

Privacy Commissioner's Submission to the Justice Committee on the Rights for Victims of Insane Offenders Bill (129—1)

Executive Summary

1. The Rights for Victims of Insane Offenders Bill (the Bill) proposes to amend:
 - the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act)
 - the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MHCAT Act)
 - the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act), and
 - the Victims' Rights Act 2002.
2. The Bill intends to ensure the victims of 'legally insane' offenders are treated the same as other victims of crime. This includes through:
 - providing certain victims of insane offenders with a right to be sent a copy of any certificate of clinical review stating that detention is no longer necessary
 - providing certain victims of insane offenders with a right to make a submission to the Minister of Health about whether continued detention is necessary or, if relevant, to the Mental Health Review Tribunal for a review of the patient's condition, and
 - requiring certain victims of insane offenders to be notified of any unescorted leave of absence or unescorted overnight leave of absence, rather than just the first instance of such leave.
3. The Privacy Act 2020 is New Zealand's main privacy law. One of my functions under the Privacy Act is to examine legislation before Parliament and to consider any matters affecting individuals' privacy. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is a very good reason (and evidence) to override those rights.
4. I do not support this Bill. I consider that this Bill has potential privacy impacts on special patients and special care recipients that require further examination. If the proposals in this Bill are to proceed, I recommend they are assessed as part of a wider review of the above legislation and in consultation with key stakeholders to help ascertain the impacts of the proposed changes on both victims and special patients or special care recipients. My comments on the Bill relate to clauses 6, 7, 9-11, 13 and 15.

Privacy impacts of proposed amendments

Providing certain victims with the right to receive copy of certificate of clinical review

5. Every special patient or special care recipient detained pursuant to a court order under section 24 of the CPMIP Act must be formally reviewed by a responsible clinician or specialist assessor at intervals specified in the MHCAT Act and IDCCR Act.¹
6. A certificate of clinical review records the responsible clinician's findings, including whether the special patient or special care recipient should still be detained. The format of a certificate of clinical review for a special patient is prescribed by the Mental Health (Forms) Regulations 1992 and includes the location of the Director of Area Mental Health Services, the full name, date of birth and address of the special patient and the name, business address and telephone number of the responsible clinician that conducted the review. I understand the certificate of clinical review for a special care recipient contains similar information.
7. Clause 9 of the Bill amends section 77 of the MHCAT Act to require the responsible clinician to send a copy of the certificate of clinical review to a victim if the clinician is of the opinion that it is no longer necessary for the person to be detained as a special patient. Clause 13 amends section 93 of the IDCCR Act to require the specialist assessor to send a copy of the certificate of clinical review to a victim if the specialist assessor is of the opinion that it is no longer necessary for the person to continue to be cared for as a special care recipient.
8. Certificates of clinical review contain personal information that is not necessary to share with the victim. For example, it is not appropriate for the victim to know the address of the hospital or facility where a special patient or special care recipient is being detained or the contact details of the responsible clinician that conducted the review. Sharing the certificate of clinical review with the victim may also create the risk that clinical information about the special patient or special care recipient is shared with the victim. This would be an unwarranted intrusion on the privacy and therapeutic rights of the special patient or special care recipient.
9. Victims already have the right to receive reasonable prior notice of an impending discharge of a person who has offended against them under section 37 of the Victims' Rights Act, without having to share unnecessary personal information. This is an appropriate amount of disclosure.

¹ The court must make an order that the defendant be detained in hospital as a special patient under the MHCAT Act or in a secure facility as a special care recipient under the IDCCR Act when a defendant is found unfit to stand trial or acquitted on account of insanity under section 24 of the CPMIP Act.

Providing certain victims with the right to make a submission about whether continued detention is necessary

10. Clauses 6-7 and 9-11 of the Bill will provide victims that receive a certificate of clinical review stating that detention is no longer necessary with the right to make a submission to the Minister about whether continued detention is necessary or to the Mental Health Review Tribunal for a review of the patient's condition if relevant.
11. While I acknowledge the intent behind this proposal, I do not think it is appropriate for a person who does not have clinical experience to comment on a special patient or special care recipient's release. A decision about whether a special patient or special care recipient should be released needs to be based on clinical evidence, unlike a decision of a parole board which can take into account details of the offending and submissions from victims, the Police and the offender.

Providing notice to certain victims of any unescorted leave of absence or unescorted overnight leave of absence

12. Victims of serious offending or their representative have the right to receive certain notifications about the person who offended against them under the Victims' Rights Act. This includes the right to receive reasonable prior notice of the first unescorted leave of absence and first unescorted overnight leave of absence granted to a person who has offended against them and is being detained as a special patient or special care recipient under section 37 of the Victims' Rights Act.
13. Clause 15 of the Bill amends this provision by requiring notice to be given to victims of *any* unescorted leave of absence or overnight leave of absence, not only the first instance. I understand the Bill does not propose to share the location of the person on unescorted leave with the victim (this is not provided for under the current legislation).
14. I do not believe the risk of a victim encountering a person that offended against them whilst on unescorted leave would be greatly minimised by notifying the victim each time a person has unescorted leave. Victims will be unable to avoid a certain area because they will not know the location of the person on unescorted leave and it is important this information is continued to be withheld to protect the privacy and safety of the special patient or special care recipient.
15. I consider that section 37 of the Victims' Rights Act strikes an appropriate balance between the victim's right to have transparency about the detention of a special patient or special care recipient who has offended against them and rights of the special patient or special care recipient to privacy and therapy.

Conclusion

16. I consider that the Bill's proposed benefits to victims are outweighed by the potential privacy impacts on special patients and special care recipients. I do not support the Bill and recommend that if proposals in this Bill are to proceed, they are revised to mitigate the potential privacy impacts.

17. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

A handwritten signature in blue ink, appearing to be 'John Edwards', with a stylized, cursive script.

John Edwards
Privacy Commissioner

28 January 2021