Te Kāhui Tātari Ture
Criminal Cases Review Commission

28 February 2025

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Tēnā koe e te rangatira, Andrew

**Review of legislation containing reference to the Treaty of Waitangi principles**

1 Thank you for your letter dated 30 January 2025 referring to the current review led by the Ministry of Justice of Treaty Principles clauses in legislation. This letter requested our views on the operation of the relevant Treaty clause within the Criminal Cases Review Commission Act 2019 (**the Act**). It asked the following questions:

a. Is it clear to the Commission what this clause requires in practice?

b. Could the Act be amended to clarify or explain the relationship between the Treaty of Waitangi principles and the Commission's procedures?

c. How did you determine that the procedures that you have developed are consistent with the principles of the Treaty of Waitangi?

d. What would be different if the provision was not there?

2 In summary, the Commission strongly supports the current wording of the Treaty clause within the Act. The clause is sufficiently directive and currently working well in the context of the purpose and operation of the Commission. It is a central, statutory pou / pillar embedded in our procedures and complementing and informing our everyday functioning and operations. It should remain as it is.

**Ko wai tatou / who we are**

3 Te Kāhui Tātari Ture | Criminal Cases Review Commission (**Te Kāhui** or **the Commission**) was established under the Crown Entities Act in 2019 as an Independent Crown Entity. Our primary function (s.11 of the Act) is to investigate and review criminal convictions and/or sentences for individuals who believe they may have suffered a miscarriage of justice and, where appropriate refer them to the appellate for reconsideration.

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4 Our criminal justice system occasionally makes mistakes. These mistakes impact an individual's right to justice and have an enduring effect on those who suffered the miscarriage, their broader whānau and the victims of the original crime. An independent review process is critical for people to have confidence in the criminal justice system. It is our role to ensure that each application is given a fair and independent review. This ensures that, where possible, an individual can have the merits of their application thoroughly examined and assessed under the law.

5 The Commission is comprised of seven Kaikōmihana | Commissioners as well as our excellent support staff.

**Giving effect to our Treaty clause**

**Context**

6 Section 15(3) of the Act states that "The Commission's procedures must be consistent with the rules of natural justice and the principles of the Treaty of Waitangi (te Tiriti o Waitangi)". The word "procedures" is undefined in the Act. We have broadly interpreted this to mean the accepted way that the Commission operates. The standard of Te Tiriti o Waitangi consistency therefore applies to much of what we do. We have taken that approach given the nature of our duties, functions and powers under the Act.

7 Supplementing our primary function of reviewing and referring convictions and sentences, and as relevant here:

- By Section 9(2), at least 1 member of the Commission *must have knowledge or understanding of te Ao Maori and tikanga Maori*.
- By Section 12 the Commission has a power/function of initiating inquiries into, and reporting on, *matters 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.*
- By Section 13 the Commission has a duty to *carry out the activities it considers necessary to make its functions known to, and understood by, the public*.
- By Section 53 the Commission must include in its annual report *on how, and the extent to which, the Commission in performing its functions and duties has engaged with groups that appear to be disproportionately affected by the criminal justice system, including any initiatives it has undertaken with respect to those groups.*
- By Section 14 and Section 15 the Commission *has and may exercise all powers necessary for performing its functions and duties* and *may regulate its own procedures for performing its functions and duties as the Commission considers appropriate.*

8. The Commission also has duties, functions and powers with respect to the Royal prerogative of mercy which, we note Section 30, is itself unaffected or limited by the Act:

- By Section 28 the Governor-General may refer applications for the exercise of the Royal prerogative to the Commission, which the Commission is to treat as applications for review of conviction or sentence under the Act.

- By Section 29 the Minister of Justice may *ask the Commission to provide an opinion on any matter in relation to the Royal prerogative.* The Commission must provide each such opinion in writing and may exercise its powers under the Act in doing so.

9. In that context we interpret the term "procedures" – itself not defined in the Act – broadly, in accordance with the well-understood principles of statutory interpretation, to mean how the Commission performs *its functions and duties* (Section 15(1). In carrying out those functions and duties consistently with the principles of the Treaty we are especially mindful, in light of our duties under Section 53, of the disproportionate effect of the Criminal justice system on Māori, of the importance of our undertaking initiatives in light of that disparity and ensuring our functions are known to, and understood by, the community, including and especially Māori.

10. We give effect to the legislative directive for our procedures to achieve consistency with the principles of the Treaty of Waitangi in several ways. This includes:

    a. **Representation and expertise**: As highlighted above, we must have at least one Kaikōmihana | Commissioner with knowledge and expertise in tikanga and Te Ao Māori. We currently have two Kaikōmihana | Commissioners with such skills as well as both having a deep understanding of Te Tiriti. We also have a diverse and inclusive workforce and have drawn on external expertise when required. This representation and expertise has been purposeful in light of our Treaty clause and high engagement with Māori. It has been critical in shaping how we actively protect and give life to the Treaty consistency requirement.

    b. **Iwi relationship:** We have an established relationship with Waikato-Tainui. Waikato-Tainui, for example, gifted Te Kāhui its name, Waikato-Tainui kaumātua are drawn on in respect of tikanga practices, protocols and guidance on cultural matters and Waikato-Tainui appointed an accredited te reo Māori translator that Te Kāhui use when needed. This is a valued partnership.

    c. **Te reo and tikanga**: We established Kia Whakarongo Ake | our Māori Language Plan in 2023 to improve the cultural capability of staff. This is important to ensure that we can engage appropriately with Māori that come to the attention of the Commission. We also use te reo Māori (as well as other languages where appropriate) and tikanga as part of our standard operating practice.

    d. **Values**: Te Ao Māori values and practices are drawn from and integrated into the core of our operating model. This not only includes practices such as karakia but also the treatment of all people that come into contact with the Commission including our process for engaging with applicants. We have utilised Te Ao Māori when engaging with Māori applicants who have requested a tikanga approach. One such applicant was appreciative of the way in which the outcome of his application was handled and communicated to him. We also drew on tikanga practices and Te Ao Māori values when going through our 2023 change management process – He Huru Manu. That included kaumātua support and engagement practices consistent with tikanga Māori complementing HR practice.

    e. **Public awareness**: We meet with iwi and Māori entities to inform them about the Commission. We also ensure we have a presence and connection to communities and events

such as the annual Māori Women's Welfare League Conference to raise awareness within Māori communities of the work of the Commission.

f. **Outreach and education**: Our strategy and action plan 'He Pou Tarāwaho' is targeted particularly towards Māori given their over-representation in the criminal justice system as offenders and victims. Aotearoa New Zealand has a history of wrongful imprisonment of Māori from Mokomoko (Whakatohea, 1866) through to Teina Pora. Our focus is therefore appropriate.

g. **Data informed and driven**: We use and collect data (including ethnicity data) to inform our decision-making. We report annually on disproportionate outcomes, including statistics as they relate to Māori. This is pertinent to the underlying policy rationale of achieving equitable outcomes for Māori in relation to miscarriages of justice.

11 As acknowledgement of the work of the Commission, we were a finalist in the Diversity Works annual awards for the Ngā Āhuatanga O Te Tiriti Tohu, and in August 2023 we were awarded highly commended for the small-medium organisation category. This tohu acknowledges authentic and committed organisations which demonstrate from a tika and pono perspective achievements and ongoing work to reflect Te Tiriti in their workplaces. It was an honour to be included as a finalist in these awards.

12 Our statistics also go some way to indicating that the way we are operating is consistent with the Treaty principles. The process prior to the establishment of the Commission was that a person who believed they suffered a miscarriage of justice could apply to the Governor-General for the exercise of the Royal prerogative of mercy (**RPM**). This could be used to grant a free pardon or refer a person's conviction to a court for further appeal. The proportion of applications from Māori and Pasifika under this previous process was low. These were estimated as being between 11% – 16%, despite Māori and Pasifika making up over 60% of the prison population. In respect of the Commission, approximately 40% of applicants processed are Māori. This engagement by Māori applicants suggests a significant and positive shift that we consider is reflective of the Te Tiriti consistent procedures and overall culture of the Commission. It goes towards more equitable access and outcomes for Māori in respect of miscarriages of justice.

**Our reflections on our Treaty clause**

13 The area of law and the subject matter that the Commission was established to deal with, is one in which Te Tiriti is directly relevant. We operate in a context where:

a. Māori are grossly and disproportionately represented in the criminal justice system.

b. Māori applicants are often vulnerable.

c. Historical Crown breaches of Te Tiriti are usually contextually relevant to applicants for example, colonisation and intergenerational systemic deprivation may have a causal connection to offending.

d. There are systemic issues that have contributed to inequity and miscarriages of justice experienced by Māori in the criminal justice system over time.

e. Māori have traditionally been under-engaged in processes for reviewing miscarriages of justice and

f. Māori should achieve equitable outcomes in relation to miscarriages of justice.

14 Given this context, it is appropriate that Te Tiriti and its principles are central to the Commission and how it functions.

15 The Commission considers that the clause, paired with the significant jurisprudence that has developed in respect of Treaty principles over the past 50 years, is sufficiently directive for the Commission to give effect to and breathe life into the commitment. The requirement for our procedures to be consistent with Te Tiriti has provided a legislative anchor that has required the Commission to turn our minds specifically to what Te Tiriti requires in our context. We have done so in a myriad of real, practical, positive and effective ways such that Te Tiriti principles are now an embedded part of the modus operandi of the Commission. The Commission has no issues with the current framing or effect of the clause and considers it has worked well.

16 The current wording is particularly useful in a context where there is significant discretion and leeway for the Commission to implement appropriate procedures. The broadly framed clause allows for growth and development without being overly prescriptive. The Commission considers that the risk of codifying how Te Tiriti operates in our context would be that the legislative directive:

a. would not accurately capture what the principles of Te Tiriti require,

b. would minimise and reduce the effect of the principles of Te Tiriti and

c. would not provide sufficient flexibility to continue to build on and lean into learnings about how the principles might best apply in this context.

17 Had the Act originally defined the list of ways in which Te Tiriti was honoured, this would unlikely have captured the full and expanding number of ways in which the Commission acts consistently with Treaty principles. The Commission therefore does not support amendment to further clarify or explain the relationship between the Treaty of Waitangi principles and the Commission's procedures.

18 The Commission considers that it is currently meeting the standard required in legislation to act consistently with the principles of the Treaty of Waitangi. This is currently a self-assessment drawing upon the extensive expertise of our Commissioners as well as both internal staff and external support (including legal counsel). This consistency is reflective across our organisation and procedures including our current positive relationship with Waikato-Tainui, our Māori engagement statistics and the lack of complaints in this respect. To the extent that the clause in the Act leaves open the possibility for judicial review against this legal standard, the Commission would welcome the opportunity to learn where it could improve. The broadly framed legal standard means (in a positive way) that the Commission cannot become complacent with a tick box but must constantly and critically reflect on what Treaty consistency requires.

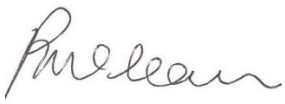
19 You have asked whether it would be different for the Commission if the provision was not there. We are aware of the long-standing judicial precedent in that Te Tiriti can be used as an interpretive

aid even in circumstances where there is no Treaty clause in legislation. However, an aid to interpretation is different to having a statutory pou | pillar that requires Treaty consistency. We consider that the removal of the Treaty clause would undermine the positive work that has been done thus far and leave those developments in a vulnerable state.

20 We consider that retaining our current Treaty clause as drafted is critical and we urge the Government not to amend it. It has worked for the Commission thus far and we consider there is no reason to change it. In fact, it would be detrimental to our operations to do so.

21 Given the comprehensive nature of our response, I would like the opportunity to meet with you to discuss further including understanding the next steps in the process.

Nāku noa, nā



Parekawhia McLean
**Tumu Whakarae | Chief Executive**

cc Chief Commissioner Hon Denis Clifford