



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

SUBSTANCE ADDICTION (COMPULSORY ASSESSMENT AND TREATMENT) BILL

29/04/2016

Substance Addiction (Compulsory Assessment and Treatment) Bill

Introduction and summary

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Substance Addiction (Compulsory Assessment and Treatment) Bill (Bill).
2. The Law Society has reviewed the potential for inconsistency between the Bill and the New Zealand Bill of Rights Act 1990. Areas of focus in the Bill were those which may conflict with section 11 (right to refuse medical treatment), section 22 (right not to be arbitrarily arrested or detained) and section 14 (right to freedom of expression) of the Bill of Rights Act.
3. The Law Society agrees with the Ministry of Justice that there is potential to improve the safeguards in the bill, to avoid inconsistency with the rights and freedoms contained in the Bill of Rights Act.¹
4. The Law Society's recommendations are that:
 - (a) Further consideration be given to the maximum period of detention and treatment without a final determination of the court. If timeframes can be reduced, while still allowing measured reviews of each case, this should be addressed to maintain consistency with section 22 of the Bill of Rights Act.
 - (b) Further consideration be given to providing timeframes within which an urgent review of a patient's status must take place under clause 34.
 - (c) The limits on the right to receive mail and electronic communications be further examined in light of the purpose of the power, and that additional safeguards be considered.
 - (d) Further consideration be given to the threshold for compulsory treatment, which adopts language imported from the Mental Health (Compulsory Assessment and Treatment) Act 1992 but appears to impose a more restrictive test.

Detention in Treatment Centre

5. Clause 30 provides for the responsible clinician to direct that the patient be compulsorily detained in a treatment centre. The Law Society has reviewed this against section 22 of the Bill of Rights Act, which provides that everyone has the right not to be arbitrarily arrested or detained.

¹ Substance Addiction (Compulsory Assessment and Treatment) Bill, Ministry of Justice advice dated 27 November 2015, at [55] – [58]. <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/substance-addiction-compulsory-assessment-and-treatment-bill>

6. The Law Society is concerned that the timeframe for concluding the review of a patient's compulsory status is too long. Clause 29 requires that an application for review must be filed within 7 days of the compulsory treatment certificate being signed, and clause 31 requires the review to be finally determined within either 10 (in the case of patients under the age of 18) or 20 days of the application being filed. The result is that a person may be compulsorily detained for up to either 17 or 27 days before the review of their compulsory treatment is finally determined by the court. The Law Commission recommended that the maximum period of detention and treatment without a final determination of the court should be 14 days.²
7. The Ministry of Justice's Bill of Rights Act advice considered the timeframe and concluded that the initial 7 days was sufficiently justifiable for clinical considerations and proper diagnosis.³ The Law Society accepts that, but recommends reviewing the 10 to 20 day timeframe between filing the application and the court determination. While a hearing will require proper preparation, restrictions on the right to liberty should be reduced to the extent possible.

Right to Apply to Court for Urgent Review of Patient's Status

8. Clause 34 provides that several parties, including the patient, their lawyer, the patient's usual medical practitioner, or the responsible district inspector, may at any time apply to the court for an urgent review of the patient's status on the grounds that either the criteria for compulsory treatment are not, or are no longer, met, or in the case of a patient who is not subject to a compulsory treatment order, the compulsory treatment certificate should not have been given.
9. The right to an urgent review of a patient's compulsory status provides for a judge to consider whether, in relation to the patient, the criteria for compulsory treatment are met and if not satisfied that the criteria for compulsory treatment are met, order that the patient be released from compulsory status.
10. There is no explicit timeframe for the hearing of urgent reviews, and in some circumstances this may result in an inconsistency with section 22 of the Bill of Rights Act. Without a clear timeframe there is potential for persons who have been detained under the Bill, but who no longer meet the criteria for compulsory treatment, to be arbitrarily detained in breach of the Bill of Rights Act.
11. The Law Society therefore recommends that further consideration be given to clause 34. Prescribed timeframes within which an urgent review must be heard would assist in meeting the requirements of section 22 of the Bill of Rights Act.

² Law Commission Report 118, Compulsory Treatment for Substance Dependence: A review of the Alcoholism and Drug Addiction Act 1966, page 12.

³ Note 1 above, at [51].

Limits on Right to Receive and Send Mail and Electronic Communications

12. Subpart 5 of Part 2 (clauses 49 to 67) provides for the rights applicable to all patients in compulsory residential treatment. These include the right to receive and send mail and electronic communications.
13. The right to receive and send mail and electronic communications may be limited under clause 61, which empowers a responsible clinician to direct that the mail or electronic communications of a patient be checked and, in certain circumstances, to 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. These powers restrict the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form, affirmed by section 14 of the Bill of Rights Act.
14. The Law Society notes that the controls on the exercise of the power go some way to ensuring any exercise of the power would be justifiable for the purposes of section 5 of the Bill of Rights Act. The relevant controls are:
 - (a) mail may only be checked and withheld if the patient's responsible clinician has reasonable grounds to consider it could be detrimental to the interests and treatment of the patient or of other persons in the treatment centre;⁴
 - (b) this restriction must have prior approval from the Area Director and the patient is informed of the restriction, unless to do so would be detrimental to the patient's interests;⁵ and
 - (c) mail and electronic communications are not to be withheld if sent by or to certain people including, among others, the patient's lawyer, a specialist from whom he or she is seeking a second opinion, the Privacy Commissioner, the Health & Disability Commissioner, and a Human Rights Commissioner.⁶
15. However, the Law Society considers that the threshold test of a clinician having reasonable grounds to consider the relevant communication "could be" detrimental to the interests of a patient or other person in the treatment centre is vague and capable of capturing a potentially wide class of communications (including objects, given the definition of mail includes packages and parcels: clause 4), depending on the circumstances and the relevant responsible clinician's professional judgment. It is also difficult to discern from the Bill and supporting material whether the drafters had a particular harm in mind. In these circumstances it is hard to assess whether the power and safeguards are a proportionate response and constitute a minimal impairment of the right in light of the purpose for which the power is conferred.

⁴ Clause 61.

⁵ Clauses 62 and 64.

⁶ Clause 63.

16. The Law Society suggests that further thought be given to whether the “could be detrimental” threshold is appropriate, having regard to the purpose for which the power is conferred. The Law Society also notes two further respects in which the exercise of the power could be controlled, to promote the right to freedom of expression:
- (a) The Bill does not confer any right of review or appeal in relation to exercises of the power in clause 61. In circumstances where the person is informed of the restriction in accordance with clause 64(1), the Bill should confer on affected persons a right to appeal to the District Inspector.
 - (b) Currently, the Bill does not require that mail be returned to the patient after treatment, or during treatment should the patient’s status improve. Clause 61(6) requires that computers or devices taken from a patient be returned when he or she is released from compulsory status, thereby allowing access to electronic communications. However, posted mail which is unable to be returned to the sender is given to the district inspector with no provision for it to be returned to the patient at a later date.⁷ The Bill should make provision for mail to be returned to the patient after treatment, or during treatment should the patient’s status improve, provided the responsible clinician is satisfied that to do so would not be detrimental to the interests of the patient.

Threshold for compulsory treatment

17. Clause 7(a) of the Bill provides that a person may be subject to compulsory treatment under the Act only if the person has a “severe substance addiction” (and the requirements in clauses 7(b) – (d) are met). A “severe substance addiction” is defined in clause 8. Clause 8(1)(b) provides that a substance addiction must be of such severity that it poses a “serious danger to the health or safety of the person *and* seriously diminishes the person’s ability to care for himself or herself” (emphasis added). This language is adopted from the definition of “mental disorder” in section 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. Under that Act, compulsory assessment and treatment require only one, not both, of the criteria to be established.
18. It is not clear from the Bill or the supporting material whether it is intended that a more stringent test is to apply, or whether the conjunctive “and” in clause 8(1)(b) is a drafting oversight. In this respect, the explanatory note to the Bill states that “substance addiction” manifests itself “in the compulsive use of a substance that is of such severity that it poses a serious danger to the health or safety of the person suffering from it *or* seriously diminishes the person’s ability to care for himself or herself” (emphasis added).⁸

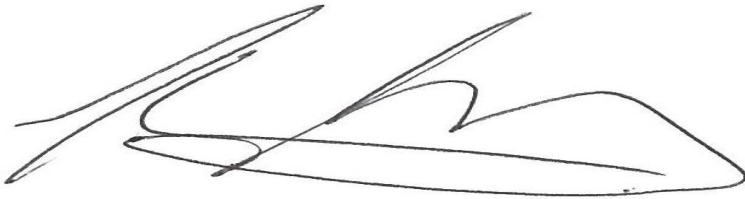
⁷ Clause 64(2)(b).

⁸ Explanatory Note, p3.

19. The Law Society therefore recommends that further consideration be given to whether the threshold for compulsory treatment set out in clause 7, when read in conjunction with the definition of “severe substance addiction” in clause 8 is too restrictive.

Conclusion

20. The Law Society does not wish to be heard.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck

President

29 April 2016