

Departmental Disclosure Statement

Criminal Cases Review Commission Bill

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

13 September 2018.

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Part One: General Policy Statement

Purpose

The Bill establishes the Criminal Cases Review Commission (the **Commission**). The Commission's purpose is to review convictions and sentences and decide whether to refer them to the appeal court. This will replace the power currently exercised by the Governor-General under section 406 of the Crimes Act 1961.

The Commission is established as a new independent Crown entity, with a membership of no fewer than 3 but no more than 7 Commissioners.

Several jurisdictions have established a similar Commission, including the United Kingdom (England, Wales, and Northern Ireland), Scotland, and Norway. These examples provide valuable experience to draw from and demonstrate the value in having an independent body to carry out this work.

Currently, if a person who has been convicted of an offence believes they have suffered a miscarriage of justice, they may apply to the Governor-General for the exercise of the Royal prerogative of mercy. The Royal prerogative of mercy can, among other things, be exercised to grant a free pardon or refer a person's conviction or sentence to the relevant appeal court under section 406(1) of the Crimes Act 1961 for a fresh appeal.

By convention, the Governor-General acts on the formal advice of the Minister of Justice. Work on prerogative of mercy applications is undertaken by lawyers in the Ministry of Justice. Establishing the Commission is an opportunity to enhance this system by having an independent body with dedicated staff focused on the mandate to identify and respond to possible miscarriages of justice. This should, in turn, help to ensure the timeliness, quality, and fairness of investigations into miscarriages of justice.

The design of the Commission is informed by the core principles underlying the Royal prerogative of mercy, and the referral mechanisms exercised by overseas Commissions, including that—

- the courts should have an opportunity to reconsider a person's conviction or sentence if a miscarriage of justice may have occurred:
- convicted persons are normally expected to exercise their rights to appeal against conviction or sentence before asking the Commission to intervene:
- the referral process is not an opportunity to simply repeat arguments or re-examine evidence that has already been considered by the courts:
- what is normally required to justify referring a case is "something new"—evidence
- or argument that has not previously been examined by the courts.

Commission's grounds for referring case back to courts

The statutory grounds for referring a case back to the appeal courts is a critical aspect of the design of the Commission. Decisions on referral will be made by the Commissioners and cannot be delegated under the Crown Entities Act 2004.

The Commission may refer a conviction or sentence if the Commission considers it is in the interests of justice that a referral to the appeal court be made. In deciding whether to refer, the Commission must have regard to—

- whether the convicted person has exercised their rights to appeal against conviction or sentence:
- 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:
- the prospects of the court allowing the appeal:
- any other matter that the Commission considers relevant.

Key features of Commission

The Commission will—

- receive applications from eligible persons or their authorised representatives:
- carry out the activities it considers necessary to make its functions known to, and understood by, the public:
- have the ability to undertake initial inquiries into a conviction or sentence on its own motion:
- undertake thematic inquiries into a practice, policy, procedure or other general matter it considers to be related to miscarriages of justice:
- have reasonable powers to obtain information relevant to the investigation from any person:
- regulate its own policies and procedure in a manner that is consistent with the rules of natural justice:
- appoint specialist advisers to give advice in relation to scientific, technical, or other matters involving particular expertise.

Residual Royal prerogative of mercy

As the Royal prerogative of mercy remains in force via the Letters Patent Constituting the Office of the Governor-General of New Zealand, the Bill provides for the interaction between the Commission's functions and the residual role of the Governor-General in exercising the Royal prerogative of mercy.

Specifically, the Bill enables the Governor-General (acting on the advice of the Minister of Justice) to transfer applications for the Royal prerogative of mercy that allege a miscarriage of justice to the Commission for it to deal with under its statutory authority. The Bill also expressly recognises the authority of the Governor-General to exercise the residual prerogative powers, which include the grant of a full pardon. It is expected that the occasion for exercise of those powers will be rare.

In the rare case where the exercise of the Royal prerogative of mercy is being considered, the Minister of Justice (as the Governor-General's adviser) may request the Commission's opinion on any matter relevant to the case.

There will be a transitional period during which applications to the Governor-General made before the establishment of the Commission are completed. The transitional arrangements in the Bill allow for such applications to be dealt with under the existing Royal prerogative powers, or transferred to the Commission if that is suitable.

Commencement

The Bill provides for the commencement date(s) to be appointed by Order in Council, and does not include a default specified date of commencement in the event that the Bill is not earlier brought into force by Order in Council.

The Bill, as with previous legislation establishing independent investigative bodies, is designed to be brought into force by Order in Council once the Commission itself is able to operate effectively. That will happen when the necessary appointments have been made, Parliament has appropriated funds to the Commission, and other key implementation decisions have been settled. The intention is for these matters to be resolved by July 2019.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>Royal Commission on Criminal Justice, <i>The Royal Commission on Criminal Justice Report</i>, (1993) https://www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice</p> <p>Neville Trendle, <i>The Royal Prerogative of Mercy: A Review of New Zealand Practice</i> (Ministry of Justice, 2003) https://www.peterellis.org.nz/docs/2003-0500_MinistryJustice_RoyalPrerogativeOfMercy-Review.htm</p> <p>Sir Thomas Thorp, <i>Miscarriages of Justice</i> (Legal Research Foundation, 2005)</p> <p>Simon Mount, <i>A Criminal Cases Review Commission For New Zealand</i> (New Zealand Law Review, 2009)</p> <p>Lissa Griffin, <i>International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission</i> (The William and Mary Bill of Rights Journal, 2013)</p> <p>The annual reports, policies and procedures of the Scottish Criminal Cases Review Commission can be found here: http://www.sccrc.org.uk/</p> <p>The annual reports, policies and procedures of the Criminal Cases Review Commission for England, Wales and Northern Ireland can be found here: https://ccrc.gov.uk/</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Criminal Cases Review Commission, Ministry of Justice. This is available at http://www.treasury.govt.nz/publications/informationreleases/ris</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Ministry of Justice provided its quality assessment process for the Criminal Cases Review Commission Regulatory Impact Assessment. The RIAT assessment team at Treasury agreed that the Ministry of Justice was well placed to consider the questions raised by the proposal to establish the Commission.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
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The Bill provides the Commission with the ability to undertake thematic inquiries. The purpose of this power is to allow the Commission to identify and examine general issues relating to miscarriages of justice that it identifies in the exercise of its functions and duties. The Commission will be required to provide a report and any recommendations to the Minister of Justice who, as soon as practicable, must table the report in the House of Representatives.

The power to undertake thematic inquiries adds a quasi-preventive function to the Commission's mandate. Commissions in other jurisdictions have been confronted by systemic issues, such as widespread material non-disclosure at trial in the United Kingdom, and that they have been instrumental in bringing issues to light and having them addressed.¹

Further, the explicit ability to report on systemic issues is a powerful means of bringing critical issues to the public's attention.

Additional resourcing will be required to enable the Commission to conduct thematic inquiries without distracting from its core mandate.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The estimated costs are outlined in the RIA, specifically section B.</p> <p>Few of the benefits of the Commission can be monetised. However, individuals who may have suffered a miscarriage of justice will directly benefit. More generally applicants will benefit, as the Commission will be able to address applications more promptly. The efficacy and transparency of the Commission is expected to increase public trust and confidence in the criminal justice system, therefore, indirectly the Commission will benefit the Government and New Zealand society.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

¹ Disclosure – Update on the CCRC's current position and programme of work, *Criminal Cases Review Commission*, 25 July 2018

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Ministry of Justice has not identified any obligations that conflict with the policies contained in the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice analysed the Bill and did not identify any adverse implications for the rights and interests of Māori protected by the Treaty of Waitangi.
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Consultation on the issues paper and the draft Bill did not include direct engagement with iwi or Māori community groups. However, a number of government agencies and external stakeholders were consulted during the policy development stage, including Te Puni Kōkiri. Implications for Māori were identified during this process and provisions in the Bill have been designed to account for these issues.
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Specifically, under the status quo, disproportionately low levels of applications are received from Māori despite disproportionate rates of imprisonment. The proportion of applications from Māori people through the current process has been estimated at between 11 – 16 percent, despite making up over 60 percent of the prison population.

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.

Consequentially, specific steps have been taken to provide the Commission with the means to try and address some of these barriers. For example, the Commission has an educative duty to increase public awareness about the work the Commission does. The intention is that this will allow the Commission to adopt tailored engagement; overseas Commissions have found this has led to material improvements in the number of applications from specific populations. Further, the Commission's power to make initial inquiries may ease the burden on applicants, particularly those who lack the resources to make an application, and may have no recourse to legal assistance or someone to champion their cause to the CCRC.
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The Commission's power to determine its own policies and procedures provides a tool for the Commission to develop these in a manner that is accessible and reflective of Māori values. In recognition of the importance of te ao Māori to the Commissions work, clause 42 requires the Minister to take this into consideration in the appointment of Commissioners.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Crown Law Office, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or report, will be accessible on the Ministry's website at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p><i>New offence</i></p> <p>Clause 34(2) of the Bill creates a new offence for someone who wilfully breaches the prohibition on disclosure of information is liable on conviction to a fine not exceeding \$20,000.</p> <p><i>The Commissions decisions cannot be appealed</i></p> <p>For completeness, there is no right of appeal of a decision of the Commission. To include a right of appeal would risk complicating the constitutional relationship between the CCRC and the courts and jeopardise the principle of finality.</p> <p>A challenge on the substance of the CCRC's determination would effectively reopen the case for appeal regardless of the outcome of the CCRC's review, and thus render the role of the CCRC moot.</p> <p>However, the Commission is encouraged to develop its own internal review procedure and judicial review is available. Having both an internal review mechanism and judicial review will, in our view, provide the necessary safeguards to ensure the CCRC's determinations are robust and lawfully made. Judicial review is an essential mechanism for maintaining the rule of law important, in that it ensures a person with an interest in a decision can challenge the lawfulness of that decision.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice has led the policy development of the Bill.</p> <p>The Ministry of Justice recognises the need for this new offence; the Commission will be dealing with inherently sensitive information, the kind of breach covered by this offence may not be captured by the Privacy Act, and the conduct is such that it is suited to the denunciatory effect of a criminal sanction.</p> <p>The Ministry is comfortable that the penalty level is reasonable and proportionate to the conduct and <i>mens rea</i> required to make out the offence.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
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The Bill provides the Commission with reasonable and proportionate information-gathering powers. It provides limited circumstances where a member of the Commission, or the Commission can disclose this information.

Clauses 31, 32 and 33 prescribe the Commission's powers to obtain information where it considers the information relevant to an investigation. The Commission must first attempt to obtain information by consent. If the Commission cannot obtain the information by consent it may require a person to provide the information, or give evidence by oath or affirmation. The Commission may copy and produce records of this information.

Existing privileges are protected by clause 37 of the Bill. This provision clarifies that the Commission cannot access privileged or confidential information that would be protected by Part 2, Subpart 8 of the Evidence Act 2003, or that is prevented from disclosure by an enactment, rule of law or court order.

If a person fails without reasonable excuse to comply with a request to provide information, or the Commission believes it should have access to information the Commission can seek a court order under clause 38 requiring the person to disclose the information.

The Commission can disclose information when it is satisfied that disclosure is reasonably necessary for a purpose listed in clause 35(2), for example in another criminal proceeding or where the person with the right to consent to disclose that information gives consent.

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted both during initial consultation on the development of the policy and in departmental consultation of the draft Bill.</p> <p>The Office of the Privacy Commissioner supported the Commission being provided with reasonable powers to obtain information, and that the preferred means of obtaining information is cooperation and consent.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Two rounds of targeted consultation have been undertaken on the proposals given effect to in this Bill. In February 2018, the Ministry of Justice 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.</p> <p>Further consultation was undertaken on the draft Bill in August 2018 particular emphasis during this round of consultation was on the language of the test for referral.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
There are Bill of Rights Act implications arising from the Bill. In particular, the information-gathering powers engage section 14 (freedom of expression) and section 21 (unreasonable search and seizure). However, the policy objective constitutes a sufficiently important objective to justify some limitations on these rights. Further, the information-gathering powers are designed in a rational and proportionate manner, ensuring the statutory parameters are reasonable.	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
Clause 44 of the Bill extends the protection from civil liability provided in sections 53 to 57 of the Crown Entities Act to include specialist advisors to the Commission. The rationale for providing specialist advisors with the same protection as Commission staff is because they will be performing a comparable role.	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Commission will perform the function currently exercised by the Governor-General under section 406 of the Crimes Act 1961.</p> <p>The Commission will be able to receive applications, investigate and refer a conviction or sentence in a criminal case back to the appeal courts when the Commission considers a miscarriage of justice might have occurred.</p> <p>Decisions on referral will be made by the Commissioners, this power cannot be delegated. The Commission will be made up of at least three and no more than seven Commissioners. At least a third of the membership of the Commission will be required to have legal qualifications, and the other two thirds of the membership also have relevant knowledge or experience in the justice system.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>The Commission is established as an Independent Crown Entity but is exempt from producing a statement of intent and statements of performance expectations. While these are important accountability and monitoring documents, they are not entirely appropriate for a body like the Commission and the core relevant information can still be set out in the Commission’s annual report.</p> <p>The Commission is also exempt from the Official Information Act 1982 in respect of information contained in any correspondence or communication that has taken place between the Commission and any person in relation to an investigation by the Commission. This is a common feature for investigative bodies in New Zealand to protect the integrity of the investigative process.</p> <p>The Commission has the power to appoint specialist advisors. These experts will ensure that relevant expertise is available to inform the Commission on specific or technical matters. Specialist advisors will not participate in the Commission’s decision-making.</p> <p>In addition to being able to receive applications to investigate a case or sentence, the Commission can make initial inquires on its own initiative. This power is limited to circumstances where the Commission is satisfied that making these inquires is in the public interest. The Commission must seek the consent of the convicted person as soon as practicable after making initial inquires, if the convicted person does not consent the Commission cannot continue inquiring into that person’s case or sentence.</p>	

Appendix One: Further Information Relating to Part Four

Other provisions that call for special comment - question 4.9

The Commission's ability to refer cases is provided in clause 17 of the Bill. The test for referral has been informed by the core principles underlying the Royal prerogative of mercy and the referral mechanisms exercised by the UK and Scottish Commissions including that:

- the courts should have an opportunity to reconsider a person's conviction or sentence if a miscarriage of justice may have occurred
- convicted persons are normally expected to exercise their rights to appeal against conviction or sentence before asking the CCRC to intervene
- the referral process is not an opportunity to simply repeat arguments or re-examine evidence that have already been considered by the courts
- what is normally required to justify referring a case is "something new" – evidence or argument – that has not previously been examined by the courts
- 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
- the CCRC should be satisfied that the case to be referred is capable of supporting an appeal.

The intention is that the test for referral signal the important underlying constitutional principles while providing the Commission's with broad discretion.