Prisoners' and Victims' Claims Bill

Report by the Privacy Commissioner to the Minister of Justice in relation to Part 2(1) of the Prisoners' and Victims' Claims Bill

11 April 2005

Privacy Commissioner
Te Mana Matapono Matatapu

PRISONERS' AND VICTIMS' CLAIMS BILL
PART 2(1)

1. Introduction

This report discusses only Part 2(1) of this bill, which aims to ensure that compensation for breaches of the New Zealand Bill of Rights Act 1990, Human Rights Act 1993 and Privacy Act 1993, is treated as a remedy of last resort for prisoners. Under the bill, compensation will only be possible when all other remedies have been explored and do not provide effective redress.

2. Part 2(1): Compensation sought by claims by prisoners

2.1 Clause 13 states:

> **"13 Restriction on awarding of compensation**
> (1) No court or tribunal may, in proceedings to which this subpart applies, award any compensation sought by a specified claim unless satisfied that –
> (a) the plaintiff has made reasonable use of all of the specified internal and external complaints mechanisms reasonably available to him or her to complain about the act or omission on which the claim is based, but has not obtained in relation to that act or omission redress that the Court or Tribunal considers effective; and
> (b) another remedy, or a combination of other remedies, cannot provide in relation to the act or omission on which the claim is based redress that the Court or Tribunal considers effective.
> (1) In this section, reasonable use of a complaints mechanism means the use that the Court or Tribunal considers it reasonable for the plaintiff to have made in the circumstances."

2.2 A "specified claim" includes a breach of, or interference with, a specified right, which includes a breach of the New Zealand Bill of Rights Act and the Human Rights Act and an interference with privacy pursuant to the Privacy Act.[1]

2.3 "Specified internal and external complaints mechanisms" include the relevant prison's internal complaints system, investigation of the complaint by the inspector of corrections and, in relation to a matter that is not more properly within the jurisdiction of another authority, official agency or body, or statutory officer, investigation by the Ombudsman.[2]

2.4 A prisoner can pursue a Privacy Act complaint in the normal way through the Privacy Commissioner and, if need be, through the Human Rights Review Tribunal. However, if the Tribunal were to contemplate awarding compensation it would need to be satisfied that a prisoner had also followed additional procedures laid out in the bill. These are not procedures that other classes of plaintiff in the Tribunal need to have followed. The prisoner would presumably have had to go through the following mechanisms (in addition to the Privacy Commissioner's

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1 Prisoners' and Victims' Claims Bill, clause 6(2).

2 This definition varies slightly depending on the type of prisoner. For example, the definition for a 2004 prisoner is different from that for a 1954 prisoner. See: Prisoners' and Victims' Claims Bill, clause 7.

processes) before the Tribunal would consider the prisoner to have made all reasonable use of the specified internal and external complaints mechanisms:

- the prison's internal complaints system, and
- an investigation by the inspector of corrections (or some variant depending on the type of prisoner under clause 7 of the bill).

2.5 There may sometimes be public benefits in requiring a potential litigant to make reasonable use of what might be termed Alternative Dispute Resolution (ADR) mechanisms, especially where these have an investigative and low-level complaints process, before a court may become seised of a dispute. This may reduce the impact on judicial resources. Such mechanisms may be well suited to investigating and resolving prisoner's complaints in an effective and timely manner.

2.6 I do not dispute that there can be certain benefits in requiring an ADR filter before accessing the courts to pursue certain types of cases. However such a filter *already exists* in relation to Privacy Act cases. I therefore recommend that Privacy Act cases be excluded from the operation of Part 2(1) of the bill.

2.7 In particular it should be noted that:

- Prisoners, and all other classes of litigant, cannot generally take cases directly to the courts (Privacy Act, s.11)[3] but must go through a specialist tribunal, the Human Rights Review Tribunal
- Prisoners, and all other classes of litigant, cannot access that tribunal without first taking the complaint to the Privacy Commissioner (Privacy Act, s.83) who undertakes an ADR-type complaints process with investigative and conciliatory aspects
- The processes are subject to further control by the Privacy Commissioner (who has, for example, powers to discontinue an investigation, and who can intervene in cases brought by an individual litigant) and the Director of Human Rights Proceedings, who may take control of meritorious cases and take action in the Tribunal himself (Privacy Act, s.82(2)).

2.8 Therefore, there is already a process, namely an investigation by my office, which seeks to resolve the matter at an informal level. I do not have the power to award compensation, although I do facilitate settlements in appropriate cases. The Tribunal can only consider awarding damages for an interference with privacy after a case has been through the Privacy Commissioner's processes. In fact, only a very small proportion of cases coming to my office, ever progress onto the Tribunal.[4] It is questionable as to what clear benefit is gained from *requiring* a prisoner by law to use an internal complaints system (compared with, say, merely encouraging them to do so which I would be more than happy to do when receiving a complaint from a prisoner) particularly where that step represents an inroad into legal rights and public sector accountabilities. It will add more steps to the process and may contribute to complexity, delay and perhaps in some cases

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[3] There is an exception in relation to access rights to information held by public bodies, which can be enforced by the courts (Privacy Act, s.11(1)). This is rarely done except in the case of access in criminal proceedings, a matter shortly to become subject to a special criminal disclosure regime under the Criminal Procedure Bill.

[4] For example, there were 934 complaints received by my office in 2003/04 but only 19 new privacy proceedings launched in the Tribunal that year.

even denial of effective justice. It will complicate the handling of complaints and tribunal proceedings.

2.9 I question whether those responsible for internal complaints system, and other processes, will have sufficient specialist knowledge of the Privacy Act to provide a mandatory preliminary complaints mechanism for privacy matters. I accept that these processes may promote good general resolution of complaints, including those with a privacy component, especially if the process is perceived by complainants as fair and relevant. Sometimes complaints cannot be resolved without an external review and forcing unwelcome internal processes may simply delay the inevitable for some complainants, and discourage other genuine complainants.

2.10 Overall, including the Privacy Act in Part 2(1) of the bill results in the prisoner effectively having to utilise new complaints mechanisms that will not always add anything useful to the existing processes. There may be some scope to better promote the use of available internal processes to prisoners, without it being a mandatory requirement, and my office would be happy to explore with the Department of Corrections practical ways for that to be done with those prisoner cases coming to my office.

3. Recommendation

I recommend that interferences with privacy under the Privacy Act be excluded from the operation Part 2(1) of the bill and specifically that clause 6 be amended by deleting clause 6(2)(c), which refers to an interference with the privacy of an individual under the Privacy Act.

Marie Shroff
Privacy Commissioner

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