A Guide to the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

Note/disclaimer

While all care has been taken in the preparation of these guidelines, they are not intended to act as a substitute for the Intellectual Disability Compulsory Care & Rehabilitation Act itself, or for legal advice about the requirements of the IDCCR Act.

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Introduction

These guidelines introduce key aspects of the application and operation of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ('the IDCCR Act'). They are intended for a wide audience including compulsory care co-ordinators, compulsory care managers, specialist assessors, disability service providers, caregivers, family and district inspectors.

The guidelines have also been designed to assist forensic mental health staff, court staff, lawyers and police in their work with people who come within the scope of the IDCCR Act.

What is the Intellectual Disability (Compulsory Care and Rehabilitation) Act for?

Compulsory care and rehabilitation

The IDCCR Act establishes a scheme which authorises the provision of compulsory care and rehabilitation to individuals with an intellectual disability who have been charged with, or convicted of, an imprisonable offence.

The stated purposes of the Act (as set out in section 3) are:

> To provide the courts with appropriate compulsory care and rehabilitation options for people who have an intellectual disability and who are charged with, or convicted of, an offence
>
> To recognise and safeguard the special rights of individuals subject to the Act
>
> To provide for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, remain subject to this Act.

Key components

The key components of the scheme established by the Act are as follows:

- **Its scope** covering:
  - individuals who have been charged with or convicted of an offence
  - who have an *intellectual disability* as defined by section 7 of the Act.
- **The ways in which an individual may become subject to the Act**: an individual with an intellectual disability can enter the scheme established by the Act in three ways:
  - through an order made in the course of criminal proceedings bought against the person or
  - by being transferred from prison (where that person has been serving a prison sentence) or
  - by being transferred from the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MH(CAT) Act), where the individual was subject to the MH(CAT) Act after being charged with or convicted of an imprisonable offence.

- **the creation of two categories of care recipient:** the Act creates two categories of care recipient:
  - special care recipients (who must always receive care and rehabilitation in a secure facility); this category is similar to the special patient category under the MH(CAT) Act 1992
  - care recipients who can, depending on their individual circumstances, either receive care and rehabilitation in a secure facility or in a supervised setting.

Procedures for assessing the care and rehabilitation needs

Individuals brought under the IDCCR Act must have their care and rehabilitation needs assessed. This will entail the preparation of care and rehabilitation plans for each individual under the Act, involving, wherever possible, consultation between care co-ordinators, specialist assessors and an individual's family and whānau.

Rights and safeguards

The Act contains clear statements of the rights of individuals who are receiving care and rehabilitation under the Act.

Safeguards for protecting and giving effect to these rights include the appointment of district inspectors who will carry out a role under the IDCCR Act which is similar to the role under the MH(CAT) Act 1992.

The Act also provides for regular mandatory reviews of an individual's condition and legal status under the Act by health and disability professionals and the courts respectively.

Why is the Act required?

Prior to 1992 individuals with an intellectual disability came within the scope of the Mental Health Act 1969 and could be made subject to orders under that Act.

The 1969 Act was linked to the Criminal Justice Act 1985 ('the CJA Act'). This link allowed the courts to make orders placing individuals with an intellectual disability under the 1969 Act as an alternative to sending them to prison or discharging them into the community.

In 1992 the MH(CAT) Act replaced the 1969 Act. One of the most significant changes brought about by the 1992 Act was the introduction of a new definition of the term 'mental disorder'. This definition excluded from the ambit of the mental health legislation individuals who had an intellectual disability (unless they also had a mental illness).

The IDCCR Act creates a new system facilitating the provision of appropriate compulsory care and rehabilitation for individuals with an intellectual disability.

A new Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP) Act) has also been enacted. This Act replaces the provisions of Part VII of the CJA Act.

Together with the IDCCR Act, the CP(MIP) Act provides the courts with the ability to order individuals who have been charged with or convicted of an imprisonable offence to accept compulsory care and rehabilitation within the system created by the IDCCR Act.

Who does the IDCCR Act cover?

The Act applies to the following classes of individuals with an intellectual disability:

- individuals being held pending trial or sentence
- individuals who are undergoing assessments to allow the criminal courts to decide whether they should be subject to the IDCCR and to help the court to determine what type of order is appropriate
- individuals who are subject to court orders made under the CP(MIP) Act
- individuals transferred from prisons and from the mental health services.

What is Intellectual Disability?

For compulsory care to be permissible under the IDCCR Act a person must be assessed as having an intellectual disability as defined in the Act.

Before an individual can be determined to have an intellectual disability for the purposes of the Act they must have:[1]

A permanent impairment that:

1. results in significant sub-average general intelligence[2] as measured by standard psychometric tests generally used by clinicians
2. wherever practicable, a person's general intelligence must be assessed by applying standard psychometric tests generally used by clinicians
3. results in significant deficits, as measured by tests generally used by clinicians, in at least two of skills listed in subsection 4 of the definition, namely:
   a. communication
   b. self-care
   c. home living
   d. social skills
   e. use of community services
   f. self-direction
   g. health and safety
   h. reading, writing, and arithmetic
   i. leisure and work

   and,
4. became apparent during the developmental period[3] of the person.

Exclusions

Section 8 of the Act specifically provides that an individual will not have an intellectual disability for the purpose of the Act simply because they:

1. have a mental disorder; personality disorder; or acquired brain injury or
2. feel neither shame nor remorse for harm they have caused to others.

The effect of this exclusion is that unless an individual has an intellectual disability as well as falling within one of the classes described, then the individual cannot be subject to compulsory care under the Act.

[1] Section 7.

[2] A person's general intelligence is defined as significantly sub-average if it results in an intelligence quotient that is expressed as 70 or less and with a confidence level of not less than 95 percent.

[3] The developmental period of a person generally finishes when the person turns 18 years.

Key Roles and Responsibilities

A number of positions have been created to facilitate the operation of the system created by the Act and to ensure that care recipient's rights are safeguarded.

These positions are:

- the compulsory care co-ordinator
- the care manager
- the specialist assessor
- the medical consultant
- the district inspector.

Compulsory care co-ordinator ('the co-ordinator')

Co-ordinators are designated by the Director-General of Health under section 140 of the IDCCR Act and are employed by Regional Intellectual Disability Care Agencies (RIDCAs) who are contracted to the Ministry of Health.

The role of the co-ordinator is to act as the administrator of the system created by the Act. They are responsible for:

- processing applications for compulsory care orders and organising assessments
- ensuring needs assessments are carried out and care and rehabilitation plans are developed
- applying for court orders for compulsory care
- liaising with the court and providing reports regarding changes to compulsory care orders
- designating care managers
- receiving (and in appropriate cases acting on) reports made by district inspectors
- performing certain duties under the Victims Rights Act 2002 which are to be delegated to co-ordinators by the Director-General of Health.

Care manager

Care managers are designated by the co-ordinator (section 141 of the IDCCR Act) for each individual under the Act and are employed by Regional Intellectual Disability Supported Accommodation Services (RIDSAS) and Regional Intellectual Disability Secure Services (RIDSS).

Care managers are legally entrusted with the care and rehabilitation of individual care recipients and are responsible for developing and implementing an individual's care and rehabilitation plan and for ensuring regular clinical reviews of the care recipient's condition take place (section 77(3) of the IDCCR Act).

Care managers' powers include:

- seclusion and restraint of care recipients in accordance with guidelines issued by the Director-General of Health[4]
- granting leave for care recipients no longer subject to the criminal justice system[5]
- re-taking care recipients absent without leave.[6]

Specialist assessors

Specialist assessors are health and disability professionals who are designated by the Director-General of Health.[7]

They play a key role in the assessment process of a proposed care recipients care needs. They are responsible for assessing:

- whether a proposed care recipient has an intellectual disability and is in need of compulsory care[8] (section 37(1)(a))
- the level of care that is required to manage the risk that the care recipients behaviour poses[9] (section 37(1)(b)).

Specialist assessors are also responsible for completing clinical reviews for the purpose of Part 6 of the IDCCR Act[10] (section 78) and for issuing a certificate, which states whether the status of the care recipient should continue, or whether it needs to be changed.[11]

Medical consultants

Medical consultants are medical practitioners who are designated by the Director-General of Health.[12] Their role is to provide a second opinion on whether an individual should receive medication for the purpose of managing their condition. Essentially this second opinion is to provide a safeguard in relation to medication of care recipients.

District inspectors

District inspectors are persons currently appointed under the MH(CAT) Act who are designated by the Director-General of Health to perform functions specified in the IDCCR Act in a specified locality. They provide an independent monitoring function to ensure that people subject to the Act have their legal rights respected and upheld.

4 Sections 60 and 61.
5 Section 65.
6 Section 111.
7 Section 146.
8 Section 37(1)(a).
9 Section 37(1)(b).
10 Sections 77 and 78.
11 Section 79.
12 Section 146.

The responsibilities of district inspectors are outlined in **Part 7** of the IDCCR Act and include:

- regular visits to facilities in the locality for which they are responsible
- investigating any alleged breach of care recipient's rights under the Act[13]
- conducting inquiries and investigations into any alleged breach of the Act or breach of duty by any director, employee, or agent of a service[14]
- assisting with inquiries by High Court Judges.[15]

[13] Section 98.
[14] Section 101.
[15] Section 102.

Assessment of Care and Rehabilitation Needs

Needs assessments and care and rehabilitation plans

The procedures to be followed for conducting needs assessments and preparing care and rehabilitation plans for (proposed) care recipients are outlined in **Part 3** of the IDCCR Act.

Needs assessments

Who requires a needs assessment?

Co-ordinators are responsible for the assessment of care and rehabilitation needs of every person:

- whose assessment is required by section 23(5)[16] or section 35(4)[17] of the CP(MIP) Act
- who is a care recipient because of an order made under the C
- P(MIP) Act[18]
- who is an inmate or former special patient who has been assessed by a specialist assessor as having an intellectual disability[19]
- who, in accordance with section 47A[20] of the MH(CAT) Act, is removed to a facility.

What is the timeframe for assessment?

When a referral for assessment is received the co-ordinator must initiate the assessment process as soon as practicable after one of a series of events specified in section 17(1) of the IDCCR Act. The needs assessment must be commenced by holding a meeting with the care recipient concerned and any member of the care recipient's family or whänau or a caregiver.[21] At this meeting the co-ordinator must explain the outcome of the assessment by an assessor[22] that the person has an intellectual disability, and also the purpose of the needs assessment.

The process of needs assessment must then be completed as quickly as practicable and may continue for no longer than 30 days[23] from the date of this initial meeting.[24]

[16] This is for the purpose of providing guidance to a court on whether it should impose an order under section 24 or 25 of the CP (MIP) Act and in the case of an assessment under section 35, whether an order should be imposed under section 34(1)(a)(ii) or 34(1)(b)(ii). In both cases the choice determines whether an individual is to be a special care recipient or care recipient.

[17] Where a court is satisfied (based on the evidence of one or more health assessors) that an offender has an intellectual disability, the court may commit that person to a hospital or facility.

[18] Sections 24(2)(b), 25(1)(b) and 34(1)(a)(ii) and 34(1)(b)(ii) of the CP (MIP) Act.

[19] Section 38(4) of the IDCCR Act.

[20] Where a Director of Area Mental Health Services, with the consent of the Director of Mental Health arranges for a patient to be transferred to a facility under the IDCCR Act.

[21] Section 18.

[22] **Assessor** means either a specialist assessor under the IDCCR Act or a health assessor under the CP(MIP) Act.

[23] Thirty days means 30 calendar days starting with the first day after the meeting (that is it should be counted as included weekends and holidays). If the 30th day falls on a day which is not a working day however, then the last day of the period will be deemed to be the next working day (section 35(6) of

Who should be consulted?

In order to fully assess the needs of the care recipient the co-ordinator shall wherever possible consult with the assessor/s[25] who assessed the care recipient's condition and the care recipient's care manager.

The co-ordinator should also make every reasonable effort to consult the following people:

- the care recipient
- any welfare guardian of the care recipient
- the care recipient's parent/s or guardian/s if the care recipient is a child or young person
- the principal caregiver of the care recipient
- members of the care recipient's family or whänau
- any support person of the care recipient
- any lawyer of the care recipient.

If the co-ordinator wishes, he or she has the option of discharging the consultation obligation by holding a case conference.[25]

Cultural assessment

As part of the needs assessment, the co-ordinator must try to identify the care recipient's culture, ethnicity, language, and any religious or ethical beliefs.

If the co-ordinator considers that the care recipient is Mäori, and the care recipient agrees with that assessment, the co-ordinator must try to obtain the views of a Mäori person[26] or organisation concerned with, or interested in the care of people with intellectual disability.

Cultural assessment should be carried out in accordance with the guidelines on cultural assessment issued by the Director-General of Health.

Care and rehabilitation plans

When the needs assessment is completed the co-ordinator instructs the care recipient's care manager to arrange for the preparation of a care and rehabilitation plan.

The care and rehabilitation plan must identify the following matters and the manner in which they can be met:

- the social, cultural, and spiritual needs of the care recipient
- any medical or psychological treatment that the care recipient requires

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the Interpretation Act 1999). So if the 30th day is a Sunday the last day of the period would be the following Monday.

[25] Section 22 of the IDCCR Act provides that a case conference can be held at a specified place or by means of a teleconference.

[26] Wherever possible this person should be a member of the care recipients whänau, hapü or iwi (section 23(3)) of the IDCCR Act.

- any requirements for medication needed to manage the care recipient's condition
- the circumstances in which the care recipient is likely to behave in a manner that endangers the health or safety of the care recipient or of others
- any aptitudes or skills of the care recipient that should, if practicable, be maintained and encouraged
- any special concerns or aversions of the care recipient
- any special dietary needs of the care recipient
- any other special needs of the care recipient.[27]

The care and rehabilitation plan must also take into account the needs identified in the care recipient's cultural assessment.

In addition, the care and rehabilitation plan must identify the kind of supervision required to avoid undue risk to the health or safety of the care recipient and of others.

The care and rehabilitation plan must also set out a care programme that identifies the following:

- the objectives of the care proposed and the approach/es to be followed to achieve those objectives
- the general nature of the care proposed to be provided
- the degree of security required.[28]

Once completed the care and rehabilitation plan must be approved by the co-ordinator.[29]

The co-ordinator and responsible care manager may vary the care and rehabilitation plan as long as the variation is consistent with any relevant court order that applies to the care recipient.

Approval from the Family Court is required if it is proposed to amend a care programme forming part of a care and rehabilitation plan where the care recipient in question is subject to a compulsory care order made under section 45 of the IDCCR Act.

[27] Section 25(a) (a) to (h). of the IDCCR Act

[28] Section 26 refers. of the IDCCR Act

[29] Section 24(2). of the IDCCR Act

The Assessment of Inmates and Former Special Patients

Part 4 of the IDCCR Act sets out the process that must be followed before a prison inmate or a former special patient[30] under the MH(CAT) Act 1992 can be made the subject of an IDCCR Act order.

Application for assessment

A prison superintendent or Director of Area Mental Health Services (DAMHS) may make an application to a co-ordinator to have an inmate or former special patient assessed under the IDCCR Act.

Applications must be in writing and must state the applicant's reasons for believing that the inmate or former special patient has an intellectual disability.[31] In addition, all applications must be accompanied by a certificate from a medical practitioner or registered clinical psychologist who has examined the person to be assessed within three days of the date of the application.[32] The certificate must state that the person has an intellectual disability and give reasons why the medical practitioner or psychologist believes that the person may come within the definition of intellectual disability under the Act.

Assessment

On receipt of an application for assessment of a prison inmate or former special patient, the co-ordinator must initiate an assessment by designating a care manager and one or more specialist assessors.

The assessment must take place within seven days after the receipt of the application by the co-ordinator.

Section 34 of the Act allows the individual to be taken from prison or from a mental health facility to a facility under the IDCCR Act for the purpose of the assessment.

The section also states that an inmate cannot stay overnight in an IDCCR facility except in accordance with section 35.

Under section 35 of the IDCCR Act the co-ordinator may notify the prison superintendent or DAMHS that the proposed care recipient must stay in a specified facility during the assessment period; and/or while a needs assessment is being carried out; and/or while an application for compulsory care is pending before the Family Court.

[30] A former special patient is defined by the Act to mean a special patient who has been reclassified under the CP (MIP) Act or under section 84(6) of the MH(CAT) Act with the end result that that they are now an 'ordinary' patient under that the MH(CAT) Act and no longer subject to the restrictions that would otherwise apply if the individual continued to be a special patient.

[31] Section 30.

[32] Section 31.

Where the co-ordinator has given notice that a prison inmate must stay in a facility, the inmate ceases to be in the legal custody of the superintendent of the institution where they are serving their prison sentence and the care manager becomes legally entrusted with the proposed care recipient's care.

The specialist assessor/s designated by the co-ordinator must carry out an assessment of the proposed care recipient in order to determine whether the proposed care recipient:

1. has an intellectual disability and is in need of compulsory care; and if so
2. what level of care is required to manage the proposed care recipient's risk to the health and safety of themselves or others.[33]

In order to obtain a comprehensive understanding of the proposed care recipient's condition and background, the specialist assessor/s must endeavour to consult with the proposed care recipient's:

- principal caregiver
- welfare guardian
- parent/s or guardian/s if the proposed care recipient is a child or young person
- family or whänau.

At the conclusion of the assessment the specialist assessor/s must submit a report to the co-ordinator. The report must state whether the proposed care recipient has been assessed as having an intellectual disability as defined in the Act. If more than one specialist assessor is involved this determination must be unanimous.

If the report indicates that the proposed care recipient does not have an intellectual disability then the co-ordinator must immediately advise the proposed care recipient of that result and ensure that they are returned to the custody of the prison superintendent or the DAMHS who referred them for assessment.

If the report indicates that the proposed care recipient does have an intellectual disability then the co-ordinator must initiate the process for needs assessment set out in **Part 3** of the Act.

[33] Section 37.

Applications for Compulsory Care Orders for Inmates and Former Special Patients

Following assessment of the care and rehabilitation needs of a proposed care recipient and the approval of a care and rehabilitation plan by the co-ordinator, the co-ordinator must decide whether to apply for a compulsory care order for the proposed care recipient.

Written notice of this decision must be sent to the following people:

- the proposed care recipient
- the appropriate prison superintendent or DAMHS (as the case may require)
- any welfare guardian of the proposed care recipient
- the parent/s or guardian/s of the proposed care recipient if they are a child or young person
- the proposed care recipient's principal caregiver
- any support person of the proposed care recipient
- any lawyer of the proposed care recipient
- the care manager of the proposed care recipient
- the responsible district inspector.

If the co-ordinator decides not to proceed with an application, then the individual who has been assessed is returned to the custody of the prison superintendent or the DAMHS as the case requires.[34]

Where the co-ordinator decides to make an application for an order, section 40 of the Act sets out the information that must be included in the application.

The Family Court's role

Once an application has been made for a compulsory care order, a Family Court Judge must examine the proposed care recipient within 14 days of the application being filed in court.[35]

As well as examining the proposed care recipient, the Judge must consult with the co-ordinator and at least one specialist assessor involved with the case. The Judge may also consult with any other person they think fit in order to make a proper assessment of the proposed care recipient's condition.

Following this examination the Judge may either:

- direct the co-ordinator to withdraw the application[36] or
- conduct a hearing of the application for a compulsory care order.[37]

Where an application is withdrawn, a proposed care recipient who is staying in a facility must be immediately returned to the custody of the appropriate prison superintendent or DAMHS.

[34] Section 39(3) of the IDCCR Act

[35] Section 41 of the IDCCR Act

[36] Section 42 of the IDCCR Act

[37] The rules governing these hearings are set out in Part 9 of the IDCCR Act.

Care Recipient's Status and Rights

The status and rights of people subject to compulsory care orders are detailed in **Part 5** of the Act. As well as dealing with care recipients' legal status and rights, Part 5 specifies the care recipients' obligation to accept care; the circumstances in which care recipients may be placed in seclusion, restrained, or receive medical treatment without their consent; and provisions for authorised leave.

In addition to the rights specified under the Act, care recipients are consumers under the Code of Health and Disability Services Consumers' Rights.[38]

[38] Section 48.

General Status and Specific Rights

Requirement to accept care (section 47)

Each care recipient must have a care manager who has been designated by a care co-ordinator. The care manager is legally entrusted with the care of the care recipient, and care recipients must comply with every lawful direction given to them by their care manager and co-ordinator.

Care recipients are required to accept the care given to them under their court order and care and rehabilitation plan.

General rights to information (section 49)

As soon as a court order is made, care managers must explain to care recipient what their rights are under the Act. This information must be provided in a manner that the care recipient is most likely to understand. For example, the care manager may need to facilitate discussion with plain language and pictorial documentation.

The care manager must also provide the care recipient's guardian, or principal caregiver if the care recipient does not have a guardian, with a written statement of the care recipient's rights.

Specifically the care recipient must be informed of:

- their legal status as a care recipient
- their right to have their condition reviewed by a specialist assessor
- their right to seek a judicial inquiry
- the function and duties of district inspectors designated under section 144 of the Act.

The care manager is under a continuing obligation to keep the care recipient informed about these matters.[39]

Respect for cultural identity (section 50)

Section 13 of the Act provides that powers exercised under the Act, as well as court proceedings conducted under the Act, must be carried out with proper recognition of the care recipient's cultural identity, language and beliefs.[40]

The purpose of section 50 (which should be read in conjunction with section 13) is to make explicit that respect for cultural identity is a right of all care recipients under the IDCCR Act.

[39] Section 49(2).

[40] Respect for cultural identity may include matters such as allowing the care recipient to communicate in their language of choice.

The right to medical treatment (section 51)

This section specifies that every care recipient is entitled to medical treatment and other health care appropriate to their condition.

The appropriate implementation of a care recipient's care and rehabilitation plan which has been tailored to their particular care needs, will be an important means to ensuring that this right is being met.

Consent to visual or audio recording (section 52)

Where it is intended to make a visual or audio recording of an interview with a care recipient, or any aspect of a care recipient's care, the care recipient, or, if they lack capacity, their guardian must give consent.

Section 52 should be read in conjunction with the Health Information Privacy Code 1994.

The right to independent health and disability advice (section 53)

Care recipients are entitled to seek a second opinion by a specialist assessor of their choice. If the specialist assessor agrees to the consultation they must be permitted access to the care recipient upon request.

The right to legal advice (section 54)

Care recipients are entitled to request a lawyer to advise them on their rights and status as a care recipient, or on any other legal issue. Where a lawyer agrees to act for a care recipient they must be permitted access to the care recipient upon request.

The right to company (section 55)

Subject to section 60, which specifies the power to seclude care recipients, every care recipient is entitled to the company of others.

The right to receive visitors and communicate orally with persons outside the facility (section 56)

Every care recipient is entitled, at reasonable times and intervals, to receive visitors and talk with persons outside the facility. This right can only be limited where the care manager has reasonable grounds for believing that a visit or oral communication would be detrimental to the care recipient's interests or care.

The decision by the care manager to limit the care recipient's rights to visits and oral communication must not interfere with the care recipient's rights to contact a specialist assessor, to receive a second opinion or to communicate with a lawyer.

The right to receive and send written communications and other items (sections 57 to 59)

Care recipients are entitled to receive, unopened, any written communications or other items that are sent to them and to have their outgoing written communications or other items dispatched promptly and unopened.

The exception to this provision is where there are reasonable grounds for believing that the receipt by, or dispatch of, written communications or other items could be detrimental to the interests or care of the care recipient or other persons. In this case a care manager, with approval from the co-ordinator, may check and withhold communications.

Note: This does not apply to written communications or other items sent by, or on behalf of, or addressed to:

a) a lawyer
b) a member of Parliament
c) a Judge or officer of the court, or a member or officer of another judicial body
d) an ombudsman
e) the Privacy Commissioner
f) the Health and Disability Commissioner
g) a Human Rights Commissioner
h) in the case of a care recipient who is a child or young person, the Commissioner for Children
i) the Director-General of Health
j) a district inspector
k) the care manager
l) a specialist assessor from whom the care recipient has sought a second opinion under section 53.

Where a care manager withholds a written communication or other item (either sent to, or sent by, the care recipient) the care manager must return the written communication or other item to the sender. If the address of the sender is unknown, or the sender is the care recipient, then the care manager must either send the written communication or other item to the responsible district inspector or produce it when the district inspector next visits the facility.

If a written communication or other item is withheld or not sent, the care manager must inform the care recipient unless the care manager believes that this would be detrimental to the interests and care of the care recipient.

The Code of Health and Disability Services Consumers' Rights

In addition to the rights specified under the Act, care recipients are consumers under the Code of Health and Disability Services Consumers' Rights and accordingly have rights under this code.

Specific Powers Exercisable over Care Recipients

Seclusion (section 60)

Seclusion is defined under the Act as the placing of a care recipient alone in a room or other area that provides a safe environment but does not allow the care recipient to leave without help.

A care recipient may only be placed in seclusion if it is necessary to prevent the care recipient from endangering the health or safety of the care recipient or others, or seriously compromising the care and well-being of others.

A care recipient may only be placed in seclusion with the authority of their care manager. The exception to this is that in an emergency a care recipient may be secluded by a person who has been delegated by the care manager as having immediate responsibility for the care recipient. In this instance the care manager must be notified immediately.

Seclusion must be carried out in accordance with the guidelines issued by the Director-General of Health under section 148 of the IDCCR Act, with the duration and the circumstances of each period of seclusion recorded in a register kept for this purpose. District inspectors will monitor entries in the register.

Restraint (Section 61)

A care manager may only restrain a care recipient if it is necessary to prevent the care recipient from endangering the health or safety of themselves or others; seriously compromising the care and well-being of others; or seriously damaging property.

Mechanical restraint may not be used if one or more authorised individuals are personally able to restrain the care recipient and it is reasonably practicable for them to do so.

A care recipient may only be restrained with the authority of their care manager. The exception to this is that in an emergency a care recipient may be restrained by a person who has been delegated by the care manager as having immediate responsibility for the care recipient. In this instance the care manager must be notified immediately.

Restraint must be carried out in accordance with the guidelines issued by the Director-General of Health under section 148. The circumstances of the restraint must also be entered in the register referred to in the commentary above about seclusion.

Enforced medical treatment (Section 62)

There are two circumstances where medical treatment can be given without a care recipient's consent. They are if the treatment is authorised by section 62 or another Act or other rule of law.

Under section 62 the care recipient can be given medical treatment without their consent in the following circumstances:

1. In an emergency where the medical treatment is necessary to save the care recipient's life; or to prevent serious damage to the health of the care recipient; or to prevent the care recipient from causing serious injury to themselves or others.
2. In accordance with the care recipient's care and rehabilitation plan; and in accordance with the guidelines on enforced medical treatment issued by the Director-General of Health under section 148 of the Act; and with the support of a second opinion given by a medical consultant designated by the Director-General of Health.
3.

Requirement to Stay in Designated Facilities or Places

Placement of care recipients

A care recipient who is required to receive secure care must stay in a secure facility that the co-ordinator has designated by written notice given to both the care recipient and their care manager.[41]

A care recipient who is required to receive supervised care may be directed by the co-ordinator to stay in a designated facility or place. A direction to this effect must be given in writing to the care recipient and their care manager.[42]

Individuals receiving supervised care can only be placed in a secure facility in an emergency, or if they require care in this setting in accordance with their care and rehabilitation plan. The latter is to provide the capability to provide 'step down' care, that is, decrease the level of security and control required over an individual over time as their condition improves.

> If a care recipient is under a direction from a care co-ordinator to stay in a facility, the care recipient may not leave that facility without authority given under the Act.

[41] Section 63.

[42] Section 64.

Provisions for Leave

Leave for care recipients no longer subject to the criminal justice system (section 65)

Care managers may grant care recipients who are no longer subject to the criminal justice system[43] up to two weeks' leave from a facility on any terms and conditions. The care manager may then extend this leave for a further period of up to two weeks.

> No care recipient may be on leave from a facility for a continuous period of more than four weeks.

The care manager may cancel leave at any time by notifying the person who is caring for the care recipient while they are on leave. If there is no such person then the care manager must notify the care recipient.

Leave for special care recipients (section 66)

Where a specialist assessor certifies that a special care recipient is fit to be on leave, the Minister of Health may grant leave for that care recipient on any terms and conditions.

The Minister of Health may cancel leave at any time by notifying the person who is caring for the special care recipient while they are on leave. If there is no such person then the Ministry of Health must notify the care recipient.

Short-term leave (section 67)

The Director-General of Health may authorise leave of up to seven days for a special care recipient.

The Director-General of Health may cancel leave at any time by notifying the person who is caring for the care recipient while they are on leave. If there is no such person then the care manager must notify the care recipient.

The Director-General of Health may delegate the powers with respect to short-term leave to the care co-ordinator. In the case of a prison inmate who has been transferred from prison to a facility for assessment, the co-ordinator must first consult with the superintendent of that prison.

> Under no circumstance may leave be granted if a special care recipient is:
>
> a) awaiting a trial or hearing related to a conviction or charge; awaiting sentencing; awaiting the results of an appeal or
>
> b) subject to life imprisonment or preventive detention.

[43] This term is defined in section 2.

Status of Special Care Recipients Subject to Sentences

A person may be both liable to detention under a prison sentence, and liable to detention in a secure facility as a result of:

1. being transferred from prison under Part 4 of the Act or
2. an order made under section 34(1)(a)(ii) of the CP(MIP) Act.

Section 68 makes it clear that for the purposes of the IDCCR Act a person's sentence ceases on the following dates:

- the date specified in an order of the New Zealand Parole Board that the person be released on parole or compassionate leave
- the release date (if any) of the person's sentence, as defined under Part 1 of the Parole Act 2002
- the date on which the sentence is determined.

Section 69 of the IDCCR Act explains the relationship between detention in a secure facility under the IDCCR Act and an individual's sentence.

The term of an individual's sentence continues to run while a person is in a secure facility or on authorised leave from the facility. If a person escapes from the facility their sentence ceases to run while they are absent and resumes once they are retaken and returned to the facility.

Once a person's liability to detention under a sentence ceases, he/she also cease being a special care recipient. If that person was a prison inmate, they will remain subject to a compulsory care order. If that person was subject to an order under section 34(1)(a)(ii) of the CP(MIP) Act, then that order becomes a six-month compulsory care order under this Act (this period is intended to give the co-ordinator the opportunity to consider whether to apply for an extension of this period if he or she considers that the individual is still in need of compulsory care).

Although a person may be no longer liable to detention under sentence, and therefore no longer a special care recipient, they are still required to receive secure care[44] unless the individual's order is varied by the Family Court.[45]

In some cases a person may cease to be a care recipient before the term of their prison sentence ceases. In this instance the co-ordinator must notify the Chief Executive of the Department of Corrections who must arrange for the person to be taken back to prison within seven days of being notified.[46]

[44] Section 70.
[45] Section 86(3).
[46] Section 71.

Reviews of Condition and Status of Care Recipients

Part 6 of the IDCCR Act describes the process for reviewing the condition and status of care recipients.

Initial review by Family Court

Six months[47] after the care co-ordinator has approved a care recipient's initial care and rehabilitation plan they must present a report to the Family Court on the continued appropriateness of the plan and, if the individual falls with the category of care recipients who are subject to a compulsory care order,[48] the continued appropriateness of the order.

The report must be accompanied by a certificate from a specialist assessor regarding the status of the care recipient,[49] along with any relevant reports from specialist assessors concerned with the case.

Copies of the report provided by the co-ordinator to the Family Court must be sent to the list of individuals in section 73 of the Act. Individuals on this list have the right to make a written submission to the court about the report.

In carrying out their review, the Family Court must review the contents of the care and rehabilitation plan and any compulsory care order.[50] They may also:

- call for reports from the co-ordinator, care manager, responsible district inspector and any specialist assessor concerned with the case
- obtain a second opinion from a specialist assessor other than the specialist assessor who issued the certificate
- require the co-ordinator, care manager, responsible district inspector and any specialist assessor concerned with the case to give evidence or produce documents.[51]

On concluding the review, the Family Court may make any recommendations that it considers appropriate to the Director-General of Health, the co-ordinator, or the care manager.[52]

[47] Section 72. If the care recipient's court order lasts less than six months then the report must be presented no later than two months after the order has been made.

[48] Section 72(2) This provision only applies to individuals who are subject to compulsory care orders (as defined) and excludes special care recipients.

[49] Section 79.

[50] Section 74.

[51] Section 75.

[52] Section 76.

Regular clinical reviews

Section 77 requires that care recipients must have their condition formally reviewed by a specialist assessor (or assessors) designated by the co-ordinator. Care managers are responsible for ensuring that this happens.

- Clinical reviews must be conducted at the times specified in section 77(2). The first review must be conducted 14 days before the co-ordinator is required to report to the Family Court under section 72.
- From then the reviews must be conducted at intervals not exceeding six months.
- A clinical review must be conducted least 14 days before the care recipient's order expires.

When conducting a clinical review the specialist assessor must:

- examine the care recipient
- consult with other health and disability professionals involved in the care of the care recipient
- take into account the views of those health and disability professionals when assessing the results of the review.[53]

At the conclusion of the review the specialist assessor must issue a certificate stating whether the status of the care recipient needs to continue or needs to be changed.[54]

Considerations that must be addressed by specialist assessors in relation to specified categories of care recipient

In issuing a certificate under section 79 the specialist assessor is required to comply with (sections 82, 89 and 92).

Section 82

When a specialist assessor completes a certificate for a care recipient who is no longer subject to the criminal justice system, or a special care recipient who is liable to detention under sentence, the specialist assessor must state whether or not they consider that the care recipient still needs to be cared for as a care recipient.

Section 89

When a specialist assessor completes a certificate for a special care recipient who is detained because they have been found unfit to stand trial, the assessor must state one of the following opinions:

1. The person is no longer unfit to stand trial.
2. The person is still unfit to stand trial and should continue to be cared for as a special care recipient.
3. The person is still unfit to stand trial but no longer needs to be cared for as a special care recipient.

[53] Section 78.
[54] Section 79.

Section 92

Where a specialist assessor completes a certificate for a special care recipient detained because they were acquitted on account of insanity, the assessor must state whether or not they are of the opinion that the care recipient should continue to be cared for as a special care recipient.

Distributing reports and certificates

Copies of the assessor's certificate, along with relevant reports and reasons for the opinion on the care recipient's condition, must be sent to:

- the care manager
- the care co-ordinator
- in the case of a special care recipient, the Director-General of Health.[55]

On receipt of the specialist assessor's certificate the care co-ordinator must send a copy to the care recipient and their:

- care manager
- welfare guardian
- parent/s or guardian/s if the care recipient is a child or young person
- lawyer
- principal caregiver
- responsible district inspector.[56]

In the case of care recipients who are special care recipients because they were found unfit to stand trial:

- if the specialist assessor concludes that they are now fit to stand trial, a certificate in the form required by section 89 must be sent to the Attorney-General
- if the specialist assessor concludes the care recipient remains unfit to stand trial but no longer needs to be a special care recipient they must forward the certificate to the Attorney-General and the Minister of Health for consideration.

In the case of a special care recipient who was acquitted on any account of insanity, the specialist assessor must send to the Minister of Health any certificate issued by the specialist assessor which states that the care recipient no longer needs to be cared for as a special care recipient.[57]

Release from compulsory care

There are four ways in which a care recipient can be released from compulsory care:

[55] Section 80.

[56] Section 81.

[57] The certificate is sent to the Minister for the purpose of deciding whether the care recipient should be reclassified following the process set out in section 33 of the CP (MIP) Act.

1. If a special care recipient and discharged under the CP(MIP) Act (found not guilty by reason of insanity), sent back to court (found unfit to stand trial) or transferred to prison (for convicted offenders sentenced under section 34(1)(a) of the CP(MIP) Act).
2. If the term of the care recipient's compulsory care order expires.
3. Where the Family Court cancels a care recipient's[58] compulsory care order on an application from the co-ordinator.[59]
4. If following an inquiry carried out by a High Court Judge the care recipient is released from compulsory status.[60]

Continuation of compulsory care (sections 85 to 87)

On application from the co-ordinator, the Family Court may:

- extend the term of the order[61]
- vary the order[62]
- defer the expiry of the order (where an application to extend an order is before the court but has not been heard).[63]

[58] Where the care recipient is either "a care recipient no longer subject to the criminal justice system" or a care recipient who is also subject to a prison sentence.

[59] The care co-ordinator may make an application to the Family Court at any time but must make an application as soon as possible after receiving a certificate from a specialist assessor stating that a care recipient no longer needs to be cared for as a care recipient.

[60] See section 104, 105 and 106 of the Act.

[61] Section 85.

[62] Section 86.

[63] Section 87.

Inspections and Inquiries

Part 7 of the IDCCR Act deals with inspections and inquiries.

Inspections, investigations, and inquiries by district inspectors

District inspectors must regularly inspect facilities and act on complaints. They may also conduct formal inquiries. A detailed description of the powers, duties and functions of district inspectors is covered in the *Guidelines for District Inspectors*.

Part 7 also provides for district inspectors to report on the results of their findings where they are investigating an alleged breach of a care recipient's rights under the Act.[64]

Where a care manager receives such a report identifying deficiencies, the care manager is under a duty to take all reasonable steps to correct these deficiencies.[65]

Inquiry by High Court Judge

The Act provides the High Court with a supervisory role to further safeguard the rights of care recipients.

Section 102 of the Act allows a High Court Judge, on their own initiative, or on application of any person, to make an order directing a district inspector, or one or more other persons, to visit and examine a care recipient and inquire into and report on any matter relating to that care recipient that the Judge specifies.

A High Court Judge may also make an order directing a care manager to bring a care recipient into open court or chambers for examination. For the purpose of this examination the Judge may summon any specialist assessor or other witness to testify and to produce any relevant documents.[66]

Following an examination, the Judge may:

- where a care recipient who is no longer subject to the criminal justice system, order his/her release[67]
- in the case of person who is a special care recipient because of a determination that they were unfit to stand trial
- direct that the person be brought before a court[68]
- direct that the charge or indictment against the person be dismissed, or:[69]

64 Section 98.

65 Section 100.

66 Section 102 and 103.

67 Section 104. Before making this order the Judge must be satisfied that the care recipient is being detained illegally or no longer needs to be cared for as a care recipient.

68 Section 105(2)(a).

69 Section 105(2)(b).

- direct that the person be cared for as a care recipient no longer subject to the criminal justice system or[70]
- release the person.[71]

In relation to individuals who are special care recipients because they have been acquitted on the account of insanity, the Judge may either order that the person be cared for as a care recipient no longer subject to the criminal justice system[72] or

- release the person.[73]

The Judge may report his/her opinion, along with any comments and recommendations, to the Minister of Health.[74]

[70] Section 105(3)(a).
[71] Section 105(3)(b).
[72] Section 106(a).
[73] Section 105(b).
[74] Section 107.

Authority to Take and Detain Care Recipients

Part 8 of the Act establishes the legal authority to require a care recipient to stay in a facility[75] and also sets out the powers available to the co-ordinator and the police to apprehend a care recipient in specified circumstances.

Where a care recipient escapes or fails to return from authorised leave, he or she may be retaken by the co-ordinator or care manager and returned to the care recipient's facility or to another facility specified by the co-ordinator.[76]

It may be necessary in some circumstances for the co-ordinator or care manager to seek the assistance of the police to return a person to a facility.

The Act authorises the police to enter and search places where they suspect an escaped care recipient may be, without the consent of the occupier.

Because this involves a coercive power, the Act limits the circumstances when this power can be exercised to the following circumstances:

- where a warrant is obtained from a District Court Judge or registrar[77]
- in an emergency where the police can enter a place without a warrant if they believe on reasonable grounds that this is necessary:
  - to retake a care recipient who has escaped and
  - the care recipient is endangering, or is at risk of endangering, the health and safety of themselves or others.[78]

In exercising their powers, the police may request the care recipient's care manager or co-ordinator to assist them to retake the care recipient and may use any reasonable force that may be required to retake the care recipient.

[75] Section 109.
[76] Section 111.
[77] Section 112.
[78] Section 113.

Procedural Provisions

Part 9 of the Act governs proceedings of the Family Court for the purposes of the Act.

The key provisions of Part 9 are that:

- the Family Court should in almost all cases hear applications under the Act[79]
- the care recipient and a number of other persons specified in section 117 have the right to appear and be heard at a hearing (this is subject to the court's power to exclude individuals in particular circumstances).[80]

Individuals who are entitled to appear and be heard at a hearing have the right to be represented by a lawyer and call and cross-examine witnesses.[81]

The court can appoint a lawyer to represent the care recipient (at no cost to the care recipient).[82]

The Family Court Judge is given wide powers to obtain reports[83] and call witnesses[84] as necessary to assist with decision-making.

The proceedings of the Family Court are not open to the public[85] and there are restrictions on the publication of the court's proceedings.[86]

79 Section 116.
80 See sections 122 and 123.
81 Section 123.
82 Section 124.
83 Section 125.
84 Section 128.
85 Section 129.
86 Section 130.

Relationship with Other Acts

Part 10 of the Act deals with the relationship between this Act and other Acts. It describes where the provisions of this Act give way to the provisions of certain Acts, and prevail over others.

The application of the IDCCR Act to mentally disordered persons

There will be some individuals who have a mental illness as well as an intellectual disability.

To accommodate this fact, provision has been made in the IDCCR Act and in section 47A of the MH(CAT) Act to allow for the transfer of individuals between the two Acts.

Different rules apply to these transfers depending on the class an individual falls within.

Transfers from the IDCCR Act

If a care manager has reason to believe that a care recipient has developed a mental illness, the care manager must apply to have the care recipient assessed under the MH(CAT) Act.[87]

If a care recipient becomes a proposed patient under the MH(CAT) Act 1992, their compulsory care order is suspended. The care manager must keep a record of the date of that suspension and of the unexpired term of the care recipient's compulsory care order.

A care recipient's compulsory care order will recommence on the date that they cease to be a proposed patient under the MH(CAT) Act 1992, or are released from compulsory status under that Act.

When a special care recipient becomes subject to the MH(CAT) Act 1992, they must be held as a special patient until their status is changed under that Act or under the CP(MIP) Act. If their status is changed from special patient to patient as a result of an order under the CP(MIP) Act, they will automatically become *a care recipient no longer subject to the criminal justice system* when they cease to be a proposed patient under the MH(CAT) Act, or are released from compulsory status under that Act.

[87] Section 136(2) of the IDCCR Act.

Transfers from the MH(CAT) Act

Section 47A of the MH(CAT) Act and Part 4 of the IDCCR Act provides for the transfer of individuals who are fit to be released from compulsory status under the MH(CAT) Act but who require compulsory care and rehabilitation under the IDCCR Act.

There are three classes of individuals who can be transferred:

- Individuals who were subject to the IDCCR and who have been transferred back once fit to be released from the MH(CAT) Act. Once transferred back the IDCCR order that applied to these individuals recommences. Where the individual was previously a special care recipient, and where the individual has not been reclassified under the CP(MIP) Act while subject to the MH(CAT) Act, the person automatically reverts to being a special care recipients under the IDCCR Act.
- Individuals who are special patients under the MH(CAT) Act. Section 47A of the MH(CAT) Act allows special patients to be reclassified as special care recipients.[88] Where a special patient is fit to be released from the MH(CAT) Act and has been assessed by a specialist assessor as intellectually disabled, a Director of Area Mental Health Services, with the agreement of the Director of Mental Health, may transfer the individual to the scheme established by the IDCCR Act. As this reclassification is essentially a clinical decision and does not affect the political controls that apply to such an individual,[89] the process does not require the consent of the Attorney-General or the Minister of Health under the CP(MIP) Act.
- Former special patients. The third category of individuals who can transfer are former special patients who can be transferred under the provisions of Part 4 of the IDCCR Act (discussed above).

Protection of Personal and Property Rights Act 1988

The Protection of Personal and Property Rights Act 1988 makes provisions for the appointment of welfare guardians for adults who lack the capacity to make decisions for themselves and for the appointment of property managers to control specific property.

The role of the welfare guardian is to protect the person's interests and make decisions on their behalf.

Section 137 of the IDCCR Act makes it clear that the provisions of that Act override those in the Protection of Personal and Property Rights Act. This means that where there is inconsistency between the application of the two Acts to an individual with an intellectual disability, the IDCCR Act will prevail.

Here it is also worth noting that if a care recipient has a welfare guardian, this person will play an important role under the IDCCR Act.

For example, the welfare guardian of a care recipient must be consulted during the needs assessment process; must receive written notice of a co-ordinator's decision to apply for a

[88] This provision only applies to special patients who are not former special care recipients transferring back.

[89] As a special patient or special care recipient.

compulsory care order; and must receive copies of specialist assessors' certificates of assessment. They are also entitled to appear and be heard at any hearing of an application that relates to a care recipient over whom they have welfare guardianship.

Children, Young Persons and their Families Act 1989

A child or young person under the age of 17 can be subject to the provisions of the IDCCR Act only if they commit a serious offence which is dealt with in the criminal courts as if the offending had been committed by an adult. In the case of such persons it is possible that the care and protection provisions of the Children, Young Persons and their Families Act will also apply. However, nothing in the Children, Young Persons and their Families Act is to be interpreted as limiting the application of the IDCCR Act.[90]

Special provisions applying to children

If a child is subject to the IDCCR Act, those exercising a power under the Act over a child or young person must have regard to section 12 of the IDCCR Act.

Section 12 sets out the principles to guide those people exercising powers under the IDCCR Act in relation to children:

- Wherever possible the family, whänau, hapü, iwi, and family group should participate in decision-making, and regard should be given to their views.
- Wherever possible the links of the child or young person with their family, whänau, hapü, iwi and family group should be maintained and strengthened.
- Any decision affecting a child or young person may be taken only after considering the likely impact of the decision on the welfare of the child or young person and on the stability of their family, whänau, and family group.
- Consideration should be given to the wishes of the child or young person.
- Decisions affecting the child or young person should be made and implemented within appropriate timeframes.[91]

The Act also specifies that an assessment of a child or young person must, wherever practicable, involve a specialist assessor who practises in the field of child and adolescent disability.

[90] Section 138.

[91] These principles are based on the youth justice principles set out in the Children, Young Persons and their Families Act 1989.

The Criminal Procedure (Mentally Impaired Persons) Act 2003

The CP(MIP) Act which amends and replaces Part 7 of the Criminal Justice Act 1985 and was passed at the same time as the IDCCR Act to provide the courts with appropriate options for dealing with people with an intellectual disability who are charged with or convicted of an imprisonable offence.

Summary of the amendments

Fitness to stand trial

One of the fundamental principles of our criminal justice system is that a person who is unable to conduct their own defence, because of physical or mental incapacity, should not be put on trial. Under the CP(MIP) Act the courts can determine that an individual with an intellectual disability is unfit to stand trial.

Courts have new disposition options for intellectually disabled people who are found unfit to stand trial. These are:

- an order that the person be detained in a secure facility as a special care recipient under the IDCCR Act
- an order that a person receive supervised care under the IDCCR Act.

The court will be guided in its decision on which option is most appropriate by an assessment under Part 3 of the Act.

Intellectually disabled person acquitted on the grounds of insanity

Under the CP(MIP) Act the same disposition options available for individuals acquitted on the grounds of 'insanity' are available when a court finds that an individual is unfit to stand trial. Namely:

- an order that the person be detained in a secure facility as a special care recipient under the IDCCR Act
- an order that the person be provided with supervised care under the Act.

Again the court will be guided in its choice of options by an assessment under Part 3 of the Act.

Procedural safeguards

The CP(MIP) Act also introduces new procedural safeguards for persons who are unfit to stand trial.

The Act establishes a new procedure to establish whether the person detained was in fact the person who caused the act or omissions that form the basis for the offence they are alleged to have committed. The safeguards ensure that persons are not detained or made subject to orders unless there is sufficient evidence to establish physical responsibility for the alleged offence (a trial of the facts).

New procedures for entering a plea of not guilty on the grounds of insanity

The CP(MIP) Act provides a new procedure for a plea of not guilty on the grounds of insanity. Where both the prosecution and the defence agree, and the Judge is satisfied on the basis of expert evidence that the defendant was legally insane at the time of the commission of the offence, the Judge must accept the plea of insanity. The issue of insanity will not then proceed to a jury trial.

Provision for convicted offenders to receive care

The CP(MIP) Act also allows an order to be made for an offender to receive compulsory care while at the same time being subject to a prison sentence. The offender assumes special care status and the operation of the new order will be similar to the provisions in the IDCCR Act allowing for transfers of inmates from prison. The prison sentence will run whilst the individual is in secure care.

If the need for care ceases the individual will be transferred from the secure care facility to prison to complete the remaining period of the sentence.

If the person ceases to be liable to a sentence while in care, he or she is reclassified from special status to a compulsory care order.

The Act also provides for a compulsory care order to be made instead of imposing a sentence where a court considers a sentence is not appropriate.