

Regulatory Impact Statement

Prisoners' and Victims' Claims Amendment Bills

Agency disclosure statement

This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice.

It provides an analysis of options to:

- prevent future claims for monetary compensation by prisoners for breaches of their rights by the State; and
- provide for transitional arrangements in respect of existing and potential claims arising from the Behaviour Management Regime (BMR) in operation at Auckland Prison between 1998 and 2004.

On 8 March 2010, Cabinet considered a paper seeking approval to extend the sunset clauses in the Prisoners' and Victims' Claims Act 2005 (PVCA). Cabinet did not approve the extension and directed the Minister of Justice to give further consideration to options to meet the objectives set out in the paragraph above. Cabinet requested a revised paper for consideration on 22 March 2010 (later extended to 29 March 2010). As a consequence, this RIS was prepared within a very short timeframe and the level of analysis undertaken reflects that timeframe. The extension proposal is presented again as option 1 in the RIS.

The best way of preventing future claims arising from breaches of prisoners' human rights is to ensure that incidents leading to such claims are kept to an absolute minimum. The Ministry of Justice carried out a comprehensive review of the prisoners' complaints system following the *Taunoa* litigation, where five prisoners were awarded compensation for human rights breaches while subject to the BMR. A number of improvements were made to the prisoners' complaints system as a result of that review (discussed at paragraphs six to nine in the RIS).

Successive Governments have made the political decision that paying out significant compensation to prisoners for their treatment while in prison is unacceptable to a significant proportion to the public, and could affect confidence in the justice system. The previous Government introduced the PVCA to further reduce the likelihood that prisoners would be awarded compensation for rights breaches during their incarceration. Sunset clauses were later included to limit the PVCA's application to claims arising from the BMR, and to allow time for an independent prisons complaints body to be established (discussed further at paragraph five in the RIS). The Ministry of Justice's view at that time was that the PVCA and its sunset clauses represented the best compromise between ensuring compensation is only paid to prisoners once they have redressed the harm caused to victims, and upholding New Zealand's domestic and international human rights obligations. This remains the Ministry's view.

The National Party's 2008 Policy on Victims of Crime included a commitment to redirect prisoners' compensation remaining in the victims' claims trust account after the victims' claims process to fund general services for victims (reflected as option 3 in the RIS). This factor in combination with those already outlined meant that non-regulatory options were not considered.

The Department of Corrections, the Ministry of Foreign Affairs and Trade, the Crown Law Office and the Treasury were consulted about the options contained in this RIS. No other external consultation was conducted. If transition option A is adopted, the public will have the opportunity to comment on the substantive proposals at Select Committee. Otherwise, future opportunities for public consultation will be severely limited (discussed at paragraphs 39 and 40 of the RIS).

Exact numbers of existing and potential claims are not stated in this RIS because that information is legally sensitive. The numbers were available and were taken into account when the impacts of each option were assessed.

Options 2 and 3 are likely to have effects that the Government has said will require a particularly strong case before regulation is considered, in that they are likely to override the following fundamental common law principles:

- the principle that all are treated equally under the law; and
- the principle that New Zealand law complies with international law.

Rajesh Chhana, General Manager, Crime Prevention and Criminal Justice

[Signature]

[Date]

Status quo and problem definition

The status quo

PRISONERS' AND VICTIMS' CLAIMS ACT 2005

1. The PVCA has two main features. First, it restricts the circumstances in which the courts can award compensation to persons under the control or supervision of the State (prisoners) for breaches of their rights.¹ The court must first consider remedies other than compensation when dealing with a claim by a prisoner for a rights breach. The court must also consider whether the complainant has made reasonable use of the complaints procedures available to them. These restrictions are intended to ensure that compensation is reserved for exceptional cases and awarded only if, and only to the extent that, it is necessary to provide effective redress.
2. Secondly, the PVCA contains a simplified process for victims of a prisoner to make claims against compensation payments before anything is paid to the prisoner (the victims' claims process). Compensation awarded by a court or paid pursuant to a settlement agreement must be paid into the victims' claims trust account following disbursements to pay legal aid debt, reparations owed by the prisoner or any previous awards to victims. Victims of the prisoner then have six months to file a claim against the prisoner under the victims' claims process. A flowchart setting out the steps in the victims' claims process is attached as appendix one.
3. The PVCA was introduced following the early *Taunoa* proceedings. In *Taunoa*, five prisoners were awarded compensation for breaches of their human rights while they were subject to the Behaviour Management Regime (BMR) operating at Auckland Prison between 1998 and 2004. A large number of other prisoners also filed claims either before or after the *Taunoa* judgments. The PVCA responded to community concerns that offenders should not receive financial compensation for wrongful treatment without first having to redress the harm they had caused to their victims.
4. The PVCA contains two sunset clauses that are due to take effect on 1 July 2010. The first provides for the expiry of the restrictions on compensation. The second provides a cut-off date for compensation awarded to prisoners to be subject to the victims' claims process.
5. The sunset clauses were included in the PVCA to limit its application to the claims arising from the BMR, and to allow time for an independent prison complaints body to be established. It was anticipated that the prison complaints system would help to ensure that breaches of prisoners' rights would not escalate to the point where compensation was needed, and that this would make the restrictions on

¹ The PVCA defines a person under control or supervision as: a prisoner; a person subject to a community-based sentence, a person subject to home detention or serving a sentence of imprisonment on home detention; a person subject to conditions such as parole; or a person subject to an extended supervision order. The term also applies to persons held on remand (whether held in prison or in Police cells); a person arrested and detained under the Armed Forces Discipline Act 1971 pending release or trial; or a service detainee or a service prisoner. For the purposes of this document, the term "prisoners" is used as a short-hand term for all persons under the control or supervision of the State.

compensation and the victims' claims process unnecessary. The sunset clauses were originally due to come into effect on 1 July 2007. However, the Prisoners' and Victims' Claims Amendment Act 2007 extended the sunset clauses to 1 July 2010 because work on the independent prison complaints body was still ongoing and the BMR claims were not completed.

Improvements to prison complaints and monitoring processes

6. In 2005, the Ministry of Justice led an inter-agency working group to examine existing prison complaints and monitoring processes within the Department of Corrections and externally, and to scope the role of an independent prison complaints body. The preferred approach was to enhance the role of the Office of the Ombudsmen, rather than set up a new body.
7. The Ombudsmen already played a significant role in the oversight of prisons. They operate as the highest tier of the prison complaints system, with the lower tiers being internal complaints mechanisms and the Department of Corrections' Inspectorate. The Ombudsmen monitored the Inspectorate's investigations into deaths in custody, and from time to time carried out "own motion" investigations into aspects of the prison system, such as the *Ombudsmen's Investigation of the Department of Corrections In Relation to the Detention and Treatment of Prisoners*, presented to Parliament in December 2005.
8. Under its enhanced role, the Office of the Ombudsmen has responsibility for monitoring investigations into deaths in custody and serious incidents that could potentially affect the safe, fair and humane treatment of offenders. The Ombudsmen are also required to undertake a greater number of reviews of systemic issues identified during visits to prisons or as a result of incidents or complaints. Resources were increased to accommodate the Ombudsmen's enhanced role.
9. On 21 June 2007, the Ombudsmen were also formally designated as the National Preventive Mechanism (NPM) for prisons, in compliance with the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The objective of the OPCAT was to establish a system of regular visits to prisons by international and national bodies, namely the United Nations Subcommittee on the Prevention of Torture and designated NPMs. These bodies visit places of detention in order to examine and monitor the conditions of detention and the treatment of detainees.
10. Claims similar to those arising from the BMR are not expected in the future. However, certain low-level claims may continue to arise. For example, around five claims for wrongful imprisonment arise each year because a prisoner is detained past his or her statutory release date, usually as a result of an administrative error. These claims are settled because a claim for unlawful detention is likely to be successful if taken to court. Any compensation paid pursuant to a settlement agreement is subject to the victims' claims process.

The problem

11. Many of the claims arising from the BMR remain at various stages of the court process (the existing claims). Crown Law is also aware of additional claims that

may establish a valid claim to compensation, which have not yet been filed (the potential claims). When the sunset clauses take effect on 1 July 2010, a proportion of the claims to which the PVCA was intended to apply will not be subject to the restrictions on compensation and the victims' claims process.

12. The Government is also concerned that prisoners continue to receive compensation for human rights breaches, despite the restrictions on awards of compensation and the victims' claims process. Since the PVCA came into force, 16 prisoners have received a total of \$60,977 in compensation.

Objectives

13. The Government's objectives are to:
 - prevent future claims for monetary compensation by prisoners for breaches of their rights by the State; and
 - provide for transitional arrangements in respect of existing and potential claims arising from the BMR [CAB Min (10) 8/5 refers].

Regulatory Impact Analysis

Preventing future claims for compensation

OPTIONS

Status quo option: Allow the sunset clauses to take effect

14. Maintaining the status quo means that the sunset clauses would come into effect on 1 July 2010. This would have the result that the restrictions on awards of compensation would cease to exist, and any compensation awarded to prisoners would not be subject to the victims' claims process. No amendment to the PVCA or transitional arrangements would be required.

Option 1: Extend the sunset clauses for three years and give further consideration to compensation issues when the BMR cases are concluded

15. Option 1 is to amend the PVCA to extend both sunset clauses until 1 July 2013. No transitional arrangements would be required if this option was implemented. Option 1 would also clarify an ambiguity in the sunset clause relating to the victims' claims process.
16. At present, that sunset clause has two potential interpretations. The first is that the victims' claims process applies to all claims filed prior to the cut-off date. The second is that the process only applies to claims finally settled or resolved by a court before the cut-off date. Option 1 would make it clear that the first interpretation is correct. This is because the first interpretation is more consistent with fundamental legal principles as it ensures the law applicable to a claim when it is first filed continues to apply throughout the course of the proceedings. The second interpretation could encourage claimants to attempt to prolong proceedings and delay the resolution of their claims until after the sunset clause takes effect.
17. The effect of option 1 would be that restrictions on awards of compensation would continue to apply to claims filed before that date and any compensation awarded

or paid as a result of a prisoner's claim filed before that date would be subject to the victims' claims process.

Option 2: Introduce a statutory bar on awards of compensation to prisoners for human rights breaches

18. Option 2 is to introduce legislation to preclude the court from awarding monetary compensation to prisoners as a remedy for a human rights breach.

Option 3: Implement the National Party's election policy and redirect unclaimed compensation to the Victims' Services Appropriation

19. Option 3 would amend the PVCA to redirect compensation remaining in the victims' claims trust account after the victims' claims process to the Victims' Services Appropriation established in 2009. This would effectively prevent offenders from receiving compensation for human rights breaches suffered while in the custody or control of the State.
20. Option 3 reflects the National Party's 2008 Policy on Victims of Crime, which included the establishment of a victims' compensation scheme to fund new services and entitlements for victims. The scheme would be funded from the redirected prisoners' compensation and by a levy imposed on all offenders at sentencing. The Victims' Services Appropriation was established in lieu of the scheme.

ANALYSIS

Preventing future breaches of prisoners' rights

21. In addition to their remedial function for claimants, compensation awards serve a disciplinary function by imposing financial consequences on the agencies responsible for rights breaches. The prospect of paying out significant compensation to prisoners and the associated adverse media attention can be an incentive for an agency to ensure that appropriate systems are in place to prevent human rights breaches.
22. With the exception of maintaining the status quo, all options limit the financial liability of agencies responsible for rights breaches. Option 1 temporarily maintains the restrictions on awards of compensation by the courts so that compensation will only be awarded if, and to the extent that, it is necessary to provide effective redress. Option 3 maintains the restrictions permanently, and may lessen the likelihood of adverse media attention because compensation would never be paid to a prisoner. Option 2 completely removes any liability to pay compensation, and thereby removes an important incentive for agencies to avoid human rights breaches.

Benefits for victims of the offenders

23. Since the PVCA came into force, 16 awards of compensation to prisoners have been subject to the victims' claims process and finalised. Nine additional awards of compensation are currently at various stages of the victims' claims process. Of the 16 finalised awards, four have been the subject of successful victims' claims.

Outstanding reparations owed to victims have also been paid from eight of the awards. The table below sets out the total amounts distributed through the victims' claims process as at February 2010, to the nearest dollar.

Prisoners' compensation paid to the Secretary of Justice	Reparations	Legal aid	Previous awards to victims under the victims' claims process	Interest earned while in trust	Awards to victims under the victims' claims process	Other payments (fines etc)	Final distribution to prisoners
138,750	25,055	47	Nil	(+)2,856	38,199	17,326	60,977

24. As the existing claims are resolved, more awards of compensation will be subject to the victims' claims process. However, as time progresses, the class of victims able to make claims reduces. This is because of the civil limitation period - victims must make a claim against the offender within six years of the offence (the limitation period is suspended while the offender is imprisoned). Due to the length of time that has elapsed since the BMR claims arose, it is likely that a number of victims who would have been eligible to claim against an offender are now no longer able to seek redress through the victims' claims process. The practical effect is that existing claimants will receive a greater amount of the compensation awarded to them than they otherwise would have if victims were able to claim. The size of this problem is not able to be quantified at this time.
25. Under the status quo, the victims' claims process would not apply to compensation for claims by prisoners that are filed after 1 July 2010 (the cut-off date). It is unclear whether the victims' claims process would apply to existing claims that were filed, but not finally settled or resolved by the courts before the cut-off date because of the ambiguity described in paragraph 16.
26. If a claim was not subject to the victims' claims process, any compensation due to the prisoner would be paid directly to them. Victims would still have the option of taking civil action for compensation through the courts. However, the process of making a civil claim can be prolonged and expensive. It would also be necessary for the victim to obtain an interim "freezing" order to address the risk of a prisoner disposing of the money before the victim's claim be decided by the court.
27. Option 2 would eventually make the victims' claims process redundant. Prisoners' claims made after the specified date would not be eligible for an award of compensation by the courts and no money would be available for victims to claim against. On the other hand, victims of the offender would be spared the sense of injustice that may arise from seeing the offender receive compensation from the Government for incidents occurring during the offender's incarceration.
28. Options 1 and 3 maintain the victims' claims process to varying extents. Under option 1, claims filed before 1 July 2013 would be subject to the victims' claims process. Option 1 ensures that existing claims are subject to the victims' claims process, but may create a small incentive for potential claimants to wait until after the new sunset date to file their claims (there is presently no formal limitation period for claims for compensation under the New Zealand Bill of Rights Act 1990, and claims can be made at any time in the future). This risk is ameliorated by the fact that the courts have discretion to refuse compensation for a delayed claim. In

addition, if existing claims are settled, potential claimants may be encouraged to progress their claims in the hope that they too might be settled.

29. Option 3 maintains the victims' claims process indefinitely. In theory, option 3 also provides additional benefits for victims of crime generally. Any compensation remaining in the victims' trust account following the victims' claims process would be transferred to the Victims' Services Appropriation and used to fund additional services and entitlements for victims. However, option 3 is likely to pose a significant disincentive for prisoners to make a claim for compensation because they will not be entitled to receive any benefit from it. Compensation awards would consequently be rare and there would be little money available for victims.

Human rights implications and international obligations

30. In addition to the Government's obligations under the New Zealand Bill of Rights Act 1990 (NZBORA), New Zealand has obligations as a party to the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These conventions and the NZBORA require the Government to provide redress to victims of human rights breaches.
31. The ICCPR and the NZBORA require the Government to provide an *effective remedy* to victims of human rights breaches. In this sense, compensation is only one available remedy and is not viewed as automatically being required upon finding a breach of rights. In contrast, Article 14 of the CAT specifically requires *compensation* to be available if a right contained in the CAT is breached. New Zealand is currently the only State party to the CAT to have a reservation to Article 14.
32. New Zealand has declared that it is actively considering lifting the reservation. The current provisions of the PVCA are a barrier to lifting the reservation, although there are other features of New Zealand's legal system that raise more significant issues. New Zealand's next periodic report under the CAT is due in May 2013. That report must include an update on New Zealand's work towards lifting the reservation.
33. Maintaining the status quo is the option most consistent with the New Zealand's domestic and international obligations as prisoners who file claims after the sunset clauses expire would directly receive any compensation awarded to them.
34. Option 1 is consistent with the NZBORA and the ICCPR as it maintains the existing provisions of the PVCA for a further three years. At present, the restrictions in the PVCA do not prevent the court from granting an effective remedy, and compensation remains available where it is the only effective remedy to the breach. The deductions from the compensation and the victims' claims process are consistent with the right to an effective remedy and are akin to the offender discharging his or her debts and other liabilities.
35. The United Nations Committee against Torture has expressed concern that the PVCA limits the award and payment of compensation to prisoners, but has not commented on whether the PVCA complies with Article 14 because of the reservation. Option 1 allows the PVCA to be re-assessed at the same time as

New Zealand's next periodic report under the CAT is prepared. That report could help to inform the future decisions in the area of prisoners' compensation.

36. Under options 2 and 3, compensation would never be available to a prisoner, even if it was the only effective remedy. Options 2 and 3 are likely to result in breaches of the NZBORA, ICCPR and the CAT.
37. Complainants who can no longer find a remedy in New Zealand are able to take a complaint to the United Nations Human Rights Committee or the United Nations Committee against Torture (the treaty bodies). The requirement for individuals to exhaust domestic remedies before taking claims to the treaty bodies does not apply if doing so would be unlikely to provide effective relief. Accordingly, any policy that resulted in prisoners not being entitled to compensation where it was likely to be the only effective remedy would enable such prisoners to take claims directly to the treaty bodies without having to go through New Zealand's domestic procedures first.
38. While not legally binding, a finding by a treaty body that New Zealand is in breach of its international obligations is a serious matter. Under international law, New Zealand is obliged to comply with its treaty commitments in good faith. Such findings carry moral and political force, and could be expected to prompt criticism both domestically and internationally.

Transitional arrangements for existing and potential BMR claims

OPTIONS

Transition option A: Extend the sunset clauses for two years and then implement the new policy

39. Transition option A would maintain the current situation for two years by amending the PVCA before 1 July 2010 to extend both sunset clauses until 1 July 2012. The ambiguity in the sunset clause relating to the victims' claims process would also be clarified so that all claims filed prior to the new sunset date would be subject to the current provisions in the PVCA.
40. A second amendment Bill would then be prepared ready for introduction in August 2010 to implement the Government's preferred option for preventing future claims for compensation. The commencement date of the second amendment Bill would coincide with the new sunset date.

Transition option B: Implement the new policy immediately and include a savings provision in the amendment Bill

41. Under transition option B, the Government's preferred option for preventing future claims for compensation would be implemented through an amendment Bill to be passed before the sunset clauses expire on 1 July 2010. The Bill would include a savings provision stating that all claims arising from breaches that occurred prior to the Bill's commencement would be subject to the current provisions of the PVCA.

ANALYSIS

42. It is appropriate that the outstanding claims arising from the BMR be dealt with under the current provisions of the PVCA, which allows prisoners to receive any compensation remaining after the victims' claims process. These claimants would otherwise be less likely to resolve their claims and may consequently seek redress through international treaty bodies.
43. The potentially significant impacts of further restricting prisoners' access to compensation mean that it is appropriate that the Bill implementing the Government's preferred option goes through a full Select Committee process. The key difference between the transition options is the time available to implement the Government's preferred option for preventing future claims for compensation.
44. Under transition option B, an amendment Bill must come into effect before 1 July 2010 in order to avoid the risk that claims are filed in the period between when the sunset clauses take effect and when an amendment Bill is enacted, and are therefore not subject to any restrictions or the victims' claims process. This timeframe is too short to allow for anything but a cursory Select Committee process. There would be little opportunity for public submissions or for the Select Committee to consider the proposal in depth.
45. Transition option A is the only option that would allow public input. It addresses the immediate concern that the sunset clauses will take effect and allows a further two years for the passage of the amendment Bill implementing the preferred option to prevent future prisoners' claims for compensation. This timeframe allows ample opportunity for a Select Committee process.
46. Transition option A also gives potential BMR claimants the opportunity and incentive to file their claims before the new, more restrictive provisions take effect. This will help to ensure that the majority of BMR claims are resolved in the foreseeable future.

Consultation

47. The Department of Corrections, the Ministry of Foreign Affairs and Trade, the Crown Law Office and the Treasury were consulted about the options contained in this RIS. However, no opportunity was provided for comment on the RIS due to time constraints. No other external consultation was conducted.
48. Any change to the Act can only be given effect by legislation. If the transitional arrangements proposed in option A are adopted, the public will have an opportunity to comment on the proposals at Select Committee.

Conclusion

49. The following table ranks the options against each other in relation of the main impacts identified in this RIS. A score of 1 indicates that the option would result in the most positive outcome in relation to the identified impact, whereas a score of 4 indicates that the option has the least positive outcome.

Impacts Options	Preventing future breaches of prisoners' rights	Benefits to victims	Compliance with New Zealand's domestic and international human rights obligations	Available transition options
Status quo	1	4	1	N/A
One	2	2	2	N/A
Two	4	3	3=	A or B
Three	3	1	3=	A or B

50. The Ministry of Justice does not have a preferred option for preventing future claims for compensation by prisoners for rights breaches, but notes that option three reflects the National Party's 2008 Policy on Victims of Crime. Transition option A represents the Ministry of Justice's preferred transitional arrangements. Due to the lack of consultation able to be carried out thus far, it is important that the Bill implementing the Government's preferred option be subject to full consideration by a Select Committee process.

Implementation

51. Under transition options A and B, a Prisoners' and Victims' Claims Amendment Bill would need to be passed prior to 1 July 2010 to avoid the risk that claims are filed in the period between when the sunset clauses take effect and when an amendment Bill is enacted.
52. Under transition option A, the first Bill would be introduced immediately and passed before 1 July 2010. A second Prisoners' and Victims' Claims Amendment Bill would be ready for introduction in August 2010, and be referred to the Justice and Electoral Committee following introduction. The commencement date of the second Bill would be timed to coincide with the new sunset date introduced by the first Bill.
53. The Ministry of Justice's Tribunals Unit is responsible for ensuring the appropriate deductions are made from prisoners' compensation after it is awarded, and that any remaining money is paid into the victims' claims trust fund. The Tribunals Unit then coordinates the victims' claims process. The Tribunals Unit will continue to exercise these functions for as long as they are required. If option 3 is implemented, the Tribunals Unit will also be responsible for transferring compensation remaining after the victims' claims process into the Victims' Services Appropriation.

Monitoring, evaluation and review

54. The Tribunals Unit will continue to keep records of compensation awarded to prisoners, disbursements made, and amounts paid to victims through the victims' claims process.

Appendix one – the victims' claims process

All final BORA, Human Rights Act, Privacy Act damages and settlements and tortious damages and settlements against the Crown are subject to the PVCA except where settlement says otherwise



