

# Regulatory Impact Statement

## Prisoners' and Victims' Claims Act 2005

### *Agency disclosure statement*

This Regulatory Impact Statement has been prepared by the Ministry of Justice.

It provides an analysis of options to meet the Government's objectives to prevent future breaches of prisoners' human rights, while providing that if breaches do occur, there is a fair response that appropriately balances the rights of prisoners and their victims. Without further government action, the sunset clauses in the Prisoners' and Victims' Claims Act 2005 (the PVC Act) will take effect on 1 July 2013. The PVC Act will effectively expire and the common law applying prior to the PVC Act will be reinstated.

The RIS also provides an analysis of a further minor issue regarding a clarification, for the avoidance of doubt, of the application of the PVC Act to claims of unlawful detention.

Exact numbers of existing and potential claims by prisoners for compensation are not stated in this RIS because that information is legally sensitive. To the extent the numbers were available, they were taken into account when the impacts of each option were assessed.

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. While it would have been desirable to consult with other interested groups, this RIS was prepared within a very short timeframe and accordingly no further consultation was undertaken.

Options 2 and 3 require amendment to the PVC Act. The public will therefore have an opportunity to comment on the proposals at Select Committee.

Options 1 and 3 are not likely to have effects that the Government Statement on Regulation has said will require a particularly strong case before regulation is considered.

Option 2 is likely to have effects that the Government has said will require a particularly strong case before regulation is considered, in that it is likely to impair private property rights and override the following fundamental common law principles:

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



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## A: Status quo and problem definition

### The status quo

#### PRISONERS' AND VICTIMS' CLAIMS ACT 2005

1. The PVC Act 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.<sup>1</sup> 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 PVC Act 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 PVC Act 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 PVC Act contains two sunset clauses that are due to take effect on 1 July 2013. The first provides for the expiry of the statutory restrictions on compensation. The second provides a cut-off date for compensation claims made by prisoners to be subject to the victims' claims process. The sunset clauses were originally due to come into effect on 1 July 2007. They have been extended three times since – in 2007, 2010 and again in 2012.

#### BEHAVIOUR MANAGEMENT REGIME

5. The PVC Act was introduced following the early *Taunoa* proceedings.<sup>2</sup> 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 number of other prisoners also filed claims either before or after the *Taunoa* judgments. The existing BMR claims have not yet been finalised, either through settlement or final judgement.

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<sup>1</sup> The PVC Act 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.

<sup>2</sup> *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC); *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC); later decisions: *Attorney-General v Taunoa* [2006] 2NZLR 457 (CA) and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 (SC)

6. Under *Taunoa*, the Crown is in principle liable to pay compensation to all prisoners held on the BMR programme. As well as the existing BMR claims, there are also additional claims that have not yet been filed, which may establish a valid claim to compensation.

#### THE REDIRECTION BILL

7. The Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill (the Redirection Bill) was introduced in Parliament on 13 October 2011. It has not yet received its first reading.
8. The Redirection Bill implements previous Cabinet decisions to make the existing provisions of the PVC Act permanent, but redirect compensation remaining after the victims' claims process to fund general services for victims (the redirection policy) [CAB Min (10) 12/14, CAB Min (11) 22/3].

#### The problem

9. Without further government action, the sunset clauses in the PVC Act will take effect on 1 July 2013. The common law applying prior to the PVC Act will be reinstated.
10. There are, and continue to be, community and government concerns about prisoner compensation. While prisoners should have their rights protected and receive a remedy when those rights are abused, the public have expressed concern that the remedy should also reflect the fact that the prisoners' crimes have caused the state to detain, restrain and/or monitor the prisoner in the first place. Without the PVC Act, the courts ability to award financial compensation to a prisoner is a matter of individual judicial discretion and only subject to controls through the appeals process. In addition, there is a community expectation that before prisoners receive compensation, they should redress the harm they caused their victims.
11. A small number of prisoner claims continue to arise every year (since 2005, the Secretary for Justice has received 40 payments of compensation awarded, or paid pursuant to settlement agreements – 28 of which related to claims of unlawful detention). Furthermore, there may be some historic claims that have yet to be lodged (including some related to the BMR regime) as there is no statutory time limit on the bringing of human rights claims.
12. To address community and government concerns, an enduring system is required that enables a proportionate balance between providing appropriate effective financial redress to prisoners while strengthening the rights of victims to make civil claims against that compensation.

#### Objectives

13. The Government's objectives are to prevent future breaches of prisoners' human rights. However, if breaches do occur, the Government wants a fair response that appropriately balances the rights of prisoners and their victims.
14. Options to achieve these objectives can be assessed as to the extent to which they:
  - a. ensure that appropriate systems are in place
  - b. ensure compensation is only paid to the extent that it is necessary to provide effective redress

- c. ensure offenders do not receive compensation for wrongful treatment without first having to redress the harm they caused their victims
- d. encourage victims to seek redress
- e. comply with New Zealand's domestic and international human rights obligations

## **Regulatory Impact Analysis**

### **OPTIONS**

*Option 1: Retain the status quo - allow the sunset clauses to take effect*

15. Maintaining the status quo means that the sunset clauses would come into effect on 1 July 2013, with the result that the statutory restrictions on awards of compensation would cease to exist, and any compensation awarded to prisoners would not be subject to the victims' claims process.

*Option 2: Continue with redirection policy in the Redirection Bill*

16. Option 2 is to progress the Redirection Bill, which is currently awaiting first reading. The PVC Act would become permanent, and the Government's previous redirection policy would be considered by Parliament.

*Option 3: Introduce a new Bill to repeal the sunset clauses*

17. Option 3 is to introduce a new Bill to repeal the sunset clauses and make the existing PVC regime permanent, but not include the redirection policy.

### **ANALYSIS**

18. The following criteria for analysis are generally of equal importance.

*Ensure that appropriate systems are in place*

19. The Government wants to prevent future breaches of prisoners' human rights. While claims similar to those arising from the BMR are not expected in the future, when prisoners have concerns they should be encouraged to make use of their internal and external complaints mechanisms, and where appropriate, the courts. Compensation awards serve a disciplinary function by imposing financial consequences on the agencies responsible for rights breaches. The prospect of paying out 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.
20. Under option 1, for prisoner claims lodged from 1 July 2013, the common law would apply and courts may have more discretion to award compensation, which could create a greater incentive for agencies to comply with their obligations, and prevent future breaches. However, option 1 also creates a small perverse incentive for potential BMR claimants, or any other potential claimants, to wait to lodge claims until after 30 June 2013. The restrictions and the victims' claims process would not apply to such claims. Existing claimants may also attempt to withdraw their claims and wait to re-file them after the sunset clauses take effect. The risk of delays is ameliorated to some degree by the courts having discretion to refuse compensation for a delayed claim. However, if claims are delayed, the opportunity to redress the actions leading to a possible breach are also delayed.
21. Options 2 and 3 remove any incentive for potential claimants to wait to file their claims in an attempt to circumvent the PVC regime. They also both limit the financial liability of agencies responsible for rights breaches to the same extent.

22. Under option 3, the prisoner may still receive any compensation (after discharging their liabilities under the victims' claims process). The prisoner would therefore still have an incentive to make a claim, with the corresponding incentive on the agency to continuously improve systems so that the likelihood of future breaches is minimised.
23. Option 2 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 due to the redirection. Compensation awards would consequently be rare, and an important incentive for agency compliance and systems' improvement would be missing.

*Ensure compensation is only paid to the extent that it is necessary to provide effective redress*

24. While it is appropriate that prisoners make use of their complaints mechanisms, including the courts where necessary, it is fair and appropriate that financial compensation is reserved for cases where it is the only effective redress.
25. Both options 2 and 3 provide clear statutory guidelines for the awarding of compensation, so that it is reserved for exceptional cases and used only if, and only to the extent that, it is necessary to provide effective redress. As discussed above, under option 2, the incentive for prisoners to make a claim is removed, meaning that compensation may not be paid even where it would be required to provide effective redress.
26. Option 1 retains the statutory guidelines for prisoner claims lodged prior to 1 July 2013. For claims lodged from that date, the courts may have more discretion to award compensation, and the public will have less certainty regarding the likely outcome of each case.

*Ensure offenders do not receive compensation for wrongful treatment without first having to redress the harm they caused their victims*

27. The PVC Act addressed concerns that offenders should not receive financial compensation for wrongful treatment without first having to redress the harm they had caused to their victims. This was achieved under the PVC Act by providing victims of a prisoner the opportunity to make a claim against any compensation the prisoner received, before the prisoner had access to it.
28. Option 1 will only provide victims this opportunity in relation to prisoner claims lodged before 1 July 2013. For prisoner claims lodged from this date, any compensation would be paid directly to the prisoner and the victim would have to conduct civil litigation to obtain any benefit of that compensation.
29. Options 2 and 3 both continue the victims' claims process under the PVC Act so that prisoners redress the harm to their direct victims. However, under option 2 the prisoner will never receive the compensation awarded to them, while under option 3 they will.

*Encourage victims to seek redress*

30. Since the PVC Act came into force, 25 awards of compensation to prisoners have been subject to the victims' claims process and finalised. Fifteen additional awards of compensation are currently at various stages of the victims' claims process. Any options are therefore only impacting a very small percentage of prisoners and their victims.

31. Outstanding reparations owed to victims have been paid from fourteen of the awards. Of the 25 finalised awards, five have been the subject of successful victims' claims. The table below sets out, for finalised claims, the total amounts distributed through the victims' claims process as at 4 October 2012, to the nearest dollar.

Prisoners' compensation paid to the Secretary for 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
\$247,250	\$43,793	\$47	\$500	(+) \$4,184	\$46,949	\$27,075	\$133,070

32. Under option 1, the victims' claims process would not apply to compensation for claims by prisoners that are filed after 1 July 2013. If a claim was not subject to the victims' claims process, any compensation due to the prisoner would be paid directly to them.
33. 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, stressful 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 is decided by the court. The Crown also has existing mechanisms to collect reparations and legal aid debt, and Corrections generally only enter settlement agreements that are subject to fines payments.
34. Therefore, under option 1, opportunities for payments similar to those under the victims' claims process will continue, but the process may discourage some victims.
35. Option 2 provides an ongoing, cost-effective and far simpler process for victims to seek redress. However, as discussed above, it is likely to pose a significant disincentive for prisoners to make a claim for compensation, meaning compensation awards would be rare, with little money available for victims.
36. Option 3 also provides an ongoing, cost-effective and far simpler process for victims to seek redress. If money becomes available, victims will be more likely to be encouraged to seek redress.
37. Options 2 and 3 will have an ongoing financial impact on the Crown through the cost of operating the victims' claims process. The annual cost of the process is approximately \$40,000, which is met within the Ministry of Justice baseline. Option 1 would only maintain the expense for the period of time it takes for any prisoner compensation claims lodged before 1 July 2013 to be resolved and for related victims' claims processes to be finalised.

*Complying with New Zealand's domestic and international human rights obligations*

38. 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).

39. The ICCPR and NZBORA require the Government to provide an 'effective remedy' to victims of human rights breaches. Where compensation is not required to achieve an effective remedy, it need not be granted.
40. CAT (Article 14) requires that victims of torture have 'an enforceable right to fair and adequate compensation'. New Zealand currently has a reservation against Article 14 of CAT (lodged in 1989, prior to the PVC Act), which reserves the right to award compensation to torture victims 'only at the discretion of the Attorney-General'.
41. The United Nations Committee against Torture has twice recommended that New Zealand withdraw its reservation. It has also expressed concern about the PVC Act, although, due to the reservation, the Committee has stopped short of commenting on whether the PVC Act contravenes Article 14.
42. Option 1 is 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.
43. Option 3 broadly follows earlier amendments to the PVC Act, which were considered consistent with NZBORA and the ICCPR. The Attorney-General will advise if any new issue of consistency arises.
44. Option 2 is not human rights consistent. The Redirection Bill received a report from the Attorney-General pursuant to section 7 of NZBORA. The report concluded that the redirection policy in the Redirection Bill appeared to be inconsistent with NZBORA and could not be justified under section 5 of that Act. The Attorney-General further noted that the Redirection Bill may also be inconsistent with New Zealand's international obligations.
45. Article 22 of the CAT and the First Optional Protocol to the ICCPR provide for individuals, who allege that the State party has breached its obligations, to bring complaints before the United Nations Committee against Torture and the Human Rights Committee respectively. Option 2 increases the risk of prisoners bringing complaints against New Zealand on the grounds that, by removing the award of compensation altogether, the domestic remedies available do not provide an effective remedy. Options 1 and 3 mitigate against this risk, as compensation remains available as an effective remedy.
46. 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. Committee decisions are made public and are reported to the General Assembly.

## **Conclusion**

47. The following table ranks the options against each other in relation to the extent to which they meet the government's objectives to prevent future breaches of prisoners' human rights, while providing a fair response to such breaches that appropriately balances the rights of prisoners and their victims (1 being the option that best meets the criteria).



CRITERIA / OPTIONS	OPTION 1: STATUS QUO	OPTION 2: REDIRECTION BILL	OPTION 3: NEW BILL
ensure that appropriate systems are in place	1	3	2
ensure compensation is only paid to the extent that it is necessary to provide effective redress	3	2	1
ensure offenders do not receive compensation for wrongful treatment without first having to redress the harm they caused their victims	3	1	1
encourage victims to seek redress	3	2	1
comply with New Zealand's domestic and international human rights obligations	1	3	2

48. Option 1 (letting the PVC Act expire) may encourage systems' changes so that future breaches do not occur. It also best complies with domestic and international human rights obligations. However, option 1 is unbalanced in favour of prisoners' rights, with less focus on encouraging victims to seek redress.
49. Option 2 (progressing the Redirection Bill) provides a disincentive for prisoners to lodge claims, even where compensation would be an appropriate remedy, as they would never receive it. There is subsequently less incentive for agencies to continuously improve systems. Option 2 also does not comply with human rights obligations. The simplified victims' claims process is maintained under option 2. In theory it also provides additional benefits for victims of crime generally, as any compensation left over after that process would fund general services and entitlements for victims. However, due to the disincentive for prisoners to claim, there will likely be fewer compensation awards and little money available for either direct or general victims. Option 2 is unbalanced in favour of victims, while at the same time effectively providing them less redress.
50. Option 3 (introducing a new Bill) meets the Government's objectives to help prevent future breaches while providing a fair response to such breaches that appropriately balances the rights of prisoners and their victims. Option 3 ensures that compensation is only paid to prisoners to the extent it is necessary to provide effective redress, and ensures offenders do not receive financial compensation for wrongful treatment without first having to redress the harm they have caused to their victims. Victims are encouraged to make claims, and option 3 appears to be consistent with domestic and international human rights obligations.

## **B: Further minor issue - Status quo and problem definition**

### **The status quo**

51. Claims of unlawful/arbitrary detention or false imprisonment (unlawful detention claims) arise from time to time, generally when a prisoner is held beyond their statutory release date, usually due to an administrative error caused either by the courts or prison staff.
52. Since 2002, Corrections has had ongoing Cabinet approval to enter into out-of-court settlement agreements with prisoners when such unlawful detention occurs [CAB Min (02) 26/10]. Since June 2005, Corrections has entered approximately 28 out-of-court settlement agreements for such claims on the basis that the compensation is subject to the PVC Act.
53. The Ministry of Justice and the Department of Corrections are actively working together to put in place administrative changes that will minimise the likelihood of such incidents in the future.



## **The problem**

54. It has always been the policy and legislative intent for prisoners' unlawful detention claims to be subject to the PVC Act. However, the current provisions in the PVC Act may allow an interpretation contrary to that existing intent.

## **Objective**

55. Further to the Government's objectives to prevent future breaches of prisoners' human rights, but, where they do occur, to have a fair response that appropriately balances the rights of prisoners and their victims – it is necessary to clarify, for the avoidance of doubt, the application of the PVC Act to unlawful detention claims.

## **Regulatory Impact Analysis**

### APPLICATION OF THE PVC ACT TO CLAIMS OF UNLAWFUL DETENTION

56. Providing an amendment that clarifies, for the avoidance of doubt, that the PVC Act applies, and has always applied, to unlawful detention claims would be consistent with the existing legislative and policy intent. The PVC Act was intended to apply to all prisoners' human rights complaints, and to ensure that offenders redress the harm to their victims before receiving compensation for wrongful treatment. It would be inconsistent with this intent for this subset of human rights complaints to be excluded from the PVC Act's application. Furthermore, the majority of compensation that has been dealt with under the PVC Act has been for unlawful detention claims (five or so claims per year).
57. Under the status quo, no clarifying amendment would be provided. This may leave it open for the courts to find that unlawful detention claims should not be subject to the PVC Act, contrary to intent.
58. Alternatively, a clarifying amendment could be included either in the Redirection Bill or a new Bill.

### *Financial implications*

59. There is a possibility that some prisoners may attempt to claim that the PVC Act should not have applied to their claims for unlawful detention. Aside from the cost of the litigation itself, if the courts found that unlawful detention claims should not have been subject to the PVC Act, the Crown may be liable for some payments made in accordance with the Act.

## **Consultation**

60. 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. The Department of the Prime Minister and Cabinet were informed. No other external consultation was conducted.
61. As any change to the PVC Act can only be given effect by legislation, the public will have an opportunity to comment at Select Committee on either the Redirection Bill (option 2) or a new Bill (option 3).

## **Implementation**

62. An amendment Bill giving effect to the preferred option will need to be passed prior to 1 July 2013 to ensure the continued application of the PVC Act to claims.
63. 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.

### **Monitoring, evaluation and review**

64. 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.
65. The Tribunals Unit will also keep a record of the ongoing costs of operating the victims' claims process, to ensure the cost of administering the regime is proportionate to the benefits received.

## 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 Act except where settlement says otherwise



