

Mental Health (Compulsory Assessment and Treatment) Amendment Bill

Government Bill

Explanatory note

General policy statement

The amendments in this Bill are intended to improve the protection of individual rights and the safety of patients and the public and enable more effective application of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**the Act**) by—

- eliminating indefinite treatment orders:
- minimising the risk of harm to the patient or the public when transporting forensic patients who are special patients as defined under the Act:
- addressing technical drafting issues that will improve the administrative efficiency of the Act:
- removing the sunset date for technical amendments and audiovisual link amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020.

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.

At times, special patients, as defined by the Act, require transport between hospitals, or to attend medical appointments or for court appearances. A small number of those patients will pose a risk to the safety of themselves or the public and will require a carefully considered transport management plan. The plan may need to include the

use of reasonable force, including restraint, if it is the safest and least restrictive option to protect their safety and to enable safe transport. However, the Act does not permit the use of force, including restraint, when transporting those patients.

New section 53A, inserted by *clause 9*, gives the legal custodian of a special patient the authority to enter into an arrangement with another agency for the provision of safe transport of the patient. In doing so, the legal custodian may authorise a transport management plan permitting an agency to use restraint if it is the safest and least restrictive option to maintain patient and public safety, or other force if reasonably necessary in the circumstances. Such an arrangement may only be entered into with the prior approval of the Director of Mental Health (to be given on a case-by-case basis). Failure to clarify this with a legislative amendment may result in an incident that results in harm to either the patient or a member of the public.

An amendment to section 9 of the Act is included to explicitly allow a family member or caregiver to be present by audio or video link when the notice relating to the assessment is explained. 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.

The COVID-19 Response (Further Management Measures) Legislation Act 2020 included urgent technical amendments to improve the effective administration of the Act, including the use of audiovisual link technology for patient assessments when the physical presence of the patient is not practicable. Those amendments had been requested by stakeholders prior to the COVID-19 response but became urgently needed during the response to ensure the effective and safe application of the Act during the COVID-19 response. Currently, those amendments expire no later than 31 October 2021. This Bill will make the changes permanent as previously requested by stakeholders.

Departmental disclosure statement

The Ministry of Health is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2021&no=14>

Regulatory impact statement

A regulatory impact statement is not required for this Bill.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. *Clauses 4, 6, 7, 8, 10, and 12* come into force on a date appointed by the Governor-General by Order in Council or on the expiry of the 24-month period that starts on the date of Royal assent, whichever is earlier. This provides for the deferred commencement of provisions relating to the replacement of indefinite compulsory treatment orders with the 12-monthly review of orders. The rest of the Bill comes into force on the day after the date on which the Bill receives the Royal assent.

Clause 3 states that the Bill amends the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the **principal Act**).

Part 1

Main amendments

Clause 4 inserts *new section 2C*, which provides that the transitional, savings, and related provisions set out in *new Schedule 1AA* have effect according to their terms.

Clause 5 amends section 9 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.

Clause 6 amends section 33 to make that section subject to *new section 34A* as well as section 34.

Clause 7 repeals section 34(4), which provides that a compulsory treatment order that is further extended after a 6-month extension is extended indefinitely. Section 34(1) is also amended to make a review of an expiring compulsory treatment order under section 34 mandatory and to clarify that a section 34 review occurs only after the expiry of an compulsory treatment order under section 33 for the first time.

Clause 8 inserts *new sections 34A to 34D*. *New section 34A* provides for the review and potential 12-month extension of a compulsory treatment order that has been extended pursuant to an application under section 34(2). *New section 34B* sets out how the court must deal with an application for a 12-month extension of a compulsory treatment order under *new section 34A*. *New section 34C* permits the examination of a patient and the appearance of participants at a hearing by audiovisual link, subject to patient consent. *New section 34D* permits the court to determine an application under section 34 or *new section 34A* without examination or hearing, subject to patient consent and other specified conditions.

Clause 9 inserts *new section 53A*, which provides for the transport of special patients for the purposes of Part 4 of the principal Act and for attendance at court or parole board hearings.

Clause 10 amends section 92(4) to require every Director of Area Mental Health Services to report every 3 months on the number of consents provided under *new section 34D(2)(b)*.

Clause 11 amends section 122B to authorise the use of such force as is reasonably necessary in respect of a transported special patient.

Clause 12 inserts *new Schedule 1AA*, which contains transitional provisions relating to this Bill.

Part 2

Amendments relating to Covid-19

Clauses 13 to 34 replace temporary amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020 with amendments that are not subject to expiry.

Hon Andrew Little

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Amendment Bill**

**Part 2
Amendments relating to COVID-19**

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34	Temporary COVID-19 response provisions repealed	10

Schedule 11

New Schedule 1AA inserted

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Mental Health (Compulsory Assessment and Treatment) Amendment Act **2021**.

2 Commencement

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(1) **Sections 4, 6, 7, 8, 10, and 12** come into force on the earlier of—

(a) a date appointed by the Governor-General by Order in Council; and

(b) the expiry of the 24-month period that starts on the date of Royal assent.

(2) The rest of this Act comes into force on the day after the date on which this Act receives the Royal assent.

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3 Principal Act

This Act amends the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the **principal Act**).

Part 1

Main amendments

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4 New section 2C inserted (Transitional, savings, and related provisions)

After section 2B, insert:

2C Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

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5 Section 9 amended (Assessment examination to be arranged and conducted)

After section 9(2), insert:

(2A) For the purposes of subsection (2)(d), a family member or caregiver of, or other person concerned with the welfare of, the proposed patient, may be present by audio or visual link if the Director of Area Mental Health Services or a duly authorised officer is satisfied that their physical presence is not reasonably practicable.

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(2B) In this section, **audio or visual link** means facilities that enable audio or visual communication between the family member or caregiver of, or the other person concerned with the welfare of, the proposed patient, and—

30

(a) the person giving the explanation; and

(b) the proposed patient.

6 Section 33 amended (Compulsory treatment order to expire after 6 months)

In section 33, replace “section 34” with “sections 34 and **34A**”.

7 Section 34 amended (Court may extend order)

(1) Replace section 34(1) with: 5

(1) Within 14 days before the date on which a compulsory treatment order is to expire under section 33 for the first time, the responsible clinician must cause the case to be reviewed under section 76.

(2) In section 34(3), after “modifications”, insert “, subject to **sections 34C and 34D**”. 10

(3) Repeal section 34(4).

8 New sections 34A to 34D inserted

After section 34, insert:

34A Court may further extend order for 12-month period

(1) If a compulsory treatment order has been extended by application under section 34(2) or under **subsection (2)**, the responsible clinician must, within 14 days immediately preceding the date on which the extended compulsory treatment order expires, cause the case to be reviewed under section 76. 15

(2) If, following that review, the responsible clinician is satisfied that the patient is not fit to be released from compulsory status, that clinician may apply to the court for an extension of the currency of the order for a period of 12 months commencing with the day after the date on which the order would otherwise have expired. 20

34B Determination of application under section 34A

(1) The court must treat an application under **section 34A** as if it were an application made under section 14(4). 25

(2) Sections 15 and 17 to 33 apply with any necessary modifications, subject to **subsection (3)** and **sections 34C and 34D**.

(3) Unless the court determines an application in accordance with section 26 or **34D**, a District Court Judge must, within 2 months after the date on which the application under **section 34A** is filed in the court,— 30

(a) examine the patient; and

(b) hear and determine the application.

(4) If, at the time immediately before the expiry of the relevant extended compulsory treatment order, the court has not determined an application under **section 34A**, the order does not expire and continues in force until the court determines the application. 35

34C Examination and hearing of application for extension of community treatment order by audiovisual link	
(1) This section applies to an application under section 34 or 34A for the extension of a community treatment order.	
(2) A District Court Judge may use an audiovisual link to examine a patient for the purposes of the application if the patient consents to the use of the audiovisual link.	5
(3) A District Court Judge may determine that all or any participants may appear at a hearing by audiovisual link if the patient consents to the use of the audiovisual link.	10
(4) The District Court Judge must take into account the following criteria when making a determination under subsection (3) :	
(a) the potential impact of the use of the technology on the effective maintenance of the rights of the person under section 20, including the right to assess the credibility of witnesses and the reliability of evidence presented to the court:	15
(b) any other relevant matters.	
(5) In this section,—	
audiovisual link means facilities that enable both audio and visual communication,—	20
(a) in relation to an examination of a patient, with the patient:	
(b) in relation to a hearing, between all participants	
participant means any of the following persons in a hearing:	
(a) a party:	
(b) the patient:	25
(c) counsel:	
(d) a witness:	
(e) the presiding District Court Judge.	
34D Court may dispense with examination and hearing	
(1) The court may determine an application under section 34 or 34A without examination of the patient and without a formal hearing if the court is satisfied that—	30
(a) the patient has given consent in accordance with subsection (2) for the application to be so determined; and	
(b) no person wishes to be heard in respect of the application; and	35
(c) it is appropriate to do so in the circumstances.	
(2) The consent of the patient must be—	

- (a) given on the advice of a solicitor; and
 - (b) provided in writing to the court and the Director of Area Mental Health Services.
- (3) In this section, **solicitor** has the meaning given to it by section 6 of the Lawyers and Conveyancers Act 2006. 5

9 New section 53A inserted (Transport of special patients)

After section 53, insert:

53A Transport of special patients

- (1) A special patient custodian may agree in writing that a government agency transport special patients for the purposes of this Part and for either of the following purposes: 10
- (a) to bring the patient before a court for a hearing or trial;
 - (b) to bring the patient before the New Zealand Parole Board for a hearing under the Parole Act 2002.
- (2) The agreement must include a transport management plan that has been approved in writing by the Director of Mental Health. 15
- (3) A transport management plan may authorise—
- (a) the restraint of a transported special patient that is the least restrictive option for both the safety of the patient and the public; and
 - (b) any other use of force in respect of the patient that is reasonably necessary in the circumstances. 20
- (4) If the transport management plan authorises the restraint of a transported special patient or other use of force in respect of the patient,—
- (a) the plan must—
 - (i) set out the grounds that satisfy the requirements in **subsection (3)(a) and (b)**; and 25
 - (ii) state the type of restraint and any other use of force that is authorised; and
 - (iii) state any additional type of restraint or use of force that is authorised in the event of escalation of risk to any person during transport and that satisfies the requirements in **subsection (3)(a) and (b)**; and 30
 - (b) a person employed or engaged by the government agency may restrain a special patient and use force in respect of the patient in accordance with the approved transport management plan. 35
- (5) The Director-General of Health must issue guidelines under section 130(a) for the purposes of this section within 12 months of the date on which this section comes into force.

- (6) In this section,—
- government agency** means a Crown agent or department as those terms are defined by section 5 of the Public Service Act 2020 or the New Zealand Police
- special patient custodian** means a person who has custody of a special patient under this Act
- transport** includes escorting a special patient to and from a vehicle, and **transported** has a corresponding meaning.
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- 10 Section 92 amended (Directors of Area Mental Health Services)**
- Replace section 92(4)(a) with:
- (a) prepare a written report for the previous 3 months on—
- (i) the exercise or performance of their powers, duties, and functions under this Act; and
- (ii) the number of consents provided under **section 34D(2)(b)**; and
- 10
- 11 Section 122B amended (Use of force)**
- After section 122B(2), insert:
- (2A) A person permitted to restrain a transported special patient or use any other force under **section 53A** may use such force as is reasonably necessary in the circumstances.
- 15
- 12 New Schedule 1AA inserted**
- Insert the **Schedule 1AA** set out in the **Schedule** of this Act as the first schedule to appear after the last section of the principal Act.
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Part 2

Amendments relating to COVID-19

- 13 Section 2 amended (Interpretation)**
- In section 2(1), insert in their appropriate alphabetical order:
- mental health practitioner** means—
- (a) a medical practitioner; or
- (b) a nurse practitioner; or
- (c) a registered nurse practising in mental health
- registered nurse practising in mental health** means a health practitioner who—
- (a) is, or is deemed to be, registered with the Nursing Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of nursing
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- 30

and whose scope of practice includes the assessment of the presence of mental disorder as defined under this Act; and

(b) holds a current practising certificate

- 14 Section 2A amended (Meaning of proposed patient)**
In section 2A(b), replace “health practitioner” with “mental health practitioner”. 5
- 15 Section 6A amended (Use of audiovisual links permitted during COVID-19 response)**
In the heading to section 6A, delete “permitted during COVID-19 response”.
- 16 Section 7A amended (Practitioner or responsible clinician to consult)** 10
In section 7A(1)(a), replace “health practitioner” with “mental health practitioner”.
- 17 Section 8B amended (Certificate to accompany application for assessment)**
(1) In section 8B(1) to (5), replace “health practitioner” with “mental health practitioner” in each place. 15
(2) Repeal section 8B(6).
- 18 Section 9 amended (Assessment examination to be arranged and conducted)**
(1) In section 9(1), replace “health practitioner” with “mental health practitioner”.
(2) In section 9(1), replace “the Director of Area Mental Health Services must make” with “the Director of Area Mental Health Services or duly authorised officer must make”. 20
- 19 Section 10 amended (Certificate of preliminary assessment)**
In section 10(1) to (4), replace “health practitioner” with “mental health practitioner” in each place. 25
- 20 Section 11 amended (Further assessment and treatment for 5 days)**
In section 11(1) and (2), replace “health practitioner” with “mental health practitioner” in each place.
- 21 Section 38 amended (Assistance when person may need assessment)**
(1) In section 38(2)(b), (3), and (4), replace “a medical examination” with “an examination”. 30
(2) In section 38(3) to (6), replace “medical practitioner” with “mental health practitioner” in each place.

22	Section 41 amended (Police assistance)	
(1)	In section 41(3)(b) and (4)(b)(ii), replace “medical examination” with “examination”.	
(2)	In section 41(4)(a), replace “a medical examination” with “an examination”.	
23	Section 42 amended (Notice of admission)	5
	In section 42(2)(c), replace “medical certificate” with “assessment certificate”.	
24	Section 45 amended (Application for assessment may be made in respect of persons detained in prisons)	
	In section 45(4)(d), replace “medical practitioner” with “mental health practitioner”.	10
25	Section 96 amended (Visitations by district inspectors and official visitors)	
	In section 96(4) and (5), replace “health practitioner” with “mental health practitioner” in each place.	
26	Section 109 amended (Police powers in relation to person appearing to be mentally disordered in public place)	15
	In section 109(1)(b), (2), (3), (3A), and (4)(b), replace “medical practitioner” with “mental health practitioner”.	
27	Section 110 amended (Powers of medical practitioner when urgent examination required)	
(1)	In the heading to section 110, replace “ medical practitioner ” with “ mental health practitioner ”.	20
(2)	In section 110(1) to (4), replace “medical practitioner” with “mental health practitioner”.	
(3)	In section 110(1)(a) and (4), replace “a medical examination” with “an examination”.	25
28	Section 110B amended (Powers of medical practitioner when urgent assessment required)	
(1)	In the heading to section 110B, replace “ medical practitioner ” with “ mental health practitioner ”.	
(2)	In section 110B(1) to (4), replace “medical practitioner” with “mental health practitioner”.	30
29	Section 110C amended (Powers of Police when urgent assistance required)	
(1)	In section 110C(1) and (2), replace “medical practitioner” with “mental health practitioner” in each place.	
(2)	In section 110C(3)(a), replace “medical examination” with “examination”.	35

- 30 Section 111 amended (Powers of nurse where urgent assessment required)**
In section 111(1) to (3), replace “medical practitioner” with “mental health practitioner” in each place.
- 31 Section 127 amended (Transfer of patients)**
In section 127(8), replace “medical certificates” with “assessment certificates”. 5
- 32 Section 134 amended (Fees of medical practitioners)**
- (1) In the heading to section 134, replace “**medical practitioners**” with “**mental health practitioners**”.
- (2) In section 134(1), (2), and (5), replace “medical practitioner” with “mental health practitioner”. 10
- 33 Schedule 1 amended**
- (1) In Schedule 1, heading to clause 3A, delete “**during COVID-19 response**”.
- (2) In Schedule 1, replace clause 8(2)(b)(i) with:
(i) members of the legal profession or health professions:
- 34 Temporary COVID-19 response provisions repealed** 15
Repeal sections 2AA, 2B, 7B, 8C, 9A, 10A, 11A, 38A, 41A, 42A, 45A, 96A, 109A, 110AA, 110BA, 110D, 111A, 127A, 134A, and 137A and clause 8A of Schedule 1.

Schedule
New Schedule 1AA inserted

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Schedule 1AA
Transitional, savings, and related provisions

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s 2C

Part 1
Provisions relating to Mental Health (Compulsory Assessment and Treatment) Amendment Act 2021

- 1 Interpretation** 10
- In this Part, unless the context otherwise requires,—
- commencement date** means the day on which this Part comes into force
- extension date**, in relation to a compulsory treatment order, means the day and month on which the order was extended indefinitely under section 34(4)
- transition period** means the 12-month period starting on the 14th day after the commencement date. 15
- 2 First 12-month review under section 34A**
- (1) This clause applies to a compulsory treatment order that, before the commencement date, was extended indefinitely under section 34(4).
- (2) The order expires on the extension date that falls within the transition period (the **expiry date**). 20
- (3) The first review of the order under **section 34A(1)** must be undertaken within the 14-day period immediately preceding the expiry date.