

Briefing

Transforming mental health law: Decisions about special patient leave and change of legal status

Date due to MOs: 10 August 2023 **Action required by:** 18 August 2023

Security level: IN CONFIDENCE **Health file reference:** H2023022620

To: Hon Dr Ayesha Verrall, Minister of Health
Hon Ginny Andersen, Minister of Justice

Contact for telephone discussion

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Minister's office to complete:

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|---|------------------------------------|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <input type="checkbox"/> Noted |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn | |

Comment:

Transforming mental health law: Decisions about special patient leave and change of legal status

Security level: IN CONFIDENCE **Date:** 10 August 2023

To: Hon Dr Ayesha Verrall, Minister of Health
Hon Ginny Andersen, Minister of Justice

Purpose of report

1. This briefing seeks your agreement for new mental health legislation to provide for a Special Patient Review Tribunal to be established to make decisions on matters relating to special patients. This is part of the repeal and replacement of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act).
2. This report discloses all relevant information and implications.

Summary

3. In December 2022 and July 2023 respectively, Cabinet agreed to the first and second tranches of policy decisions for new mental health legislation to repeal and replace the Mental Health Act [SWC-22-MIN-0234, SWC-23-MIN-0096].
4. Under current legislation, the Minister of Health has a decision-making role in relation to special patients. These are people who enter compulsory mental health care through the criminal justice system.
5. Cabinet agreed that new mental health legislation should shift decisions relating to special patients from the Minister of Health to an appropriately independent body, with the independent body to be determined by the Ministers of Health and Justice [SWC-23-MIN-0096].
6. We recommend that these decisions be shifted to a dedicated Special Patient Review Tribunal, in line with a recommendation from the Law Commission. The Special Patient Review Tribunal would be designed to better promote the expertise of a range of people, including Māori, people with lived experience, and clinicians. This proposal was tested with, and supported by, the Mental Health Act Expert Advisory Group.
7. This proposal imposes direct financial cost, estimated at approximately \$515,000 per year. These costs will be met under Vote Health and managed within agreed multi-year health budgets alongside other health priorities. There will also be minor implications of approximately \$76,900 per year for legal aid provision within the justice portfolio. These costs will be met within the legal aid baseline funding.

8. Giving effect to this proposal would require minor amendments to the Criminal Procedure (Mentally Impaired Persons) Act 2003 and, to ensure consistent access to legal aid for special patients, to the Legal Services Act 2011. Both of these Acts sit in the justice portfolio.
9. Existing rights for victims of offenders will not be affected.
10. The Minister of Health also has a decision-making role under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the Intellectual Disability Act), which provides for compulsory mental health care for people in the criminal justice system who have an intellectual disability. Changes to this legislation are outside the scope of the repeal and replacement of the Mental Health Act. Any changes that may be necessary will be considered as part of wider work underway on the Intellectual Disability Act.
11. Subject to your agreement, the proposal to establish a Special Patient Review Tribunal will be reflected in the Mental Health Bill.

Recommendations

We recommend you:

- a) **Note** that on 26 July 2023 Cabinet agreed to a second tranche of policy proposals for new mental health legislation to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) [SWC-23-MIN-0096], including:
 - i. agreement that new legislation will enable decisions about leave and change of legal status for special patients to be confirmed through an appropriately independent body such as a court or the Mental Health Review Tribunal
 - ii. authorisation for the independent body referred to in recommendation a)i above to be determined between the Ministers of Health and Justice

Decisions about special patient leave and change of legal status

- b) **Note** that the Minister of Health currently has a decision-making role in relation to leave and change of legal status for special patients under both the Mental Health Act and the Criminal Procedure (Mentally Impaired Persons) Act 2003
- c) **Note** that the 2010 Law Commission report *Mental Impairment Decision-Making and the Insanity Defence* (Report 120) recommended that Ministers no longer have a decision-making role in relation to special patients
- d) **Note** we have identified a Special Patient Review Tribunal as the appropriate independent mechanism to consider special patient matters
- e) **Note** that the current Mental Health Act allows the Minister of Health to establish tribunals, this will continue under new legislation

- | | | | |
|----|---|-------------------------------------|--------------------------------------|
| f) | Agree that new mental health legislation require the Minister of Health to establish a Special Patient Review Tribunal to make decisions about leave and change of legal status for special patients | Minister of Health
Yes/No | Minister of Justice
Yes/No |
| g) | Agree that a Special Patient Review Tribunal include: | Minister of Health
Yes/No | Minister of Justice
Yes/No |
| | i. an appropriately qualified health practitioner with expertise in forensic mental health care | | |
| | ii. a tangata whaiora who has lived experience of forensic mental health care | | |
| | iii. a Māori member appropriately knowledgeable in tikanga and mātauranga Māori | | |
| | iv. a lawyer with appropriate qualifications and practice experience | | |
| h) | Agree that decisions of a Special Patient Review Tribunal may be appealed to the Family Court | Minister of Health
Yes/No | Minister of Justice
Yes/No |
| i) | Agree that procedural arrangements for the Special Patient Review Tribunal mirror those of the existing Mental Health Review Tribunal | Minister of Health
Yes/No | Minister of Justice
Yes/No |
| j) | Agree that any necessary amendments be made to the Criminal Procedure (Mentally Impaired Persons) Act 2003 to give effect to the above decisions | | Minister of Justice
Yes/No |
| | <i>Legal aid</i> | | |
| k) | Agree that legal aid be available to special patients for reviews and proceedings under the new legislation | | Minister of Justice
Yes/No |
| l) | Agree that any necessary amendments be made to the Legal Services Act 2011 to give effect to the above decision | | Minister of Justice
Yes/No |

Next steps

- m) **Note** that subject to your agreement, the proposal to provide for a Special Patient Review Tribunal will be reflected in the Mental Health Bill.



Robyn Shearer
Deputy Chief Executive and
Deputy Director-General
**System Performance and Monitoring | Te
Pou Mahi Pūnaha**
Ministry of Health
Date: 4 August 2023

Hon Dr Ayesha Verrall

Minister of Health

Date:



Sam Kunowski
Acting Deputy Secretary Policy
Policy Group
Ministry of Justice
Date: 9 August 2023

Hon Ginny Andersen

Minister of Justice

Date:

Transforming mental health law: Decisions about special patient leave and change of legal status

Background

1. The Mental Health Act sets out the specific circumstances under which people may be subject to compulsory mental health assessment and treatment. This includes the provision of compulsory mental health care for certain people in the criminal justice system.
2. In May 2019, Cabinet approved the Government response to *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (He Ara Oranga) [CAB-19-MIN-0182]. This included the repeal and replacement of the Mental Health Act 'so that it reflects a human rights-based approach, promotes supported decision-making, aligns with the recovery and wellbeing model of mental health, and provides measures to minimise compulsory or coercive treatment'.

Context

Special patients enter compulsory mental health care through the criminal justice system

3. 'Special patient' status is conferred on people subject to compulsory mental health care who are detained in a hospital following an order under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP(MIP) Act) or transferred from a prison. Special patients include:
 - a. defendants found not criminally responsible on account of insanity (formerly referred to as 'not guilty by reason of insanity')
 - b. defendants who are unfit to stand trial
 - c. people charged with, or convicted of, a criminal offence and remanded to a hospital for a psychiatric report
 - d. people who have been convicted of a criminal offence and both sentenced to a term of imprisonment and placed under a compulsory treatment order
 - e. remanded or sentenced prisoners transferred from prison to a hospital for mental health care.
4. In 2020/21, there were 423 special patients nationally. Of those, around 86% were male, and around 52% were Māori. This is comparable to the over-representation of Māori in the prison population, and greater than the proportion of patients subject to compulsory treatment orders under the Mental Health Act who are Māori (around 38%).

Special patients are intended to be treated like other recipients of compulsory mental health care...

5. Once a special patient enters the health system, they receive compulsory mental health care from a forensic mental health service.
6. The current Mental Health Act outlines that special patients should receive the same care and treatment as other tāngata whaiora who are subject to a compulsory treatment order. This includes the same access to services that meet their needs and rights under the legislation. These expectations are intended to be retained in new legislation.

...but entry and exit criteria for special patients will continue to be governed by the CP(MIP) Act

7. In December 2022, Cabinet agreed that compulsory mental health care should only happen when:
 - a. a person has a serious need for mental health care, support or treatment, and there is a benefit from it being provided through statutory intervention
 - b. if mental health care, support or treatment were not accessed serious adverse effects are likely to occur in the near future
 - c. a person does not have capacity to make informed decisions about their own mental health care, support and/or treatment [SWC-22-MIN-0234].
8. If any of the above conditions are not met, it would be expected that a person is not subject to compulsory mental health care in the first place, or if they are already subject to compulsory mental health care, that they be immediately released from compulsory care. A key difference between the new compulsory care criteria compared with that set out in the current Mental Health Act is the introduction of a decision-making capacity test.
9. Special patients enter the health system via the criminal justice system. There are different criteria for conferring or removing special patient status, and these are set out in the CP(MIP) Act. Significant policy changes to that legislation are outside the scope of the repeal and replacement of the Mental Health Act. Therefore, the new entry criteria will not apply to special patients.
10. Special patients will not automatically be released from compulsory care if they regain decision-making capacity, as will be the case for others subject to compulsory care under new mental health legislation. The existing legal processes set out in the CP(MIP) Act will still apply – decision-makers would need to be satisfied that continued detention is no longer necessary to safeguard the special patient’s own interests as well as the safety of others and the general public.¹

¹ Sections 31(3) and 33(3) of the CP(MIP) Act.

The Minister of Health has decision-making responsibilities in relation to special patients

11. Both the Mental Health Act and the CP(MIP) Act identify decision-making roles for the Minister of Health in relation to special patients, specifically:
 - a. Under the Mental Health Act, the Minister of Health makes decisions about special patient leave from hospital for periods longer than seven days (long leave)
 - b. Under the CP(MIP) Act, the Minister of Health makes decisions about change of legal status for those special patients previously found unfit to stand trial or found not criminally responsible on account of insanity (ie, ending special patient status so that a person is no longer detained under that Act for compulsory care). Where the decision relates to a person found unfit to stand trial, both the Minister of Health and the Attorney-General must agree.
12. On average, there are around 50 special patients per year for whom applications for long leave or change of legal status are submitted. In 2020/21, the Minister of Health took 46 of these decisions, of which 11 related to change of legal status and 35 related to leave. Of those, 40 applications for leave or change of legal status were approved. Leave was revoked in 3 instances, and a change of legal status was declined in 3 instances.
13. The 2010 Law Commission report *Mental Impairment Decision-Making and the Insanity Defence* (Report 120) recommended that decisions about leave and change of legal status for special patients be shifted from the Minister of Health to a new tribunal established for that purpose. The Law Commission sought to avoid any politicisation of the decisions, and to improve procedural fairness for tāngata whaiora who do not have an opportunity to be heard in the existing process. The Government agreed with the Law Commission's outline of the problem, however, the tribunal was not established due to cost.

Drafting the Mental Health Bill is underway, and your decisions are required on a final matter

Cabinet has agreed to policy decisions required to draft the Mental Health Bill

14. In December 2022, Cabinet agreed to the fundamental policy proposals for new mental health legislation [SWC-22-MIN-0234]. These proposals focused on shifting the legislation governing compulsory mental health care towards an approach centred on human rights and recovery, and enabling care in line with a te ao Māori world view. Cabinet also agreed that the general administrative settings contained in the current Mental Health Act be retained, with updates required in line with the policy direction of new legislation.
15. In July 2023, Cabinet agreed to a second tranche of policy proposals for new legislation, focused on oversight, monitoring, and accountability mechanisms [SWC-23-MIN-0096]. This includes improvements to:
 - a. statutory roles and responsibilities for administering and overseeing the legislation
 - b. the rights of tāngata whaiora under legislation and associated complaint resolution procedures
 - c. means of reviewing and challenging statutory decisions

- d. strengthened monitoring and reporting requirements.

Cabinet also agreed that Ministerial decision-making in relation special patients move to an independent body

16. As part of improvements to statutory roles and responsibilities, Cabinet [SWC-23-MIN-0096]:
 - a. agreed that new legislation will shift responsibility for decisions about leave and change of legal status for special patients from the Minister of Health to an appropriately independent body such as a court or the Mental Health Review Tribunal
 - b. authorised the Ministers of Health and Justice to finalise policy decisions in relation to the appropriate body referred to above.
17. This paper seeks your decisions on the independent body to make decisions about special patient leave and change of legal status, to finalise drafting of the Mental Health Bill.

We recommend the independent body be a Special Patient Review Tribunal

18. We recommend that new legislation provides for a Special Patient Review Tribunal to be established to make decisions about special patient leave and change of legal status. Shifting these decisions to a new Special Patient Review Tribunal is in line with the Law Commission's recommendation and is consistent with most overseas jurisdictions examined by the Law Commission.
19. This proposal has been tested with, and is supported by, the Mental Health Act Expert Advisory Group. The group was established to assist with testing and refining proposals for new legislation. It includes members from different backgrounds who bring a range of expertise including tāngata whaiora with personal or whānau lived experience of the current legislation, service providers and clinicians (including forensic), as well as legal and academic expertise. Over half of the members are Māori.

Tribunal membership

20. Consistent with the membership of the Mental Health Review Tribunal, we recommend that membership of the Special Patient Review Tribunal should include:
 - a. an appropriately qualified health practitioner with expertise in forensic mental health care
 - b. a tangata whaiora who has lived experience of forensic mental health care
 - c. a Māori member appropriately knowledgeable in tikanga and mātauranga Māori
 - d. a lawyer with appropriate qualifications and practice experience.
21. The Special Patient Review Tribunal would sit with four members, including a designated convenor. In exceptional circumstances it may sit with three members.
22. The Special Patient Review Tribunal would be able, and in some cases required, to co-opt additional members to ensure ethnic, gender, and/or disability representation, and to fill expertise gaps. The co-opting requirements are not expected to result in delays to proceedings; the existing Mental Health Review Tribunal has implemented similar

arrangements, and these have been met without difficulty. Further information on the co-opting arrangements is provided at **Appendix 1**.

23. This proposal promotes both the voices of tāngata whaiora with lived experience and Māori, which is in line with the strategic direction for new mental health legislation. This aspect of the proposal responds to feedback received from stakeholders through public consultation, to provide for greater participation of Māori and tāngata whaiora with lived experience in decision-making processes. It therefore responds to the Crown's obligations under Te Tiriti o Waitangi and recognises the over-representation of Māori classified as special patients.

Cost implications

24. This proposal imposes direct financial cost, estimated at approximately \$515,000 per year for Vote Health. This includes the cost of remuneration for tribunal members, set in accordance with the Fees and Travelling Allowances Act 1951. It also includes secretariat support, hosted by the Ministry of Health alongside the existing Mental Health Review Tribunal secretariat, and other administrative costs. These costs will be met under Vote Health and managed within agreed multi-year health budgets alongside other health priorities. Indirect costs for the Ministry of Justice for the provision of legal aid of approximately \$76,900 per year will be met through baseline funding.

Procedural arrangements

25. We recommend that procedural arrangements for the Special Patient Review Tribunal mirror those of the Mental Health Review Tribunal, as we consider these procedural arrangements work well and provide robust and independent decision-making in this related context. The Tribunal would be administered by the Ministry of Health. Further information on the procedural arrangements is provided at **Appendix 1**.
26. We are not proposing to make any changes to the role of the Attorney-General in decisions about change of legal status for special patients found unfit to stand trial. Under new legislation, both the Special Patient Review Tribunal and the Attorney-General would have decision-making roles in these circumstances.²

Other options considered

27. We considered recommending shifting decisions to the existing Mental Health Review Tribunal but determined this would not be suitable due to the potential for conflicting purposes and philosophies. The Mental Health Review Tribunal makes decisions primarily in the interest of the detained person, whereas decisions relating to special patients must take into account additional public safety considerations.

² CP(MIP) Act section 31(3). The Attorney-General will also continue to have a role in cases where special patients are found no longer unfit to stand trial under the CP(MIP) Act section 31(2). When the Special Patient Review Tribunal makes a decision, the Attorney-General must determine whether the defendant be bought before the court to stand trial or receive a change of status.

28. Other options considered include shifting decisions to the Family Court, the District Court, a judicial officer, an independent authority, or the Director of Mental Health. These options were ruled out on the basis that they would not be fit for purpose or would not provide sufficient benefits compared with a Special Patient Review Tribunal.

Complementary changes to intellectual disability legislation will be considered separately

29. We are not proposing any changes to the role of the Minister of Health in making decisions about change of legal status for special care recipients under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the Intellectual Disability Act).³ The Law Commission recommended that those decisions also be shifted to a tribunal rather than being made by Ministers, but changes for special care recipients are outside the scope of this work. Any changes that may be necessary to the Intellectual Disability Act and the CP(MIP) Act as a result of changes to mental health legislation will be considered as part of wider work underway between the Ministry of Health and Whaikaha to consider possible amendments to the Intellectual Disability Act.

Reviews of condition would shift to the new Special Patient Review Tribunal

30. Under the current Mental Health Act, a special patient or a member of their extended support network may apply to the existing Mental Health Review Tribunal for a review of the patient's condition. This provides for a second opinion when a responsible clinician determines that continued detention is necessary to safeguard the special patient's own interests and the safety of the public, but the special patient or their support network do not agree.
31. Reviews of condition for special patients would shift from the Mental Health Review Tribunal to the Special Patient Review Tribunal. This is to utilise the more appropriate experience and composition of the new Tribunal.
32. The special patient or a member of their extended support network, including legal professionals and the district inspector, may apply to the Tribunal for a review of their condition if the responsible clinician considers continued detention is warranted but this determination is disputed.
33. Shifting reviews of condition of special patients to the Special Patient Review Tribunal will be expenditure neutral.

We further recommend an appeal pathway to the Family Court

34. It is important to ensure decisions made by the Special Patient Review Tribunal are able to be reviewed to meet New Zealand Bill of Rights Act natural justice requirements. We therefore recommend that decisions of a Special Patient Review Tribunal may be appealed to the Family Court.
35. In situations where an application for leave or change of legal status has been denied, the special patient or a member of their extended support network may lodge an

³ Special care recipients are people with intellectual disabilities rather than mental distress who are in the care of the health and justice systems.

appeal. In situations where an application has been approved, but the Director of Mental Health disagrees with the decision, the Director of Mental Health may lodge an appeal.

36. We consider that the Family Court is well-placed to consider appeals on matters relating to special patients as it already has a role in making compulsory treatment and care orders under the Mental Health Act and the Intellectual Disability Act.
37. Appeals of Special Patient Review Tribunal decisions would be hearings de novo, which is consistent with appeals of the Mental Health Review Tribunal. Hearings de novo would require the court to reassess the facts of a case by ordering a new assessment of the patient.
38. Reviews of condition by the Special Patient Review Tribunal will also be able to be appealed to the Family Court. Reviews of condition of special patients under the current Mental Health Act cannot be appealed to the Court. However, reviews of condition of other compulsory patients may be appealed to the Family Court. Allowing reviews of condition by the Special Patient Review Tribunal to be appealed to the Family Court is in line with the appeal rights for other compulsory mental health patients.
39. We expect approximately 5 appeals of reviews of condition per annum, based on the number of reviews of special patients currently conducted by the Mental Health Review Tribunal which do not result in a recommendation of a change of status to the Minister of Health.
40. We expect that workload impacts for the court in considering these appeals would be minimal. Based on the current average number of revocations of leave and declined applications for change of status, and the reviews of condition, only a maximum of approximately 11 appeals to the Family Court would be expected per annum. This is unlikely to impact scheduling of court events and will be managed within current resourcing by the Family Court and Ministry of Justice.
41. We have consulted with the Principal Family Court Judge, Judge Moran, on the establishment of a new Special Patient Review Tribunal and an appeals pathway to the Family Court. Judge Moran raised no concerns with this proposal.

Legal aid will assist special patients to access the new tribunal and appeal decisions

42. Mental health patients subject to compulsory care are more likely to be suffering from economic deprivation. Legal aid for mental health patients currently ensures that legal advocates are available to engage in proceedings with the Mental Health Review Tribunal and courts.
43. Provisions under the Legal Services Act 2011 provide a lower barrier to legal aid for patients in respect of tribunal and court proceedings under the Mental Health Act. Special patients currently do not receive the same entitlement to legal aid.
44. We consider special patients should have the same right to legal aid as other patients under the Mental Health Act for any new tribunal and court proceedings under the Mental Health Act or CP(MIP) Act. As part of the repeal and replacement of the Mental Health Act, we seek your agreement to amend the Legal Services Act 2011 to ensure that special patients may apply for legal aid.

45. As an administrative tribunal for the purposes of the Legal Services Act 2011, applicants to the Special Patient Review Tribunal would be able to apply for legal aid to engage in proceedings before the Tribunal. This is in line with the provision of legal aid for reviews conducted by the existing Mental Health Review Tribunal.
46. We expect that there will be minor resourcing implications for the Ministry of Justice of approximately \$76,900 per year to provide legal aid for special patients. This figure includes costs of grants for special patients to access the Special Patient Review Tribunal and to appeal to the Family Court. This would be accommodated within baseline funding as legal aid is already provided for in the majority of compulsory mental healthcare reviews and appeals.

Victims' rights will not be affected

47. Changes made by the Rights for Victims of Insane Offenders Act 2021 increased the rights of victims to receive notifications and make submissions to inform decisions about people who have offended against them. The Director of Mental Health has obligations to notify victims when applications for leave or change of legal status are made, and to invite submissions from victims on whether applications should be approved.
48. We are not proposing any changes to these settings. New mental health legislation will not affect victims' rights to be informed of, and have a voice in, decision-making processes relating to leave or change of legal status for special patients, nor any other rights and protections (such as privacy) that victims have.
49. The Special Patient Review Tribunal would develop procedures to invite and hear additional written and oral submissions from victims, as deemed necessary to inform decisions regarding leave and change of status. Expert members would balance the desire for victims to inform decision-makers as to the relevant safety considerations, with the need for timely and healthcare-oriented decision-making.
50. We have consulted with the Chief Victims Advisor to Government, Dr Kim McGregor, on the proposals outlined in the paper. Dr McGregor was supportive of rights and protections for victims being maintained under new legislation.

Equity

51. Decisions sought through the December 2022 and July 2023 Cabinet papers lay the foundations and provide practical mechanisms for improving equity in compulsory mental health care under new legislation. A key focus has been on improving outcomes for Māori and providing clarity on how new legislation will give effect to the Crown's Te Tiriti obligations within a framework for compulsory mental health care.
52. Around half of special patients identify as Māori. The proposal to establish a Special Patient Review Tribunal will enable Māori expertise and representation by requiring a Māori member appropriately knowledgeable in tikanga and mātauranga Māori. This will support Māori to have input into decisions affecting a cohort where Māori are disproportionately represented. Further improvements to promote equity will be a focus for implementation planning and supported by non-legislative changes, including improved guidelines, service changes and expansions, and workforce changes.

Next steps

53. Subject to your agreement, the proposal that a Special Patient Review Tribunal make decisions about leave and change of legal status of special patients will be reflected in the Mental Health Bill. The Ministry of Health will consult the Ministry of Justice on drafting relevant sections of the legislation.

ENDS.

PROACTIVELY RELEASED

Appendix 1: Procedural arrangements of the Special Patient Review Tribunal

1. The procedural arrangements of the Special Patient Review Tribunal are intended to mirror those of the existing Mental Health Review Tribunal.
2. The Mental Health Review Tribunal appears to be producing robust decisions under the current procedural framework. Mirroring proven procedural arrangements will ensure that the Special Patient Review Tribunal makes robust and independent decisions which balance the needs and rights of special patients with the relevant safety considerations for themselves and others.
3. Notable procedural arrangements for the Special Patient Review Tribunal are set out below.

Appointments

4. A pool of suitably qualified and experienced Tribunal members will be appointed by the Minister of Health with oversight from the Cabinet Appointments and Honours Committee. The pool will consist of a lead member for each of the specified positions and a number of deputies for each of the positions.
5. Members will be appointed for no longer than three years and may be removed for neglect of duty, misconduct, bankruptcy, or inability to perform the functions of the office to the satisfaction of the Minister of Health.

Hearings and decision-making

6. The Special Patient Review Tribunal will usually sit with four lead members, with their deputies substituted if necessary. A quorum of three may make decisions in exceptional circumstances. These provisions balance ensuring experienced members are present, with the practical need of substituting members.
7. A convener will be chosen from amongst the members of each panel and will have a deciding vote. It is expected that in practice decisions will be made unanimously, however, this is not a requirement.
8. The Special Patient Review Tribunal will be required to co-opt additional members where the panel does not include a member of the same ethnic identity or gender as the special patient, and the special patient or a member of their support network request that the Tribunal ensures representation. The mandatory co-opting requirements will also apply on request of disabled special patients. Health services will have a duty to advise tāngata whaiora of these rights and ensure they are understood. The Tribunal will also be able to co-opt other members if necessary to fill expertise gaps.
9. There will be no cost to apply to the Special Patient Review Tribunal. Legal aid and health advocacy services will be available to assist special patients and their wider support network, including legal advocates, to participate in the hearing process.
10. Consistency of decision-making by the Special Patient Review Tribunal will be ensured through a similar process to the Mental Health Review Tribunal. The secretariat will assist the Tribunal to record case notes and decisions, and to develop practice notes, guidelines, policies and procedures, and annual reports.

Confidentiality

11. Special Patient Review Tribunal proceedings and records are confidential to ensure the privacy of special patients and the independence of members to engage in frank discussion. It is an offence to tell the public what happens during a proceeding, or to disclose private medical records.
12. Members will be immune from civil proceedings as a result of their decision-making, unless it is demonstrated that the member acted in bad faith.
13. The Special Patient Review Tribunal will develop procedures to respond to conflicts of interest. Members are expected to disclose potential conflicts and are to be disqualified when appropriate.

Involvement of victims

14. Victims may make written submissions to the Special Patient Review Tribunal to consider as part of reviewing a special patient's condition. The Tribunal may develop procedures to hear oral submissions.