

In Confidence

Office of the Minister of Justice and Minister for Courts

Chair, Cabinet Legislation Committee

## **Criminal Cases Review Commission: Approval for Introduction**

### **Proposal**

- 1 This paper seeks Cabinet agreement to introduce the Criminal Cases Review Commission Bill (the Bill).

### **Policy**

- 2 The Government has a coalition agreement to establish a Criminal Cases Review Commission (the Commission), an independent body set up to review suspected miscarriages of justice and refer appropriate cases back to the appeal courts. On 6 August 2018 Cabinet agreed to policy proposals for establishing the Commission [SWC-18-MIN-0087 and CAB-18-MIN-0370].

*The power to refer deserving cases to the courts will be the Commission's primary function*

- 3 Currently, a person who believes they have suffered a miscarriage of justice may apply to the Governor-General for the exercise of the Royal prerogative of mercy.
- 4 By convention, the Governor-General acts on the formal advice of the Minister of Justice. Where it appears that a miscarriage of justice has or is likely to have occurred in a criminal case, the Royal prerogative of mercy can be exercised to grant a free pardon, or refer a person's conviction or sentence to the relevant appeal court under section 406(1) of the Crimes Act 1961 for a further appeal.
- 5 As agreed by Cabinet, the Commission will perform the referral function currently exercised by the Governor-General under section 406 of the Crimes Act 1961. While the Governor-General would continue to exercise the Royal prerogative of mercy, specifically the grant of a pardon, they will cease to play a role in the exercise of the referral power. To manage any potential for confusion about the residual role remaining to the Governor-General, the Bill expressly provides for how the Commission and Governor-General's roles will interact.
- 6 The Commission will be able to receive applications, investigate and refer a conviction or sentence in a criminal case back to the appeal courts when the Commission considers a miscarriage of justice might have occurred. [SWC-18-MIN-0087 and CAB-18-MIN-0370].
- 7 The Commission's referral power is guided by a statutory test. As the test for referral is likely to be contentious, considerable time has been put into its development, including consultation with experts.
- 8 The test I am proposing, set out in clause 17, provides the Commission with a broad discretion to refer cases where it considers = that it is in the interests of justice to do so. In exercising that discretion the Commission must have regard to:

- 8.1 whether the convicted person has exercised their rights of appeal;
  - 8.2 the extent to which the application relates to argument, evidence, information or a question of law raised or dealt with in earlier proceedings;
  - 8.3 the prospects that the court will allow the appeal; and
  - 8.4 any other matter the Commission considers relevant.
- 9 Many of the experts the Ministry of Justice consulted on the test believe the test strikes the right balance, providing the necessary flexibility. However, others were concerned that the test is overly prescriptive and the use of factors may be interpreted in a manner that has a “chilling effect” on referrals.
- 10 In my view, the test in clause 17 is not unduly constraining. I consider that the broad discretion it conveys will enable the Commission to refer meritorious cases, including those at the margins, without undermining the underlying constitutional principles that currently inform the exercise of the Royal prerogative.

*Commission to have secondary duties and powers not currently available*

- 11 The Bill also includes several duties and powers that relate to, and support the exercise of, the referral function. These duties and powers include:
- 11.1 the Commission’s duty to educate people and promote its work;
  - 11.2 the power to make initial inquiries on its own-motion;
  - 11.3 a power to conduct thematic inquiries; and
  - 11.4 powers to obtain information or exhibits from any person.
- 12 These duties and powers are a meaningful change from the status quo, and may also be contentious.
- 13 For example, the educative duty and the power to conduct thematic inquiries may raise concerns about detracting from the core function of the Commission. The Commission, if not operating within appropriate parameters, may also be seen to undermine the independence of the judiciary if, for example, without any complaint from the defendant, the Commission began to assess a miscarriage that it perceived had gone uncorrected by the courts.
- 14 The power to conduct thematic inquiries is also likely to increase the cost of the Commission compared to initial estimates.
- 15 However, educating and promotion of its work is a necessary corollary of the Commission’s primary function. Overseas, the educative function has provided Commissions with a mechanism to adopt tailored engagement leading to material improvements in the number of applications from specific populations. This is important as, in New Zealand, applications from Māori and Pacific peoples for the Royal prerogative have been disproportionately low.
- 16 Likewise, the ability to conduct thematic inquiries recognises that an explicit ability to investigate and report on systemic issues would be a powerful means of bringing critical issues to the public’s attention.

17 These duties and powers have been designed to ensure they can only be exercised in appropriate circumstances. For example, the Commission is required by the Bill to take reasonable steps to obtain information by consent, and must only use its powers of compulsion where it considers the information is unlikely to be obtained by other means.

*Additional policy matters have been resolved since Cabinet decisions*

18 The Bill also includes provisions relating to immunities and victims of crime which were not agreed to by Cabinet in agreeing to establish the Commission. Per Cabinet's direction, I have consulted with the Minister of State Services and the Attorney-General to resolve these additional policy matters.

19 The immunity from civil liability in the Crown Entities Act 2004 will apply to, and 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.<sup>1</sup>

20 However, the extent to which the immunities in the Crown Entities Act apply to a specialist advisor is unclear. I therefore consider that it is preferable to clarify this in the Commission's governing legislation, rather than leave it open to interpretation in future.

21 In respect of the Commission's interactions with victims of crime, I propose that the Bill:

21.1 signal that the Commission should develop a procedure for notifying victims of crime, where appropriate, when considering an application;

21.2 consequentially amend the Victims' Rights Act 2002 to require that victims be notified when there will be a hearing as a result of the Commission making a referral; and

21.3 ensure that any referrals made by the Governor-General during the transitional period are notified as they currently are.

22 In my view, this approach will replicate the key requirements under the status quo, while signalling to the Commission that it should give specific consideration to its treatment of victims in the exercise of its functions.

23 I also note that the Bill contains minor amendments to the process envisaged for the protection of privilege and confidentiality when the Commission is exercising its information-gathering powers.

24 Specifically, it is no longer proposed that the Bill contain a process similar to that in the Inquiries Act 2013 for the Commission to test claims of privilege itself. Instead, claims of privilege and confidentiality will, if needed, be tested through the civil process for enforcing the requirement to provide information to the Commission. Further, the scope of the protection of privilege and confidentiality has been broadened to include situations where the disclosure of information is prevented by secrecy obligations in an enactment, or order of a court.

*Legislation required due to the constitutional significance of the function*

25 Legislation is required to establish the Commission because of the constitutional significance of the Commission's function; namely, that the Commission's function is currently part of the Royal prerogative, exercised by the Governor-General. Prescribing

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<sup>1</sup> Crown Entities Act 2004, s 121 refers.

the function and powers of the Commission in legislation allows Parliament to detail their scope and makes them accessible to the public.

### **Impact analysis**

- 26 A Regulatory Impact Statement was prepared in accordance with Cabinet requirements and submitted to Cabinet alongside the paper seeking policy approval in August 2018 [SWC-18-MIN-0087 and CAB-18-MIN-0370].

### **Compliance**

- 27 The Bill complies with the following:
- 27.1 the principles of the Treaty of Waitangi;
  - 27.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) and the Human Rights Act 1993. There are implications for the Bill of Rights Act in the Bill. The information-gathering powers engage section 14 (freedom of expression) and section 21 (unreasonable search and seizure). However, the policy objective constitutes a sufficiently important objective to justify some limitations on these rights, and the powers are designed in a rational and proportionate manner;
  - 27.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to this the paper);
  - 27.4 the principles and guidelines set out in the Privacy Act 1993;
  - 27.5 we have not identified any relevant international standards and obligations;
  - 27.6 the *Legislation Guidelines 2018*, which are maintained by the Legislation Design and Advisory Committee.

### **Consultation**

- 28 The Ministry of Justice undertook targeted consultation with the judiciary, investigative bodies, members of the legal profession, academics and Commissions in other jurisdictions on both the initial policy proposals, and later on specific aspects of the Bill. The feedback received during this process has been supportive of the establishment of the Commission, and has informed the design of its structure, functions and powers.
- 29 The following Government agencies were consulted on the Bill and this paper; 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, Ministry for Women. The Office of the Privacy Commissioner was consulted on the paper.
- 30 Consultation has been undertaken with government caucuses.

### **Binding on the Crown**

- 31 The Bill will bind the Crown to ensure that the law will apply to the Government in the same way it applies to individuals. Cabinet has not previously agreed to the Crown being bound by the Bill. No Government operations or activities would be hindered by making

the Crown subject to the Act, and the financial costs of making the Crown subject to the Act are not unreasonable.

### **Creating new agencies or amending law relating to existing agencies**

- 32 The Bill establishes a new Commission. The Bill exempts the Commission from producing a statement of intent and a statement of performance expectations, as agreed by Cabinet. [SWC-18-MIN-0087 and CAB-18-MIN-0370]
- 33 The Official Information Act 1982 will apply to the Commission, except for information contained in correspondence or communication that has taken place between the Commission and any person in relation to an investigation by the Commission.

### **Allocation of decision making powers**

- 34 Commissioners will be appointed by the Governor-General on the advice of the Minister of Justice, as is standard for ICEs.<sup>2</sup> As agreed by Cabinet, the Commission will have a board, composed of at least three and no more than seven Commissioners. At least one third of the members must be legally qualified, and at least two thirds of the members must have experience in the criminal justice system or expertise relevant to the Commission's work [SWC-18-MIN-0087 and CAB-18-MIN-0370].
- 35 The Commissioners will make decisions on whether to refer cases back to the appeal courts. This power cannot be delegated under the Crown Entities Act 2004. Where a referral is made by the Commission the appeal court must hear and determine the matters as if it were an appeal against the conviction or sentence. The courts will remain the ultimate decision-makers with regard to guilt or innocence.

### **Associated regulations**

- 36 The Bill does not contain regulation-making powers as the function of the Commission does not require the development of regulations.

### **Other instruments**

- 37 The Bill does not include any provision allowing the creation of instruments deemed to be legislative or disallowable instruments.

### **Definition of Minister/department**

- 38 The Bill will be administered by the Ministry of Justice. The Bill does not contain a definition of the Ministry of Justice or the Chief Executive of the Ministry of Justice.

### **Commencement of legislation**

- 39 The Bill provides for commencement date(s) to be appointed by Order in Council. This is necessary as the establishment of the Commission is subject to funding decisions made by Cabinet in Budget 2019.
- 40 Subject to those decisions, my intention is that the Commission will become operational in July 2019. In any case, the commencement date for the legislation could be amended at select committee or by Supplementary Order Paper to reflect greater certainty in relation

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<sup>2</sup> Crown Entities Act 2004, s 28(1)(b).

to the funding of the Commission. The explanatory note to the Bill outlines the reasons for commencement by Order in Council.

### Parliamentary stages

- 41 Cabinet has agreed to enact the Bill by July 2019 (SWC-18-MIN-0087 refers). To meet this timeframe, the Bill should be introduced into the House on the first available date after Cabinet approval.
- 42 I propose that the Bill be referred to the Justice Committee. To support the Commission becoming operational by July 2019, subject to funding in Budget 2019, I propose that the Select Committee be required to report back to the House of Representatives after four months, and that the Bill be enacted as soon as possible after it is reported back.
- 43 The Bill currently has a category 2 priority (must be passed in 2018). However, to enable public discussion on the Bill, and to align the Bill and its implementation with funding processes, I propose that the Bill be reprioritised to Category 5 (to be referred to a Select Committee in 2018).

### Publicity

- 44 I will issue a press release following the introduction of the Bill. I intend to arrange for the briefings I have received on establishing the Commission to be proactively published on the Ministry of Justice website.
- 45 I also intend to publish this paper and related Cabinet decisions on the Ministry of Justice website, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

### Recommendations

The Minister of Justice recommends that the Committee:

- 46 **note** that the Criminal Cases Review Commission Bill holds a category 2 priority on the 2018 legislation programme;
- 47 **agree** to reprioritise the Criminal Cases Review Commission Bill to category 5, to allow it to be referred to Select Committee and to align it with the Budget 2019 process;
- 48 **note** that the Criminal Cases Review Commission Bill establishes the Criminal Cases Review Commission as an independent body to review suspected miscarriages of justice and refer appropriate cases back to the appeal courts;
- 49 **approve** the Criminal Cases Review Commission Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 50 **agree** that the Criminal Cases Review Commission Bill will bind the Crown;
- 51 **note** that the additional policy matters relating to immunities and victims of crime have been resolved, in consultation with the Minister of State Services and the Attorney-General, since Cabinet policy approvals;
- 52 **agree** that the Bill be introduced on the first available date after Cabinet approval;

53 **agree** that the Government propose that the Bill be:

53.1 referred to the Justice committee for consideration;

53.2 reported back to the House after four months' consideration;

53.3 enacted by July 2019.

Authorised for lodgement

Hon Andrew Little

Minister of Justice