Hon Andrew Little

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J.17

Legislative Statement: Mental Health (Compulsory Assessment and Treatment) Act Amendment Bill

This legislative statement is presented to the House in accordance with Standing Order 272.

Overview

This legislative statement supports the first reading of the Mental Health (Compulsory Assessment and Treatment) Act Amendment Bill.

This Bill proposes to amend the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) to improve the protection of individual rights and the safety of patients and the public, and enable more effective application of the Mental Health Act by:

- eliminating indefinite treatment orders
- minimising the risk of harm to the patient or the public when transporting forensic patients who are 'special patients' as defined under the Act
- addressing technical drafting issues that will improve the administrative efficiency of the Act
- removing the sunset date for technical amendments and audiovisual link amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020.

Repeal and replacement of the Mental Health Act

He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction (*He Ara Oranga*) highlighted that the Mental Health Act is outdated and not consistent with domestic and international human rights commitments. In response, the Government committed to the full repeal and replacement of the Mental Health Act.

Work to fully repeal and replace the Mental Health Act will take some time, as it involves careful consideration of diverse perspectives and complex ethical, legal and policy issues to avoid unintended consequences. The Bill is the first step towards new human rights-based mental health legislation. These amendments address pressing issues that are possible to achieve now while work on the full repeal and replacement of the Mental Health Act progresses.

Improvements to the Mental Health Act made by the Bill

Eliminating indefinite treatment orders

An indefinite treatment order is a compulsory treatment order that has no defined end date and is not required to have further review by a court. At the end of 2019, approximately 2,866 of 5,450 people under the Mental Health Act were subject to an indefinite treatment order. Māori are 2.9 times more likely to be subject to an indefinite

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community treatment order, and 2.7 times more likely to be subject to an indefinite inpatient treatment order.

Indefinite treatment orders have been widely criticised as a serious breach of human rights, discriminatory towards people with a mental disorder, a form of arbitrary detention, and restricting access to justice. This is a concern given the significant restrictions that can be placed on people's rights under the Act, including the right to refuse medical treatment.

This Bill 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. The bill proposes for this amendment to come into force by an order in council, or two years after Royal Assent at the latest. This is to ensure sufficient time for the courts and mental health services to prepare for implementation.

Special patient transport

Another amendment in this Bill relates to the transport of special patients, as defined in the Act. Special patients may include individuals who have been found not guilty by reason of insanity or unfit to stand trial, or prisoners transferred to hospital for mental health care. At times special patients detained and treated by Forensic Mental Health Services require transport between hospitals for medical appointments or for court appearances.

A small number of these patients pose a risk to their own or the public's safety. The use of reasonable force or restraint may be required to protect patient and public safety and to enable safe transport. However, the Mental Health Act does not currently permit this for purposes of transport. Directors of Area Mental Health Services, statutory officials responsible for administration of the Mental Health Act within district health boards, have raised serious concerns that this may result in an incident that harms either the patient or a member of the public.

The amendment enables agencies experienced with this type of transport, for example the Department of Corrections, to provide transport assistance and permission to use reasonable force, including restraint, during the transport. As an example, this may involve placing hands on a person to assist in exiting a vehicle if the person refuses to exit, or the use of handcuffs.

The amendment includes critical safeguards to ensure any force or restraint is used only if absolutely necessary and if it is the least restrictive option. Further, the use of restraint in these cases 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. The Attorney-General has advised that this amendment is consistent with the New Zealand Bill of Rights Act 1990 because any limitation on the rights under that Act are no more than necessary and proportional to the objective.

Family member or caregiver presence for notice of assessment

This Bill includes a technical amendment to improve the administrative efficiency of the Mental Health Act and to improve the inclusion of family and whānau in the early processes of the Act. This amendment to section 9 of the Act will explicitly allow a family member or caregiver to be present by audio or video link when the notice relating to an

assessment being conducted is explained to the person being assessed. Historically, there has been no flexibility where the physical presence of a family member or caregiver is not possible.

Removing sunset date for COVID-19 emergency amendments

The COVID-19 Response (Further Management Measures) Legislation Act 2020 included urgent technical amendments to improve the effective administration of the Act, including the use of audiovisual link technology for patient assessments when the physical presence of the patient is not practicable. These amendments had been requested by stakeholders prior to the COVID-19 response but became urgently needed to ensure the effective and safe application of the Act during the COVID-19 response. Currently, these amendments expire no later than 31 October 2021. This Bill will make the changes permanent as previously requested by stakeholders.

Along with permitting the use of audiovisual link technology for patient assessments when the physical presence of the patient is not practicable, the amendments correct drafting errors that resulted from the Health Practitioners (Replacement of Statutory References to Medical Practitioners) Bill which created the Mental Health (Compulsory Assessment and Treatment) Amendment Act 2016.

These include changing references to ‘medical practitioner’ and ‘medical examination’ to ‘mental health practitioner’ and ‘examination’, respectively, in certain sections to enable a wider range of practitioners to conduct the initial assessment under the Mental Health Act, as initially intended by the Health Practitioners (Replacement of Statutory References to Medical Practitioners) Bill. Not all relevant sections were amended accordingly, which has resulted in only medical practitioners being able to conduct the initial assessment in practice. This change assists in ensuring there are no undue delays in the initial assessment if a medical practitioner is not immediately available (this may be the case in rural areas, particularly if an assessment is needed in the middle of the night), and still requires appropriate competence of the mental health practitioners permitted to step in at this stage.

Another technical amendment corrects an inadvertent change to the scope of powers of a duly authorised officer that was made through the Mental Health (Compulsory Assessment and Treatment) Amendment Act 2016. That amendment narrowed the scope for a duly authorised officer with respect to responsibilities to make arrangements for assessments. This resulted in Directors of Area Mental Health Services having to undertake duties that previously a duly authorised officer could be responsible for, creating inefficiencies and an unnecessary burden on Directors of Area Mental Health Services.