NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Rights for Victims of Insane Offenders Bill 2019

28/01/2021

Submission on Rights for Victims of Insane Offenders Bill 2019

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Rights for Victims of Insane Offenders Bill (**the Bill**). This is a member's bill in the name of National MP Louise Upston, which is intended to "ensure the victims of legally insane offenders are treated the same as other victims of crime".[1]

1.2 The Law Society wishes to be heard.

2 Executive Summary

2.1 The Bill has two distinct aims:

2.1.1 first, to alter the status of persons affected by conduct of another person (the offender) which would have been considered criminal if the proceedings had not concluded with a finding that the offender was not guilty by reason of insanity, and

2.1.2 secondly, to give victims of that offending the right to have input into decisions later made about the treatment and release of the offender found not guilty by reason of insanity.

2.2 The intent of the Bill is to place all victims on the same footing, regardless of whether or not an offender is determined to be legally insane. The Law Society respectfully considers the Bill would not achieve this. Rather, it would create inconsistencies between the two types of victims, potentially providing victims of legally insane offenders with more information and ongoing input than other victims of crime. More concerning, there are risks to privacy, and the scheme of the Bill is at odds with some core principles of criminal justice. Victims' rights to information and support can be better protected by changes within the existing legislative framework.

2.3 For these reasons, the Law Society considers the Bill should not proceed. A better alternative would be to consider an amendment to the definitions of "offence" and "offender" in the Victims' Rights Act 2002. In the Law Society's submission, this is a more appropriate avenue for achieving the Bill's policy intent of ensuring that victims of legally insane offenders are treated the same as other victims of crime.

2.4 However, if the Bill is to proceed, the Law Society makes the following key recommendations:

2.4.1 Investigate fully the policy implications of the order in which proof of conduct/circumstances, and a finding of insanity are made. More work is required to determine the appropriate course for both judge-alone and jury trials.

2.4.2 Include an express reference to judge-alone trials in the replacement section 20, that such cases will be decided under section 20AAA, rather than leave it to be implied.

2.4.3 Consider expert advice about the impact of allowing victims to make submissions to the Minister of Health and/or the Mental Health Review Tribunal.

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1 Rights for Victims of Insane Offenders Bill, Explanatory note, p1.

2.4.4 Specify the form of the certificate of clinical review in a schedule to the Mental Health (Compulsory Assessment and Treatment) Act 1992, to protect against the breach of patients' rights.

3 Brief overview of the Bill

3.1 The Bill proposes to amend four Acts: the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CP(MIP) Act**); the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**MH(CAT) Act**); the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (**ID(CCR) Act**); and the Victims' Rights Act 2002 (**VR Act**).

3.2 To achieve its policy intent of ensuring that victims of legally insane offenders are treated the same as other victims of crime, the Bill proposes to:

3.2.1 Require 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". The revised language is intended to acknowledge the offender did in fact commit the criminal act.

3.2.2 Give certain victims the right to have input into future decisions about the status of persons who are detained following a finding of unfitness to stand trial or an acquittal on account of insanity.

3.2.3 Provide certain victims of those 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 Changing the status of persons affected by conduct of persons later found not guilty by reason of insanity

Procedure when question of insanity arises

4.1 The Bill proposes to significantly amend the CP(MIP) Act by inserting three new sections and replacing section 20.[2] Clause 4 would insert new sections 20AAA to 20AAC covering the procedure to be adopted when a question of insanity arises before the court.

4.2 Proposed section 20AAA states:

> **20AAA Procedure when question of insanity arises**
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> If, at trial, the defendant raises a defence of insanity or the court considers (either on application by the prosecution or on its own initiative) that the defendant's sanity at the time of the offence should be determined, the Judge must decide the order in which the following matters should be determined:
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> (a) whether the defendant committed the acts or omissions that constitute the offence:
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> (b) whether the defendant was insane at the time of the commission of the offence.

[2] Section 20 of the CP(MIP) Act currently sets out the procedure for the court when there is a finding of insanity.

4.3 This section would give the judge the power to decide the order in which the two pivotal issues – whether the defendant committed the acts or omissions that constitute the offence and whether the defendant was, at the relevant time, insane – will be decided. No criteria are provided for how this decision should be made and it is not clear why this approach is taken. This is also at odds with the policy statement in the Explanatory Note to the Bill, which states:

> "These sections make it clear that a defendant may only be found not guilty on account of insanity **if it is first determined that the defendant committed the acts or omissions that constitute the offence**. Also, they provide that when the court has determined that the defendant both committed the acts or omissions that constitute the offence and was insane at the time the offence was committed, the verdict that must be recorded is "the acts or omissions are proven but the defendant is not criminally responsible on account of insanity"." (emphasis added)

4.4 Further, proposed section 20AAA seems to imply that issue of insanity could be decided at any point in the trial. This would not be appropriate. If the trial is before a jury, they will be asked to return the verdict at the end of the trial.

4.5 If the Bill is to proceed in its current form, it will be important for the Committee to understand what the policy basis is for deciding what order the two pivotal issues in proposed section 20AAA need to be considered by the court and the point at which a verdict can be issued.

Definition of 'victim' in the Victims' Rights Act 2002

4.6 In relation to clause 4 (CP(MIP) Act), the starting premise of the Bill appears to be that such persons are not currently "victims" of offending for the purposes of the VR Act. If statutory change is aimed only at ensuring that persons affected by the conduct of someone found not guilty of an offence by reason of insanity, are "victims" for the purposes of the VR Act, the Law Society considers it would be simpler and clearer to amend the definitions of "offence" and "offender" in section 4 of the VR Act.

4.7 The definition of "victim" in section 4 of the VR Act states:

> "victim—
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> (a) means—
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> (i) a person against whom *an offence is committed* by another person; and
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> (ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; and
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> (iii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i) or subparagraph (ii), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and
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> (iv) a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless

that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; …."

4.8 That definition also requires consideration of the meaning of the phrase "an offence is committed". Section 4 of the VR Act provides that "offence":

> "(a) means an offence against an enactment—
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> (i) committed against the victim (or committed against a child or young person of whom the victim is a parent or legal guardian); or
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> (ii) through which, or by means of which, the victim (or a child or young person of whom the victim is a parent or legal guardian) suffered physical injury or emotional harm, or loss of, or damage to, property; or
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> (iii) that resulted in the death of a member of the victim's immediate family, or in a member of the victim's immediate family being incapable; and
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> (b) includes an alleged offence (whether or not a person is convicted of the offence) committed against the victim (or committed against a child or young person of whom the victim is a parent or legal guardian), or that has affected the victim (or a child or young person of whom the victim is a parent or legal guardian) in any of the ways referred to in paragraph (a)(ii) or (iii)."

4.9 It seems likely the definition of "offence" will encompass persons who are the victim of conduct which would amount to an offence were the defendant not later acquitted on the grounds of insanity. However, uncertainty is created by the definition of "offender" which states:

> "offender, in relation to a victim,—
>
> (a) means a person **convicted of the crime or offence** that affected the victim; and
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> (b) in section 9 (which relates to meetings requested by victims) and sections 17AA to 27 (which relate to victim impact statements), includes a person found guilty of, or who pleads guilty to, that crime or offence" (emphasis added)."

4.10 By definition, a person who is acquitted of an offence at trial on the grounds of insanity will not have been convicted of an offence. The definition also appears to exclude a defendant who is found to be not fit to stand trial or held not to be liable on the grounds of insanity prior to trial under the CP(MIP) Act (sections 8A and 20 respectively). In each of those cases it is important to note that the judge will need to be satisfied on the balance of probabilities that the person charged with the offence committed the necessary physical conduct and that any necessary circumstances were present.

Recommendation

4.11 A simpler alternative to achieve the same policy intent would be to amend the definitions of "offence" and "offender" in section 4 of the VR Act by including the italicised words:

> "offence" means an offence against an enactment *(including conduct which would have amounted to that offence if the offender had not been found not guilty of the offence by reason of insanity under s 20 of the Crimes Act 1961 or s 20 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 or unfit to stand trial under s 8A of the Criminal Procedure (Mentally Impaired Persons) Act 2003)* …

and

> "offender, in relation to a victim,—
>
> (a) means a person convicted of the crime or offence that affected the victim; and
>
> (b) in section 9 (which relates to meetings requested by victims) and sections 17AA to 27 (which relate to victim impact statements), includes a person found guilty of, or who pleads guilty to, that crime or offence"; and
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> (c) *A person charged with the crime or offence that affected the victim who was found not guilty of the offence by reason of insanity under s 20 of the Crimes Act 1961 or s 20 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 or unfit to stand trial under s 8A of the Criminal Procedure (Mentally Impaired Persons) Act 2003)."*

4.12 Alternatively, if the Committee considers changes to the CP(MIP) Act are more appropriate to achieve the Bill's objectives, it will need to be aware there are unanswered issues about the order in which issues are determined. Some lawyers have suggested that, for clarity and consistency, it would be preferable to follow the model used elsewhere in the CP(MIP) Act in relation to fitness to plead. In those circumstances the court is required to examine the mental state of the defendant first.[3] Others have submitted that, where it is unclear whether criminal conduct has occurred at all, there should be a complete acquittal regardless of sanity. Both positions have merit. It is by no means clear which should prevail, nor that the Bill's proposal for judges to determine the issue on a case-by-case basis will deliver appropriate consistency to this vexing issue. We urge the Committee to consider this issue in more detail and seek advice from officials.

Section 20 – Other procedure relating to finding of insanity

4.13 Clause 5 of the Bill proposes to amend section 20 of the CP(MIP) Act by "making it clear in the remaining paragraphs that any decision that the defendant is not guilty on account of insanity

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[3] Section 8A of the CP(MIP) Act requires the Court to receive evidence of two health assessors to determine whether the defendant is mentally imparied. If the court is satisfied the defendant is mentally impaired and makes a finding that the defendant is unfit to stand trial, only then does the court go on to assess whether the defendant committed the acts in question (see sections 10-12).

must be accompanied by a specific finding that the defendant committed the acts or omissions that constitute the offence."[4]

4.14 The Law Society raises two issues with proposed new section 20.

4.14.1 First, section 20 provides for findings of 'not criminally responsible' by the judge *before or at trial* where essentially both prosecution and defence agree and by the jury where the issue is contested. There is no explicit wording in proposed section 20 to cover cases where the issue of insanity is contested in a judge-alone trial (for example, section 20(2) only makes reference to 'at a trial before a jury'). However, it is apparent that judge-alone trial matters can be dealt with under proposed section 20AAA. The Law Society therefore considers it would be clearer to include an express reference to judge-alone trials in the replacement section 20 that such cases will be decided under section 20AAA, rather than leave it to be implied.

4.14.2 Second, the wording of proposed subsections 20(1) and (2) contrasts oddly with proposed subsection 20(3). In the former subsection the judge must take steps to determine whether the defendant was not criminally responsible by reason of insanity, whereas under subsection (3) the judge "may" do so. There seems no logical reason for granting a discretion in the latter situation and it risks the possibility of creating inconsistent outcomes.

4.15 The Committee is urged to consider and obtain detailed advice on these issues from officials.

5 Involvement of the "victim" in later proceedings relating to the release of the "offender" from detention in a secure facility

5.1 The Bill proposes to amend the CP(MIP) Act, the MH(CAT) Act and the IDDCR Act to give the following rights to victims of persons found not criminally responsible:

5.1.1 The right to be sent a copy of any certificate of clinical review stating that detention is no longer necessary.[5]

5.1.2 In the case of persons detained under the MH(CAT) Act, to apply for a review of the person's condition.[6]

5.1.3 The right to make submissions 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.[7] We also note that clause 6 of the Bill says the Minister of Health **must** consider any submission from the victim, i.e. it is mandatory for the Minister to take the submission into account.

5.1.4 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.[8]

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4 Explanatory Note, Rights for Victims of Insane Offenders Bill, p 1.

5 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.

6 Proposed new ss 77(5)(a) of the MH(CAT) Act.

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

8 Proposed new s 80(2B) of the MH(CAT) Act.

Right to make submissions – amendments to the CP(MIP) Act and MH(CAT) Act

5.2 As noted above, the Bill proposes to give certain victims the right to have input into future decisions about the status of persons who are detained following a finding of unfitness to stand trial or an acquittal on account of insanity.

5.3 The right to make submissions to either the Minister of Health (when considering release of a detained person) or the Mental Health Review Tribunal (when considering a review of the status of a detained person) raises two principal issues.

5.4 First, aspects of the first reading debate[9] suggest the proposed amendments have been largely modelled on similar provisions of the Parole Act 2002 which allow for victims of offences to be informed of, and to have input into, decisions as to the release of an offender on parole and the making of Extended Supervision Orders.[10] The Law Society considers this approach is logically unsound, and no analogy should be drawn between that regime and the regime for "offenders" released into the community when detention is no longer required in the interest of public safety.

5.5 The flaw in the reasoning is that the Parole Act deals with persons who committed offences and are sentenced to detention as a punishment. The views of victims may be relevant to the question of whether there has been sufficient change in the offender's behaviour that further punishment by detention is not necessary or deserved. The position of "offenders released from treatment" is quite different. Firstly, the issue of public protection is very evidently more of a matter of expert opinion and must already have been determined in the offender's favour before release is proposed. Second and more importantly, the fact of a finding of not guilty by reason of insanity must be taken as establishing, on the balance of probabilities, that but for the offender's mental state, the offending would not have occurred. The offender should therefore be treated as being without some moral fault which must be expiated by punishment.

5.6 Second, the proposed amendment appears to invite the generally inexpert views of the victim to influence what should be a decision made on the advice of clinical experts. This is inappropriate, and risks making it the subject of public debate. There is a general concern about the role of the Minister in the context of both section 31 CP(MIP) Act and section 77(4)(c) MH(CAT) Act, namely that this may result in decisions around reclassification of special patients being politically rather than clinically driven. Where a defendant has not been found guilty of a criminal offence (whether because of insanity or because they were unfit to stand trial) the only reason for continued detention should be where it is in the patient's interest or for the safety of the victim and/or wider community. Where the patient has not been convicted of a criminal offence, the feelings of the victim and the decision-maker's sense of compassion to the victim, no matter how understandable, cannot justify continued detention.

5.7 We recommend the Committee seek expert advice about the impact of allowing victims to make submissions to the Minister of Health and/or the Mental Health Review Tribunal.

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9 See https://www.parliament.nz/en/pb/hansarddebates/rhr/combined/HansDeb_20200701_20200701_36

10 See Parole Act 2002, sections 44, 49(4) and 107H(5).

5.8 Part 3 of the Bill proposes a similar amendment to the ID(CCR) Act and is unsatisfactory for essentially the same reasons as outlined above**.**

Giving victims a copy of the certificate of clinical review

5.9 As noted above, the Bill also provides certain victims of insane offenders with a right to be sent a copy of any certificate of clinical review where detention is no longer necessary.

5.10 The New Zealand Bill of Rights Act 1990 (**NZBORA**) advice prepared by the Ministry of Justice considers that this process does not infringe the right in section 23(5) NZBORA for those deprived of liberty to be "treated with humanity and with respect for the inherent dignity of the person", on the basis that the victims' views would not be determinative of the outcome of any review process, and that:[11]

> "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".

5.11 The format of the certificate of clinical review is set out in Form 2 of the Mental Health (Forms) Regulations 1992.[12] The certificate of clinical review currently provides minimal information about the patient. Provided that the certificate remains in the same format, the Law Society considers it is appropriate for the information contained in the certificate of clinical review to be provided to victims. However, if the certificates were expanded to include information not currently provided (for example, full particulars of the reasons for the Responsible Clinician's opinion of the patient's condition and any relevant reports from other health professionals involved in the case), there is a significant risk this would begin to breach the patient's privacy rights. If the Bill is to proceed, the Law Society suggests the form of the certificate should be specified in a schedule to the Act, to protect against breach of patient rights.

5.12 The Law Society also notes the Bill of Rights advice takes no account of the obvious risk that any personal health information distributed to victims may end up in the public arena. While the Bill would continue the requirement that recipients of information are not to publicise it, experience suggests that is only a frail safeguard. It does not appear to be compatible with the dignity of the detained person to expose them to that risk. This is an issue the Committee will need to consider.

Other amendments

5.13 Clause 6 also proposes to insert a requirement in section 31(3)(a) CP(MIP) Act that, when considering the release from detention as a special patient or a special care recipient of a person earlier found not criminally responsible, the Minister of Health must have regard to whether that person poses a risk to the safety of her/himself or others.

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11 Ministry of Justice advice as to consistency with the New Zealand Bill of Rights at [16].

12 See http://www.legislation.govt.nz/regulation/public/1992/0305/latest/DLM167648.html

5.14 The Law Society considers this change is unnecessary, since the threshold for detention is that the detention of the defendant was "necessary" in the public interest.[13]

Tiana Epati
NZLS President
28 January 2021

[13] See for example the discussion in *Adams on Criminal Law – Criminal Procedure – Criminal Procedure (Mentally Impaired Persons) Act 2003* at [CM 24.03 and .04].