

Health and Disability Services (Safety) Amendment Bill

3 December 2010

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
HEALTH AND DISABILITY SERVICES (SAFETY) AMENDMENT BILL

1. We have considered whether the Health and Disability Services (Safety) Amendment Bill (PCO 13308/8.0) (“the Bill”) is consistent with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 9 December 2010.
2. The purpose of this Bill is to amend the Health and Disability Services (Safety) Act 2001 (“the Act”). The Act provides for a licensing regime for providers of health care services, which is designed to keep consumers safe while encouraging providers to continuously improve services.
3. The Ministry of Health advises that operational experience has shown that the Act does not adequately give effect to some aspects of the policy intent, has been misinterpreted by providers in some places, and does not provide sufficient powers to enforce safety and quality. This Bill is intended to address these issues.
4. The Bill seeks to amend the Act by:
 - clarifying that the Act does not apply to residential disability care homes with fewer than five residents, residences established under s 364 of the Children, Young Persons, and Their Families Act 1989 or children’s health camps
 - removing the exemption of prisons from the Act. The Ministry of Health advises that the prison health service has developed significantly since the Act came into effect and now aims to provide prisoners with an equivalent quality of health service as is available to the non-prison population
 - providing for the Director-General of Health (“the Director-General”) to appoint a temporary manager of a particular health care service provider. The Act currently allows the Director-General to issue cessation or closing orders to a health care service that breaches the Act. However, the Ministry of Health advises that it is rarely desirable to halt or close services due to negative effects on consumers. The power to appoint a temporary manager to return the operation of the service to acceptable quality and safety standards is intended to ensure safety while minimising disruption
 - creating two new administrative offences: applying to be certified less than three months before an existing certification is due to expire and failing to comply with a certification condition. These will be able to be dealt with as infringement offences
 - strengthening the audit system by providing the Director-General with greater discretion when deciding whether to designate an audit agency and clarifying the designation criteria, and
 - introducing an additional level of certification (temporary certification) to be applied to new service providers or service providers that consistently fail to meet a standard.

Offence Provisions

- Clause 18 of the Bill creates two new offences with a maximum penalty of a fine of up to \$2,500. New s 54(1A) makes it an offence to apply to be certified to provide health care

services less than three months before an existing certification is due to expire or to fail to comply with a certification condition requiring the provider concerned to give a report or information to the Director-General.

- Clause 19 of the Bill amends s 54 of the Act to create infringement offences. New s 54A provides that the infringement fee for an infringement offence is an amount (not exceeding \$500) prescribed by regulations, and that an infringement offence means an offence against new s 54(1A) (described above). New s 54B provides that a person may be proceeded against under the Summary Proceedings Act 1957 or served with an infringement notice.
- We note that s 55 of the Act puts the burden of proof for some matters relating to the offences in s 54 on the defendant and that s 56 of the Act provides for some defences which the defendant must prove. As the matters and defences in ss 55 and 56 of the Act do not apply to the new offences proposed in the Bill, these offences do not raise issues in relation to s 25(c) of the Bill of Rights Act (right to be presumed innocent until proved guilty).
- We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

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