



Ross Francis

fyi-request-9816-01d9630c@requests.fyi.org.nz

Dear Mr Francis

Official Information Act request: Criminal Cases Review Commission

Thank you for your email of 10 March 2019 requesting, under the Official Information Act 1982 (the Act), information relating to the Criminal Cases Review Commission (CCRC) Bill. As noted to you on 28 March 2019, the timeframe in which to respond to your request was extended by 20 working days due to the substantial collation of documents required. I have detailed your specific requests and my response to each below.

1. *Copies of all submissions made in regards to the proposed Criminal Cases Review Commission Bill.*

As I am sure you will be aware, copies of written submissions on a Bill are publicly available on the Parliament website at www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80426/tab/submissionsandadvice. In respect of such submissions, I am refusing part one of your request under section 18(d) of the Act as the information requested is or will soon be publicly available.

In the case that any submissions have not yet been released publicly, they remain confidential to the Select Committee under the Standing Orders. I am, therefore, refusing copies of these submissions under sections 18(c)(ii) and 52(1) of the Act as their release would constitute contempt of the House of Representatives.

2. *Copies of all communication you have had with the Justice Ministry in regards to establishing a Criminal Cases Review Commission, dated 20 October 2017 to 31 December 2018. Communication includes hand-written notes and all other forms of communication. It also includes communication from officials to you.*

In my previous response to you dated 10 September 2018, you requested “all communication you have had with Justice Ministry officials and others in regards to establishing a Criminal Cases Review Commission (CCRC)”. The period covered by your amended request was 19 October 2017 to 14 August 2018. I provided documents within scope of that request in my previous response to you and have listed those documents in appendix one. Those documents have not been included in this response.

I have interpreted part two of this request to include communication between myself and the Ministry of Justice dated 15 August 2018, from the date the last document was provided to you in the 11 September 2018 response, to 31 December 2018, as you have requested, about the establishment of a CCRC.

Appendix two lists the documents that fall within scope of my interpretation of part two of your request. Several documents have been withheld in full under:

- section 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; and
- section 18(d) as the information requested is or will soon be publicly available.

I have provided links below to where these documents are publicly available.

- *Document 4(3), (6(3) and 10(6) Criminal Cases Review Commission Bill Introduced* now entitled *Significant step to correct miscarriages of justice* – www.beehive.govt.nz/release/significant-step-correct-miscarriages-justice
- *Document 7 and 10(2) Criminal Cases Review Commission Bill Draft Speech Notes* now entitled *Criminal Cases Review Commission Bill – First Reading* – www.parliament.nz/en/watch-parliament/ondemand?itemId=203219
- *Document 10(5) Criminal Cases Review Commission Bill* – www.legislation.govt.nz/bill/government/2018/0106/latest/LMS90599.html
- *Document 10(7) Criminal Cases Review Commission Bill passes first reading* – www.beehive.govt.nz/release/criminal-case-review-commission-bill-passes-first-reading
- *Document 10(10) and 13(7) Criminal Cases Review Commission: Approval for Introduction* – www.justice.govt.nz/assets/Documents/Publications/leg-criminal-cases-review-commission-bill-approval-for-introduction.pdf
- *Document 10(11) and 13(6) Establishing a Criminal Cases Review Commission* – www.justice.govt.nz/assets/Documents/Publications/cab-establishing-a-criminal-cases-review-commission.pdf
- *Document 13(2) Proposed model for establishing a Criminal Cases Review Commission* – www.justice.govt.nz/assets/Documents/Publications/briefing-20171211-proposed-model-for-establishing-a-ccrc-redacted.pdf
- *Document 13(3) Supplementary advice on the Criminal Cases Review Commission model* – www.justice.govt.nz/assets/Documents/Publications/briefing-20180309-supplementary-advice-on-proposed-ccrc-model-redacted.pdf
- *Document 13(4) Criminal Cases Review Commission: areas for further discussion* – www.justice.govt.nz/assets/Documents/Publications/aide-memoire-20180328-criminal-cases-review-commission-areas-for-further-discussion-redacted.pdf
- *Document 13(5) Criminal Cases Review Commission Bill* – www.justice.govt.nz/assets/Documents/Publications/briefing-20180822-criminal-cases-review-commission-bill-redacted.pdf
- *Document 13(8) Establishing a Criminal Cases Review Commission* – www.justice.govt.nz/assets/Documents/Publications/briefing-20171109-establishing-a-criminal-cases-review-commission-redacted.pdf

Copies of the remaining documents are enclosed. Some information has been withheld under section 9(2)(a) to protect the privacy of natural persons, and section 9(2)(g)(i). I am satisfied that there are no other public interest considerations that render it desirable to make the information withheld under section 9 available.

If you are not satisfied with my response to your request, you have the right to complain to the Ombudsman under section 28(3) of the Act. The Ombudsman may be contacted by email at info@ombudsman.parliament.nz.

Yours sincerely

A handwritten signature in blue ink that reads "Andrew Little". The signature is written in a cursive, slightly slanted style.

Hon Andrew Little
Minister of Justice

Appendix 1: Documents from previous OIA response

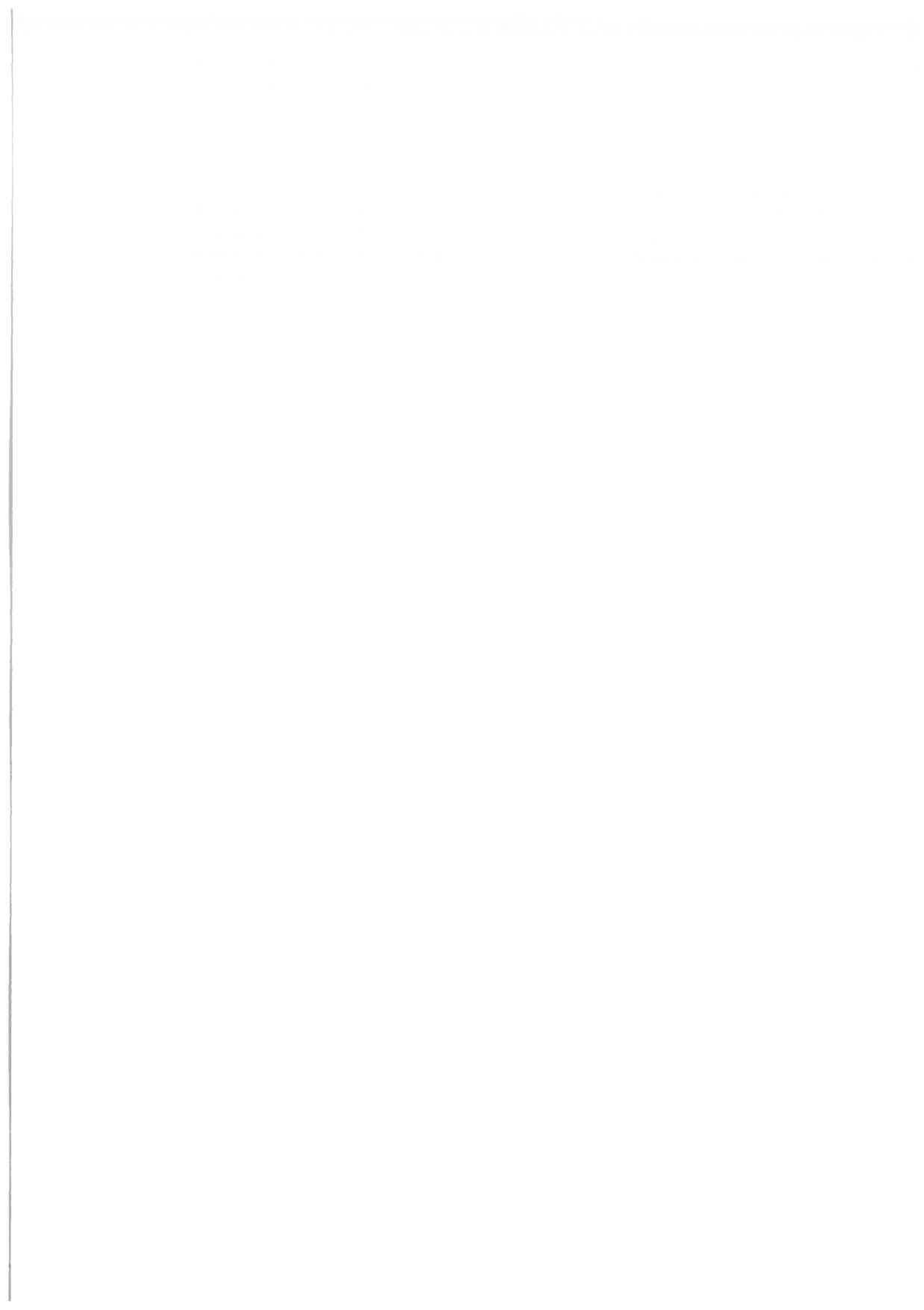
No	Document title	Date	Document type	Comments
1	Establishing a Criminal Cases Review Commission	9 November 2017	Briefing	Some information withheld under s9(2)(a), s9(2)(f)(iv) and s9(2)(g)(i)
2	Weekly Report for Minister of Justice and Minister for Courts	10 November 2017	Weekly Report	Some information withheld under s9(2)(a) and some information out of scope
3	Proposed model for establishing a Criminal Cases Review Commission	11 December 2017	Briefing	Some information withheld under s9(2)(a), s9(2)(f)(iv) and s9(2)(g)(i)
4	Weekly Report for Minister of Justice and Minister for Courts	19 January 2018	Weekly Report	Some information withheld under s9(2)(a) and some information out of scope
5	Weekly Report for Minister of Justice and Minister for Courts	26 January 2018	Weekly Report	Some information withheld under s9(2)(a) and some information out of scope
6	Weekly Report for Minister of Justice and Minister for Courts	23 February 2018	Weekly Report	Some information withheld under s9(2)(a) and some information out of scope
7	Supplementary advice on the Criminal Cases Review Commission model	9 March 2018	Briefing	Some information withheld under s9(2)(a), s9(2)(f)(iv) and s9(2)(g)(i)
8	Establishing a Criminal Cases Review Commission	9 March 2018	Draft Cabinet paper	Withheld in full under s9(2)(g)(i)
9	Criminal Cases Review Commission: areas for further discussion	28 March 2018	Aide memoire	Some information withheld under s9(2)(f)(iv)
10	Timing for the establishment of the Criminal Cases Review Commission	27 April 2018	Aide memoire	Some information withheld under s9(2)(f)(iv)
11	Criminal Cases Review Commission: areas for further discussion	11 May 2018	Aide memoire	Some information withheld under s9(2)(f)(iv)
12	Hon Grant Robertson – Establishing a Criminal Cases Review Commission	21 May 2018	Letter	Some information withheld under s9(2)(f)(iv)
13	Establishing a Criminal Cases Review Commission	21 May 2018	Draft Cabinet paper	Withheld in full under s9(2)(g)(i)
14	Hon Andrew Little – Funding Options for the Criminal Cases Review Commission and the Human Rights Review Tribunal	13 June 2018	Letter	Some information withheld under s9(2)(f)(iv) and some information out of scope
15	Establishing a Criminal Cases Review Commission	19 June 2018	Draft Cabinet paper	Withheld in full under s9(2)(g)(i)

16	Establishing a Criminal Cases Review Commission	9 July 2018	Draft Cabinet paper	Withheld in full under s9(2)(g)(i)
17	Her Excellency The Right Honourable Dame Patsy Reddy, GNZM, QSO – Establishing a Criminal Cases Review Commission	20 July 2018	Letter	Some information withheld under s9(2)(f)(iv)
18	Weekly Report for Minister of Justice and Minister for Courts	20 July 2018	Weekly Report	Some information withheld under s9(2)(a), s9(2)(f)(iv) and some information out of scope
19	Establishing a Criminal Cases Review Commission	24 July 2018	Draft Cabinet paper	Withheld in full under s9(2)(g)(i)
20	Establishing a Criminal Cases Review Commission	25 July 2018	Briefing	Some information withheld under s9(2)(a) and s9(2)(f)(iv)
21	FW: Governor-General – Criminal Cases Review Commission – request for a meeting with Minister Little	26 July 2018	Email	Withheld in full under s9(2)(f)(iv)
22	Establishing a Criminal Cases Review Commission	26 July 2018	Draft Cabinet paper	Withheld in full under s9(2)(g)(i)
23	Criminal Cases Review Commission	26 July 2018	Regulatory Impact Analysis	Withheld in full under s18(d)
24	Meeting with Governor-General on the Criminal Cases Review Commission	27 July 2018	Aide memoire	Withheld in full under s9(2)(f)(iv)
25	Social Wellbeing Committee: Establishing a Criminal Cases Review Commission	30 July 2018	Aide memoire	Some information withheld under s9(2)(f)(iv)
26	Establishing a Criminal Cases Review Commission	30 July 2018	Cabinet paper	Withheld in full under s18(d)
27	SWC-18-MIN-0087 Minute	1 August 2018	Cabinet Committee Minute	Withheld in full under s18(d)
28	Aide memoire for Cabinet: Establishing a Criminal Cases Review Commission	3 August 2018	Aide memoire	Some information withheld under s9(2)(f)(iv)
29	The Rt Hon Dame Sian Elias GNZM, Chief Justice - Establishing a Criminal Cases Review Commission	14 August 2018	Letter	Some information withheld under s9(2)(f)(iv)

Appendix 2: Documents from 15 August 2018 to 31 December 2018 regarding the CCRC Bill

No	Document title	Date	Document type	Comments
1	1. RE: Due 30 August 2. Written Parliamentary Questions 16921	27 August 2018	1. Email 2. Attachment – Written Parliamentary Question	1. Withheld in full under s9(2)(g)(i) 2. Withheld in full under s9(2)(g)(i)
2	Aide memoire for LEG: Criminal Cases Review Commission Bill	18 September 2018	Aide memoire	Some information withheld under s9(2)(g)(i)
3	1. RE: Criminal Cases Review Commission Bill: aide memoire for LEG 2. Aide memoire for LEG: Criminal Cases Review Commission Bill - Attached as 2	18 September 2018	1. Email 2. Attachment – Aide memoire	1. Some information withheld under s9(2)(a) 2. Some information withheld under s9(2)(g)(i)
4	1. CCRC – Media release and QAs 2. Criminal Cases Review Commission: FAQs 3. Criminal Cases Review Commission Bill Introduced	21 September 2018	1. Email 2. Attachment – Frequently asked questions 3. Attachment – Media release	1. Some information withheld under s9(2)(a) 2. Released in full 3. Withheld in full under s18(d)
5	1. RE: CCRC email from Duncan Webb 2. Criminal Cases Review Commission Bill	21 September 2018	1. Email 2. Attachment - Letter	1. Some information withheld under s9(2)(a) 2. Released in full
6	1. RE: CCRC 2. Criminal Cases Review Commission: FAQs – Attached as 4(2) 3. Criminal Cases Review Commission Bill Introduced – Attached as 4(3)	27 September 2018	1. Email 2. Attachment – Frequently asked questions 3. Attachment – Media release	1. Some information withheld under s9(2)(a) 2. Released in full 3. Withheld in full under s18(d)
7	Criminal Cases Review Commission Bill Draft Speech Notes	11 October 2018	Draft Speech Notes	Withheld in full under s18(d)
8	RE: FOR COMMENT: Draft First Reading speech for CCRC Bill	11 October 2018	Email	Some information withheld under s9(2)(a)
9	RE: CCRC – papers for website	12 October 2018	Email	Some information withheld under s9(2)(a) and s9(2)(g)(i)
10	1. RE: CCRC First Reading House folder documents 2. Criminal Cases Review Commission Bill Draft Speech Notes – Attached as 7	16 October 2018	1. Email 2. Attachment – Draft Speech Notes	1. Withheld in full under s9(2)(g)(i) 2. Withheld in full under s18(d) 3. Released in full

11	<p>3. Criminal Cases Review Commission Bill Overview</p> <p>4. Aide memoire for Cabinet: Establishing a Criminal Cases Review Commission</p> <p>5. Criminal Cases Review Commission Bill (<i>mistakenly named Crimes Amendment Bill in email</i>)</p> <p>6. Criminal Cases Review Commission Bill Introduced – Attached as 4(3) and 6(3)</p> <p>7. Criminal Cases Review Commission Bill Passes First Reading</p> <p>8. Criminal Cases Review Commission: FAQs – Attached as 4(2) and 6(2)</p> <p>9. Criminal Cases Review Commission Bill: Approval for Introduction</p> <p>10. Criminal Cases Review Commission: Approval for Introduction</p> <p>11. Establishing a Criminal Cases Review Commission</p> <p>12. Establishing a Criminal Cases Review Commission</p>		<p>3. Attachment – Bill overview</p> <p>4. Attachment – Aide memoire</p> <p>5. Attachment – Bill</p> <p>6. Attachment – Media release</p> <p>7. Attachment – Media release</p> <p>8. Attachment – Frequently asked questions</p> <p>9. Attachment – Cabinet Legislation Committee Minute of Decision</p> <p>10. Attachment – Cabinet Legislation paper</p> <p>11. Attachment – Cabinet paper</p> <p>12. Attachment – Cabinet Social Wellbeing Committee Minute of Decision</p>	<p>4. Some information withheld under s9(2)(g)(i)</p> <p>5. Withheld in full under s18(d)</p> <p>6. Withheld in full under s18(d)</p> <p>7. Withheld in full under s18(d)</p> <p>8. Released in full</p> <p>9. Released in full</p> <p>10. Withheld in full under s18(d)</p> <p>11. Withheld in full under s18(d)</p> <p>12. Released in full</p>
12	<p>CCRC Bill report back timeframes</p> <p>1. RE: Today's oral questions</p> <p>2. Talking points for Question Time 24 October 2018</p>	<p>19 October 2018</p> <p>24 October 2018</p>	<p>Email</p> <p>1. Email</p> <p>2. Attachment – Oral questions</p>	<p>Some information withheld under s9(2)(a)</p> <p>1. Withheld in full under s9(2)(g)(i)</p> <p>2. Withheld in full under s9(2)(g)(i)</p>
13	<p>1. RE: CCRC material</p> <p>2. Proposed model for establishing a Criminal Cases Review Commission</p> <p>3. Supplementary advice on the Criminal Cases Review Commission model</p> <p>4. Criminal Cases Review Commission: areas for further discussion</p> <p>5. Criminal Cases Review Commission Bill</p> <p>6. Establishing a Criminal Cases Review Commission</p> <p>7. Criminal Cases Review Commission: Approval for Introduction</p> <p>8. Establishing a Criminal Cases Review Commission</p>	<p>19 December 2018</p>	<p>1. Email</p> <p>2. Attachment – Briefing</p> <p>3. Attachment – Briefing</p> <p>4. Attachment – Aide memoire</p> <p>5. Attachment – Briefing</p> <p>6. Attachment – Cabinet paper</p> <p>7. Attachment – Cabinet Legislation paper</p> <p>8. Attachment – Briefing</p>	<p>1. Some information withheld under s9(2)(a) and s9(2)(g)(i)</p> <p>2. Withheld in full under s18(d)</p> <p>3. Withheld in full under s18(d)</p> <p>4. Withheld in full under s18(d)</p> <p>5. Withheld in full under s18(d)</p> <p>6. Withheld in full under s18(d)</p> <p>7. Withheld in full under s18(d)</p> <p>8. Withheld in full under s18(d)</p>





Aide memoire for LEG: Criminal Cases Review Commission Bill

18 September 2018

Purpose

1. This paper provides information to support discussion of the Cabinet paper 'Criminal Cases Review Commission Bill: Approval for Introduction' at Cabinet Legislation Committee ('LEG') on 20 September 2018.

Key messages

- The Government has committed to establishing a Criminal Cases Review Commission ('CCRC'). A CCRC is an independent body created to investigate suspected miscarriages of justice.
- Cabinet agreed to establish the CCRC, s9(2)(f)(iv), on 6 August 2018.
- Introduction of the Bill is needed as soon as possible so that there is sufficient time for public input and select committee consideration ahead of the s9(2)(f)(iv).
- Following Cabinet approval, the Ministry of Justice undertook further consultation with experts external to Government, including senior lawyers and academics.
- While some questions or concerns were raised during consultation, and technical changes made in response, on balance no need for fundamental changes in approach were considered necessary.

Purpose and key features of the CCRC

2. The CCRC's purpose is to review convictions and sentences and decide whether to refer them to the appeal court for a fresh appeal. This will replace the power currently exercised by the Governor-General under section 406 of the Crimes Act 1961.
3. The Governor-General will continue to exercise the Royal prerogative of mercy, specifically the grant of a pardon, but will cease to play a role in the exercise of the referral power.
4. Some key features of the Bill include that the CCRC will:
 - a. receive applications from eligible persons or their authorised representatives:
 - b. carry out the activities it considers necessary to make its functions known to, and understood by, the public:
 - c. have the ability to undertake initial inquiries into a conviction or sentence on its own motion:
 - d. undertake thematic inquiries into a practice, policy, procedure or other general matter it considers to be related to miscarriages of justice:
 - e. have reasonable powers to obtain information relevant to the investigation from any person:
 - f. regulate its own policies and procedure in a manner that is consistent with the rules of natural justice:
 - g. appoint specialist advisers to give advice in relation to scientific, technical, or other matters involving particular expertise.

5. The design of the CCRC is informed by the core principles underlying the Royal prerogative of mercy, the functions and powers of overseas Commissions, and the design of comparable bodies in New Zealand.

Test for referral

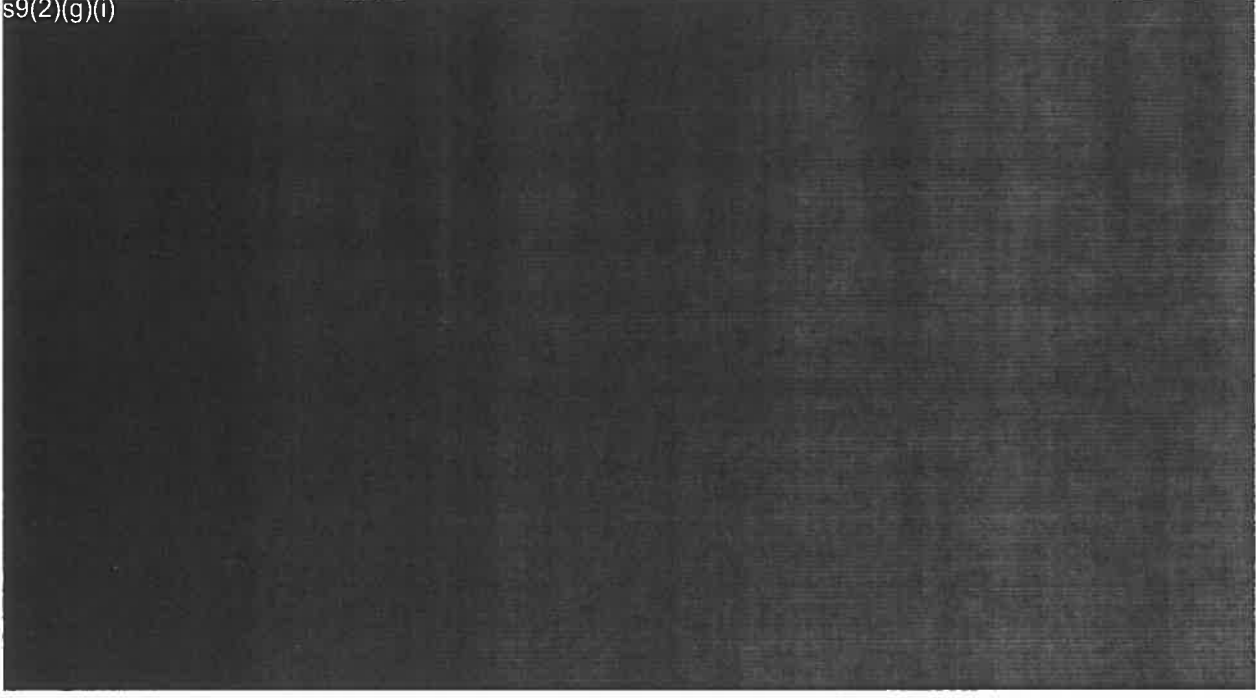
6. The test for referring a case back to the appeal courts is arguably the most important part of the design of the CCRC, and was unsurprisingly the predominant focus of comments during consultation with experts following Cabinet decisions in August.
7. The test for referral is that the Commission may refer a conviction or sentence if the Commission considers it is in the interests of justice that a referral to the appeal court be made. In deciding whether to refer, the Commission must have regard to—
 - a. whether the convicted person has exercised their rights to appeal against conviction or sentence:
 - b. the extent to which the application relates to argument, evidence, information, or a question of law previously raised or dealt with in the proceedings relating to the conviction or sentence:
 - c. the prospects of the court allowing the appeal:
 - d. any other matter that the Commission considers relevant.
8. Many of the experts the Ministry of Justice consulted on the test believe the test strikes the right balance, providing the necessary flexibility. s9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED].
9. The Minister of Justice and Ministry of Justice view is, however, that the test in clause 17 is not unduly constraining. 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.
10. It is likely the test will continue to receive significant attention during the legislative process, and amendments can be given further consideration during this time.

Information-gathering and disclosure powers

11. The issue that received the most comment during departmental consultation, and some comment from experts, was the scope of the information-gathering and disclosure powers in clauses 33 – 37 of the Bill.
12. Among the discussions were whether the CCRC should be able to override privilege and confidentiality (clause 37 provides that it cannot). Some submitters were concerned the Bill did not go far enough in protecting privilege, while others thought the CCRC should be able to access all information. Given the importance of obligations of privileges and confidentiality, the Ministry of Justice considers the right balance has been struck.
13. The powers have also been carefully designed to be exercised only where the CCRC believes it is reasonably necessary and where the information is unlikely to be obtained in another way. The Crown Law Office's advice to the Attorney-General is that the powers appear to be consistent with section 14 (freedom of expression) and section 21 (unreasonable search and seizure) of the New Zealand Bill of Rights Act 1990.

14. The Office of the Privacy Commissioner also signalled the need to ensure the Bill explicitly protects the ability to seek personal information under Information Privacy Principle 6. The Bill was amended to reflect this; clause 34(3) refers.
15. As with the test, it is likely that these powers will receive specific consideration during the legislative process in light of public submissions.

s9(2)(g)(i)



Stace, Rachael

From: Stace, Rachael
Sent: Tuesday, 18 September 2018 12:55 p.m.
To: s9(2)(a)
Cc: McGilvray, Stuart; s9(2)(a) Purple, Folder; correspondence, official; Goddard, Andrew
Subject: RE: Criminal Cases Review Commission Bill: aide memoire for LEG
Attachments: 20180918 AM LEG Criminal Cases Review Commission Bill REVISED.docx

Importance: High

Categories: CJSP - Printed

Kia ora s9(2)(a),

Please see **attached** the revised AM to accompany the LEG paper. The fifth bullet point in the key messages now reads:

- “Some questions were raised during consultation about several issues, including the test for referral and the CCRC’s information gathering powers. The technical changes made in response are detailed in this paper. On balance, no need for fundamental changes in approach were considered necessary.”

Andrew is away at MFAT for a meeting so if any further changes are necessary please contact either myself or Stuart.

**Rachael Stace**

Policy Advisor | Criminal Law | Policy Group

Tāhū o te Ture | Ministry of Justice

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Proposing to create or modify an offence or penalty? If so, the Cabinet Manual requires us to vet the proposal. Get in touch early via offenceandpenaltyvet@justice.govt.nz.

From: Goddard, Andrew
Sent: Tuesday, 18 September 2018 11:30 a.m.
To: s9(2)(a)
Cc: Stace, Rachael <Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>; s9(2)(a) Purple, Folder <Folder.Purple@justice.govt.nz>; correspondence, official <official.correspondence@justice.govt.nz>
Subject: Criminal Cases Review Commission Bill: aide memoire for LEG

Kia ora s9(2)(a)

Please find **attached** an aide memoire to support discussion of the Criminal Cases Review Commission Bill at LEG this Thursday 20 September 2018. Also attached, for convenience, is the version of the Bill sent to you by PCO yesterday, as the aide memoire cross references to relevant clauses on a couple of occasions.

If you have any suggested edits, or any questions, please do not hesitate to get in touch.

Ngā mihi nui,

Andrew



Andrew Goddard

Senior Policy Advisor | Criminal Law

DDI: +64 4 494 9964 | Ext 50964 |

www.justice.govt.nz

Stace, Rachael

From: Stace, Rachael
Sent: Friday, 21 September 2018 11:17 a.m.
To: s9(2)(a)
Cc: s9(2)(a); Goddard, Andrew; McGilvray, Stuart; Purple,
 Folder; correspondence, official
Subject: CCRC - Media release and QAs
Attachments: 2018 09 21 - CCRC QA.docx; 2018 09 21 CCRC Media Release.docx
Categories: CJSP - Printed

Kia ora s9(2)(a)

Please see **attached** the media release and Q+As for the first reading of the Criminal Cases Review Commission Bill.

These have been reviewed by our communications team.

Happy to discuss.

Ngā mihi nui,
Rachael



Rachael Stace

Policy Advisor | Criminal Law | Policy Group

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Proposing to create or modify an offence or penalty? If so, the Cabinet Manual requires us to vet the proposal. Get in touch early via offenceandpenaltyvet@justice.govt.nz.

Criminal Cases Review Commission: FAQs

What does the Criminal Cases Review Commission Bill do?

The Criminal Cases Review Commission Bill will establish an independent public body, the Criminal Cases Review Commission (CCRC), to review suspected miscarriages of justice and refer appropriate cases back to the appeal courts. In New Zealand, this function is currently performed by the Governor-General as part of the Royal prerogative of mercy.

Why is NZ establishing a CCRC?

Establishing the CCRC is an opportunity to enhance this system by giving an independent body with dedicated staff the mandate to identify and respond to possible miscarriages of justice. A CCRC provides independence. It enables Ministers to maintain an arms-length distance from involvement in criminal cases.

Further, the relatively low levels of applications from Māori and Pacific people through the current justice system suggests that the status quo may be failing to encourage applications from all people. A CCRC cannot address, on its own, a sense of alienation or dissatisfaction with the criminal justice system. It is not certain that Māori and Pacific peoples will relate more easily to the CCRC than they do to the Royal prerogative process.

However, for the reasons outlined above, a well-designed and resourced CCRC could make material improvements in encouraging and resolving meritorious applications that, at present, are not being put forward.

Several jurisdictions have established a CCRC, including the United Kingdom (England, Wales and Northern Ireland), Scotland, and Norway. These models provide valuable experience to draw upon in considering the design of a CCRC for New Zealand.

How does the current process work?

Currently, if a person who has been convicted of an offence believes they have suffered a miscarriage of justice they may apply to the Governor-General for the exercise of the Royal prerogative of mercy.

By convention, the Governor-General acts on the formal advice of the Minister of Justice. Work on prerogative of mercy applications is undertaken by lawyers in the Ministry's Office of Legal Counsel, and assistance is sought, where required, from an independent adviser such as a Queen's Counsel or a retired Judge.

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.

The power to refer a person's conviction or sentence back to the courts has been exercised on 15 occasions since 1995, which represents about 9 percent of the 166 applications for the prerogative of mercy lodged in that time.

What is the structure of the CCRC?

The CCRC will be established as a new Independent Crown Entity, with between three and seven Commissioners, including a Chief and Deputy Chief Commissioner. The Commissioners will be appointed by the standard process for a Crown Entity, that is, by the Governor-General on the advice of the responsible Minister.

At least one third of the Commissioners must be legally qualified, and at least two-thirds must have experience working in the criminal justice system or have knowledge or experience relevant to the CCRC's functions and duties.

The appointment of Commissioners will be governed by the Crown Entities Act 2004 which requires appointment takes into account the desirability of promoting diversity in the membership of Crown entities. In recommending an appointment, the Minister must also take into consideration the desirability of the Commission being able to draw on knowledge or understanding of te ao Māori.

Overseas CCRC's have had staff from a range of backgrounds including: including lawyers, former police detectives, criminal psychologists and forensic experts.

Test for referral

The test for referring a case back to the appeal courts is arguably the most important part of the design of the CCRC. The Bill provides that the Commission can refer a conviction or sentence to the appeal court if the Commission considers it is in the interests of justice. In deciding whether to refer, the Commission must have regard to—

- a. whether the convicted person has exercised their rights to appeal against conviction or sentence:
- b. the extent to which the application relates to argument, evidence, information, or a question of law previously raised or dealt with in the proceedings relating to the conviction or sentence:
- c. the prospects of the court allowing the appeal:
- d. any other matter that the Commission considers relevant.

The test seeks to strike a careful balance by providing a broad discretion to ensure flexibility while still signalling important constitutional principles that should inform the referral function. The test focuses on the overall interests of justice which is the most appropriate criteria in this context.

What happens when the CCRC refers a case back to the courts?

Section 20 of the Bill provides that when a conviction or sentence has been referred by the CCRC the appeal court to which it has been referred must hear it as if it were a fresh appeal.

What power does the CCRC have to access information?

The CCRC's first method of accessing information is through consent. However, if the CCRC has taken reasonable steps to seek information by consent, or it considers the information is unlikely to be obtained through another means, the CCRC has the power to require a person to provide information. The CCRC may request this information be provided in writing, through provision of documents, or by the giving of evidence.

If a person refuses to comply with a request to provide information the CCRC may apply to the District Court for an order directing the person to comply with the CCRC's request. The Bill provides that in these circumstances the District Court also has the power to issue any other order it considers appropriate.

The CCRC cannot override existing protections of privilege and confidentiality, which reflects the importance of these obligations. Access to legally privileged material, for example, could only be achieved on receipt of a waiver from a lawyer's client.

What happens to the Royal prerogative of mercy when the CCRC is established?

The CCRC does not entirely replace the Royal prerogative of mercy, only the referral power contained in section 406 of the Crimes Act.

The Bill enables the Governor-General (acting on the advice of the Minister of Justice) to transfer applications for the prerogative of mercy that allege a miscarriage of justice direct to the Commission for it to deal with under its statutory authority.

The Governor-General has the power to exercise the residual prerogative powers, which include the grant of a full pardon. The use of these powers is likely to be rare.

In the rare case where the exercise of the prerogative of mercy is being considered, the Minister of Justice (as the Governor-General's advisor) will be able to request the Commission's opinion on any matter relevant to the case.

Who can apply to the CCRC?

Any living person convicted of an offence in New Zealand, or their representative can apply to the CCRC if they believe there may have been a miscarriage of justice in their sentence or conviction.

Why can't someone apply on behalf a deceased person?

New Zealand law requires that a person be living for an appeal hearing, therefore, if the CCRC received and investigated applications on behalf of deceased person it could not refer the case for appeal. However, an application can be made for a pardon in respect of such people, part of the Royal prerogative of mercy.

How will the CCRC work?

The Bill provides the CCRC with the power to create a flexible and innovative process which it thinks best suits the CCRC's function and duties. Following appointment of the Chair and other Commissioners the CCRC will develop its process and procedures. These procedures will be made public.

Can the CCRC's decisions be appealed?

No, the decisions of the CCRC cannot be appealed. However, if the CCRC does not act within the law, or if the decision was unreasonable the affected by the decision can apply for a judicial review.

How long will the process take?

That is difficult to know because every investigation will be different.

However, the Bill has been designed to enable the CCRC to operate in an efficient, effective and fair manner. The CCRC will be developing its own more detailed processes, and these will be publicly available.

Who are the CCRC members?

No appointments have been made yet.

The Chair and members will be appointed by the Governor-General on the advice of the Minister of Justice, once the Bill is passed.

Will legal representation be necessary?

No, legal representation is not necessary and the CCRC will make reasonable efforts to assist people to apply if they require assistance.

What is the limit of the initial inquiries power?

The CCRC's power to make initial inquiries is limited to circumstances where the Commission is satisfied that there are reasonable grounds to carry out an investigation in the public interest. The Commission is required to seek the consent of the convicted person as soon as practicable. The CCRC might, for example, proactively assist a potential applicant to identify possible grounds for an application. The CCRC might, for example, proactively assist a potential applicant to identify possible grounds for an application.

The UK CCRC has found a proactive approach to be valuable and has initiated own motion investigations when, for example, they see that there may be co-defendants wrongly convicted.

The CCRC's power to undertake thematic inquiries

The CCRC has the power to conduct thematic inquiries into a matter of general nature that arises during the CCRC's investigation. It must be satisfied that carrying out the thematic inquiry is in the public interest. The CCRC is required to provide a report to the Minister of Justice following the inquiry, which the Minister is then required to present to the House of Representatives.

When can applications be made to the Commission?

The Bill must be passed before the CCRC is established, so final timing is not yet known., T
The intention is to establish the CCRC by July 2019.

Stace, Rachael

From: Goddard, Andrew
Sent: Friday, 21 September 2018 8:39 a.m.
To: s9(2)(a)
Cc: McGilvray, Stuart; Stace, Rachael
Subject: RE: CCRC email from Duncan Webb
Attachments: 20180920 DRAFT Response to Duncan Webb MP.docx

Mōrena s9(2)(a)

Hope all is well. Per the below, and your conversations with Stuart, please find attached a draft letter for the Minister to respond to Dr Webb's thoughts, should the Minister wish to do so. Apologies for this taking a little longer than anticipated – the focus over the last week has largely been geared on getting to LEG and preparing other associated material.

Happy to discuss.

Ngā mihi nui,

Andrew



Andrew Goddard
 Senior Policy Advisor | Criminal Law
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From: s9(2)(a)
Sent: Wednesday, 12 September 2018 10:34 a.m.
To: McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: FW: CCRC email from Duncan Webb
Importance: High

Hi Stuart

As discussed, attached is the email from Duncan Webb MP with his views on the CCRC. I will let Mr Webb know that his message has been provided to Officials. Let me know if you need anything more from me.

Ngā mihi

s9(2)(a)

Private Secretary (Justice and Courts)

s9(2)(a)

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts, Minister for Treaty of Waitangi Negotiations,
 Minister Responsible for the NZSIS, Minister Responsible for the GCSB, Minister Responsible for Pike River Re-entry
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 Private Bag 18 041, Parliament Buildings, Wellington 6160, New Zealand

Authorised by Hon Andrew Little MP, Parliament Buildings, Wellington 6160, New Zealand

From: s9(2)(a)
Sent: Wednesday, 12 September 2018 10:12 AM
To: s9(2)(a)
s9(2)(a)
Subject: CCRC email from Duncan Webb
Importance: High

Hi team

See the attached email from Duncan Webb MP. He is open to discussing with officials.

Is it possible for one of you to sort/organise?

Thanks

s9(2)(a) | Private Secretary - Justice and Courts

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts

s9(2)(a) | Reception +64 4 817 8707 | Ministerial Email a.little@ministers.govt.nz | Web beehive.govt.nz | Postal Freepost Parliament, Private Bag 18 041, Parliament Buildings, Wellington 6160, New Zealand

Dr Duncan Webb
Member of Parliament for Christchurch Central
Parliament Buildings
Wellington 6160

Dear Duncan

Criminal Cases Review Commission Bill

Thank you for your comments on the Criminal Cases Review Commission Bill.

I am certainly hopeful that the legislation is welcomed by a wide range of New Zealanders, including the public and experts in the fields. Experience during consultation with experts suggests there is a broad consensus that this is the right thing to do, although there are somewhat differing views on many of the policy and technical issues you raise.

I anticipate that the legislative process will lead to many of these issues being considered further, and may well result in a number of technical changes. While the drafting matters you raise have not been incorporated in the version of the Bill for introduction, I will direct my officials to begin consideration of these and encourage you to raise them further during the select committee process.

Set out below are some responses to the larger points you have raised.

'Speedy, fair and efficient'

I agree entirely that it will be vital that the CCRC process applications in a speedy, fair and efficient manner.

Fairness is expressly incorporated in clause 16 of the Bill which requires the Commission to act independently, impartially and fairly in performing its functions and duties.

Speed and efficiency is not expressly incorporated in the provisions of the Bill, though the substantive provisions have been designed with these goals in mind. Whether there should be express calls for speed and efficiency is, however, a very useful question to consider during the legislative process.

Judicial review

I do not intend to oust judicial review in respect of the CCRC's decisions.

As you know, judicial review is an essential mechanism for maintaining the rule of law is important, in that it ensures a person with an interest in a decision can challenge the lawfulness of that decision.

Further, judicial review actions of decisions made by the UK CCRC and the Scottish CCRC have been rare. Decisions from judicial review cases against the CCRCs in both Scotland and the UK have emphasised that the courts are hesitant to override the CCRC judgement on a case. Even if the court objects to a decision to not refer a case by the CCRC on the merits, they have tended to rule on whether the decision was legally tenable and, if not, that the CCRC should reconsider the case.

Privacy Act 1993

A similar question to yours was also raised by the Office of the Privacy Commissioner. The policy intent is not to exclude the application of the Privacy Act 1993 in respect of the CCRC.

To make this clear, the Bill now includes a provision explicitly highlighting that nothing in the limitations on disclosure of information held by the CCRC affects a person's right to access their personal information under Information Privacy Principle 6.

The test for referral

As you might imagine, the test for referral has been one of the complex issues to resolve during the policy and drafting process.

The intention underlying the drafting of clause 17 is to provide the CCRC with a broad discretion to refer meritorious cases back to the courts, while signalling what the relevant considerations are likely to be in almost every conceivable case.

In my view, the proposed test for referral provides the Commission with a very broad discretion; potentially broader, even, than a test that would require the Commission to determine whether a miscarriage of justice *has* or *may have* occurred.

The test is also designed to cover referrals for both conviction and sentence, and the grounds of appeal for both scenarios in sections 232 and 250 of the Criminal Procedure Act 2011. A miscarriage of justice is only one (albeit the most commonly used) of three appeal grounds against conviction in section 232 of the Criminal Procedure Act, and the phrase does not appear at all in section 250 in respect of an appeal against sentence.

However, I again anticipate this aspect of the Bill will continue to receive significant attention and will gladly consider any improvements that can be made to it so that the CCRC may effectively carry out its core function.

Compensation

The CCRC will not have a role in making recommendations to the Minister of Justice on compensation. While a case can be made for the CCRC to play a role in compensation claims, I determined early in the policy process that the key question for the CCRC should be whether a case merits referral back to the courts, and that its substantive role should end at that point. This is also the case for the CCRCs in the UK (England, Wales and Northern Ireland) and Scotland.

I hope this information answers some of your questions. I appreciate the time and effort you have put into thinking about the Bill and, as I intend for the Bill to be sent to the Justice Committee for consideration, I am sure that your input will continue to help materially improve the Bill as it progresses through the House.

Yours sincerely

Andrew Little
Minister of Justice

DRAFT

Stace, Rachael

From: Goddard, Andrew
Sent: Thursday, 27 September 2018 10:11 a.m.
To: s9(2)(a)
Cc: s9(2)(a); Byers, Antony; McGilvray, Stuart; Stace, Rachael
Subject: RE: CCRC
Attachments: 2018 09 21 CCRC Media Release.docx; 2018 09 21 - CCRC QA.DOCX

Mōrena s9(2)(a),

As discussed, please find **attached** the draft media release and the QAs. They have not changed since the last versions we sent through, and hopefully all look okay, but please let us know if there is anything else we can do.

Ngā manaakitanga,

Andrew



Andrew Goddard
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From: s9(2)(a)
Sent: Thursday, 27 September 2018 9:40 a.m.
To: McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>; Stace, Rachael <Rachael.Stace@justice.govt.nz>; Goddard, Andrew <Andrew.Goddard@justice.govt.nz>
Cc: s9(2)(a); Byers, Antony <Antony.Byers@justice.govt.nz>
Subject: CCRC

Hi team

The CCRC Bill is going to be lodged today, so could we get some comms lines about it sent through please? Sing out with any questions.

Ngā mihi

s9(2)(a)

Private Secretary (Justice and Courts)

s9(2)(a)

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts, Minister for Treaty of Waitangi Negotiations, Minister Responsible for the NZSIS, Minister Responsible for the GCSB, Minister Responsible for Pike River Re-entry
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Stace, Rachael

From: Goddard, Andrew
Sent: Thursday, 11 October 2018 10:06 a.m.
To: s9(2)(a)
Subject: RE: FOR COMMENT: Draft First Reading speech for CCRC Bill

Mōrena s9(2)(a),

Marvellous – thank you! Appreciate you turning that around so quickly. We'll finalise it and get the House folders all sorted for delivery unto you.

Ngā manaakitanga,

Andrew



Andrew Goddard
 Senior Policy Advisor | Criminal Law
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www.justice.govt.nz

From: s9(2)(a)
Sent: Thursday, 11 October 2018 9:39 a.m.
To: Goddard, Andrew <Andrew.Goddard@justice.govt.nz>
Subject: RE: FOR COMMENT: Draft First Reading speech for CCRC Bill

Mōrena Andrew

The speech looks good and there are no additional comments from this end at this stage.

Ngā mihi

s9(2)(a)

Private Secretary (Justice and Courts)

s9(2)(a)

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts, Minister for Treaty of Waitangi Negotiations, Minister Responsible for the NZSIS, Minister Responsible for the GCSB, Minister Responsible for Pike River Re-entry Reception +64 4 817 8707 | Ministerial Email a.little@ministers.govt.nz | Web beehive.govt.nz | Postal Freepost Parliament, Private Bag 18 041, Parliament Buildings, Wellington 6160, New Zealand

Authorised by Hon Andrew Little MP, Parliament Buildings, Wellington 6160, New Zealand

From: Goddard, Andrew [<mailto:Andrew.Goddard@justice.govt.nz>]
Sent: Monday, 8 October 2018 5:02 PM
To: s9(2)(a)
Cc: Stace, Rachael <Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>; Purple, Folder <Folder.Purple@justice.govt.nz>
Subject: FOR COMMENT: Draft First Reading speech for CCRC Bill

Kia ora s9(2)(a)

I hope you are well. Please find **attached**, for consideration and comment from the Office, a draft First Reading speech for the Criminal Cases Review Commission Bill.

The final version of this will be included in the Minister's House Folder, which we are looking to have over your way later this week / early next week, subject to confirmation that the Bill will indeed be read a first time during the next sitting week (we understand this is the case, but do not know if this has been agreed as yet).

Very keen to hear any thoughts that you or other parties in the office have on the speech, and will make amendments as required. Happy also to discuss timeframes, if that would be useful.

Ngā mihi nui,

Andrew



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Thank you.

Stace, Rachael

From: Goddard, Andrew
Sent: Friday, 12 October 2018 3:09 p.m.
To: s9(2)(a)
Cc: Stace, Rachael; McGilvray, Stuart
Subject: RE: CCRC - papers for website

Hi s9(2)(a)

Great – thank you. Really appreciate the update!

Ngā mihi nui,

Andrew



Andrew Goddard
 Senior Policy Advisor | Criminal Law
 DDI: +64 4 494 9964 | Ext 50964 |
www.justice.govt.nz

From: s9(2)(a)
Sent: Friday, 12 October 2018 11:20 a.m.
To: Goddard, Andrew <Andrew.Goddard@justice.govt.nz>; s9(2)(a)
Cc: Stace, Rachael <Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: RE: CCRC - papers for website

Hi Andrew

As an update, I have gone through the documents and will get them to the Ministerial advisors for consultation today. I'll get back to you with our comments ASAP.

Ngā mihi

s9(2)(a)

Private Secretary (Justice and Courts)

s9(2)(a)

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts, Minister for Treaty of Waitangi Negotiations, Minister Responsible for the NZSIS, Minister Responsible for the GCSB, Minister Responsible for Pike River Re-entry Reception +64 4 817 8707 | Ministerial Email a.little@ministers.govt.nz | Web beehive.govt.nz | Postal Freepost Parliament, Private Bag 18 041, Parliament Buildings, Wellington 6160, New Zealand

Authorised by Hon Andrew Little MP, Parliament Buildings, Wellington 6160, New Zealand

From: Goddard, Andrew [<mailto:Andrew.Goddard@justice.govt.nz>]
Sent: Tuesday, 9 October 2018 2:54 PM
To: s9(2)(a) s9(2)(a)
Cc: Stace, Rachael <Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: RE: CCRC - papers for website

Hi s9(2)(a)

Wonderful, thank you. I can certainly do so.

Attached are the versions of the documents yet to be uploaded (the RIA and the disclosure statement having, as discussed previously, already been published) with the s 9(2)(a) redactions incorporated (where relevant). As below, we do not propose to make any further redactions, as we consider the relevant grounds for withholding information that have been relied on in the past no longer apply (or are outweighed by countervailing public interest).

Hope this is helpful – and I am, of course, happy to discuss.

Best wishes,

Andrew



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From: s9(2)(a)
Sent: Tuesday, 9 October 2018 2:48 p.m.
To: Goddard, Andrew <Andrew.Goddard@justice.govt.nz>; s9(2)(a)
Cc: Stace, Rachael <Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: RE: CCRC - papers for website

Hi Andrew

We are just reviewing them but if you could send through the final draft versions with the proposed redactions, that would be good.

Ngā mihi

s9(2)(a)

Private Secretary (Justice and Courts)

s9(2)(a)

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts, Minister for Treaty of Waitangi Negotiations, Minister Responsible for the NZSIS, Minister Responsible for the GCSB, Minister Responsible for Pike River Re-entry
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Authorised by Hon Andrew Little MP, Parliament Buildings, Wellington 6160, New Zealand

From: Goddard, Andrew [<mailto:Andrew.Goddard@justice.govt.nz>]
Sent: Monday, 24 September 2018 3:55 PM
To: s9(2)(a)
Cc: s9(2)(a) Stace, Rachael <Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: RE: CCRC - papers for website

Just in case the .zip does not work (as I understand it is not, universally)

From: Goddard, Andrew
Sent: Monday, 24 September 2018 3:32 p.m.

To: s9(2)(a)
Cc: s9(2)(a); Stace, Rachael
<Rachael.Stace@justice.govt.nz>; McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Subject: CCRC - papers for website

Kia ora s9(2)(a)

As discussed, I am pulling together all the material to be uploaded to the MoJ website when the Criminal Cases Review Commission Bill is introduced tomorrow. As the original Cabinet paper envisioned, this includes all previous briefings on the substantive policy work as well as the relevant Cabinet papers. These are all included in the **attached** zip folder.

We propose to redact people's phone numbers on the cover pages of the briefings to protect individuals' privacy under s 9(2)(a) of the Official Information Act 1982.

As discussed, we have reviewed the rest of the documents to look at, amongst other things, the financial implications and cannot see any good reason to withhold further information.

s9(2)(g)(i)

On that basis, we do not propose any further redactions. However, if there are specific parts of the briefings the Office thinks there is good reason to withhold, please let us know ASAP.

Happy to discuss.

Ngā mihi nui,

Andrew



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Thank you.

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- (1) reply promptly to that effect, and remove this email and the reply from your system;
- (2) do not act on this email in any other way.

Thank you.

CRIMINAL CASES REVIEW COMMISSION BILL OVERVIEW

Background

- The Government has committed to establish a Criminal Cases Review Commission (the CCRC).
- The policy and Criminal Cases Review Commission Bill (the Bill) for introduction were approved at LEG on 20 September 2018 and confirmed at Cabinet on 24 September 2018.
- The Bill was introduced on 27 September 2018.

General effect of the Bill

- The Bill establishes the CCRC. The CCRC will-
 - receive applications from eligible persons or their authorised representatives;
 - carry out the activities it considers necessary to make its functions known to, and understood by, the public;
 - have the ability to undertake initial inquiries into a conviction or sentence on its own motion;
 - undertake thematic inquiries into a conviction or sentence on its own motion;
 - undertake thematic inquiries into a practice, policy, procedure or other general matter it considers to be related to miscarriages of justice;
 - have reasonable powers to obtain information relevant to investigation from any person;
 - regulate its own policies and procedures in a manner than is consistent with the rules of natural justice;
 - appoint specialist advisers to give advice in relation to scientific, technical or other matters involving particular expertise.

Structure of the Bill

- **Part 1** specifies the preliminary provisions, including the purpose and the terms used throughout the Bill.

CRIMINAL CASES REVIEW COMMISSION BILL OVERVIEW

- **Part 2** provides the key features of the Commission
 - **Subpart 1** – this sets out the CCRC as a Crown entity, provides for the membership of the CCRC, and the appointment of specialist advisors.
 - **Subpart 2** – outlines the CCRC's primary function, along with the CCRC's duties and powers. This includes the CCRC's power to make inquiries into a general matter, and regulate its own procedures.
 - **Subpart 3** – provides the specifics of the CCRC's primary function of referral, including the test for referral, and the requirement that the CCRC provide its reasons, or a summary of its reasons for referral to the appeal court.
 - **Subpart 4** – specifies who can make an application to the CCRC, and provides the CCRC's power to investigate or take no further action on an application. This part also provides the CCRC's power to make initial inquiries on own initiative.
 - **Subpart 5** – outlines the relationship between the CCRC and the Royal prerogative of mercy.
 - **Subpart 6** – sets out the CCRC's investigation powers, the treatment of this information and how the CCRC's power interacts with privileged and confidential information. This part also specifies how the OIA provides to the CCRC.
 - **Subpart 7** – includes the miscellaneous provisions, such as the power for the Court to make orders for a failure to comply with a request. It also provides how the CCRC relates to the Crown Entities Act 2004 including the CCRC's exemption from being required to prepare a statement of intent, and performance expectations.
- **Schedule 1** – outlines how existing applications for the Royal prerogative of mercy may be treated including transfer to the CCRC or referral to the appeal court.
- **Schedule 2** – provides the amendments to other acts that will be necessary.



Aide memoire for Cabinet: Establishing a Criminal Cases Review Commission

Hon Andrew Little
3 August 2018

Purpose

1. This paper provides information to support discussion of the Cabinet paper 'Establishing a Criminal Cases Review Commission' at Cabinet on 6 August 2018, specifically on key issues raised at the Social Wellbeing Committee (SWC) meeting.

Key messages

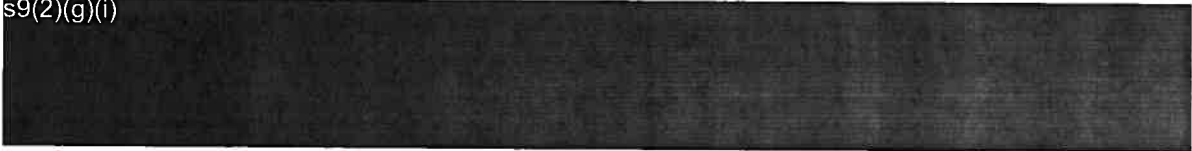
- The Government has committed to establishing a Criminal Cases Review Commission ('CCRC'). A CCRC is an independent body created to investigate suspected miscarriages of justice.
- SWC considered the paper on 1 August 2018. We understand that the key issues considered were whether to allow the CCRC to instigate thematic inquiries, and how the CCRC would be funded.
- We previously recommended against a similar function to the CCRC being able to instigate thematic inquiries, though there are also reasons to include such an ability. s9(2)(g)(i)
- s9(2)(f)(iv). Some establishment funding may come from within Vote Justice baselines, if resource can be identified, but ongoing operational expenditure should not be expected to come from within baselines also.

Thematic inquiries

2. We understand that the prospect of including a power for the CCRC to undertake thematic inquiries was raised at SWC. This ability is now included in recommendation 10 alongside the CCRC's ability to launch own motion investigations into a conviction or sentence (SWC-18-MIN-0087 refers).
3. Our original advice in December 2017 included a recommendation that the CCRC be required to monitor trends in relation to their investigations into potential miscarriages of justice and to report to the relevant Minister(s) when appropriate.
4. However, following targeted consultation we recommended against proceeding with the function to monitor and report on trends. 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.
5. This recommendation was also based on the following arguments made against thematic inquiries raised during targeted consultation:
 - a. the anticipated volume of cases would be unlikely to generate reportable trends or 'systemic issues';
 - b. undertaking thematic inquiries requires a very different skillset; and
 - c. it could distract from the CCRC's core mandate by drawing resource and focus away from investigations and referrals.
6. 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. Thematic inquiries would also add a quasi-preventive function to the CCRC's mandate.
7. We also note that 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 these issues to light.

8. Should Cabinet wish to proceed with an ability to conduct thematic inquiries, additional resourcing would be required for the CCRC to avoid the risk of distracting from its core mandate.

s9(2)(g)(i)

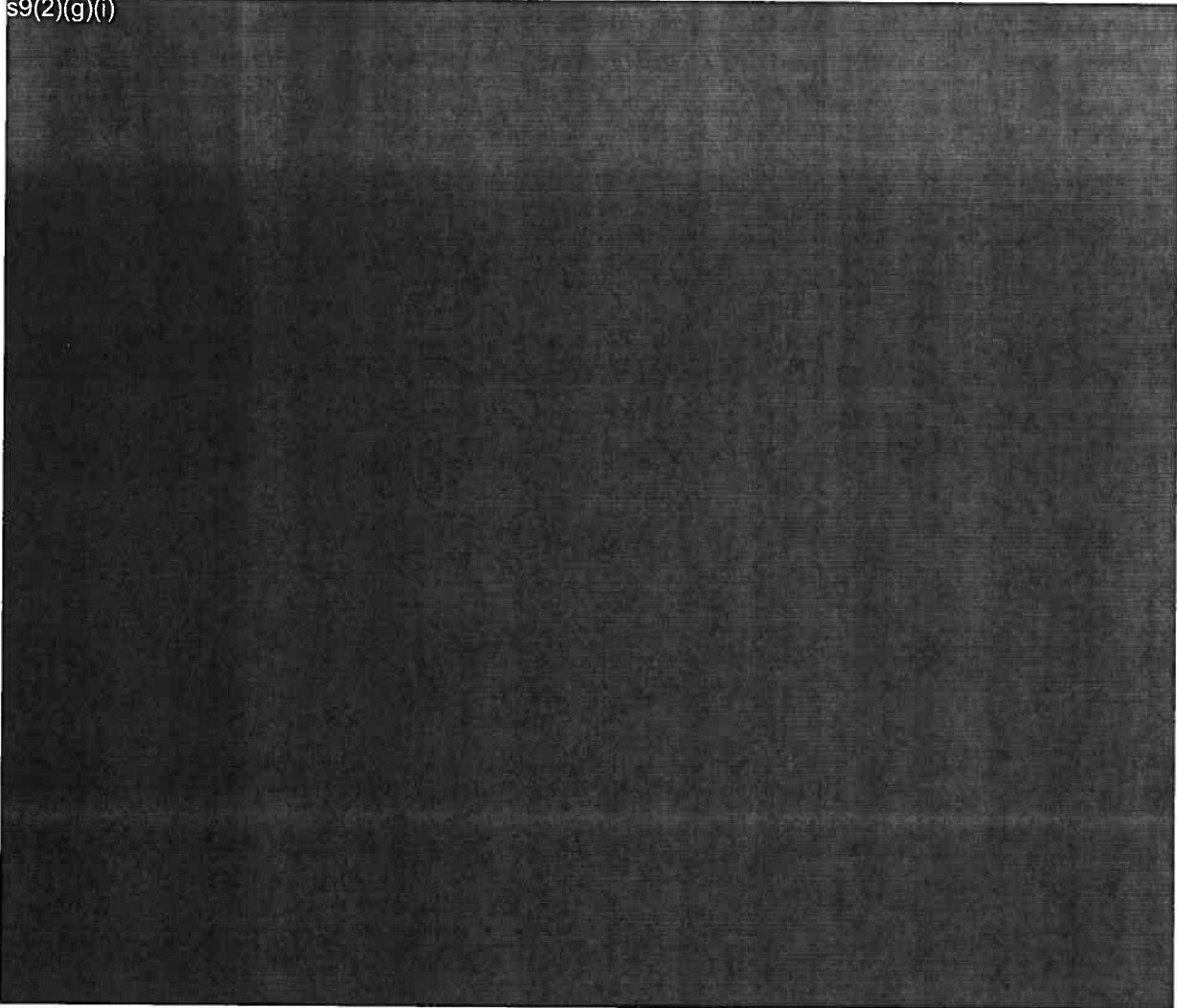


10. If Cabinet agrees to give the CCRC to ability to conduct thematic inquiries, it may also be appropriate to retain the Independent Crown Entity ('ICE') reporting functions that are currently proposed it be exempted from. A Statement of Intent and statements of performance expectations speak to the strategic direction of ICEs, which may be more relevant to any planned thematic inquiries than to the CCRC's more individualised focus in investigating suspected miscarriages of justice.

Funding for the CCRC

11. The other primary issue that was discussed was the cost of establishing the CCRC and its ongoing operational expenditure.

s9(2)(g)(i)





Cabinet Legislation Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Criminal Cases Review Commission Bill: Approval for Introduction

Portfolio **Justice**

On 20 September 2018, the Cabinet Legislation Committee:

- 1 **noted** that on 1 August 2018, the Cabinet Social Wellbeing Committee (SWC) agreed to establish a Criminal Cases Review Commission (the Commission) for New Zealand [SWC-18-MIN-0087;
- 2 s9(2)(f)(iv)
- 3 s9(2)(f)(iv)
- 4 **noted** 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;
- 5 **approved** the Criminal Cases Review Commission Bill [PCO 21108/8.0] for introduction, subject to the final approval of the government caucuses and sufficient support in the House of Representatives;
- 6 **agreed** that the Criminal Cases Review Commission Bill will bind the Crown;
- 7 **noted** 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:
- 8 **agreed** that the Bill be introduced on the first available date after Cabinet approval;
- 9 **agreed** that the government propose that the Bill be:
 - 9.1 referred to the Justice Committee for consideration;
 - 9.2 s9(2)(f)(iv)
 - 9.3 s9(2)(f)(iv)

Vivien Meek
Committee Secretary

Hard-copy distribution (see over)

Hard-copy distribution;

Present:

Rt Hon Winston Peters
Hon David Parker
Hon Stuart Nash
Hon Iain Lees-Galloway (Chair)
Hon Damien O'Connor
Hon Tracey Martin
Hon Kris Faafoi
Hon Eugenie Sage
Hon James Shaw
Hon Ruth Dyson (Senior Government Whip)

Officials present from:

Officials Committee for LEG

Hard-copy distribution:

Minister of Justice



Cabinet Social Wellbeing Committee

Minute of Decision

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Establishing a Criminal Cases Review Commission

Portfolio Justice

On 1 August 2018, the Cabinet Social Wellbeing Committee:

Criminal Cases Review Commission establishment

- 1 **agreed** to establish a Criminal Cases Review Commission (the Commission) for New Zealand;
- 2 **s9(2)(f)(iv)**
- 3 **agreed** that the primary function of the Commission will be to investigate and refer any conviction or sentence in a criminal case back to the appeal courts where it considers a miscarriage of justice might have occurred;
- 4 **agreed** that the Commission be established as a new independent Crown entity, with between three and seven Commissioners, including a full time Chief Commissioner and Deputy Chief Commissioner;
- 5 **agreed** that one third of the Commissioners be required to have legal qualifications, and that two thirds also be required have relevant knowledge or experience in the justice system;
- 6 **agreed** to adopt a test for referral that provides that the Commission:
 - 6.1 may refer a conviction or sentence if it considers it is in the interests of justice that the referral may be made; and
 - 6.2 in deciding whether to refer, must have regard to:
 - 6.2.1 whether the convicted person has exercised their rights to appeal against conviction or sentence;
 - 6.2.2 the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in the proceedings relating to the conviction or sentence;
 - 6.2.3 the prospects that the court will allow the appeal;
 - 6.2.4 any other matter that the Commission considers relevant;
- 7 **noted** that officials will continue to consult with selected experts on the test for referral;

- 8 **agreed** that the Commission have a secondary function to promote, by way of education and discussion, its primary function;
- 9 **agreed** that investigations of the Commission may be triggered on application from a living convicted person or their representative;
- 10 **agreed** that the Commission be able to undertake initial inquiries on its own initiative where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest and new inquiries relating to thematic issues identified by the Commission arising from its investigations;
- 11 **agreed** that the Commission should have limited grounds to take no further action on an application;
- 12 **agreed** that the legislation to establish the Commission provide for the relationship between the Commission's functions and the Royal prerogative of mercy, specifically to:
- 12.1 preserve the authority of the Governor-General to exercise the residual prerogative powers;
- 12.2 enable the Governor-General (or Minister of Justice) to refer applications for the prerogative of mercy that allege a miscarriage of justice direct to the Commission for it to deal with under its statutory authority;
- 12.3 allow the Minister of Justice (as the Governor-General's adviser) to request the Commission's opinion on any matter relevant to the Royal prerogative of mercy;
- 13 **agreed** that the Commission be given powers to obtain relevant information, including written information and exhibits, from both public bodies and private persons, where the Commission has reasonable grounds to believe the information is necessary for the investigation and cannot be obtained by other means;
- 14 **agreed** that if a person fails or refuses to comply with a notice requiring information, without reasonable excuse, the Commission may apply to the court seeking an order:
- 14.1 directing the person to comply with any requirements in the notice; and
- 14.2 an order for any consequential relief that the court thinks appropriate;
- 15 **agreed** that there be a process whereby persons may claim, and have that claim verified, privilege and confidentiality in relation to information sought by the Commission;
- 16 **agreed** that a person who is or has been a member or employee of the Commission shall be prohibited from disclosing any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is authorised by the Commission on limited grounds;
- 17 **agreed** that the Official Information Act 1982 should not apply in respect of information contained in any correspondence or communication that has taken place between the Commission and any person in relation to an investigation;
- 18 **agreed** that the Commission be able to co-opt specialist advice to assist in the exercise of its functions;

- 19 **agreed** that the Commission be given statutory authority to regulate and promulgate its procedures for dealing with operational matters pertaining to the exercise of its functions and powers;
- 20 **agreed** that there will be no statutory right of appeal from determinations of the Commission;
- 21 **agreed** to make any necessary consequential amendments to the Legal Services Act 2011 to ensure that, where appropriate, applicants may have access legal aid;

Financial implications

- 22 **noted** that the Commission will cost an estimated:
 - 22.1 \$2.3 million to establish;
 - 22.2 \$3.9 million per year to carry out its functions; and
 - 22.3 \$600,000 in flow on costs to other appropriations;
- 23 **agreed** to establish the following new appropriation:

Vote	Appropriation Minister	Title	Type	Scope
Justice	Minister of Justice	Establishing the Criminal Cases Review Commission	Departmental Output Expense	This appropriation is limited to establishing the Criminal Cases Review Commission

- 24 **noted** that the Ministry of Justice is exploring options to fund the establishment of the Commission from within baselines;
- 25 **noted** that the Minister of Finance and the Minister of Justice will jointly approve a fiscally neutral adjustment from within existing 2018/19 Vote Justice baselines to the new appropriation, when an amount to be transferred is identified;

26 s9(2)(f)(iv) 

27 s9(2)(f)(iv) 

Legislative implications

28 s9(2)(f)(iv) 

29 s9(2)(f)(iv) 

- 30 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the decisions under SWC-18-MIN-0087;
- 31 **agreed** that the Minister of Justice may resolve minor policy issues in relation to the drafting of legislation, following consultation with the Minister of State Services and the

Attorney-General, which are consistent with the contents of the paper under SWC-18-MIN-0087, without further reference to Cabinet;

Publicity

- 32 **noted** that the Minister of Justice will issue a press release about the decisions under SWC-18-MIN-0087, and arrange for all advice relating to the establishment of the Commission to be proactively published on the Ministry of Justice website, when the Bill is approved for introduction;
- 33 **noted** that the Minister of Justice intends to publish the paper and related Cabinet decisions online, subject to any redactions as appropriate under the Official Information Act 1982, once the Bill has been approved for introduction;

s9(2)(f)(iv)

34

s9(2)(f)(iv)

Vivien Meek
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson
Hon Phil Twyford
Hon Andrew Little
Hon Carmel Sepuloni (Chair)
Hon Dr David Clark
Hon Nanaia Mahuta
Hon Jenny Salesa
Hon Damien O'Connor
Hon Tracey Martin
Hon Aupito William Sio
Hon Julie Anne Genter
Jan Logie, MP

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet
Office of the Chair of SWC
Officials Committee for SWC

Hard-copy distribution:

Minister of Justice

Stace, Rachael

From: Goddard, Andrew
Sent: Friday, 19 October 2018 3:17 p.m.
To: s9(2)(a)
Cc: Stace, Rachael; McGilvray, Stuart
Subject: CCRC Bill report back timeframes

Kia ora s9(2)(a)

As discussed, and apropos of my slightly vague question on the phone, here is an email.

Cabinet agreed that the Government propose that the Criminal Cases Review Commission Bill be:

- referred to the Justice committee for consideration;
- s9(2)(f)(iv)
- s9(2)(f)(iv)

The first point has largely been taken care of (the Minister having nominated the Committee in his speech), and enactment is question for next year s9(2)(f)(iv). What we are keen to ensure is that the timing of the report back is in hand. I think this is just a question of checking in with the Minister's team to see that the necessary arrangements have been made – presumably with the Office of the Clerk – so that the instruction to the select committee under Standing Order 290 gives effect to Cabinet's decision.

Happy to discuss further. And let us know if there's anything we can do to assist.

Ngā mihi nui,

Andrew



Andrew Goddard
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Stace, Rachael

From: Goddard, Andrew
Sent: Wednesday, 19 December 2018 9:32 a.m.
To: s9(2)(a)
Cc: Stace, Rachael; McGilvray, Stuart
Subject: RE: CCRC material
Attachments: 20171211 BR Proposed model for establishing a CCRC REDACTED.pdf; 20180309 BR Supplementary advice on proposed CCRC model - redacted.pdf; 20180328 AM Criminal Cases Review Commission - areas for further discussion REDACTED.pdf; 20180822 BR Criminal Cases Review Commission Bill REDACTED.pdf; CAB Establishing a Criminal Cases Review Commission.pdf; LEG Criminal Cases Review Commission Bill - Approval for introduction.pdf; 20171109 BR Establishing a Criminal Cases Review Commission REDACTED.pdf

Kia ora s9(2)(a)

Thanks again for getting the comments over to us.

s9(2)(g)(i)

I will be in touch with OLC to let them know that they can inform the Ombudsman that we have published the material.

Any questions, happy to discuss.

Ngā mihi nui,

Andrew



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From: McGilvray, Stuart
Sent: Thursday, 13 December 2018 10:39 a.m.
To: s9(2)(a)
Cc: Goddard, Andrew <Andrew.Goddard@justice.govt.nz>
Subject: RE: CCRC material

Great, ta

From: s9(2)(a)
Sent: Thursday, 13 December 2018 9:42 a.m.
To: McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>
Cc: Goddard, Andrew <Andrew.Goddard@justice.govt.nz>
Subject: RE: CCRC material

Good news, I went through it all for the final time with [REDACTED] last night. I'm not in the office today but will drop it over tomorrow morning

Ngā mihi

[REDACTED]

Private Secretary (Justice and Courts)

[REDACTED]

Office of Hon Andrew Little MP, Minister of Justice, Minister for Courts, Minister for Treaty of Waitangi Negotiations, Minister Responsible for the NZSIS, Minister Responsible for the GCSB, Minister Responsible for Pike River Re-entry

Reception +64 4 817 8707 | Ministerial Email a.little@ministers.govt.nz | Web beehive.govt.nz | Postal Freepost Parliament, Private Bag 18 041, Parliament Buildings, Wellington 6160, New Zealand

Authorised by Hon Andrew Little MP, Parliament Buildings, Wellington 6160, New Zealand

SENT FROM A MOBILE DEVICE

From: McGilvray, Stuart <Stuart.McGilvray@justice.govt.nz>

Date: Thursday, 13 Dec 2018, 9:35 AM

To: [REDACTED]

Cc: Goddard, Andrew <Andrew.Goddard@justice.govt.nz>

Subject: RE: CCRC material

This is me following up on this again ...

-----Original Message-----

From: McGilvray, Stuart

Sent: Tuesday, 11 December 2018 9:43 a.m.

To: [REDACTED]

Subject: CCRC material

Hey

[REDACTED]

Cheers

Stuart

Sent from my iPhone

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(2) do not act on this email in any other way.

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