

Introduced by the Hon J P Hannaford, MLC

First print



New South Wales

Criminal Appeal Amendment (Review of Criminal Cases) Bill 1997

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Criminal Appeal Act 1912* to establish a Criminal Cases Review Commission, whose functions include:

- (a) referring to the Court of Criminal Appeal criminal cases in which it considers there has been or may have been a miscarriage of justice, and
- (b) investigation of matters referred to it by that Court arising from a criminal appeal, and
- (c) investigation of matters referred to it by the Governor or the Attorney General under Division 2 of Part 13A of the *Crimes Act 1900* (Petitions to Governor) concerning review of convictions and sentences or the pardoning power of the Governor-in-Council.

The Bill also provides for payments of compensation by the Government in cases of miscarriage of justice.

The Bill repeals or modifies certain provisions of Part 13A of the *Crimes Act 1900* that currently deal with review of convictions by the Supreme Court or other judicial officers.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 3 months after the date of assent, unless sooner commenced by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Criminal Appeal Act 1912* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Crimes Act 1900* set out in Schedule 2.

Schedule 1 Amendment of Criminal Appeal Act 1912

Schedule 1 [1] inserts definitions of *Commission* and *functions* into the Act.

Schedule 1 [2] inserts a new Part 2A (proposed sections 4A and 4B) that establishes a Criminal Cases Review Commission, the purpose of which is to investigate and, where appropriate, refer to the courts cases of possible wrongful conviction or sentence. The Commission is established as a body corporate independent of the Crown, whose functions are to be performed by a Commissioner and one or more Deputy Commissioners appointed by the Governor on the recommendation of the Attorney General. The Commissioner and Deputy Commissioners are to be judges or retired judges or legal practitioners of at least 15 years' standing.

Schedule 1 [3] inserts a new Part 4A (proposed sections 23A–23P) and a new Part 4B (sections 23Q and 23R). The provisions of the new Parts are explained below.

Part 4A Review by Commission of criminal cases

Division 1 Referrals to the court

Proposed section 23A allows the Commission to refer a conviction or sentence to the Court of Criminal Appeal. Such a referral is treated for all purposes as an appeal by the person the subject of the conviction or sentence. It does not matter if that person is barred from lodging the appeal by a limitation of time or for want of any requisite leave, but the powers of the Commission under the proposed section are subject to certain limitations (see the note on proposed section 23D).

Proposed section 23B provides that the Commission may refer to the Court of Criminal Appeal a detention order made in respect of a person who has been the subject of a verdict or finding of mental illness or mental incapacity. Such an order is treated as a sentence.

Proposed section 23C allows the Commission to refer to the District Court a conviction or sentence in any case that has been tried in a summary manner before a Local Court. Such a referral is treated for all purposes as an appeal by the person the subject of the conviction or sentence. The proposed section provides for the District Court to grant bail, in appropriate cases, to a person who is the subject of a referral.

Proposed section 23D sets out the criteria that must be satisfied before the Commission may refer a conviction or sentence to the Court of Criminal Appeal. In referring a case, the Commission must give reasons for the referral. If it declines to refer a case, it must inform the applicant of its reasons for doing so (see the note on proposed section 23E).

The criteria require the raising of new issues, whether by way of argument or evidence, if a conviction or sentence is to be referred. These issues or matters must not have been raised at any relevant court proceedings, and the Commission must be satisfied that raising them would give rise, in the context of the whole case, to a real possibility that the conviction or sentence would not be upheld on appeal. (A case could therefore be referred if, for example, incompetent advocacy prevented an important aspect of an applicant's case from being put to the jury at trial in the first instance.)

The Commission may not, unless there are exceptional circumstances, make a referral unless the convicted person has already appealed, or leave to appeal has been refused. Such exceptional circumstances might be where evidence in another case (or in respect of a co-defendant) casts doubt on the conviction of an individual, though that individual has not appealed against his or her conviction.

Proposed section 23E sets out the very wide powers of the Commission to refer a conviction or sentence. It also prescribes the matters that the Commission should consider before making a referral, and requires the Commission to give reasons for making, or declining to make, a referral.

Division 2 Investigations

Proposed section 23F provides that the Court of Criminal Appeal may direct the Commission to conduct an investigation, on behalf of the court, into a matter relevant to the determination of a case before it.

Proposed section 23G provides for the Commission, following a direction by the Court of Criminal Appeal to do so, to conduct an investigation on behalf of the court. The Commission has complete discretion as to the manner in which such an investigation is to be carried out, and may investigate any other matters it considers will be likely to help conclude the principal investigation. The proposed section also prescribes the procedural matters the Commission must follow during the investigation, such as reporting the progress of any investigation to the Court of Criminal Appeal.

Proposed section 23H makes provision for the Commission to consider, and to give the Attorney General its conclusions on, any matter referred to it by the Attorney General arising out of any consideration of the exercise of the prerogative of mercy relating to a conviction. (Such a matter might be referred to the Commission under Part 13A of the *Crimes Act 1900* or otherwise.) It also empowers the Commission, if it is of the opinion that a particular case is one in respect of which the Attorney General ought to consider the exercise of the prerogative of mercy, so to advise the Attorney General, giving reasons for its opinion.

Division 3 Powers of the Commission

Proposed section 23I defines *appropriate person* and *public authority* for the purposes of the proposed Division.

Proposed section 23J deals with access by the Commission to documents and other evidence. The necessity to preserve evidence relevant to the Commission's investigations, or to its considerations as to whether to make a referral, requires the Commission to have the ability to acquire evidence that is in the hands of third parties and that is documentary in form. Under the proposed section, the Commission is empowered to acquire access to documents or other material in the hands of a person serving in a public authority, if such documents or materials may assist the Commission in carrying out its functions.

Proposed section 23K empowers the Commission to require the appointment of investigating officers. These officers are authorised to conduct inquiries with the object of assisting the Commission in carrying out its functions in relation to any case. The Commission may stipulate that an investigating officer be someone from a public authority other than the body that originally investigated the relevant offence that resulted in the conviction or sentence that is the subject-matter of the Commission's consideration. If no public

authority investigated the relevant offence, the Commission may require the Commissioner of Police to appoint the investigating officer. The Commission or any commissioner investigating the possible miscarriage of justice retains full control over the investigations and the investigating officer.

Proposed section 23L is supplementary to proposed section 23K. It makes provision for the Commission to direct and supervise any investigation carried out by an investigating officer under proposed section 23K. The investigating officer is under an obligation to report his or her findings to the Commission and to any person appointing him or her.

Proposed section 23M provides that, irrespective of the extensive powers given to the Commission to obtain evidence or conduct investigations in connection with the performance of its functions under the provisions of the proposed Division, these provisions do not preclude the Commission from a general power to obtain opinions, commission reports or take any other steps to assist itself in the performance of its functions.

Proposed section 23N provides that it is an offence for a person who is or has been a member of the Commission, an employee of the Commission or an investigating officer to disclose any information obtained in connection with their involvement with the Commission, except in accordance with proposed section 23O. A Commissioner may not authorise an employee or investigating officer to disclose any information obtained as a result of involvement with the Commission's functions except in accordance with proposed section 23O.

Proposed section 23O enables the Commission and any investigating officer to disclose, if the circumstances specified in the section are satisfied, information that would otherwise be subject to an obligation of secrecy. The disclosure or authorisation to disclose is also excepted from proposed section 23N if the information is disclosed by an employee or investigating officer for the purposes of investigation of an offence, or in deciding whether to prosecute, unless the disclosure is prohibited by or under an Act of Parliament. The regulations may prescribe additional circumstances where disclosure of information may be permitted under the proposed section.

Proposed section 23P provides that, in the circumstances prescribed by the section, a person who supplies information, documents or materials to the Commission can require the Commission not to disclose any such matters unless the person consents to the disclosure.

Part 4B Compensation for miscarriages of justice

Proposed section 23Q provides a statutory right to compensation in cases of miscarriage of justice. It gives statutory effect to paragraph 6 of Article 14 of the *International Covenant on Civil and Political Rights* adopted by the United Nations, on which the proposed section is based. Compensation is payable under the proposed section only where a conviction is reversed outside the normal judicial process (eg on a referral, under the provisions inserted by the Bill, or by a pardon) and only if it is shown beyond reasonable doubt that there has been a miscarriage of justice that has been later revealed by the emergence of a new or newly discovered fact (not being a fact that was suppressed by the convicted person).

Proposed section 23R provides that the provisions of proposed section 23Q do not preclude the Government from making a compensation payment in any case of a miscarriage of justice that does not meet the technical requirements of that section but where the Commission believes that such a payment should nevertheless be made. All requests and proposals for payments of such compensation are to be dealt with and determined by the Commission.

Schedule 1 [4] enacts transitional provisions concerning the application of the provisions proposed to be inserted by the Bill. The Commission is generally empowered to review cases decided before the commencement of those provisions (but not any that are the subject of review or inquiry under the existing review provisions of Part 13A of the *Crimes Act 1900*, until the conclusion of any such review or inquiry).

Schedule 1 [5] inserts Schedule 2 into the Act, which makes further provision concerning the appointment and remuneration of members of the Commission and aspects of their duties.

Schedule 2 Amendment of Crimes Act 1900

Schedule 2 [1] amends section 474A to repeal a definition as a consequence of other repeals effected by the Schedule.

Schedule 2 [2] amends section 474C, which currently provides for petitions to the Governor for review of conviction or sentence to be dealt with either by setting up an inquiry by a judicial officer or by referring the matter to the Court of Criminal Appeal to be dealt with as an appeal. The amendment abolishes this procedure, and provides instead for referral of such petitions to the Criminal Cases Review Commission.

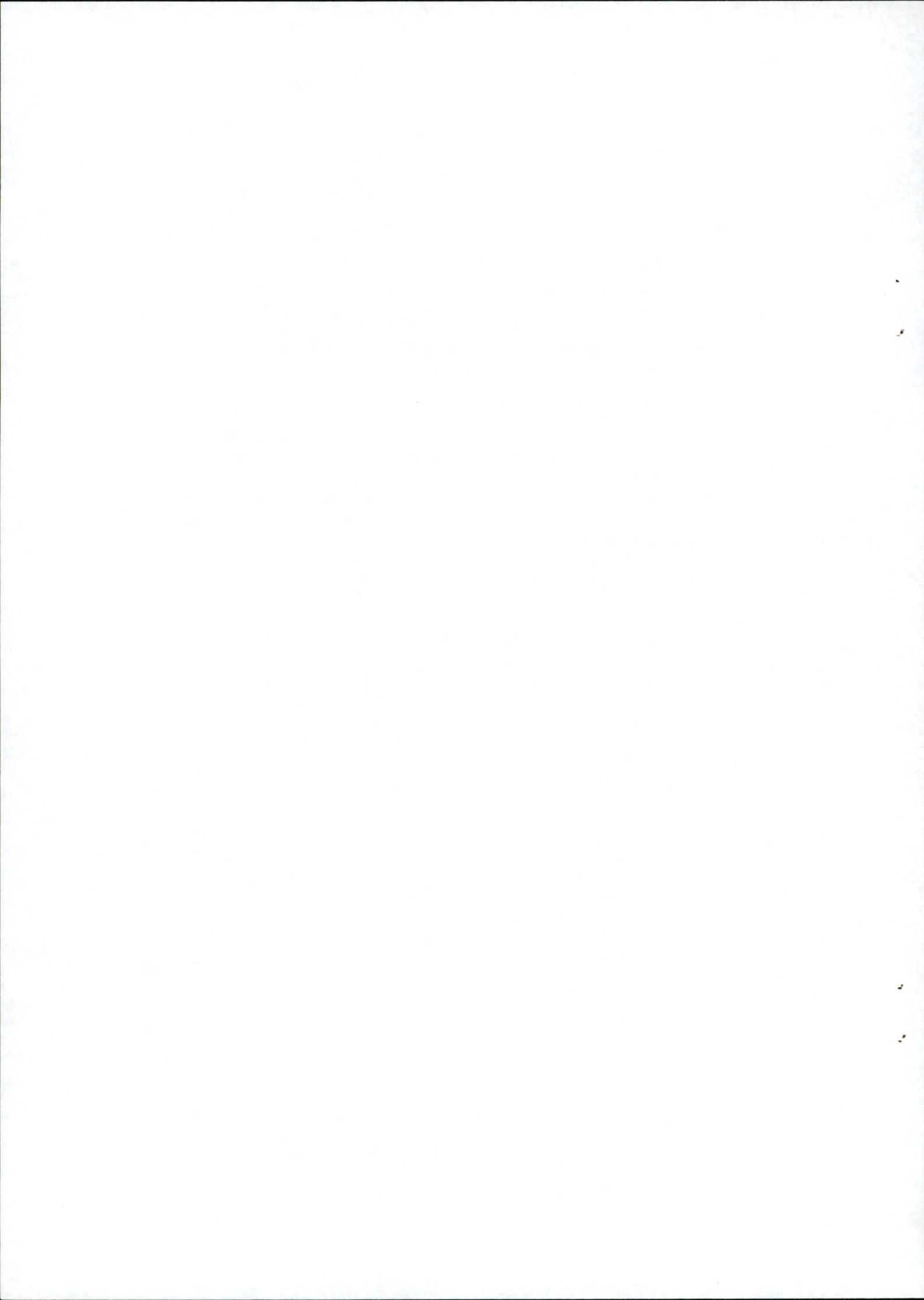
Criminal Appeal Amendment (Review of Criminal Cases) Bill 1997

Explanatory note

Schedule 2 [3] repeals Divisions 3 and 4 of Part 13A, which currently provide for inquiries by the Supreme Court or other judicial officers into convictions.

Schedule 2 [4]–[6] make consequential amendments.

Schedule 2 [7] enacts provisions to facilitate the transition of functions from the Governor-in-Council and the Attorney General under Part 13A of the Act to the Criminal Cases Review Commission under the amended provisions of the *Criminal Appeal Act 1912*. The repealed provisions of Part 13A are taken to survive for the purpose of dealing with a petition made under that Part before the Bill is enacted. Such a petition may, however, if it has not already been dealt with, be referred by the Governor or the Attorney General to the Commission to be dealt with by it.



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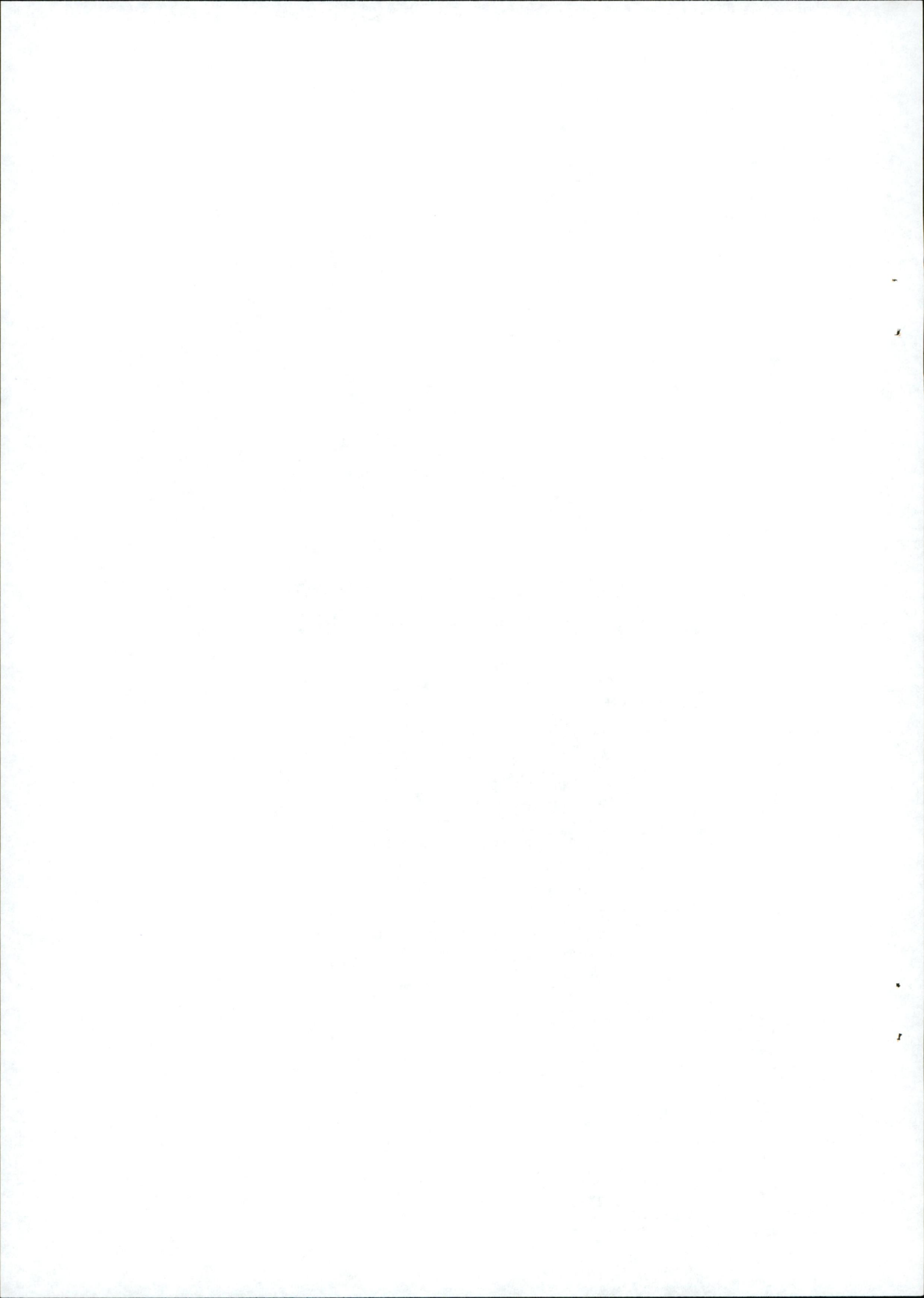
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New South Wales

Criminal Appeal Amendment (Review of Criminal Cases) Bill 1997

No. , 1997

A Bill for

An Act to amend the *Criminal Appeal Act 1912* with respect to the review of criminal convictions; to provide for the establishment of a Criminal Cases Review Commission; to provide for payment of compensation in cases of miscarriage of justice; to amend the *Crimes Act 1900* consequentially; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Criminal Appeal Amendment (Review of Criminal Cases) Act 1997*.

2 Commencement

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This Act commences 3 months after the date of assent, unless sooner commenced by proclamation.

3 Amendment of Criminal Appeal Act 1912 No 16

The *Criminal Appeal Act 1912* is amended as set out in Schedule 1.

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4 Amendment of Crimes Act 1900 No 40

The *Crimes Act 1900* is amended as set out in Schedule 2.

Schedule 1 Amendment of Criminal Appeal Act 1912

(Section 3)

[1] Section 2 Definitions

Insert in alphabetical order in section 2 (1):

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Commission means the Criminal Cases Review Commission established under Part 2A.

functions includes powers, authorities and duties, and a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

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[2] Part 2A

Insert after Part 2:

Part 2A Criminal Cases Review Commission

4A Establishment of Commission

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(1) A Criminal Cases Review Commission is established.

(2) The Commission is a body corporate consisting of a Commissioner and one or more Deputy Commissioners appointed under this section.

(3) The functions of the Commission are to be exercised:

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(a) by the Commissioner, and

(b) by one or more Deputy Commissioners under the direction of the Commissioner.

(4) The Commissioner and Deputy Commissioners are to be appointed by the Governor on the recommendation of the Attorney General.

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(5) A Commissioner or Deputy Commissioner must be a judge or retired judge or a legal practitioner of at least 15 years' standing.

- (6) Schedule 2 (Further provisions with respect to the Commission) has effect.
- (7) The Commission is not, for the purposes of any Act, a statutory body representing the Crown.

4B Functions of the Commission

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- (1) The principal function of the Commission is to investigate and, where appropriate, to refer to a court of suitable appellate jurisdiction cases of possible wrongful conviction or sentence.
- (2) The Commission has the functions specified in Part 4A and such other functions as may be conferred or imposed on it by or under this or any other Act or law.

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[3] Parts 4A and 4B

Insert after Part 4:

Part 4A Review by Commission of criminal cases

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Division 1 Referrals to the court

23A Referral of convictions and sentences

- (1) The Commission may at any time refer to the court any conviction referred to in any of sections 5-5AD.
- (2) Whether or not it has referred the conviction, the Commission may at any time refer to the court any sentence (not being a sentence fixed by law) imposed on, or in subsequent proceedings relating to, such a conviction.
- (3) A referral under this section of a conviction is to be dealt with as an appeal under Part 3 by the convicted person against the conviction.
- (4) A referral under this section of a sentence is to be dealt with as an appeal under Part 3 by the person sentenced against:
 - (a) the sentence, and
 - (b) any other sentence (not being a sentence fixed by law) imposed in respect of, or in subsequent proceedings relating to, the conviction or any related conviction.

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- (5) On a referral under this section of a person's conviction, the Commission may give notice to the court that any related conviction that is specified in the notice is to be treated as referred to the court under this section.
- (6) For the purposes of this section, convictions are related if they are dealt with on the same indictment or, if dealt with in a summary manner, they arise from the same facts or are dealt with in the same proceedings. 5
- (7) For the purposes of subsections (3) and (4):
- (a) any time limit for lodgment of an appeal, and 10
- (b) any leave or other matter that would ordinarily be a prerequisite to lodgment of an appeal,
- are to be disregarded.

23B Findings of mental illness or incapacity

If a conviction consists of a finding or verdict under or in accordance with section 14, 22 (1) (c) or (d) or 30 (2) of the *Mental Health (Criminal Procedure) Act 1990*, any order to keep the person the subject of the finding or verdict in custody is taken for the purposes of this Part to be a sentence, and references in this Part to a "sentence" and to a "person sentenced" are to be construed accordingly. 15
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23C Referral of cases dealt with by Local Court

- (1) The Commission may at any time refer to the District Court any conviction in respect of which an appeal lies to that court under section 122 of the *Justices Act 1902*, or that could have been the subject of such an appeal but for the fact that the time for lodgment of the appeal has expired. 25
- (2) Whether or not it has referred the conviction, the Commission may at any time refer to the District Court any sentence (not being a sentence fixed by law) imposed in respect of such a conviction. 30

- (3) A referral under this section of a conviction is to be dealt with as an appeal under section 122 of the *Justices Act 1902* by the convicted person against the conviction.
- (4) A referral under this section of a sentence is to be dealt with as an appeal under section 122 of the *Justices Act 1902* by the person sentenced against:
- (a) the sentence, and
 - (b) any other sentence (not being a sentence fixed by law) imposed in respect of, or in subsequent proceedings relating to, the conviction or any related conviction.
- (5) On a referral under this section of a person's conviction, the Commission may give notice to the District Court that any related conviction that is specified in the notice is to be treated as referred to the District Court under this section.
- (6) For the purposes of this section, convictions are related if they arise from the same facts or are dealt with in the same proceedings.
- (7) On a referral under this section, the District Court may not award any punishment more severe than that awarded by the court whose decision is referred.
- (8) The District Court may grant bail to a person whose conviction or sentence has been referred under this section. Any time during which the person is released on bail does not count as part of any term of imprisonment or detention under his or her sentence.

23D Conditions precedent to referrals

- A conviction or sentence is not to be referred to the court under this Part unless:
- (a) the Commission is of the opinion that there is a real possibility that the conviction or sentence would not be upheld were it to be so referred, and

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- (b) the Commission forms that opinion:
- (i) in the case of a conviction, because of an argument, or evidence, not raised in the proceedings that led to it or on any appeal or application for leave to appeal against it, or 5
 - (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and
- (c) an appeal against the conviction or sentence has been determined or leave to appeal against it has been refused. 10

Nothing in paragraph (b) (i) or (c), however, precludes a referral if the time for lodgment of an appeal by the person in respect of whom the conviction or sentence was found or imposed has expired or if it appears to the Commission that there are exceptional circumstances that justify a referral. 15

23E Further provisions about referrals

- (1) A referral of a conviction or sentence may be made under this Part either after an application has been made by or on behalf of the person to whom it relates or without an application having been so made. 20
- (2) A reference in subsection (1) to an application includes a reference to a petition under Division 2 of Part 13A of the *Crimes Act 1900* for review of a conviction or the exercise of the Governor's pardoning power that has been referred to the Commission under that Division. 25
- (3) In considering whether to refer a conviction or sentence under this Part, the Commission must have regard to: 30
 - (a) any application or representations made to the Commission by or on behalf of the person to whom it relates, and

- (b) any other representations made to the Commission in relation to it, and
 - (c) any other matters that appear to the Commission to be relevant.
- (4) In considering whether to refer a conviction or sentence under this Part, the Commission may at any time refer to the court any point on which it desires the assistance of the court for the court's opinion on it, and on such a referral the court is to consider the point referred and furnish the Commission with the court's opinion on the point. 5 10
- (5) The Commission, when referring a conviction or sentence under this Part, must:
 - (a) give to the court to which the referral is made a statement of the Commission's reasons for making the referral, and 15
 - (b) send a copy of the statement to every person who appears to the Commission to be likely to be a party to any proceedings on the appeal arising from the referral. 20
- (6) To the extent that a referral under this Part is treated as an appeal against any conviction or sentence, the appeal may be on any ground relating to the conviction or sentence (whether or not the ground is related to any reason given by the Commission for making the referral). 25
- (7) In every case in which:
 - (a) an application has been made to the Commission by or on behalf of any person for the referral under this Part of any conviction or sentence, and 30
 - (b) the Commission decides not to refer the conviction or sentence,

the Commission must give a statement of the reasons for its decision to the person who made the application.

Division 2 Investigations

23F Court may direct investigation

- (1) On an appeal against a conviction the court may direct the Commission to investigate and report to the court on any matter if it appears to the court that: 5
- (a) the matter is relevant to the determination of the case and ought, if possible, to be resolved before the case is determined, and
 - (b) an investigation of the matter by the Commission is likely to result in the court's being able to resolve it, and 10
 - (c) the matter cannot be resolved by the court without an investigation by the Commission.
- (2) A direction by the court under this section is to be given in writing and is to specify the matter to be investigated. 15
- (3) Copies of the direction are to be made available to the appellant and the respondent.

23G Investigations at direction of the court

- (1) The Commission is to investigate the matter specified in a direction under section 23F in such manner as the Commission thinks fit. 20
- (2) If, in investigating such a matter, it appears to the Commission that:
- (a) another matter (a *related matter*) that is relevant to the determination of the case by the court ought, if possible, to be resolved before the case is determined by the court, and 25
 - (b) an investigation of the related matter is likely to result in the court's being able to resolve it,
- the Commission may also investigate the related matter. 30

- (3) The Commission is required:
- (a) to keep the court informed as to the progress of the investigation of the matter, and
 - (b) if it decides to investigate any related matter, to notify the court of its decision and keep the court informed as to the progress of the investigation. 5
- (4) The Commission is to report to the court on the investigation of any matter specified in a direction under section 23F when:
- (a) it completes the investigation of that matter and of any related matter investigated by it, or 10
 - (b) it is directed to do so by the court, whichever happens first.
- (5) A report under subsection (4) must include details of any inquiries made by or for the Commission in the investigation of the matter specified in the direction or any related matter investigated by it. 15
- (6) Such a report must be accompanied:
- (a) by any statements and opinions received by the Commission in the investigation of the matter specified in the direction or any related matter investigated by it, and 20
 - (b) subject to subsection (7), by any reports so received.
- (7) Such a report need not be accompanied by any reports submitted to the Commission by an investigating officer. 25

23H Assistance in connection with prerogative of mercy

- (1) Where the Attorney General refers to the Commission any matter that arises in the consideration of whether to recommend the exercise of the prerogative of mercy in relation to a conviction and on which the Attorney General desires its assistance, the Commission is required to:
- (a) consider the matter referred, and 30
 - (b) give to the Attorney General a statement of its conclusions on it, 35

and the Attorney General, in considering whether so to recommend, is to treat the Commission's statement as conclusive of the matter referred.

- (2) Where in any case the Commission is of the opinion that the Attorney General should consider whether to recommend the exercise of the prerogative of mercy in relation to the case, the Commission may so advise the Attorney General, giving the reasons for its opinion.

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Division 3 Powers of the Commission

23I Definitions

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In this Division:

appropriate person means:

- (a) in relation to the Police Service, the Commissioner of Police, or
- (b) in relation to the Crown Prosecution Service, the Director of Public Prosecutions, or
- (c) in relation to any government department not within any of the preceding paragraphs, the responsible Minister, or
- (d) in relation to any public authority not within any of the preceding paragraphs, the public authority itself (if it is a body corporate) or the person in charge of the public authority (if it is not).

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public authority means:

- (a) a government department, or
- (b) a local authority, or
- (c) the Police Service or any other body constituted by or under any Act, whether or not it is a statutory body representing the Crown.

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23J Power to obtain documents or other material

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- (1) This section applies where the Commission believes that a person serving in a public authority has possession or control of a document or other material that may assist the Commission in the exercise of any of its functions.

- (2) The Commission may require the person who is the appropriate person in relation to the public authority:
- (a) to produce the document or other material to the Commission or to give the Commission access to it, and 5
 - (b) to allow the Commission to take away the document or other material or to make and take away a copy of it in such form as it considers appropriate.
- and may direct that person that the document or other material must not be destroyed, damaged or altered before the direction is withdrawn by the Commission. 10
- (3) The documents and other material to which this section applies include, but are not limited to, any document or other material obtained or created during any investigation or proceedings relating to: 15
- (a) the case in relation to which the Commission's function is being or may be exercised, or
 - (b) any other case that may be in any way connected with that case (whether or not any function of the Commission could be exercised in relation to that other case). 20
- (4) The duty to comply with a requirement under this section is not affected by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or under any Act) that would otherwise prevent the production of the document or other material to the Commission or prevent access to it by the Commission. 25

23K Power to require appointment of investigating officers 30

- (1) If the Commission believes that inquiries should be made for assisting it in the exercise of any of its functions in relation to any case, it may require the appointment of an investigating officer to carry out the inquiries.

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- (2) If any offence to which the case relates was investigated by persons serving in a public authority, a requirement under this section may be imposed:
- (a) on the person who is the appropriate person in relation to the public authority, or 5
 - (b) if the public authority has ceased to exist, on the Commissioner of Police or on the person who is the appropriate person in relation to any public authority that appears to the Commission to have functions that consist of or include functions similar to any of those of the public authority that has ceased to exist. 10
- (3) If no offence to which the case relates was investigated by persons serving in a public authority, a requirement under this section may be imposed on the Commissioner of Police. 15
- (4) A requirement under this section imposed on a person who is the appropriate person in relation to a public authority other than the Police Service may be:
- (a) a requirement to appoint a person serving in the public authority, or 20
 - (b) a requirement to appoint a police officer, or a person serving in a public authority (other than the Police Service), who has functions that consist of or include the investigation of offences, selected by the appropriate person. 25
- (5) The Commission may direct that a person is not to be appointed, or that the Police Service or another public authority is not to be selected, under subsection (4) without the approval of the Commission. 30
- (6) A person who is the appropriate person in relation to any public authority and who makes an appointment under this section must inform the Commission of the appointment, and if the Commission is not satisfied with the person appointed, it may direct that: 35

- (a) the person who is the appropriate person in relation to the public authority must, as soon as is reasonably practicable, select another person in his or her place and notify the Commission of the proposal to appoint the other person, and 5
- (b) the other person must not be appointed without the approval of the Commission.

23L Inquiries by investigating officers

- (1) A person appointed as the investigating officer in relation to a case is to undertake such inquiries as the Commission may from time to time reasonably direct the person to undertake in relation to the case. 10
- (2) A person appointed as an investigating officer is to be permitted to act as such by the person who is the appropriate person in relation to the public authority in which he or she is serving. 15
- (3) The Commission may take any steps it considers appropriate for supervising the undertaking of inquiries by an investigating officer.
- (4) The Commission may at any time direct that a person appointed as the investigating officer in relation to a case is to cease to act as such. The giving of such a direction does not prevent the Commission from imposing a requirement under section 23K to appoint another investigating officer in relation to the case. 20
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- (5) A person appointed as the investigating officer in relation to a case who has completed the inquiries that he or she has been directed by the Commission to undertake in relation to the case must:
 - (a) prepare a report of his or her findings, and 30
 - (b) submit it to the Commission, and
 - (c) send a copy of it to the person by whom he or she was appointed.

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- (6) When a person appointed as the investigating officer in relation to a case submits to the Commission a report of his or her findings, any statements, opinions and reports received by the person in connection with the inquiries that the person was directed to undertake in relation to the case are to be submitted with those findings. 5

23M Other powers

The foregoing provisions of this Division do not preclude the Commission from taking any steps it considers appropriate for assisting it in the exercise of any of its functions, including: 10

- (a) undertaking, or arranging for others to undertake, inquiries, and
- (b) obtaining, or arranging for others to obtain, statements, opinions and reports. 15

23N Offence of disclosure

- (1) A person who is or has been a member or employee of the Commission must not disclose any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is excepted from this section by section 23O. 20
- (2) A person who is or has been an investigating officer must not disclose any information obtained by the person in his or her inquiries unless the disclosure of the information is excepted from this section by section 23O. 25
- (3) A member of the Commission must not authorise:
- (a) the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of its functions, or
- (b) the disclosure by an investigating officer of any information obtained by the investigating officer in his or her inquiries, 30

unless the authorisation of the disclosure is excepted from this section by section 23O.

- (4) A person who contravenes this section is guilty of an offence and liable on summary conviction to a penalty not exceeding 50 penalty units.
- (5) Proceedings for an offence against this section are to be dealt with by a Local Court constituted by a Magistrate sitting alone. 5

230 Exceptions from obligation of non-disclosure

- (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 23N by this section if the information is disclosed, or is authorised to be disclosed: 10
 - (a) for the purposes of any criminal, disciplinary or civil proceedings, or
 - (b) in order to assist in dealing with an application made to the Attorney General for compensation for a miscarriage of justice, or 15
 - (c) by a person who is a member or an employee of the Commission either to another person who is a member or an employee of the Commission or to an investigating officer, or 20
 - (d) by an investigating officer to a member or an employee of the Commission, or
 - (e) in any statement or report required by or under this Act, or
 - (f) in or in connection with the exercise of any function under this Act, or 25
 - (g) in any circumstances prescribed by the regulations.
- (2) The disclosure of information is also excepted from section 23N by this section if the information is disclosed by an employee of the Commission, or an investigating officer, who is authorised to disclose the information by a member of the Commission. 30

(3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 23N by this section if the information is disclosed, or is authorised to be disclosed, for the purposes of:

- (a) the investigation of an offence, or 5
- (b) deciding whether to prosecute a person for an offence.

unless the disclosure is or would be prevented by an obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or under any Act) arising otherwise than under that section. 10

(4) A disclosure of information that is excepted from section 23N by subsection (1) or (2) is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or under any Act) arising otherwise than under that section. 15

23P Consent to disclosure

(1) If a person on whom a requirement is imposed under section 23J notifies the Commission that any information contained in any document or other material to which the requirement relates is not to be disclosed by the Commission without the person's prior consent, the Commission must not disclose the information without that consent. 20 25

(2) Such consent, however, may not be withheld unless:

(a) but for section 23J (4), the person would have been prevented, by any obligation of secrecy or other limitation on disclosure, from disclosing the information to the Commission, and 30

(b) it is reasonable for the person to withhold his or her consent to disclosure of the information by the Commission.

- (3) An obligation of secrecy or other limitation on disclosure that applies to a person only where disclosure is not authorised by another person is not taken, for the purposes of subsection (2) (a), to prevent the disclosure by the person of information to the Commission unless: 5
- (a) reasonable steps have been taken to obtain the authorisation of the other person, or
- (b) such authorisation could not reasonably be expected to be obtained.

Part 4B Compensation for miscarriages of justice 10

23Q Statutory right to compensation

- (1) When a person has been convicted of a criminal offence and when subsequently the person's conviction has been reversed or the person has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Attorney General must pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of the conviction (or, if the person is dead, to the person's personal representatives), unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted. 15
- (2) No payment of compensation under this section is to be made unless an application for such compensation has been made to the Attorney General or the Commission. 25
- (3) Whether there is a right to compensation under this section, and the amount of any such compensation, are matters to be determined by the Commission.
- (4) In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the Commission must have particular regard to: 30
- (a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction, and 35

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- (b) the conduct of the investigation and prosecution of the offence, and
 - (c) any other convictions of the person and any punishment resulting from them.
- (5) In this section, *reversed* means quashed: 5
- (a) on an appeal out of time, or
 - (b) on a referral under Part 4A.
- (6) For the purposes of this section, a person suffers punishment as a result of a conviction when sentence is passed on the person for the offence of which the person was convicted. 10
- (7) Compensation under this section is to be paid out of money to be provided by Parliament.

23R Non-statutory payments

- (1) Nothing in section 23Q precludes the Attorney General, or any other Minister of the Crown or official, from making any ex gratia payment by way of compensation to any person in accordance with any arrangement applying to cases of wrongful or apparent or possible wrongful conviction or otherwise concerning a miscarriage of justice. 15 20
- (2) A request for or proposal to make any such payment must, however, be referred to the Commission for its advice on whether the payment should be made and the amount (if any) that should be paid, and no such payment is to be made except on the recommendation of the Commission. 25

[4] Schedule 1 Savings and transitional provisions

Insert at the end of the Schedule:

4 Criminal Appeal Amendment (Review of Criminal Cases) Act 1997 30

- (1) In this clause, *amending Act* means the *Criminal Appeal Amendment (Review of Criminal Cases) Act 1997*.

- (2) The Commission's powers under Part 4A extend to permit the Commission, for any reason that appears to it sufficient, to refer to the court a conviction or sentence found or imposed before the commencement of the amending Act, whether or not the conviction or sentence has been the subject of review or inquiry in accordance with the provisions of Part 13A of the *Crimes Act 1900*, as in force before that commencement. The Commission may not, however, refer a matter while it is the subject of such review or inquiry. 5
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- (3) Section 23J does not apply to any document or other material in the possession or control of a person serving in a government department if the document or other material:
- (a) is relevant to a case that is the subject of review or inquiry under Part 13A of the *Crimes Act 1900*, and 15
- (b) is in the possession or control of the person in consequence of such review or inquiry.

[5] Schedule 2 20

Insert after Schedule 1:

**Schedule 2 Further provisions with respect to the
Commission**

(Section 4A)

Part 1 Preliminary 25

1 Definitions

In this Schedule:

Commissioner means the Commissioner appointed under section 4A.

financial year of the Commission means a year ending on 30 June. 30

member means the Commissioner or a Deputy Commissioner appointed under section 4A.

Part 2 Constitution

2 Terms of office of members

Subject to this Schedule, a member holds office for such period (not exceeding 3 years) as is specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment. 5

3 Remuneration

A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine in respect of the member. 10

4 Vacancy in office of member

- (1) The office of a member becomes vacant if the member:
- (a) dies, or
 - (b) completes a term of office and is not re-appointed, or 15
 - (c) resigns the office by instrument in writing addressed to the Attorney General, or
 - (d) is removed from office by the Attorney General under this clause, or 20
 - (e) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or 25
 - (f) becomes a mentally incapacitated person, or
 - (g) is convicted in New South Wales of an offence that is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable. 30

- (2) The Attorney General may at any time remove from office a member who, in the Attorney General's opinion, is unable or unfit to discharge the duties of his or her office as a member.

5 Filling of vacancy in office of member

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- (1) If the office of Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.
- (2) If the office of a Deputy Commissioner becomes vacant, a person may, subject to this Act, be appointed to fill the vacancy.

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6 Disclosure of pecuniary interests

- (1) If:
- (a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered by the Commission, and
- (b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter,

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the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest to the Attorney General.

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- (2) A disclosure by a member that the member:
- (a) is a member, or is in the employment, of a specified company or other body, or
- (b) is a partner, or is in the employment, of a specified person, or
- (c) has some other specified interest relating to a specified company or other body or to a specified person,

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is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).

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- (3) Particulars of any disclosure made under this clause must be recorded by the Attorney General in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the Attorney General. 5
- (4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Attorney General otherwise determines, exercise any function of the Commission with respect to the matter.
- (5) A contravention of this clause does not invalidate any decision of the Commission. 10

7 Effect of certain other Acts

- (1) Part 2 of the *Public Sector Management Act 1988* does not apply to or in respect of the appointment of a member. 15
- (2) If by or under any Act provision is made:
- (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
- (b) prohibiting the person from engaging in employment outside the duties of that office, 20
- the provision does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as a member. 25

Part 3 Annual reports and accounts

8 Annual report

- (1) As soon as practicable after the end of a financial year of the Commission, the Commission is to send to the Attorney General a report on its work and activities during that year. 30
- (2) The report may include a report on the operation of any of the provisions of Parts 4A and 4B and recommendations relating to any of those provisions.

- (3) The Commission's report is to form part of the annual report of the Attorney General's Department and is to be laid before Parliament accordingly.

9 Accounts

- (1) The Commission is to: 5
- (a) keep proper accounts and proper records in relation to the accounts, and
 - (b) prepare a statement of accounts in respect of each financial year of the Commission.
- (2) The statement of accounts is to contain such information and is to be in such form as the Attorney General may, with the consent of the Treasurer, direct. 10
- (3) The Commission's statement of accounts is to be submitted to the Attorney General together with the Commission's annual report. 15

Part 4 Procedure

10 General procedure

The procedure for the exercise of the Commission's functions and the conduct of its business is, subject to this Act, to be as determined by the Commissioner. 20

Schedule 2 Amendment of Crimes Act 1900

(Section 4)

[1] Section 474A Definitions

Omit the definition of *prescribed person*.

[2] Section 474C Consideration of petitions

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Omit section 474C (1) and (2). Insert instead:

(1) To the extent that a petition under this Division seeks review of a conviction, it is to be referred to the Criminal Cases Review Commission to be dealt with under Part 4A of the *Criminal Appeal Act 1912*, except as provided by subsection (3).

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(2) To the extent that a petition under this Division seeks the exercise of the Governor's pardoning power, it may be referred to the Criminal Cases Review Commission to be dealt with under Part 4A of the *Criminal Appeal Act 1912*, except as provided by subsection (3).

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[3] Part 13A, Divisions 3 and 4

Omit the Divisions.

[4] Section 474J Quashing of conviction following pardon

Omit section 474J (4). Insert instead:

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(4) Such an application cannot, however, be made in respect of a free pardon arising from:

(a) an inquiry under Division 4 of this Part, as in force immediately before the repeal of that Division by the *Criminal Appeal Amendment (Review of Criminal Cases) Act 1997*, if the matter has previously been dealt with under this Division following its referral to the Court under that Division by the person who conducted that inquiry, or

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- (b) consideration of the matter by the Criminal Cases Review Commission on a referral of the matter to the Commission under section 474C (2), if the matter has previously been dealt with under this Division as a consequence of the Commission's referral of the matter to the Court under Part 4A of the *Criminal Appeal Act 1912*. 5

[5] Section 474K Procedure on application for quashing of conviction

Omit section 474K (1) (b) (i) and (ii). Insert instead: 10

- (i) if the matter was considered by the Criminal Cases Review Commission, any report of the Commission on the matter, and

[6] Sections 474L–474O

Omit the sections. 15

[7] Eleventh Schedule Savings and transitional provisions

Insert at the end of the Schedule:

Part 11 Criminal Appeal Amendment (Review of Criminal Cases) Act 1997

34 Meaning of "amending Act" 20

In this Part, *amending Act* means the *Criminal Appeal Amendment (Review of Criminal Cases) Act 1997*.

35 Consideration of petitions

- (1) Section 474C (1) and (2), as in force immediately before their repeal by the amending Act, continue to apply in respect of a petition under section 474B that was made to the Governor before that Act commenced. 25

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- (2) Subclause (1) does not prevent the referral of any such petition, at the option of the Attorney General or the Governor, to the Criminal Cases Review Commission in accordance with section 474C (1) and (2), as in force after the commencement of the amending Act, if the petition has not already been dealt with under those subsections as in force immediately before that Act commenced. 5

36 Applications to Supreme Court for inquiries

An application under section 474D that was pending at the commencement of the amending Act is to be dealt with as though the provisions of Divisions 3 and 4 of Part 13A, as in force immediately before their repeal by the amending Act, and section 474M as so in force, had not been repealed. 10
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37 Inquiries

Division 4 of Part 13A, as in force immediately before its repeal by the amending Act, continues to apply in respect of any direction for an inquiry given:

- (a) before the amending Act commenced, or 20
(b) in accordance with this Part of this Schedule.