Substance Addiction (Compulsory Assessment and Treatment) Bill

27 November 2015
Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Substance Addiction (Compulsory Assessment and Treatment) Bill

Purpose

1. We have considered whether the Substance Addiction (Compulsory Assessment and Treatment) 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 with the latest version of the Bill (PCO 15293/5.0) and on the understanding that the Bill will be subject to minor amendments before it is submitted to Cabinet. We will provide you with further advice if the final version of the Bill 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 section 11 (right to refuse medical treatment), section 14 (freedom of expression), and section 22 (right not to be arbitrarily arrested or detained). Our analysis is set out below.

Summary

4. The Bill provides for the compulsory assessment and treatment of individuals who are considered to have a severe substance addiction, and who do not have the capacity to participate in treatment.

5. The Bill raises a number of concerns with section 11 and section 22 of the Bill of Rights Act. These rights are fundamentally concerned with individual autonomy and dignity. Any limitation on these rights requires careful scrutiny and justification.

6. We consulted with the Crown Law Office during the preparation of this advice. We agree the impairment of an individual's right to refuse medical treatment is justified under the Bill and that the provisions authorising detention in the Bill are not arbitrary for the purposes of section 22.

7. In our view, however, the justification for the limitations on the right not to be arbitrarily detained is finely balanced.

The Bill

8. The Bill provides for the compulsory assessment and treatment of individuals who are considered to have a severe substance addiction, and who do not have the capacity to participate in treatment. The Bill will replace the Alcoholism and Drug Addiction Act 1966 ('the ADA Act').

9. The Bill provides for:

a. applications for assessment to determine whether an individual suffers from severe substance addiction and whether their capacity to make informed decisions about treatment is severely impaired;
b. detention and compulsory treatment for individuals who meet the statutory criteria with a focus on enabling the individual to gain the capacity to consent to and participate in ongoing treatment;
c. provisions to protect the rights of individuals subject to the Bill and to investigate alleged breaches of those rights;
d. offences and penalties for breaches of the Bill; and
e. transitional provisions to allow for the management of individuals who are subject to the ADA Act.

Consistency of the Bill with the Bill of Rights Act

Section 11 - Right to refuse to undergo medical treatment

10. Section 11 of the Bill of Rights Act affirms that everyone has the right to refuse to undergo any medical treatment. The right to refuse to undergo medical treatment protects the concept of personal autonomy, specifically the idea that individuals have the right to determine for themselves what they do or not do to their own body, free from restraint or coercion.

11. Clause 19 requires that once an Area Director has received an application to assess whether a person has a severe substance addiction, the Area Director must make the necessary arrangements to have a person assessed by an approved specialist. The necessary arrangements include providing written notice to the subject of the application that they are required to attend for the purposes of an assessment. If an individual is assessed as meeting the criteria for compulsory assessment a compulsory treatment certificate will be signed, making them subject to compulsory status.

12. Clause 36 requires a patient - individuals subject to compulsory status - to accept treatment properly given under the Bill and comply with every lawful direction given by, or on behalf of, a responsible clinician or the manager of the treatment centre. Responsible clinicians are authorised to give any treatment, including medication, which they see fit.

13. Compulsory assessment and treatment are both considered medical treatment for the purposes of section 11. The White paper commentary to the Bill of Rights Act stated that

the term “medical” should be interpreted broadly, including surgical, psychiatric, psychological and similar forms of treatment. *[1]*

14. The Bill therefore creates a prima facie limitation on the right to refuse to undergo medical treatment. As summarised by Lord Donaldson MR in Re T (Adult: Refusal of Treatment) every adult has the right and capacity to decide whether they will accept medical treatment, even if refusal may risk permanent injury to their health, or lead to premature death. *[2]* However, an adult patient may be deprived of capacity to decide, or not have capacity to decide at the time of refusal. When faced with refusal there must be very careful and detailed consideration of what the patient’s capacity to decide is, and to what extent capacity has been reduced. *[3]*

Is the limitation justified and proportionate under section 5 of the Bill of Rights Act?

15. Limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered reasonable limits that are demonstrably justified under section 5 of that Act. The section 5 inquiry may be summarised as: *[4]*

a. does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
b. if so, then:
    i. is the limit rationally connected with the objective?
    ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    iii. is the limit in due proportion to the importance of the objective?

Does the Bill serve an important objective?

16. We agree with the Law Commission that: *[5]*
“… in the case of people who are severely dependent on alcohol or drugs there is an important public interest that is served by intervening to protect them where they have as a result of severe substance dependence, a substantially impaired capacity to care for themselves or make treatment decisions and are therefore at risk of serious harm.”

17. Clause 3 makes it explicit that the purpose of compulsory treatment is, amongst other things, to protect individuals from harm. This is a lower threshold than serious harm. In our view, there remains a public interest in protecting individuals from harm, even if the harm must not be serious. The lower threshold must, however, be taken into account when considering the proportionality of the limitations on rights and freedoms.

Is the limit rationally connected to the objective?

18. As above, we agree with the Law Commission that “[t]here is a clear and rational connection between interventions such as detoxification and steps taken to stabilise a person’s medical condition and the objective of protecting a person from serious harm”.

19. The criteria for compulsory assessment in clause 7 do not expressly refer to protection from either harm or serious harm. However, the definition of “severe substance addiction”

in clause 8 makes it clear the condition must be of "such severity that it poses a serious danger to the health or safety of the person". Clause 7 also makes it clear that a person's capacity to make informed decisions about treatment is severely impaired, and that compulsory treatment must be necessary.

20. We therefore consider that there is a rational connection between limiting a person's right to refuse medical treatment and the stated purpose of the Bill.

Does the limit impair the right or freedom no more than reasonably necessary?

21. In our view, the question of minimal impairment turns on whether there are sufficient safeguards contained in the process which culminates in compulsory treatment and assessment.

22. The Bill provides some safeguards to ensure minimal impairment of section 11. Clause 37 requires that the objective of compulsory treatment is to facilitate the stabilisation of the patient and, if possible, to restore their capacity to make informed decisions about their treatment. Any medication given to a patient must only be prescribed with due regard to the possible effects of that medication, and must be minimally prescribed so as not to prevent the patient from communicating adequately.

23. Once a compulsory treatment certificate has been signed clause 56 also entitles every patient to obtain a second opinion about their condition. If the approved specialist agrees to a consultation, they must be permitted access to the patient. We note that no such entitlement to a second opinion is explicitly stated in the process leading to a compulsory treatment certificate being signed. This means that arguably there is no mechanism to seek independent advice prior to compulsory detention and treatment.

24. However, on balance, we consider the safeguards in the Bill mean the right to refuse medical treatment is minimally impaired.
Is the limit in due proportion to the objective?

25. The proportionality question rests on whether the public interest that is served by intervening to protect people who have a severe substance addiction is sufficiently important to justify a significant limitation on an individual's right to refuse medical treatment.

26. We consider that the limit is in due proportion to the objective. In coming to this view, we note the importance accorded to demonstrating that a person does not have the capacity and the competence to make an informed and rational decision about treatment. *[6]* In our view, it is essential that the process for demonstrating that a substance addiction is of such severity that it poses a serious danger to an individual's health or safety, and that their capacity to make informed decisions about treatment is severely impaired, is robust.

27. Any person who is 18 years or older may apply to an Area Director to have a person assessed. The application must be accompanied by a medical certificate or, if attempts to have the person assessed by a medical professional have been unsuccessful, a

memorandum from an authorised officer. Once an application has been received, the subject of the application must be assessed by an approved specialist.

28. The determination of the approved specialist is a crucial one in establishing whether a limitation on a person's right to refuse medical treatment is proportionate. The Bill defines an approved specialist as a health professional, which includes a:

a. medical practitioner
b. health practitioner who is, or is deemed to be, registered with the Psychologists Board as a practitioner of the profession of psychology
c. health practitioner who is, or is deemed to be, registered with the Nursing Council of New Zealand as a practitioner of the profession of nursing
d. practitioner who has expertise in treating persons suffering from severe substance addiction and who is registered on account of that expertise by a body corporate designated under the Bill, and
e. social worker who is registered with the Social Workers Registration Board or who is a member of a body corporate designated under the Bill.

29. We note that this is a relatively broad definition, which encompasses individuals who may have no medical training. It could be argued the potentially significant implications for individual rights would warrant a more carefully delineated class of persons.

30. However, approved specialists must be designated by the Director of Addiction Services ('the Director') under clause 95. Before the Director designates a health professional as an approved specialist, the Director must be satisfied that the health professional has significant experience in the treatment of severe substance addictions and is suitably qualified to conduct specialist assessments and reviews. Authorised officers must also be specifically designated by the Director under clause 91.

31. If the approved specialist considers that the criteria for compulsory assessment are met, the approved specialist must sign a compulsory treatment certificate. As noted above, the criteria for compulsory treatment set an appropriately high threshold.

32. We consider that the fact that assessment may only be undertaken by specifically designated individuals, along with other safeguards outlined above, mean that the limitation is in due proportion to the public interest protected by the Bill.

Section 14 – Freedom of expression

33. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

34. Clause 61 provides that a responsible clinician may direct that the mail or electronic communications of a patient be checked. In certain situations, the responsible clinician may then direct that the patient not receive or send mail or electronic communications or electronic communications of a particular class, or that they may only do so subject to conditions or under supervision.

35. The power to check and potentially prevent communication is a prima facie limit on section 14 of the Bill of Rights Act. However, we consider the limitation to be justified on the basis that it serves the objective of the Bill and:

a. a. there is a rational connection to the objective – the responsible clinician must have reasonable grounds to consider that any mail or electronic communications could be detrimental to the interests and treatment of:
   a patient or of other persons in the treatment centre, and
b. b. the right is minimally limited – an Area Director must approve the checking or withholding of mail and clause 63 provides that communications with certain people (including judges, district inspectors, and lawyers) cannot be withheld.

36. We therefore conclude that the limitation is in due proportion to the importance of the objective, and is consistent with section 14 of the Bill of Rights Act.

Section 22 – Liberty of the person

37. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. Similarly to section 11, the right not to be arbitrarily detained protects human dignity, autonomy and liberty. *[7]*

38. To trigger the concept of detention there must be a "substantial intrusion on personal liberty" *[8]*, whether a physical deprivation or a statutory constraint. The term "arbitrarily" is intended to provide a measure of the reasonableness of statutory powers *[9]*, as well as the exercise of those powers. Where an enactment is inconsistent with section 22, there can be no role for a section 5 justification.

39. Clause 30 requires a responsible clinician to direct that a patient be detained and treated in a treatment centre once a compulsory treatment certificate has been signed. The patient must not leave the treatment centre in which they are detained without leave from a responsible clinician. Detention can originally last for a period of up to 56 days after the date on which the compulsory treatment certificate was signed.

40. We consider that detention for compulsory treatment constitutes a substantial intrusion into personal liberty for the purposes of section 22 of the Bill of Rights Act. At issue is whether there is sufficient justification for detention and whether the Bill carefully circumscribes who may detain a person, for how long, and under what conditions.

Is there sufficient justification for detention?

41. The justification for detention for compulsory treatment is that an individual's substance addiction is of such severity that it poses a serious danger to their health or safety, and their capacity to make informed decisions about treatment is severely impaired. To the extent a person meets these criteria, there will be sufficient justification for detention.

Who may detain, for how long, and under what conditions?

42. Once a compulsory treatment certificate is signed, a person becomes immediately subject to compulsory status (clause 11). The Area Director must then be notified (clause 25) and a responsible clinician appointed (clause 28). Clause 25 also provides after consultation with the Area Director, for the patient to be detained in an appropriate facility until the patient is admitted to a treatment centre. The term "appropriate facility" is not defined in the Bill.

43. Clause 29 requires that the responsible clinician must, as soon as practicable and in any case not later than seven days after the signing of the certificate:

a. prepare a treatment plan for the patient
b. arrange for admission of the patient to a treatment centre, and
c. apply to the court for a review of the patient's compulsory status.

44. Clause 75 requires that a judge must interview the patient within seven days from the date of filing of the application for review. If at that stage the judge is satisfied that the criteria for compulsory status are not met, they must order the immediate release of the patient. Otherwise, the application for review must be determined within 10 days after the date of filing, unless the judge considers the application cannot be determined within 10 days of the application for review, in which case they may extend the date for determination to up to 20 days after the application is filed. If the judge is satisfied the criteria for compulsory treatment are met they may make a compulsory treatment order. The compulsory treatment order expires on the close of the 56th day after the date on which the patient's compulsory treatment certificate was signed.

45. The sum effect of the procedure outlined above is that a person may be compulsorily detained for up to 14 days before being interviewed by a judge, and for up to either 17 or 27 days without a final determination of the court.

46. By contrast, the Law Commission recommended that the maximum period of detention and treatment without a final determination of the court should be 14 days. *[10]* We raised this issue with officials from the Ministry of Health during the drafting of the Bill.

47. Turning to the question of arbitrariness, the Court of Appeal has stated that a detention is arbitrary when it is "capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures." *[11]* The length of detention must be considered when considering its arbitrariness and the question of reasonableness will be central to the issue. Relevant principles when considering whether the length of detention is reasonable include:

a. whether a person has been detained for an unreasonable period "can only be a matter of fact and degree in each case" *[12]*
b. there is some scope for delay in the process without giving rise to a breach of section 22
c. delay is less likely to render detention arbitrary where there is no evidence the detainee was prejudiced by the delay, and *[14]*

d. it is accepted that a reasonable period to allow for organisational arrangements to be put in place does not render the detention arbitrary. *[15]*

48. Initially we had concerns that the period of up to seven days within which a patient may be detained and treated before an application for review of compulsory status is made was excessive. Although some delays to allow for organisational arrangements are acceptable, we consider that where a person is being detained and compulsorily treated, applying for judicial authorisation of compulsory status should be a matter of priority. Further, as the patient is being compulsorily treated during this period, any delay is likely to be prejudicial.

49. The Ministry of Health has advised the period of up to seven days to prepare the application to the court is necessary. This is because on an application for review the court will consider both whether the criteria for compulsory status are met, and whether, in all the circumstances of the case, compulsory status should be continued (clause 32(1) and (2)).The seven day period accounts for the need to gather additional information about the patient to appropriately advise the court how the patient meets the threshold for compulsory status and whether that status should be continued. This includes information about what their treatment may involve and where it will be undertaken.

50. We understand this will involve assessing the patient over a short period of time, possibly gathering information from treatment services and health professionals previously involved in their care, and looking at where the best place is for treatment. Patients may also need to be detained under clause 25 in order to undergo medically managed withdrawal in hospital. The physical and mental state of the patient may make it difficult to assess them properly within a very short time period.

51. In the case of detention for therapeutic purposes some allowance may be made for clinical considerations and the time required for proper diagnosis. We therefore consider the period of seven days' detention prior to application is sufficiently justifiable.

52. The Bill also provides some safeguards to mitigate the risk a patient will be detained for longer than necessary. As soon as practicable after a compulsory treatment certificate is signed, the approved specialist must notify that Area Director. Clause 26 requires that the Area Director must then notify a range of people, including the patient's principal caregiver, lawyer and medical practitioner, as well as the district inspector.

53. Clause 34 provides for urgent review of a patient's compulsory status, which may be brought by the patient or any of the people whom the Area Director has notified under clause 26. An urgent review may be applied for at any time a person is subject to compulsory status. This provides an avenue for a judge to review the compulsory status earlier than it might otherwise if an application for an urgent review precedes the responsible clinician's application for a review of compulsory status.

54. We note, however, that the Bill does not explicitly require that an urgent review be dealt with more expeditiously than the standard review of compulsory status. As per clause 75, the judge must interview the patient within seven days after an application is made to the

court. The time for confirming or dismissing compulsory status under an urgent review is unstated.

55. The urgency of an application under clause 34 is therefore entirely reliant on the time at which the urgent application is filed, which may not be materially different from the point at which the application for review is filed under clause 29(c). Establishing clearer and more expeditious timeframes for an interview and decision in the case of an urgent review would assist in making the Bill more rights consistent.

56. Clause 98 provides that the district inspector must visit the treatment centre as soon as practicable after receiving notice of the patient's detention. As noted above, the district inspector must also be notified of the right to challenge the compulsory status of the patient as soon as practicable after the compulsory treatment certificate is issued.

57. We agree that it is essential for the district inspector to visit as soon as practicable. However, we also note that given there is no prescribed time period in which they must do so, it is possible that it may not be until seven days following detention and commencement of compulsory treatment. Given the urgent review process does not provide an expedited process for the determination of the compulsory status order, in our view the safeguard may not be wholly sufficient.

58. On balance we consider that, despite some risk of a patient being detained for longer than necessary, and potential for improvement in the safeguards, the Bill does not meet the threshold required for arbitrariness. We therefore consider the Bill is consistent with section 22 of the Bill of Rights Act.

Conclusion

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

Jeff Orr

Chief Legal Counsel
Office of Legal Counsel

Disclaimer

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Substance Addiction (Compulsory Assessment and Treatment) Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-

General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.

Footnotes

[1] A Bill of Rights for New Zealand: A White Paper [1985] AJHR A.6 at [10.167].
[2] Re T (Adult: Refusal of Treatment) [1992] 4 All ER 649, [1993] Fam 95 (CA) at [116].
[3] Ibid.
[4] Hansen v R [2007] NZSC 7.
[5] Law Commission Report 118, Compulsory Treatment for Substance Dependence: A Review of the Alcoholism and Drug Addiction Act 1966 at [9].
[6] Chief Executive of the Department of Corrections v All Means All [2014] NZHC 1433.
[7] R v Briggs [2009] NZCA 244 at [85] per Arnold J.
[8] Police v Smith [1994] 2 NZLR 306 (CA) at [316] per Richardson J.
[9] Surrey County Council v P [2014] 2 WLR 642 (UKSC)
[10] Law Commission Report 118 at [5.55].
[11] Neilsen v Attorney-General [2001] 3 NZLR 433 (CA) para [34]
[12] R v Chadderton [2014] NZCA 528
[13] Ibid
[14] Ibid
[15] R v I (CA71/02) (2002) 19 CRNZ 413 (CA).