

Criminal Cases Review Commission Bill

Government Bill

Explanatory note

General policy statement

Purpose

The Bill establishes the Criminal Cases Review Commission (the **Commission**). The Commission's purpose is to review convictions and sentences and decide whether to refer them to the appeal court. This will replace the power currently exercised by the Governor-General under section 406 of the Crimes Act 1961.

The Commission is established as a new independent Crown entity, with a membership of no fewer than 3 but no more than 7 Commissioners.

Several jurisdictions have established a similar Commission, including the United Kingdom (England, Wales, and Northern Ireland), Scotland, and Norway. These examples provide valuable experience to draw from and demonstrate the value in having an independent body to carry out this 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. The Royal prerogative of mercy can, among other things, 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 fresh appeal.

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 of Justice.

Establishing the Commission is an opportunity to enhance this system by having an independent body with dedicated staff focused on the mandate to identify and respond to possible miscarriages of justice. This should, in turn, help to ensure the timeliness, quality, and fairness of investigations into miscarriages of justice.

The design of the Commission is informed by the core principles underlying the Royal prerogative of mercy, and the referral mechanisms exercised by overseas Commissions, including that—

- the courts should have an opportunity to reconsider a person’s conviction or sentence if a miscarriage of justice may have occurred:
- convicted persons are normally expected to exercise their rights to appeal against conviction or sentence before asking the Commission to intervene:
- the referral process is not an opportunity to simply repeat arguments or re-examine evidence that has already been considered by the courts:
- what is normally required to justify referring a case is “something new”—evidence or argument that has not previously been examined by the courts.

Commission’s grounds for referring case back to courts

The statutory grounds for referring a case back to the appeal courts is a critical aspect of the design of the Commission. Decisions on referral will be made by the Commissioners and cannot be delegated under the Crown Entities Act 2004.

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—

- whether the convicted person has exercised their rights to appeal against conviction or sentence:
- 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:
- the prospects of the court allowing the appeal:
- any other matter that the Commission considers relevant.

Key features of Commission

The Commission 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 practice, policy, procedure or other general matter it considers to be related to miscarriages of justice:
- have reasonable powers to obtain information relevant to the investigation from any person:
- regulate its own policies and procedure in a manner that 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.

Residual Royal prerogative of mercy

As the Royal prerogative of mercy remains in force via the Letters Patent Constituting the Office of the Governor-General of New Zealand, the Bill provides for the interaction between the Commission's functions and the residual role of the Governor-General in exercising the Royal prerogative of mercy.

Specifically, the Bill enables the Governor-General (acting on the advice of the Minister of Justice) to transfer applications for the Royal prerogative of mercy that allege a miscarriage of justice to the Commission for it to deal with under its statutory authority. The Bill also expressly recognises the authority of the Governor-General to exercise the residual prerogative powers, which include the grant of a full pardon. It is expected that the occasion for exercise of those powers will be rare.

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

There will be a transitional period during which applications to the Governor-General made before the establishment of the Commission are completed. The transitional arrangements in the Bill allow for such applications to be dealt with under the existing Royal prerogative powers, or transferred to the Commission if that is suitable.

Commencement

The Bill provides for the commencement date(s) to be appointed by Order in Council, and does not include a default specified date of commencement in the event that the Bill is not earlier brought into force by Order in Council.

The Bill, as with previous legislation establishing independent investigative bodies, is designed to be brought into force by Order in Council once the Commission itself is able to operate effectively. That will happen when the necessary appointments have been made, Parliament has appropriated funds to the Commission, and other key implementation decisions have been settled. The intention is for these matters to be resolved by July 2019.

Departmental disclosure statement

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2018&no=106>

Regulatory impact assessment

The Ministry of Justice produced a regulatory impact assessment on 26 July 2018 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- <https://www.justice.govt.nz/assets/document/publications/ris-criminal-cases-review-comission.pdf>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill comes into force on a date appointed by Order in Council. The reason for the deferred commencement is so that the practical steps that will need to be taken before the Criminal Cases Review Commission (the **Commission**) can start operating will have been taken when the Commission is formally established by the Bill.

Part 1

Preliminary provisions

Clause 3 specifies the purpose of the Bill. The purpose is consistent with the key function of the Commission (to consider convictions and sentences to determine whether they should be referred to the appropriate appeal court on the ground provided for under the Bill). The purpose of the Bill is therefore to establish the Commission and to do that in a manner that ensures the Commission is able to carry out its investigations in a transparent, effective, and fair manner.

Clause 4 defines various terms used in the Bill.

Clause 5 gives effect to the transitional and savings provisions set out in *Schedule 1* of the Bill.

Clause 6 provides that the Bill binds the Crown.

Part 2

Criminal Cases Review Commission

Subpart 1—Establishment and appointments

Clause 7 establishes the Commission.

Clause 8 provides that the Commission is a Crown entity to which the Crown Entities Act 2004 applies, except to the extent that the Bill expressly provides otherwise.

Clause 9 provides for the membership of the Commission, with the effect that the Commission must comprise a total of not more than 7 but not less than 3 members.

One of those members must be the Chief Commissioner, one must be the Deputy Chief Commissioner, and each other one will be a Commissioner. The members of the Commission must be qualified. At least one-third of them must have legal qualifications and the other two-thirds must have experience working in the criminal justice system or have other knowledge or expertise relevant to the Commission's functions.

Clause 10 enables the Commission to appoint, as specialist advisers, people who can assist the Commission in performing its functions and duties by providing specialist advice, for example, in relation to scientific, technical, or other matters.

Subpart 2—General provisions relating to functions, duties, and powers

Clause 11 provides that the primary function of the Commission is to review convictions and sentences for referral to the appropriate appeal court.

Clause 12 enables the Commission to initiate inquiries into matters of a general nature that it identifies in the course of reviewing convictions or sentences and that it considers may be related to cases involving a miscarriage of justice. The Commission must, before initiating an inquiry, be satisfied that it is in the public interest to conduct the inquiry.

Clause 13 requires the Commission to promote public knowledge and understanding of the Commission's functions.

Clause 14 gives the Commission all the powers necessary for it to perform its functions and duties.

Clause 15 is a general power for the Commission to control its own procedures, subject to specific provisions of the Act dealing with procedural matters. The Commission's procedures must be consistent with the rules of natural justice.

Clause 16 requires the Commission to act independently, impartially, and fairly in performing its functions and duties and exercising its powers.

Subpart 3—Commission's primary function

Key provisions

Clause 17 provides for the ground on which the Commission may refer a conviction or sentence to the appropriate appeal court: that is, when the Commission, after reviewing the case, considers that it is in the interests of justice to do so. The clause also provides for the matters that the Commission must have regard to in making its decision on whether to refer. The matters include whether the convicted person has exercised their rights to appeal against the conviction or sentence, the extent to which the application relates to argument evidence, information, or a question of law raised or dealt with in the proceedings, the prospects of the appeal court allowing the appeal, and any other matter the Commission considers relevant.

Clause 18 specifies the relevant appeal court to which the Commission must refer a conviction or sentence on granting an application.

Clause 19 requires the Commission to give the appeal court its reasons for referring the conviction or sentence to the court.

Clause 20 requires the appeal court to which a conviction or sentence is referred to hear that matter as if it were an appeal against the conviction or the sentence.

Subpart 4—Applications to Commission to refer convictions and sentences

Persons who may apply, etc

Clause 21 specifies that either an eligible person (defined in *clause 4* as a living person who has been convicted of an offence) or a person acting on behalf of an eligible person may apply to the Commission to refer a sentence or conviction.

Clause 22 specifies how a person may apply to the Commission.

Clause 23 provides for when the Commission may accept an application made by a person in a representative capacity.

Commission's decision-making powers, etc, relating to applications

Clause 24 provides for the circumstances in which the Commission may decide to take no action, or no further action, in relation to an application.

Clause 25 empowers the Commission to investigate the conviction or sentence to which the application relates.

Clause 26 requires the Commission give written notice of its decision on an application, including the reasons for the decision, to the eligible person and, if applicable, their representative.

Commission's power to act on own initiative

Clause 27 empowers the Commission to make initial inquiries into a conviction or sentence, on its own initiative, if it is satisfied that those inquiries are in the public interest. However, the clause requires the Commission to notify the convicted person after starting to make those inquiries and ask for the person's consent. If the person does not consent, the Commission must not investigate further and cannot refer the conviction or sentence to the appeal court under *clause 17*.

Subpart 5—Commission's functions relating to Royal prerogative of mercy

Clause 28 enables the Governor-General to transfer a person's application for the exercise of the Royal prerogative of mercy to the Commission if the Governor-General considers that the application is sufficiently connected with the Commission's primary function or would more appropriately be dealt with as part of that function.

Clause 29 provides for the Commission's function of giving written opinions to the Minister of Justice on matters arising in relation to applications for the Governor-

General to exercise the Royal prerogative of mercy. The Commission performs this function at the Governor-General's request and may exercise the same investigative powers in doing so as it may exercise in relation to applications to the Commission to refer convictions and sentences to the appeal court.

Clause 30 provides that nothing in the Act affects the Royal prerogative of mercy.

Subpart 6—Commission's investigative powers, protection of information gathered, privileged or confidential information, etc

Investigative powers

Clause 31 is a general provision concerning the Commission's powers of investigation. It enables the Commission to obtain any information that it considers relevant to an investigation and authorises the Commission to access court documents in accordance with the relevant rules of court. *Subclause (2)* qualifies those powers by requiring the Commission to take reasonable steps to obtain information by consent and providing that it may use its power under *clauses 32 and 33* to require a person to provide information only if it considers that it is unlikely to obtain the relevant information by any other means.

Clause 32 enables the Commission to issue a written notice requiring a person to give information to the Commission, provides for the Commission's powers to examine and make records of that information, and requires the person to comply with the Commission's notice (subject to the person's rights under *clause 37* in respect of confidential and privileged information).

Clause 33 enables the Commission to issue a written notice requiring a person to appear before the Commission to be examined on oath or affirmation and requires the person to comply with that notice.

Protection of information gathered

Clause 34 makes it an offence for former or existing members or employees, of the Commission, or former or existing specialist advisers to the Commission, to disclose information obtained by the Commission unless the disclosure is authorised under *clause 35*.

Clause 35 authorises specified disclosures of information to be made at the discretion of the Commission and certain persons.

Clause 36 has the effect that the Official Information Act 1982 does not apply to communications between members or employees of the Commission and other persons in relation to an investigation by the Commission.

Privileged and confidential communications and information

Clause 37 provides for when a person may refuse to disclose communications or information to the Commission on grounds of privilege or confidentiality.

Subpart 7—Miscellaneous provisions

Clause 38 provides for enforcement, by orders obtained from the District Court, of the requirements under *clauses 32 and 33*.

Provisions relating to application of Crown Entities Act 2004

Clauses 39 to 44 provide for how certain provisions of the Crown Entities Act 2004 apply in relation to the Commission. In particular, *clause 40* (which refers to section 29 (criteria for appointments and recommendations by responsible Minister) of that Act)) requires the Minister to take into account the desirability of the Commission being able to draw on knowledge or understanding of te ao Māori from within its membership when appointing or recommending appointments, and *clause 41* ensures that the Commission's primary function cannot be delegated under section 73 of that Act (ability to delegate).

Amendments to other Acts

Clause 45 provides for the consequential amendments to other Acts set out in *Schedule 2*.

Hon Andrew Little

Criminal Cases Review Commission Bill

Government Bill

Contents

	Page
1 Title	3
2 Commencement	3
Part 1	
Preliminary provisions	
3 Purpose of this Act	3
4 Interpretation	4
5 Transitional, savings, and related provisions	4
6 Act binds the Crown	4
Part 2	
Criminal Cases Review Commission	
Subpart 1—Establishment and appointments	
7 Criminal Cases Review Commission established	4
8 Commission is Crown entity	4
9 Membership of Commission	5
10 Specialist advisers	5
Subpart 2—General provisions relating to functions, duties, and powers	
11 Primary function	5
12 Commission's power to initiate inquiries into general matter	5
13 Duty to promote public awareness of functions	6
14 Powers of Commission	6
15 Commission may regulate own procedures	6
16 Manner in which Commission must act	6

Criminal Cases Review Commission Bill

Subpart 3—Commission’s primary function

Key provisions

17	Ground for referring conviction or sentence to appeal court	7
18	Appeal court to which conviction or sentence may be referred	7
19	Commissioner must give appeal court reasons for referral	7
20	Hearing and determination of appeal	7

Subpart 4—Applications to Commission to refer convictions and sentences

Persons who may apply, etc

21	Who may apply	8
22	How application may be made	8
23	Commission may accept application made in representative capacity	8

Commission’s decision-making powers, etc, relating to applications

24	Commission may decide to take no action in relation to application	8
25	Commission may decide to investigate	8
26	Commission must notify its decision on application for referral	8

Commission’s power to act on own initiative

27	Commission’s power to make initial inquiries on its own initiative	9
----	--	---

Subpart 5—Commission’s functions relating to Royal prerogative of mercy

28	Governor-General may transfer applications for exercise of Royal prerogative to Commission	9
29	Advisory function in relation to applications for exercise of Royal prerogative of mercy	9
30	Exercise of Royal prerogative of mercy not affected	10

Subpart 6—Commission’s investigative powers, protection of information gathered, privileged or confidential information, etc

Investigative powers

31	Powers of investigation: general	10
32	Commission may require person to give information	10
33	Commission may require person to give evidence on oath or affirmation	10

Protection of information gathered

34	Prohibition on disclosure of information unless authorised	11
35	Authorised disclosures of information	11
36	Application of Official Information Act 1982	12

	<i>Privileged and confidential communications and information</i>	
37	Privileged or confidential information	12
	Subpart 7—Miscellaneous provisions	
	<i>Enforcement orders</i>	
38	Court may make orders for failure to comply with requirements	12
	<i>Provisions relating to application of Crown Entities Act 2004</i>	
39	Commission members' legal status for purposes of Crown Entities Act 2004	13
40	Application of section 29 of Crown Entities Act 2004	13
41	Limitation on power to delegate	13
42	Immunities	13
43	Exemption from requirement to prepare statement of intent	13
44	Exemption from requirements concerning statement of performance expectations	13
	<i>Amendments to other Acts</i>	
45	Amendments to other enactments	14
	Schedule 1	15
	Transitional, savings, and related provisions	
	Schedule 2	17
	Amendments to other enactments	

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Criminal Cases Review Commission Act **2018**.

2 Commencement

This Act comes into force on a date appointed by the Governor-General by Order in Council, and 1 or more Orders in Council may be made bringing different provisions into force on different dates. 5

Part 1

Preliminary provisions

3 Purpose of this Act

10

The purpose of this Act is to establish an independent body to review criminal convictions and sentences and decide whether to refer them under the Act to an appeal court.

4 Interpretation

In this Act, unless the context otherwise requires,—

appeal court means the court specified in **section 18** to which the Commission may refer a conviction or sentence

Chief Commissioner means the Chief Commissioner appointed under **section 9** 5

Commission means the Criminal Cases Review Commission established by **section 7**

Deputy Chief Commissioner means the Deputy Chief Commissioner appointed under **section 9** 10

eligible person means a living person who has been convicted of an offence **information**, in relation to an investigation, includes matters of opinion based on the specialist knowledge or skill of an expert in relation to those matters, as well as matters of fact

responsible Minister means the Minister who, under the authority of any warrant or with the authority of the Prime Minister, is the person for the time being responsible for the administration of this Act 15

sentence has the same meaning as in section 212 of the Criminal Procedure Act 2011

specialist adviser means a specialist adviser appointed under **section 10**. 20

5 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

6 Act binds the Crown

This Act binds the Crown. 25

Part 2**Criminal Cases Review Commission**

Subpart 1—Establishment and appointments

7 Criminal Cases Review Commission established

The Criminal Cases Review Commission is established. 30

8 Commission is Crown entity

(1) The Commission is a Crown entity for the purposes of the Crown Entities Act 2004.

(2) The Crown Entities Act 2004 applies to the Commission except to the extent that this Act expressly provides otherwise. 35

- (3) *See* **subpart 7**, which contains provisions relating to how certain provisions of the Crown Entities Act 2004 apply to the Commission.

9 Membership of Commission

- (1) The Commission must have the following members:
- (a) a Chief Commissioner: 5
 - (b) a Deputy Chief Commissioner:
 - (c) at least 1 and not more than 5 other Commissioners.
- (2) At least one-third of the members must be legally qualified.
- (3) At least two-thirds of the members must have experience in working in the criminal justice system or have other knowledge or expertise relevant to the Commission's functions and duties, which may include experience, knowledge, or expertise acquired overseas. 10
- (4) A person is **legally qualified** for the purposes of **subsection (2)** if the person—
- (a) has held a practising certificate as a barrister or as a barrister and solicitor for not less than 7 years; or 15
 - (b) has been admitted as a barrister, solicitor, barrister and solicitor, advocate, or attorney by a senior court in another country and has practised as such in that country for not less than 7 years.

10 Specialist advisers 20

- (1) The Commission may appoint qualified persons, as required, to assist the Commission with any of its functions or duties by giving advice in relation to scientific, technical, or other matters involving particular expertise.
- (2) A specialist adviser is subject to the same obligations of confidentiality as members and employees of the Commission under **section 34**. 25
- (3) Advice given by a specialist adviser is information provided to the Commission for the purposes of **sections 35 to 37** and is subject to those provisions.

Subpart 2—General provisions relating to functions, duties, and powers

11 Primary function

The primary function of the Commission is to review convictions and sentences and decide whether to refer them to the appeal court under **section 17**. 30

12 Commission's power to initiate inquiries into general matter

- (1) This section applies if the Commission, in the course of reviewing a conviction or sentence under this Act, identifies a practice, policy, procedure, or other matter of a general nature that it considers may be related to cases involving a miscarriage of justice or has the potential to give rise to such cases. 35

- (2) The Commission may conduct an inquiry into the matter on its own initiative if it is satisfied that an inquiry is in the public interest.
- (3) The Commission must provide a written report on the inquiry, including the Commission's findings and any recommendations it may wish to make, to the Minister of Justice. 5
- (4) The Minister of Justice, as soon as practicable after receiving the report, must present it to the House of Representatives.
- 13 Duty to promote public awareness of functions**
- The Commission must carry out the activities it considers necessary to make its functions known to, and understood by, the public. 10
- 14 Powers of Commission**
- The Commission has and may exercise all powers necessary for performing its functions and duties.
- 15 Commission may regulate own procedures**
- (1) Subject to this Act, the Commission may regulate its own procedures for performing its functions and duties as the Commission considers appropriate including, without limitation, its procedures for— 15
- (a) obtaining information:
- (b) conducting interviews or examinations, or taking evidence by other means, including on oath or affirmation: 20
- (c) disclosing information obtained in the course of an investigation:
- (d) giving its opinion to the Minister of Justice under **section 29**:
- (e) notifying and interacting with victims of crime, where appropriate, when considering a conviction or sentence:
- (f) handling any complaints to the Commission about its actions, processes, or procedures. 25
- (2) The Commission's powers under this section include, without limitation, the power to specify how a person may make an application to the Commission.
- (3) The Commission's procedures must be consistent with the rules of natural justice. 30
- (4) The Commission must make its procedures publicly available, in the manner it considers appropriate.
- 16 Manner in which Commission must act**
- The Commission must act independently, impartially, and fairly in performing its functions and duties and exercising its powers under this Act. 35

Subpart 3—Commission’s primary function

Key provisions

17 Ground for referring conviction or sentence to appeal court

- (1) The Commission may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so. 5
- (2) In deciding whether to refer a conviction or sentence, the Commission must have regard to—
- (a) whether the eligible person has exercised their rights of appeal against the conviction or sentence; and 10
 - (b) the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence; and
 - (c) the prospects of the court allowing the appeal; and
 - (d) any other matter that the Commission considers relevant. 15

18 Appeal court to which conviction or sentence may be referred

- (1) The appeal court to which a conviction may be referred is—
- (a) the High Court, if the eligible person’s right of first appeal against a conviction under subpart 3 of Part 6 of the Criminal Procedure Act 2011 is to the District Court or the High Court; or 20
 - (b) otherwise, the Court of Appeal.
- (2) The appeal court to which a sentence may be referred is—
- (a) the High Court, if the eligible person’s right of first appeal against a sentence under subpart 4 of Part 6 of the Criminal Procedure Act 2011 is to the District Court or the High Court; or 25
 - (b) otherwise, the Court of Appeal.

19 Commissioner must give appeal court reasons for referral

The Commission, when referring a conviction or a sentence to the appeal court, must give the court a statement of its reasons for the referral.

20 Hearing and determination of appeal 30

The appeal court to which the Commission refers a conviction or sentence must hear and determine the matter as if it were an appeal against the conviction or sentence.

Subpart 4—Applications to Commission to refer convictions and sentences

Persons who may apply, etc

21 Who may apply

An eligible person or a representative may apply to the Commission for it to refer a conviction or sentence to the appeal court. 5

22 How application may be made

An application may be made in the manner required by the Commission.

23 Commission may accept application made in representative capacity

The Commission may accept an application made by a person in a representative capacity if the Commission is satisfied that the person is authorised to act as the eligible person's representative. 10

Commission's decision-making powers, etc, relating to applications

24 Commission may decide to take no action in relation to application

The Commission may decide to take no action, or take no further action, in relation to an application if— 15

- (a) the eligible person no longer wishes the application to proceed; or
- (b) the eligible person dies; or
- (c) in the Commission's opinion, the application is frivolous, vexatious, or otherwise not made in good faith; or 20
- (d) for any other reason, the Commission believes that it is unnecessary or inappropriate for it to take any action or further action.

25 Commission may decide to investigate

- (1) The Commission may decide to investigate the conviction or sentence to which an application relates. 25
- (2) *See* **subpart 2** (which provides for the Commission's powers and duties concerning investigations) and **subpart 6** (which provides for the protection of information gathered as part of the Commission's investigations).

26 Commission must notify its decision on application for referral

- (1) The Commission must, as soon as practicable after making a decision under **section 17 or 24**, give written notice of the decision, with the reasons or a summary of the reasons for the decision, to— 30
 - (a) the eligible person; and

- (b) if the application was made by a representative on behalf of the eligible person, the representative.
- (2) The Commission must, as soon as practicable after notifying those persons, make its decision, and the reasons or a summary of the reasons, publicly available in the manner that the Commission considers appropriate. 5

Commission's power to act on own initiative

27 Commission's power to make initial inquiries on its own initiative

- (1) The Commission may make initial inquiries into a conviction or sentences on its own initiative if it is satisfied that those inquiries are in the public interest.
- (2) As soon as practicable after starting to make any initial inquiries under this section, the Commission must— 10
- (a) notify the eligible person that the Commission has started making those inquiries; and
- (b) ask that person if they consent to the Commission investigating the conviction or sentence as if they had applied to the Commission to refer the conviction or sentence to the appeal court. 15
- (3) If the eligible person does not consent, the Commission must not investigate further and cannot exercise its power to refer the conviction or sentence to the appeal court under **section 17**.
- (4) In this section, **initial inquiries** means investigative actions that do not involve the Commission exercising of any of its powers under **sections 32 and 33**. 20

Subpart 5—Commission's functions relating to Royal prerogative of mercy

28 Governor-General may transfer applications for exercise of Royal prerogative to Commission 25

- (1) The Governor-General may transfer an application for the exercise of the Royal prerogative of mercy to the Commission if the Governor-General considers that the application is sufficiently connected with the Commission's primary function or would more appropriately be dealt with as part of that function.
- (2) The Commission must treat an application transferred to it under this section as if it were an application to the Commission made under **subpart 4**. 30
- (3) The provisions of this Act apply accordingly.

29 Advisory function in relation to applications for exercise of Royal prerogative of mercy

- (1) The Minister of Justice may ask the Commission to provide an opinion on any matter arising in relation to the Royal prerogative of mercy. 35

- (2) The Commission must provide that opinion, in writing, to the Minister of Justice.
- (3) The Commission may exercise its powers under this Act, including its investigative powers under **subpart 6**, in relation to the request.
- 30 Exercise of Royal prerogative of mercy not affected** 5
- Nothing in this Act limits or affects the Royal prerogative of mercy.
- Subpart 6—Commission’s investigative powers, protection of information gathered, privileged or confidential information, etc
- Investigative powers*
- 31 Powers of investigation: general** 10
- (1) The Commission may investigate a conviction or sentence under this Act as it considers appropriate.
- (2) In investigating a matter, the Commission may obtain from any person, under **sections 32 and 33**, any information that the Commission considers relevant to an investigation if the Commission— 15
- (a) has taken reasonable steps to obtain the information by consent; and
- (b) considers that the information is unlikely to be obtained by the Commission through any means other than under those sections.
- (3) **Subsection (2)** does not affect the ability of the Commission to access court documents in accordance with the rules of practice and procedure applying to the relevant court. 20
- 32 Commission may require person to give information**
- (1) The Commission may, by written notice, require a person to—
- (a) produce documents or things that the person may hold and that may be relevant to the investigation; and 25
- (b) provide information in writing.
- (2) The Commission may examine and make copies, take photographs, or create other records of documents or things produced or information provided under **subsection (1)**.
- (3) Subject to **section 37**, a person must comply with a notice given under this section. 30
- 33 Commission may require person to give evidence on oath or affirmation**
- (1) The Commission may take evidence from a person by—
- (a) requiring the person, by written notice, to appear before the Commission to be examined on oath or affirmation: 35

- (b) requiring the person, on appearing before the Commission, to answer questions on oath or affirmation:
- (c) permitting the person to give the evidence by any other means approved by the Commission and requiring the person to verify that evidence on oath or by affirmation. 5
- (2) Subject to **section 37**, a person must comply with a requirement to—
- (a) appear before the Commission under **subsection (1)(a)**:
- (b) answer questions under **subsection (1)(b)**:
- (c) verify evidence given to the Commission under **subsection (1)(c)**.
- Protection of information gathered* 10
- 34 Prohibition on disclosure of information unless authorised**
- (1) A person who is, or has been, a member or an employee of the Commission, or a person appointed as a specialist adviser to the Commission, must not disclose any information obtained by the Commission unless the disclosure is authorised under **section 35**. 15
- (2) A person who wilfully contravenes **subsection (1)** commits an offence and is liable on conviction to a fine not exceeding \$20,000.
- (3) This section does not affect an individual's entitlement to request access to information under information privacy principle 6 of the Privacy Act 1993.
- 35 Authorised disclosures of information** 20
- (1) The disclosures specified in **subsections (2) and (3)** are authorised and may be made at the discretion of the Commission and other persons as specified in those provisions.
- (2) The Commission may disclose information, or a member of the Commission may authorise the disclosure of information, if satisfied that the disclosure is reasonably necessary— 25
- (a) for the purposes of a criminal, disciplinary, or civil proceeding; or
- (b) in order to assist in dealing with any matter relating to the exercise of the Royal prerogative of mercy; or
- (c) in order to assist in dealing with any official inquiry or review relating to a person's conviction or sentence or with any official assessment of whether such an inquiry or review is desirable; or 30
- (d) as part of a statement or report required to be made or provided under this Act; or
- (e) in connection with the performance or exercise of the Commission's functions, duties, or powers; or 35
- (f) for the purposes of the Police or any other enforcement authority investigating an offence or deciding whether to prosecute an offence, provided

that the disclosure is not, or would not be, prevented by some obligation of secrecy or limitation on disclosure (including an obligation or limitation imposed by an enactment) other than the obligation imposed by **section 34**.

- (3) The Commission may disclose information, or a member of the Commission may authorise the disclosure of information, if a person with the right to consent to disclosure of that information gives that consent. 5
- (4) A member or an employee of the Commission, or a specialist adviser to the Commission, may disclose information to any other member or employee of, or specialist adviser to, the Commission, for the purpose of performing their functions or duties or exercising their powers in that capacity. 10

36 Application of Official Information Act 1982

Nothing in the Official Information Act 1982 applies to any communication that has taken place between a member or an employee of the Commission and any person in relation to an investigation by the Commission. 15

Privileged and confidential communications and information

37 Privileged or confidential information

Nothing in this Act requires a person to disclose to the Commission any communication or information—

- (a) to which any of the protections of privilege or confidentiality recognised in subpart 8 of Part 2 of the Evidence Act would apply if the disclosure were made in a proceeding; or 20
- (b) where such disclosure is prevented by an enactment, a rule of law, or an order of a court prohibiting or restricting disclosure or the manner of disclosure. 25

Subpart 7—Miscellaneous provisions

Enforcement orders

38 Court may make orders for failure to comply with requirements

- (1) The Commission may apply to the District Court for orders against a person on the grounds that they have failed without reasonable excuse to comply with a requirement under **section 32 or 33**. 30
- (2) The District Court may, on the application of the Commission, make either or both of the following orders if the court is satisfied that the person has failed without reasonable excuse to comply with the requirement:
- (a) an order directing the person to comply with the requirement specified in the notice: 35
- (b) any other order that the court considers appropriate.

- (3) The District Court may require a person to produce documents or provide other information to the court for the purposes of determining an application under this section.

Provisions relating to application of Crown Entities Act 2004

- 39 Commission members' legal status for purposes of Crown Entities Act 2004** 5
- (1) The members of the Commission are the board for the purposes of the Crown Entities Act 2004.
- (2) The Chief Commissioner holds office as chairperson of the board for the purposes of the Crown Entities Act 2004, for the same term as that person holds office as Chief Commissioner. 10
- (3) The Deputy Chief Commissioner holds office as deputy chairperson of the Board for the purposes of the Crown Entities Act 2004 for the same term as that person holds office as Deputy Chief Commissioner.
- 40 Application of section 29 of Crown Entities Act 2004** 15
- Without limiting section 29 of the Crown Entities Act 2004 (criteria for appointments and recommendations by responsible Minister), the Minister, in appointing or recommending appointments, must take into account the desirability of the Commission being able to draw on knowledge or understanding of te ao Māori (the Māori world view) from within its membership. 20
- 41 Limitation on power to delegate**
- Despite section 73 of the Crown Entities Act 2004 (ability to delegate), the Commission must not delegate the performance of its function of referring a conviction or sentence to the appeal court under **section 17** of this Act.
- 42 Immunities** 25
- (1) Sections 120 to 126 of the Crown Entities act 2004 apply to the Commission and the Commission's members, employees, and specialist advisers.
- (2) This section is for the avoidance of doubt.
- 43 Exemption from requirement to prepare statement of intent**
- The Commission is exempted from the requirements of sections 139 and 139A of the Crown Entities Act 2004 (obligation to prepare statement of intent). 30
- 44 Exemption from requirements concerning statement of performance expectations**
- The Commission is exempted from the requirements of section 149C and all related provisions of the Crown Entities Act 2004 concerning statements of performance expectations. 35

Amendments to other Acts

45 Amendments to other enactments

The enactments referred to in **Schedule 2** are amended as set out in that schedule.

Schedule 1

Transitional, savings, and related provisions

s 5

Part 1

Provisions relating to this Act as enacted

5

1 Interpretation

In this Part, **commencement date** means the date on which **subpart 1 of Part 2** of this Act comes into force under **section 2**.

2 Application of Act to past convictions and sentences

To avoid doubt, this Act applies to convictions entered and sentences imposed before the commencement date. 10

3 Existing applications for exercise of Royal prerogative of mercy

(1) This clause applies if, before the commencement date, the Governor-General has received, but not determined, an application for the exercise of the Royal prerogative of mercy. 15

(2) The Governor-General may exercise the powers under section 406 of the Crimes Act 1961, and that section and section 406A of that Act apply accordingly as if they had not been repealed by this Act.

(3) The Minister of Justice may ask the Commission for its opinion on a matter arising in relation to the application, and the Commission must treat that request as if it were a request for an opinion under **section 29(1)**. 20

(4) The Governor-General may transfer the application to the Commission to be dealt with as an application for referral to the appeal court under this Act.

(5) The Commission must treat an application transferred to it under **subclause (4)** as if it were an application for a referral under **section 21**. 25

4 Existing references of matters to appeal court under section 406(1) of Crimes Act 1961

(1) This clause applies if, before the commencement date, the Governor-General has—

(a) referred the question of a conviction or sentence to the Court of Appeal or to the High Court for hearing and determination under section 406(1)(a) of the Crimes Act 1961; or 30

(b) referred a point arising in the case to the Court of Appeal for its opinion under section 406(1)(b) of the Crimes Act 1961.

- (2) The court to which a matter has been referred may hear and determine the question or give its opinion (as the case may be) as if section 406 of the Crimes Act 1961 had not been repealed by this Act.
- (3) **Section 12(2)(f)** of the Victims' Rights Act 2002 as in force immediately before the commencement date applies in relation to the question of a conviction or sentence referred to the court under section 406(1)(a) of the Crimes Act 1961. 5
- (4) Section 406A of the Crimes Act 1961 applies in relation to the court's determination on a referral as if that section had not been repealed.

Schedule 2

Amendments to other enactments

s 45

Crimes Act 1961 (1961 No 43)

Repeal sections 406 and 406A.

5

Crown Entities Act 2004 (2004 No 115)

In Schedule 1, Part 3, insert in its appropriate alphabetical order:

Criminal Cases Review Commission

Legal Services Act 2011 (2011 No 4)

After section 6(d), insert:

10

- (e) applications to the Criminal Cases Review Commission under **section 21** of the Criminal Cases Review Commission Act **2018**.

Official Information Act 1982 (1982 No 156)

In Schedule 1, insert in its appropriate alphabetical order:

Criminal Cases Review Commission

15

Victims' Rights Act 2002 (2002 No 39)

Replace section 12(2)(f) with:

- (f) any referral of the conviction or sentence by the Criminal Cases Review Commission under **section 17** of the Criminal Cases Review Commission Act **2018**.

20