

14 September 2018

Attorney-General

Criminal Cases Review Commission Bill – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/286

1. We have reviewed the Criminal Cases Review Commission Bill (**CCRC Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). A copy of the current version of the Bill is **enclosed** with this advice. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.

Introduction

2. The CCRC Bill establishes the Criminal Cases Review Commission (**Commission**), the purpose of which is to review convictions and sentences and decide whether to refer to them to an appeal court.
3. Currently, if a person who has been convicted of an offence considers 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 may be exercised either to grant a person a free pardon, or to refer a person's conviction or sentence to the relevant appeal court for a fresh appeal. The Commission will replace the second of these functions, currently exercised by the Governor-General under section 406 of the Crimes Act 1961.
4. Under the current system, and by convention, the Governor-General acts on the formal advice of the Minister of Justice. Work on applications for the Royal prerogative of mercy is performed by lawyers in the Ministry of Justice. The Commission is established as a new independent Crown entity. It is an independent body with dedicated staff focused on the identification of, and responding to, possible miscarriages of justice.
5. The CCRC Bill provides statutory grounds for referring a case back to the appeal court. The Commission may refer a conviction or sentence to the appeal court if it considers it is in the interests of justice to do so, having regard to the statutory criteria.
6. The Commission will have powers to regulate its own procedures, to initiate inquiries into general matters that may be related to cases involving a miscarriage of justice, and to require persons to provide information and evidence.

Consistency of the CCRC Bill with the Bill of Rights Act

Section 14 – freedom of expression

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form. The right has been interpreted to include the right not to be compelled to say certain things or to provide certain information.¹
8. The CCRC Bill includes two types of provision that prima facie limit freedom of expression:
 - 8.1 Compelled expression: various provisions of the CCRC Bill require an individual to provide information and/or evidence at the request of the Commission; and
 - 8.2 Restrictions on speech: the CCRC Bill contains provisions preventing an individual from expressing certain information.
9. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it is a reasonable limit that is justifiable in terms of s 5 of the Bill of Rights Act. That inquiry may be approached in the following way:²
 - 9.1 Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - 9.2 If so, then:
 - 9.2.1 Is the limit rationally connected with the objective?
 - 9.2.2 Does the limit impair the right or freedom no more than is reasonably necessary sufficiently to achieve the objective?
 - 9.2.3 Is the limit in due proportion to the importance of the objective?

Compelled expression – the provision of documents and evidence

10. One aspect of the Commission’s investigative powers involves the Commission being able to compel persons to provide information or evidence:
 - 10.1 Clause 31(2) provides that the Commission “may obtain from any person ... any information that the Commission considers relevant to an investigation”;
 - 10.2 Clause 32 provides that the Commission may, by written notice, require a person to:
 - 10.2.1 produce documents or things that the person may hold and that may be relevant to the investigation; and

¹ See, e.g., *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [121].

- 10.2.2 provide information in writing.
- 10.3 Clause 33 provides that the Commission may take evidence from a person by:
- 10.3.1 requiring the person, by written notice, to appear before the Commission to be examined on oath or affirmation;
- 10.3.2 requiring the person, on appearing before the Commission, to answer questions on oath or affirmation;
- 10.3.3 permitting the person to give evidence by any other means approved by the Commission and requiring the person to verify that evidence on oath or affirmation.
11. Clauses 32 and 33 are subject to the requirements of clause 31(2)—the Commission must take reasonable steps to obtain the information by consent, and it may only require a person to provide information if the Commission considers that the information is unlikely to be obtained through any means other than under that section.
12. Clause 38 provides that 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”. The privileges applying to witnesses in a court of law apply.³
13. Clauses 32 and 33 accordingly compel a person to provide the Commission with information or evidence, and a refusal to provide such information or evidence may lead to a finding of contempt of Court. This compulsion is a prima facie limit on an individual’s right to freedom of expression under s 14 of the Bill of Rights Act.
14. In our view, however, such a limit is likely to be justified under s 5 of the Bill of Rights:
- 14.1 The Commission’s purpose is to investigate potential miscarriages of justice, and for those investigations to be undertaken in a timely and efficient manner. This is an objective that is, in our view, sufficiently important to warrant a limitation on the right protected by s 14.
- 14.2 The limit is rationally connected with the objective in that the Commission’s purpose is not to simply repeat arguments or re-examine evidence that has already been considered by the Courts—it is intended that applicants are required to provide “something new” that has not previously been considered by the Courts. A set of provisions that allow the Commission to obtain that “something new” is connected to that objective.

³ Clause 37.

- 14.3 The limit impairs the right as little as possible to achieve the objective in that:
- 14.3.1 the right to obtain information requires the Commission to “take reasonable steps” to obtain the information by consent, without resort to compelling its production;
 - 14.3.2 the Commission may only obtain information under cl 32 and 33 where it considers that the information is unlikely to be obtained through any means other than those sections; and
 - 14.3.3 in the event the Commission applies to the Court for an order that a person comply with a requirement under the CCRC Act, the District Court is required to be satisfied that the person has failed to comply “without reasonable excuse”.⁴

These restrictions suggest that the Commission will only be able to compel a person to provide information where there is no other alternative means by which that information may be obtained.

- 14.4 The limit is proportionate to the Commission’s objective to investigate possible miscarriages of justice and to refer cases to the appeal court.
15. We have also considered the Bill in light of the common law privilege against self-incrimination. To the extent that a person may be required by cl 32 or 33 to provide documents or evidence that tend to incriminate them, we consider it doubtful that such a limit on the right affirmed by s 14 would be reasonable. However, cl 37 provides that nothing in the CCRC Bill requires a person to disclose information to which the “the protections of privilege or confidentiality recognised in subpart 8 of Part 2 of the Evidence Act” would apply. Section 60 of the Evidence Act 2006 provides a privilege against self-incrimination, which would prevent the Commission or a Court from requiring persons to provide incriminating documents or evidence.
16. We therefore conclude that the provisions compelling persons to provide information of evidence to the Commission do not appear to be inconsistent with s 14 of the Bill of Rights Act.

Restrictions on speech – prohibition on disclosure of information

17. Clause 34 of the CCRC Bill provides that a member or employee of the Commission, or a person appointed as a specialist advisor to the Commission, must not disclose any information obtained by the Commission unless that disclosure is authorised by cl 35.
18. Clause 35 provides that disclosures are authorised if the Commission, or a member of the Commission, is satisfied either that the person with the right to consent to disclosure has consented, or that disclosure is reasonably necessary for one of a specified set of purposes, including a criminal, disciplinary or civil proceeding, as part of a report required to be made under the Act, or for the purposes of the Police deciding whether to prosecute an offence.

⁴ This would presumably require the Commission to prove that a defendant did not have a reasonable excuse once some evidence of a reasonable excuse is raised. See *King v Police* [2016] NZHC 977 at [24].

19. Clause 34 limits the right of a member or employee of the Commission from expressing certain information. However, we consider that the limit appears to be justified under s 5 of the Bill of Rights Act in that the provision protects the privacy of the person about whom an investigation is being conducted, provides exceptions where the public interest in disclosure of that information may outweigh the individual's privacy concerns, and is both rationally connected with, and proportionate to, protection of individual privacy.

Section 21 – unreasonable search and seizure

20. The provisions relating to the Commissioner's power to obtain information have also been reviewed in light of s 21 of the Bill of Rights Act, which affirms the right to be secure against unreasonable search and seizure. The reasonable justification test set out in s 5 of the Bill of Rights Act does not apply to s 21—the Supreme Court has held that an unreasonable search cannot logically be demonstrably justified in a free and democratic society.⁵
21. As set out above, the Commissioner may obtain information and documents, and examine under oath a person who the Commission considers relevant to an investigation.⁶ The Commission may apply to the District Court for an order if a person fails to comply, without reasonable excuse, with a request from the Commission.⁷ The privileges applying to witnesses in a court of law apply.⁸
22. In our view, the operation of the CCRC Act requires the Commission be able to obtain information relevant to its investigations. To do so the Commission may need information from persons or agencies other than the person who has made the application. The Commission's powers are connected with the purpose for which they are provided and proportionate. We accordingly conclude that they appear to be consistent with s 21 of the Bill of Rights Act.

Section 19 – freedom from discrimination

23. We have considered whether cl 40 of the CCRC Bill may engage s 19 of the Bill of Rights Act, which affirms the right of everyone to be free from discrimination on the grounds set out in s 21 of the Human Rights Act 1993. One of the prohibited grounds of discrimination is race. Clause 40 of the CCRC Bill provides that 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”.
24. We consider that cl 40 does not engage the right affirmed by s 19—s 19(2) of the Bill of Rights Act provides that “measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful ... do not constitute discrimination”. To the extent cl 40 is designed to address barriers to Māori making applications to the Commission, cl 40 does not involve discrimination on the basis of race.

⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162].

⁶ Clauses 31-33.

⁷ Clause 38.

⁸ Clause 37.

25. In accordance with Crown Law policy, this advice has been peer reviewed by Paul Rishworth QC, Senior Crown Counsel.

Recommendation

26. We recommend that you:

- 26.1 **Note** our advice that the Criminal Cases Review Commission Bill appears to be consistent with the New Zealand Bill of Rights Act 1990

Yes/No

Noted/Approved/Declined

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Hon David Parker
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/ /2018