



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Criminal Cases Review Commission Bill

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*24/01/2019*

## Submission on the Criminal Cases Review Commission Bill 2018

### 1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Criminal Cases Review Commission Bill (the Bill).
- 1.2 The Bill establishes a Criminal Cases Review Commission (Commission), the purpose of which is to review suspected miscarriages of justice<sup>1</sup> and decide whether to refer them to the appropriate appeal court. Currently the Royal prerogative of mercy performs the same function, and the Bill will replace the power exercised by the Governor-General under section 406 of the Crimes Act 1961.<sup>2</sup> The Bill will bring New Zealand into line with other jurisdictions such as the United Kingdom (England, Wales and Northern Ireland), Scotland, and Norway.
- 1.3 The Law Society supports the establishment of an independent body to assess potential miscarriages of justice. The Law Society recommends that the select committee clarify one matter concerning the membership of the Commission.
- 1.4 The Law Society would appreciate the opportunity to appear before the committee.

### 2 Support for establishing the Commission

- 2.1 The Law Society's reasons for supporting the establishment of the Commission can be shortly stated.
- 2.2 First, establishing the Commission will enhance public confidence in the criminal justice system. Confidence is increased by independence and transparency of decision-making, and effective communication about the results of reviews. The establishment of the Commission will be a significant improvement on these dimensions.
- 2.3 Second, the Commission will have investigative and "own motion" powers that are currently unavailable under the current system and which will significantly improve the scope and outcomes of reviews.
- 2.4 Third, there is evidence that the current system is failing to deal with potential miscarriages involving minority groups who are unaware of the existence of the current system and are ill equipped to engage with it.<sup>3</sup> The establishment of the Commission will enable it to consider potential miscarriages of justice involving vulnerable populations.

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<sup>1</sup> "Miscarriage of justice' refers to an unjustified conviction, a conviction in breach of the law, or where the total available evidence leaves doubt as to the adequacy of proof of guilt": Sir Thomas Thorp, *Miscarriages of Justice*, Legal Research Foundation, 2005.

<sup>2</sup> Criminal Cases Review Commission Bill, explanatory note at p1; there is also a residual role for the exercise of the Royal prerogative in rare cases: see p3.

<sup>3</sup> Regulatory Impact Assessment, p 10, citing Simon Mount "A Criminal Cases Review Commission for New Zealand" [2009] NZLRev 455 at 474 and Sir Thomas Thorp *Miscarriages of Justice* (Legal Research Foundation, 2005).

2.5 Finally, development of the Bill has been informed by the experience of other comparable jurisdictions which have established similar commissions. The experiences in those jurisdictions are positive.<sup>4</sup>

### **3 Membership of Commission**

3.1 One matter the committee may wish to clarify relates to membership of the Commission. Clause 9 of the Bill provides that at least one-third of the members of the Commission must be legally qualified and at least two-thirds of the members must have other relevant experience, knowledge or expertise, such as experience working in the criminal justice system.

3.2 The Law Society supports these requirements.

3.3 However, under clause 9(2) or 9(3) as currently drafted, current or retired members of the judiciary would be eligible for appointment. Arguments that current or retired members of the judiciary should not be eligible include:

(a) A fundamental tenet of the Bill is the Commission's independence from the judicial system. That policy would be undermined if a member or former member of that system were to be appointed as commissioner. This argument applies more acutely to current members of the judiciary.

In particular, the perception risk is all the more acute given the inclusion in the Bill (supported by the Law Society) of clause 12 giving the Commission "own motion" powers to initiate inquiries into practices, policies or procedures. That power may well focus on matters of judicial practice or court procedures relating to miscarriages of justice.

(b) Other members might well tend to defer to a judge's mana and experience in the criminal justice system when commissioners are discussing whether to refer a conviction or sentence to the relevant appeal court, especially given that judges have significant experience in relation to sentencing matters.

3.4 The counterargument is that in a small jurisdiction it may be challenging enough to resource a Commission, without excluding a significant pool of qualified people.

3.5 The United Kingdom's Criminal Cases Review Commission contains no current or former members of the judiciary. However, the Law Society also notes that the Criminal Appeal Act 1995, which established the UK Commission, contains no expression of ineligibility of former members of the judiciary.

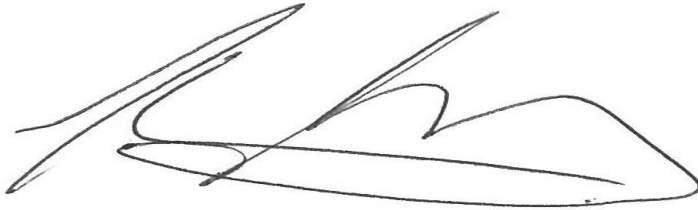
3.6 The Law Society recommends that the committee consider whether the Bill should expressly state whether current (and possibly also former) members of the judiciary are eligible for appointment as commissioners.

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<sup>4</sup> Criminal Cases Review Commission Bill, explanatory note at p1 "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". See also the Regulatory Impact Assessment, p 1.

**4 Conclusion**

- 4.1 The Law Society supports the enactment of the Bill. While the Law Society proposes no amendments to the Bill it suggests that the committee consider whether the Bill should expressly state whether current (and possibly also former) members of the judiciary are eligible for appointment as commissioners.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck  
**President**  
24 January 2019