

24 April 2019

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Rights of Victims of Insane Offenders Bill**

### **Purpose**

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1. We have considered whether the Rights for Victims of Insane Offenders Bill ('the Bill'), a member's Bill in the name of Hon Louise Upston, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 11 (right to refuse to undergo medical treatment), s 23(5) (rights of persons deprived of liberty to be treated with humanity and dignity), and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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3. The Bill proposes to ensure the victims of 'legally insane' offenders are treated the same as other victims of crime by:
  - a. requiring courts to make a finding as to whether the defendant caused the act or omission forming the basis of the offence in cases where issues of insanity arise and changing the verdict of "not guilty on account of insanity" to "the acts or omissions are proven but the defendant is not criminally responsible on account of insanity";
  - b. giving certain victims rights to have input into future decisions about the status of persons who are detained pursuant to orders made under s 24(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP(MIP) Act) following a finding of unfitness to stand trial or an acquittal on account of insanity (detained persons); and
  - c. providing certain victims of persons detained in a hospital or secure facility in connection with an offence with prior notice of every unescorted leave of absence from a hospital or secure facility into the community, rather than just the first of each such leave as is currently required.
4. The Bill proposes to do this by amending four separate Acts:
  - a. the CP(MIP) Act;
  - b. the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MH(CAT) Act);

- c. the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the ID(CCR) Act); and
- d. the Victims' Rights Act 2002.

## **Consistency with the Bill of Rights Act**

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### **Section 11 – Right to refuse to undergo medical treatment**

- 5. Section 11 of the Bill of Rights Act affirms that everyone has the right to refuse to undergo any medical treatment.
- 6. The compulsory treatment provisions in the CP(MIP) Act, MH(CAT) Act, and ID(CCR) Act engage the right to refuse to undergo medical treatment. The current provisions are considered justified under s 5 of the Bill of Rights Act. The question to be addressed is whether the Bill's amendments change this conclusion.
- 7. The Bill gives certain victims the right to have input into future decisions about the status of persons detained under these Acts in connection with the offence that affected them. In particular, if a periodic review of the person's condition results in a finding that their detention is no longer necessary, victims are given the right:
  - a. to be sent a copy of the certificate recording the outcome of the review;<sup>1</sup>
  - b. in the case of persons detained under the MH(CAT) Act, to apply for a review of the person's condition;<sup>2</sup> and
  - c. to make a submission to the Minister of Health as to whether the person should be released from compulsory status or, in the case of persons acquitted on account of insanity, discharged.<sup>3</sup>
- 8. In respect of persons detained under the MH(CAT) Act, the Bill would entitle victims to be notified of, and make submissions on, any application to a Review Tribunal for a review of that person's condition.<sup>4</sup>
- 9. The objective of these provisions would appear to be to allow the victim to have input into decisions that may affect their safety and in respect of which they may be able to provide relevant information.
- 10. While the Bill allows victims to have input into decisions that affect the medical treatment of persons detained under mental health legislation, the victim's views are not determinative of the final order. We therefore consider that the amendments in the Bill do not impact on the right to refuse to undergo medical treatment, and do not alter the conclusion that the limits on the right to refuse to undergo any medical treatment in the CP(MIP) Act, MH(CAT) Act, and ID(CCR) Act are justified under s 5 of the Bill of Rights Act.

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<sup>1</sup> Proposed new ss 77(3)(ca) and 77(4)(c)(i) of the MH(CAT) Act and s 93(1)(b) of the ID(CCR) Act. We note that an equivalent change is not proposed to s 91 of the ID(CCR) Act (regarding certificates completed by specialist assessors following a review of the condition of persons detained as special care recipients following a finding of unfitness to stand trial).

<sup>2</sup> Proposed new ss 77(5)(a) of the MH(CAT) Act.

<sup>3</sup> Proposed new ss 31(3A) and 33(4A) of the CP(MIP) Act and s77(5)(b) of the MH(CAT) Act.

<sup>4</sup> Proposed new s 80(2B) of the MH(CAT) Act.

## **Section 23(5) - Rights of persons deprived of liberty to be treated with humanity and dignity**

11. Section 23(5) of the Bill of Rights Act affirms that everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.
12. There is a lack of domestic case law regarding the application of the s 23(5) right. Previous cases on this right have largely arisen from a context of imprisonment, but academic commentators have argued that it applies to persons deprived of liberty “for whatever reason and by whatever means,” including under mental health legislation.<sup>5</sup>
13. Section 23(5) is breached by state conduct that is less reprehensible than a breach of s 9 (right not to be subject to torture or cruel treatment), but is still unacceptable in New Zealand society.<sup>6</sup> Section 23(5) captures conduct that lacks humanity but falls short of cruelty, conduct that is demeaning, and/or conduct that is clearly excessive in the circumstances but not grossly so.<sup>7</sup> Whether s 23(5) has been breached will require a court to consider a wide range of factors and circumstances in an individual case.
14. As outlined in paragraphs 7 and 8 above, the Bill gives certain victims the right to have input into future decisions about the status of persons detained under mental health legislation in connection with the offence that affected them. The objective would appear to be to allow the victim to have input into decisions that may affect their safety and in respect of which they may be able to provide relevant information.
15. We have considered whether the combined effect of these provisions engages s 23(5), noting in particular that giving victims standing to apply for a review of the condition of a detained person gives the victims of ‘insane offenders’ rights that go beyond those of victims of other offenders. A detained person’s dignity could further be affected if a significant amount of personal information was provided to victims with the certificate recording the outcome of a periodic review.<sup>8</sup>
16. In our view, any limit on the s 23(5) right is rationally connected and proportionate to the objective outlined in paragraph 14. In coming to this conclusion, we have noted that the victims’ views are not determinative and that there does not appear to be any legal requirement to provide a substantial amount of personal information to victims with the certificate recording the outcome of a periodic review.<sup>9</sup>
17. As a result, we consider that the Bill’s victims’ rights provisions are consistent with the requirement that persons deprived of their liberty under mental health legislation be treated with humanity and respect for their inherent dignity.

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<sup>5</sup> Andrew and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2ed) (LexisNexis NZ Limited, 2015) at 1125.

<sup>6</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

<sup>7</sup> *Ibid.*

<sup>8</sup> In this respect, we have been advised by the Ministry of Health that practising clinicians interpret that meaning of ‘certificate’ as including the patient’s full personal file including their treatment history, clinical notes, risk assessment, and the full report from the treating clinician.

<sup>9</sup> The prescribed forms for certificates of clinical review for special patients detained under the MH(CAT) Act pursuant to orders made under s 24(2)(a) of the CP(MIP) Act require limited personal information about the subject to be included, namely the patient’s full name, date of birth, address, and the clinician’s finding: see forms 2 and 3 of the Mental Health (Forms) Regulations 1992. These forms expressly state that full particulars of the reasons for the opinion and any relevant reports from other health professionals will be sent to the Director of Area Mental Health Services only. To our knowledge, there is no prescribed form for a certificate of clinical review issued under ss 89 or 92 of the ID(CCR) Act (for a special care recipient detained under the ID(CCR) Act pursuant to an order made under s 24(2)(a) of the CP(MIP) Act).

18. We therefore conclude that the Bill appears to be consistent with s 23(5) of the Bill of Rights Act.

### **Section 25(c) - Right to be presumed innocent until proven guilty**

19. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
20. Clauses 4 and 5 of the Bill change the formal finding of the court, as discussed above in paragraph 3(a). The new verdict proposed in the Bill can be viewed as making express what is already implicit in the current law.
21. Insanity is a positive defence relating to *mens rea* and is only relevant if there is sufficient evidence to prove that the defendant committed the *actus reus*. Furthermore, the new verdict does not imply or presume guilt; the fact remains that the defendant is not guilty of the offence because they did not have the requisite *mens rea*.
22. For these reasons, we conclude that the Bill appears to be consistent with s 25(c) of the Bill of Rights Act.

### **Conclusion**

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23. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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