

South Australia

Criminal Cases Review Commission Bill 2010

A BILL FOR

An Act to provide for the establishment of a Criminal Cases Review Commission and for the reference of matters by that Commission to appellate courts; to make related amendments to the *Bail Act 1985* and the *Criminal Law Consolidation Act 1935*; and for other purposes.

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The Parliament of South Australia enacts as follows:**Part 1—Preliminary****1—Short title**

This Act may be cited as the *Criminal Cases Review Commission Act 2010*.

2—Commencement

5 This Act will come into operation on a day to be fixed by proclamation.

3—Interpretation

(1) In this Act, unless the contrary intention appears—

appropriate person, in relation to a public body, means—

- (a) the principal officer of the public body; or
- 10 (b) an officer of the public body who has been designated by the principal officer of the body as an appropriate person for the purposes of this Act;

Commission means the Criminal Cases Review Commission established under Part 2;

Court means the Supreme Court;

principal officer, in relation to a public body, means—

- 15 (a) if the body consists of a single person (including a corporation sole but not any other body corporate)—that person;
- (b) if the body consists of an unincorporated board or committee—the presiding officer;
- (c) in any other case—the chief executive officer of the agency or a person
- 20 designated by the regulations as principal officer of the body;

public body means—

- (a) a Minister of the Crown; or
- (b) a person who holds an office established by an Act; or
- (c) an administrative unit under the *Public Sector Management Act 1995*; or
- 25 (d) South Australia Police; or
- (e) any incorporated or unincorporated body—
 - (i) established for a public purpose by an Act; or
 - (ii) established for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations); or
 - 30 (iii) established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown or a council (whether or not established by or under an Act or an enactment); or

- (f) a person or body declared by the regulations to be a public body.
- (2) For the purposes of this Act, convictions are *related* if they are convictions of the same person by the same court on the same day.

Part 2—The Commission

4—The Commission

- (1) The *Criminal Cases Review Commission* is established.
- (2) The Commission—
 - (a) is a body corporate; and
 - (b) has perpetual succession and a common seal; and
 - (c) is capable of suing and being sued in its corporate name; and
 - (d) has all the powers of a natural person that are capable of being exercised by a body corporate; and
 - (e) has the functions and powers assigned or conferred by or under this Act or any other Act.
- (3) If a document appears to bear the common seal of the Commission, it will be presumed, in the absence of proof to the contrary, that the common seal of the Commission was duly affixed to the document.
- (4) The Commission is not an agent or instrumentality of the Crown and the Commission's property is not to be regarded as property of, or held on behalf of, the Crown.
- (5) The Commission will consist of 5 members appointed by the Governor.
- (6) At least 2 of the members of the Commission must be persons who are legal practitioners of not less than 10 years standing.
- (7) At least 3 of the members of the Commission must be persons who have knowledge or experience of any aspect of the criminal justice system (including, in particular, the investigation of offences and the treatment of offenders).

5—Terms and conditions of membership

- (1) A member of the Commission will be appointed on conditions determined by the Governor and for a term, not exceeding 5 years, specified in the instrument of appointment and subject to subsection (2), at the expiration of a term of appointment, is eligible for reappointment.
- (2) No person may hold office as a member of the Commission for a continuous period which is longer than 10 years.
- (3) The Governor may appoint a suitable person to be the deputy of a member of the Commission and the deputy may act as a member of the Commission during any period of absence of the member.
- (4) The Governor may remove a member of the Commission from office—
 - (a) for breach of, or non-compliance with, a condition of appointment; or
 - (b) for misconduct; or

- (c) for failure or incapacity to carry out official duties satisfactorily.
- (5) The office of a member of the Commission becomes vacant if the member—
- (a) dies; or
 - (b) completes a term of office and is not reappointed; or
 - 5 (c) resigns by written notice to the Minister; or
 - (d) is removed from office under subsection (4).
- (6) If a casual vacancy occurs in the office of a member, the Governor may appoint a suitable person to fill the vacancy, and that person will hold office for the balance of the term of his or her predecessor.

10 **6—Presiding member**

The Governor must appoint a member of the Commission (the *presiding member*) to preside at meetings of the Commission.

7—Vacancies or defects in appointment of members

15 An act or proceeding of the Commission is not invalid by reason only of a vacancy in its membership or a defect in the appointment of a member.

8—Remuneration

A member of the Commission is entitled to remuneration, allowances and expenses determined by the Governor.

9—Commission's procedures

- 20 (1) A quorum of the Commission consists of 3 members.
- (2) A meeting of the Commission will be chaired by the presiding member or, in his or her absence, the members present at a meeting of the Commission must choose 1 of their number to preside at the meeting.
- 25 (3) A decision carried by a majority of the votes cast by members of the Commission at a meeting is a decision of the Commission.
- (4) Each member present at a meeting of the Commission has 1 vote on any question arising for decision and the member presiding at the meeting may exercise a casting vote if the votes are equal.
- 30 (5) A conference by telephone or other electronic means between the members of the Commission will, for the purposes of this section, be taken to be a meeting of the Commission at which the participating members are present if—
- (a) notice of the conference is given to all members in the manner determined by the Commission for the purpose; and
 - 35 (b) each participating member is capable of communicating with every other participating member during the conference.

(6) A proposed resolution of the Commission becomes a valid decision of the Commission despite the fact that it is not voted on at a meeting of the Commission if—

(a) notice of the proposed resolution is given to all members of the Commission in accordance with procedures determined by the Commission; and

(b) a majority of the members express concurrence in the proposed resolution by letter, telegram, telex, fax, email or other written communication setting out the terms of the resolution.

(7) The Commission must have accurate minutes kept of its meetings.

(8) Subject to this Act, the Commission may determine its own procedures.

10—Staff

(1) The Commission may, in the performance of its functions under this Act, be assisted by employees in the Public Service who are assigned to the staff of the Commission by the Minister.

(2) The Commission may, by agreement with the Minister responsible for an administrative unit of the Public Service, make use of the services of the staff, equipment or facilities of that administrative unit.

Part 3—References to court

11—References of indictable offences

(1) If a person has been convicted of an indictable offence, the Commission—

(a) may at any time refer the conviction to the Court; and

(b) whether or not the conviction is referred to the Court—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, the conviction.

(2) A reference under subsection (1) has effect as follows:

(a) a reference of a person's conviction will be treated for all purposes as an appeal by the person against the conviction;

(b) a reference of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction of an indictable offence will be treated for all purposes as an appeal by the person against—

(i) the sentence; and

(ii) any other sentence (not being a sentence fixed by law) imposed on, or in subsequent proceedings relating to, the conviction or any related conviction,

(and the Commission's reasons for making the reference will be taken to be the grounds of the appeal unless the Court grants special leave to appeal on other grounds).

(3) On a reference under subsection (1) of a person's conviction, the Commission may give notice to the Court that any related conviction specified in the notice is to be treated as referred to the Court under this section.

- (4) If a person has been declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935* in relation to an indictable offence, the Commission may at any time refer the declaration to the Court.
- (5) A reference under subsection (4) will be treated for all purposes as an appeal by the person against the declaration (and the Commission's reasons for making the reference will be taken to be the grounds of the appeal unless the Court grants special leave to appeal on other grounds).

12—References of summary cases

- (1) Where a person has been convicted of a summary offence by the Magistrates Court, the Commission—
- (a) may at any time refer the conviction to the District Court; and
 - (b) (whether or not they refer the conviction) may at any time refer to the District Court any sentence imposed on, or in subsequent proceedings relating to, the conviction.
- (2) A reference under subsection (1) has effect as follows:
- (a) a reference of a person's conviction will be treated for all purposes as an appeal by the person against the conviction;
 - (b) a reference of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction will be treated for all purposes as an appeal by the person against—
 - (i) the sentence; and
 - (ii) any other sentence imposed on, or in subsequent proceedings relating to, the conviction or any related conviction,
- (and the Commission's reasons for making the reference will be taken to be the grounds of the appeal unless the Court grants special leave to appeal on other grounds).
- (3) On a reference under subsection (1) of a person's conviction the Commission may give notice to the District Court that any related conviction specified in the notice is to be treated as referred to the District Court under this section.
- (4) On a reference under subsection (1), the District Court may not award any punishment more severe than that awarded by the court whose decision is referred.

13—Conditions for making of references

- (1) A reference of a conviction, sentence or declaration must not be made under this Part unless—
- (a) the Commission considers that there is a real possibility that the conviction, sentence or declaration would not be upheld were the reference to be made; and
 - (b) the Commission so considers because of an argument, evidence or information not raised in the proceedings which led to the conviction, sentence or declaration or on any appeal or application for leave to appeal against the conviction, sentence or declaration; and

(c) an appeal against the conviction, sentence or declaration has been determined or leave to appeal against it has been refused.

(2) Nothing in subsection (1)(b) or (c) prevents the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

5 **14—Further provisions about references**

(1) A reference of a conviction, sentence or declaration 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.

10 (2) In considering whether to make a reference of a conviction, sentence or declaration under this Part, the Commission must have regard to—

(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 which appear to the Commission to be relevant.

15 (3) In considering whether to make a reference to a court under this Part, the Commission may at any time refer any point on which they desire the assistance of the court to the court for the court's opinion on it, and on a reference under this subsection the court must consider the point referred and furnish the Commission with the court's opinion on the point.

20 (4) A reference under subsection (3) may be dealt with by the court in chambers and without notice to any other person.

(5) If the Commission makes a reference under this Part, the Commission must—

(a) give to the court to which the reference is made a statement of the Commission's reasons for making the reference; and

25 (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 reference.

(6) In every case in which—

30 (a) an application has been made to the Commission by or on behalf of any person for the reference under this Part of any conviction, sentence or declaration; but

(b) the Commission decide not to make a reference of the conviction, sentence or declaration,

35 the Commission must give a statement of the reasons for their decision to the person who made the application (and may give such a statement to such other persons as the Commission thinks fit).

Part 4—Investigations and assistance

15—Investigations pursuant to direction of Court

40 (1) Where a direction is given by the Court, the Commission must investigate the matter specified in the direction in such manner as the Commission think fit.

- (2) Where, in investigating a matter specified in such a direction, it appears to the Commission that—
- (a) another matter (a *related matter*) which is relevant to the determination of the case by the Court ought, if possible, to be resolved before the case is determined by that Court; and
 - (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.

- (3) The Commission must—
- (a) keep the Court informed as to the progress of the investigation of any matter specified in a direction; and
 - (b) if the Commission decides to investigate any related matter, notify the Court of the decision and keep the Court informed as to the progress of the investigation.

- (4) The Commission must report to the Court on the investigation of any matter specified in a direction when—

- (a) they complete the investigation of that matter and of any related matter investigated by them; or
- (b) they are 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 them.

- (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 them; and
- (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 under section 19(5) by an investigating officer.

16—Assistance in connection with prerogative of mercy

- (1) If the Attorney-General refers to the Commission any matter which arises in the consideration of whether the Governor should exercise the prerogative of mercy in relation to a conviction and on which the Attorney-General desires their assistance, the Commission must—

- (a) consider the matter referred; and
- (b) give to the Attorney-General a statement of their conclusions on it,

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

- (2) Where in any case the Commission are of the opinion that the Governor should consider whether to exercise the prerogative of mercy in relation to the case they must give the Attorney-General the reasons for that opinion.

Part 5—Supplementary powers

17—Power to obtain documents etc

- (1) This section applies if the Commission believes that—
- (a) a public body, or an officer of a public body, has possession or control of a document or other material which may assist the Commission in the exercise of any of their functions; and
 - (b) it is reasonable, in the circumstances, to exercise powers under this section.
- (2) Without limiting subsection (1), the documents and other material covered by this section include, in particular, any document or other material obtained or created during any investigation or proceedings relating to—
- (a) the case in relation to which the Commission’s function is being or may be exercised; or
 - (b) any other case which 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).
- (3) If this section applies, the Commission may issue to the appropriate person for the public body 1 or more of the following notices:
- (a) a notice specifying that the document or other material must not be destroyed, damaged or altered before the notice is withdrawn by the Commission;
 - (b) a notice directing the appropriate person to produce the document or other material to the Commission, or to give the Commission access to the document or other material, in a manner and at a time specified in the notice;
 - (c) a notice directing the appropriate person 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 they think appropriate.
- (4) An appropriate person who refuses or fails, without reasonable excuse, to comply with a notice issued to the person under this section is guilty of an offence.
Maximum penalty: \$10 000.
- (5) 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 by virtue of an enactment) which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission.

18—Power to require appointment of investigating officers

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

- (2) Where any offence to which the case relates was investigated by persons serving in a public body, a requirement under this section may be imposed—
- (a) on the person who is the appropriate person in relation to the public body; or
 - (b) where the public body has ceased to exist, on the Commissioner of Police or on the person who is the appropriate person in relation to any public body which appears to the Commission to have functions which consist of or include functions similar to any of those of the public body which has ceased to exist.
- (3) Where no offence to which the case relates was investigated by persons serving in a public body, a requirement under this section may be imposed on the Commissioner of Police.
- (4) A requirement under this section imposed on the Commissioner of Police may be a requirement to appoint a police officer as investigating officer.
- (5) A requirement under this section imposed on a person who is the appropriate person in relation to a public body (other than the Commissioner of Police) may be—
- (a) a requirement to appoint a person serving in the public body; or
 - (b) a requirement to appoint a police officer, or an officer of another public body having functions which consist of or include the investigation of offences, selected by the appropriate person.
- (6) The Commission may direct—
- (a) that a person may not be appointed; or
 - (b) that a public body may not be selected,
- under subsection (4) or (5) without the approval of the Commission.
- (7) Where an appointment is made under this section by the person who is the appropriate person in relation to any public body, that person must inform the Commission of the appointment and if the Commission are not satisfied with the person appointed they may direct that—
- (a) the person who is the appropriate person in relation to the public body must, as soon as is reasonably practicable, select another person and notify the Commission of the proposal to appoint the other person; and
 - (b) the other person must not be appointed without the approval of the Commission.

19—Inquiries by investigating officers

- (1) A person appointed as the investigating officer in relation to a case must undertake such inquiries as the Commission may from time to time reasonably direct the person to undertake in relation to the case.
- (2) A person appointed as an investigating officer may be permitted to act as such by the person who is the appropriate person in relation to the public body in which the person is serving.
- (3) The Commission may take any steps which they consider 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 ceases to act as such, but the making of such a direction does not prevent the Commission from imposing a requirement under section 18 to appoint another investigating officer in relation to the case.

5 (5) When a person appointed as the investigating officer in relation to a case has completed the inquiries which the person has been directed by the Commission to undertake in relation to the case, the person must—

(a) prepare a report of his or her findings; and

(b) submit it to the Commission; and

10 (c) send a copy of it to the person by whom he or she was appointed.

(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, the person must also submit to them any statements, opinions and reports received by the person in connection with the inquiries which he or she was directed to undertake in relation to the case.

15 **20—Other powers**

Nothing in this Part derogates from the power of the Commission to take any other steps which they consider appropriate for assisting them in the exercise of any of their functions including, in particular—

(a) undertaking, or arranging for others to undertake, inquiries; and

20 (b) obtaining, or arranging for others to obtain, statements, opinions and reports.

Part 6—Disclosure of information

21—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 their functions unless the disclosure of the information is excepted from this section by section 22.

(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 22.

30 (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 their functions; or

(b) the disclosure by an investigating officer of any information obtained by the officer in his or her inquiries.

35 (4) A person who contravenes this section is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 1 year.

22—Exceptions from obligations of non-disclosure

- (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 21 by this section if the information is disclosed, or is authorised to be disclosed—
- 5 (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
- (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
- 10 investigating officer; or
- (d) by an investigating officer to a member or an employee of the Commission; or
- (e) in any statement or report authorised or required by this Act; or
- (f) in or in connection with the exercise of any function under this Act; or
- 15 (g) in any circumstances in which the disclosure of information is authorised, in writing, by the Attorney-General.
- (2) The disclosure of information is also excepted from section 21 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.
- 20 (3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 21 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
- (b) deciding whether to prosecute a person for an offence,
- 25 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 by virtue of an enactment) arising otherwise than under that section.
- (4) If the disclosure of information is excepted from section 21 by subsection (1) or (2), the disclosure of the information is not prevented by any obligation of secrecy or other
- 30 limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.
- (5) An authorisation of the Attorney-General under subsection (1)(g) is of no effect unless—
- 35 (a) a copy of the authorisation has been laid before each House of Parliament; and
- (b) neither House has resolved, in pursuance of a notice of motion given within 14 sitting days (which need not fall within the same session of Parliament) after the authorisation was laid before the House, to disallow the authorisation.

23—Consent to disclosure

- 5
- (1) Where a person on whom a requirement is imposed under section 17 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 such consent.
- (2) Such consent may not be withheld unless—
- 10
- (a) apart from section 17—the person would have been prevented by any obligation of secrecy or other limitation on disclosure from disclosing the information to the Commission; and
- (b) it is reasonable for the person to withhold his consent to disclosure of the information by the Commission.
- (3) An obligation of secrecy or other limitation on disclosure which applies to a person only where disclosure is not authorised by another person will not be taken for the purposes of subsection (2)(a) to prevent the disclosure by the person of information to the Commission unless—
- 15
- (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 7—Miscellaneous

24—Reports to Attorney-General

- 20
- (1) The Commission may report to the Attorney-General on any matter related to the administration of this Act or the criminal justice system in this State.
- (2) A report may be made by the Commission under this section of its own motion or at the request of the Attorney-General or a House or Committee of the Parliament.
- 25
- (3) The Attorney-General must, within 12 sitting days after receiving a report prepared under this section, cause a copy of the report to be tabled in each House of Parliament.

25—*State Records Act 1997* and *Freedom of Information Act 1991* not to apply

- 30
- (1) The *State Records Act 1997* does not apply to information obtained by the Commission under this Act.
- (2) Information obtained by the Commission under this Act is not liable to disclosure under the *Freedom of Information Act 1991*.

26—Regulations

- 35
- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) The regulations may—
- (a) be of general application or vary in their application according to prescribed factors;

- (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister or the Commission.

Schedule 1—Related amendments

Part 1—Amendment of *Bail Act 1985*

1—Amendment of section 4—Eligibility for bail

- (1) Section 4(1)(c)—after "reviewed" insert:

(other than by the Criminal Cases Review Commission established under the *Criminal Cases Review Commission Act 2010*)

- (2) Section 4(1)—after paragraph (c) insert:

(ca) a person who is the subject of a referral to a court under the *Criminal Cases Review Commission Act 2010*;

Part 2—Amendment of *Criminal Law Consolidation Act 1935*

2—Insertion of section 368

After section 367 insert:

368—Power to order investigations

- (1) On an appeal against conviction, the Full Court may, by notice in writing, direct the Criminal Cases Review Commission to investigate and report to the Court on any matter specified in the notice if it appears to the Court that—
- (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 being able to resolve it; and
- (c) the matter cannot be resolved by the Court without an investigation by the Commission.
- (2) Copies of a direction under this section must be made available to the appellant and the respondent.
- (3) Where the Commission have reported to the Court on any matter which they have been directed under this section to investigate, the Court—
- (a) must notify the appellant and the respondent that the Commission have reported; and
- (b) may make available to the appellant and the respondent the report of the Commission and any statements, opinions and reports which accompanied it.