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# Mental Health (Compulsory Assessment and Treatment) Amendment Bill

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*18/05/2021*

## **Submission on the Mental Health (Compulsory Assessment and Treatment) Amendment Bill**

### **1. Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Mental Health (Compulsory Assessment and Treatment) Amendment Bill (**the Bill**).
- 1.2 The Bill amends the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**the Act**) by:
  - a. eliminating indefinite treatment orders;
  - b. minimising the risk of harm to the patient or the public when transporting forensic patients who are special patients as defined under the Act;
  - c. addressing technical drafting issues that will improve the administrative efficiency of the Act; and
  - d. removing the sunset date for technical amendments and audiovisual link amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020.
- 1.3 This submission has been prepared with the assistance of the Law Society's Family Law Section. It raises concerns about extending the use of audio-visual links (**AVL**) in mental health proceedings on a permanent basis, identifies practical issues with the proposed removal of indefinite treatment orders, and makes recommendations about what information should be provided to the District Inspector of Health regarding the secure transport of special patients.
- 1.4 The Law Society wishes to be heard.

### **2. Extending the use of audio-visual links in mental health examinations and assessments**

#### **Overview**

- 2.1 Clauses 13 to 34 replace temporary amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020 (**the 2020 Act**). The urgent temporary amendments, introduced during the COVID-19 pandemic, enabled the use of AVL for patient examinations and assessments when the physical presence of the patient was not practicable. The temporary amendments are due to expire no later than 31 October 2021. Clauses 13 to 34 propose amendments that are not subject to expiry.
- 2.2 Schedule 11 (clause 4) of the COVID-19 Response (Further Management Measures) Legislation Bill 2020 (**the 2020 Bill**) inserted new section 6A in the Act, to allow AVL to be used for clinical assessments, examinations and reviews of patients and proposed patients, and for judicial examinations of patients, only during the response to the pandemic.
- 2.3 The Law Society made a submission on the 2020 Bill.<sup>1</sup> The Law Society supported measures to address constraints on in-person assessments and examinations during the COVID-19 pandemic, but noted that use of AVL to conduct mental health assessments and examinations under the Act would have significant implications for the vulnerable people involved, and recommended a higher threshold for the use of AVL. That recommendation was not adopted.

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<sup>1</sup> NZLS submission, Covid-19 Response (Further Management Measures) Legislation Bill, 8 May 2020. Available here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/COVID-19-Response-Further-Management-Measures-Legislation-Bill-8-5-20.pdf>

- 2.4 The Law Society also recommended that the amendments should be subject to a sunset clause and repealed when the Epidemic Preparedness (COVID-19) Notice 2020 expired. Subsequently section 6A came into force on 16 May 2020 and is set to expire by 31 October 2021.
- 2.5 As an aside, the explanatory note to the current Bill states that the amendments to allow AVL for examinations and assessments of patients had been requested by stakeholders prior to the COVID-19 response and that the proposed change to make AVL permanent is in response to this request. The Law Society has not been able to find any relevant evidence in the supporting materials to the Bill (or the 2020 Bill) to suggest that such a request was made, nor who the stakeholders were. Therefore, there does not appear to be any publicly available evidence to justify permanently extending the use of AVL under the Act.

***Clause 15 – Section 6A amended (Use of audio-visual links permitted during COVID-19 response)***

- 2.6 Clause 15 now proposes to remove the words “permitted during COVID-19 response” in the heading to section 6A. This change will allow AVL to be used for clinical assessments, examinations, and reviews of patients and proposed patients, and for judicial examinations of patients on a permanent basis, where “it is not practicable for the person to be physically present” (see section 6A(2) and (3)).
- 2.7 The Law Society has long acknowledged that remote participation via AVL is appropriate in certain proceedings (such as civil proceedings and criminal procedural hearings). However, we remain of the view that the use of AVL for mental health assessments and examinations under the Act has significant implications for the vulnerable people involved, and consequently AVL for these purposes should only be used as a last resort.
- 2.8 Patients subject to the Act include some of the most vulnerable and marginalised people in society. An assessment under the Act has the potential to result in periods of compulsory detention amounting to a significant encroachment on their fundamental rights.<sup>2</sup> Undertaking mental health assessments and examinations via AVL should therefore be limited to a narrow set of extraordinary circumstances (as was the case during the COVID-19 pandemic).
- 2.9 Lawyers practising in this area also note it is not uncommon for people suffering from a serious mental illness to experience delusions and/or paranoia about cameras, television screens and other devices. Often, auditory and visual hallucinations are part of a mental health condition. The use of AVL has the potential to exacerbate these problems. A vulnerable person may therefore have a less positive experience being assessed or examined via AVL rather than in person.
- 2.10 Further, the examination required for a clinician to form an opinion about whether the person is mentally disordered is a crucial step. During the examination, information is gathered from the patient’s verbal and physical presentation as well as from other sources. It will be difficult for clinicians to make accurate assessments when examining a patient via AVL, as many people do not respond well when speaking to a screen rather than a person who is physically present. Many non-verbal responses and cues may be missed via AVL, making it difficult for the clinician to properly understand and assess the nuances of the person’s communication and their state of mental wellbeing.
- 2.11 While sections 6A(2) and (3) state that AVL may be used if the clinician or judicial officer

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<sup>2</sup> See for instance sections 17 (freedom of association), 18 (freedom of movement), and 22 (liberty of the person) of the New Zealand Bill of Rights Act 1990.

“considers that it is not practicable for the person to be physically present”, the Law Society continues to consider there needs to be a higher threshold. As recommended in relation to the 2020 Bill, in-person assessments and examinations under the Act should continue to be the default, and AVL should only be used as a last resort and limited to situations where there is no other safe option available to conduct an in-person assessment.<sup>3</sup>

- 2.12 In addition, the decision to use AVL should take into account whether the patient consents and the urgency of the assessment/examination required. Proposed new section 34C(3) (clause 8) in relation to extension of community treatment orders permits examination of the patient and participants to appear at the hearing via AVL, subject to the patient’s consent. There is no apparent reason for not including the same requirement in the proposed amendment of section 6A.
- 2.13 The Law Society also recommends that the reasons for using AVL instead of in-person assessments and examinations should be recorded.

### ***Recommendations***

- 2.14 The Law Society recommends that clause 15 is amended to:
- a. set out a higher threshold for the use of AVL (for example, that there is no other safe option to conduct an in-person assessment);
  - b. take into account whether the patient consents to the use of AVL and whether there is an urgent need to conduct the examination/assessment by AVL; and
  - c. require the reasons for using AVL instead of in-person assessments to be recorded in writing.

### **3. Assessment examination to be arranged and conducted: clause 5 – section 9 amended**

- 3.1 Clause 5 amends section 9 of the Act to provide for a family member or caregiver of the proposed patient, or another person concerned with the welfare of the proposed patient, to be present by audio or visual link when the purpose of the assessment examination and the requirements of the notice given under section 9(2)(c) are explained to the proposed patient. Historically, there has been no flexibility for instances where the physical presence of a family member or caregiver is not possible. This may occur when an assessment under section 9 is conducted in the middle of the night, or if the appropriate family member or caregiver is not geographically located to be present in a timely manner.
- 3.2 Similarly to the discussion above about the use of AVL, the Law Society considers it is preferable for the family member or caregiver to be physically present. However, we agree that AVL may be appropriate in circumstances where the Director of Area Mental Health Services or a duly authorised officer is satisfied that the family member or caregiver’s physical presence “is not reasonably practicable” (new section 9(2A)).

### **4. Repeal of Indefinite Treatment Orders: clause 7 – section 34 amended**

- 4.1 Clause 7 repeals indefinite compulsory treatment orders as currently provided for in section 34(4). (Currently, section 34(4) states that a compulsory treatment order that is further extended after a 6-month extension is extended indefinitely.) Clause 7 also amends section 34(1) to make a review of an expiring compulsory treatment order under section 34

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<sup>3</sup> Note 1 above, at [4.6].

mandatory and to clarify that a section 34 review occurs only after the expiry of a compulsory treatment order under section 33 for the first time.

4.2 The Bill's explanatory note states:

"Indefinite treatment orders have been widely criticised as a serious breach of human rights and their elimination is a significant policy reform that stakeholders and *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (November 2018) have clearly called for. Indefinite treatment orders discriminate against people with a mental disorder, could amount to arbitrary detention, and restrict 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."

4.3 The Law Society supports the repeal of indefinite compulsory treatment orders. The Law Society has previously submitted that section 34(4) is in direct conflict with Articles 1 (full and equal enjoyment of all human rights and fundamental freedoms) and 14 (the existence of a disability shall in no case justify a deprivation of liberty) of the Convention on the Rights of Persons with Disabilities, and sections 18 (freedom of movement), 19 (freedom from discrimination) and 22 (liberty of the person) of the New Zealand Bill of Rights Act 1990.<sup>4</sup>

4.4 However, it is important to note that if indefinite compulsory treatment orders are repealed, patients currently subject to these orders will still require ongoing review by the Family Court. The Principal Family Court Judge has indicated to the Law Society's Family Law Section that this amendment will likely require approximately 1,500 additional hours of judicial resource from an already over-stretched judiciary. We invite the Committee to seek further advice from officials on this issue.

4.5 Finally, if a patient seeks to have an order discharged and a clinician does not agree, the Law Society suggests that legal aid should be available so that a lawyer is able to advise the patient of their right to appeal a decision not to discharge an order, to the Mental Health Review Tribunal.

**Recommendation**

4.6 The Law Society recommends that section 34 is amended to allow a patient to engage a legal aid provider.

**5. Transport of special patients: clause 9 – new section 53A inserted**

5.1 Clause 9 inserts new section 53A to provide for the transport of special patients to attend court or Parole Board hearings. As some special patients will pose a risk to the safety of themselves or others, a transport management plan is required which may need to include the use of reasonable force, including restraint. The creation of a transport management plan for special patients is a new development.

5.2 It is important to note there are varying regional differences in the transport of special patients. In some regions, practices will include the least restrictive transport options (rather than full restraint of the patient, for example). However, family lawyers have indicated that the Police are often reluctant to assist unless the patient is able to be properly restrained.

5.3 The Ministry of Health's Guidelines to the Mental Health (Compulsory Assessment and

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<sup>4</sup> NZLS submission on the "*Mental Health Act and Human Rights: discussion document*", Ministry of Health, 28 February 2017. Available here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0005-108914-l-MOH-Mental-Health-Act-Human-Rights-28-2-17.pdf>.

Treatment) Act 1992 provide guidance for the current reporting requirements when force is used under section 122B. Although not specified in the guidelines, the Law Society understands that in practice the District Inspector of Mental Health (in the relevant location) is notified of specific matters including whether any restraints and/or seclusion of the patient was used along with any incidents that arose (from the transportation). In order to provide the District Inspector with the full scope of matters necessary for the safe transportation of a patient, the Law Society recommends that proposed new section 53A(4)(a) should be amended to state that a copy of the transport management plan is also sent to the District Inspector.

- 5.4 Further, special or restricted patients may not be the only types of patients that will or may pose a risk to the safety of themselves or others (for example any patient with mental health problems or who may be subject to a community treatment order). The Committee may wish to consider whether the proposals in new section 53A should be extended to all patients requiring secure transportation and who may pose a safety risk to themselves and/or others. This may require amendments to other parts of the Act.

***Recommendation***

- 5.5 The Law Society recommends that new section 53A(4)(a) is amended to provide that a copy of the transport management plan is sent to the District Inspector.

A handwritten signature in black ink, appearing to read 'F. Barton'.

Frazer Barton  
**NZLS Vice President**

18 May 2021