

Justice Select Committee
New Zealand Parliament
By email to Gabor Hellyer
Clerk of the Justice Committee
Gabor.Hellyer@parliament.govt.nz



29 May 2019

Supplementary submission on the Criminal Cases Review Commission Bill

1. The Human Rights Commission thanks the Committee for its engagement with our oral and written submissions on the Criminal Cases Review Commission Bill, and welcomes this opportunity to provide supplementary information.
2. During the Commission's oral submission, we were asked by Committee members:
 - i. How often is the Human Rights Commission approached about issues of structural discrimination, institutional bias, and over-representation of vulnerable communities in the criminal justice system?
 - ii. Has the Human Rights Commission done any surveys regarding structural discrimination, institutional bias, and over-representation of vulnerable communities in the criminal justice system?
 - iii. Does the Human Rights Commission receive many complaints from people who have made criminal law complaints which have not led to the conviction or other outcome they were seeking?
3. During a subsequent oral submission, while Human Rights Commission representatives remained present in the Committee room, members of the Select Committee also referred to the Human Rights Commission in relation to criminal records legislation. This supplementary submission includes related information relevant to the Committee's discussion and to the Commission submission.

Response to question (i):

Approaches about structural discrimination in the justice system

4. Approaches to the Human Rights Commission about structural discrimination broadly fall into two categories: complaints from individuals to our enquiries and complaints service; and approaches to Commissioners and staff in the context of other work – including general public engagements and consultations in relation to international human rights reporting.

5. The following are some specific examples of complaints made to the Commission's enquiries and complaints service which relate to issues around structural discrimination, institutional bias, and over-representation of vulnerable communities in the criminal justice system.
6. Quantification of these approaches is complex, as our data is collected largely under Human Rights Act categories of discrimination. However, word searches of the enquiries and complaint team database provide a range of examples of the types of complaints that are received:
 - A complainant alleged judges would not award a light sentence to people of different ethnicity (for example, Pasifika) if they had committed the same crime.
 - A complainant, a lawyer, alleged a Judge's comments made about Māori in proceedings were inappropriate. The lawyer was hesitant to engage the Judicial Conduct Commissioner because of concerns around repercussions for their career.
 - A complainant alleged race and religious belief discrimination from District Court staff at both the criminal and civil counters who he said have been instructed by management to refuse him service and to call security to remove him from the premises.
 - A lawyer on behalf of a complainant (a client) alleged court processes and procedures discriminate against people with disabilities. Additionally, it was stated that the legislation and court process used to determine whether people are fit to stand trial impacts on a client's rights to a fair trial under the Bill of Rights Act and can result in people with intellectual disabilities being detained indefinitely in secure care under the civil jurisdiction.
7. It is important to note that the above complaints are dealt with through our complaint resolution process, which involves the provision of mediation. The Commission is not able to make any findings about whether discrimination has occurred. Determination of individual complaints under the Human Rights Act is carried out by Human Rights Review Tribunal, which is separate to the Commission.
8. Similar and related issues are also raised with Commissioners and staff in a range of other contexts.
9. For example, concerns about the disproportionate impact of the criminal justice system on neuro-diverse people is a recurring concern among those who seek meetings with the Disability Rights Commissioner.¹ It was also a feature of the neurodisability roundtable the Commission held in 2017.
10. The Commission has also actively engaged with survivors of abuse in state care, particularly in 2017. As part of this work, the Commission received a vast amount of anecdotal information. Some such information included

¹ Stakeholders refer to, for example, the Donald Beasley Institute's 2014 report "[Developing a more responsive legal system for people with intellectual disability in New Zealand](#)".

concerns that Māori children were more likely to be taken into state care. Consequently, Māori were more likely to be over represented in the criminal justice system because of the failings of state care. Further that those in state care were more likely to experience disabilities (for example mental health conditions). There was a strongly held belief that these factors contributed to the structural discrimination and institutional bias within the criminal justice system.

11. A further example arises in the context of the government consultations conducted for the purpose of informing the draft government report on compliance with the Convention Against Torture. Commission staff attended these events and the issue of overrepresentation of Māori was discussed by attendees.
12. Concerns have also been raised with Commissioners and staff about cultural capability and attitudes amongst the judiciary, particularly towards participants in the court system of Asian descent or appearance. These concerns have been raised with the current and former Chief Justice.

Response to question (ii):

Surveys about structural discrimination in the justice system

13. The existence of structural discrimination and racial bias in the criminal justice system is well known.² From the over-representation of Māori throughout the criminal justice process (from apprehension to imprisonment) and the high instances of people who come in contact with the criminal justice system having experienced a mental health issue, it is clear that the criminal justice system does not cater well to marginalised communities including, Māori, disabled people, people with a neurodisability and tangata whaiora.
14. The Commission has not carried out any surveys on structural discrimination in the criminal justice system, in recent years. In 2012, the Commission published a discussion paper on structural discrimination called, *A Fair Go For All? Rite Tahī Tātou Katoa: Addressing Structural Discrimination in Public Services*.³ This paper was based on a considerable amount of engagement and consultation, including interviews, inter-agency workshops and a presentation at the annual Diversity Forum. The paper includes a section (at pages 34- 43) specifically on structural discrimination in the justice system.
15. Structural discrimination and unconscious bias against Māori, in general and within the criminal justice system, are issues regularly addressed by bodies of the United Nations. In 2018, the Committee on Economic, Social and

² See for example Department of Corrections (2007) [Over-representation of Māori in the criminal justice system: An exploratory report](#), New Zealand Police. (2012) [The Turning of the Tide – a Whānau Ora Crime and Crash Prevention Strategy](#), New Zealand Police [Update on The Turning of the Tide – making a difference now and for future generations](#), New Zealand Police (2014) [A review of Police and iwi/Maori relationships: Working together to reduce offending and victimisation among Maori](#), Ministry of Justice. (2017) [The criminal justice system factsheet](#).

³ The paper is [publicly available on our website](#).

Cultural Rights raise concerns about “*the significant detrimental impact unconscious bias has on Māori in all areas of life.*”⁴ In 2017, the Committee on the Elimination of Racial Discrimination remained concerned at the disproportionate incarceration rates of Māori and specifically recommended that “*the State party take robust measures to increase the representation of Maori, Pasifika and other minority groups as decision makers, including as prosecutors and judges, at all levels of the criminal justice system*”.⁵

Response to question (iii):

Complaints from people dissatisfied with criminal justice complaint outcome

16. The Human Rights Commission does receive some contact from people seeking information on their human rights as they engage with the criminal justice system
17. Section 79(3) of the Human Rights Act, which prohibits the Commission from dealing with court decisions, is relevant:

Despite every other provision of this section, if the complaint or part of it concerns a judgment or other order of a court, or an act or omission of a court affecting the conduct of any proceedings, the [Human Rights] Commission must take no further action in relation to the complaint or relevant part of it.

18. In some instances, the Commission informs complainants of the option to also contact the Independent Police Conduct Authority or the Judicial Conduct Commissioner in relation to these complaints.
19. Some people also contact the Commission where there is uncertainty around the likely progress of their allegations in the criminal justice system, and the allegations may fall within the Human Rights Commission’s jurisdiction. For example, an indecent assault may not reach the evidential threshold for a criminal law prosecution but may give rise to an allegation of sexual harassment under the Human Rights Act in the civil jurisdiction.
20. The Commission also receives contact from organisations and individuals with system-level concerns about access to justice for complainants, including those who have experienced rape or other sexual violence.

Committee interaction with submitter regarding Clean Slate Act

⁴ United Nations Economic and Social Council, *Fourth periodic report of New Zealand by the Committee on Economic, Social and Cultural Rights*, (May 2018)

⁵ United Nations Committee on the Elimination of Racial Discrimination, *Twenty-first and twenty-second periodic reports of New Zealand*, (September 2017).

21. The Justice Committee will recall their engagement with a submitter regarding eligibility under the Criminal Records (Clean Slate) Act 2004 (the Clean State Act).
22. Some Members expressed the view that a short prison sentence might be able to be “clean-slated” after some decades without any convictions. However, under the Clean Slate Act, an individual is *ineligible* to conceal their convictions if they have received *any* sentence of imprisonment, no matter how many years have passed since that sentence.⁶
23. The Human Rights Commission would be happy to provide any further information required or answer any further questions from the Committee.

Nāku noa, nā



Jaimee Paenga

Legal Officer | Kaitiaki Ture

New Zealand Human Rights Commission | Te Kāhui Tika Tangata

⁶ Section 7(1)(b) <https://www.justice.govt.nz/criminal-records/clean-slate/>