**CONSULTATION ON A CRIMINAL CASE REVIEW COMMISSION FOR CANADA**

**Introduction**

The Government of Canada has committed to create an independent Canadian Criminal Cases Review Commission that will operate outside of the political sphere. Such a commission will be able to consider applications from those who believe that they have been wrongfully convicted; who have suffered miscarriage of justice that have not been remedied by the courts.

The Honourable David Lametti, Minister of Justice and Attorney General of Canada, appointed the Honourable Harry LaForme, former justice of the Ontario Court of Appeal, to lead public-facing consultations on the creation of the Commission. Minister Lametti also named the Honourable Juanita Westmoreland-Traoré, a former judge of the Court of Québec to join Justice LaForme in these consultations.

At the conclusion of the consultation process a report will be submitted to the Minister of Justice. This report will discuss options for the Commission, what has been heard during the consultations and learned from the Criminal Cases Review Commissions in England, Wales and Northern Ireland, and in Scotland, Norway, New Zealand and North Carolina.

This consultation paper poses questions about what the Commission could look like and may evolve over time to reflect what is learned during the consultation process.

**This is about Justice**

At its core this is about justice - criminal and social justice and being mindful of societal demands for equity, inclusion, respect and fairness.

In Canada, as it is in other countries, there are people who have been failed time and time again by our system of criminal justice. Many know of Stephen Truscott, the young teen who initially was sentenced to be hanged and then was jailed for years for a murder he did not commit. Many have heard of Donald Marshall Jr., a Mi’kamq man; an innocent man who languished in jail for a crime he did not commit. Recently the murderer of Christine Jessop was identified but not until after Guy Paul Morin was exonerated and released from his wrongful imprisonment.

In its *2019-2020 Annual Report*, the Office of Correctional Investigator stated that, “Indigenous over-representation in federal custody had reached a new historic high”. Despite declines in the overall inmate population the incarceration rate of Indigenous people had accelerated and that of Indigenous women was even higher; representing 42% of the women inmate population.

“*A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report”* highlighted the increasing overrepresentation of Black people relative to their proportion in the population. In the ten years leading up to 2012 the number of federally incarcerated Black inmates in Canada increased by 75%.

When the criminal justice system fails it fails all Canadians. “Wrongful conviction cases” represent real people, with real family and friends and include those wrongfully convicted and those who have lost loved ones to crime. As stated by Ronald Dalton, “These cases are a stain on the collective conscience of Canadians”.

Diverse communities are calling out the deep rooted, systemic injustice that exists in society and their voices are joined by voices from the broad Canadian society demanding change. The specific needs of women, young people and those who experience diverse forms of discrimination must be addressed. A process aimed at improving fairness and justice for all Canadians must have a criminal justice system that is attentive to these realities.

It is hoped that the consultation process will lead to the creation of a Commission attuned to the many manifestations of discrimination and committed to the rectification of wrongful convictions.

**INDEX**

**Issue Page**

**Section A: The Structure of the Commission**

Question 1: Who Should the Commissioners Be? p4

 Question 2: Commission Location p4

 Question 3: Funding and Advisory Boards p5

**Section B: The Mandate of the Commission**

 Question 4: Serious and Less Serious Cases p5

 Question 5: Sentence Only Applications p5

 Question 6: Historical Cases p6

 Question 7: Role in Systemic Reform p6

 Question 8: Outreach p6

 Question 9: Legal Representation p7

 Question 10: Language Interpretation and Communication Assistance p8

 Question 11: Victim Participation p8

**Section C: Decision-Making by the Commission**

Question 12: Application screening p8

Question 13: Who in the Commission should make decisions about

 applications p9

 Question 14: Investigation Threshold p9

 Question 15: Investigation Powers p10

 Question 16: Court Referral Test p10

 Question 17: The Court’s Grounds for allowing an Appeal p11

 Question 18: Challenging Commission Decisions p12

**Section D: Remedy**

 Question 19: Referral to Appeal or Trial p12

Question 20: Should the reasons given by the Commission be Public or Confidential? p13

 Question 21: Should the Commission be Involved in Pardons? p13

Question 22: Should the Commission be involved in Compensation and Reintegration? p13

 Question 23: Anti-Discrimination Provisions p14

**A: THE STRUCTURE OF THE COMMISSION**

**Question 1: Who should the Commissioners be?**

The commissioners in existing Criminal Case Review Commissions (CCRCs) are predominantly legal experts commissioned by the state for a fixed term. In England, Scotland and New Zealand, one third of the commissioners are experienced lawyers and two thirds must have expertise in criminal justice (Option 1: Criminal Justice Expertise Model).

In New Zealand, at least one commissioner must have special expertise and understanding of Maori world views and practices and this could be extended to other groups that are overrepresented in the justice system or particularly vulnerable to miscarriages. Commissioners in Norway have significant healthcare knowledge, currently incorporating professors with psychiatry and psychology expertise. In the United Kingdom, a recent parliamentary consultation recommended the inclusion of a youth justice specialist in the English CCRC (Option 2: Vulnerable people[[1]](#footnote-1) expertise and cultural competency model).

In North Carolina the model is based on the traditional criminal justice structure including commissioners reflecting the judiciary, prosecution, defence and a victims of crime advocate (Criminal Justice Stakeholders Model).

**Question 1: Who Should the Commissioners Be?**

Please indicate a preferred option:

* Option 1: Criminal Justice Expertise Model.
* Option 2: Vulnerable People Expertise and Cultural Competency Model.
* Option 3: Criminal Justice Stakeholders Model.

The New Zealand CCRC can appoint, as required, qualified persons to assist it by giving advice on cultural, scientific, technical or other matters involving particular expertise. The English CCRC can appoint investigating police officers, but does so infrequently. What, if anything, should a Canadian statute say about the staff of the commission and those who can be asked to assist the commission in specific cases? Should the CCRC be created as part of the *Criminal Code* or in stand-alone legislation?

If you wish, please provide any further relevant comment on this issue (including whether your preference is for a combination of the above options).

**Question 2: Where should the Commission be located?**

The location of the CCRC is important, including for symbolic and accessibility reasons. Some countries have chosen to locate their commissions in the capital while others have selected a city outside the capital to emphasize the commission’s independence. Regional offices are not generally used, although Canada’s geography and access requirements may make this an option.

**Question 2: Commission location**

Please indicate a preferred option:

* Option 1: Location in the Nation’s Capital.
* Option 2: Location other than the Capital Region.
* Option 3: Central and Regional Offices.

If you wish, please provide any further relevant comment on this issue.

**Question 3: Funding and Advisory boards**

A temporary or permanent advisory board may have a role in supporting the establishment and/or continuing functions of the commission. The New Zealand CCRC has an advisory committee to assist with its establishment. The English CCRC has a management board and has utilised advisory committees.

**Question 3: Funding and Advisory Boards**

Please indicate a preferred option:

* Option 1: No Advisory Board except the Commission is Required.
* Option 2: Advisory Board only for Establishment of Commission.
* Option 3: Legislated designation of Advisory Board to guard against under-funding and ensure sufficient ongoing funding.
* Option 4: Advisory Board that holds expertise to improve access to justice and prevent discrimination.
* Option 5: Scheduled Reviews by Parliament or Expert Body.

A 2015 Parliamentary committee found that the English CCRC was under-funded and its funding was 43% lower in real terms than in 2004. How can the danger of under-funding be addressed in Canada and could an advisory board for the commission serve as an advocate for the commission?

Should the Advisory Board hold special expertise, aiming to prevent discrimination and improve access to justice (as identified in Question 1 above)? Should the Commission be designated an officer or agent of Parliament or an independent agency? Should there be a mandated review of the commission’s performance after five or ten years? Could an advisory board serve as an advocate for the commission?

If you wish, please provide any further relevant comment on this issue (including whether your preference is for a combination of the above options).

**B: THE MANDATE OF THE COMMISSION**

**Question 4: Should the Commission consider both serious and less serious cases?**

The majority of existing commissions hear applications about both serious and less serious convictions. The North Carolina CCRC, however, can only hear applications from convictions for serious offences or felonies. The current system in Canada includes both serious and less serious cases. In 2019, the United Kingdom’s government proposed that there be discussions with the CCRC over removing the ability to consider less serious convictions and sentences. That proposal has not been adopted. The English CCRC has stressed the importance of addressing miscarriages of justice even in less serious cases.

**Question 4: Serious and Less Serious Cases**

Please indicate a preferred option:

* Option 1: More Serious Cases Only.
* Option 2: Less Serious Cases Included.

If you wish, please provide any further relevant comment on this issue*.*

**Question 5: Should the Commission consider applications against sentence?**

Most existing CCRCs permit applications against sentence but generally after appeals to the courts have been exhausted. While some United Kingdom reviews have suggested excluding less serious and sentencing cases from the English CCRC to reduce costs, that approach has so far been rejected. The present Canadian process of Ministerial reviews allows for applications for those convicted as well as those sentenced as dangerous and long-term offenders. The North Carolina commission has no role to play with respect to sentences.

**Question 5: Sentence Only Applications**

Please indicate a preferred option:

* Option 1: Commission can consider applications against sentence.
* Option 2: Commission cannot consider matters of sentencing.

If you wish, please provide any further relevant comment on this issue.

**Question 6: Should the Commission hear applications about historical cases involving convictions or sentences of deceased persons?**

Both the New Zealand and North Carolina commissions can only hear applications from living applicants. The Norwegian commission can only hear applications about deceased persons if “special reasons” exist while the English and Scottish commissions can hear applications from deceased persons

**Question 6: Historical Cases**

Please indicate a preferred option:

* Option 1: Commission that only accepts applications about living persons.
* Option 2: Commission that only accepts applications about living persons except in special circumstances.
* Option 3: Commission that accepts applications about historical cases involving deceased persons.

If you wish, please provide any further relevant comment on this issue.

**Question 7: Should the Commission have a role in systemic reform to prevent miscarriages of justice?**

The New Zealand CCRC has power to inquire into systemic issues about policies, procedures and other general matters contributing to miscarriages of justice. It can make recommendations to the Minister of Justice and the legislature. Older commissions do not fulfil this role although, at inception, the English CCRC was intended to have such a role.

**Question 7: Role in Systemic Reform**

Please indicate a preferred option:

* Option 1: Reactive Commission that responds only to applications but does no additional systemic reform work.
* Option 2: Proactive Commission that also does systemic reform work to prevent miscarriages of justice.

If you wish, please provide any further relevant comment on this issue.

**Question 8: What should the Commission’s mandate be with respect to outreach to potential applicants and ensuring accessibility?**

The English, Scottish and Norwegian CCRCs’ outreach strategies incorporate attempts to improve accessibility such as simplified application forms, language translation and prison visits. The English CCRC saw a 70% increase in applications as a result of increased outreach. The New Zealand CCRC has statutory duties to raise public awareness of its function. It can also initiate an investigation on behalf of a person though it must stop if it cannot obtain the person’s consent. It has a full-time education and engagement manager and a half time communication advisor. The Norwegian CCRC has a positive statutory duty to assist applicants for relief and has appointed more interpreters to assist applicants.

**Question 8: Outreach**

Please indicate a preferred option:

* Option 1: Reactive Commission with outreach limited to existing applicants.
* Option 2: Proactive Commission that conducts outreach work to potential applicants.
* Option 3: Proactive Commission that can initiate investigations for potential applicants.

Are there specific forms of outreach you wish to see for applicants to ensure equality and accessibility? Could support be given to applicants through referral to legal, health, mental health and other community supports? Should advisory boards engage in advocacy on behalf of Innocence projects and other non-profit or community-based organizations?

If you wish, please provide any further relevant comment on this issue (including whether your preference is for a combination of the above options).

**Question 9: What funding for legal representation should be provided to the applicant?**

The English, Scottish and New Zealand CCRCs rely on legal aid funding of applicants. As a result of legal aid cuts only 10% of applicants to the English CCRC have legal aid funding currently compared to one third of applicants in 2008. In Canada legal aid is a provincial and territorial responsibility with some providing funding for private lawyers and other jurisdictions using staff lawyers and court workers. An English study found that 82% of represented applicants had their case go beyond initial assessment by the commission compared to 50% of unrepresented applicants. The Norwegian CCRC has statutory powers to appoint defence counsel and set terms for their payment. It appoints counsel in about 16% of cases, including cases involving mental disorders. The North Carolina commission can make an order that a lawyer be appointed to an applicant. The New Zealand CCRC has some staff dedicated to communicating with applicants. Ensuring accessibility is essential to avoid discrimination or exclusion.

**Question 9: Funding for Legal Representation**

Please indicate a preferred option:

* Option 1: No Dedicated Funding (beyond existing legal aid/ private funding).
* Option 2: Dedicated Funding for legal representation in the Commission’s Discretion.
* Option 3: Dedicated Funding and specialized caseworkers and/or staff lawyers within the Commission to represent applicants.

Should funding for legal representation be automatically available to youth applicants? Yes/No?

Limited resources for legal representation create additional barriers for Indigenous and racialized applicants and the severity of barriers increases for those who experience multiple forms of disadvantage. Should there be caseworkers and/or staff lawyers within the CCRC who can provide assistance, especially to vulnerable, disadvantaged or unrepresented applicants, and also keep them informed about the CCRC’s work on their case?

If you wish, please provide any further relevant comment on this issue.

**Question 10: What statutory requirements should there be for language interpretation and communication assistance for applicants?**

None of the enabling statutes for the foreign CCRCs provide for translation, sign language interpretation, braille, voice synthesizers or the provision of services for those with limited literacy. The Canadian CCRC will need to provide services in both official languages, and there may be a need to provide translation into other languages, including Indigenous languages and to accommodate diverse manners of communication.

**Question 10: Statutory requirements for Language Interpretation and Communication Assistance**

Please indicate a preferred option:

* Option 1: Statutory requirements on the new Commission for translation and communication assistance.
* Option 2: Existing statutory requirements relating to bilingualism.

What additional modifications, such as face-to-face interviews, might be required to ensure there is no exclusion due to communication needs?

If you wish, please provide any further relevant comment on this issue.

**Question 11: What provision should there be for crime victim notification and participation?**

If the Canadian CCRC is subject to the *Canadian Victims Bill of Rights,* victims would have rights to be informed about the CCRC’s investigations, have their privacy considered, request that their identity be protected and have their views and victim impact statements considered. The New Zealand commission is required by statute to notify crime victims of a decision to refer a conviction back to the courts. It also intends to notify crime victim when an application proceeds to the investigation stage but has determined that earlier notification may cause unnecessary trauma.

The Norwegian commission can appoint counsel for victims and next of kin and did so in 11 cases in 2019/2020. The North Carolina commission must notify victims or next of kin and allow them to express their views when an application has reached the formal inquiry stage and commission hearings phases.

**Question 11: Victim participation**

Please indicate a preferred option:

* Option 1: No Notification and No Participation.
* Option 2: Notification but no Participation.
* Option 3: Notification and Participation.

If you wish, please provide any further relevant comment on this issue.

**C. DECISION-MAKING BY THE COMMISSION**

There are key stages where existing commissions have a threshold to a case proceeding, usually up to three threshold points: (1) acceptance of the application (2) proceeding to full investigation (3) referral to the court. At each stage, it may be necessary to consider how the case proceeds to the next threshold, whether the entire commission or a subset of the commission can make the decision and whether that process is codified.

**Question 12: Should there be statutory criteria for initial acceptance of an application?**

The English CCRC is empowered by statute to govern its own procedures. Consequently, there is no statutory threshold for acceptance of an application to the English CCRC. On receipt of an application, the Casework Administrator will check that the case is eligible for review. A similar process occurs in Scotland. There is a statutory threshold in Norway where applications can be rejected as inadmissible. In Canada, there is no statutory first screening; the first step under regulations is the preliminary assessment (see below). The North Carolina commission applies standard criteria before an application will be accepted.

**Question 12: Application screening**

Please indicate a preferred option:

● Option 1: Legislative threshold/ criteria.

● Option 2: Commission screening process.

Should the threshold/ criteria and screening be modified for applicants most at risk of miscarriages of justice, including groups suffering discrimination, vulnerable individuals and young people?

If you wish, please provide any further relevant comment on this issue.

**Question 13: Who in the Commission should decide applications?**

A single commissioner of the English CCRC can reject an application whereas three commissioners decide whether to refer an application for investigation and further for referral to the Court of Appeal. Some concerns have been expressed about inconsistencies in the approach of different commissioners. When a decision to reject an application is made, the English, Scottish and New Zealand commissions give the applicant a draft written decision and the applicant is given 28 days to respond with additional material or evidence.

**Question 13: Decision Makers**

Please indicate a preferred option:

* Option 1: Subset of the Commission can reject an application, but with the applicant being able to respond to provisional decisions.
* Option 2: Entire Commission decides applications.

Should the statute establishing the commission provide for decision-making processes or should the Commission be free to develop its own processes?

If you wish, please provide any further relevant comment on this issue.

**Question 14: Should there be a statutory threshold for investigation/review?**

At present, regulations provide that the federal Minister of Justice shall conduct an investigation after a preliminary assessment if there *may* be reasonable grounds to conclude that a miscarriage of justice likely occurred. This preliminary determination has played a role in cases where applicants seek bail pending the Minister’s decision on whether to refer the case back to the courts. There is no statutory threshold for the English CCRC or Scottish CCRC to send an application for investigation and they have developed their own processes in this regard.

**Question 14: Investigation threshold**

Please indicate a preferred option:

* Option 1: Legislative threshold.
* Option 2: Commission criteria/policy.

Should the criteria be modified for applicants most at risk of miscarriages of justice, including groups suffering discrimination, vulnerable individuals and young people? Should the issue of bail pending a final decision by the commission be addressed and if so, how?

If you wish, please provide any further relevant comment on this issue.

**Question 15: Investigative Powers**

The English CCRC originally only had powers to compel the production of material from public agencies. All existing CCRCs now have how powers to compel the production of documents and things from public and private entities as does the federal Minister of Justice under the present Ministerial review provisions. They can also require witnesses to answer questions.

**Question 15: Investigative powers**

Please indicate a preferred option:

* Option 1: Statutory powers to compel production from public agencies.
* Option 2: Statutory powers to compel production from public and private entities.
* Option 3: Statutory powers to compel a witness to answer questions.
* Option 4: Statutory powers compel production from public and private entities and to compel a witness to answer questions.

What investigative powers should the new commission have? What, if any, provisions should be made about the various forms of legal privileges that may be invoked or asserted with respect to providing the commission with material and/or answering questions? What role, if any, should the applicants play in the investigation?

If you wish, please provide any further relevant comment on this issue.

**Question 16: What should the test for referral to the Courts be?**

Some commissions impose “predictive tests” for referring a case to court, which rely on the likelihood of the conviction being overturned by the court. For example, the English CCRC may refer a conviction if “there is a real possibility it will not be upheld” by the courts. The Scottish CCRC must find that a “miscarriage of justice may have occurred”[[2]](#footnote-2). The Scottish commission must also find it is in the “interests of justice” that a referral be made. At present, the federal Minister of Justice will refer a case to the court when satisfied that “a miscarriage of justice likely occurred”.

The newest commission in New Zealand will refer convictions and sentence if it is in the “interests of justice”[[3]](#footnote-3). A recent Parliamentary consultation in the United Kingdom[[4]](#footnote-4) proposed replacing the existing test with referral where the CCRC determines that the conviction “may be unsafe”, the sentence may be manifestly excessive or wrong in law or where it concludes that it is in the “interests of justice” to make a referral.

The North Carolina commission refers cases on the basis of credible, verifiable and new evidence of “factual innocence”. Factual innocence does not include reduced level of criminal responsibility for the crime charged and this is subsequently reviewed by the courts to determine if there is clear and convincing case of innocence.

**Question 16: Court referral test**

Please indicate a preferred option:

* Option 1: Predictive test based on likelihood that the conviction or sentence will be overturned by the courts.
* Option 2: Predictive test based on possibility that the conviction or sentence will be overturned by the courts.
* Option 3: Predictive test based on likelihood that the conviction or sentence will be overturned by the courts plus that the commission finds that a referral back to the courts is in the “interests of justice”.
* Option 4: “Interests of justice” test for referral.

Should the referral test be modified for applicants most at risk of miscarriages of justice, including groups suffering discrimination, vulnerable individuals and young people?

If an “interest of justice” test is used, should Parliament provide statutory relevant considerations? For example, the statute could direct the commission’s attention to specific issues in applying the test, such as discrimination and breaches of international law.

The Minister of Justice is required by the *Criminal Code* to consider whether the application for relief “is supported by new matters of significance” not previously considered and assess the “relevance and reliability” of the new material. It also provides that Ministerial relief is an “extraordinary remedy” that “is not intended to serve as a further appeal”. Should similar provisions apply to the new commission?

If you wish, please provide any further relevant comment on this issue (including whether your preference is for a combination of the above options).

**Question 17: The Court’s Grounds for allowing an Appeal in cases referred to them by the Commission**

Several reviews of the English CCRC have suggested that the grounds on which the Appeal Court can overturn a conviction in that country (whether a conviction is unsafe) should be expanded. This raises the question of whether existing grounds for allowing appeals in Canada are adequate. In Canada, sentences can be overturned on “fitness” grounds and convictions can be overturned if the appeal court finds: 1) errors of law[[5]](#footnote-5) or 2) convictions that are unreasonable or cannot be supported by the evidence or 3) on any ground there was a miscarriage of justice.

Some commissions of inquiry into wrongful convictions have recommended that convictions also be overturned on the basis of a lurking doubt but this has not been followed by Parliament or the courts. Courts will also not make determinations and declarations of factual innocence even in cases referred back to them. They have, however, developed some tests for determining whether when quashing a conviction on the basis of a referral and new evidence, they should order a new trial or enter an acquittal in older cases where a new trial is unlikely to be possible.

 **Question 17: The Court’s Grounds for allowing an Appeal**

Please indicate a preferred option:

* Option 1: Existing grounds of appeal from conviction or sentence in Canada are adequate.
* Option 2: Existing grounds of appeal from conviction should be expanded.
* Option 3: Appellate courts should be able to make determinations of factual innocence.

If courts make declarations of factual innocence, what should be the basis for such determinations? Should there be statutory guidance whether in cases where convictions are overturned, the appeal court should order a new trial or enter an acquittal? Canadian courts have recognized the need for a different approach in cases where it will not be possible to hold a new trial because of the age of the case.

As was the case in Scotland from 2010 to 2016, should an appeal court ever have a discretion not to hear a case referred by the commission?

If you wish, please provide any further relevant comment on this issue.

**Question 18: Challenging Commission decisions**

The majority of commissions disclose provisional reasons to reject an application, giving the applicant 28 days to respond with additional submissions or material. The courts can also review decisions by the commissions for their reasonableness and fairness. The North Carolina model is unique as it has a full public hearing before the decision to refer the conviction for review is made. The Norwegian CCRC can hold oral hearings which may include statements from relevant witnesses and applicants. None of the foreign commissions have a process of an appeal to the full commission though this would be possible where decisions are made by a subset of the full commission.

**Question 18: Challenging Commission decisions**

Please indicate a preferred option:

* Option 1: Provisional Written Decision subject to comments for response.
* Option 2: Statutory provisions providing for appeals to the full Commission and/or hearings by the Commission.

How would this be modified for applicants most at risk, including youth applicants, those at risk of discrimination and vulnerable individuals?

Should the statute establishing the commission attempt to limit how the courts may review the commission’s decisions? The Norwegian statute attempted to preclude judicial review, but the Norwegian courts now review the procedural fairness of the commission and the whether it is interpreting the law correctly.

If you wish, please provide any further relevant comment on this issue.

**D. REMEDY**

**Question 19: Should the Commission be able to refer a case for a new appeal or new trial or both?**

Existing commissions can typically only refer a conviction to an appeal court and cannot order that a new trial be held.The Norwegian CCRC and the Canadian federal Minister of Justice have the option of either directing a new trial or a new appeal. Although generally seen as matters of prosecutorial discretion, the commission could offer recommendations with respect to subsequent prosecutions or pardons.

**Question 19: Referral to appeal or trial**

Please indicate a preferred option:

* Option 1: New Appeals only.
* Option 2: Option of New Appeal or New Trial.
* Option 3: Option of a New Appeal or New Trial but with Recommendations to the Prosecutor or the Executive.

If you wish, please provide any further relevant comment on this issue.

**Question 20: Should the reasons given by the Commission be Public or Confidential?**

The English and Scottish CCRCs have statutory restrictions on the disclosure of information and do not release their decisions publicly. The New Zealand CCRC is required to make publicly available its reasons or a summary of its reasons in the manner that it considers appropriate.

 **Question 20: Publicity of Decisions**

Please indicate a preferred option:

* + Option 1: Statutory restrictions on publicity of the Commission’s decisions.
	+ Option 2: Statutory requirement that decisions be made public, subject to anonymity and privacy safeguards appropriate to individual cases.

How should the privacy of applicants and victims of crime be respected? Should the commission have statutory obligations as in New Zealand to publish data about groups that are overrepresented in the justice system? Should it be required to publish the gender, race, age and other personal characteristics of its applicants? What should it do to facilitate research into how it does its job while protecting privacy and other important interests?

If you wish, please provide any further relevant comment on this issue.

**Question 21: Should the Commission be involved in pardons?**

The Norwegian, North Carolina and Scottish CCRCs have no explicit role with respect to pardons. At present, the Parole Board of Canada is the main decision maker with respect to pardons. The English CCRC and New Zealand CCRC may provide advice at the request of the responsible Minister on matters relating to the prerogative of mercy. The Cabinet may transfer an application for mercy to the New Zealand CCRC if the matter would more appropriately be decided by the commission.

**Question 21: Commission involvement with Pardons**

Please indicate a preferred option:

* Option 1: Commission should have a role with respect to pardons.
* Option 2: Commission should not be involved with pardons.

If you wish, please provide any further relevant comment on this issue.

**Question 22: Should the Commission be involved in compensation and reintegration for those who have suffered miscarriages of justice?**

Most commissions play no role in compensation and re-integration. The North Carolina statute provides that when applicants are declared factually innocent by a three - judge panel, they are eligible to apply for compensation without having to obtain a pardon.

**Question 22: Commission involvement with Compensation and Reintegration**

Please indicate a preferred option:

* Option 1: Commission should not be involved with compensation.
* Option 2: Commission should decide compensation.
* Option 3: There should be a separate legislative scheme for compensation and reintegration.

If you wish, please provide any further relevant comment on this issue.

**Question 23: Non-Discrimination and Positive Safeguards**

The statute establishing the commission could contain free-standing non-discrimination provisions related to all prohibited grounds of discrimination in the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act* and applicable international law[[6]](#footnote-6) and/or provisions targeted to those groups such as Indigenous people and Black people who are over-represented in the justice system and/or special reference to youth applicants and individuals with disability. Alternatively, the commission could be required and entrusted to develop its own non-discrimination policies and guidance.

**Question 23: Non-Discrimination and Positive Safeguards**

Please indicate a preferred option:

* Option 1: Should the legislation creating the Commission contain free-standing non-discrimination provisions?
* Option 2: Should the Commission develop its own non-discrimination policies?

What positive safeguards or other provisions should be included, in either Option 1 or 2, to protect applicants most at risk of discrimination?

If you wish, please provide any further relevant comment on this issue.

1. The inclusion of Indigenous and racialized persons, and members of other disadvantaged groups among commission experts and personnel would bring expertise in diversity and enhance creativity and outreach that would benefit of people the commission is serves. [↑](#footnote-ref-1)
2. The same ground of appeal used by Scottish courts. [↑](#footnote-ref-2)
3. This test for referral by the Commission differs from the test that appeal courts will apply once the case has been referred to them. The New Zealand appellate courts allow appeals from convictions on grounds of miscarriage of justice or unreasonable verdicts. [↑](#footnote-ref-3)
4. All Party Parliamentary Group Report, “In the Interests of Justice” https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf [↑](#footnote-ref-4)
5. However, not if the court finds no substantial wrong or miscarriage of justice. [↑](#footnote-ref-5)
6. International law frequently prohibits discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. [↑](#footnote-ref-6)