

In Confidence

Office of the Minister of Health
Chair, Cabinet Legislation Committee

Amendments to the Mental Health (Compulsory Assessment and Treatment) Act 1992: Approval for Introduction

Proposal

- 1 This paper seeks approval for the introduction of the Mental Health (Compulsory Assessment and Treatment) Amendment Bill (the Bill) to Parliament.

Policy

- 2 As part of the response to *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction*, Cabinet agreed to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) [CAB-19-MIN-0182].
- 3 In August 2020, Cabinet agreed to make initial amendments to the Mental Health Act ahead of full repeal and replacement to address pressing issues [CAB-20-MIN-0376]. The Bill gives effect to these decisions, including:
 - 3.1 eliminating indefinite treatment orders by requiring the Courts to review an order at the end of each 12-month period for the duration of the compulsory treatment order;
 - 3.2 providing agencies involved in transporting special patients¹ under the Mental Health Act with legal authority to transport those patients, including permitting an agency to use restraint if it is the safest and least restrictive option to maintain patient and public safety or other force if reasonably necessary in the circumstances;
 - 3.3 addressing a technical issue to improve the administrative efficiency of the current Act to enable the presence of a family member or caregiver by audio or video link when physical presence is not reasonably practicable;
 - 3.4 removing the sunset date to make temporary technical and audio visual link amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020, due to expire no later than 31 October 2021, permanent.

¹ As defined in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992

- 4 These amendments are intended to improve the safety of patients and the public and enable more effective application of the Mental Health Act. Eliminating indefinite treatment orders, which has been widely criticised as a serious breach of human rights, will immediately deliver action on a key policy change called for in *He Ara Oranga*.
- 5 The amendment that provides authority for transport management plans, that permit the use of restraint for special patient transport in limited circumstances, is informed by concerns raised by Directors of Area Regional Forensic Mental Health Services regarding potential impacts to safety of patients and the public if the amendments are not implemented. The population impacted by these clauses is small, however, the potential safety impacts without these amendments is significant and not necessarily quantifiable.
- 6 Some stakeholders may not support the use of restraint on special patients on the grounds that it might be considered inconsistent with overall goals to reduce and eventually eliminate the use of restraint and seclusion in mental health services. The permissible use of restraint under this provision is not related to the presence of a mental health condition, rather it is related to offending behaviour, such as attempts to escape, that pose a safety risk. In this context the use of restraint is similar to restraint of any individual detained in custody during transport. It will not be universally permitted and will be closely monitored by the Director of Mental Health.
- 7 As the previous Minister of Health advised Cabinet when seeking approval for the policy decisions that have led to this Bill [CAB-20-MIN-0376], this provision will only be used if it is the least restrictive option and in limited circumstances, and will require the prior approval of the Director of Mental Health (to be given on a case-by-case basis).
- 8 Alongside the proposed amendments to the Mental Health Act, the Ministry of Health is continuing its programme of work to fully repeal and replace the Act, which will include wide stakeholder consultation. I will report back to Cabinet at key milestones in the future.

Impact analysis

- 9 The Treasury agreed that no Regulatory Impact Assessment is required for this proposal.

Compliance

- 10 The Bill complies with:
 - 10.1 the principles of the Treaty of Waitangi;
 - 10.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (refer 8 below);
 - 10.3 the disclosure statement requirements (a copy of that statement is attached to this paper);

- 10.4 the principles and guidelines set out in the Privacy Act 1993;
 - 10.5 relevant international standards and obligations; and
 - 10.6 the [Legislation Guidelines](#) (2018 edition), which are maintained by the Legislation Design and Advisory Committee.
- 11 The proposal to eliminate indefinite treatment orders will improve consistency with United Nations conventions such as the Convention on the Rights of People Disabilities (particularly the rights to liberty and security and to justice). This proposal will also ensure the Mental Health Act is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 by removing the potential for arbitrary detention and ensuring the restriction on the right to refuse medical treatment is applied consistent with the justified limitations permitted through section 5 of the New Zealand Bill of Rights Act 1990.
- 12 The proposal to allow transport management plans that may authorise the use of restraint if it is absolutely necessary and only if it is the least restrictive option could potentially infringe a person's rights under sections 18 (right to be free from arbitrary detention), 22 (freedom of movement) and 23 (rights of persons arrested or detained) of the Bill of Rights Act. However, I consider the proposal is 'reasonably justified' under section 5 of the Bill of Rights Act because it may only be used if it is the safest and least restrictive option to protect the safety of the person or the public and the Director of Mental Health has given his prior approval (on a case-by-case basis).

Consultation

- 13 The Principal Family Court Judge and the Ministry of Justice have been consulted in developing this Bill.
- 14 The following government agencies have been consulted in the development of this paper and the Bill: the Ministries of Education, Justice, Social Development, Primary Industries, Women, Pacific Peoples, and Business, Innovation and Employment; the Department of Corrections, the New Zealand Police, Oranga Tamariki–Ministry for Children, Te Puni Kōkiri, the Office for Disability Issues, the Accident Compensation Corporation, the Social Wellbeing Agency, the Public Service Commission, the Department of the Prime Minister and Cabinet, the Treasury and Parliamentary Counsel Office.

Stakeholders

- 15 The proposed amendments are anticipated to be well-supported by stakeholders overall as they address concerns raised by various stakeholders over many years. Eliminating indefinite treatment orders was a key policy change called for in *He Ara Oranga* and widely supported by submissions to the Government Inquiry into Mental Health and Addiction. Some stakeholders may not support the proposed the use of restraint on special patients (refer paragraphs 5–8).

Binding on the Crown

- 16 The Mental Health Act is binding on the Crown. The Bill does not propose to amend that provision.

Allocation of decision-making powers

- 17 The Bill does not involve the allocation of decision-making powers between the Executive, the Courts and Tribunals.

Associated regulations

- 18 Regulations are not needed to bring the Bill into operation.

Other instruments

- 19 The Bill does not include any provision empowering the making of legislative instruments.

Definition of Minister

- 20 The Mental Health Act defines the Minister as the Minister of Health. The Bill does not propose to amend that provision.

Commencement of legislation

- 21 The Bill comes into force on the day after the date on which the Bill receives the Royal assent.
- 22 Clauses 4, 6, 7, 8, and 12 come into force on the earlier of a date set by an Order in Council, or the expiry of up to two years following Royal assent. This is to allow flexibility for the Ministry of Justice to secure necessary implementation funding through subsequent Budget processes if funding is not secured through a Budget 21 bid.

Parliamentary stages

- 23 I propose the Bill should be introduced on 17 March 2021 to allow for a first reading on 25 March 2021.
- 24 The Bill should be enacted, if possible, by 31 October 2021 to avoid expiration of the temporary amendments made by the COVID 19 Response (Further Management Measures) Legislation Act 2020.
- 25 I intend to refer the Bill to the Health Committee for consideration.

Proactive release

- 26 This paper, alongside relevant briefings and Cabinet papers, will be proactively released and published on the Ministry of Health's website. Release will be subject to redactions as appropriate under the Official Information Act 1982.

Recommendations

The Minister for Health recommends that the Committee:

- 1 **note** Cabinet has previously agreed to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act 1992 [CAB-19-MIN-0182];
- 2 **note** that the Mental Health (Compulsory Assessment and Treatment) Amendment Bill (the Bill) gives effect to Cabinet's decision to make initial amendments to the Mental Health Act ahead of full repeal and replacement to address pressing issues [CAB-20-MIN-0376];

s 9(2)(ba)(ii)

- 4 **note** that the Bill:
 - 4.1 eliminates indefinite treatment orders by requiring the Courts to review an order at the end of each 12-month period for the duration of the compulsory treatment order;
 - 4.2 provides agencies involved in transporting special patients under the Mental Health Act with legal authority to transport those patients, including permitting an agency to use restraint if it is the safest and least restrictive option to maintain patient and public safety or other force if reasonably necessary in the circumstances;
 - 4.3 addresses a technical issue to improve the administrative efficiency of the current Act by amending section 9(2)(d) to enable the presence of a family member or caregiver by audio or video link when physical presence is not reasonably practicable;
 - 4.4 removes the sunset date to make permanent the technical and audio visual link amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020, due to expire no later than 31 October 2021;
- 5 **approve** the Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 6 **note** that the Bill comes into force on the day after the date on which the Bill receives the Royal assent;
- 7 **note** that clauses 4, 6, 7, 8, and 12 come into force on the earlier of a date set by an Order in Council, or the expiry of up to two years following Royal assent, to allow flexibility for implementation funding through Budget processes;
- 8 **note** that implementation of clauses 4, 6, 7, 8, and 12 is subject to a funding decision as part of the Budget process;
- 9 **agree** that the Bill be introduced on 17 March 2021;

- 10 **agree** that the Government propose that the Bill be:
- 10.1 referred to the Health committee for consideration;
 - 10.2 enacted by 31 October 2021.

Authorised for lodgement

Hon Andrew Little
Minister of Health

PROACTIVELY RELEASED