperation to be provided with the necessary information.</p>	<p>++</p> <p>Having a secondary educative function is likely to improve the quality of the CCRC's work as it is a tool to address the existing inequalities in people who make applications.</p> <p>Further, different and specialist staff are likely to be hired to carry out the education work separate from those hired to investigate applications.</p> <p>Having a secondary, educative function provides a clear message that the approach of the CCRC is different from the responsive and advisory approach currently taken.</p>	<p>++</p> <p>An educative function ensures the CCRC is working to increase public understanding of the CCRC's work and process, increasing the transparency of the current process.</p>

	Independence	Timeliness	Quality	Transparency
Identification of systematic issues	<p>+</p> <p>Broadening the CCRCs function to include the identification of systematic issues was proposed as a way of ensuring the any larger thematic or procedural problems identified by CCRC staff during investigations were addressed.</p> <p>However, during consultation, concerns were raised that this function goes beyond the role of the CCRC and risks undermining the constitutional relationship between the CCRC, an executive body, and the judiciary.</p>	<p>0</p> <p>This option does not address the concerns regarding the timeliness of investigations.</p> <p>This option also does not directly address reliance on cooperation issues.</p>	<p>+</p> <p>This function does not directly impact staffing decisions. However, one commentator did state that this function should be performed by academics, independent of both the CCRC and government generally.</p> <p>This change would further clarify that there was a change from the status quo of advising on applications to researching and responding to broader issues.</p>	<p>+</p> <p>This change would not impact the transparency of the process directly. However, recommendations or comments made by the CCRC subsequent to investigations may be valued by the public.</p>

Key feature 3: Powers

	Independence	Timeliness	Quality	Transparency
Regulate its own procedure	<p>+ +</p> <p>Providing the CCRC with the power to regulate its own procedure, is an important and powerful indication and tool to provide the CCRC with independence. It is also a feature of both the Scottish and UK CCRC.</p>	<p>+ +</p> <p>Having the ability to regulate and determine its own procedures and processes provides the CCRC with an ability to respond to the environment that it operates in and develop the most efficient and effective procedures possible.</p> <p>This feature does not address the challenge of officials being reliant on cooperation to be provided with the necessary information.</p>	<p>+ +</p> <p>The CCRC staff will be specialists and therefore, the best placed to develop and advise on the CCRCs process and procedures.</p> <p>This power clearly demonstrates that the CCRCs function is not advisory and the way that it is framed in the statute will provide boundaries to ensure that it does not become an advocacy body.</p>	<p>+</p> <p>Providing the CCRC with the power to regulate its own processes and procedures, and requiring that these are made public is a powerful tool to improve on the transparency of the existing system.</p>
Information gathering powers	<p>+ +</p> <p>Providing the CCRC with adequate powers to request information from other agencies and private individuals clearly indicates the independence of the CCRC.</p>	<p>+ +</p> <p>Having the ability to compel information is likely to improve the timeliness of investigations, as compared to current reviews.</p> <p>This feature addresses the existing concerns that advisors rely on cooperation for access to what may be, essential information.</p>	<p>+ +</p> <p>Providing the CCRC with the ability to compel information will improve the quality of investigations as it is a way to ensure that decisions are made with all of the relevant/necessary information.</p> <p>These powers will further clarify the move from the current advisory approach to a more investigative model.</p>	<p>0</p> <p>This power will not alter the transparency of the process.</p>

	Independence	Timeliness	Quality	Transparency
Own initiative inquiries	<p>+</p> <p>Providing the CCRC with the ability to make initial inquiries into a case where an application has not been made by an individual clearly indicates that the organisation is independent.</p>	<p>+</p> <p>Providing the CCRC with the power to make inquiries before an application is made may provide some benefit to the timeliness of investigations.</p>	<p>+</p> <p>This change would not alter who is doing investigations.</p> <p>This change would further clarify that there was a change from the status quo of advising on applications to researching and responding to broader issues.</p>	<p>0</p> <p>This change would not impact the transparency of the process directly.</p>

Key feature 4: Commissioners

	Independence	Timeliness	Quality	Transparency
Sole Commissioner	<p>+</p> <p>A Commissioner would likely be perceived as more independent than decision-makers under the status quo.</p> <p>The background, views and decisions of an individual Commissioner may be scrutinised more heavily than a more diffuse decision-making model.</p>	<p>0</p> <p>Having a single Commissioner would not be expected to materially impact on timelines vis-à-vis the status quo.</p> <p>Timeliness could be affected if significant volumes of applications were made and the requirement was for the Commissioner to solely determine them.</p>	<p>0</p> <p>A qualified sole Commissioner with relevant experience can reasonably be expected to provide sound direction and decision-making.</p> <p>However, having a single Commissioner would not be expected to materially impact on quality of investigations vis-à-vis the status quo. The bulk of investigative work would still be undertaken predominantly by staff, rather than the decision-maker.</p>	<p>+</p> <p>Decisions, or a summary of the decisions, would likely be made public, which will improve transparency compared to the status quo.</p>

	Independence	Timeliness	Quality	Transparency
Board with 3 – 7 members	<p>+ +</p> <p>The CCRC will likely be governed by a board.</p> <p>Having between 3 – 7 members allows a number of experiences to be represented, this contributes positively to actual and perceived independence because it provides that there are a large number of decisionmakers, rather than just one.</p>	<p>-</p> <p>A greater number of board members may create a slower decision-making process than a smaller number of members or than under the status quo.</p> <p>This feature does not address the challenge of officials being reliant on cooperation to be provided with the necessary information.</p>	<p>+ +</p> <p>Having a greater number of board members allows for a greater number of experiences, and perspectives to be expressed and used to analyse applications and in decisions.</p> <p>This decision does not directly impact on the advisory/investigative approach.</p>	<p>+ +</p> <p>Having a board structure means the group of decision makers is identifiable and there will be the requirement that decisions, or a summary of the decisions, are made public, which will improve transparency.</p>
Relevant experience	<p>+ +</p> <p>Requiring only some of the board members to have legal qualifications, as is done by other CCRCs, ensures that there are a range of perspectives represented. This can improve the perception of independence as decisionmakers are from throughout the criminal justice system as opposed to just the legal sector.</p> <p>Not having a board of retired judges also provides a protection against the perception that the CCRC is an additional appeal route.</p>	<p>+ +</p> <p>Having decision makers with relevant experience may improve the timeliness of decisions as external experts may not be necessary in some cases where they may currently have to be sought.</p> <p>This feature does not address the challenge of officials being reliant on cooperation to be provided with the necessary information.</p>	<p>+ +</p> <p>Having board members with a range of experiences, and perspectives will provide additional depth and a robust nature to decisions the CCRC makes.</p> <p>Furthermore, it is recommended that the general requirement to promote diversity in the membership of Crown entities is emphasised by specifying knowledge of te ao Māori as a relevant factor when considering appointment.</p> <p>Including people with a broad range of skills demonstrates that the CCRC is not simply advising, but investigating.</p>	<p>0</p> <p>This decision will not impact the transparency of the process.</p>

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The analysis table above indicates that the establishment of the CCRC best meets the assessment criteria, along with the Commission of Inquiry. The preferred approach is, therefore, is to establish a CCRC.

The CCRC should have the following key features:

1. It should be structured as an Independent Crown Entity (ICE) with specific exemptions from the Crown Entities Act 2004 to minimise compliance costs.
 - a. While a Commission of Inquiry model scores similarly to an ICE, the following additional factors have influenced this conclusion
 - i. Standing Commissions of Inquiry are usually combined with another organisational models, such as a tribunal or an ICEs. Given the power to refer cases back to the appeal courts is an Executive function, a tribunal model would not be appropriate. There is no discernible benefit in making the CCRC a Standing Commission of Inquiry and an ICE.
 - ii. The ICE model is well understood and well-regulated, more so, than the other options. While both a Commission of Inquiry, and ISO could be structured to have greater independence and transparency than is inherent in the models, the ICE model has these build in – ie appointment process and legislated requirements for the annual report.
 - iii. While there is nothing to prevent a Commission of Inquiry being ongoing, they are traditionally more established on a more short-term basis to inquiry into one specific issue rather than existing as ongoing inquiries into a broad range of cases.
2. The primary function of the CCRC should be to identify potential miscarriages of justice and refer deserving cases back to the appeal courts.
3. The CCRC should have a secondary educative and awareness raising function. The CCRCs function should not extend to include identification of systematic issues.
4. The CCRC should have the power to regulate its own procedures. The CCRC should be required to publicise its processes and procedures.
5. The CCRC should have the power to gather information from both public and private persons when the CCRC have reasonable grounds to believe the information is necessary for the purposes of reviewing a case and that it is not able to obtain the information in any other manner.
6. The CCRC should have the power to make initial inquiries alongside being able to investigate when an application has been made by or on behalf of a living convicted person.
7. The CCRC should be governed by a board of of 3 – 7 people who should have relevant criminal justice experience, but not all should be required to have legal qualifications.

These conclusions align with the Government commitment to establish a CCRC and is broadly supported by stakeholder consultation.

5.2 Summary table of costs and benefits of the preferred approach

Below, we have summarised the costs and benefits our preferred option. We have categorised the relevant affected parties' costs as low, medium or high, in the context of likely costs under the counterfactual.

Estimated costs of establishing a CCRC

Additional costs of proposed approach, compared to taking no action			
Affected parties	Comment	Impact	Evidence certainty
Applicants	<ul style="list-style-type: none"> Unlikely to experience an increase in costs, because they will still have the same entitlements to legal aid that they do under the existing system. is likely to be more of them which is likely to have implications for legal aid. 	Low (monetisable)	Low-medium
Government	<p>Establishment costs (2018 – 2019) \$2,268,000</p> <p>Total cost for the establishment unit \$1,433,000</p> <p>Operating costs* \$635,500</p> <p>Contingency costs** \$200,000</p> <p>Operating expenditure (2019 onwards) \$3,865,000 (annually)</p> <ul style="list-style-type: none"> Staff \$2,580,000 Operating costs \$1,740,000 <p>Flow on costs \$572,000</p> <ul style="list-style-type: none"> Legal aid \$282,000 Crown Law (supporting investigations and additional trials) \$150,000 Other agencies (supporting investigations) \$75,000 Court costs (incl. judicial review) \$65,000 <p>* Whether operating costs are required in the establishment phase is contingent on timing of funding decisions / when the CCRC becomes available</p> <p>** Estimated at 10 percent of other expenditure to cover unexpected costs in areas such as fit out and website design</p>	Medium (monetisable)	Medium
Total monetised cost		Medium	Medium
Non-monetised costs		See risks in section 5.3 below.	Low

Expected benefits of proposed approach, compared to taking no action			
Affected parties	Comment	Impact	Evidence certainty
Applicants	<p>Unless there are also changes made to legal aid entitlements it is unlikely that there will be a significant direct monetised implication on applicants.</p> <p>As a consequence of the more investigative nature of the CCRC, as compared to the existing process, there is likely to be less emphasis on the information that needs to be provided by the applicant this may, therefore, reduce some of the financial burden on applicants.</p> <p>Because of the possible improvements in the rate with which applications are dealt with, in comparison with the current process where there are competing priorities, it is possible that applicants may save time and money as their applications are dealt with in a more timely manner.</p>	Low (monetisable)	Low-medium
Lawyers and human rights specialists	Establishing a CCRC is a way to strengthen the existing procedural protection for people in the criminal justice system as a result it is likely to be well received by legal and human rights professionals.	Low (non-monetisable)	High
Government	A possible benefit of establishing the CCRC is that more miscarriages of justice may be identified or miscarriages of justice may be identified faster than through the existing process.	Low (monetisable)	Low-medium
Applicants	<p>The CCRC is expected to be more accessible than the existing process as a result of the agency's transparency and independence. Furthermore, as the CCRC will determine its own requirements for application it is expected that they will adopt procedures that accommodate different abilities, akin to the Scottish "easy read" form.</p> <p>Additionally, it is expected that the CCRC will be more timely in its resolution of applications. This is because staff carrying out reviews in the existing process have competing priorities for their time and do not have the same powers to require information that the CCRC is likely to have.</p>	High (non-monetisable)	Medium
Government and wider society	Public trust and confidence in the criminal justice system will improve or be maintained more effectively than under the status quo, creating secondary/flow-on non-monetised benefits for both the Government and society. This is based on the expectation that people will have a greater understanding of the process and confidence in its decisions than under the status quo.	Low-medium (non-monetisable)	Low-medium
Government	New Zealand's international reputation is likely to improve as a result of the establishment of the CCRC as it brings our process in line with other like-minded common-law countries such as England, Wales, Northern Ireland and Scotland.	Low (non-monetisable)	Medium

New Zealand	We are expecting a larger number of miscarriages of justice to be identified, therefore there will be a reduction in the number of people wrongfully imprisoned.	High (non-monetisable)	Medium
Total monetised benefits		Low-medium	Medium
Non-monetised benefits		Low-medium	Low-medium

5.3 What other impacts is this approach likely to have?

The broader impact of the establishment of a CCRC is an increase in public trust and confidence in the criminal justice system. It provides a mechanism to address some of the concerns that have been raised about the current system including its perceived lack of independence, the limited resource and reliance on the applicant.

Furthermore, the CCRC may provide a material improvements in encouraging applications from Māori and Pasifika people who are currently disproportionately underrepresented in applications for the Royal prerogative of mercy. During implementation and the development of the policies and procedures will provide a critical opportunity for the CCRC to develop tailored outreach efforts to Māori and Pacific peoples. These, alongside the easing of the burden on the applicant that will arise from the CCRC's dedicated investigative mandate and resource, can provide the opportunity to reduce the disproportionately low levels of access to the process for addressing suspected miscarriages of justice.

There are risks associated with the establishment of a CCRC:

The CCRC is not more efficient than the existing process

Applications, and investigations may take just as long, or longer, to be resolved through the CCRC as under the status quo. The nature of investigations into possible miscarriages of justice is complex and often time consuming, there is a risk that the CCRC is not more efficient than the current system.

The public do not perceive the CCRC as independent

The public may not perceive the CCRC as independent. There is a possibility that the CCRC will face the same issues regarding its perceived independence as the current process. It will be difficult to determine if this risk has come to fruition because as it is difficult to measure public perceptions, and a change in attitude (recognising the independence of the CCRC) may take time. A public perception of a lack of independence may manifest in low application numbers.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

The preferred option generally complies with the Government's 'Expectations for the design of regulatory systems'.

There are clear objectives that the option seeks to achieve while remaining flexible and efficient.

It has a clear objective: to investigate possible miscarriages of justice and refer deserving cases back to court.

Establishing a CCRC serves this objective in a cost-effective way, and with little or no adverse impact on market completion, property rights, individual autonomy and responsibility.

The proposed model for the CCRC is flexible enough to allow it to adapt its approach to the attitudes and needs of the system in which it will be operating, it will allow the CCRC to be efficient and innovative in its approach to receiving applications and carrying out investigations into possible miscarriages of justice.

The processes the CCRC will develop will be publicly available, as will decisions of the Commission. The outcome of investigations by the CCRC will be a decision to either refer, or not refer, in this way, the CCRC will be producing predictable and consistent outcomes across a time and place.

The CCRC will be investigating alleged miscarriages of justice; investigations will be need to be proportionate, fair and equitable in the way it treats applicants and other parties it interacts with.

Section 6: Implementation and operation

Sections 6 and 7 are completed in relation to only the Government's preferred option.

6.1 How will the new arrangements work in practice?

As an independent body, we anticipate that the majority of the operational procedure will be left to the discretion of the CCRC. It is intended that the CCRC will be equipped with the expertise, understanding and technical knowledge to develop their own policies and procedures alongside carrying out their educative and awareness raising function.

However, broadly speaking applicants will apply to the CCRC seeking exercise of the power to refer their case back to the courts. The CCRC will undertake an initial triage of the application. The application may then proceed to a full investigation where an investigator seeks information on the case including relevant case files, court document and evidence. The investigator then provides a report to the CCRC board who decide how to exercise their discretion with regard to the referral of a case back to court. The applicant is then provided with a draft copy of the decision before a final report is made by the CCRC.

It is also proposed that the CCRC will have the power to make initial inquiries on its own motion. Where it is in the public interest the CCRC may be able to proactively assist an application to identify possible grounds for an application, for example.

The Governor-General would continue to be responsible for the exercise of the residual RPM powers, specifically the grant of a full pardon. The legislation establishing the CCRC will likely need to address such issues as:

- expressly providing that the Commission could refer a person's conviction back to the appeal courts and the Governor-General would no longer have that power
- enabling the Governor-General (acting on the advice of the Minister of Justice) to transfer applications for the prerogative of mercy that allege a miscarriage of justice direct to the Commission for it to deal with under its statutory authority, but nevertheless
- recognising the authority of the Governor-General to exercise the residual prerogative powers, which include the grant of a full pardon, albeit that the occasion for exercise of those powers will likely be rare.

In practice, on the Governor-General's receipt of any application, it is likely that the Minister of Justice would advise whether it was appropriate for the application to be referred to the Commission. If the Minister advised that the matter should remain with the Governor-General, the Minister would provide formal advice to the Governor-General on the application, as happens now.

For the purposes of providing such advice to the Governor-General, the Minister could in turn take advice from Ministry of Justice officials, or an external adviser, as happens under the status quo. In the rare case where the exercise of the prerogative of mercy is being considered, the Minister of Justice (as the Governor-General's advisor) could request the Commission's opinion on any matter relevant to the case.

6.2 What are the implementation risks?

Implementations risks are discussed above in 5.3. The key implementation risks include:

- The CCRC takes longer than expected to become operational. This may cause people to believe the CCRC is ineffective from its inception. The main causes of delay in getting the CCRC up and running are likely to be through the time required to draft and enact legislation, and the time needed to establish the Commission (for example, getting Commissioners appointed, and staff trained, developing policies and procedures, housed and ready to investigate cases).

Work to mitigate these risks will be able to be undertaken in parallel to the legislative process. In particular, to the extent possible, set-up and procurement processes will be undertaken prior to enactment, so the initiative is operational as soon as possible.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

It is proposed that the CCRC will be provided with the resourcing and mandate to undertake its own monitoring and reporting. The majority of this monitoring and reporting will be included within the CCRC’s annual report. The Independence Police Conduct Authority has a similar power under section 34(1) of the Independent Police Conduct Authority Act 1988.

To minimise compliance costs as a Crown entity, it is recommended that the CCRC be exempt from preparing a Statement of Intent and statements of performance expectations. The intent of the CCRC is explicit in its function. The performance of the CCRC can be adequately monitored in the annual report obligations provided in section 151 Crown Entities Act 2004.

7.2 When and how will the new arrangements be reviewed?

Should monitoring or feedback highlight persisting and serious problems with the CCRC’s operation, Parliament may review the legislative settings. The legislation that underlies both the Scottish and UK CCRC’s has been modified over time to better reflect the function and purpose of the agencies. However, officials would strongly recommend against any legislative reform in the early years of the CCRC’s operation to allow its operation and process to be given time to effectively develop.