

## **Purpose**

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

## **The test for referral**

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2. You have indicated that you wish to specifically discuss the test for the CCRC to use in deciding whether to refer a person's conviction or sentence back to the courts.
3. This section provides some additional background information in response to your comments on our briefing of 9 March 2018, including on the extent to which the test may require the CCRC to predict the outcome of the referral.

## **Proposed test for referral**

“On the consideration of an application, the Commission may refer the question of a person's conviction or sentence to the relevant appeal court if the Commission considers that:

- there is a reasonable prospect that [the relevant appeal court] will allow an appeal against conviction or sentence, as the case requires, if the reference is made; and
- it is in the interests of justice that the reference be made.

In considering whether it is in the interests of justice that a reference be made, the Commission must consider whether or not the person has used his or her opportunities to appeal or seek leave to appeal against conviction or sentence, as the case requires.”

## **Tests for referral are aligned with grounds of appeal**

4. As indicated in our previous advice, the tests for referral for overseas CCRCs are aligned to those jurisdictions' statutory grounds of appeal. For example, in Scotland, 'miscarriage of justice' is the sole ground of appeal against conviction and sentence. Therefore, when the Scottish CCRC referral test mentions a 'miscarriage of justice', it is referring directly to the ground for a successful appeal.
5. The proposed statutory test for the New Zealand CCRC is therefore also aligned with the grounds of appeal for conviction and sentence, which are set out in sections 232 and section 250 respectively of the Criminal Procedure Act 2011.

## *Grounds for appeal against conviction in New Zealand*

6. Section 232 of the Criminal Procedure Act 2011 provides the court must allow an appeal against conviction if satisfied that:
  - a. in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable
  - b. in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred, or
  - c. in any case, a miscarriage of justice has occurred for any reason.

7. Most appeals are concerned with whether “a miscarriage of justice has occurred for any reason”. Under section 232(4) miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that:
  - a. has created a real risk that the outcome of the trial was affected, or
  - b. has resulted in an unfair trial or a trial that was a nullity.
8. This definition gives rise to two broad categories of error that can constitute a miscarriage of justice; matters that could have affected the *result* of the trial, and matters that could have affected the overall *fairness* of the trial.

#### *Grounds for appeal against sentence in New Zealand*

9. Section 250 of the Criminal Procedure Act codified the ‘error principle’ that has long governed sentence appeals. A sentence appeal may be allowed if, for any reason, there is an error in the sentence imposed on conviction, and the appeal court considers that a different sentence should be imposed.
10. As with conviction appeals, there is scope for a successful Royal prerogative of mercy (RPM) application relating to sentence based on ‘fresh evidence’ – an important matter of fact that was not before the sentencing judge but, had it been, would likely have affected the sentence.
11. However, sentence appeals are frequent and the normal appeals process deals with virtually all substantive issues about the length and / or terms of a person’s sentence. RPM applications on sentence are correspondingly rare.

#### **Meaning of ‘reasonable prospect’ that the court will allow an appeal**

12. The idea that a person’s case should be capable of supporting a successful appeal underpins the proposed test for referral, as it has informed the Ministry’s approach to the RPM.
13. The key policy question in respect of the ‘reasonable prospect of success’ formula is what degree of certainty or probability is required prior to referral; including what weight is given to the predicted outcome in the appeal courts.
14. ‘Reasonable prospect of success’ is not an expression of certainty or even probability. An adviser does not have to be sure that an appeal will succeed or be satisfied on the balance of probabilities that an appeal will succeed. There should, however, be a viable basis for appeal, supported by sufficiently persuasive evidence and/or argument that it could be entertained by the appeal court.
15. The ‘reasonable prospect’ test is similar in this regard to the United Kingdom (England, Wales and Northern Ireland) CCRC’s ‘real possibility’ test. The courts have held that a ‘real possibility’ means:<sup>1</sup>

“... more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty.”
16. On current exercise of the ‘reasonable prospect of success’ test, where there is a real issue of substance but the Ministry is not sure of the outcome, it will recommend referral.
17. If it is abundantly clear that there is no sound basis for an appeal (that is, if the Ministry is sure), then it will recommend that the application be declined. In the uncommon case where

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

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

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

#### *Inherently predictive nature of tests for referral*

19. The test for referral is inherently predictive, as the courts are the ultimate decision-maker on whether an appeal for conviction or sentence should be allowed. As we noted in our previous advice, the relevant policy question may therefore be the extent to which the test for referral is explicitly predictive.
20. The 'real possibility' test is what might be characterised as *explicitly* predictive – it is clear on the wording of the statute that the CCRC must cast its mind to the outcome in the relevant appeal court. Such a test clearly reflects the principle that the CCRC should not refer cases where there is little or no realistic prospect of success, which would be undesirable given the attendant costs and possible impact on victims.<sup>2</sup>
21. Conversely, section 406 of the Crimes Act 1961, which regulates the Governor-General's referral power, contains no explicit statutory test for referral. The exercise of the referral power is governed by strong conventions, including that a person's case should be capable of supporting a successful appeal. In this sense, our current statutory framework might appropriately be characterised as *implicitly* predictive.
22. Scotland's test for referral might also be characterised as *implicitly* predictive, in that it does not refer directly to the possible outcome of the referral. However, as the Scottish CCRC notes, it must still consider the relevant case law and endeavour to apply the appropriate legal tests in deciding whether to make a referral. The result is that the Scottish CCRC considers it is not "constrained absolutely by the approach that the [courts have] taken in the past to the case under review or to similar cases."<sup>3</sup>
23. In practice, while there are some broad trends, the rates of referral do not appear to indicate any significant difference between the outcomes of the Scottish and UK tests. For example, the Scottish test appears to have produced a slightly higher rate of referrals, though with a somewhat lower rate of success in court, than with the 'real possibility' test used by the UK CCRC.<sup>4</sup> In any case, it is far from clear that any difference in the rate of referrals, or their ultimate success, is a result of the statutory language of the test for referral, or whether it is simply a correlation.
24. Indeed, the determining factor in the extent to which the CCRC would interpret 'reasonable prospects of success' – or a different formulation – to allow it to push the boundaries of existing jurisprudence on miscarriages of justice<sup>5</sup> may well be the resolve of its membership,

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<sup>2</sup> Refer House of Commons Justice Committee 'Criminal Cases Review Commission' Twelfth Report of Session 2014-15, pg. 10 - 11.

<sup>3</sup> Scottish Criminal Cases Review Commission, 'Position Paper: Referrals to the High Court: The Commission's Statutory Test'.

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

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

rather than the drafting of the test. It is always possible, also, that a different formulation would result in *less* clarity about when referrals may be made, not more.

### **Approach in the draft Cabinet paper**

25. The draft Cabinet paper currently seeks agreement in principle to adopt the ‘reasonable prospect of success’ formulation, noting that the approach may be refined in drafting. We seek to confirm this approach with you in light of the discussion above.

### **Increasing the maximum number of Commissioners**

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26. You have indicated that you are considering increasing the maximum number of Commissioners from five to seven.
27. We agree that a maximum of seven Commissioners would allow for a greater diversity of experience and perspectives. As noted in our previous advice, the CCRC will be well served by a mix of backgrounds, skills and experience contributing to its decision-making and governance.
28. s 9(2)(f)(iv) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
29. We do not think this potential additional cost is prohibitive, particularly in light of the additional benefit to the CCRC board. s 9(2)(f)(iv) [REDACTED]  
[REDACTED] We propose to amend the Cabinet paper accordingly.

### **Automatic right to all information held by Police and trial courts**

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30. You have indicated that you wish the CCRC to have an automatic, unimpeded right to all information held by Police and trial courts.

### **Access to information held by Police**

31. The currently proposed powers to obtain information are compulsory in nature. While not automatic per se, Police would be required to provide the relevant information reasonably sought by the CCRC. This is likely to provide all the necessary statutory authority to access Police files and, indeed, information held by other organisations and / or individuals.
32. Conversely, a provision to the effect that Police, and possibly all state sector organisations, are required to provide information to the CCRC could arguably help speed up the process and set clear expectations about cooperation with the CCRC.
33. There are several possible ways an extension to the CCRC’s information-gathering powers vis-à-vis Police could be framed, including a:
- a. right to access any information held by Police<sup>7</sup>
  - b. general duty for any state sector organisations, including Police, to provide all reasonable assistance to the CCRC<sup>8</sup>

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<sup>6</sup> Except for the Chief Commissioner, whose salary was estimated at \$200,000.

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

<sup>8</sup> See, for example, Health and Safety at Work Act 1995, s 176.

- c. right for the CCRC to access relevant information held by Police and a duty for Police to provide reasonable assistance,<sup>9</sup> or
  - d. requirement that Police, or any state sector organisation, must provide information.<sup>10</sup>
34. On balance, we do not consider that an extension of the information-gathering powers in relation to Police information would materially enhance the CCRC's ability to conduct an effective investigation. There appear to be few examples of the type of extension outlined above across the statute book, particularly *in addition* to powers to obtain information. Further, as noted in previous advice, while there have been delays in obtaining information from sources in the past, there is no evidence to suggest Police do not, or will not, cooperate with investigations.
35. Should you wish to proceed with an adjunct to the information-gathering powers in relation to Police, we can provide further advice on how to achieve the best balance between signalling the need for the CCRC to access all relevant information efficiently, without becoming overly coercive in nature.

### **Access to court records**

36. Our previous advice noted that, in our view, the CCRC's access to court records should be governed under the District Court (Access to Court Documents) Rules 2017 and the Senior Courts (Access to Court Documents) Rules 2017 (the Rules).
37. Under the Rules every person has a general right to access court documents, subject to any enactment, court order, or direction limiting or prohibiting access or publication. Specifically, in relation to a criminal proceeding, every person has a right to access:
- a. the permanent court record and any published list providing notice of a hearing
  - b. any judgment, order, or minute of the court given in the proceeding, including any records of the reasons given by a judicial officer, and
  - c. any judicial officer's sentencing notes.
38. There is also a general right of access to any information relating to any appeal.
39. However, some categories of information relating to a criminal proceeding may be obtained only if a judge permits it.<sup>11</sup> For any information not covered by general rights of access, there are specified matters for the judge to consider in determining whether to release the information.<sup>12</sup>
40. It may be possible to provide that the CCRC has a right to access any court document related to a criminal proceeding, thus negating the need for judicial consideration of release. This would help to guarantee the CCRC's access to important information and mitigate the risk of a perception that the CCRC's ability to investigate is reliant on the courts' good will.
41. The potential benefits must be balanced, however, against the possible inappropriateness of overriding judicial discretion and any implication that the courts will not take an independent

<sup>9</sup> Similar to Oranga Tamariki (Residential Care) Regulations 1996, s 16(5) where "[a]ny person acting as an advocate for a child or young person under this regulation shall be afforded reasonable assistance and access to records concerning the child or young person that are relevant to the complaint"

<sup>10</sup> See, for example, State Sector Act 1988, s 9.

<sup>11</sup> Including, for example, electronically recorded documents of interviews with a defendant, or any document received, or any record of anything said, in a proceeding while members of the public are excluded from the proceeding.

<sup>12</sup> District Court (Access to Court Documents) Rules 2017, Rule 12; Senior Courts (Access to Court Documents) Rules 2017, Rule 12.

and impartial approach to releasing information. Further, there are sound reasons why some information is not generally available as of right, including the protection of vulnerable persons involved in the criminal justice system.<sup>13</sup>

42. If you wish to take a different approach to that recommended in the Cabinet paper, we recommend that you consult the Chief Justice on this issue prior to seeking Cabinet approval, with a view to finding a way of ensuring the CCRC can have access to the court record in a manner that respects the independence and discretion of the judiciary.

### **Factual innocence and procedural fairness**

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43. You have indicated you also wish to discuss our recommendation to write a letter responding to the Chief Justice's feedback during targeted consultation; namely, that the CCRC should focus primarily or solely on factual innocence. This section provides further information on what constitutes 'fresh evidence' to support that discussion.
44. 'Fresh evidence' is something that was not reasonably available at trial. To support a successful appeal, it must also be credible, and it must be sufficiently cogent that, when considered alongside the evidence given at the trial, it might reasonably have led the jury to return a verdict of not guilty.<sup>14</sup> Where the evidence is strong and demonstrates a real risk of miscarriage of justice, the appeal court may relax its requirement that it be fresh. The freshness criterion may also be relaxed where the evidence relied on was not heard at trial because of serious error by trial counsel.<sup>15</sup>
45. There are two main kinds of potential 'fresh evidence':
  - a. evidence relating to guilt – for example, the evidence of witnesses, physical and forensic evidence, the opinions of experts that go towards proving or resisting guilt, and
  - b. evidence relating to trial integrity – for example, evidence about the actions or omissions of trial participants that have a bearing on the conduct and fairness of the trial.
46. Procedural errors are normally apparent at the time of appeal and are corrected at that point. However, while many RPM applications focus on fresh evidence relating to guilt, applications alleging there is new evidence about the integrity of the trial also arise. For instance, the Ministry is currently assessing an application alleging that evidence has emerged long after a person's trial of conduct by jury members that could have prejudiced the applicant's trial.
47. On this basis, even if the CCRC's role is focussed predominantly on fresh evidence relating to guilt – and, therefore, factual innocence – there will be cases where applicants may have justifiable concerns about procedural fairness that should be investigated by the CCRC. This is consistent with a test for referral that is, as in overseas jurisdictions, aligned with the grounds of appeal. We therefore recommend no change in approach (that all possible grounds of appeal be considered by the CCRC), and that you write to the Chief Justice explaining the reasons for this view.

### **Next steps**

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

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<sup>13</sup> NZLC R93 at [2.19] refers.

<sup>14</sup> *R v Bain* [2004] 1 NZLR 639.

<sup>15</sup> *R v Fairburn* [2011] 2 NZLR 63 at [33].