

Hon Andrew Little, Minister of Justice

**Establishing a Criminal Cases Review Commission**

Date	<b>9 November 2017</b>	File reference	<b>CON-34-22</b>
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**Action sought**

**Timeframe**

<b>Note</b> the content of this briefing, which summarises: <ul style="list-style-type: none"> <li>the main features of a Criminal Cases Review Commission; and</li> <li>the key considerations for the establishment of a New Zealand CCRC</li> </ul>	n/a
<b>Read</b> the report in conjunction with the associated briefing entitled <i>Initial Briefing on the Royal Prerogative of Mercy</i> .	n/a
<b>Discuss</b> the content of this briefing with officials.	n/a

**Contacts for telephone discussion (if required)**

Name	Position	Telephone		First contact
		(work)	(a/h)	
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**Minister's office to complete**

<input type="checkbox"/> Noted <input type="checkbox"/> Approved <input type="checkbox"/> Overtaken by events <input type="checkbox"/> Referred to: _____ <input type="checkbox"/> Seen <input type="checkbox"/> Withdrawn <input type="checkbox"/> Not seen by Minister <b>Minister's office's comments</b>    
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## **Purpose**

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1. This briefing:
  - 1.1. Describes the purpose and main features of a Criminal Cases Review Commission (CCRC);
  - 1.2. Summarises the key considerations for the establishment of a New Zealand CCRC; and
  - 1.3. Seeks direction on next steps.

## **Executive summary**

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2. The Government has a coalition agreement commitment to establish a CCRC. A CCRC is an independent public body set up to review suspected miscarriages of justice and refer deserving cases back to the appeal courts. In New Zealand, the Royal prerogative of mercy performs the same function.
3. A number of other jurisdictions have established a CCRC, including the United Kingdom (for England, Wales and Northern Ireland), Scotland and Norway. These models provide valuable experience to draw upon in considering the design of a CCRC for New Zealand.
4. The international models indicate some of the main issues for further consideration, which include the:
  - 4.1. Reasons for a CCRC;
  - 4.2. Functions and powers of a CCRC;
  - 4.3. Structure and cost; and
  - 4.4. Legislation required.
5. We seek discussion of this paper and the next steps in providing substantive advice on the options for implementing the coalition agreement to establish a CCRC.

## **Reviewing miscarriages of justice – the current system**

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6. In New Zealand, a person who believes they have suffered a miscarriage of justice may apply to the Governor-General for the exercise of the Royal prerogative of mercy. By convention, the Governor-General acts on the formal advice of the Minister of Justice. Work on prerogative of mercy applications is undertaken by lawyers in the Ministry's Office of Legal Counsel, and assistance is sought, where required, from an independent adviser such as a Queen's Counsel or retired Judge.
7. Where it appears that a miscarriage of justice has or is likely to have occurred in a criminal case, the Royal prerogative of mercy can be exercised to:
  - 7.1. Grant a free pardon; or
  - 7.2. Refer a person's conviction or sentence to the relevant appeal court under section 406(1) of the Crimes Act 1961 for a further appeal.

8. The ability to refer a case back to the appeal courts is the constitutional mechanism by which the executive branch of government can intervene in criminal cases in a manner compatible with the separation of powers.
9. Strong conventions, reflecting the separation of powers, underpin the exercise of the prerogative of mercy. Applicants are expected to use their appeals before applying for the prerogative of mercy. The prerogative of mercy is not an opportunity to repeat arguments or re-examine evidence that have already been considered by the courts.
10. What is normally required to justify referring a case back to the appeal courts is “something new” – for example, fresh evidence – that has not been properly considered by the courts and is sufficiently cogent to raise a real doubt about the safety of the conviction. We have provided you with a companion briefing on the Royal prerogative of mercy that describes in more detail the principles and process for consideration, and provides information about applications currently under consideration.
11. The grant of a pardon is extremely rare and would be contemplated only where there is compelling evidence that the person could not properly have been convicted and the case is no longer susceptible to consideration by the courts. The last person to be pardoned on the basis of a wrongful conviction was Arthur Allan Thomas.<sup>1</sup>
12. It is the power to refer a person’s conviction or sentence back to the courts for reconsideration that has real operational significance for those convicted persons who have used their appeals and remain dissatisfied with the outcome. That power has been exercised on 15 occasions since 1995, which represents about 9% of the 166 applications for the prerogative of mercy lodged in that time.

## **What is a CCRC?**

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13. A CCRC is a public body set up to review suspected miscarriages of justice and, like the operation of the Royal prerogative of mercy, refer deserving cases back to the appeal courts. Therefore, this is not a new function in the criminal justice system. What the establishment of a CCRC represents is a change in who performs the function and how.
14. While a CCRC may undertake such investigations as it considers necessary to inquire into an alleged miscarriage of justice, it is not an advocate or crusader for an applicant. Its statutory role requires it to make a considered legal judgement about whether an application has sufficient merit that an appeal court should reconsider the person’s conviction or sentence.
15. Consistent with the separation of powers, CCRCs do not determine guilt or innocence. Determinations of criminal responsibility, including any decision to quash a conviction or order a new trial, remain with the appeal courts. The CCRC’s role is complete at the time it refers a case to the courts. When a case is referred back, it is dealt with as an appeal and the applicant is represented by counsel in the normal way. The CCRC does not appear in court.

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

## International examples of a CCRC

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16. As noted above, several jurisdictions have established a CCRC, including the United Kingdom, Scotland, and Norway. These models provide valuable experience to draw upon in considering the design of a CCRC for New Zealand.
17. In 1997, a CCRC (referred to in this briefing as the UK CCRC) was set up to investigate suspected miscarriages of justice in England, Wales and Northern Ireland. Its establishment was recommended by the Report of the Royal Commission on Criminal Justice<sup>2</sup>, otherwise known as the *Runciman Report*.
18. In Scotland, a special committee, the *Sutherland Committee*<sup>3</sup>, recommended that a similar body (referred to in this briefing as the Scottish CCRC) be set up in that jurisdiction. It was established in 1999.
19. The UK and Scottish CCRCs are state-funded but operate independently of the core public service and Ministers of the Crown. The CCRCs are bodies corporate, whose members (Commissioners) are appointed by the Queen on ministerial advice. They comprise a Board, a senior management team and employed staff. Decisions on applications are made by the appointed Commissioners.
20. Norway established a CCRC in 2004 following amendment to the Criminal Procedure Act 1981. The Norwegian Commission is a state-funded independent body, consisting of five permanent members and three alternate members.
21. Each CCRC is established by statute, which provides for:
  - 21.1. The constitution and membership of the Commission;
  - 21.2. The authority of the CCRC to refer a person's conviction or sentence to the appeal courts and the grounds on which a referral may be made;
  - 21.3. Any powers to obtain documents or information or to require investigations to be carried out;
  - 21.4. Any rules about non-disclosure of information held by or provided to the Commission.
22. Table One below outlines key elements of CCRCs in the United Kingdom, Scotland and Norway. We have included a more detailed summary of arrangements in those jurisdictions in **Appendix One**.

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<sup>2</sup> Cm 2263 (1993).

<sup>3</sup> *Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures* Cm 3245 (1996).

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

	<b>United Kingdom</b>	<b>Scotland</b>	<b>Norway</b>
What triggers a review by the CCRC?	Application from a convicted person or request from the Court of Appeal	Application from a convicted person	Application from a convicted person or prosecution authorities
What are the criteria for a referral back to the courts?	If there is a 'real possibility' that the conviction or sentence will be set aside, there is new argument or evidence, and the applicant has exhausted the appeal process	If a miscarriage of justice may have occurred and referral is in the interests of justice	If there is new evidence, misconduct by a person involved in the case, or an international body has found the decision contravenes international law
Which court is the referral made to?	Court of Appeal	High Court	Court of equal standing to the one that made the original decision
What powers does the Commission have during a review?	<ul style="list-style-type: none"> <li>• Obtain documents from any public office.</li> <li>• A court order for information from a private person.</li> <li>• Require police to appoint an investigating officer.</li> </ul>	<ul style="list-style-type: none"> <li>• Obtain documents from any person or public office.</li> <li>• A court order to summon witnesses to testify</li> </ul>	<ul style="list-style-type: none"> <li>• Require police to investigate new evidence</li> <li>• Summon witnesses to testify.</li> </ul>
Commission structure	<ul style="list-style-type: none"> <li>• Independent body</li> <li>• At least 11 members; one third must have legal experience, and two-thirds must have knowledge or experience with the justice system</li> <li>• 5-year terms, 2-term limit</li> </ul>	<ul style="list-style-type: none"> <li>• Independent body</li> <li>• At least 3 members; one third must have legal experience, and two-thirds must have knowledge or experience with the justice system</li> <li>• 5-year terms, 2-term limit</li> </ul>	<ul style="list-style-type: none"> <li>• Independent body</li> <li>• 5 permanent members, 3 of whom must be from the legal profession; 3 deputy members</li> <li>• Chairman serves 5-year terms, 1-term limit; other members, 3-year terms, 2-term limit</li> </ul>
2016 Budget (NZD)	\$11.35 million	\$1.96 million	\$2.85 million
2016 case volume	1,397 cases (2.3 per 100,000 people)	150 cases (2.8 per 100,000 people)	161 cases (3.1 cases per 100,000 people)
Cases referred back to the courts	3.3% overall	5.7% overall	13% overall

## **Referral arrangements in other jurisdictions**

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

## **Main issues for consideration**

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

## **Reasons for establishing a CCRC**

25. Overseas CCRC models have generally been established in response to public concern about the functioning of the criminal justice system, including perceptions that existing post-appeal mechanisms were not sufficiently independent or were not functioning effectively.
26. These concerns may be addressed by the establishment of a CCRC. However, some public expectations probably cannot be met. In New Zealand, commentators have also suggested that some high-profile cases would have been resolved differently if a CCRC had existed, often overlooking that the role performed by a CCRC had in fact been carried out pursuant to the Royal prerogative of mercy.<sup>4</sup>

## **Function of the CCRC**

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

### *Basis for referral back to the Court*

28. If it followed the overseas models, a CCRC would have the statutory power to refer a conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred. This would replace section 406 of the Crimes Act 1961, under which the referral power is currently exercised by the Governor-General on Ministerial advice.
29. The statute would need to specify the ground or grounds on which referral to the court was permitted. This would ensure a clear statement of the CCRC's principal function and ensure that the body maintained a constitutionally appropriate relationship with the courts. The formula for referral would likely have regard, as the UK and Scottish statutes do, to the statutory criteria for an appeal to be allowed by the appeal court.

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

### *Residual role for Royal prerogative of mercy*

30. As with the CCRC models in the UK and Scotland, the Governor-General, acting on Ministerial advice, would continue to have the constitutional authority to exercise the prerogative powers to grant a pardon and remit a sentence. That is because those powers are delegated by the Queen to the Governor-General in the Letters Patent. However, as use of these powers has already been largely eclipsed by the power to refer a matter back to the courts, in practice the independent body would take over responsibility for investigating alleged miscarriages of justice. A fresh convention would develop where any applicants for a pardon would be directed instead to the CCRC.
31. There might however, regardless of the existence of a CCRC, be a very small residual role for the Governor-General and the Minister of Justice. That would arise where applicants who are unsuccessful before the CCRC or who are successful in having their case referred back to the courts but are dissatisfied with the outcome then apply to the Governor-General for an outright pardon (e.g. Peter Ellis).

### **Powers of the CCRC**

32. For the Royal prerogative of mercy process, the Ministry relies mainly on the co-operation of the courts and Police for access to official documents, and on an applicant's current and previous lawyers for information about the case and how it was handled. Witness interviews are undertaken with their consent. The lack of coercive powers has not been an obstacle in practice.
33. Nevertheless, if a new body was established by statute, it may be advisable to specify certain information-gathering powers, even if it is not strictly necessary to rely on them. Examples include:
  - 33.1. Authority to obtain relevant documents from the courts – section 15(4)(b), Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004;
  - 33.2. Authority to request relevant information from the Police – section 21(2), Independent Police Conduct Authority 1988;
  - 33.3. Power to require any person to provide relevant information or documents – section 24, Independent Police Conduct Authority 1988.

### **Structure and cost**

34. A New Zealand CCRC could take one of several forms, principally:
  - 34.1. An Independent Crown Entity (ICE) – a state-funded legal entity operating independently of Ministers but within the strategic direction settled with the responsible Minister;
  - 34.2. An independent statutory office – a new office, with administrative support from government, with the task of exercising specific statutory functions or powers independently of Ministers;

- 34.3. A senior departmental officer required by statute to exercise specific statutory responsibilities, independently of Ministers and departmental Chief Executives.
35. The Justice sector has examples of all three types. The Independent Police Conduct Authority and the Human Rights Commission are two of several Crown entities funded through Vote Justice. The office of the Judicial Conduct Commissioner is an example of an independent statutory office. And the Legal Services Commissioner is a statutory officer who by law is a Ministry employee but is required to perform certain statutory functions independently.
36. The cost of establishing and running a CCRC is difficult to estimate, largely because of the unpredictable workload. We would expect to see an increase in applications with the creation of a CCRC.<sup>5</sup> Cost would be impacted further depending on your choice of structure, and the functions and powers of the CCRC.
37. For example, the Independent Police Conduct Authority<sup>6</sup> is an example of a high workload ICE which carries out a complaints-based investigative function. It currently has a full-time chair, two part-time members who sit on the board, and approximately 25-27 staff. Its budget for the 2017/18 year is \$4.111m.
38. Legal aid is currently available for applications for the Royal prerogative of mercy and would continue if applications were directed instead to a CCRC. A projected increase in the number of applications could therefore be expected to lead to a rise in legal aid costs.

### **Legislation required**

39. The establishment of a CCRC would require legislation covering the matters outlined above. Other matters that the legislation would likely need to provide for include:
- 39.1. The procedure for receipt and consideration of applications;
  - 39.2. Any rules on confidentiality of information held or received by the CCRC;
  - 39.3. The ability to prescribe forms and procedures;
  - 39.4. Transitional arrangements regarding existing applications.

### **Timeframe for policy and legislative development**

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40. This briefing provides an outline of the key considerations for the establishment of a New Zealand CCRC. For completeness, we note that the Ministry has previously done some initial work, since 2002, on other options that could strengthen arrangements for reviewing miscarriages of justice, including:
- 40.1. Bolstering the Ministry's capacity, including greater use of external counsel;
  - 40.2. Establishing a special unit within the Ministry;
  - 40.3. Formalising external peer review in a special adviser or panel to oversee the Ministry's function.

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

<sup>6</sup> Established by section 4 of the Independent Police Conduct Authority 1988.

41. Should you wish, we can provide additional information about that previous work.
42. As post-appeal review is only one part of the system for addressing miscarriages of justice, and is largely reactive, you may also wish to consider whether there are options that could help address or prevent wrongful convictions at earlier stages of the criminal justice process.
43. Detailed policy work on establishing a CCRC remains to be done. We propose to provide you with substantive advice and seek your decisions on these matters before the end of the year. That work will include advice on the estimated cost of establishing a CCRC.
44. We understand your intention is to have a CCRC operating in early 2019, with legislation in the House to establish the CCRC in 2018. In light of your discussion with officials about Budget 2018 initiatives, we will work with Treasury to prepare a contingency bid for Budget 2018 to ensure funding is available to establish a CCRC within this timeframe.

## Recommendations

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45. It is recommended that you:
  1. **Note** the content of this report, which summarises:
    - 1.1. the main features of a Criminal Cases Review Commission;
    - 1.2. the key considerations for the establishment of a New Zealand CCRC
  2. **Read** this report in conjunction with the associated briefing entitled *Initial Briefing on the Royal Prerogative of Mercy*;
  3. **Note** that officials plan to provide further advice to you before the end of the year on key considerations for the establishment of a New Zealand CCRC, including estimated costs;
  4. **Discuss** the contents of this briefing with officials; YES / NO

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

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Jeff Orr  
**Chief Legal Counsel**

APPROVED    SEEN    NOT AGREED

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Hon Andrew Little  
**Minister of Justice**

**Date**    /    /

**Attachments:** Appendix One – International CCRC models

## Appendix One: International CCRC models

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### United Kingdom CCRC

1. The UK CCRC was established by section 8 of the Criminal Appeal Act 1995. The Commission must have no fewer than 11 members, of whom at least one third must have specified legal experience and two thirds knowledge or experience of the criminal justice system. Members are appointed for terms of up to 5 years and may be reappointed, provided that the maximum continuous period of office is 10 years.
2. The Commission currently has 14 Commissioners and 3 non-executive directors who sit on its board. Its Annual Report for the 2015/16 year stated that it had 83 permanent members of staff representing 76 Full Time Equivalent (FTE) positions.
3. The Commission is funded by a Grant in Aid from the UK Ministry of Justice. Its budget for the 2016/17 year was £5.906m.
4. Section 13 of the Criminal Appeal Act 1995 describes the criteria for referring a conviction or sentence back to the appeal court. Under subsection (1), three requirements must normally be met:
  - 4.1. The CCRC must consider there is a “real possibility” that the conviction or sentence will be set aside if the reference is made;
  - 4.2. The argument or evidence supporting the reference must be one that has not previously been raised in the proceedings; and
  - 4.3. The applicant has previously appealed or been refused leave to appeal.
5. Subsection (2) provides that the second and third requirements do not prevent a reference if there are exceptional circumstances that justify making it.
6. Information for potential applicants on the Commission’s website stresses the need for “significant new evidence or new legal argument” – something that has not previously been heard by a court – to justify a reference. The Commission adds that it is very rare that “exceptional circumstances” will warrant a reference in the absence of a prior appeal. Additional guidance for legal representatives underlines that an application should contain all the points that an applicant wants considered:

“We expect to receive (from legal representatives) clear and targeted submissions that address why a conviction is unsafe or sentence manifestly excessive or wrong in law. We cannot simply re-investigate a case from the beginning in the hope of finding a flaw that has not previously come to light.

We expect you to have considered the information provided by your client and to forward only those submissions that you believe may form, possibly with investigation by us, the basis of a referral.”
7. The CCRC has two additional functions:
  - 7.1. In respect of a matter that is already before the Court of Appeal, it can undertake an investigation at the request of that Court (section 15);
  - 7.2. In relation to the potential exercise of the Royal prerogative of mercy, it can provide an opinion to the Secretary for State (section 16).

8. In performing its functions, the CCRC has special information-gathering powers. It can direct any “public body”, such as the Police or another government department, to produce documents or material that may be relevant to the Commission’s work (section 17). A 2016 amendment now enables the Commission to seek a court order to obtain access to information from a private body or person. In addition, the CCRC has power to require the Police to appoint an investigating officer to work with the Commission and carry out investigations for it (section 19).
9. Over 20 years, to 31 March 2017, the CCRC had received and closed 21,093 applications and made 631 referrals to the appeal courts, at a rate of 3.30% of completed cases. It currently receives about 1,400 applications a year but its referral rate has fallen. The CCRC’s Annual Report for 2016/17 year gives a referral rate of 0.8% for that year, and 1.8%, 2.2%, 2.7%, 1.6%, and 2.5% for the previous five years.

### **Scottish CCRC**

10. The Scottish CCRC was established by section 194A of the Criminal Procedure (Scotland) Act 1995. In form, it is like a small-scale version of the UK body.
11. The Commission must have no fewer than 3 members. Like the UK CCRC, at least one third of the members must have specified legal experience and two thirds knowledge or experience of the criminal justice system. Also like the UK body, members are appointed for terms of up to 5 years and can serve for a maximum continuous period of 10 years.
12. The Commission currently has a board of 8 members. Its permanent staff of a Chief Executive and 13 others, including 8 legal officers, is much smaller than the UK CCRC.
13. The Commission receives “grant in aid” funding from the Scottish Government’s Justice Directorate. The Commission’s budget for the 2016/17 year was approximately £1.019m, a little more than 17% of the UK CCRC.
14. Its power to refer cases back to the appeal courts is expressed in more general terms than the UK statute. Section 194C of the Criminal Procedure (Scotland) Act provides that a case may be referred back if the Commission believes that:
  - 14.1. A miscarriage of justice may have occurred; and
  - 14.2. It is in the interests of justice to make the reference.
15. Guidance on the Commission’s website explains that applicants are expected to appeal against their conviction or sentence first and that the CCRC generally will not accept a case that simply repeats grounds previously argued on appeal or in a previous application to the Commission. What the CCRC is looking for are “grounds of review that are both statable and plausible”.
16. Website guidance also explains that the reference in the statutory test to a possible “miscarriage of justice” is because that is the sole ground of appeal under Scottish criminal law. In effect, section 194C requires the Commission to focus on whether a case could be referred back on grounds capable of succeeding in the appeal courts. As to the “interests of justice” requirement, the CCRC takes into account the interests of finality and certainty in criminal proceedings without giving them undue prominence.

17. The Scottish CCRC's mandate is limited to the referral function. Unlike the UK body, it does not have ancillary functions of providing assistance to an appeal court or to a government Minister in relation to the Royal prerogative of mercy.
18. Like the UK body, the Scottish CCRC has power to obtain documents or material from any "public body", such as the Police or another government department (section 194I). In addition, where it believes that an individual may hold relevant information but the person refuses to make a statement, the CCRC can apply for a warrant requiring the person to appear before a sheriff and have their evidence taken on oath (section 194H).
19. In the 18 years to 31 March 2017, the Scottish body had received and completed the review of 2264 cases. Of these, 130 had been referred to the appeal courts, at a rate of 5.74% of completed cases. In the last 5 years, the CCRC has received about 165 applications a year. Consistent with the overall statistics, it made 11 referrals in 2012/13. But there were just 12 more referrals in the next four years, at a much lower referral rate of 1.91%.

### **Norwegian CCRC**

20. Norway established a Criminal Cases Review Commission in 2004 following amendment to the Criminal Procedure Act 1981. The Commission is a state-funded independent body, consisting of five permanent members and three alternate members. The Commission has an operating budget of approximately NZ\$2.85 million.
21. The Commission's principal functions are to receive petitions for the re-opening of criminal cases and, like the UK and Scottish CCRCs, refer meritorious cases back to the courts.
22. In one respect, the Commission appears to have substantially broader powers to reopen court decisions than the British bodies. Petitions may be lodged not only by convicted persons but also by prosecution authorities. The grounds for referring cases back to the courts encompass fresh evidence, criminal conduct or misconduct by a person connected with the case and a new legal interpretation by the Supreme Court, Norway's highest court.
23. The Commission has statutory powers to obtain information and summons witnesses to be examined. Both parties to a criminal case are entitled to be heard by the Commission on any petition. Where the Commission decides to reopen a case, the case is to be referred for retrial to a court of equal standing to the court that made the ruling being challenged.
24. The number of petitions fluctuates from year to year. According to the Commission's most recent annual report, to December 2016, it received 161 petitions to reopen cases in that year, compared to 152 in 2015. A total of 162 cases were concluded in 2016, and 11 cases were reopened.