

4 March 2021

Hon David Parker, Attorney-General

**Consistency with the New Zealand Bill of Rights Act 1990: Mental Health (Compulsory Assessment and Treatment) Amendment Bill**

**Purpose**

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1. We have considered whether the Mental Health (Compulsory Assessment and Treatment) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22589/1.7). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 23(5) (right to be treated with humanity and respect). Our analysis is set out below.

**The Bill**

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4. The Bill amends the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Act) to improve the protection of individual rights, the safety of patients and the public, and enable a more effective application of the Act.
5. The amendments:
  - a. enable a family member, caregiver or other person concerned with the welfare of the proposed patient to be present by audio or visual link when the purpose of an assessment examination and the requirements of the written notice are explained to the proposed patient;
  - b. eliminate indefinite treatment orders, and allow a compulsory treatment order, that is further extended after a 6-month extension, to be extended for 12-months only; and
  - c. minimise the risk of harm to special patients<sup>1</sup> or the public by permitting the use of restraints and force on special patients, on a case-by-case basis, when transporting<sup>2</sup> them.
6. The Bill also addresses technical drafting issues and makes amendments relating to the COVID-19 pandemic.

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<sup>1</sup> 'Special patient' is defined in s 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

<sup>2</sup> 'Transport' is defined to include escorting a special patient to and from a vehicle.

## Consistency of the Bill with the Bill of Rights Act

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### Section 23(5) – Right to be treated with humanity and respect

7. Section 23(5) of the Bill of Rights Act affirms that everyone who is deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.
8. There is a lack of domestic case law regarding the application of the s 23(5) right. Previous cases on this right have largely arisen from a context of imprisonment, but academic commentators have argued that it applies to persons deprived of liberty “for whatever reason and by whatever means,” including under mental health legislation.<sup>3</sup>
9. Section 23(5) is breached by state conduct that is less reprehensible than a breach of s 9 (freedom from torture, or cruel, degrading or disproportionately severe treatment), but is still unacceptable in New Zealand society.<sup>4</sup> Section 23(5) captures conduct that lacks humanity but falls short of cruelty, conduct that is demeaning, and/or conduct that is clearly excessive in the circumstances but not grossly so.<sup>5</sup> Whether s 23(5) has been breached will require a court to consider a wide range of factors and circumstances in an individual case.
10. At times ‘special patients’ are to be transported for the purposes of Part 4 of the Act and to allow them to attend court and Parole Board appearances. A small number of patients will pose a risk to the safety of themselves and/or the public because of their prior offending behaviour while in treatment as a special patient, including escape attempts and assaultive behaviour. However, the Act does not permit the use of restraint or force when transporting those patients. Clauses 9 and 11 of the Bill are intended to address the gap in the legislation.
11. Clause 9 inserts new section 53A which sets out a framework in which restraints and force can be used when transporting a special patient. The new s 53A authorises a special patient custodian<sup>6</sup> to enter into an agreement with a government agency for the provision of safe transport of the special patient. The agreement must include a transport management plan which permits the use of restraints and force. Such an agreement can only be entered into with the prior written approval of the Director of Mental Health (which is to be given on a case-by-case basis).
12. The use of force is authorised by cl 11. This clause amends s 122B by making it clear that a person permitted to restrain a transported special patient or use any other force under the new s 53A may use such force as is reasonably necessary in the circumstances.
13. These provisions *prima facie* limit the right that everyone who is deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.
14. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms

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<sup>3</sup> Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2ed) (LexisNexis NZ Limited, 2015) at [20.5.16].

<sup>4</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 42.

<sup>5</sup> *Taunoa v Attorney-General*, above n 4.

<sup>6</sup> ‘Special patient custodian’ means a person who has custody of a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right; and, if so, whether the limitation is rationally connected and proportionate to that objective and limits the right no more than reasonably necessary to achieve that objective.<sup>7</sup>

15. The Bill is intended to improve the protection of individual rights, the safety of patients and the public, and enable a more effective application of the Act. We consider that this is a legitimate objective and sufficiently important to justify some restriction on the s 23(5) right.
16. Currently, the Act does not permit the use of restraints and force when transporting special patients who are considered to be a risk to themselves and the public; the new s 53A intends to reduce this risk. Enabling a special patient custodian to enter into an agreement, which allows the use of restraint and force, for the provision of safe transport of a special patient is rationally connected to the objective of maintaining patient and public safety.
17. We consider that the use of restraints and force for the provision of safe transport limits the right not more than necessary and is proportional to the objective because:
  - a. approval for the use of restraints and force is to be made on a case by case basis and prior approval, as part of a transport management plan, must be obtained from the Director of Mental Health. Decisions made under the new s 53A must be made in accordance with guidance which will be issued by the Director-General of Health. Decisions and guidance must also comply with the Bill of Rights Act;
  - b. the use of force, in respect of the patient, must be reasonably necessary in the circumstances. This requires the use of force to be reasonably necessary in the circumstances as the intervener reasonably believed them to be. The Court of Appeal in *R v Rosso* noted that while there is an element of subjectivity (for example, there must be an actual belief), the test is objective.<sup>8</sup> The purpose of the force will be to restrain the special patient and to ensure their safe transport. Accordingly, we believe the threshold to be appropriate in the context of the purpose of the force;
  - c. if force is used, the circumstances in which the force was used must be recorded as soon as practicable, and a copy of the record must be given to the Director of Area Mental Health. The Ministry of Health's *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* provide guidance for the current reporting requirements when force is used under s 122B. The Guidelines also note that any force deemed to be excessive may be liable for criminal responsibility.<sup>9</sup> We consider this to be adequate safeguard to ensure the power is not exercised unreasonably or excessively; and

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<sup>7</sup> *Hansen v R* [2007] NZSC 7 [123].

<sup>8</sup> *R v Rosso* [2011] NZCA 79 at [12]. *R v Rosso* cites *R v Guay* [2008] NBCA 72, 337 NBR (2d) 252 where a similar worded Canadian provision was considered. At [25] the majority said that the objective part of the test required consideration of whether the intervener's belief that force was necessary "was reasonable on the basis of the situation as he perceived it".

<sup>9</sup> Ministry of Health *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* (2020) at 128 – 129.

- d. treatment of special patients is monitored by the independent mechanism<sup>10</sup> as part of the monitoring of compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol.

18. As a result, we consider that the Bill's transport of special patients provisions are consistent with the requirements that persons detained be treated with humanity, and with respect for their inherent dignity. We therefore conclude that the Bill appears to be consistent with s 23(5) of the Bill of Rights Act.

## **Conclusion**

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- a. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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<sup>10</sup> The independent mechanism is made up of the Human Rights Commission (Central National Preventive Mechanism) and four National Preventive Mechanisms tasked with monitoring detention facilities: the Independent Police Conduct Authority, the Inspector of Service Penal Establishments, the Office of the Children's Commissioner and the Office of the Ombudsman.