

In confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

## **Establishing a Criminal Cases Review Commission**

### **Proposal**

- 1 This paper seeks Cabinet's approval to establish a Criminal Cases Review Commission ('CCRC') in New Zealand.

### **Executive Summary**

- 2 The Government has committed to 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. I intend for the CCRC to be operational by July 2019, though this is subject to decisions made by Budget Ministers during the decision-making process for Budget 2019. Establishing a CCRC is estimated to cost approximately \$2.3 million and \$3.9 million per year in operational expenditure.
- 3 There are several compelling reasons to establish a CCRC in New Zealand, which primarily stem from concerns expressed about the independence, timeliness, quality, and fairness of investigations into miscarriages of justice under the status quo.
- 4 The success of the CCRC will depend primarily on the public's perception of its independence, its ability to resolve case reviews in a timely manner, and transparency in its processes. These objectives have influenced these proposals, along with comparisons to CCRCs in other jurisdictions and investigative bodies in New Zealand.
- 5 The CCRC's function would be to refer a conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred, replacing the function currently exercised by the Governor-General under section 406 of the Crimes Act 1961. The Governor-General will continue to exercise all other aspects of the Royal prerogative of mercy, including the grant of a pardon.
- 6 The design of the CCRC is constrained in some respects by the referral function. There are, however, opportunities to include some new developments in the exercise of this function that will enhance public perceptions of independence, timeliness and effectiveness in addressing miscarriages of justice.
- 7 For example, I propose the CCRC be able to make initial inquiries on its own initiative, as well as receiving applications from convicted persons and their representatives. To assist its investigation, the CCRC would also have powers to obtain information.
- 8 The design of the CCRC is complex and the issues can be resolved in different ways. Officials have undertaken targeted consultation with the judiciary, members of the legal profession, academics and other key stakeholders to help ensure the proposals in this paper are robust and that New Zealand can have an effective CCRC.

## Background

*New Zealand currently addresses miscarriages of justice through the Royal prerogative of mercy*

- 9 Currently 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.
- 10 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:
  - 10.1 grant a free pardon, or
  - 10.2 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.
- 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 significance for those convicted persons who may have been the subject of a miscarriage of justice. That power 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.

*Other jurisdictions have established CCRCs to address miscarriages of justice*

- 13 Several jurisdictions have established a CCRC, including the United Kingdom (England, Wales and Northern Ireland), Scotland, and Norway. A summary of arrangements for the CCRCs in those jurisdictions is attached as **Appendix One**.

## Rationale for establishing a CCRC

- 14 There are several compelling reasons to establish a CCRC in New Zealand, which primarily stem from concerns expressed about the independence, timeliness, quality, and fairness of investigations into miscarriages of justice under the status quo.
- 15 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). As such, and particularly in relation to high-profile cases, media coverage has often highlighted these views, and calls for a CCRC have long been publicised accordingly.

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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.

*There is a public perception that the status quo is not sufficiently independent of the Executive*

- 16 A common criticism of the current system is that it is not independent from Ministers and officials in the Ministry of Justice.
- 17 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.
- 18 However, perceptions matter and they do affect public confidence in the current system. These perceptions can, in turn, influence the number and nature of the applications.
- 19 In my view, public confidence will be enhanced by the establishment of a CCRC that, in its day to day operations, is seen to be clearly independent of Ministers and officials.

*Addressing miscarriages of justice requires dedicated resource*

- 20 Investigations of possible miscarriages of justice must be thorough in order to minimise the risk of error and preserve public confidence in the justice system. Under the Royal prerogative process, applications are carefully considered by the Ministry of Justice's Office of Legal Counsel and assistance is sought, where required, from an independent adviser such as a Queen's Counsel or retired Judge.
- 21 However, the lack of a dedicated unit focused on the task of addressing possible miscarriages of justice has been regularly criticised.<sup>2</sup>
- 22 Identification of errors that do occur is not easy and requires significant expertise. Addressing possible miscarriages of justice requires a broad range of skills, including:<sup>3</sup>
  - 22.1 a sound understanding of the criminal justice system
  - 22.2 analytical intelligence, and
  - 22.3 knowledge of the potential and use of modern forensic and investigative techniques.
- 23 Investigators in overseas CCRCs tend to have a broad range of backgrounds, including lawyers, former Police detectives, criminal psychologists and forensic experts. In my view, achieving parity with overseas CCRCs' expertise and diversity of experience cannot be accomplished under the status quo.

*The current system relies heavily on the applicant and on cooperation of other parties*

- 24 Given the resources the State puts into securing a conviction, there is a reasonable expectation that some resource and initiative will be expended by the State to help identify and address wrongful convictions.
- 25 Currently, the onus is on the applicant to make out the case for the exercise of the Royal prerogative. There is a view that the Ministry of Justice's role is advisory and reactive,

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<sup>2</sup> See, for example, Simon Mount, 'A Criminal Cases Review Commission For New Zealand' [2009] *New Zealand Law Review*, pg. 478 – 479; Neville Trendle, *The Royal Prerogative of Mercy: A Review of New Zealand Practice* (Ministry of Justice, 2003) pg. 12.

<sup>3</sup> Sir Thomas Thorp, *Miscarriages of Justice* (Legal Research Foundation, 2005), pg. 60.

rather than investigative, and the Ministry relies on the cooperation of public and private persons to provide additional information to support this role.

- 26 Observers have suggested that the consequence of this onus is that well-resourced applicants with access to professional assistance are advantaged in this process. High-profile cases can also attract determined supporters, who are then able to generate further publicity. Meanwhile, possible applicants without such resources are less likely to be able to make an application, let alone one of sufficient quality to secure a referral.
- 27 Reliance on cooperation alone to obtain documents, without the power to compel parties to comply with officials' requests, can also lead to delays.
- 28 I note that the ability for CCRCs to compel information appears to have been helpful in overseas CCRCs' work, including where failure to disclose information at trial was a key element in the apparent miscarriage of justice.<sup>4</sup>

*Applications for the Royal prerogative from Māori and Pacific peoples are disproportionately low*

- 29 The proportion of applications from Māori and Pacific peoples has been estimated at between 11 – 16 percent,<sup>5</sup> despite making up over 60 percent of the prison population.<sup>6</sup> The relatively low levels of applications despite disproportionate rates of imprisonment suggests the status quo may be failing to encourage applications from vulnerable populations.<sup>7</sup>
- 30 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.<sup>8</sup> For Pacific peoples, I understand that there are cultural practises that may prevent applications for the exercise of the Royal prerogative of mercy for reasons that go beyond a lack of understanding complex processes. For example, there is a cultural norm for Pacific people to respect those in positions of authority, which means they may be less likely to question or clarify the consequences of the outcome.
- 31 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 Pacific peoples will relate more easily to the CCRC than they do to the Royal prerogative process. However, for the reasons outlined above, it may be that a well-designed and resourced CCRC could make material improvements in encouraging and resolving meritorious applications that, at present, may not be being put forward.
- 32 For example, in 2008 the Scottish CCRC made significant efforts to increase awareness amongst female prisoners of their rights in relation to reviewing possible miscarriages of justice, including via face-to-face meetings. These efforts helped to increase the proportion of female applicants from 1.9 per cent in 2006/2007 to 5.1 per cent in

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<sup>4</sup> See, for example, Lissa Griffin, 'International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission' 21 *The William and Mary Bill of Rights Journal*, 1153,1214 (2013).

<sup>5</sup> Mount (2009) pg. 474.

<sup>6</sup> Department of Corrections, 'Prison facts and statistics – September 2017'.

<sup>7</sup> Thorp (2005) pg. 53 – 54; Mount (2009) pg. 474.

<sup>8</sup> *Ibid*; see also the New Zealand Public Perceptions of Crime Survey 2016 for information on levels of confidence in the criminal justice system.

2007/2008.<sup>9</sup> The UK CCRC has also effectively undertaken tailored engagement with specific populations, including young people and persons with disabilities.

- 33 Similar tailored outreach efforts to Māori and Pacific peoples, alongside the easing of the burden on the applicant that will arise from the CCRC's dedicated investigative mandate and resource, can reasonably be expected to reduce the disproportionately low levels of access to the process for addressing suspected miscarriages of justice.

### **Proposed model for the CCRC**

- 34 I propose the following model for the CCRC:
- 34.1 **form and structure** – established as an Independent Crown Entity ('ICE') with between three and seven Commissioners with relevant experience, including a Chief and Deputy Chief Commissioner
  - 34.2 **primary function** – investigate suspected wrongful conviction and sentences and refer a conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred
  - 34.3 **secondary function** – promote, by way of education and discussion, its primary function
  - 34.4 **interaction with residual Royal prerogative process** – Governor-General able to direct applications to CCRC, seek CCRC's advice on granting of a pardon
  - 34.5 **powers** – able to compel relevant information where reasonably necessary and ability to regulate own procedures, and
  - 34.6 **complaints, appeal and review** – no statutory appeal rights, but the ability to lodge a complaint with the CCRC and also to seek judicial review.
- 35 Further detail in support of this proposed model is provided below.

#### *CCRC to be an independent Crown entity with up to seven Commissioners*

- 36 I propose that the CCRC be established as a new ICE, with between three and seven Commissioners, including a Chief and Deputy Chief Commissioner.
- 37 The ICE model will enable the CCRC to operate within a coherent, well-established framework that is sufficiently independent of Ministers, the courts, and relevant state sector organisations including, for example, the Ministry of Justice, Police, and the Crown Law Office.
- 38 I am conscious of views expressed during targeted consultation on proposals for a CCRC, that there are risks of the ICE model, including around the involvement of the responsible Minister in setting performance objectives and strategic direction, and the level of resourcing required for reporting obligations.
- 39 Other options, including an independent statutory officer or a standing Commission of Inquiry, were considered. However, models like an independent statutory officer tend to rely on departmental support, which would likely not address concerns about perceived

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<sup>9</sup> Scottish Criminal Cases Review Commission, *Annual Report* (2008) pg. 5; Mount (2009) pg. 467.

independence from agencies or Ministers in this context. Standing Commissions of Inquiry, meanwhile, are usually combined with another organisational model, such as a tribunal or even an ICE.<sup>10</sup>

- 40 Given the power to refer cases back to the appeal courts is an Executive function, a tribunal model would not be appropriate. I also cannot see a discernible benefit in making the CCRC a Standing Commission of Inquiry *and* an ICE.
- 41 Further, as an ICE, the CCRC would not be subject to Ministerial direction on matters of government policy under the Crown Entities Act 2004. The only directions to which it would be subject are whole of government directions<sup>11</sup> or any specific powers of direction that were inserted into its own legislation. I do not propose that any such powers of direction would be included in the CCRC's governing legislation.
- 42 I therefore consider the ICE model is the most appropriate organisational model for the CCRC. However, to minimise compliance costs as a Crown entity, I propose that in its establishing legislation it should be exempted from preparing a Statement of Intent and statements of performance expectations. While these are important accountability and monitoring documents, I do not consider they are entirely appropriate for a body like the CCRC and the core relevant information can still be set out in the CCRC's annual report.

#### *Requirement for Commissioners to have certain qualifications and experiences*

- 43 Membership of up to seven Commissioners will enable the CCRC to have the necessary mix of skills and experience for its decision-making and governance, while avoiding the risk of ongoing expansion in membership beyond what may be necessary for the performance of its functions.
- 44 I propose a statutory requirement that, as with international CCRCs, a third of the membership of the CCRC be required to have legal qualifications, and that two thirds of the membership also have relevant knowledge or experience in the justice system.
- 45 Section 29 of the Crown Entities Act 2004, which requires appointments take into account the desirability of promoting diversity in the membership of Crown entities, will also apply. Further, I propose to emphasise this requirement by specifying knowledge of te ao Māori as a relevant factor when considering an appointment.

#### *The CCRC's primary function is to refer appropriate cases back to the courts*

- 46 As with overseas models, the CCRC will have the statutory power to refer any conviction or sentence in a criminal case back to the appeal courts where it considers its statutory test for referral is met. 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. Referral decisions would be made by the Commissioners, and could not be delegated under the relevant provisions of the Crown Entities Act.
- 47 The statutory test for referral is a critical aspect of the design of the CCRC in general, and for the exercise of the CCRC's primary function in particular.

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<sup>10</sup> See, for example, the Waitangi Tribunal and the Transport Accident Investigation Commission respectively.

<sup>11</sup> Refer Crown Entities Act 2004, section 107.

- 48 Any proposed test should be informed by the core principles underlying the Royal prerogative of mercy and the referral mechanisms exercised by the UK and Scottish CCRCs, including that:
- 48.1 the courts should have an opportunity to reconsider a person's conviction or sentence if a miscarriage of justice may have occurred
  - 48.2 convicted persons are normally expected to exercise their rights to appeal against conviction or sentence before asking the CCRC to intervene
  - 48.3 the referral process is not an opportunity to simply repeat arguments or re-examine evidence that have already been considered by the courts
  - 48.4 what is normally required to justify referring a case is "something new" – evidence or argument – that has not previously been examined by the courts
  - 48.5 the referral test should be permissive, not mandatory, so a referral is not made where it would be contrary to the interests of justice, and
  - 48.6 the CCRC should be satisfied that the case to be referred is capable of supporting an appeal.
- 49 I therefore propose to adopt, in principle, a test for referral that provides that the CCRC may refer a conviction or sentence if the CCRC considers it is in the interests of justice that referral to the appeal courts be made. In deciding whether to refer, the CCRC must have regard to:
- 49.1 whether the convicted person has exercised their rights to appeal against conviction or sentence
  - 49.2 the extent to which the application relates to argument, evidence, information, or a question of law previously raised or dealt with in the proceedings relating to the conviction or sentence
  - 49.3 the prospects that the court will allow the appeal, and
  - 49.4 any other matter that the CCRC considers relevant.
- 50 I consider that this option will send a clear message about what the relevant factors are in considering a referral, without unduly constraining the CCRC's discretion.
- 51 Because of the importance of the test, and the precise wording that is used, I also seek agreement for officials to consider the test further in light of submitters' concerns identified above, and test options with selected experts.

*A secondary role of promotion and education is also appropriate*

- 52 I propose the CCRC have a limited secondary role to promote, by way of education and discussion, its primary function.
- 53 I acknowledge that the inclusion of a secondary function could lead to concern about distracting the CCRC from its core mandate. However, in my view, the overall objective of increasing public confidence in the justice system requires that the CCRC have some limited role outside the consideration of individual cases alone.

- 54 It should not be assumed that people who may be worthy applicants to the CCRC will be aware of its existence or how to make an application. Promotion of the work of the CCRC and the application process could help to increase the number of viable applications and, regardless, the quality of the information contained in applications. It would also help to set clear expectations about how the process works and potentially increase overall satisfaction with the CCRC as a result.
- 55 It was suggested, during targeted consultation, that the CCRC should also have a statutory function to advise on compensation claims relating to miscarriages of justice. I do not currently propose that the CCRC have a role in recommending compensation for wrongful conviction and imprisonment. I note, however, that I have directed officials to provide a detailed briefing outlining improvements that can be made to the current Guidelines governing compensation for wrongful conviction and imprisonment.

*Investigations may be launched on application and CCRC may make initial inquiries on own motion*

- 56 The primary means of triggering an investigation by the CCRC will be on application. Persons eligible to apply will be a convicted person or their representative.<sup>12</sup>
- 57 I also propose that the CCRC be able to make initial inquiries on its own-motion. To ensure this power is used only where necessary and appropriate, I recommend that such initial inquiries only take place where the CCRC is satisfied that there are reasonable grounds to carry out an investigation in the public interest.<sup>13</sup> Lastly, the CCRC should inform the affected person as soon as reasonably practicable and ascertain whether they wish to pursue an application. This may require the CCRC to adopt a more inquisitorial approach to reviewing suspected miscarriages of justice than exists under the current system, but it would not extend to reopening or reinvestigating a case with a view to determining criminal responsibility.
- 58 The CCRC might, for example, proactively assist a potential applicant to identify possible grounds for an application. I anticipate this ability would be exercised rarely, and generally in cases where an individual lacks the resources to make an application, and may have no recourse to legal assistance or someone to champion their cause to the CCRC.
- 59 I understand the UK CCRC has found a proactive approach to be valuable and has initiated own motion investigations when, for example, they see that there may be co-defendants wrongly convicted. Proactive enquiries can also be made in relation to convictions when a thematic issue is brought to its attention.<sup>14</sup>
- 60 Where the CCRC decides to open a case review on its own initiative, it should as soon as possible approach the relevant convicted person to secure their consent to proceed. A referral is not possible without an appellant, and the CCRC should, therefore, not exercise its powers to review a case where the relevant person is not seeking or does not support the terms of a referral.

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<sup>12</sup> 'Representative' could include a spouse or partner, family member, or anyone the CCRC is satisfied can represent the person.

<sup>13</sup> See, for example, Independent Police Conduct Authority Act 1988, s 12(1)(b).

<sup>14</sup> Thematic issues could include matters such as widespread material non-disclosure, advances in forensic science, or investigative practices.

61 This proactive approach goes hand in hand with the policy objective of inspiring public confidence in the justice system; and gives some assurance that where mistakes happen, they will be addressed.

*Power to take no further action in respect of an application*

62 The CCRC should have an ability to take no further action on an investigation on the following grounds:

62.1 the identity of the convicted person is unknown and any investigation would thereby be substantially impeded

62.2 the subject matter of the application does not relate to an alleged miscarriage of justice

62.3 the complaint is frivolous or vexatious or is not made in good faith

62.4 the eligible person does not desire that action be taken or, as the case may be, continued

62.5 the applicant has died in the course of the investigation, or

62.6 in the course of the investigation, it appears that any further action is unnecessary or not in the interests of justice.

63 Where the CCRC decides to take no action, or no further action, on an investigation, it shall inform the relevant parties of this decision.

64 The power to take no further action is permissive. It would not require the CCRC to refuse to investigate an application. However, the proposed grounds to take no further action represent a range of situations where an investigation cannot practically be undertaken or continued.

*Requirement for the CCRC to disclose its reasons for decisions*

65 Disclosure of the reasons underpinning a decision is vital for transparency and natural justice. I therefore propose that:

65.1 the applicant gets a copy of the full report from the CCRC, on which the reference is based, and

65.2 the CCRC's reasons, or a summary of its reasons, for a decision to refer, declining to refer, or taking no further action are published publicly.

66 The level of detail and need for appropriate redactions will necessarily vary according to the details of the case and reasonable expectations of privacy. For example, decisions to take no further action could be published with a case number, the grounds for taking no further action and, if necessary, a brief elaboration on why those grounds were applicable. This proactive publication will enable scrutiny of the CCRC's decision-making, and provide useful data for researchers. This will, in turn, promote public confidence in the CCRC's work or, at least, identify possible issues early should the rationale be criticised.

*There will be a limited residual role for the Royal prerogative of mercy*

- 67 The CCRC will essentially inherit the responsibility for examining miscarriages of justice and enabling them to be corrected, where necessary, by the courts.
- 68 However, as the Royal prerogative of mercy remains in force via the Letters Patent<sup>15</sup>, the reforms will need to clearly address the relationship between the CCRC and any residual role for the prerogative of mercy. It is critical that legislation is clear that the CCRC is the body to which miscarriage of justice allegations should be made and that applicants should generally not see the prerogative of mercy as an additional or alternative remedy.
- 69 I therefore propose that the legislation to establish the CCRC:
- 69.1 enables the Governor-General to transfer applications for the prerogative of mercy that allege a miscarriage of justice direct to the CCRC for it to deal with under its statutory authority, but nevertheless
  - 69.2 preserves the authority of the Governor-General to exercise the residual prerogative powers, specifically the grant of a full pardon, albeit that the occasion for exercise of those powers will be extremely rare.<sup>16</sup>
- 70 I also propose that, in the rare case where the exercise of the prerogative of mercy is being considered, the Minister of Justice (as the Governor-General's adviser) could request the CCRC's opinion on any matter relevant to the case. This would help to cement the CCRC's role as an independent authority on potential miscarriages of justice.

*Transitional arrangements will be required*

- 71 The CCRC will be able to receive and investigate applications from its first day of operation.
- 72 There will be a transitional period during which applications to the Governor-General made prior to the establishment of the CCRC are completed. The transitional arrangements will allow for such applications to be dealt with under the existing Royal prerogative powers (for example, when consideration of the application is well advanced) or transferred to the CCRC if that is suitable (such as when the application is new or little work has been done).

*Information-gathering powers are required to fulfil the CCRC's functions*

- 73 To ensure the CCRC can work effectively, and complete reviews in a timely manner, I recommend the CCRC be given reasonable powers to obtain information or exhibits from any persons.
- 74 It is important that information-gathering powers strike the right balance between an imperative to provide information, without creating cumbersome procedural processes or unjustifiably intruding on rights to freedom of expression and security against unreasonable search and seizure.
- 75 To this end, I consider that that cooperation and consent ought to be the preferred means of obtaining relevant information. Cooperation is generally a more effective method of

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<sup>15</sup> *Letters Patent Constituting the Office of Governor-General of New Zealand* (SR 1983/225).

<sup>16</sup> For example, where there is compelling evidence of innocence and it is not feasible to refer the case to the courts.

engagement than more coercive means that involve the delays and costs associated with court procedures.

- 76 For example, I note that court records would almost always be obtained as a matter of consent and cooperation, and I anticipate that the ability for the CCRC to make such a request will be explicitly included in the legislation.<sup>17</sup> The existing processes for acquiring information from the courts are effective and efficient and it is unlikely any further action would be required.
- 77 However, there are circumstances where reasonably constructed information-gathering powers may be necessary as a tool of last resort.
- 78 I therefore recommend giving the CCRC the power to require any person to supply information where the CCRC has 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.<sup>18</sup>
- 79 The information the CCRC will be requesting from persons in public organisations would most likely include Police records and files from Crown Prosecutors. The information I expect to be requested from private persons includes specific documentation or material, and examination on oath of eye witnesses.
- 80 I also propose a civil enforcement mechanism in relation to the CCRC. If a person failed or refused to comply with a notice requiring information, without reasonable excuse, the CCRC could apply to the court seeking an order:
- 80.1 directing the person to comply with any requirements in the notice, and / or
  - 80.2 an order for any consequential relief that the court thinks appropriate.
- 81 These types of civil orders are relatively common across the New Zealand statute book, usually in relation to breaches of an enforceable undertaking between a public entity and the person to which the undertaking applies.<sup>19</sup> Failure to comply with an order of the court would amount to contempt of court.
- 82 I understand that the ability for overseas CCRCs to seek a court order is, in itself, usually sufficient to incentivise provision of the information. Furthermore, the civil enforcement mechanism is primarily aimed at the core policy objective; ensuring the CCRC obtains the information. A criminal offence, meanwhile, is aimed primarily at punishing non-compliance, but would not necessarily secure the information sought.
- 83 It is also, in our view, undesirable to potentially criminalise persons such as victims or witnesses who fail or refuse to provide information, notwithstanding a “without reasonable excuse” proviso in the offence. These people may be vulnerable, and it seems difficult to justify subjecting them to the full threat of the criminal law and, potentially, the lifelong consequences of a conviction.

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<sup>17</sup> Under the District Courts (Access to Court Documents) Rules 2017 and Senior Courts (Access to Court Documents) Rules 2017.

<sup>18</sup> See, for example, Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, cl 16.

<sup>19</sup> See, for example, Fair Trading Act 1986, s 46B; Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 82; Brokering (Weapons and Related Items) Controls Act 2018, s 34.

*Existing privileges retained in relation to information sought by the CCRC*

- 84 To avoid doubt, I do not propose to override any existing privileges in relation to information. For example, access to any legally privileged material could only be on receipt of a waiver from a lawyer's client.
- 85 I do propose, however, that the legislation provide a clear means by which privilege or confidentiality can be claimed, and then verified by the CCRC or another independent body.<sup>20</sup> These provisions will be based on those in the Inquiries Act 2013, as recommended by the Law Commission.<sup>21</sup> The civil enforcement mechanism outlined above could also provide another avenue to test claims of privilege should a party from whom information is requested refuse to provide information for the purposes of testing whether privilege applies.

*Statutory protections for information gathered by the CCRC are also necessary*

- 86 I propose a general prohibition on the disclosure of information held by the CCRC. Specifically, a person who is or has been a member or employee of the CCRC shall be prohibited from disclosing any information obtained by the CCRC in the exercise of any of its functions unless the disclosure of the information is authorised by the CCRC on limited grounds.
- 87 The exceptions to the prohibition on disclosure should include where the CCRC authorises disclosure is reasonably necessary:<sup>22</sup>
- 87.1 for the purposes of any criminal, disciplinary or civil proceedings
  - 87.2 in order to assist in dealing with an application for compensation for wrongful conviction and imprisonment
  - 87.3 in order to assist in dealing with an application to the Governor-General for the exercise of the residual powers under the Royal prerogative of mercy
  - 87.4 in any statement or report required by the legislation establishing the CCRC, and
  - 87.5 in or in connection with the exercise of any of the CCRC's functions.
- 88 In my view, this prohibition will recognise that the CCRC will be gathering information that needs to be held in confidence and with appropriate protections. However, it also recognises that disclosure of information will, in a range of circumstances, be necessary to ensure the CCRC can fulfil its statutory functions.
- 89 I note the ability to authorise disclosure is permissive; it would not *require* the CCRC to make such a disclosure simply because a request had been received where that disclosure would be unreasonable, inappropriate, or harmful. The provisions of the Privacy Act 1993 would also apply.

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<sup>20</sup> See, for example, Inquiries Act 2013, s 20(c).

<sup>21</sup> NZLC R102 at [9.57 – 9.63].

<sup>22</sup> See, for example, Criminal Appeal Act 1995 (UK), s 24; Criminal Procedure (Scotland) Act 1995, s 194K.

*Official Information Act to have limited application*

- 90 I consider that the Official Information Act 1982 ('the OIA') should not apply in respect of information contained in any correspondence or communication that has taken place between the CCRC and any person in relation to an investigation by the CCRC. This is a common feature for investigative bodies in New Zealand to protect the integrity of the investigative process. It would also affirm that material would be accessible at the discretion of the CCRC.

*Power to co-opt specialist advice*

- 91 During targeted consultation, it was suggested that the CCRC be given a power to co-opt specialist advice to assist with its functions. Broadly comparable models for these powers exist in the New Zealand Public Health and Disability Amendment Act 2010 for the Health Quality and Safety Committee, and in the Contraception, Sterilisation and Abortion Act 1977 for the Abortion Supervisory Committee.
- 92 I have considered this suggestion and, in my view, these powers could support the policy objectives of ensuring that relevant expertise is available to the CCRC. For example, where the Commissioners felt that particular expertise would be beneficial in considering whether to make a referral, they could invite a specialist advisor to provide additional advice to the Board. The specialist advisor would not participate in the decision-making process.

*The CCRC will have a statutory power to regulate its own procedures*

- 93 I propose the CCRC be given statutory authority to regulate and promulgate its procedures for dealing with operational matters pertaining to the exercise of its functions and powers. For example, the CCRC could develop and issue policies relating to matters including:
- 93.1 repeat or persistent applicants
  - 93.2 stages in the decision-making process
  - 93.3 interviews and the hearing of evidence, and
  - 93.4 complaints procedures.
- 94 The functions and powers of the CCRC described above are broad and framed permissively. There are many details that cannot be provided for in the primary legislation. Further, it would compromise the independence of the CCRC if processes or procedures were provided for in regulations made by Order in Council.
- 95 Providing the CCRC with this ability would provide them the necessary independence and flexibility to ensure they can fully regulate internal procedures to keep pace with any changes in their operational context. These procedures would be required to be published publicly, which would promote public scrutiny of how the CCRC carries out its functions.

*No statutory right of appeal, but judicial review to be unaffected*

- 96 I do not propose to include a statutory right of appeal of the CCRC's determination on whether to refer a case.

- 97 To include a right of appeal would risk complicating the constitutional relationship between the CCRC and the courts and jeopardise the principle of finality. A challenge on the substance of the CCRC's determination would also effectively reopen the case for appeal regardless of the outcome of the CCRC's review, and thus render the role of the CCRC moot.
- 98 Decisions of the CCRC will, however, be judicially reviewable unless otherwise provided. I see no reason to consider ousting judicial review in respect of the CCRC's work.
- 99 Judicial review is an essential mechanism for maintaining the rule of law is important, in that it ensures a person with an interest in a decision can challenge the lawfulness of that decision.
- 100 Further, judicial review actions of decisions made by the UK CCRC and the Scottish CCRC have been rare. Decisions from judicial review cases against the CCRCs in both Scotland and the UK have emphasised that the courts are hesitant to override the CCRC judgement on a case.<sup>23</sup> Even if the court objects to a decision to not refer a case by the CCRC on the merits, they have tended to rule on whether the decision was legally tenable and, if not, that the CCRC should reconsider the case.

#### *Legal aid to be available*

- 101 Legal aid is currently available for applications for the Royal prerogative of mercy and I see no reason why this should not continue for applications directed to the CCRC. The experience overseas and in New Zealand suggests that many applicants are self-represented, but that access to assistance from counsel can have a significant, positive impact on the quality of an application. I therefore propose to make any necessary consequential amendments to the Legal Services Act 2011 to ensure that, where appropriate, applicants may have access legal aid.

#### **Consultation**

- 102 The State Services Commission, Crown Law Office, New Zealand Police, Department of Corrections, Treasury, Department of the Prime Minister and Cabinet, Ministry for Social Development, Te Puni Kōkiri, Ministry for Pacific Peoples, Ministry for Women, and Office of the Privacy Commissioner have been consulted on the paper.
- 103 In January and February, the Ministry of Justice also took undertook a targeted consultation with the judiciary, investigative bodies, members of the legal profession, academics and CCRCs in other jurisdictions to test and refine the proposals. The feedback received during this process was positive about the proposal and led to several new issues being identified and considered.

#### **Financial Implications**

- 104 It is essential to provide adequate funding to the CCRC to ensure it is effective from initiation. Without sufficient resources to carry out quality investigations in a timely manner, public confidence in the CCRC and, in turn, the criminal justice system will be negatively affected.
- 105 The CCRC did not receive funding in Budget 2018. I will therefore be seeking funding in Budget 2019 to meet the cost of the CCRC.

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<sup>23</sup> See, for example, *Regina v CCRC, ex parte Pearson* [2001].

- 106 While it is generally desirable to have certainty regarding funding, I am of the view it is important to get policy approvals now and introduce legislation as soon as possible to support the CCRC becoming operational once funding is available.
- 107 Establishing the CCRC is expected to cost approximately \$2.3 million, which includes finding a location, purchasing office equipment and software, and developing a bespoke website for the CCRC. It also includes some initial operating costs for applications submitted prior to ongoing funding commencing, though this is subject to when funding becomes available.
- 108 The Ministry of Justice is exploring options to fund this establishment work from within baselines. I propose that the Minister of Finance and I will jointly approve a fiscally neutral adjustment from within existing 2018/19 Vote Justice baselines to a new appropriation for establishing the CCRC, when an amount to be transferred is identified.
- 109 If an amount to be transferred cannot be identified, then establishment funding may need to be sought from Budget 2019 alongside a bid to meet the ongoing operational costs of the CCRC.
- 110 Officials have estimated that the CCRC will receive approximately 125 applications per year. This is a significant increase in the average of about eight applications per year since 1995. However, I understand that overseas jurisdictions experienced a notable increase in applications upon the establishment of their CCRCs. This estimate is also in line with average applications per head of population in these other jurisdictions.<sup>24</sup>
- 111 s 9(2)(f)(iv) [REDACTED] This estimate assumes that there will be a significant increase in applications and assessment of cases, as compared to reviews under the Royal prerogative.<sup>26</sup> The main ongoing cost is for the CCRC's staff, investigation and service costs including ICT and rent.
- 112 The estimated \$3.9 million in operating expenditure is exclusive of an additional estimated \$600,000 per year that will accrue in flow on effects of the CCRC's work. This cost includes the estimated legal aid, retrials and the cost to Crown Law Office for supporting investigations and conducting further criminal appeals.
- 113 s 9(2)(f)(iv) [REDACTED]

**Human Rights**

- 114 The proposals contained in this Cabinet paper have implications concerning consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

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<sup>24</sup> On average the CCRC's in the UK (England and Wales) Scotland and Norway receive an average of 2.7 applications per 100, 000 people (2.3, 2.8, 3.1 respectively) per year. This figure has been extrapolated

<sup>25</sup> s 9(2)(f)(iv) [REDACTED]

<sup>26</sup> The estimated increase in the number of applications per year increase is from an average of 8 to an average of 125. This figure is based on the ratio of applications received by overseas CCRCs per 100,000 population.

- 115 Specifically, the CCRC’s information-gathering powers are likely to engage section 14 (freedom of expression)<sup>27</sup> and section 21 (unreasonable search and seizure) of the Bill of Rights Act.
- 116 Generally, limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered reasonable limits that are demonstrably justified under section 5 of that Act.<sup>28</sup>
- 117 I consider the objective of the policy – ensuring that potential miscarriages of justice are identified, investigated, and referred to the courts where appropriate – constitutes a sufficiently important objective to justify some limitation on these rights and freedoms. Further, the information-gathering powers proposed are designed in a rational and proportionate manner, and will be drafted to ensure that the statutory parameters of the power are reasonable. The CCRC would require reasonable grounds to believe the compulsion of information is necessary from public bodies, which explicitly reflects signals the need to safeguard individuals’ reasonable expectations of privacy.
- 118 A final view as to whether the proposals appear to be consistent with the Bill of Rights Act will be possible once the necessary legislation has been drafted. Officials from the Ministry of Justice and the Crown Law Office will work together on these issues to ensure the information-gathering powers are designed in a rational and proportionate manner.

### **Legislative Implications**

- 119 Establishing a CCRC requires legislative authority. A stand-alone Act of Parliament will be required. The prioritisation and commencement of the legislation will ultimately be subject to decisions by Budget Ministers during the decision-making process for Budget 2019.
- 120 A Criminal Cases Review Commission Bill (‘the Bill’) is on the 2018 legislative programme with a Category 2 priority – must be passed in 2018. I intend to introduce the Bill in late August or early September. I wrote to the Attorney-General early this year seeking agreement to begin drafting the Bill ahead of Cabinet approvals. I understand that preliminary drafting is progressing well, subject to policy approvals from Cabinet.
- 121 If the Bill is still to be passed in 2018, August introduction would require a truncated period at select committee and, therefore, the House may debate the time allowed for the committee to report back.<sup>29</sup> Second Reading, Committee of the Whole House, Third Reading and the Royal Assent would then occur across November and December 2018.
- 122 I propose, however, to allow for at least four months at select committee, and passing the Bill before the end of the financial year. This will allow more time for funding decisions to be made and ensure that legislative consideration does not outpace resourcing. It will also ensure that the public have an appropriate amount of time to contribute. This timeline will, in my view, support my intention for the CCRC to become operational in July 2019, subject

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<sup>27</sup> The right to freedom of expression been interpreted as including the right not to be compelled to say certain things or to provide certain information; see, for example, *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199; *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>28</sup> If a provision is inconsistent with s 21 of the Bill of Rights Act, it cannot be demonstrably justified under section 5. Consistency with s 21 requires that the power is justified by a sufficiently compelling public interest, and that the intrusion proportional to that interest and accompanied by adequate safeguards to ensure it will not be exercised unreasonably; see, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

<sup>29</sup> Refer Standing Order 290(2).

to funding in Budget 2019. A flexible, staggered commencement process for the legislation will likely be required to allow room for decisions on the timing of establishment.

### **Regulatory Impact Analysis**

123 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. 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.

### **Gender Implications**

124 There are likely to be differential impacts of the establishment of a CCRC on gender.

125 The prison population is overwhelmingly male, and men are therefore likely to represent a higher proportion of applications to the CCRC. As noted above, however, overseas CCRCs, most notably the Scottish CCRC, have identified that the volume of applications from women is generally low relative to their proportion of the prison population.

126 The experience overseas appears consistent with applications under the Royal prerogative and, indeed, the disproportionality seems to carry over into the rates of referral to the courts. In the 15 cases referred back to the courts since 1995 all the appellants have been men. I also note that almost half of those cases referred back to court were in relation to sexual offending, which is disproportionately perpetrated against women.

127 These figures tentatively suggest that while the CCRC will predominantly consider men's cases, the potential impact of its work for women is arguably more acute.

128 However, as noted above, it is anticipated that the implications are more likely to be positive than not. A new entity with appropriate funding will be better positioned to monitor and identify any gender disparities, including rates of applications. Further, having dedicated, multi-skilled staff could improve the handling of cases where women do apply or, for example, where a case may involve gendered patterns of violence against a woman or issues of consent.

### **Disability Perspective**

129 The New Zealand Disability Strategy 2016-2026 affirms that people with disabilities must be treated with fairness and respect at all stages of the justice system.

130 People in prison have considerably more issues with mental health and substance abuse disorders than the general population. Nearly all prisoners have been diagnosed with either a mental health or substance use disorder over their lifetime.<sup>30</sup> Numerous studies have also reported significant proportions of prisoners with intellectual and physical disabilities.<sup>31</sup>

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<sup>30</sup> Office of the Prime Minister's Chief Science Advisor, 'Using evidence to build a better justice system: The challenge of rising prison costs' (2018) p. 16; citing Indig, D., Gear, C., Wilhelm, K. (2016) *Comorbid substance use disorders and mental health disorders among New Zealand prisoners*. New Zealand Department of Corrections, Wellington. "Mental disorder" includes mood, anxiety, substance or eating disorders.

<sup>31</sup> See, for example, Simpson, A., Brinded, P., Laidlaw, T., Fairley, N., & Malcolm, F. (1999) *The National Study of Psychiatric Morbidity in New Zealand Prisons*. Department of Corrections; Ministry of Health. 2006. Results from the Prisoner Health Survey

- 131 It is therefore reasonable to expect that a sizeable proportion of applicants to the CCRC will have some need of services or supports specific to their impairment. In my view, a new, independent entity with dedicated staff and more of an investigative remit is more likely to meet these needs than under the current Royal prerogative process. For people with disabilities, the onus placed on the applicant under the status quo is likely to present more serious difficulties in having their claim assessed.
- 132 While a CCRC is not a panacea to these barriers, it does present an opportunity to improve the fairness of the State's treatment of people with disabilities who may have been subjected to a miscarriage of justice.

## Publicity

- 133 When the Bill is ready for introduction, I intend to issue a press release about these proposals and arrange for the briefings I have received on establishing the CCRC to be proactively published on the Ministry of Justice website.
- 134 Once approval to introduce the legislation has been given, I also intend to publish this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.
- 135 It is likely the announcement will receive significant media attention, given the enduring interest in stories about alleged miscarriages of justice and the effectiveness of the current system for addressing them.

## Recommendations

- 136 The Minister of Justice recommends that the Committee:
- 1 **agree** to establishing a Criminal Cases Review Commission for New Zealand
  - 2 **note** that it is intended that the Criminal Cases Review Commission will become operational in July 2019
  - 3 **agree** that the primary function of the Criminal Cases Review Commission will be to investigate and refer any conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred
  - 4 **agree** that the Criminal Cases Review Commission be established as a new independent Crown entity, with between three and seven Commissioners, including a full time Chief Commissioner and Deputy Chief Commissioner
  - 5 **agree** that one third of the Commissioners be required to have legal qualifications, and that two thirds also be required have relevant knowledge or experience in the justice system
  - 6 **agree**, in principle, to adopt a test for referral that provides that the Criminal Cases Review Commission:

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2005; Julia J. Rucklidge, Anthony P. McLean and Paula Bateup 'Criminal Offending and Learning Disabilities in New Zealand Youth Does Reading Comprehension Predict Recidivism?' *Crime & Delinquency* Vol 59, Issue 8, 2009.

- 6.1 may refer a conviction or sentence if it considers it is in the interests of justice that the referral may be made, and
- 6.2 in deciding whether to refer, must have regard to:
  - 6.2.1 whether the convicted person has exercised their rights to appeal against conviction or sentence
  - 6.2.2 the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in the proceedings relating to the conviction or sentence
  - 6.2.3 the prospects that the court will allow the appeal, and
  - 6.2.4 any other matter that the CCRC considers relevant.
- 7 **note** that officials will continue to consult with selected experts on the test for referral
- 8 **agree** that the Criminal Cases Review Commission have a secondary function to promote, by way of education and discussion, its primary function
- 9 **agree** that investigations of the Criminal Cases Review Commission may be triggered on application from a living convicted person or their representative
- 10 **agree** that the Criminal Cases Review Commission be able to undertake initial inquiries on its own initiative where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest
- 11 **agree** that the Criminal Cases Review Commission should have limited grounds to take no further action on an application
- 12 **agree** that the legislation to establish the Criminal Cases Review Commission provide for the relationship between the Commission's functions and the Royal prerogative of mercy, specifically to:
  - 12.1 preserve the authority of the Governor-General to exercise the residual prerogative powers
  - 12.2 enable the Governor-General (or Minister of Justice) to refer 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
  - 12.3 allow the Minister of Justice (as the Governor-General's adviser) to request the Commission's opinion on any matter relevant to the Royal prerogative of mercy
- 13 **agree** that the Criminal Cases Review Commission be given powers to obtain relevant information, including written information and exhibits, from both public bodies and private persons, where the Commission has reasonable grounds to believe the information is necessary for the investigation and cannot be obtained by other means
- 14 **agree** that if a person fails or refuses to comply with a notice requiring information, without reasonable excuse, the Criminal Cases Review Commission may apply to the court seeking an order:

- 14.1 directing the person to comply with any requirements in the notice, and
- 14.2 an order for any consequential relief that the court thinks appropriate.
- 15 **agree** that there be a process whereby persons may claim, and have that claim verified, privilege and confidentiality in relation to information sought by the Criminal Cases Review Commission
- 16 **agree** that a person who is or has been a member or employee of the Commission shall be prohibited from disclosing any information obtained by the Criminal Cases Review Commission in the exercise of any of its functions unless the disclosure of the information is authorised by the Criminal Cases Review Commission on limited grounds
- 17 **agree** that the Official Information Act 1982 should not apply in respect of information contained in any correspondence or communication that has taken place between the Criminal Cases Review Commission and any person in relation to an investigation
- 18 **agree** that the Criminal Cases Review Commission be able to co-opt specialist advice to assist the Commission in the exercise of its functions
- 19 **agree** that the Criminal Cases Review Commission be given statutory authority to regulate and promulgate its procedures for dealing with operational matters pertaining to the exercise of its functions and powers
- 20 **agree** that there will be no statutory right of appeal from determinations of the Criminal Cases Review Commission
- 21 **agree** to make any necessary consequential amendments to the Legal Services Act 2011 to ensure that, where appropriate, applicants may have access legal aid

*Financial implications*

- 22 **note** that the Criminal Cases Review Commission will cost an estimated:

22.1 \$2.3 million to establish

22.2 \$3.9 million per year to carry out its functions, and

22.3 \$600,000 in flow on costs to other appropriations

- 23 **agree** to establish the following new appropriation:

<b>Vote</b>	<b>Appropriation Minister</b>	<b>Title</b>	<b>Type</b>	<b>Scope</b>
Justice	Minister of Justice	Establishing the Criminal Cases Review Commission	Departmental Output Expense	This appropriation is limited to establishing the Criminal Cases Review Commission

- 24 **note** that the Ministry of Justice is exploring options to fund the establishment of the Criminal Cases Review Commission from within baselines

- 25 **note** that the Minister of Finance and the Minister of Justice will jointly approve a fiscally neutral adjustment from within existing 2018/19 Vote Justice baselines to the new appropriation, when an amount to be transferred is identified
- 26 **note** that the Minister of Justice will seek funding in Budget 2019 to meet the ongoing operational costs of the Criminal Cases Review Commission and, if necessary, the establishment cost
- 27 **note** that the flow on costs to other departments may be sought as cost pressure bids in Budget 2019

#### *Legislative implications*

- 28 **note** that a Criminal Cases Review Commission Bill is currently on the 2018 legislative programme with a Category 2 priority
- 29 **agree** that the Bill be passed by July 2019 to allow more time at select committee and to enable time for funding decisions to be made
- 30 **invite** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to these policy proposals
- 31 **agree** that the Minister of Justice may resolve minor policy issues in relation to the drafting of legislation, following consultation with the Minister of State Services and the Attorney-General, which are consistent with the contents of this paper, without further reference to Cabinet

#### *Publicity*

- 32 **note** that the Minister of Justice will issue a press release about these proposals, and arrange for all advice relating to the establishment of the Criminal Cases Review Commission to be proactively published on the Ministry of Justice website, at the point the Criminal Cases Review Commission Bill has been approved for introduction
- 33 **note** that the Minister of Justice intends to publish this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982, at the point the Criminal Cases Review Commission Bill has been approved for introduction

#### *Budget 2019*

- 34 **agree** that establishing a Criminal Cases Review Commission is subject to decisions taken by Cabinet during the decision-making process for Budget 2019

Authorised for lodgement

Hon Andrew Little

Minister of Justice

## Appendix One - The key elements of CCRCs in the United Kingdom, Scotland and Norway

	<b>United Kingdom (England, Wales, Northern Ireland)</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