

Criminal Cases Review Commission Bill

Government Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Criminal Cases Review Commission Bill. The committee is unable to recommend that it be passed but does recommend the amendments as detailed in this report.

Bill as introduced

The bill would establish an independent Criminal Cases Review Commission to review suspected miscarriages of justice. The Commission could review convictions and sentences, and could refer them to the appeal courts if it considered it in the interests of justice to do so.

The Commission would comprise between 3 and 7 members and would be independent of other government agencies and the Government. It could consider applications from people who have been convicted of an offence, and could also initiate inquiries.

The Commission's powers would partially replace the Governor-General's Royal prerogative of mercy. The part of the prerogative that the Commission would take over is currently set out in section 406 of the Crimes Act 1961: the power to refer a person's conviction or sentence back to the appeal courts. The Governor-General would keep the other aspects of the prerogative of mercy, including the ability to grant a full pardon.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement date

Clause 2 provides that the bill would come into force on a date or dates appointed by Order in Council. The Regulations Review Committee told us that having no set commencement date in a bill creates uncertainty. The will of Parliament could be thwarted if the Executive decided not to set a commencement date.

We agree that this bill should have a specific commencement date to fall back on should there be no Order in Council. We understand that the Government expects the Commission to be operational by 1 July 2020. We recommend amending clause 2 so the bill would come into force on 1 July 2020 unless it was brought into force earlier by Order in Council.

Knowledge of te ao Māori and tikanga Māori

Clause 9 sets out the membership requirements of the Commission. It would require at least a third of Commission members to have legal qualifications and at least two thirds to have experience working in the criminal justice system or other relevant knowledge or expertise.

Clause 40 of the bill as introduced would require the Minister, when appointing Commissioners, to take account of the desirability of the Commission being able to draw on knowledge or understanding of te ao Māori (the Māori world view) from within its membership.

In our view, familiarity with te ao Māori should be required in the Commission rather than merely desirable. The requirement should also be broader than set out in clause 40. It should encompass knowledge and understanding of both te ao Māori and tikanga Māori (Māori culture and custom).

We recommend amending clause 9 to require at least one Commissioner to have knowledge or understanding of te ao Māori and tikanga Māori.

If this change is accepted, clause 40 would become redundant. We therefore recommend removing it.

Specialist advisers with cultural knowledge

Clause 10(1) would allow the Commission to appoint specialists to advise it in relation to “scientific, technical, or other matters involving particular expertise”. We understand that this is intended to include specialist advisers with cultural expertise, such as Pacific or Māori cultural experts. To avoid doubt, we recommend amending clause 10(1) to specify cultural expertise. This change would also help to emphasise the importance of cultural understanding in the Commission’s work.

Primary function should include investigating cases

Clause 11 states the Commission’s primary function. It is to review convictions and sentences and decide whether to refer them to the appeal court.

In our view, investigation of a conviction or sentence should be an inherent element of the Commission’s review function, and the bill should make this clear. We recom-

mend amending clause 11 to expressly recognise that the Commission's primary function would include investigation.

Power to initiate inquiries

Clause 12 would enable the Commission to initiate an inquiry into a general matter related to cases involving a miscarriage of justice or having the potential to give rise to such cases. Under subclause (1), the matter must have arisen while the Commission was reviewing a conviction or sentence.

We believe that the power to inquire into general matters should not be confined to issues that have come up during a Commission review. We expect that general inquiries by the Commission would occur infrequently and would be directly related to miscarriages of justice. However, the Commission should be able to initiate them when issues arose during the course of any of its work, not just during consideration of a conviction or sentence. We recommend amending clause 12(1) to allow the Commission to initiate inquiries into general matters that have arisen in the course of performing any of its functions or duties.

Procedures consistent with Treaty principles

Clause 15 would allow the Commission to regulate its own procedures, including the way it conducts interviews, interacts with victims of crime, and handles complaints. Under clause 15(3), the procedures would have to be consistent with the rules of natural justice.

We believe the bill should also make it clear that the Commission's procedures must be consistent with the principles of the Treaty of Waitangi (te Tiriti o Waitangi). The Treaty is a founding document of New Zealand. Its inclusion in clause 15 is pertinent to an underlying policy rationale of achieving equitable outcomes for Māori in relation to miscarriages of justice.

We recommend amending clause 15(3) to require the Commission's procedures to be consistent with the principles of the Treaty.

Appeal court's consideration of referred cases

If the Commission considered it in the interests of justice to do so, it would refer a conviction or sentence to an appeal court as set out in clauses 17 to 20. Under clause 20, the court would have to hear and determine the matter as if it were an appeal against the conviction or sentence.

We think it would not be appropriate for appeals referred by the Commission to be limited by an earlier appeal the convicted person might have made. We recommend amending clause 20 to make it clear that courts should treat a referral from the Commission as a first appeal against the conviction or sentence.

Requiring information or evidence

Under clauses 32 and 33, the Commission could require a person to provide information or evidence. Under clause 38 of the bill as introduced, the Commission could

apply to a District Court for an order that the person provide the information on the grounds that the person had failed, without reasonable excuse, to provide the information.

We recommend moving clause 38 so that it follows clause 33. It is more logical for it to appear as clause 33A, taking into account the changes to subsequent provisions that we recommend below. We also recommend inserting subclause (4) into clause 33A to allow the court the flexibility of making an order subject to appropriate conditions.

A person might withhold information or evidence because they believe that it is privileged or confidential under clause 37 (discussed below). We considered whether new clause 33A should be the mechanism for testing in court whether a privilege or confidentiality claim is correct.

We decided that applications under clause 33A should not be the mechanism for determining whether information or evidence is actually privileged or confidential. That mechanism should be provided separately. To do this, we recommend inserting new subclause (2) into clause 37, and new clauses 37A and 37B. We discuss this in more detail below.

Disclosure of information gathered by the Commission

Clauses 34 to 36 provide for the protection of information that the Commission might gather during an investigation. Clause 35 sets out when the Commission might disclose that information. The circumstances are set out in clause 35(2). They include the requirement that disclosure must be reasonably necessary for matters such as:

- for the purposes of a criminal, disciplinary, or civil proceeding
- to assist in dealing with a matter relating to the exercise of the Royal prerogative of mercy
- in connection with the performance or exercise of the Commission's functions, duties, or powers.

The bill as introduced does not explicitly allow the Commission to disclose information in order to prevent or lessen a threat to public health and safety. However, this type of disclosure would be permitted under the Privacy Act 1993, Information Privacy Principle 11(f).

Provisions about the disclosure of information should be consistent with the Privacy Act. We recommend inserting new paragraph (g) into clause 35(2) to allow disclosure if it would prevent or lessen a serious threat (as defined in section 2(1) of the Privacy Act) to public health or safety or an individual's life or health.

Protection of information that is privileged or confidential

Clause 37 would enable people to withhold certain information from the Commission. Under clause 37(a) as introduced, no one would have to disclose to the Commission any communication or information which would be protected under Part 2, subpart 8 of the Evidence Act 2006 if the disclosure was made in a proceeding.¹ Under clause

37(b), a communication or information could be withheld if disclosure was prohibited by an enactment, a rule of law, or a court order.

Examples of protected information under the relevant provisions of the Evidence Act are:

- communications between a lawyer and client (section 54)
- information told in confidence to a minister of religion for the purpose of spiritual advice, benefit, or comfort (section 58)
- information that would be likely to incriminate the person who is being asked to provide it (section 60)
- information about the identity of a journalist's source (section 68).

We propose several changes to the bill in relation to privileged or confidential information. It should set out more detail about how the Commission's powers to gather information would interact with the Evidence Act, including provision for the courts to disallow claims of privilege or confidentiality.

First, we recommend providing separately for claims of confidentiality and privilege by removing reference to confidentiality from clause 37 and inserting new clauses 37C to 37G to provide for confidential communications and information. We recommend amending clause 37 so that it would apply only to sections 54 to 60 and section 64 of the Evidence Act.

Privileged information

As mentioned earlier, we recommend inserting new subclause (2) into clause 37 and inserting new clauses 37A and 37B. These new provisions would provide a way to test whether a person is correct in claiming that information is privileged.

Under new clause 37A, a District Court Judge could decide that the information was not privileged and should be disclosed to the Commission. Under new clause 37B, even if the Judge determined that the information was privileged, they could make an order disallowing the claim of privilege and requiring the information to be given to the Commission. This decision would be based on the two criteria in clause 37B(1)(b). The first is that the information is necessary to the Commission's referral decision. The second is that the interests protected by withholding the information are outweighed by the importance of the information to the Commission's decision about whether to refer a case to the appeal courts.

Confidential information

We recommend inserting clauses 37C to 37F to specify how sections 68, 69, and 70 of the Evidence Act would apply. These are about, respectively, the protection of a journalist's sources, the overriding discretion about confidential information, and the

¹ Part 2, subpart 8 of the Evidence Act contains sections 51 to 70.

discretion as to matters of State. Our proposed new clauses mirror the provisions in the Evidence Act.

We recommend inserting new clause 37G to enable the Judge to see the information in question if required. We also recommend allowing them, in new clause 37G(2), to make an order subject to any conditions they think appropriate. This is consistent with our new clause 33A(4) and like provisions in other legislation.

Protections for those referred to in the information

We recommend inserting clause 37H to ensure that a person with a privilege that is disallowed under the bill (such as a client in the lawyer–client relationship) could not have the information used against them in proceedings in New Zealand. We also recommend inserting clause 37I to protect the person who had to provide the information by confirming that disclosure would not constitute a breach of a non-disclosure obligation that would otherwise apply.

We recommend inserting clause 37J to provide that these applications are civil proceedings and to make clear which legislation and court rules would apply.

Commission should prepare statements of intent and performance expectations

Clauses 43 and 44 in the bill as introduced would exempt the Commission from certain requirements in the Crown Entities Act 2004. Clause 43 would exempt it from having to prepare a statement of intent. Clause 44 would exempt it from having to prepare a statement of performance expectations.

We believe that these exemptions could limit Parliament’s ability to adequately monitor the Commission’s performance. Also, these two documents could help in the Commission’s planning and accountability processes and help it meet statutory requirements and established monitoring processes. In our view, the Commission should have to prepare statements of intent and performance expectations.

Sections 145(d) and 149H(d) of the Crown Entities Act allow the Minister responsible for a Crown entity to change statements of intent and performance expectations. Although the Minister responsible for the Commission could be involved in setting its strategic direction, we do not believe that he or she should be able to change the statements after the Commission has finalised them.

We therefore recommend removing clauses 43 and 44 from the bill as introduced and inserting new clause 43. This would require the Commission to prepare statements of intent and performance expectations but would not allow the responsible Minister to change final statements of intent and performance expectations.

Additional matter for inclusion in annual report

It was submitted that the Commission should have to report yearly about the extent to which it has engaged with marginalised groups. We agree that this would be useful

and we believe the information should be included in the Commission's annual report.

We recommend inserting new clause 44 to require the Commission to include in its annual report information on how, and the extent to which, it engaged with groups that appear to be disproportionately affected by the criminal justice system. Clause 44 would also require information on any initiatives the Commission had undertaken with respect to these groups.

National Party view

National members do not support the passage of the bill as they do not consider that establishing a Commission is the best method of addressing concerns regarding the criminal justice system.

National members believe that the Government should consider reforming existing structures of criminal justice in the first instance.

The primary function of the Commission (and hence the bill, in establishing the Commission) is to provide a mechanism for reviewing suspected miscarriages of justice. Of course the right to appeal the outcome of any given case already exists in the legal architecture. While a problem may well exist regarding a lack of access to criminal justice, by certain sectors of society in particular, there appears to be no good reason that accessibility issues cannot be addressed in other ways. An example would be better publicising of opportunities afforded by the Royal prerogative of mercy.

The secondary function of the Commission is to facilitate inquiries into "general matters". National members note, however, that several different agencies of government already possess such an ability, including the Law Commission, relevant Parliamentary select committees, and the Government of the day (by various possible means).

National members have also expressed reservations about certain aspects of the bill's design. One is the lack of consideration given to victims' rights and interests. For example, no acknowledgement appears to have been made of the fact that adding appeal rights to convicted criminals comes with a cost to victims who may be forced to undergo the ordeal of providing testimony on additional occasions. Another aspect of the Commission's establishment that National members find unsatisfactory can be found at clause 9 of the bill ("Membership of Commission"). There is no requirement that the Commission's membership include any New Zealand-qualified lawyers, nor any that have practised in the criminal legal jurisdiction.

National members believe that the select committee's consideration of the bill has been a useful exercise (for example, providing an opportunity to clarify the relationship of the Commission's workings to the provisions of the Evidence Act) but feel unable to support the passage of the bill at this stage, for the reasons outlined above.

Appendix

Committee process

The Criminal Cases Review Commission Bill was referred to the committee on 25 October 2018. The closing date for submissions was 7 January 2019. We received and considered 33 submissions from interested groups and individuals. We heard oral evidence from 8 submitters.

We received advice from the Ministry of Justice. The Regulations Review Committee wrote to us about the powers contained in clause 2.

Committee membership

Hon Meka Whaitiri (Chairperson)

Ginny Andersen

Hon Clare Curran

Hon Tim Macindoe

Hon Mark Mitchell

Greg O'Connor

Chris Penk

Hon Dr Nick Smith

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Andrew Little

Criminal Cases Review Commission Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Criminal Cases Review Commission Act **2018**.

2 Commencement

This Act comes into force on a date appointed by the Governor-General by Order in Council, and 1 or more Orders in Council may be made bringing different provisions into force on different dates. 5

- (2) To the extent that it is not previously brought into force under **subsection (1)**, the rest of this Act comes into force on 1 July 2020.

Part 1 10
Preliminary provisions

3 Purpose of this Act

The purpose of this Act is to establish an independent body to review criminal convictions and sentences and decide whether to refer them under the Act to an appeal court. 15

4 Interpretation

In this Act, unless the context otherwise requires,—

appeal court means the court specified in **section 18** to which the Commission may refer a conviction or sentence

Chief Commissioner means the Chief Commissioner appointed under **section 9** 20

Commission means the Criminal Cases Review Commission established by **section 7**

Deputy Chief Commissioner means the Deputy Chief Commissioner appointed under **section 9** 25

eligible person means a living person who has been convicted of an offence **information**, in relation to an investigation, includes matters of opinion based on the specialist knowledge or skill of an expert in relation to those matters, as well as matters of fact

responsible Minister means the Minister who, under the authority of any warrant or with the authority of the Prime Minister, is the person for the time being responsible for the administration of this Act 30

sentence has the same meaning as in section 212 of the Criminal Procedure Act 2011

specialist adviser means a specialist adviser appointed under **section 10**.

5 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 5

6 Act binds the Crown

This Act binds the Crown.

Part 2

Criminal Cases Review Commission

10

Subpart 1—Establishment and appointments

7 Criminal Cases Review Commission established

The Criminal Cases Review Commission is established.

8 Commission is Crown entity

(1) The Commission is a Crown entity for the purposes of the Crown Entities Act 2004. 15

(2) The Crown Entities Act 2004 applies to the Commission except to the extent that this Act expressly provides otherwise.

(3) *See* **subpart 7**, which contains provisions relating to how certain provisions of the Crown Entities Act 2004 apply to the Commission. 20

9 Membership of Commission

(1) The Commission must have the following members:

(a) a Chief Commissioner:

(b) a Deputy Chief Commissioner:

(c) at least 1 and not more than 5 other Commissioners. 25

(1A) At least 1 member of the Commission must have knowledge or understanding of te ao Māori and tikanga Māori.

(2) At least one-third of the members must be legally qualified.

(3) At least two-thirds of the members must have experience in working in the criminal justice system or have other knowledge or expertise relevant to the Commission's functions and duties, which may include experience, knowledge, or expertise acquired overseas. 30

(4) A person is **legally qualified** for the purposes of **subsection (2)** if the person—

- (a) has held a practising certificate as a barrister or as a barrister and solicitor for not less than 7 years; or
- (b) has been admitted as a barrister, solicitor, barrister and solicitor, advocate, or attorney by a senior court in another country and has practised as such in that country for not less than 7 years.

5

10 Specialist advisers

- (1) The Commission may appoint qualified persons, as required, to assist the Commission with any of its functions or duties by giving advice in relation to cultural, scientific, technical, or other matters involving particular expertise.
- (2) A specialist adviser is subject to the same obligations of confidentiality as members and employees of the Commission under **section 34**. 10
- (3) Advice given by a specialist adviser is information provided to the Commission for the purposes of **sections 35 to 37** and is subject to those provisions.

Subpart 2—General provisions relating to functions, duties, and powers

11 Primary function

15

The primary function of the Commission is to investigate and review convictions and sentences and decide whether to refer them to the appeal court under **section 17**.

12 Commission's power to initiate inquiries into general matter

- (1) This section applies if the Commission, in the course of ~~reviewing a conviction or sentence~~ performing its functions and duties under this Act, identifies a practice, policy, procedure, or other matter of a general nature that it considers may be related to cases involving a miscarriage of justice or has the potential to give rise to such cases. 20
- (2) The Commission may conduct an inquiry into the matter on its own initiative if it is satisfied that an inquiry is in the public interest. 25
- (3) The Commission must provide a written report on the inquiry, including the Commission's findings and any recommendations it may wish to make, to the Minister of Justice.
- (4) The Minister of Justice, as soon as practicable after receiving the report, must present it to the House of Representatives. 30

13 Duty to promote public awareness of functions

The Commission must carry out the activities it considers necessary to make its functions known to, and understood by, the public.

14 Powers of Commission

35

The Commission has and may exercise all powers necessary for performing its functions and duties.

- 15 Commission may regulate own procedures**
- (1) Subject to this Act, the Commission may regulate its own procedures for performing its functions and duties as the Commission considers appropriate including, without limitation, its procedures for—
- (a) obtaining information: 5
 - (b) conducting interviews or examinations, or taking evidence by other means, including on oath or affirmation:
 - (c) disclosing information obtained in the course of an investigation:
 - (d) giving its opinion to the Minister of Justice under **section 29**:
 - (e) notifying and interacting with victims of crime, where appropriate, when considering a conviction or sentence: 10
 - (f) handling any complaints to the Commission about its actions, processes, or procedures.
- (2) The Commission’s powers under this section include, without limitation, the power to specify how a person may make an application to the Commission. 15
- (3) The Commission’s procedures must be consistent with the rules of natural justice and the principles of the Treaty of Waitangi (te Tiriti o Waitangi).
- (4) The Commission must make its procedures publicly available, in the manner it considers appropriate.
- 16 Manner in which Commission must act** 20
- The Commission must act independently, impartially, and fairly in performing its functions and duties and exercising its powers under this Act.

Subpart 3—Commission’s primary function

Key provisions

- 17 Ground for referring conviction or sentence to appeal court** 25
- (1) The Commission may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so.
- (2) In deciding whether to refer a conviction or sentence, the Commission must have regard to— 30
- (a) whether the eligible person has exercised their rights of appeal against the conviction or sentence; and
 - (b) the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence; and 35
 - (c) the prospects of the court allowing the appeal; and

(d) any other matter that the Commission considers relevant.

18 Appeal court to which conviction or sentence may be referred

- (1) The appeal court to which a conviction may be referred is—
- (a) the High Court, if the eligible person’s right of first appeal against a conviction under subpart 3 of Part 6 of the Criminal Procedure Act 2011 is to the District Court or the High Court; or 5
- (b) otherwise, the Court of Appeal.
- (2) The appeal court to which a sentence may be referred is—
- (a) the High Court, if the eligible person’s right of first appeal against a sentence under subpart 4 of Part 6 of the Criminal Procedure Act 2011 is to the District Court or the High Court; or 10
- (b) otherwise, the Court of Appeal.

19 Commissioner must give appeal court reasons for referral

The Commission, when referring a conviction or a sentence to the appeal court, must give the court a statement of its reasons for the referral. 15

20 Hearing and determination of appeal

The appeal court to which the Commission refers a conviction or sentence must hear and determine the matter as if it were ~~an~~ a first appeal against the conviction or sentence.

Subpart 4—Applications to Commission to refer convictions and sentences 20

Persons who may apply, etc

21 Who may apply

An eligible person or a representative may apply to the Commission for it to refer a conviction or sentence to the appeal court. 25

22 How application may be made

An application may be made in the manner required by the Commission.

23 Commission may accept application made in representative capacity

The Commission may accept an application made by a person in a representative capacity if the Commission is satisfied that the person is authorised to act as the eligible person’s representative. 30

*Commission's decision-making powers, etc, relating to applications***24 Commission may decide to take no action in relation to application**

The Commission may decide to take no action, or take no further action, in relation to an application if—

- (a) the eligible person no longer wishes the application to proceed; or 5
- (b) the eligible person dies; or
- (c) in the Commission's opinion, the application is frivolous, vexatious, or otherwise not made in good faith; or
- (d) for any other reason, the Commission believes that it is unnecessary or inappropriate for it to take any action or further action. 10

25 Commission may decide to investigate

- (1) The Commission may decide to investigate the conviction or sentence to which an application relates.
- (2) *See* **subpart 2** (which provides for the Commission's powers and duties concerning investigations) and **subpart 6** (which provides for the protection of information gathered as part of the Commission's investigations). 15

26 Commission must notify its decision on application for referral

- (1) The Commission must, as soon as practicable after making a decision under **section 17 or 24**, give written notice of the decision, with the reasons or a summary of the reasons for the decision, to— 20
 - (a) the eligible person; and
 - (b) if the application was made by a representative on behalf of the eligible person, the representative.
- (2) The Commission must, as soon as practicable after notifying those persons, make its decision, and the reasons or a summary of the reasons, publicly available in the manner that the Commission considers appropriate. 25

*Commission's power to act on own initiative***27 Commission's power to make initial inquiries on its own initiative**

- (1) The Commission may make initial inquiries into a conviction or sentences on its own initiative if it is satisfied that those inquiries are in the public interest. 30
- (2) As soon as practicable after starting to make any initial inquiries under this section, the Commission must—
 - (a) notify the eligible person that the Commission has started making those inquiries; and

- (b) ask that person if they consent to the Commission investigating the conviction or sentence as if they had applied to the Commission to refer the conviction or sentence to the appeal court.
- (3) If the eligible person does not consent, the Commission must not investigate further and cannot exercise its power to refer the conviction or sentence to the appeal court under **section 17**. 5
- (4) In this section, **initial inquiries** means investigative actions that do not involve the Commission exercising of any of its powers under **sections 32 and 33**.
- Subpart 5—Commission’s functions relating to Royal prerogative of mercy 10
- 28 Governor-General may transfer applications for exercise of Royal prerogative to Commission**
- (1) The Governor-General may transfer an application for the exercise of the Royal prerogative of mercy to the Commission if the Governor-General considers that the application is sufficiently connected with the Commission’s primary function or would more appropriately be dealt with as part of that function. 15
- (2) The Commission must treat an application transferred to it under this section as if it were an application to the Commission made under **subpart 4**.
- (3) The provisions of this Act apply accordingly.
- 29 Advisory function in relation to applications for exercise of Royal prerogative of mercy** 20
- (1) The Minister of Justice may ask the Commission to provide an opinion on any matter arising in relation to the Royal prerogative of mercy.
- (2) The Commission must provide that opinion, in writing, to the Minister of Justice. 25
- (3) The Commission may exercise its powers under this Act, including its investigative powers under **subpart 6**, in relation to the request.
- 30 Exercise of Royal prerogative of mercy not affected**
- Nothing in this Act limits or affects the Royal prerogative of mercy.
- Subpart 6—Commission’s investigative powers, protection of information gathered, privileged or confidential information, etc 30
- Investigative powers*
- 31 Powers of investigation: general**
- (1) The Commission may investigate a conviction or sentence under this Act as it considers appropriate. 35

- (2) In investigating a matter, the Commission may obtain from any person, under **sections 32 and 33**, any information that the Commission considers relevant to an investigation if the Commission—
- (a) has taken reasonable steps to obtain the information by consent; and
 - (b) considers that the information is unlikely to be obtained by the Commission through any means other than under those sections. 5
- (3) **Subsection (2)** does not affect the ability of the Commission to access court documents in accordance with the rules of practice and procedure applying to the relevant court.
- 32 Commission may require person to give information** 10
- (1) The Commission may, by written notice, require a person to—
- (a) produce documents or things that the person may hold and that may be relevant to the investigation; and
 - (b) provide information in writing.
- (2) The Commission may examine and make copies, take photographs, or create other records of documents or things produced or information provided under **subsection (1)**. 15
- (3) Subject to **section 37**, a person must comply with a notice given under this section.
- 33 Commission may require person to give evidence on oath or affirmation** 20
- (1) The Commission may take evidence from a person by—
- (a) requiring the person, by written notice, to appear before the Commission to be examined on oath or affirmation:
 - (b) requiring the person, on appearing before the Commission, to answer questions on oath or affirmation: 25
 - (c) permitting the person to give the evidence by any other means approved by the Commission and requiring the person to verify that evidence on oath or by affirmation.
- (2) Subject to **section 37**, a person must comply with a requirement to—
- (a) appear before the Commission under **subsection (1)(a)**: 30
 - (b) answer questions under **subsection (1)(b)**;
 - (c) verify evidence given to the Commission under **subsection (1)(c)**.

Enforcement orders

33A Court may make orders for failure to comply with requirements

- (1) The Commission may apply to the District Court for orders against a person on the grounds that they have failed without reasonable excuse to comply with a requirement under **section 32 or 33**. 35

- (2) The court may, on the application of the Commission, make either or both of the following orders if the court is satisfied that the person has failed without reasonable excuse to comply with the requirement:
- (a) an order directing the person to comply with the requirement specified in the notice: 5
- (b) any other order that the court considers appropriate.
- (3) The court may require a person to produce documents or provide other information to the court for the purposes of determining an application under this section.
- (4) The court may make an order under this section subject to any conditions the court thinks appropriate. 10

Protection of information gathered

34 Prohibition on disclosure of information unless authorised

- (1) A person who is, or has been, a member or an employee of the Commission, or a person appointed as a specialist adviser to the Commission, must not disclose any information obtained by the Commission unless the disclosure is authorised under **section 35**. 15
- (2) A person who wilfully contravenes **subsection (1)** commits an offence and is liable on conviction to a fine not exceeding \$20,000.
- (3) This section does not affect an individual's entitlement to request access to information under information privacy principle 6 of the Privacy Act 1993. 20

35 Authorised disclosures of information

- (1) The disclosures specified in **subsections (2) and (3)** are authorised and may be made at the discretion of the Commission and other persons as specified in those provisions. 25
- (2) The Commission may disclose information, or a member of the Commission may authorise the disclosure of information, if satisfied that the disclosure is reasonably necessary—
- (a) for the purposes of a criminal, disciplinary, or civil proceeding; or
- (b) in order to assist in dealing with any matter relating to the exercise of the Royal prerogative of mercy; or 30
- (c) in order to assist in dealing with any official inquiry or review relating to a person's conviction or sentence or with any official assessment of whether such an inquiry or review is desirable; or
- (d) as part of a statement or report required to be made or provided under this Act; or 35
- (e) in connection with the performance or exercise of the Commission's functions, duties, or powers; or

- (f) for the purposes of the Police or any other enforcement authority investigating an offence or deciding whether to prosecute an offence, provided that the disclosure is not, or would not be, prevented by some obligation of secrecy or limitation on disclosure (including an obligation or limitation imposed by an enactment) other than the obligation imposed by **section 34**; or 5
- (g) in order to prevent or lessen a serious threat (as defined in section 2(1) of the Privacy Act 1993) to—
- (i) public health or public safety; or
 - (ii) the life or health of any individual. 10
- (3) The Commission may disclose information, or a member of the Commission may authorise the disclosure of information, if a person with the right to consent to disclosure of that information gives that consent.
- (4) A member or an employee of the Commission, or a specialist adviser to the Commission, may disclose information to any other member or employee of, or specialist adviser to, the Commission, for the purpose of performing their functions or duties or exercising their powers in that capacity. 15

36 Application of Official Information Act 1982

Nothing in the Official Information Act 1982 applies to any communication that has taken place between a member or an employee of the Commission and any person in relation to an investigation by the Commission. 20

Privileged and confidential communications and information

37 ~~Privileged or confidential information~~

- (1) Nothing in this Act requires a person to disclose to the Commission any communication or information— 25
- (a) to which any of the protections of ~~privilege or confidentiality~~ recognised in ~~subpart 8 of Part 2~~ sections 54 to 60 or 64 of the Evidence Act 2006 would apply ~~if the disclosure were made~~ in a proceeding; or
 - (b) where such disclosure is prevented by an enactment, a rule of law, or an order of a court prohibiting or restricting disclosure or the manner of disclosure. 30
- (2) If a person claims that a communication or information is protected or prevented from disclosure under **subsection (1)**, the Commission may apply to a District Court Judge for any 1 or more of the following orders:
- (a) an order determining whether the person's claim is valid; 35
 - (b) an order for disclosure under **section 37A**;
 - (c) an order disallowing the person's claim under **section 37B**.

37A Order for disclosure

If the Judge determines that a communication or information is not protected or prevented from disclosure under **section 37(1)** the Judge may make any further order the Judge thinks necessary to ensure that the communication or information is disclosed to the Commission.

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37B Power of Judge to disallow privilege, etc

(1) The Judge may, despite determining that a communication or information is protected or prevented from disclosure under **section 37(1)**, order that the communication or information be disclosed to the Commission if the Judge is satisfied—

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(a) that section 67(1) of the Evidence Act 2006 would apply were the claim to privilege to have been made in a proceeding; or

(b) the following criteria apply:

(i) evidence of the communication or information is necessary to enable the Commission to decide whether to refer a person's conviction or sentence to the appeal court under **section 17**; and

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(ii) the importance of the communication or information to the Commission's decision outweighs the interests that are protected by withholding the communication or information.

(2) This section does not apply to a communication or information to which a protection of privilege under section 60 of the Evidence Act 2006 (privilege against self-incrimination) applies.

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*Confidentiality***37C Protection of journalists' sources**

Section 68 of the Evidence Act 2006 applies in respect of a journalist and their employer—

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(a) as if every reference in that section to—

(i) a civil or criminal proceeding were a reference to an investigation under this Act; and

(ii) a party were a reference to the Commission; and

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(iii) the Judge were a reference to a Judge of the High Court; and

(b) with any other necessary modifications.

37D Overriding discretion as to confidential information

Section 69 of the Evidence Act 2006 applies in respect of a communication and the information identified in subsection (1) of that section—

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(a) as if every reference in that section to—

- (i) a proceeding were a reference to an investigation under this Act; and
- (ii) to the Judge were a reference to a Judge of the District Court; and
- (b) with any other necessary modifications.

37E Discretion as to matters of State 5

Section 70 of the Evidence Act 2006 applies in respect of a communication or information relating to matters of State—

- (a) as if every reference in that section to—
 - (i) a proceeding were a reference to an investigation under this Act; and 10
 - (ii) to the Judge were a reference to a Judge of the District Court; and
- (b) with any other necessary modifications.

37F Who may apply for orders or directions under sections 37C to 37E

An application for an order under **section 37C** or directions under **sections 37D or 37E** may be made by the Commission or by the person claiming that they are not compellable to disclose the relevant communication or information to the Commission. 15

37G General powers of Judge for purposes of provisions concerning privilege and confidentiality

- (1) A Judge may, for the purposes of considering an application or otherwise exercising a power under **sections 37 to 37B, 37D, or 37E**, require a person to produce documents or provide other information to the Judge. 20
- (2) An order, direction, or requirement made or given under **subsection (1)** or the sections referred to in that provision may be subject to any conditions the Judge thinks appropriate. 25

Protections for holders of privilege and persons required to disclose

37H Claims of privilege disallowed: protection for holder of privilege against use of information, etc, in proceedings

Any communication or information disclosed as a result of disallowance of a claim of privilege conferred by any sections 54 to 59 and 64 of the Evidence Act 2006, and any information derived from that disclosure, cannot be used against the holder of the privilege in a proceeding in New Zealand. 30

37I Protection for persons required to disclose information, etc

Where a person discloses a communication or information in compliance with an order of a Judge and any of **sections 37 to 37E**, the person does not breach the relevant obligation of non-disclosure that would otherwise apply in respect of that communication or information. 35

*Miscellaneous provisions***37J Applications for orders under this subpart are civil proceedings for purposes of District Court Act 2016, High Court Act 2016, etc**

- (1) An application to a District Court Judge for an order under this subpart is a civil proceeding for the purposes of the District Court Act 2016 and rules made under that Act. 5
- (2) An application to a High Court Judge under **section 37C** is a civil proceeding for the purposes of the Senior Courts Act 2016 and the High Court Rules 2016.

Subpart 7—Miscellaneous provisions

Enforcement orders 10**38 Court may make orders for failure to comply with requirements**

- (1) ~~The Commission may apply to the District Court for orders against a person on the grounds that they have failed without reasonable excuse to comply with a requirement under **section 32 or 33**.~~
- (2) ~~The District Court may, on the application of the Commission, make either or both of the following orders if the court is satisfied that the person has failed without reasonable excuse to comply with the requirement:~~ 15
- (a) ~~an order directing the person to comply with the requirement specified in the notice:~~
- (b) ~~any other order that the court considers appropriate.~~ 20
- (3) ~~The District Court may require a person to produce documents or provide other information to the court for the purposes of determining an application under this section.~~

*Provisions relating to application of Crown Entities Act 2004***39 Commission members' legal status for purposes of Crown Entities Act 2004** 25

- (1) The members of the Commission are the board for the purposes of the Crown Entities Act 2004.
- (2) The Chief Commissioner holds office as chairperson of the board for the purposes of the Crown Entities Act 2004, for the same term as that person holds office as Chief Commissioner. 30
- (3) The Deputy Chief Commissioner holds office as deputy chairperson of the Board for the purposes of the Crown Entities Act 2004 for the same term as that person holds office as Deputy Chief Commissioner.

- 40** ~~**Application of section 29 of Crown Entities Act 2004**~~
 Without limiting section 29 of the Crown Entities Act 2004 (criteria for appointments and recommendations by responsible Minister), the Minister, in appointing or recommending appointments, must take into account the desirability of the Commission being able to draw on knowledge or understanding of te ao Māori (the Māori world view) from within its membership. 5
- 41** **Limitation on power to delegate**
 Despite section 73 of the Crown Entities Act 2004 (ability to delegate), the Commission must not delegate the performance of its function of referring a conviction or sentence to the appeal court under **section 17** of this Act. 10
- 42** **Immunities**
- (1) Sections 120 to 126 of the Crown Entities Act 2004 apply to the Commission and the Commission's members, employees, and specialist advisers.
- (2) This section is for the avoidance of doubt.
- 43** ~~**Exemption from requirement to prepare statement of intent**~~ 15
 The Commission is exempted from the requirements of sections 139 and 139A of the Crown Entities Act 2004 (obligation to prepare statement of intent).
- 44** ~~**Exemption from requirements concerning statement of performance expectations**~~
 The Commission is exempted from the requirements of section 149C and all related provisions of the Crown Entities Act 2004 concerning statements of performance expectations. 20
- 43** **Certain provisions relating to statement of intent and statement of performance expectations do not apply**
- (1) Sections 145(d) and 147 of the Crown Entities Act 2004 do not apply in relation to the Commission's statement of intent. 25
- (2) Section 149H(d) and 149J of the Crown Entities Act 2004 do not apply in relation to the Commission's final statement of performance expectations.
- 44** **Report on additional matter to be included annual report**
The Commission's annual report under section 150 of the Crown Entities Act 2004 must include a report on how, and the extent to which, the Commission in performing its functions and duties has engaged with groups that appear to be disproportionately affected by the criminal justice system, including information on any initiatives it has undertaken with respect to such groups. 30

Amendments to other Acts

45 Amendments to other enactments

The enactments referred to in **Schedule 2** are amended as set out in that schedule.

Schedule 1

Transitional, savings, and related provisions

s 5

Part 1

Provisions relating to this Act as enacted

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1 Interpretation

In this Part, **commencement date** means the date on which ~~subpart 1 of Part 2~~ of this Act **section 21** comes into force under **section 2**.

2 Application of Act to past convictions and sentences

To avoid doubt, this Act applies to convictions entered and sentences imposed before the commencement date. 10

3 Existing applications for exercise of Royal prerogative of mercy

(1) This clause applies if, before the commencement date, the Governor-General has received, but not determined, an application for the exercise of the Royal prerogative of mercy. 15

(2) The Governor-General may exercise the powers under section 406 of the Crimes Act 1961, and that section and section 406A of that Act apply accordingly as if they had not been repealed by this Act.

(3) The Minister of Justice may ask the Commission for its opinion on a matter arising in relation to the application, and the Commission must treat that request as if it were a request for an opinion under **section 29(1)**. 20

(4) The Governor-General may transfer the application to the Commission to be dealt with as an application for referral to the appeal court under this Act.

(5) The Commission must treat an application transferred to it under **subclause (4)** as if it were an application for a referral under **section 21**. 25

4 Existing references of matters to appeal court under section 406(1) of Crimes Act 1961

(1) This clause applies if, before the commencement date, the Governor-General has—

(a) referred the question of a conviction or sentence to the Court of Appeal or to the High Court for hearing and determination under section 406(1)(a) of the Crimes Act 1961; or 30

(b) referred a point arising in the case to the Court of Appeal for its opinion under section 406(1)(b) of the Crimes Act 1961.

- (2) The court to which a matter has been referred may hear and determine the question or give its opinion (as the case may be) as if section 406 of the Crimes Act 1961 had not been repealed by this Act.
- (3) **Section 12(2)(f)** of the Victims' Rights Act 2002 as in force immediately before the commencement date applies in relation to the question of a conviction or sentence referred to the court under section 406(1)(a) of the Crimes Act 1961. 5
- (4) Section 406A of the Crimes Act 1961 applies in relation to the court's determination on a referral as if that section had not been repealed.

Schedule 2

Amendments to other enactments

s 45

Crimes Act 1961 (1961 No 43)

Repeal sections 406 and 406A. 5

Crown Entities Act 2004 (2004 No 115)

In Schedule 1, Part 3, insert in its appropriate alphabetical order:

Criminal Cases Review Commission

Legal Services Act 2011 (2011 No 4)

After section 6(d), insert: 10

- (e) applications to the Criminal Cases Review Commission under **section 21** of the Criminal Cases Review Commission Act **2018**.

Official Information Act 1982 (1982 No 156)

In Schedule 1, insert in its appropriate alphabetical order:

Criminal Cases Review Commission 15

Victims' Rights Act 2002 (2002 No 39)

Replace section 12(2)(f) with:

- (f) any referral of the conviction or sentence by the Criminal Cases Review Commission under **section 17** of the Criminal Cases Review Commission Act **2018**. 20

Legislative history

27 September 2018
25 October 2018

Introduction (Bill 106–1)
First reading and referral to Justice Committee