Hon Andrew Little
Minister of Justice

Proactive release – Criminal Cases Review Commission Bill: second Cabinet Paper decisions

Date of issue: 17 February 2020

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1.	**Amendments to the Criminal Cases Review Commission Bill** *Cabinet paper* Office of the Minister of Justice 24 July 2019	Some information has been withheld in accordance with section 9(2)(j) of the OIA to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).
2.	**Amendments to the Criminal Cases Review Commission Bill** *Cabinet Minute* Cabinet Office Meeting date: 24 July 2019	Some information has been withheld in accordance with section 9(2)(j) of the OIA to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).

In confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

Amendments to the Criminal Cases Review Commission Bill

Proposal

1 This paper seeks Cabinet's approval for amendments to the Criminal Cases Review Commission Bill (the Bill).

2 s9(2)(j) [redacted]

Executive Summary

3 The Government has committed to establishing a CCRC. Cabinet gave policy approvals for the CCRC on 6 August 2018. The Bill was introduced on 27 September 2018 and referred to the Justice Committee on 25 October 2018.

4 The establishment of the CCRC is strongly supported by submitters on the Bill.

5 Several useful amendments to the Bill have been identified by submitters and officials. I propose that Cabinet agree to several relatively substantive changes, including:

5.1 setting a fall-back commencement date for the Bill of 1 July 2020;

5.2 allowing the court to order disclosure of privileged and confidential information to the CCRC on limited grounds; and

5.3 amending the clauses in the Bill that exempt the CCRC from preparing a statement of intent and statement of performance expectations.

6 Other worthwhile, but more technical, changes are also highlighted in this paper.

7 I also seek to provide submitters, officials and the public with certainty about the timeline for establishing the CCRC. s9(2)(j) [redacted]

7.1 s9(2)(j) [redacted]

7.2 s9(2)(j) [redacted]

Background

8 The Government has committed to establishing a CCRC as part of the Coalition Agreement between the Labour Party and New Zealand First. Cabinet gave policy approvals for the CCRC on 6 August 2018, subject to decisions made in Budget 2019 (CAB-18-MIN-0370 refers). At that time, I indicated that it was my intention for the CCRC to be operational by July 2019.

9 The Bill was introduced on 27 September 2018 and was referred to the Justice Committee on 25 October 2018.

10 The Justice Committee was originally scheduled to report back to the House on 25 April 2019, but this was extended to 31 July 2019 due to significant pressures on them. I have written to the Justice Committee to advise that officials will now provide the departmental report on the Bill on 6 August 2019 and to indicate my support for a further extension, to allow Cabinet to consider the changes proposed in this paper.

11 Submissions on the Bill have been strongly supportive of establishing a CCRC. Most of the provisions of the Bill have received expressions of support. A number of substantive and technical amendments have also been proposed by submitters.

Proposed amendments to the Bill

12 Two amendments proposed by submitters, and another change identified by officials, are relatively substantive. In my view, Cabinet agreement to these changes would be beneficial at this stage.

13 Other possible changes are under consideration, but these are generally minor and technical in nature and do not require additional policy approvals. For completeness, however, I have outlined some of the more notable of these technical changes below at paragraphs 40 – 43.

Setting a fall-back commencement date for the Bill

14 Clause 2 is the commencement clause which states that the Act comes into force on a date appointed by the Governor-General by Order in Council, and that one or more Orders in Council may be made bringing different provisions into force on different dates.

15 The explanatory note to the Bill states that, as with previous legislation establishing independent investigative bodies, this Bill is designed to be brought into force by Order in Council once the CCRC is able to operate effectively. That will happen when the necessary appointments have been made, Parliament has appropriated funds to the CCRC, and other key implementation decisions have been settled. The intention was for these matters to be resolved by July 2019, though this is no longer feasible.

16 The Regulations Review Committee wrote to the Justice Committee expressing concern that clause 2 of the Bill does not currently provide a “fall-back” commencement date for the legislation to come into force at a specified time.

17 The concern with clause 2 having no fall-back commencement date is that the will of Parliament could be thwarted by an executive that no longer supports the policies of the legislation, or that there could be large amounts of latent legislation created over time, creating uncertainty. The Regulations Review Committee considered that the

Departmental Disclosure Statement did not make it sufficiently clear why there could not be a specific commencement date.

18 I acknowledge the Regulations Review Committee's concerns and agree that it is preferable for the Bill to have a fall-back commencement date.

19 I therefore propose to incorporate a provision in the Bill that it be brought into force automatically on 1 July 2020, unless it is earlier brought into force by Order in Council.

20 Establishing an independent Crown generally entity takes about 12 – 18 months from enactment. This process includes key steps such as making Board appointments, developing relevant strategies and operational policies and finding suitable premises.

21 I am hopeful that this work can be completed sooner than this, given some pre-planning has been undertaken and the availability of existing overseas models to draw from. Further, in my view, meeting the Government's commitment requires a swifter timeframe.

22 A swifter timeframe is highly likely to involve utilising nomination of Commissioners[1] through an abbreviated process. The State Services Commission Guidelines provide some flexibility, when time pressures prevail, for direct appointment rather than using the recommended full public-facing process. Utilising a more truncated method of appointment requires Ministerial certification that the process is an appropriate one. Officials have advised that there are some risks to the integrity of the CCRC as a result of truncating the appointment process, but that it does not appear possible to meet the Government's commitment in the timeframe without doing so. Regardless of the process used, appointments will not be able to be made until after the legislation has passed.

23 Officials have also advised that, notwithstanding efforts to hasten the process, a fall-back commencement date of 1 July 2020 carries a risk that the CCRC will be operational as a matter of law, but that establishment work will not be completed in practice. However, I consider providing the fall-back commencement date of 1 July 2020 to be the most desirable course of action to fulfil the Government's commitment.

24 I acknowledge that this approach has an impact on the decision-making processes for funding the CCRC, s9(2)(j) [redacted], in that a fall-back commencement date will require resources be provided to establish the CCRC by that date. Further discussion on funding is below at paragraphs 45 to 58.

Allowing the court to authorise disclosure of privileged and confidential information

25 In seeking policy approvals, I did not propose to override any existing privileges in relation to information. For example, access to any legally privileged material could only be on receipt of a waiver from a lawyer's client.

26 Clause 37 of the Bill implements the protections for information that is privileged or confidential. Specifically, a person is not required to disclose to the CCRC any communication or information:

1 A nomination process bypasses the SSC recommended steps of advertising and using a selection panel to identify the proposed candidates. Instead, either I, with the Ministry's support, identify candidates (direct nomination) or one or more bodies are requested to identify one or more candidates (indirect nomination). This process can result in appointments within a few weeks of enactment of the legislation.

26.1 to which any of the protections of privilege or confidentiality recognised in subpart 8 of Part 2 of the Evidence Act would apply if the disclosure were made in a proceeding; or

26.2 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.

27 Clause 38 provides a civil enforcement mechanism for the requirement to provide information to the CCRC. Specifically, the Commission may apply to the District Court for an order to provide the information if they have failed to comply with a requirement to provide information. The civil enforcement mechanism outlined also provides an avenue to test claims of privilege should a party from whom information is requested refuse to provide information for the purposes of testing whether privilege applies.

28 While some submissions have noted the importance of upholding privilege and confidentiality, the weight of submissions on the Bill have expressed the view that clause 37 is unduly restrictive. Generally speaking, these submissions argued that the ability to see privileged and confidential material in appropriate cases would help filter out unmeritorious claims and also help identify genuine miscarriages. In other words, the ability to access privileged information will help the CCRC to complete its core task: identifying miscarriages of justice. These submissions also highlighted the ability for overseas CCRCs to obtain privileged and confidential information, subject to a court order.

29 Several submissions consequently proposed amendment to allow for privileged or confidential information to be obtained in certain circumstances.

30 I recognise submitters' concerns about the blanket protection provided to privileged or confidential information. It is possible that there will be information that, while privileged or confidential, would be useful or necessary for the CCRC to access to make a fully informed decision as to whether a miscarriage of justice may have occurred. In such cases, it would be helpful to have a mechanism to balance those interests against the interests protected by privilege and confidentiality.

31 The Evidence Act 2006 and Criminal Disclosure Act 2008 provide mechanisms which may be useful models. For example, section 67 of the Evidence Act allows a judge to disallow privilege where they are:

31.1 satisfied there is a prima facie case that a communication was made or received, or information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan what the person claiming the privilege knew, or reasonably should have known, to be an offence; and

31.2 are of the opinion that evidence of a communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence.

32 Section 30 of the Criminal Disclosure Act also allows a judge to order disclosure of information that may be withheld from a defendant[2] if the interests protected by the withholding of that information are outweighed by other considerations that make it desirable, in the public interest.

2 This includes, for example, where disclosure of the information would be contrary to the provisions of any other enactment. See, for all the relevant grounds, Criminal Disclosure Act 2008, section 16.

33 I propose to adopt a similar process in the Bill, which would allow the court to require disclosure of information that would otherwise be privileged, confidential, or that is otherwise prohibited from being disclosed. While the precise test for such an order requires further work and will be refined through the parliamentary process, I anticipate that it would be a relatively high threshold that centres on whether an applicant's innocence is at stake[3] and whether the information is necessary for the CCRC to assess whether it is in the interests of justice that referring the relevant conviction or sentence back to the courts. This further work will also cover any consequential amendments that may be required including, for example, expressly allowing the court order that disclosure is subject to certain conditions. If required, such conditions may help to manage situations where making certain confidential information available to the CCRC may, if subsequently published, jeopardise the privacy and safety of individuals involved in investigations or result in a waiver of privilege.

34 As submitters have noted, the courts are well placed to make such determinations, having the necessary independence and expertise to assess the competing rights and interests. While it is unlikely to be used regularly, I consider that allowing for a judge to require disclosure of information protected by clause 37 on limited grounds is in keeping with the policy intent of the Bill while adequately protecting the rights and interests protected by that provision.

Amending the exemptions from preparing statements of intent and performance expectations

35 Clauses 43 and 44 of the Bill currently exempt the CCRC from preparing a statement of intent and statement of performance expectations. However, Justice officials have identified that amendments to these provisions would be beneficial.

36 The policy intent behind exempting the CCRC from preparing a statement of intent and statement of performance expectations included the following factors:

36.1 reducing the administrative burden on the CCRC; and

36.2 limiting the scope for Ministerial involvement in setting the strategic direction for the CCRC given its role in the criminal justice system.

37 On further consideration, my officials have identified that there may be several technical difficulties arising from the proposed exemptions. Specifically, a total exemption from the requirement to prepare these documents may limit the ability to satisfactorily monitor the CCRC's performance and could lead to new, and possibly less efficient, systems needing to be created from scratch to meet various statutory requirements and established monitoring processes.[4]

38 I still consider, however, that the CCRC should have the greatest possible autonomy in setting its strategic direction, as well in carrying out its day-to-day operations. Its role in reviewing and investigating specific criminal cases makes this independence (real and perceived) exceptionally important.

39 I therefore recommend amending clauses 43 and 44 to instead disapply only the sections of the Crown Entities Act that allow a Minister to direct that changes be made to

3 See, for example, *Liev v R* [2017] NZHC 1352; *R v Johnson* [2018] NZHC 2998.

4 Including, for example, the requirements of the Public Finance Act 1989 for financial appropriations, including obligations on Chief Executives.

the final statement of intent and statement of performance expectations.[5] This change will:

39.1 mean that the CCRC will be required to prepare statements of intent and performance expectations;

39.2 enable the responsible Minister to be involved in the process of setting the CCRC's strategic direction; but

39.3 limit Ministerial ability to override decisions made by the CCRC on these matters.

Officials are also considering a series of technical amendments to improve the Bill

40 As noted above, officials are also developing advice to the Justice Committee on a series of more technical amendments to the Bill that are consistent with existing policy decisions.

41 Some possible amendments under consideration include:

41.1 requiring that at least one Commissioner have knowledge or understanding of te ao Māori and tikanga Māori rather than expressing the "desirability" of appointing such Commissioners;

41.2 allowing the CCRC to initiate an inquiry into a general matter that has arisen in the course of exercising "any of its functions or duties" rather than only during the investigation of a specific conviction or sentence; and

41.3 permitting the CCRC to disclose information where reasonably necessary to prevent or lessen a serious threat (as defined in section 2(1) of the Privacy Act 1993) to public health or public safety, or the life or health of the individual concerned or another individual.

42 Other changes being considered are matters of clarification, including:

42.1 expressly providing for the appointment of specialist advisors with relevant cultural expertise, as well as scientific and technical knowledge;

42.2 recognising that the primary function of the CCRC includes to "investigate" a conviction or sentence; and

42.3 clarifying that the appeal court must consider a reference of the CCRC as a first appeal against conviction or sentence.

43 Officials will consider these changes and provide advice to the Justice Committee in due course. Other proposed changes may emerge during the remainder of the select committee process, but these are all anticipated to be in line with the original policy intent of the Bill and should not require additional Cabinet approvals. Any potential amendments would also be subject to advice from the Parliamentary Counsel Office about the best approach to draft amendments.

5 Crown Entities Act, sections 147 and 149J.

Consultation

44 The State Services Commission, Crown Law Office, New Zealand Police, Department of Corrections, Treasury, Department of the Prime Minister and Cabinet, Ministry for Social Development, Te Puni Kōkiri, Ministry for Pacific Peoples, and Ministry for Women have been consulted on the paper.

Financial Implications

Cost estimates

45 It is essential to provide adequate funding to the CCRC to ensure it is effective from initiation. Without sufficient resources to carry out quality investigations in a timely manner, public confidence in the CCRC and, in turn, the criminal justice system will be negatively affected.

46 s9(2)(j) [redacted]

47 Officials have estimated that the CCRC will receive approximately 125 applications per year. This is a significant increase in the average of about eight applications per year since 1995. This estimate is based on the experience of comparable Commissions in overseas jurisdictions.[7]

s9(2)(j) [redacted]

6 s9(2)(j) [redacted]

7 Jurisdictions with CCRCs have experienced a notable increase in applications upon the establishment of their CCRCs. On average the CCRC's in the UK (England and Wales) Scotland and Norway receive an average of 2.7 applications per 100, 000 people (2.3, 2.8, 3.1 respectively) per year. This figure has been extrapolated

8 s9(2)(j) [redacted]

Funding status and options

s9(2)(j)

Human Rights

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

60 Specifically, the proposal to allow a judge to disallow privilege and confidentiality engages section 14 (freedom of expression)[9] and section 21 (unreasonable search and seizure) of the Bill of Rights Act.

61 The Crown Law Office advice to the Attorney-General on the Bill's consistency with the Bill of Rights Act noted that the information-gathering powers in the Bill engaged these rights, but that the powers were connected to the purpose for which they are provided and proportionate to that purpose.

62 In doing so, the advice highlighted the protections for privileged and confidential information; particularly in respect of the protections against self-incrimination protected in the relevant subpart of the Evidence Act. The advice noted that if a person was required to provide documents or evidence that tend to incriminate them, Crown Law considered it doubtful that the limitation on section 14 would be reasonable.

63 Allowing a judge to require that privileged and confidential information be disclosed to the CCRC therefore requires renewed justification.

64 As before, I consider the objective of the proposal to allow a judge to disallow privilege – ensuring that potential miscarriages of justice are identified, investigated, and referred to the courts where appropriate – constitutes a sufficiently important objective to justify some limitation on these rights and freedoms.

65 Further, the proposal remains rationally and proportionately connected to that objective. The CCRC is not able to directly override privilege and confidentiality. That determination can only be made by the courts, who are well placed to balance the competing rights and interests at stake, including those affirmed by the Bill of Rights Act. In addition to the existing prerequisites for the CCRC to exercise its information gathering powers, judicial discretion ensures that any intrusion into sections 14 and 21 of the Bill of Rights Act will only be where reasonably necessary. I also note that section 67 of the Evidence Act does not allow privilege against self-incrimination to be overridden and see no reason to depart from that principle in this instance. This is, in my view, an appropriate and nuanced way of addressing submitters' concerns that is consistent with human rights legislation.

Legislative Implications

66 s9(2)(j) [redacted]

67 As noted above, I have written to the Justice Committee indicating my support for a further extension to the report back date of the Bill to allow Cabinet to consider this paper. The report back is now 17 October 2019.

68 s9(2)(j) [redacted]

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

s9(2)(j) [redacted]

69 s9(2)(j) [redacted]

70 s9(2)(j) [redacted]

Regulatory Impact Analysis

71 The Ministry of Justice's internal Regulatory Impact Analysis ('RIA') Quality Assurance Panel reviewed the RIA and associated material prepared by the Ministry of Justice that accompanied the original paper seeking Cabinet approvals. The Panel considered that the information and analysis summarised in the RIS met the quality assurance criteria. In reaching this conclusion, the Panel noted there are some constraints on the analysis and that the RIS focuses on a comparison between the status quo and options for the Government's proposed approach.

Gender Implications

72 There are no gender implications arising specifically from the proposals in this paper.

73 The original Cabinet paper seeking policy approvals for the CCRC noted that there were likely to be differential impacts on gender arising from the policy; including that applications are likely to be predominantly from men and the cases are likely to disproportionately involve women as victims who may be at risk of re-victimisation.

74 The specific proposals in this paper do not affect the previous conclusion; that the implications are more likely to be positive than not. A new entity with appropriate funding will be better positioned to monitor and identify any gender disparities, including rates of applications. Further, having dedicated, multi-skilled staff could improve the handling of cases where women do apply or, for example, where a case may involve gendered patterns of violence against a woman or issues of consent. I also note that the Bill provides the mechanisms to put in place appropriate safeguards to manage risks around re-victimisation, including expressly signalling that the CCRC should develop policies and procedures relating to interactions with victims of crime.

Disability Perspective

75 There are no disability implications arising specifically from the proposals in this paper.

Publicity

76 I propose to delay the proactive release of this Cabinet paper. The Justice Committee is still considering the Bill and, in my view, it would not be appropriate to release this paper until after the Committee has reported back on 17 October 2019. After that point, I intend to proactively release the paper, subject to any necessary redactions under the Official Information Act 1982. s9(2)(j) [redacted]

Recommendations

77 The Minister of Justice recommends that the Committee:

1 agree to amend the commencement clause in the Criminal Cases Review Commission Bill to provide that the Act will be brought into force automatically on 1 July 2020, unless it is earlier brought into force by Order in Council

2 agree to amend the Criminal Cases Review Commission Bill to allow a District Court judge to require disclosure of information that is subject privilege, confidentiality, or that is otherwise prohibited from being disclosed, on limited grounds

3 agree to amend clauses 43 and 44 of the Criminal Cases Review Commission Bill to disapply only the sections of the Crown Entities Act that allow a Minister to direct that changes be made to the final statement of intent and statement of performance expectations

4 note that officials are considering the following minor changes to improve the Criminal Cases Review Commission:

4.1 requiring that at least one Commissioner have knowledge or understanding of te ao Māori and tikanga Māori rather than expressing the "desirability" of appointing such Commissioners;

4.2 allowing the CCRC to initiate an inquiry into a general matter that has arisen in the course of exercising "any of its functions or duties" rather than only during the investigation of a specific conviction or sentence;

4.3 permitting the CCRC to disclose information where reasonably necessary to prevent or lessen a serious threat (as defined in section 2(1) of the Privacy Act 1993) to public health or public safety, or the life or health of the individual concerned or another individual;

4.4 providing for the appointment of specialist advisors with cultural knowledge;

4.5 recognising that the primary function of the CCRC includes to "investigate" a conviction or sentence; and

4.6 clarifying that the appeal court must consider a reference of the CCRC as a first appeal against conviction or sentence.

Financial implications

5 note that the establishment of the CCRC is a commitment within the Coalition Agreement between the Labour Party and New Zealand First

6 s9(2)(j) [redacted]

7 s9(2)(j) [redacted]

8 s9(2)(j) [redacted]

s9(2)(j)

s9(2)(j) [redacted]

Legislative implications

16 s9(2)(j) [redacted]

17 s9(2)(j) [redacted]

Publicity

18 note that the proactive release of this Cabinet paper will be delayed until after the Justice Committee has reported back on the Criminal Cases Review Commission Bill

19 s9(2)(j) [redacted]

Authorised for lodgement
Hon Andrew Little
Minister of Justice

SWC-19-MIN-0084

Cabinet Social Wellbeing Committee

Minute of Decision

Amendments to the Criminal Cases Review Commission Bill

Portfolio **Justice**

On 24 July 2019, the Cabinet Social Wellbeing Committee:

Amendments to Criminal Cases Review Commission Bill

1 **agreed** to amend the commencement clause in the Criminal Cases Review Commission Bill (the Bill) to provide that the Act will be brought into force automatically on 1 July 2020, unless it is earlier brought into force by Order in Council;

2 **agreed** to amend the Bill to allow a District Court judge to require disclosure of information that is subject to privilege, confidentiality, or that is otherwise prohibited from being disclosed, on limited grounds;

3 **agreed** to amend clauses 43 and 44 of the Bill to disapply only the sections of the Crown Entities Act 2004 that allow a Minister to direct that changes be made to the final statement of intent and statement of performance expectations;

4 **noted** that officials are considering the following minor changes to improve the Criminal Cases Review Commission (the Commission):

4.1 requiring that at least one Commissioner have knowledge or understanding of te ao Māori and tikanga Māori rather than expressing the "desirability" of appointing such Commissioners;

4.2 allowing the Commission to initiate an inquiry into a general matter that has arisen in the course of exercising "any of its functions or duties" rather than only during the investigation of a specific conviction or sentence;

4.3 permitting the Commission to disclose information where reasonably necessary to prevent or lessen a serious threat (as defined in section 2(1) of the Privacy Act 1993) to public health or public safety, or the life or health of the individual concerned or another individual;

4.4 providing for the appointment of specialist advisors with cultural knowledge;

4.5 recognising that the primary function of the Commission includes to "investigate" a conviction or sentence; and

4.6 clarifying that the appeal court must consider a reference of the Commission as a first appeal against conviction or sentence;

Financial implications

5 **noted** that the establishment of the Commission is a commitment within the Coalition Agreement between the Labour Party and New Zealand First;

6 s9(2)(j) [redacted]

7 s9(2)(j) [redacted]

8 s9(2)(j) [redacted]

s9(2)(j)

14 s9(2)(j) [redacted]

15 s9(2)(j) [redacted]

Legislative implications

16 s9(2)(j) [redacted]

Publicity

17 **noted** that the submission under SWC-19-SUB-0084 will be proactively released after the Justice Committee has reported on the Bill;

18 s9(2)(j) [redacted]

Gerrard Carter
Committee Secretary

Present:
Rt Hon Jacinda Ardern
Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Andrew Little
Hon Carmel Sepuloni (Chair)
Hon Dr David Clark
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Jenny Salesa
Hon Tracey Martin
Hon Willie Jackson
Hon Aupito William Sio
Hon Poto Williams
Jan Logie, MP

Officials present from:
Office of the Prime Minister
Office of the Chair
Officials Committee for SWC

Hard-copy distribution:
Minister of Justice