

Hon Andrew Little, Minister of Justice

Criminal Cases Review Commission Bill

Date	22 August 2018	File reference	CON-34-22
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Action sought

Timeframe

Note the contents of this briefing	27 August 2018
Indicate any amendments you wish made to the Bill and draft Cabinet paper enclosed with this briefing	
Agree to initiate Ministerial and party consultation on the draft Bill and Cabinet paper	
Forward a copy of this briefing to the Minister of State Services and Attorney-General for their information	

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Erin Lubowicz	Acting General Manager, Criminal Justice	04 894 2934	§ 9(2)(a)	<input type="checkbox"/>
Stuart McGilvray	Policy Manager, Criminal Law	04 918 8812	§ 9(2)(a)	<input checked="" type="checkbox"/>
Andrew Goddard	Senior Policy Advisor	§ 9(2)(a)		<input type="checkbox"/>

Minister's office to complete

- Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister

Minister's office's comments

Purpose

1. This briefing seeks your direction on outstanding issues raised during the drafting of the Criminal Cases Review Commission Bill ('the Bill').
2. We seek your agreement to proceed with Ministerial and further departmental consultation on the Bill and the draft Cabinet paper seeking approval for introduction ('the LEG paper').

Executive summary

3. We are working towards introduction of the Bill on 25 September 2018. To support meeting this date, we have instructed the Parliamentary Counsel Office ('PCO') on several matters that we now seek your confirmation on.
4. Specifically, we seek your direction on the following matters:
 - 4.1. the power to conduct thematic inquiries;
 - 4.2. immunities for Commissioners and other staff;
 - 4.3. ability to compel Commissioners and other staff to give evidence; and
 - 4.4. the CCRC's interaction with victims of crime.
5. We will work with your office to arrange for Ministerial consultation on the LEG paper and the Bill, with any necessary modifications.
6. We also suggest you forward a copy of this briefing to the Minister of State Services and the Attorney-General and discuss your proposed approach to these additional policy matters with them ahead of initiating Ministerial consultation, if possible.

Background

7. The Government has committed to the establishing a CCRC. Cabinet gave policy approvals for the CCRC on 6 August 2018, subject to decisions made in Budget 2019 (CAB-18-MIN-0370 refers).
8. You have indicated that you intend for the CCRC to be operational by July 2019. To support this, following Cabinet approvals we advised that we considered the earliest opportunity to introduce the Bill was 18 September 2018.

Draft Bill and LEG paper

9. We have been working with PCO to finalise drafting of the Bill. The latest version is enclosed with this briefing, along with the LEG paper.
10. We are also undertaking further consultation on the test for referral with a targeted group of experts. To date, the feedback from consultation has largely been positive, though some concerns have been raised. While we remain confident the proposed test achieves the right balance, once we have all the feedback we will provide it to you, along with any advice necessary.
11. During Cabinet consideration and the drafting process, a number of issues have also been raised with, or identified by officials, which require further direction.

12. The specific issues we seek your direction on are:
 - 12.1. the power to conduct thematic inquiries;
 - 12.2. immunities for Commissioners and other staff;
 - 12.3. ability to compel Commissioners and other staff to give evidence; and
 - 12.4. the CCRC's interaction with victims of crime.
13. Our recommended approach to each matter is reflected in the drafting of the Bill and in the LEG paper. We explain the approach we have taken on each matter below, to inform your decision.

The power to conduct thematic inquiries

14. Cabinet agreed that the CCRC would have a power to launch thematic inquiries in addition to the CCRC's ability to launch own motion investigations into a conviction or sentence (SWC-18-MIN-0087 refers). Our proposed approach to implementing this agreement is reflected in cl 12 of the Bill.

Targeted consultation highlighted a number of issues relevant to thematic inquiries

15. In March 2018, we recommended against proceeding with a comparable function; to monitor and report on trends relating to the CCRC's work. Our view was that it would be sufficient and appropriate for the CCRC to bring such matters to the relevant authorities' attention through informal channels, or via its annual report.
16. This recommendation was also based on the following arguments made against thematic inquiries raised during targeted consultation:
 - 16.1. the anticipated volume of cases would be unlikely to generate reportable trends or 'systemic issues';
 - 16.2. undertaking thematic inquiries requires a very different skillset to investigating a specific case; and
 - 16.3. it could distract from the CCRC's core mandate by drawing resource and focus away from investigations and referrals.
17. There is also a risk that a thematic inquiries power is seen to overlap with the jurisdiction of bodies such as the Independent Police Conduct Authority ('IPCA'), in respect of Police conduct, or the Office of the Ombudsman, in respect of the administrative conduct of state sector agencies.
18. We also heard, however, that an explicit ability to report on systemic issues, for example to the House of Representatives, would be a powerful means of bringing critical issues to the public's attention.
19. Thematic inquiries would also add a quasi-preventive function to the CCRC's mandate. CCRCs in other jurisdictions have been confronted by systemic issues, such as widespread material non-disclosure at trial in the United Kingdom, and that they have been instrumental in bringing issues to light and having them addressed.

Thematic inquiries to take place within specified parameters

20. To address the type of concerns outlined above and ensure the thematic inquiries power operates within appropriate parameters, we propose that it be based on the following key principles:
 - 20.1. the inquiry should relate to a matter of a *general* nature concerning miscarriages of justice (e.g. policies, practices, or procedures) and not into a specific case;
 - 20.2. the trigger for exercising the power is when matters come to the CCRC's attention during its investigations;
 - 20.3. the CCRC should be satisfied that an inquiry is in the public interest; and
 - 20.4. it should present its report, and any recommendations it wishes to make, to the Minister of Justice following their inquiry, who would then be required to present the report to the House of Representatives.
21. We have sought to incorporate this approach in the drafting of cl 28 of the Bill. The framing of this clause is also based on broadly comparable powers in the governing legislation for investigative bodies like the IPCA and the Human Rights Commission,¹ but tailored to the CCRC's specific operating context.

The power to conduct thematic inquiries has financial implications

22. For completeness, and as indicated above, we also note that additional resourcing will be required for the CCRC to enable it to conduct thematic inquiries, to avoid the risk of distracting from its core mandate.
23. s 9(2)(f)(iv)

Immunities for Commissioners and other staff

24. Liability and immunities for Commissioners and CCRC staff has been raised during the drafting process.
25. The Crown Entities Act 2004 provides that where a member, office holder or employee acts in good faith and in performance, or intended performance, of the entity's functions, they are immune from civil liability in respect of that act or omission unless:
 - 25.1. it is also a breach of an individual duty of a board member under sections 53 to 57 of the Crown Entities Act;² or
 - 25.2. the responsible Minister or entity personnel apply to the court for an order to ensure a member's compliance with the law.³
26. These provisions do not affect a person's criminal liability.

¹ Independent Police Conduct Authority Act 1988, s 12(2); Human Rights Act 1993, s 5(2)(h).

² Crown Entities Act 2004, s 121 refers.

³ Crown Entities Act 2004, s 60 refers.

27. Our view is that the general civil immunity provision in the Crown Entities Act should be sufficient to protect Commissioners and Commission staff for acts or omissions that are in good faith and in performance of the entity's functions.
28. However, the extent to which the immunities in the Crown Entities Act will apply to a specialist advisor is unclear; i.e. we are unsure whether they are a member, office holder, or employee for the purposes of that Act. Our view is that it is preferable to clarify this in the Commission's governing legislation, rather than leave it open to interpretation in future. This approach is reflected in cl 44 of the Bill.

Ability to compel Commissioners and other staff to give evidence

29. During discussions with the Parliamentary Counsel Office, we have identified the involvement of Commissioners, CCRC staff and specialist advisors in future proceedings as requiring specific consideration.
30. Members of the CCRC could be called to give evidence in relation to an investigation, or their findings, in a range of proceedings. These include, but are not limited to, a fresh appeal, subsequent re-trial, or judicial review of the CCRC's decision.

The Evidence Act provides for near universal eligibility to be compelled to give evidence

31. Section 71 of the Evidence Act 2006 codifies the general rule that any person is eligible to give evidence, and that any person eligible to give evidence is also compellable to give evidence. There are limited exceptions to this rule for judges, jurors and counsel in cases they are involved in, defendants and co-defendants, Sovereigns, Heads of State and judges acting in their judicial capacity, and bank officers.⁴
32. Universal eligibility is based on the principle that, if a person has evidence that is relevant and probative, that evidence should be available to the fact-finder through that person giving evidence as a witness.
33. Issues as to the probative value of the evidence can then be determined by s 8 of the Evidence Act. Decisions on admissibility are, therefore, focused on the quality of the evidence, rather than the quality of the witness.⁵
34. In addition to the exceptions in the Evidence Act, there are some bespoke exceptions for certain persons in other Acts of Parliament. For example:
 - 34.1. an inquiry, members of an inquiry and officers of an inquiry cannot be compelled to give evidence unless leave of the court is granted to bring proceedings relating to an allegation of bad faith against the inquiry;⁶
 - 34.2. a Transport Accident Investigation Commission ('TAIC') investigator cannot be compelled to give evidence in relation to an investigation in proceedings to which the TAIC is not a party;⁷ and
 - 34.3. the IPCA, or members of the IPCA, must not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to their knowledge in the exercise of their functions.

⁴ Evidence Act 2006, ss 72 – 76 refer.

⁵ NZLC R127 at [11.2 – 11.5]

⁶ Inquiries Act 2013, s 26(2) refers.

⁷ Transport Accident Investigation Commission Act 1990, s 14O refers.

We do not recommend that Commissioners and other staff be exempted from compellability

35. In our view, Commissioners and other staff should be not exempted from being compelled to give evidence in relation to any aspect of their investigation. The Bill therefore includes no provision exempting the CCRC or its members from being compelled in future proceedings.
36. The CCRC's statement of reasons for referring a case should generally be all that is required from them to support the appeal and, in most cases, there should be no need for members of the CCRC or its staff to appear as witnesses in future proceedings.
37. However, the need for the CCRC to appear cannot be ruled out entirely. It is quite common for criminal appeals to put in issue the conduct of participants in the criminal process regarding things done along the path to the appeal. This may include, for instance, the conduct of lawyers, Police, witnesses and potential witnesses. Conceivably, the CCRC, in exercising its investigative functions, may find that something it does, particularly if it results in new evidence that is then brought before the appeal court, may be the subject of scrutiny at the appeal. A CCRC investigator who has been instrumental in gathering new evidence may for instance, be asked to produce an affidavit about that evidence, or the investigation that led to its production, and/or to appear for cross-examination.
38. In such circumstances, where testimony from a potential CCRC witness appeared to have probative value, but could not be compelled, it could lead to a further miscarriage of justice, whether real or perceived.
39. Furthermore, where the proceedings may relate to the legality of the CCRC's decision-making, or meritorious actions alleging bad faith against individual members, it is clear that the general rules of eligibility to be compelled should apply.
40. In our view, the courts are best placed to determine whether hearing further from the CCRC is appropriate in the circumstances. On balance, we therefore do not propose to exclude the CCRC, Commissioners or other staff from being compelled to give evidence in any future proceedings.

The CCRC's interaction with victims of crime

41. The Victims' Rights Act 2002 requires that a victim, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor, about a range of matters.⁸
42. Currently, one such matter is the date and place of any hearing of a question of conviction or sentence referred by the Governor-General under section 406(a) of the Crimes Act 1961 and any hearing of an appeal against the determination of that question.⁹ As the referral function will now be exercised by the CCRC, this requires amendment through the Bill.
43. There are also broader issues relating to the CCRC's interaction with, and treatment of, victims of crime that have arisen in previous discussions with experts and government agencies; specifically, in relation to the risks of re-victimisation that could be caused by the prospect or occurrence of a further appeal, or the conduct of an investigation.

⁸ Victims' Rights Act 2002, s 12(1).

⁹ Victims' Rights Act 2002, s 12(2)(f).

44. We propose that the Bill:
- 44.1. signal that the CCRC should develop a procedure for notifying victims of crime, where appropriate, when considering an application;
 - 44.2. consequentially amend the Victims' Rights Act to require that victims be notified when there will be a hearing as a result of the CCRC making a referral; and
 - 44.3. ensure that any referrals made by the Governor-General during the transitional period are notified as they currently are.
45. This approach is reflected in cl 15, and Schedules 1 and 2 of the Bill. It is intended to replicate the key requirements under the status quo, while signalling to the CCRC that it should give specific consideration to its treatment of victims. The United Kingdom (England, Wales and Northern Ireland) CCRC has a formal memorandum on contact with victims of crime, which sets out key principles and processes that could serve as a useful precedent for the CCRC to follow.
46. For completeness, we considered whether the Bill should include more explicit requirements about when and how the CCRC should interact with victims of crime. However, in our view, this would not be a comfortable fit with the CCRC's devolved powers to regulate its own procedure.
47. Further, the Victims' Rights Act already provides broad principles to ensure officials treat victims with courtesy and compassion, respecting victims' dignity and privacy.¹⁰ In our view, these will apply to CCRC. We also note that the Victims' Rights Act does not provide victims with legally enforceable rights.¹¹ Specific obligations in the Bill would either substantially duplicate this approach, achieving little discernible benefit, or place more onerous obligations on the CCRC than are placed on other organisations.

Next steps

48. Subject to your decisions, we will work with your office to arrange for Ministerial consultation on the LEG paper and the Bill starting no later than 28 August 2018, with any necessary modifications. We will also undertake departmental consultation, and further consultation with experts, during this period.
49. Starting consultation no later than 28 August, closing consultation no later than 11 September 2018, will support you to take the LEG paper to Cabinet Legislation Committee on 20 September 2018, with a view to introducing the Bill on 25 September 2018. If the Bill is not introduced in that sitting week, the next opportunity for introduction will be the sitting week of 16 October – 18 October 2018.
50. Per Cabinet's direction relating to resolving minor policy issues without recourse to Cabinet, we suggest you forward a copy of this briefing to the Minister of State Services and the Attorney-General. You may also wish to discuss these additional policy matters with them ahead of initiating Ministerial consultation, if possible.
51. We will continue to refine the drafting with PCO, and will provide further advice on any additional matters arising out of drafting, or from Ministerial and party consultation.

¹⁰ Victims' Rights Act 2002, s 7.

¹¹ Victims' Rights Act 2002, s 10.

Recommendations

52. It is recommended that you:
1. **Note** the contents of this briefing
 2. **Agree** to the proposed approach in relation to:
 - 2.1. the power to conduct thematic inquiries; YES / NO
 - 2.2. immunities for Commissioners and other staff; YES / NO
 - 2.1. ability to compel Commissioners and other staff to give evidence; YES / NO
 - 2.2. the Criminal Cases Review Commission's interaction with victims of crime. YES / NO
 3. **Indicate** to officials any amendments you wish to see made to the LEG paper
 4. **Direct** officials to work with your office to arrange for Ministerial consultation on the LEG paper YES / NO
 5. **Forward** a copy of this briefing to the Minister of State Services and Attorney-General for their information YES / NO

Stuart McGilvray

Policy Manager, Criminal Law

APPROVED SEEN NOT AGREED

Hon Andrew Little

Minister of Justice

Date / /

Attachments:

Draft Cabinet paper – Criminal Cases Review Commission Bill: Approval for introduction
Criminal Cases Review Commission Bill (PCO 21108/5.4)