

Mental Health (Compulsory Assessment and Treatment) Amendment Bill

Government Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Mental Health (Compulsory Assessment and Treatment) Amendment Bill and recommends that it be passed with the amendments shown.

About the bill as introduced

The Mental Health (Compulsory Assessment and Treatment) Amendment Bill seeks to improve the protection of individual rights and the safety of patients and the public. It also aims to enable the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) to be applied more effectively. The changes proposed in the bill are designed to address some pressing issues with the current legislation while work continues towards the planned repeal and replacement of the Act. This bill is part of the wider work programme to repeal and replace the Mental Health Act, which we discuss later in our commentary.

The bill would amend the Act to eliminate indefinite treatment orders. These are compulsory treatment orders that have no defined end date and do not require further review by a court. The bill would require the courts to review any compulsory treatment order at the end of each 12-month period for the duration of the order.

The bill also seeks to minimise the risk of harm to the patient and the public when transporting patients who are defined as “special patients” under the Act. It would amend the Act to enable the legal custodian of a special patient to authorise a transport management plan with the government agency transporting the patient. The plan could permit an agency to use restraint if it was the safest and least restrictive option to maintain patient and public safety. Other force could also be used if it was reasonably necessary in the circumstances.

The bill would also amend the Act to:

- allow a family member or caregiver of a patient to be present by audio or video link when the notice relating to the assessment examination made under section 9 of the Act is explained
- remove the expiry date for technical and audiovisual link amendments made by the COVID-19 Response (Further Management Measures) Legislation Act 2020
- address technical drafting issues to improve the administrative efficiency of the Act.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation’s design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Use of audiovisual link technology for patient assessments

Section 6A of the Act enables audiovisual link (AVL) technology to be used for patient assessments and examinations when the physical presence of a patient is not practicable. It was inserted by the COVID-19 Response (Further Management Measures) Legislation Act and is due to expire by 31 October 2021. Clause 15 of the bill as introduced would make the amendment permanent by removing “permitted during COVID-19 response” from the heading of section 6A.

Determining whether the use of audiovisual link technology is appropriate

Some submitters expressed concern that AVL technology could become the default method for assessments and examinations under the Mental Health Act. They were also concerned that it could be used to ease pressure on services when staff resources were limited.

We were advised that the Ministry of Health issued guidance about the use of AVL technology allowed by the temporary COVID-19 amendment. Under the guidance, providers should consider a range of factors when determining whether it is practicable for the patient to attend in person. They include:

- the preference and best interests of the patient or proposed patient
- the least restrictive manner of providing assessment and treatment
- whether barriers to in-person attendance would prevent timely access to assessment and treatment.

We understand that, if the bill is enacted, this guidance, with any changes resulting from the bill’s amendments, would be incorporated into the guidelines issued under

section 130 of the Mental Health Act. Although practitioners are expected to apply the guidelines, we consider that this should be made an explicit requirement in the legislation. We note that this would be similar to a provision in section 7A of the Act, which requires a practitioner to consult with the patient or proposed patient's family or whānau. Section 7A(5) requires practitioners to apply guidelines or standards issued under section 130 when deciding how to carry out this consultation.

We recommend amending clause 15 accordingly, to insert section 6A(2A) requiring application of the guidelines or standards issued under section 130.

Monitoring the use of audiovisual link technology

We note that the ministry has been monitoring the use of AVL technology in several ways. There are monthly inspections by District Inspectors and quarterly check-ins between the Director of Mental Health and the Directors of Area Mental Health Services. We were advised that the ministry intends to continue monitoring the use of AVL technology to ensure that it is appropriate and does not disadvantage patients.

Some submitters suggested that the bill be amended to require practitioners to record the reason for using AVL technology. We agree with this suggestion. We understand that the ministry intends to include this in the guidance that it will issue about the use of AVL technology. However, we consider that including the requirement in legislation would ensure that it was followed. It would also strengthen the message that AVL technology should not be the default option and should not replace face-to-face assessments and examinations. Therefore, we recommend amending clause 15 to insert section 6A(2B) to require a practitioner to record why the physical presence of a patient was not practicable and an AVL link was used.

Further, we note that the Mental Health Act enables the Director of Mental Health to require the Directors of Area Mental Health Services to report quarterly about the use of the Act. We consider that requiring practitioners to report the use of AVL technology to the relevant Director of Area Mental Health Services could enable oversight at a national level. This is because the Director of Mental Health could require the information to be included in quarterly reports. We recommend amending clause 15 to insert section 6A(2B)(b) to this effect.

Broader work programme to repeal and replace the Mental Health Act

In November 2018, *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* recommended that the Mental Health Act be replaced with new legislation that:

- reflects a human rights approach
- promotes supported decision making
- aligns with the recovery and wellbeing model of mental health
- provides measures to minimise compulsory or coercive treatment.

We note that the Government accepted this recommendation in full in May 2019. As a result, the ministry is undertaking work to repeal and replace the Act.

A number of submitters commented on the wider repeal and replacement of the Mental Health Act. They recognised that the bill is an interim step to address some concerns about the Act while a permanent solution is being developed. However, these submitters expressed eagerness for an urgent start to the repeal and replacement of the Act. They emphasised the importance of consultation, including with those who are most affected by the Act.

We requested advice about the timing of this work. We were advised that preliminary consultation is under way and formal consultation is expected to begin before the end of 2021.

Expectations regarding public reporting

We consider that transparency and reporting about the use of legislation that restricts people's rights is vital. We also believe that public accessibility to this information is important. We discussed whether a requirement should be included in legislation for the Director of Mental Health to publicly report on the use of AVL technology for assessments or examinations.

We note that the Mental Health Act has no provisions that require public reporting of any information at present. However, the Act contains requirements for statutory officials to report certain information to the Director of Mental Health or Director-General of Health. Further, although it is not a statutory requirement, the Director of Mental Health publicly releases reports about the use of the Act

We were advised that the Director of Mental Health intends to include in future reports the use of certain provisions proposed in the bill. They are: the use of restraint or force under new section 53A, the use of AVL technology, and the number of compulsory treatment orders extended by patient consent under new section 34D(2)(b).

We consider that including a requirement in legislation for the ministry to publicly report on any of the new provisions contained in the bill could create fragmentation and inconsistency within the Act. However, we note that a comprehensive review of the Mental Health Act is under way. We recommend that future reporting and monitoring requirements should be included as part of that review. In the meantime, we recommend that the ministry publicly report on the elements included in this bill on a regular basis.

Appendix

Committee process

The Mental Health (Compulsory Assessment and Treatment) Amendment Bill was referred to the committee on 6 April 2021.

The closing date for submissions on the bill was 19 May 2021. We received and considered 53 submissions from interested groups and individuals. We heard oral evidence from 15 submitters at hearings in Wellington and by videoconference.

We received advice on the bill from the Ministry of Health. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Dr Liz Craig (Chairperson)

Chris Bishop (from 31 August 2021)

Matt Doocey (until 31 August 2021)

Dr Elizabeth Kerekere

Dr Anae Neru Leavasa

Dr Tracey McLellan

Debbie Ngarewa-Packer

Sarah Pallett

Dr Gaurav Sharma

Penny Simmonds

Tangi Utikere

Brooke van Velden

Simon Watts

Chlöe Swarbrick also took part in the consideration of this item of business.

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Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Andrew Little

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34	Temporary COVID-19 response provisions repealed	11

Schedule

New Schedule 1AA inserted

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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—

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(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. 5
- 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— 10
(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
- 11 Section 122B amended (Use of force)**
After section 122B(2), insert: 15
(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.
- 12 New Schedule 1AA inserted**
Insert the **Schedule 1AA** set out in the **Schedule** of this Act as the first 20
schedule to appear after the last section of the principal Act.

Part 2 Amendments relating to COVID-19

- 13 Section 2 amended (Interpretation)**
In section 2(1), insert in their appropriate alphabetical order: 25
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 30
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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Part 2 cl 14

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)

(1) In the heading to section 6A, delete “permitted during COVID-19 response”.

(2) Replace section 6A(1)(a) with: 10

(a) a clinician, mental health practitioner, or psychiatrist (a practitioner) exercises a power under this Act that requires access to a person; or

(3) Replace section 6A(2) with:

(2) The practitioner may use an audiovisual link to access the person to exercise a power under this Act if the practitioner considers— 15

(a) that it is not practicable for the person to be physically present; and

(b) the use of an audiovisual link is appropriate in the circumstances.

(2A) The practitioner must apply any relevant guidelines and standards of care and treatment issued by the Director-General of Health under section 130 when deciding whether— 20

(a) it is not practicable for the person to be physically present; and

(b) the use of an audiovisual link is appropriate in the circumstances.

(2B) If an audiovisual link is used to access the person under **subsection (2)**, the practitioner must—

(a) record in writing the reason that— 25

(i) it was not practicable for the person to be physically present; and

(ii) the use of an audiovisual link was appropriate in the circumstances; and

(b) provide the record to the relevant Director of Area Mental Health Services as soon as practicable after the use of the link. 30

16 Section 7A amended (Practitioner or responsible clinician to consult)

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. 35

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- (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”. 5
- 19 Section 10 amended (Certificate of preliminary assessment)**
- In section 10(1) to (4), replace “health practitioner” with “mental health practitioner” in each place. 10
- 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”. 15
- (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”. 20
- (2) In section 41(4)(a), replace “a medical examination” with “an examination”.
- 23 Section 42 amended (Notice of admission)**
- 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)** 25
- In section 45(4)(d), replace “medical practitioner” with “mental health practitioner”.
- 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. 30

- 26 Section 109 amended (Police powers in relation to person appearing to be mentally disordered in public place)**
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)** 5
- (1) In the heading to section 110, replace “**medical practitioner**” with “**mental health practitioner**”.
- (2) In section 110(1) to (4), replace “medical practitioner” with “mental health practitioner”. 10
- (3) In section 110(1)(a) and (4), replace “a medical examination” with “an examination”.
- 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**”. 15
- (2) In section 110B(1) to (4), replace “medical practitioner” with “mental health practitioner”.
- 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. 20
- (2) In section 110C(3)(a), replace “medical examination” with “examination”.
- 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. 25
- 31 Section 127 amended (Transfer of patients)**
In section 127(8), replace “medical certificates” with “assessment certificates”.
- 32 Section 134 amended (Fees of medical practitioners)**
- (1) In the heading to section 134, replace “**medical practitioners**” with “**mental health practitioners**”. 30
- (2) In section 134(1), (2), and (5), replace “medical practitioner” with “mental health practitioner”.
- 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: 35

- (i) members of the legal profession or health professions:

34 Temporary COVID-19 response provisions repealed

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.

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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

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

Legislative history

17 March 2021
6 April 2021

Introduction (Bill 14–1)
First reading and referral to Health Committee