

Rights for Victims of Insane Offenders Bill

Member's Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Rights for Victims of Insane Offenders Bill and recommends that it be passed with the amendments shown

Introduction

This bill is a Member's bill in the name of Hon Louise Upston MP. It seeks to amend the Criminal Procedure (Mentally Impaired Persons) Act 2003, the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and the Victims' Rights Act 2002.

The bill aims to ensure the equivalent treatment of victims of legally insane offenders with other victims of crime. It also seeks to develop a more victim-centred approach when the court is considering cases involving defendants found unfit to stand trial or acquitted on account of insanity. The bill, as introduced, would achieve these outcomes by:

- renaming 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”
- giving victims the right to be sent a copy of any certificate of clinical review stating that detention of a person found either unfit to stand trial or insane is no longer necessary
- giving victims the right to make a submission to the Minister of Health about whether release from detention is necessary before the Minister can make certain directions
- giving victims the right to make a submission to the Mental Health Tribunal for a review of the patient's condition

- ensuring that victims are notified any time a special patient is given unescorted or overnight leave of absence from a secure healthcare facility into the community.

In the 2019/20 financial year, 153 people were found unfit to stand trial, and 40 people were found not guilty on account of insanity.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to the following legislative design issues, which we discuss in more detail later in this commentary.

Clause 5 seeks to repeal the verdict of "not guilty on account of his or her insanity" and replace it with "not criminally responsible on account of insanity" as the finding recorded by the judge. In law, "not criminally responsible" is not synonymous with "not guilty". Changing the existing verdict terminology could risk creating unintended adverse consequences.

Clause 9 would enable the sharing of a patient's private clinical information with a victim, engaging the patient's right to privacy and right to be treated with humanity and dignity.

Transitional provisions may be included in legislation to cater for cases where a law change might affect a process already under way. The bill, as introduced, does not contain any transitional provisions for court proceedings in progress at the time the bill would come into force.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement

Clause 2 provides that the bill would come into force 6 months after the date on which it receives Royal assent. We recommend amending the commencement date to 1 July 2022 to give departments sufficient time to comply with the bill's requirements and to provide certainty about when the new regime comes into effect.

New procedures relating to a finding of insanity

Clause 4 would insert new sections 20AAA to 20AAC into the Criminal Procedure (Mentally Impaired Persons) Act. This would create a new two-step procedure for the court to consider the defendant's sanity at the time the offence was committed. The court would decide:

- whether the acts or omissions that form the basis of the offence are proven
- whether the defendant was insane at the time of the alleged offence.

Clause 4 would also change the wording of a finding of insanity from “not guilty on account of insanity” to “the act or omissions are proven but the defendant is not criminally responsible on account of insanity”.

We consider that introducing a new two-step procedure is not needed to achieve the bill’s intent. We agree with submitters that it is not the court’s procedures in reaching a verdict that are problematic. Rather, it is the finding of “not guilty on account of insanity” that victims of persons found insane, and their friends and family, find deeply upsetting. This is because there is usually no doubt that the person committed the act or omission that is the subject of the charge brought against them, even though they are found insane or unfit to stand trial.

We recommend deleting clause 4 of the bill to remove the proposed two-step procedure. Instead, we recommend inserting clause 3A, which would amend section 4 of the Act to include the new verdict of “proven but insane”. The new verdict would:

- clarify that the defendant has been proven to have committed the act or omission that is the subject of the charge brought against them but was insane at the time
- create a more victim-centric approach by acknowledging to the victim that the act or omission that is the subject of the charge brought against them did occur
- be easily understood.

We propose that the new verdict be defined more fully in the Act to satisfy the legal and technical requirements for the existing terminology of “not guilty”. This would avoid unintended consequences and adverse effects in changing the wording of an established verdict.

Alternative procedure related to a finding of insanity

Currently, section 20 of the Criminal Procedure (Mentally Impaired Persons) Act contains a process which avoids the need for a full trial if both parties agree that the only reasonable verdict is “not guilty on account of insanity”. To give effect to the bill’s intent to rename the verdict of “not guilty on account of insanity”, clause 5 of the bill would amend section 20. It would provide a process which avoids the need for a full trial if both parties agree that the only reasonable verdict is “the act or omission is proven but the defendant is not criminally responsible on account of insanity.”

We recommend amending clause 5 to change the verdict accepted by both parties. Instead of “the act or omission is proven but the defendant is not criminally responsible on account of insanity”, we propose “proven but insane”.

Clause 5 would also amend section 20 to place an extra requirement on the judge in a jury trial where insanity has been raised as a defence and the jury has found the defendant not guilty. The judge must ask the jury to determine whether the defendant committed the acts or omissions that constituted the offence.

We recommend amending clause 5 by inserting new section 20(4). This change would mean that, when the jury has acquitted the defendant on account of the defendant’s insanity, the judge must record a finding of “proven but insane”.

We also recommend some amendments in clause 5 to update section 20 with modernised language.

Submission rights and notification entitlements for victims if a change to a patient's status is contemplated

Clauses 6 and 7 would amend sections 31 and 33 of the Criminal Procedure (Mentally Impaired Persons) Act. These clauses relate to notifying a victim of a proposed change of status for:

- a defendant who has been found unfit to stand trial and whose status is proposed as being changed from special patient to patient, or from special care recipient to care recipient
- a defendant who has been acquitted on account of insanity and who is detained as a special patient or a special care recipient to a patient or recipient or is being discharged.

The bill would require that, before the Minister of Health makes a change of status order, they must consider any submission from the victim about the continued detention of the defendant.

We note that it is operationally feasible to enable victims of special patients and special care recipients to make submissions directly to the Minister. However, enabling victims to make a submission directly to the Minister implies that the Minister is expected to weigh the victim's submission against clinical advice provided in support of the application. This could increase the risk of a patient being detained for longer than necessary, known as arbitrary detention. This would further increase the likelihood of administrative review of Ministerial decisions regarding changes of status or discharge.

We consider that the risks of arbitrary detention and administrative review would be mitigated if the Minister were to receive the content of the victim's submission in the context of a report provided by the Director. The report would address the relevant issues, including any issues raised by the victim, and would be considered as comprehensive advice to the Minister. The Minister would retain the ability to weigh various elements of the advice.

We recommend amending clauses 6 and 7 to give effect to our consideration.

Minister's ability to grant leave to special patients

Currently, section 50 of the Mental Health (Compulsory Assessment and Treatment) Act provides that the Minister may grant a leave of absence to a special patient from a hospital into the community, subject to conditions specified in the section.

We consider that the bill should require that victims of persons found insane be notified when the special patient is being considered for a leave of absence. This would prepare them for the possibility of the patient's moving to a form of leave with greater autonomy or release, and give the victim an opportunity to express a view on that possible change.

We also consider that, at the point that the determination is to be made about whether the special patient should be granted leave into the community, the victim should be able to make a statement that gives voice to their concerns about the risks to safety if the patient is granted leave and ways the risks might be mitigated. For example, in their submission, the victim could specify where they lived and worked. By disclosing this information to the Director of Mental Health, leave conditions might be applied, where practicable, that would minimise the chances of the person found insane and the victim coming into contact. We consider that this would enhance victims' feelings of safety and security in their communities.

Our considerations also give effect to the bill's intent to create a broader equivalence between the submission rights and notification entitlements for registered victims of a special patient compared with other victims of crime. Many of the amendments we recommend below mirror parallel provisions in the Parole Act 2002.

Right of victim to make a submission

We recommend inserting clause 8B, to insert new sections 50B and 50C. The new sections would secure the right of the victim to make a submission on the proposed leave of absence of a special patient. This includes:

- ensuring that the Director takes all reasonable steps to notify the victim that they are considering whether to support a leave of absence for the special patient
- providing the victim with information about the process and how they may participate
- ensuring that the Director has regard to any submission made by the victim.

Scope of victim's submission

We consider that victims have useful testimony and should be able to voice their concerns about risks to safety for themselves, their family, and the wider public, should the patient be granted leave into the community.

We consider that any direction and guidance given to victims on their submission should focus on information related to the victim's safety and the safety of their whānau. This does not exclude the victim from making a submission regarding public safety, but does focus the scope of their submission to where it may most usefully be applied.

We recommend inserting new clause 8B, which would insert new section 50C to clarify that a person's submission may address any concerns that the person has, on reasonable grounds, about any risk the special patient might present to the person's safety, the safety of their immediate family, or any other information that the person considers relevant to the decision of whether to grant leave.

Victim to be registered

We recommend inserting new clause 8A to clarify that the rights and requirements relating to victim submissions apply only to registered victims. This is based on equivalent provisions in the Parole Act.

Minister must ensure the victim's submission has been considered

We also recommend inserting clause 8B, new section 50A. New section 50A(1) would specify that one of the requirements that must be met for the Minister to grant leave is that the Director supports the proposed leave of absence having taken into account any submission made by the victim.

Rights of non-registered victims to make a submission

We consider that non-registered victims should also be able to write to the Director to ask for information about proposed leaves of absence and to make a submission about them. We recommend inserting clause 8B, new section 50D, to give effect to this. This amendment would reflect an equivalent provision in the Parole Act.

Decision about leave that must be notified to victims

We recommend inserting clause 8B, new section 50E, to specify the decisions the Director must notify to the victims (either registered, or non-registered but who have made a submission). These decisions are:

- whether the Director has decided to support the proposed leave of absence for the special patient
- if the Director has supported the proposed leave, whether the Minister has then granted that leave
- whether the Minister has applied any conditions to the leave granted to the special patient.

Information about victims is not to be given to the special patient

We consider that, for protection of the victim, at no time should any of their address or contact details be given to the special patient. We recommend inserting clause 8B, new section 50F, to give effect to this.

Ability of victim to opt out of notification process

We consider that some victims may wish to avoid any future notifications regarding the special patient or special care recipient. We note that the bill recognises the ability of victims to nominate a representative to receive notifications on their behalf. We also note that victims will be able to “opt out” of the notification process by choosing not to register with the existing scheme.

Director of Mental Health able to grant short-term leave to special patients

Section 52 of the Act specifies that the Director may grant short-term leave—a period not longer than seven days—subject to any conditions they think appropriate. We recommend inserting clauses 8C and 8D, replacing section 52 and inserting new sections 52B to 52H, to specify new requirements relating to the Director’s ability to grant short-term leave. These requirements would mirror many of the amendments we have recommended above, regarding the Minister’s ability to grant leave and how the victims of special patients are included in that process. They include:

- the requirement that the Director give notice to the victim that they intend to make a decision about giving a special patient short-term leave
- the requirement that the Director provide the victim with an explanation of the process and how the victim might participate in that process
- the ability of the victim to make a submission to the Director about the Director’s decision to grant short-term leave
- the requirement that the Director must consider any written submission made by the victim
- the requirement that the Director notify the victim of any decision and conditions of leave.

We consider that, in granting short-term leave to special patients, the Director should be able to delegate some powers to a Director of Area Mental Health Services. This would ensure that the new requirements for notification and submission could be carried out effectively, alongside the existing arrangements for leave approvals. We recommend inserting clause 8D, new section 52H, to give effect to this.

Requirement to send clinical certificates of special patients to victims

Clause 9 would amend section 77 of the Mental Health (Compulsory Assessment and Treatment) Act. It would require clinicians to send a copy of the certificate of clinical review of a special patient to the victim. This would occur when the clinician determines that it is no longer necessary for the patient to be subject to an order of detention.

We consider that victims should be notified when a determination is to be made about whether a special patient is to be granted leave. Our intent is to enhance victims’ feelings of safety and wellbeing. They would be able to voice any concerns about risks to their safety at the point that this determination was made, or to prepare for the potential release of the patient.

However, we consider that the requirement to provide the victim with a certificate of clinical review is not appropriate. The clinical certificate, as required by the Mental Health (Forms) Regulations Act 1992, would include the patient’s full name, date of birth, address, and a summary of the clinician’s findings regarding the status of the patient. (Full particulars of the clinician’s findings and patient’s condition are not

required by the certificate, but are included as a matter of practice by some clinicians.)

We believe the provision of clinical information would risk breaching the privacy of the special patient and their ongoing rehabilitation. It also risks retraumatising the victim as they contend with the information provided in the certificate.

We recommend that clause 9 of the bill be deleted, to ensure that certificates of clinical reviews are not sent to victims.

Tribunal reviews of certain special patients

Clause 10 of the bill would amend section 80 to require the Mental Health Review Tribunal to notify the Director if applications are made to review a special patient's condition. The Director would then be required to send the registered victim (or their representative) a notice of the application to review, a statement of the legal consequences of the application, and a notice about the victim's right to make a submission to the Mental Health Review Tribunal on the application.

We recommend amending clause 10, section 80. Our amendment would retain the requirement that the Mental Health Review Tribunal notify the Director of any applications to review a special patient's condition. It would then require the Director to give notice of the application to review to each victim of the special patient, and provide the victims with an explanation of the process and how they might participate in it.

We also recommend amending clause 11 which would amend Schedule 1 of the Act. Our amendment would clarify that the victim has the right to make a submission to the Mental Health Review Tribunal reviewing the special patient's condition.

Changes to the Intellectual Disability (Compulsory Care and Rehabilitation) Act

We consider that the provisions in our proposed new clauses 8A to 8D, which would amend the Mental Health (Compulsory Assessment and Treatment) Act, should be paralleled in the Intellectual Disability (Compulsory Care and Rehabilitation) Act. Our amendments would ensure that the definition of "victim" in both Acts is based on the definition of "victim" in the Parole Act.

Our amendments would also insert new sections 65A to 65E, amend section 66, and insert new sections 67B to 67H into the Act that are equivalent to those proposed to sections 50 and 52 of the Mental Health (Compulsory Assessment and Treatment) Act. These would ensure that victims are notified when leave with a greater degree of autonomy than previously is being considered for a special patient. It would also ensure that victims have the opportunity to make a submission on the proposed leave.

We recommend inserting new clauses 12A to 12D to give effect to this.

Changes to the Victims' Rights Act

Part 4 of the bill would amend the Victims' Rights Act.

Changing definitions of “offence” and “offender”

We recommend inserting clause 14A, amending section 4 of the Act, to change the definitions of “offence” and “offender”. The new definitions would include offences in respect of which the court recorded a finding of “proven but insane”. Our amendment would also clarify that an “offender” may mean a person charged with a crime or offence and in respect of which the court recorded a finding of “proven but insane”.

Victim impact statements

The Victims’ Rights Act currently provides that a victim of a criminal offender may submit a victim impact statement to the court. The statement enables the victim to provide information to the court about the effects of the offending, assists the court in understanding the victim’s views about the offending, and informs the offender about the impact of the offending. The statement is submitted to the judicial officer sentencing the offender. This ensures that the victim impact statement does not influence the verdict given at trial, but that information from the statement may be used to inform sentencing.

We consider that parallel provisions for giving victim impact statements should be applied to victims of persons found insane. It is not our intent that the victim impact statements of the victims of persons found insane be used to inform any clinical or judicial decision about the fitness of a person to stand trial. However, once the court has determined that a defendant is acquitted on account of his or her insanity, the court must make a determination regarding the defendant that parallels the sentencing aspect of a criminal proceeding, known as a disposition hearing. Sections 24 and 25 of the Criminal Procedure (Mentally Impaired Persons) Act specify what the court must consider when it makes its determinations and the subsequent orders it must impose, such as to detain the defendant, or order their treatment, care, or release. We consider that, at the disposition hearing, before the court makes this order, it should consider the victim impact statement of any victim of the person found insane.

To give effect to our view, we recommend inserting clauses 14A to 14N. These proposed clauses would include a new class of victims— victims of defendants where the court recorded a finding of “proven but insane”—alongside the existing class of victims who are able to make a victim impact statement—other victims of crime. The same provisions that apply to victims able to make a victim impact statement at the point of sentencing would also apply to victims of persons found insane at the point of a disposition hearing.

Transitional, savings, and related provisions

We recommend inserting new clauses 7B, 8AA, 11AAA, 12AA, 13A, 14AA, and 15AAA. These clauses would insert new schedules which would introduce transitional, savings, and related provisions into several of the Acts amended by this bill. The amendments would clarify that the provisions relating to specified sections con-

tinue to apply to the matters already under way as if they had not been repealed or replaced by the bill.

Determining areas for future legislative improvement

This bill would make significant steps toward a more victim-centred approach when the court is considering cases involving persons found unfit or insane. It would ensure the equivalent treatment of victims of persons found unfit or insane with other victims of crime. However, several issues were raised by submitters, or in our own consideration, that lay outside the scope of our work on this bill. We believe they give rise to potential areas for future legislative improvement in cases involving persons found unfit to stand trial or acquitted on account of insanity. We outline these issues below.

Inability to qualify a defendant as needing detention or treatment

One submitter, Mark Watts, told us about his experience of being violently attacked. The defendant, found unfit to stand trial, had suffered a brain injury resulting in brain damage that impaired their cognitive functioning. Because of the nature of the injury, the defendant did not qualify as having a “mental disorder”, or for compulsory treatment, under the Mental Health (Compulsory Assessment and Treatment) Act. Nor did the defendant fulfil the criteria for treatment under the Intellectual Disability (Compulsory Care and Rehabilitation) Act. Even though the defendant’s attack left the victim in an intensive care unit and permanently disabled, the court was compelled to release the defendant back into the community without consequence.

The presiding judge argued that the Intellectual Disability (Compulsory Care and Rehabilitation) Act was too narrow, and should have allowed the defendant to be regarded as a person with an intellectual disability and treated as such.¹ The judge also expressed the opinion that the defendant needed to be detained for the safety of others, but lamented that there was no facility that could cater for their needs. The defendant has since gone on to attack other members of the public.

We consider that work needs to be done to ensure that existing legislation adequately captures all persons found unfit to stand trial or acquitted on account of insanity and who continue to pose a risk to public safety.

Ability to provide a victim impact statement where a defendant is found unfit to stand trial on account of insanity

The amendments we recommend to the bill would provide that a victim impact statement may be submitted to the court by the victim of a defendant who is acquitted on account of insanity at the time of the disposition hearing during the trial. This provision could not be extended to the class of victims of persons who are found unfit to stand trial due to insanity, as no trial takes place.

¹ Oral judgement of Judge D C Ruth, *The Queen v Miranda Leigh Young*, 25 October 2019.

Defendants found unfit to stand trial may eventually be brought to trial if it is determined that they are fit to stand. At this point the victim would be able to provide a victim impact statement, although this may occur years after the alleged offence.

Some of us consider that an equivalent opportunity to present a victim impact statement should be provided to victims of persons who are found unfit to stand trial due to insanity. However, we are mindful that a victim impact statement is only submitted at sentencing or the disposition hearing so as not to unduly influence the court's arrival at a verdict. Although outside the scope of our work on this bill, some of us consider that work should be done to achieve a better balance in creating an equivalent opportunity for ensuring a victim-centred approach where the victim's voice is heard while protecting the defendant found unfit to stand trial from any bias that might unduly influence a future trial.

Notification to victim of further offending by person found insane

We noted that victims of sentenced criminal offenders are notified of further offending in two circumstances:

- if the offender is convicted of breaching parole or home detention conditions
- if the offender is serving a long-term prison sentence and is appearing before the Parole Board and the victim has requested the information to assist in preparing their submission to the board.

Some of us consider that victims of persons found unfit or insane should be notified if the person is convicted of any further offending, or breaches their leave conditions.

The Ministry of Health told us that, if a special patient is convicted of an offence for which a victim is eligible to receive notifications, the victim will receive relevant notifications under those requirements. However, the health system cannot be responsible for notifications of criminal justice system processes and can only be responsible for the required notifications related to health system processes. Similarly, the New Zealand Police are not responsible for the administration of the Mental Health (Compulsory Assessment and Treatment) Act, which would provide for the notification to victims of persons found unfit or insane at various points. Some of us do not accept that the administrative issues between Police and Mental Health make this too difficult. If a person is found unfit or insane and is charged with or convicted of another offence, it should be a requirement for mental health services to be advised and responsibilities to victims to be met.

We heard that it is not a criminal offence for a patient to breach their leave conditions, when undertaking leave. Special patients who breach their leave are held accountable through other mechanisms, such as having their leave cancelled, postponed, or limited. If a special patient breached their leave conditions while on approved leave, such that they are absent without leave, current notification requirements already require that the registered victim be notified.

Aligning the agencies' processes to allow for the notification of future offending to victims of persons found unfit or insane would require further consultation and ana-

lysis. Some of us consider that, although this is outside the scope of our work on this bill, it should be undertaken. It would enhance victims' feelings of safety and confidence, better align health and justice outcomes, and ensure accountability that the sectors were working adequately to prevent and address future offending.

Alignment with the Armed Forces Discipline Act 1971

We note that the Armed Forces Discipline Act 1971 provides for the administration of separate justice and criminal provisions for the armed forces. Our bill would not amend this Act. However, we consider that any future review of the Act should consider aligning with the intent of our bill in ensuring the equivalent treatment of victims of legally insane offenders with other victims of crime.

Petitions of Wendy Hamer

The petition of Wendy Hamer—Wendy's Petition: Victims' Rights When Offender Found Insane—was presented to the House on 12 March 2019. A second petition, the petition of Wendy Hamer and 1,467 others—Wendy's Petition: Victims' Rights When Offender Found Insane—was also presented to the House on 12 March 2019.

Both petitions request that the House of Representatives amend the law to extend to the victims of crime committed by people found to be insane, the same protections and rights as other victims.

We resolved to consider Wendy's petitions alongside the bill as the bill directly addressed the concerns raised by the petitions. We invited Wendy to submit evidence to aid our consideration of the bill.

Wendy presented written evidence to the committee and we also heard oral evidence from Wendy on 18 February 2021. In her evidence, Wendy noted that the intent of her petitions "endorses and concurs" with the bill.

Wendy told us about how she was the victim of an attempted murder in Nelson while she was working as a registered nurse in the community. Wendy was violently attacked by Blair Swain on New Year's Eve in 2009, when she went to visit him. Swain was found not guilty of attempted murder on account of insanity and was detained as a special patient at Hillmorton Hospital in Christchurch. Swain was transferred to Nelson Hospital in October 2018.

Wendy reported that Swain had been relocated back to the community of Nelson and had begun undertaking escorted leave in the area in which Wendy lives and works. Wendy said that this was done without her input, consent, or notification, and caused her great distress. Blair Swain died while in care in October 2019.

In requesting the same protections and rights for victims of insane offenders as for victims of other crimes, Wendy asked for several key actions. These include:

- an alternative verdict to "not guilty by reason of insanity" that acknowledges that the defendant did commit a crime
- the right for a victim of a person found unfit or insane to make a Victim Impact Statement to the court

- the development of principles that place the victims of persons found unfit or insane at the heart of court processes
- allow victims of persons found unfit or insane input into determinations made about their leave or release into the community
- the review of services and support available to victims of persons found unfit or insane.

We wish to thank Wendy for her courage in recounting her experiences to us and her advocacy for victims of persons found unfit or insane. The matters that Wendy raised in her evidence and the actions that she requested ensure a better victim-centric approach and the more equitable treatment of the victims of persons found unfit or insane with the victims of criminal offenders. Her evidence has informed our consideration of this bill and the recommendations we have made in this report.

Appendix

Committee process

The Rights for Victims of Insane Offenders Bill was referred to the Justice Committee of the 52nd Parliament on 1 July 2020. It was reinstated with this committee in the 53rd Parliament on 26 November 2020.

We called for submissions with a closing date of 29 January 2021. We received and considered 72 submissions from interested groups and individuals. We heard oral evidence from 20 submitters.

We received advice on the bill from the Ministry of Justice and the Ministry of Health. Concerning the scope of advice provided on the bill, the Ministry of Health was given a full remit for the bill. As this was a Member's bill, and did not involve Government policy, the Ministry of Justice was limited to providing factual information about the bill's interaction with the relevant regulatory framework. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Ginny Andersen (Chairperson)

Hon Simon Bridges

Simeon Brown

Dr Emily Henderson

Nicole McKee

Willow-Jean Prime

Hon Dr Nick Smith

Vanushi Walters

Arena Williams

Hon Louise Upston participated in the committee's proceedings for this item of business.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Louise Upston

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	22C Judicial officer not to take into account withheld part	29
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14N	Section 28 and cross-heading renumbered and repositioned	30
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	<u>Consequential amendments</u>	

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Rights for Victims of Insane Offenders Act **2019**.

2 Commencement

This Act comes into force on 1 July 2022 ~~six months after the date on which it receives the Royal assent.~~ 5

Part 1

Amendments to Criminal Procedure (Mentally Impaired Persons) Act 2003

3 Principal Act

This Part amends the Criminal Procedure (Mentally Impaired Persons) Act 2003 ~~(the principal Act)~~. 5

3A Section 4 amended (Interpretation)

In section 4(1), insert in its appropriate alphabetical order:

proven but insane, in respect of a defendant charged with an offence, means—

- (a) the defendant is proven to have done, or omitted to do, an act that is the subject of the charge brought against the defendant; but 10
- (b) the defendant was insane at the time that the defendant did, or omitted to do, the act

victim has the same meaning as in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992. 15

4 ~~New sections 20AAA to 20AAC inserted (Procedure when question of insanity arises)~~

Before section 20, insert:

~~20AAA Procedure when question of insanity arises~~

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: 20

- (a) whether the defendant committed the acts or omissions that constitute the offence: 25
- (b) whether the defendant was insane at the time of the commission of the offence.

~~20AAB Procedure when first question is whether defendant committed acts or omissions~~

- (1) If the Judge decides that the first question to be determined is the question in **section 20AAA(a)** and the court finds beyond a reasonable doubt that the defendant committed the acts or omissions that constitute the offence,— 30
 - (a) the Judge must record that finding; and
 - (b) the court must proceed to determine the question in **section 20AAA(b)**.
- (2) If the court then finds on a balance of probabilities that the defendant was insane at the time of the commission of the offence, the Judge must record a 35

~~finding that the acts or omissions are proven but the defendant is not criminally responsible on account of insanity.~~

- (3) ~~However, if the court does not find on the balance of probabilities that the defendant was insane at the time of the commission of the offence,—~~

(a) ~~the Judge must record that finding; and~~

(b) ~~the court must proceed to conclude the trial in the normal way.~~

- (4) ~~If the Judge decides that the first question to be determined is the question in **section 20AAA(a)** and the court does not find beyond a reasonable doubt that the defendant committed the acts or omissions that constitute the offence, the Judge must—~~

(a) ~~record that finding; and~~

(b) ~~discharge the defendant.~~

20AAC Procedure when first question is whether defendant was insane at time of commission of offence

- (1) ~~If the Judge decides that the first question to be determined is the question in **section 20AAA(b)** and the court finds that, on the balance of probabilities, the defendant was insane at the time of the commission of the offence,—~~

(a) ~~the Judge must record that finding; and~~

(b) ~~the court must proceed to determine the question in **section 20AAA(a)**.~~

- (2) ~~If the court then determines beyond a reasonable doubt that the defendant committed the acts or omissions that constitute the offence, the Judge must record a finding that the acts or omissions are proven but the defendant is not criminally responsible on account of insanity.~~

- (3) ~~However, if the court does not find beyond a reasonable doubt that the defendant committed the acts or omissions that constitute the offence, the Judge must—~~

(a) ~~record that finding; and~~

(b) ~~discharge the defendant.~~

- (4) ~~If the Judge decides that the first question to be determined is the question in **section 20AAA(b)** and the court does not find on the balance of probabilities that the defendant was insane at the time of the commission of the offence,—~~

(a) ~~the Judge must record that finding; and~~

(b) ~~the court just proceed to conclude the trial in the normal way.~~

5 Section 20 replaced (Finding of insanity)

Replace section 20 with:

20	Other procedure relating to finding of insanity	
(1)	Before or at a trial, the Judge must record a finding that the acts or omissions are proven but the defendant is not criminally responsible on account of insanity if—	
(a)	the defendant indicates that they intend to raise the defence of insanity; and	5
(b)	the prosecution agrees that the only reasonable verdict is not guilty on account of insanity; and	
(c)	the Judge is satisfied—	
(i)	beyond a reasonable doubt that the defendant committed the acts or omissions that constitute the offence; and	10
(ii)	on the basis of expert evidence and on the balance of probabilities that the defendant was insane within the meaning of section 23 of the Crimes Act 1961 at the time of the commission of the offence.	
(2)	If, at a trial before a jury, the defendant gives evidence as to their insanity and the jury finds the defendant not guilty, the Judge must ask the jury the following:	15
(a)	whether or not it finds that the defendant committed the acts or omissions that constitute the offence;	
(b)	whether or not it finds that the defendant was insane at the time the offence was committed.	20
(3)	If, at a trial before a jury, it appears from the evidence that the defendant may have been insane at the time of the commission of the offence, and even if the defendant has not given evidence as to their insanity or put the question of their insanity in issue, the Judge may ask the jury to find—	25
(a)	whether the defendant committed the acts or omissions that constitute the offence; and	
(b)	whether the defendant was insane within the meaning of section 23 of the Crimes Act 1961.	
20	<u>Finding of insanity</u>	30
(1)	<u>At a trial, the Judge must record a finding of proven but insane if—</u>	
(a)	<u>the defendant gives evidence as to the defendant's insanity; and</u>	
(b)	<u>the jury or (if there is no jury) the Judge finds—</u>	
(i)	<u>the defendant is proven to have done, or omitted to do, an act that is the subject of the charge brought against the defendant; but</u>	35
(ii)	<u>the defendant was insane at the time that the defendant did, or omitted to do, the act.</u>	
(2)	<u>Before or at a trial, the Judge must record a finding of proven but insane if—</u>	

- (a) the defendant indicates an intention to raise the defence of insanity; and
- (b) the prosecution agrees that the only reasonable verdict is a finding of proven but insane; and
- (c) the Judge is satisfied, on the basis of expert evidence, that the defendant was insane within the meaning of section 23 of the Crimes Act 1961 at the time of the commission of the offence. 5
- (3) If, at a trial before a jury, the defendant gives evidence as to the defendant's insanity and the jury finds the defendant not guilty, the Judge must ask the jury whether it has acquitted the defendant on account of the defendant's insanity.
- (4) The Judge must record a finding of proven but insane if— 10
- (a) the Judge asks the jury under **subsection (3)** whether it has acquitted the defendant on account of the defendant's insanity; and
- (b) the jury responds that it has acquitted the defendant on account of the defendant's insanity.
- (5) In a case where it appears from the evidence that the defendant may have been insane at the time of the commission of the offence, the Judge may ask the jury to find whether the defendant was insane within the meaning of section 23 of the Crimes Act 1961, even though the defendant has not given evidence as to the defendant's insanity or put the question of the defendant's sanity in issue. 15
- 6 Section 31 amended (Change of status from special patient to patient or special care recipient to care recipient where person unfit to stand trial)** 20
- (1) In section 31(3)(a), after “no longer necessary”, insert “in the defendant's own interests or in the interests of the safety of the public or the safety of a person or class of person”.
- (2) After section 31(3), insert: 25
- (3A) Before making a direction under section 31(3)(b), the Minister must consider any submission about the continued detention of the defendant from a victim who was sent a copy of the certificate of clinical review under **sections 77(3)(ca)** or **section 77(4)(c)(ii)** of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or of the certificate of the specialist assessor under **section 93(1)(b)** of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. 30
- 6 Section 31 amended (Change of status from special patient to patient or special care recipient to care recipient where person unfit to stand trial)**
- Replace section 31(3) with: 35
- (3) If, at any time before the expiry of the relevant maximum period specified in section 30, a certificate is given under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 to the effect that, although the defendant is still unfit to stand trial, the continued detention of the defendant under section 24 is 40

	no longer necessary to safeguard the interests specified in subsection (3A) , the Minister of Health, acting with the concurrence of the Attorney-General, must—	
	(a) <u>consider whether, in the Minister's opinion, the continued detention of the defendant under that section is no longer necessary to safeguard those interests; and</u>	5
	(b) <u>direct that the defendant be held as a patient or, as the case requires, as a care recipient if, in the Minister's opinion, that detention is no longer necessary to safeguard those interests.</u>	
(3A)	<u>The interests referred to in subsection (3) are—</u>	10
	(a) <u>the defendant's own interests; and</u>	
	(b) <u>the safety of the public or the safety of a person or class of person.</u>	
(3B)	<u>In reaching a decision under subsection (3)(a), the Minister must have regard to any report from the Director of Mental Health made under section 33A.</u>	15
7	Section 33 amended (Duration of order for detention as special patient or special care recipient if person acquitted on account of insanity) After section 33(4), insert:	
(4A)	Before making a direction under section 33(3)(b), the Minister must consider any submission about the continued detention of the defendant from a victim who was sent a copy of the certificate of clinical review under sections 77(3)(ca) or section 77(4)(c)(ii) of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or of the certificate of the specialist assessor under section 93(1)(b) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.	20
7	Section 33 amended (Duration of order for detention as special patient or special care recipient if person acquitted on account of insanity) After section 33(4), insert:	
(4A)	<u>In reaching a decision under subsection (3)(a), the Minister must have regard to any report from the Director of Mental Health made under section 33A.</u>	30
7A	New sections 33A to 33E inserted After section 33, insert:	
33A	Report by Director of Mental Health on defendant's continued detention <u>The Director of Mental Health may report to the Minister of Health about the continued detention under section 24 of a defendant described in section 31(1) or 33(1).</u>	35

33B When victims must be notified of impending decision under section 31 or 33

(1) This section applies if the Director of Mental Health intends to report to the Minister of Health under **section 33A**.

(2) The Director must take all reasonable steps to— 5

(a) give notice to a victim that the Director intends to report to the Minister of Health under **section 33A** about the continued detention of a defendant; and

(b) explain to the victim—

(i) the process under **section 31(3)** or 33(3); and 10

(ii) how the victim may participate in that process.

33C Right of victims to make submissions on proposed change of status

(1) This section applies to a person notified under **section 33B**.

(2) The person may write to the Director of Mental Health, making submissions on, or giving information relevant to, the decision of whether to change the defendant's status under **section 31(3)** or 33(3). 15

(3) The person's submissions may address—

(a) any concerns that the person has, on reasonable grounds, about any risk that the defendant presents to—

(i) the person's physical safety or security; or 20

(ii) the physical safety or security of 1 or more members of the person's immediate family; and

(b) any other information that the person considers relevant to the decision of whether to change the defendant's status under **section 31(3)** or 33(3). 25

(4) The person must send the submission to the Director by the date specified by the Director.

(5) The Director must have regard to any written submissions made by a victim under this section or **section 33D**.

(6) In this section, **immediate family** has the same meaning as in section 4 of the Victim's Rights Act 2002. 30

33D Submissions from certain victims

(1) This section applies to a person who—

(a) is not a victim as defined in section 4; but

(b) is a victim as defined in section 4 of the Victim's Rights Act 2002. 35

(2) The person may make written submissions to the Director of Mental Health about the decision of whether to change the defendant's status under section 31(3) or 33(3).

(3) If the person seeks information from the Director for the purpose of making submissions under **subsection (2)**, the Director may—

5

(a) advise the person of the date on which the Director intends to report to the Minister of Health about the continued detention of the defendant; and

(b) give the person any other information that is reasonably necessary to enable the person to make submissions.

10

(4) **Section 33C** applies with any necessary modifications.

(5) Neither the Director nor any other person has any liability for any act done in pursuance, or intended pursuance, of the Director's functions under this section or **section 33E(1)(b)**, unless the act was done in bad faith.

33E Victims must be notified of decisions made under sections 31 and 33

15

(1) The Director of Mental Health must advise the following persons of the matters specified in **subsection (2)**:

(a) a person notified under **section 33B**:

(b) a person who makes a submission under **section 33D(2)**.

(2) The specified matters are—

20

(a) whether the Director's report to the Minister of Health concludes that the defendant's continued detention under section 24—

(i) continues to be necessary; or

(ii) is no longer necessary; and

(b) what decision the Minister has reached under **section 31(3)** or 33(3).

25

33F Information about victims not to be disclosed

(1) This section applies to **sections 33A to 33E**.

(2) No person may, directly or indirectly, disclose to the defendant the current address or contact details of any victim of the defendant.

7B Schedule 1AA amended

30

In Schedule 1AA,—

(a) insert the Part set out in **Schedule 1** of this Act as the last Part; and

(b) make all necessary consequential amendments.

Part 2

Amendments to Mental Health (Compulsory Assessment and Treatment) Act 1992

8 Principal Act

This Part amends the Mental Health (Compulsory Assessment and Treatment Act 1992 ~~(the principal Act)~~. 5

8A Section 2 amended (Interpretation)

In section 2(1), insert in its appropriate alphabetical order:

victim means (unless otherwise provided),—

- (a) in relation to a special patient, a person who has, under section 32B of the Victims' Rights Act 2002,— 10
 - (i) asked for notice, or for advice and copies; and
 - (ii) given their address:
- (b) an individual appointed under section 40 of that Act

8AA New section 2C inserted (Transitional, savings, and related provisions) 15

After section 2B, insert:

2C Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

8B Section 50 replaced (Leave of special patients) 20

Replace section 50 with:

50 Special patient defined

In this section and in **sections 50A to 50G**, **special patient** means a person who is detained in a hospital under—

- (a) section 24(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 as a person acquitted on account of insanity; or 25
- (b) section 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act 2003; or
- (c) section 45; or
- (d) section 46. 30

50A Minister may grant leave to special patients

- (1) The Minister may grant a special patient leave of absence from the hospital if—

- (a) 2 medical practitioners certify that the special patient is fit to be allowed to be absent from the hospital; and
- (b) the Director supports the proposed leave of absence, taking into account any submission from a victim made in accordance with **section 50C or 50D**. 5
- (2) The Minister may grant the leave of absence subject to any conditions the Minister considers appropriate, including (at the Minister's discretion) a condition that the person must return to the hospital on the date or within the period that the Minister specifies.
- (3) The Minister may not exercise the power to grant leave under this section in respect of any person who— 10
- (a) was, immediately before that person's admission to the hospital, detained in a prison—
- (i) while awaiting, or during the course of, a trial or hearing before a court; or 15
- (ii) while awaiting sentence by a court; or
- (iii) pending the determination of an appeal to a court against conviction; or
- (b) is subject to a sentence of imprisonment for life or to a sentence of preventive detention. 20
- 50B When victims must be notified of impending decision under section 50A**
- (1) This section applies if the Director is required to decide whether to support the proposed leave of absence of a special patient under **section 50A(1)**.
- (2) The Director must take all reasonable steps to—
- (a) give notice to a victim that the Director is required to decide whether to support the proposed leave of absence of the special patient under **section 50A(1)**; and 25
- (b) explain to the victim—
- (i) the process under **section 50A** for granting a special patient leave of absence; and 30
- (ii) how the victim may participate in that process.
- 50C Right of victims to make submissions on proposed leave of absence**
- (1) This section applies to a person notified under **section 50B**.
- (2) The person may write to the Director, making submissions on, or giving information relevant to, the decision of whether to grant leave of absence under **section 50A(1)**. 35
- (3) The person's submissions may address—

- (a) any concerns that the person has, on reasonable grounds, about any risk that the special patient presents to—
- (i) the person’s physical safety or security; or
- (ii) the physical safety or security of 1 or more members of the person’s immediate family; and 5
- (b) any other information that the person considers relevant to the decision of whether to grant leave of absence under **section 50A(1)**.
- (4) The person must send the submissions to the Director by the date specified by the Director.
- (5) The Director must have regard to any written submissions made by a victim under this section or **section 50D**. 10
- (6) In this section, **immediate family** has the same meaning as in section 4 of the Victims’ Rights Act 2002.
- 50D Submissions from certain victims**
- (1) This section applies to a person who— 15
- (a) is not a victim as defined in section 2(1); but
- (b) is a victim as defined in section 4 of the Victims’ Rights Act 2002.
- (2) The person may make written submissions to the Director about the decision of whether to grant leave of absence under **section 50A(1)**.
- (3) If the person seeks information from the Director for the purpose of making submissions under **subsection (2)**, the Director may— 20
- (a) advise the person of the date on which the Director intends to decide whether to support the proposed leave of absence of the special patient; and
- (b) give the person any other information that is reasonably necessary to enable the person to make submissions. 25
- (4) **Section 50C** applies with any necessary modifications.
- (5) Neither the Director nor any other person has any liability for an act done in pursuance, or intended pursuance, of the Director’s functions under this section or **section 50E(1)(b)**, unless the act was done in bad faith. 30
- 50E Victims must be notified of decisions made under **section 50A****
- (1) The Director must advise the following persons of the matters specified in **subsection (2)**:
- (a) a person notified under **section 50B**;
- (b) a person who makes a submission under **section 50D(2)**. 35
- (2) The specified matters are—

	(a) whether the Director supports the proposed leave of absence of the special patient under section 50A(1) ;	
	(b) if the Director supports the proposed leave of absence, whether the Minister has granted the special patient leave of absence under section 50A(1) ;	5
	(c) if the Minister has granted the special patient leave of absence, any conditions applying to the special patient under section 50A(2) .	
(3)	The Director may withhold advice of a particular condition if, in the Director's opinion, disclosing the condition would unduly interfere with the privacy of any other person (other than the special patient).	10
50F	Information about victims not to be disclosed	
(1)	This section applies to sections 50B to 50E .	
(2)	No person may, directly or indirectly, disclose to the special patient the current address or contact details of any victim of the special patient.	
50G	Minister may cancel leave of special patients	15
(1)	The Minister may, during a period of leave of absence granted under section 50A(1) to a special patient, cancel that leave of absence.	
(2)	If the Minister cancels a leave of absence, the Director must direct, in writing, that the special patient be admitted or re-admitted to a specified hospital.	
(3)	The special patient may be taken to the specified hospital by any of the following:	20
	(a) the Director;	
	(b) the Director of Area Mental Health Services;	
	(c) a duly authorised officer;	
	(d) a constable;	25
	(e) a person to whom the charge of the special patient has been entrusted during the period of leave.	
(4)	If the specified hospital is not the one from which the special patient was on leave of absence, the special patient must be received and detained there as if the special patient had been transferred to that hospital under section 49.	30
8C	Section 52 replaced (Director may grant short-term leave)	
	Replace section 52 with:	
52	Director may grant short-term leave to special patients	
(1)	The Director may grant a special patient leave of absence from the hospital for a period of up to 7 days, excluding the days of the patient's departure and return.	35

- (2) The Director may grant the leave of absence subject to any conditions the Director considers appropriate.
- (3) The Director's power to grant leave under this section—
- (a) must not be exercised in respect of any special patient described in **section 50A(3)(a)**; and
- (b) applies despite any other provision of this Act.

5

8D New sections 52B to 52H inserted

After section 52A, insert:

52B When victims must be notified of impending decision under section 52

- (1) This section applies if—
- (a) the Director intends to decide whether to grant a special patient leave of absence under **section 52(1)**; and
- (b) that leave of absence would permit the patient to exercise greater autonomy outside the hospital than has any other leave of absence previously granted to the patient.
- (2) The Director must take all reasonable steps to—
- (a) give notice to a victim that the Director intends to decide whether to grant leave of absence to the special patient under **section 52(1)**; and
- (b) explain to the victim—
- (i) the process under **section 52** for granting a special patient leave of absence; and
- (ii) how the victim may participate in that process.

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52C Right of victims to make submissions on proposed leave of absence

- (1) This section applies to a person notified under **section 52B**.
- (2) The person may write to the Director, making submissions on, or giving information relevant to, the decision of whether to grant leave of absence under **section 52(1)**.
- (3) The person's submissions may address—
- (a) any concerns that the person has, on reasonable grounds, about any risk that the special patient presents to—
- (i) the person's physical safety or security; or
- (ii) the physical safety or security of 1 or more members of the person's immediate family; and
- (b) any other information that the person considers relevant to the decision of whether to grant leave of absence under **section 52(1)**.
- (4) The person must send the submissions to the Director by the date specified by the Director.

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(5) The Director must have regard to any written submissions made by a victim under this section or **section 52D**.

(6) In this section, **immediate family** has the same meaning as in section 4 of the Victims' Rights Act 2002.

52D Submissions from certain victims

(1) This section applies to a person who—

(a) is not a victim as defined in section 2(1); but

(b) is a victim as defined in section 4 of the Victims' Rights Act 2002.

(2) The person may make written submissions to the Director about the decision of whether to grant leave of absence under **section 52(1)**.

(3) If the person seeks information from the Director for the purpose of making submissions under **subsection (2)**, the Director may—

(a) advise the person of the date on which the Director intends to decide whether to grant the leave of absence to the special patient; and

(b) give the person any other information that is reasonably necessary to enable the person to make submissions.

(4) **Section 52C** applies with any necessary modifications.

(5) Neither the Director nor any other person has any liability for an act done in pursuance, or intended pursuance, of the Director's functions under this section or **section 52E(1)(b)**, unless the act was done in bad faith.

52E Victims must be notified of decisions made under section 52

(1) The Director must advise the following persons of the matters specified in **subsection (2)**:

(a) a person notified under **section 52B**:

(b) a person who makes a submission under **section 52D(2)**.

(2) The specified matters are—

(a) whether the Director has granted a special patient leave of absence under **section 52(1)**:

(b) if the Director has granted the special patient leave of absence, any conditions applying to the special patient under **section 52(2)**.

(3) The Director may withhold advice of a particular condition if, in the Director's opinion, disclosing the condition would unduly interfere with the privacy of any other person (other than the special patient).

52F Information about victims not to be disclosed

(1) This section applies to **sections 52B to 52E**.

(2) No person may, directly or indirectly, disclose to the special patient the current address or contact details of any victim of the special patient.

52G Director may cancel short-term leave of special patients

- (1) The Director may, during a period of leave of absence granted under **section 52(1)** to a special patient, cancel that leave of absence.
- (2) If the Director cancels a leave of absence, **section 50G(2) to (4)** applies with any necessary modifications.

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52H Director may authorise Director of Area Mental Health Services to exercise certain powers

- (1) The Director of Area Mental Health Services may exercise the powers and duties conferred on the Director by **sections 50B, 50D, 50E, 52, and 52B to 52G** in respect of a special patient—
- (a) with the authority of the Director; and
- (b) subject to any conditions imposed by the Director.
- (2) If the special patient is a special patient under **section 50(c) or (d)**, the Director of Area Mental Health Services may exercise a power under **subsection (1)** only after consulting the manager of the appropriate prison.

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9 Section 77 amended (Clinical reviews of certain special patients)

- (1) After section 77(3)(c), insert:

(ea) in any case where the responsible clinician is of the opinion that the patient is still unfit to stand trial but it is no longer necessary that the patient should be subject to the order of detention as a special patient, the clinician shall also send a copy of the certificate of clinical review to every victim to whom section 37 of the Victims Rights Act 2002 applies, or his or her representative:

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- (2) Replace section 77(4)(c), with:

(e) in any case where the responsible clinician is of the opinion that the patient's condition no longer requires, either in the patient's own interest or for the safety of the public, that he or she should be subject to the order of detention as a special patient, that clinician shall also send a copy of the certificate of clinical review to—

(i) the Minister of Health for the purposes of section 33 of the Criminal Procedure (Mentally Impaired Persons) Act 2003; and

(ii) every victim to whom section 37 of the Victims Rights Act 2002 applies, or his or her representative:

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- (3) After section 77(4), insert:

- (5) Any copy of a certificate of clinical review sent to a victim under **section 77(3)(ea)** or **section 77(4)(c)(ii)** must be accompanied by a statement of the legal consequences of the finding set out in the certificate and of the victim's rights to—

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- (a) ~~apply under section 80 to the Review Tribunal for a review of the patient's condition; and~~
- (b) ~~make a submission under **section 33(4A)** of the Criminal Procedure (Mentally Impaired Persons) Act 2003 to the Minister concerning whether the patient's continued detention is necessary.~~

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10 Section 80 amended (Tribunal reviews of certain special patients)

After section 80(2), insert:

- (2A) ~~The Review Tribunal must notify the Director of applications under section 80(1) for a review of the patient's condition.~~
- (2B) ~~In relation to each notification of an application under **section 80(2A)**, the Director must, as soon as practicable, send a victim of the patient to whom section 37 of the Victims Rights Act 2002 applies, or his or her representative, the following:~~
 - (a) ~~notice of the application under section 80(1) for review of the patient's condition;~~
 - (b) ~~a statement of the legal consequences of the application and of the victim's right to make a submission to the Review Tribunal on the application.~~
- (2A) The convener of the Review Tribunal must notify the Director of an application under subsection (1) for a review of the special patient's condition.
- (2B) On receiving notice, the Director must take all reasonable steps to—
 - (a) give notice to each victim of the special patient that the Review Tribunal has received an application under subsection (1) for a review of the special patient's condition; and
 - (b) provide the victim with an explanation of—
 - (i) the process under this section for reviewing a special patient's condition; and
 - (ii) how the victim may participate in that process.

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11 Schedule 1 amended (Procedural provisions relating to Review Tribunals)

After clause 3 of Schedule 1, insert:

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3A Right of victim to make a submission

Any victim to whom a copy of the certificate of clinical review is sent under **section 77(3)(ca)** or **section 77(4)(c)(ii)** may provide a submission to the Tribunal about whether the patient should continue to be subject to the order of detention as a special patient.

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3AAA Right of victim to make a submission

Any person notified under **section 80(2B)** may write to the Review Tribunal, by the date specified by the Tribunal, making submissions on, or giving information relevant to, the Tribunal's review of the special patient's condition.

11AAA New Schedule 1AA inserted

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Insert the **Schedule 1AA** set out in **Schedule 2** of this Act as the first schedule to appear after the last section of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

11A Consequential amendments to Mental Health (Compulsory Assessment and Treatment) Act 1992

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Amend the Mental Health (Compulsory Assessment and Treatment) Act 1992 as set out in **Part 1 of the Schedule**.

Part 3**Amendments to Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003**

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12 Principal Act

This Part amends the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (~~the principal Act~~).

12A Section 5 amended (Interpretation)

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In section 5(1), insert in its appropriate alphabetical order:

victim means (unless otherwise provided),—

(a) in relation to a care recipient or a special care recipient, a person who has, under section 32B of the Victims' Rights Act 2002,—

(i) asked for notice, or for advice and copies; and

(ii) given their address:

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(b) an individual appointed under section 40 of that Act

12AA New section 9A inserted (Transitional, savings, and related provisions)

After section 9, insert:

9A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

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12B New sections 65A to 65E inserted

After section 65, insert:

65A When victims must be notified of impending decision under section 65

- (1) This section applies if—
- (a) a care manager intends to decide whether to authorise a care recipient to be on leave under section 65(1); and
 - (b) that period of leave would permit the care recipient to exercise greater autonomy outside the facility than has any other period of leave previously granted to the care recipient.
- (2) The care manager must take all reasonable steps to—
- (a) give notice to a victim that the care manager intends to decide whether to authorise a care recipient to be on leave under section 65(1); and
 - (b) explain to the victim—
 - (i) the process under section 65 for granting a care recipient a period of leave; and
 - (ii) how the victim may participate in that process.

65B Right of victims to make submissions on proposed leave

- (1) This section applies to a person notified under **section 65A**.
- (2) The person may write to the care manager, making submissions on, or giving information relevant to, the decision of whether to authorise leave under section 65(1).
- (3) The person's submissions may address—
- (a) any concerns that the person has, on reasonable grounds, about any risk that the care recipient presents to—
 - (i) the person's physical safety or security; or
 - (ii) the physical safety or security of 1 or more members of the person's immediate family; and
 - (b) any other information that the person considers relevant to the decision of whether to authorise leave under section 65(1).
- (4) The person must send the submission to the care manager by the date specified by the care manager.
- (5) The care manager must have regard to any written submissions made by a victim under this section or **section 65C**.
- (6) In this section, **immediate family** has the same meaning as in section 4 of the Victims' Rights Act 2002.

65C Submissions from certain victims

- (1) This section applies to a person who—
- (a) is not a victim as defined in section 5(1); but
 - (b) is a victim as defined in section 4 of the Victims' Rights Act 2002.

- (2) The person may make written submissions to the care manager about the decision of whether to authorise leave under section 65(1).
- (3) If the person seeks information from the care manager for the purpose of making submissions under **subsection (2)**, the care manager may—
- (a) advise the person of the date on which the care manager intends to decide whether to authorise a care recipient to be on leave; and
 - (b) give the person any other information that is reasonably necessary to enable the person to make submissions.
- (4) **Section 65B** applies with any necessary modifications.
- (5) Neither the care manager nor any other person has any liability for an act done in pursuance, or intended pursuance, of the care manager’s functions under this section or **section 65D(1)(b)**, unless the act was done in bad faith.
- 65D Victims must be notified of decisions made under section 65**
- (1) The care manager must advise the following persons of the matters specified in **subsection (2)**:
- (a) a person notified under **section 65A**:
 - (b) a person who makes a submission under **section 65C(2)**.
- (2) The specified matters are—
- (a) whether the care manager has authorised a care recipient to be on leave under section 65(1):
 - (b) if the care manager has authorised the care recipient to be on leave, any terms and conditions applying to the care recipient under section 65(1).
- (3) The care manager may withhold advice of a particular term or condition if, in the care manager’s opinion, disclosing the term or condition would unduly interfere with the privacy of any other person (other than the care recipient).
- 65E Information about victims not to be disclosed**
- (1) This section applies to **sections 65A to 65D**.
- (2) No person may, directly or indirectly, disclose to the care recipient the current address or contact details of any victim of the care recipient.
- 12C Section 66 amended (Minister may authorise leave for special care recipients)**
- Replace section 66(1) with:
- (1) The Minister may authorise a special care recipient to be on leave from the care recipient’s secure facility on any terms and conditions that the Minister specifies, if—
- (a) a specialist assessor certifies that the care recipient is fit to be on leave; and

- (b) the Director-General of Health supports the proposed leave, taking into account any submission from a victim made in accordance with **section 67D or 67E**.

12D New sections 67B to 67H inserted

After section 67A, insert:

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67B When victims must be notified of impending decision under section 66

- (1) This section applies if the Director-General of Health is required to decide whether to support the proposed leave of a special care recipient under **section 66(1)**.

- (2) The Director-General must take all reasonable steps to—

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- (a) give notice to a victim that the Director-General is required to decide whether to support the proposed leave of a special care recipient under **section 66(1)**; and

- (b) explain to the victim—

- (i) the process under section 66 for granting a special care recipient a period of leave; and

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- (ii) how the victim may participate in that process.

67C When victims must be notified of impending decision under section 67

- (1) This section applies if—

- (a) the Director-General of Health intends to decide whether to authorise a special care recipient to be on leave under section 67(1); and

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- (b) that period of leave would permit the special care recipient to exercise greater autonomy outside the secure facility than has any other period of leave previously granted to the special care recipient.

- (2) The Director-General must take all reasonable steps to—

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- (a) give notice to a victim that the Director-General intends to decide whether to authorise a special care recipient to be on leave under section 67(1); and

- (b) provide the victim with an explanation of—

- (i) the process under section 67 for granting a special care recipient a period of leave; and

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- (ii) how the victim may participate in that process.

67D Right of victims to make submissions on proposed leave

- (1) This section applies to a person notified under **section 67B or 67C**.

- (2) The person may write to the Director-General, making submissions on, or giving information relevant to, the decision of whether to authorise leave under **section 66(1)** or 67(1).

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- (3) The person's submissions may address—
- (a) any concerns that the person has, on reasonable grounds, about any risk that the special care recipient presents to—
 - (i) the person's physical safety or security; or
 - (ii) the physical safety or security of 1 or more members of the person's immediate family; and
 - (b) any other information that the person considers relevant to the decision of whether to authorise leave under **section 66(1)** or 67(1).
- (4) The person must send the submissions to the Director-General by the date specified by the Director-General.
- (5) The Director-General must have regard to any written submissions made by a victim under this section or **section 67E**.
- (6) In this section, **immediate family** has the same meaning as in section 4 of the Victims' Rights Act 2002.
- 67E Submissions from certain victims**
- (1) This section applies to a person who—
- (a) is not a victim as defined in section 5(1); but
 - (b) is a victim as defined in section 4 of the Victims' Rights Act 2002.
- (2) The person may make written submissions to the Director-General of Health about the decision of whether to authorise leave under **section 66(1)** or 67(1).
- (3) If the person seeks information from the Director-General for the purpose of making submissions under **subsection (2)**, the Director-General may—
- (a) advise the person of the date on which the Director-General intends to decide whether to—
 - (i) support the proposed leave of the special care recipient under **section 66(1)**; or
 - (ii) authorise a special care recipient to be on leave under section 67(1); and
 - (b) give the person any other information that is reasonably necessary to enable the person to make submissions.
- (4) **Section 67D** applies with any necessary modifications.
- (5) Neither the Director-General nor any other person has any liability for an act done in pursuance, or intended pursuance, of the Director-General's functions under this section, **section 67F(1)(b)**, or **67G(1)(b)**, unless the act was done in bad faith.
- 67F Victims must be notified of decisions made under section 66**
- (1) The Director-General must advise the following persons of the matters specified in **subsection (2)**:

- (a) a person notified under **section 67B**;
- (b) a person who makes a submission under **section 67E(2)** about the decision of whether to authorise leave under **section 66(1)**.
- (2) The specified matters are—
- (a) whether the Director-General supports the proposed leave of the special care recipient under **section 66(1)**; 5
- (b) if the Director-General supports the proposed leave, whether the Minister has authorised the special care recipient leave under **section 66(1)**;
- (c) if the Minister has authorised the special care recipient leave, any terms and conditions applying to the special care recipient under **section 66(1)**. 10
- (3) The Director-General may withhold advice of a particular term or condition if, in the Director-General's opinion, disclosing the term or condition would unduly interfere with the privacy of any other person (other than the special care recipient). 15
- 67G Victims must be notified of decisions made under section 67**
- (1) The Director-General must advise the following persons of the matters specified in **subsection (2)**:
- (a) a person notified under **section 67C**;
- (b) a person who makes a submission under **section 67E(2)** about the decision of whether to authorise leave under section 67(1). 20
- (2) The specified matters are—
- (a) whether the Director-General has authorised a special care recipient to be on leave under section 67(1);
- (b) if the Director-General has authorised the special care recipient leave, any terms and conditions applying to the special care recipient under section 67(1). 25
- (3) The Director-General may withhold advice of a particular term or condition if, in the Director-General's opinion, disclosing the term or condition would unduly interfere with the privacy of any other person (other than the special care recipient). 30
- 67H Information about victims not to be disclosed**
- (1) This section applies to **sections 67B to 67G**.
- (2) No person may, directly or indirectly, disclose to the special care recipient the current address or contact details of any victim of the special care recipient. 35
- 13 Section 93 amended (Where person considered not to require further care as special care recipient)**
- (1) Replace section 93(1) with:

- (1) If a certificate in the form required by section 92 states the opinion specified in subsection (2)(b) of that section, the co-ordinator must—
- (a) forward the certificate to the Minister for the purposes of section 33 of the Criminal Procedure (Mentally Impaired Persons) Act 2003; and
 - (b) give or send a copy of the certificate to every victim to whom section 37 of the Victims Rights Act 2002 applies, or their representative.
- (2) In section 93(2), replace “subsection (1)” with “**subsection (1)(a)**”.
- (3) After section 93(2), insert:
- (3) A copy of the certificate sent to a victim under section 93(1)(b) must be accompanied by the following:
- (a) a statement of the legal consequences of the finding set out in the certificate;
 - (b) a statement of the victim’s right to make a submission under **section 33(4A)** of the Criminal Procedure (Mentally Impaired Persons) Act 2003 to the Minister concerning whether the patient’s continued detention is necessary.

13A New Schedule 1 inserted

Insert the **Schedule 1** set out in **Schedule 3** of this Act as the first schedule to appear after the last section of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

Part 4

Amendments to the Victims’ Rights Act 2002

14 Principal Act

This Part amends the Victims’ Rights Act 2002 ~~(the principal Act)~~.

14A Section 4 amended (Interpretation)

- (1) In section 4, definition of **offence**, after paragraph (b), insert:
- (c) includes an offence—
 - (i) committed against the victim; and
 - (ii) in respect of which the court recorded a finding of proven but insane under **section 20** of the Criminal Procedure (Mentally Impaired Persons) Act 2003
- (2) In section 4, replace the definition of **offender** with:
- offender**, in relation to a victim,—
- (a) means a person—
 - (i) convicted of the crime or offence that affected the victim; or

- (ii) charged with the crime or offence that affected the victim, and in respect of which the court recorded a finding of proven but insane under **section 20** of the Criminal Procedure (Mentally Impaired Persons) Act 2003; 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
- (3) In section 4, insert in its appropriate alphabetical order:
proven but insane has the same meaning as in section 4(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003
- 14AA New section 5A inserted (Transitional, savings, and related provisions)**
After section 5, insert:
- 5A Transitional, savings, and related provisions**
The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.
- 14B Cross-heading above section 17AA replaced**
Replace the cross-heading above section 17AA with:
- Part 2A**
Victim impact statements
Definitions and purpose
- 14C Section 17AA amended (Victim impact statement defined)**
In section 17AA(1)(a)(ii)(B), after “sentencing the offender”, insert “or making an order under section 24(1) or 25(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 in relation to a defendant who is acquitted on account of insanity”.
- 14D New cross-heading above section 17 inserted**
After section 17AB, insert:
- Information to be ascertained*
- 14E Section 20 renumbered and repositioned (Statements by others disadvantaged by offence)**
Renumber section 20 as **section 17AAB** and reposition it after section 17AA.
- 14F New cross-heading above section 21AA inserted**
Before section 21AA, insert:

*Sentence indication***14G New cross-heading above section 21 inserted**

Before section 21, insert:

*Use by judicial officer***14H Section 21 amended (Victim impact statement to be submitted to judicial officer)**

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Replace section 21(1)(a) with:

(a) to the judicial officer—

(i) sentencing the offender; or

(ii) making an order under section 24(1) or 25(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 in relation to a defendant who is acquitted on account of insanity; and

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14I Section 22 amended (Victim impact statement may be read to court)

In section 22(1), after “sentencing the offender”, insert “or making an order under section 24(1) or 25(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 in relation to a defendant who is acquitted on account of insanity”.

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14J Section 22A amended (Victim impact statement may be presented to court in some other manner)

In section 22A, after “sentencing the offender”, insert “or making an order under section 24(1) or 25(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 in relation to a defendant who is acquitted on account of insanity”.

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14K New section 22C inserted (Judicial officer not to take into account withheld part)

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After section 22B, insert:

22C Judicial officer not to take into account withheld part

(1) In this section, **withheld part** means a part of a victim impact statement withheld under an order made under section 25.

(2) A judicial officer must not take into account a withheld part in—

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(a) sentencing the offender; or

(b) making an order under section 24(1) or 25(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 in relation to a defendant who is acquitted on account of insanity.

14L New cross-heading above section 23 inserted

Before section 23, insert:

Distribution or disclosure

14M Section 26 repealed (Judicial officer not to take into account withheld part)

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Repeal section 26.

14N Section 28 and cross-heading renumbered and repositioned

Renumber section 28 as **section 16B** and reposition it, with the cross-heading above it, after section 16A.

14O New section 30A and cross-heading inserted

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After section 30, insert:

Notice for victims of persons or offenders subject to mental health or intellectual disability care

30A Victims of persons or offenders subject to mental health or intellectual disability care must be notified of person's or offender's designation

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(1) Without limiting sections 29 and 32B, this section applies to a victim if the person accused of the offence or, as the case requires, the offender—

(a) is liable to be detained in a hospital or facility in connection with the offence; and

(b) when their liability of that kind began, they were liable to be detained in a hospital or facility—

(i) as a special patient as defined in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or as a special care recipient as defined in section 6(2) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; or

(ii) under an order made under section 25(1)(a) or (b) or 34(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

(2) The Director-General of Health must give a victim to whom this section applies—

(a) notice of whether the person or offender has been designated as—

(i) a special patient as defined in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992; or

(ii) a special care recipient as defined in section 6(2) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; or

(iii) a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992, under an order made under section 25(1)(a)

- or 34(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003; or
- (iv) a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, under an order made under section 25(1)(b) or 34(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003; and 5
- (b) an explanation of the meaning and consequences of the person or offender's designation; and
- (c) a list of the future notifications that the victim is eligible to receive.
- (3) The Director-General of Health must give notice under **subsection (2)** to the victim as soon as practicable after the person or offender has been designated as one of the classes of people described in **subsection (2)(a)**. 10
- 15 Section 37 amended (Notice of discharge, leave of absence, or escape or death of accused or offender who is compulsorily detained in hospital or facility)** 15
- (1) In section 37(2)(b), replace “the first” with “any”.
- (2) In section 37(2)(ba), replace “the first” with “any”.
- 15AAA New Schedule 1AA inserted**
- Insert the **Schedule 1AA** set out in **Schedule 4** of this Act as the first schedule to appear after the last section of the Victims' Rights Act 2002. 20
- 15A Consequential amendments to Victims' Rights Act 2002**
- Amend the Victims' Rights Act 2002 as set out in **Part 2 of the Schedule**.

Part 5

Consequential amendments to other enactments

- 16 Consequential amendments to other enactments** 25
- Amend the enactments specified in **Part 3 of the Schedule** as set out in that schedule.

Schedule 1**New Part inserted into Schedule 1AA of Criminal Procedure
(Mentally Impaired Persons) Act 2003****s 7A****Part 2**

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**Provision relating to Rights for Victims of Insane Offenders Act
2019****2 Transitional provision**

- (1) This clause applies to any matter initiated under section 20, 31, or 33 before the commencement of this clause. 10
- (2) If this clause applies, the provisions of the relevant section, as they read immediately before the commencement of this clause, continue to apply to the matter as if they had not been amended or replaced by the Rights of Victims of Insane Offenders Act 2019.
- (3) In this section, **matter** includes any— 15
- (a) action undertaken; and
 - (b) decision taken; and
 - (c) notice given; and
 - (d) proceeding commenced; and
 - (e) application made; and 20
 - (f) agreement entered into; and
 - (g) requirement imposed.

Schedule 2
**New Schedule 1AA inserted in Mental Health (Compulsory
Assessment and Treatment) Act 1992**

s 11AAA

Schedule 1AA
Transitional, savings, and related provisions

s 2C

Part 1
**Provisions relating to Rights for Victims of Insane Offenders Act
2019**

1 **Transitional provision**

- (1) This clause applies to any matter initiated under section 50, 52, 80, or Schedule 1 before the commencement of this clause.
- (2) If this clause applies, the provisions of the relevant section or Schedule, as they read immediately before the commencement of this clause, continue to apply to the matter as if they had not been amended or replaced by the Rights for Victims of Insane Offenders Act **2019**.
- (3) In this section, **matter** includes any—
 - (a) action undertaken; and
 - (b) decision taken; and
 - (c) notice given; and
 - (d) proceeding commenced; and
 - (e) application made; and
 - (f) agreement entered into; and
 - (g) requirement imposed.

Schedule 3**New Schedule 1 inserted in Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003****s 13A****Schedule 1**

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Transitional, savings, and related provisions**s 9A****Part 1****Provisions relating to Rights for Victims of Insane Offenders Act 2019**

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1 Transitional provision

(1) This clause applies to any matter initiated under section 66 before the commencement of this clause.

(2) If this clause applies, the provisions of the relevant section, as they read immediately before the commencement of this clause, continue to apply to the matter as if they had not been amended or replaced by the Rights of Victims of Insane Offenders Act 2019.

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(3) In this section, **matter** includes any—

(a) action undertaken; and

(b) decision taken; and

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(c) notice given; and

(d) proceeding commenced; and

(e) application made; and

(f) agreement entered into; and

(g) requirement imposed.

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Schedule 4
New Schedule 1AA inserted in Victims' Rights Act 2002

s 15AAA

Schedule 1AA
Transitional, savings, and related provisions

5

s 5A

Part 1
Provisions relating to Rights for Victims of Insane Offenders Act 2019

- 1 Transitional provision** 10
- (1) This clause applies to any matter initiated under section 17AA, 20, 21, 22, 22A, 26, or 28 before the commencement of this clause.
- (2) If this clause applies, the provisions of the relevant section, as they read immediately before the commencement of this clause, continue to apply to the matter as if they had not been amended or replaced by the Rights for Victims of Insane Offenders Act 2019. 15
- (3) In this section, **matter** includes any—
- (a) action undertaken; and
 - (b) decision taken; and
 - (c) notice given; and 20
 - (d) proceeding commenced; and
 - (e) application made; and
 - (f) agreement entered into; and
 - (g) requirement imposed.

Schedule 5

Consequential amendments

ss 11A, 15A, 16

Part 1

Consequential amendments to Mental Health (Compulsory Assessment and Treatment) Act 1992

- In section 46, replace “section 50” with “**section 50A**”.
- In section 48, replace “section 50” with “**section 50A**”.
- In section 51(1), replace “section 50” with “**section 50A**”.
- In section 51(3), replace “section 50(1)” with “**section 50A(1)**”.
- In section 51(5), replace “section 50(3)” with “**section 50G(1)**”.
- In section 51(6), replace “section 50(1)” with “**section 50A(2)**”.
- In section 51(7), replace—
- (a) “section 50(3)” with “**section 50G(1)**”; and
- (b) “section 50(1)” with “**section 50A(2)**”.
- In section 52A(1)(a) and (2)(a), replace “section 50” with “**section 50A**”.

Part 2

Consequential amendments to Victims’ Rights Act 2002

- In section 17AA(1)(a)(i)(B), replace “section 20” with “**section 17AAB**”.
- In section 21(2), replace “section 20” with “**section 17AAB**”.
- In section 53, replace “the Schedule” with “**Schedule 1**”.
- In the Schedule heading, after “**Schedule**” insert “**1**”.

Part 3

Consequential amendments to other enactments

Criminal Procedure Act 2011

- In section 200(6), replace “section 28” with “**section 16B**”.

Residential Care and Disability Support Services Regulations 2018

- In regulation 6(f)(i), replace “section 50” with “**section 50A**”.

Rights for Victims of Insane Offenders Bill

Legislative history

4 April 2019
1 July 2020

Introduction (Bill 129–1)
First reading and referral to Justice Committee