

# Departmental Disclosure Statement

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Mental Health Act (Compulsory Assessment and Treatment) Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Health.

The Ministry of Health certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

3 March 2021.

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## Part One: 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 enable safe transport. However, the Act does not permit the use of force, including restraint, when transporting these 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. These 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, these amendments expire no later than 31 October 2021. This Bill will make the changes permanent as previously requested by stakeholders.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p><i>He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction</i>, Government Inquiry into Mental Health and Addiction, November 2018, available at <a href="https://mentalhealth.inquiry.govt.nz/inquiry-report/he-ara-oranga/">https://mentalhealth.inquiry.govt.nz/inquiry-report/he-ara-oranga/</a></p> <p><i>Submissions on the Mental Health Act and Human Rights discussion document – An Analysis</i>, Ministry of Health, December 2017, available at <a href="https://www.health.govt.nz/our-work/mental-health-and-addiction/mental-health-legislation/mental-health-compulsory-assessment-and-treatment-act-1992/mental-health-and-human-rights-assessment">https://www.health.govt.nz/our-work/mental-health-and-addiction/mental-health-legislation/mental-health-compulsory-assessment-and-treatment-act-1992/mental-health-and-human-rights-assessment</a></p> <p><i>Convention on the Rights of Persons with Disabilities: Concluding observations on the initial report of New Zealand</i>, Committee on the Rights of Persons with Disabilities, 31 October 2014, available at <a href="https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/NZL/CO/1&amp;Lang=En">https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/NZL/CO/1&amp;Lang=En</a></p> <p><i>Report of the Working Group on Arbitrary Detention – Addendum – Mission to New Zealand</i>, Human Rights Council, 6 July 2015, available at <a href="https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/148/80/PDF/G1514880.pdf?OpenElement">https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/148/80/PDF/G1514880.pdf?OpenElement</a></p> <p><i>He Ara Oranga – Mānuka Takoto, Kawea Ake: Upholding the Wero Laid in He Ara Oranga</i>, Initial Mental Health and Wellbeing Commission, June 2020, available at <a href="https://www.mhwc.govt.nz/assets/Interim-Report/Upholding-the-Wero-Laid-in-He-Ara-Oranga.pdf">https://www.mhwc.govt.nz/assets/Interim-Report/Upholding-the-Wero-Laid-in-He-Ara-Oranga.pdf</a></p>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
<p>This Bill does not seek to give effect to New Zealand action in relation to an international treaty, however the Bill does seek to make existing legislation more consistent with obligations under the Convention on the Rights of Persons with Disabilities.</p>	

### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>NO</b>
<p>On an application for an exemption, the Treasury agreed that no Regulatory Impact Assessment was required for these policy decisions, since they are expected to have either only minor impacts on businesses, individuals or not-for-profit entities; or an assessment would duplicate analysis from previous consultation; or the changes are technical so are suitable for inclusion in a Statutes Amendment Bill; or the policy is essential (minimum necessary) to comply with international obligations that are binding on New Zealand.</p>	

## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
<p>A publicly accessible impact analysis report is not currently available, however the Ministry of Justice and Principal Family Court Judge have been consulted on the potential impacts of clauses 6, 7, 8, 10 and 12 of the Bill regarding the elimination of indefinite treatment orders, including the burden on Government entities for implementation and the size of the population potentially benefited.</p> <p>The policy implemented by clauses 9 and 11 is informed by concerns raised by the Directors of Area Regional Forensic Mental Health Services regarding potential impacts to safety of patients and the public if the amendments are not implemented. The population impacted by these clauses is small however the potential safety impacts without these amendments may be significant, but are not necessarily quantifiable.</p>	

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
<p>There is no publicly available analysis report, however approximately 2500 people are currently on indefinite compulsory treatment orders. These individuals will receive a positive benefit from clauses 6, 7, 8, 10 and 12 of the Bill by having a regular independent court review of any further extension of their compulsory treatment to ensure their rights are not restricted for longer than necessary or appropriate.</p> <p>The Ministry of Justice and Principal Family Court Judge have been consulted on the potential costs of clauses 6, 7, 8, 10 and 12 of the Bill regarding the elimination of indefinite treatment orders</p> <p>There is no reason to expect any of the provisions in this Bill will create the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth.</p>	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>
<p>The potential costs or benefits are not likely to be impacted by the level of effective compliance or non-compliance with applicable obligations or standards, or the nature and level of regulator effort put into encouraging or securing compliance.</p>	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

#### 3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The elimination of indefinite treatment orders by clauses 6, 7, 8, 10 and 12 is expected to improve compliance with obligations under the Convention on the Rights of Persons with Disabilities because it will ensure individuals have access to justice and will not have their rights restricted for longer than necessary or appropriate.

The ability to authorise use of reasonable force including restraint during the transport of special patients under clauses 9 and 11 should not be considered inconsistent the Convention on the Rights of Persons with Disabilities because the use of reasonable force or restraint is not related to the presence of a mental health condition, rather it is related to offending behaviour that poses a safety risk to the patient, staff, and/or public. The use of reasonable force or restraint in this circumstance is most similar to reasonable force or restraint of other individuals detained in custody during transport.

### Consistency with the government's Treaty of Waitangi obligations

#### 3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The elimination of indefinite treatment orders by clauses 6, 7, 8, 10 and 12 is consistent with Mana whakahaere and Mana tangata because it supports the enablement of Māori aspirations for health and independence by addressing the inequities of Māori who are more likely to be subject to an indefinite treatment order and have their rights and independence potentially restricted for longer than appropriate or necessary. This amendment is also consistent with Te Tiriti o Waitangi principles of equity and active protection.

The overall proposals included in this Bill have also been informed by multiple consultations including consultation for *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* and the consultation regarding human rights and the Mental Health Act, as well as feedback received by stakeholders over many years.

### Consistency with the New Zealand Bill of Rights Act 1990

#### 3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The Department has provided a copy of the Bill to the Ministry of Justice for their consideration and we understand advice is expected to be provided to the Attorney-General.

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of the Bill.

Such advice, or reports, will be accessible on the Ministry of Justice's website at: <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-ofrights-compliance-reports/>

## Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>NO</b>
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>YES</b>
Clause 8 creates ongoing rights to judicial review of compulsory treatment orders by requiring applications for extensions to be made to the court every 12 months following the first two court approved extensions under the existing section 34 of the Mental Health Act.	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
The Ministry of Justice was consulted in the development of the policy proposal and advice provided to Government. The Ministry of Justice has continued to be consulted and involved in the development of drafting instructions and reviews of the draft Bill. Further consultation has occurred regarding the process and resources needed for implementation of the provisions in clause 8. During this consultation concerns were raised regarding burdens for, and capacity of, the family court created by the provision. In response the Ministry of Health has worked with the Ministry of Justice to ensure clause 8 is feasible for the courts to implement.	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>NO</b>
This Bill does not create, amend, or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information.	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>Clauses 6, 7, 8, 10 and 12 have been developed in response to feedback in <i>He Ara Oranga</i> recommending that indefinite compulsory treatment orders be eliminated. This is supported by feedback received over time from stakeholders raising concerns about indefinite compulsory treatment orders and the lack of evidence of therapeutic benefit from such orders. The Principal Family Court Judge was consulted regarding the implementation of this provision to inform the development of drafting instructions to ensure practical feasibility for the family court.</p> <p>Clauses 9 and 11 have been developed in response to significant concerns raised by the Directors of Regional Forensic Mental Health Services about the safety of patients, staff, and public resulting from a gap in the current legislation related to custody of patients during the transport and ability to use appropriate force if necessary to ensure the safety of the patient, staff, and public. Department of Corrections and New Zealand Police have been consulted on this specific policy reflected in the Bill.</p> <p>Clauses 5 and 13 to 34 have been developed in response to feedback received over time from mental health services as technical issues impeding effective administration of duties under the Mental Health Act.</p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>NO</b>
<p>While no formal testing has been undertaken to assess the workability or completeness of the policy details in the Bill, the issues addressed have been discussed with the Directors of Area Mental Health Services and clause 8 has been informed by consultation with the Principal Family Court Judge.</p> <p>Clauses 13 to 34 have been implemented on a temporary basis as part of emergency amendments related to COVID-19. There has been no indication that these policies as implemented through the temporary amendments have not been workable or complete.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>NO</b>
This Bill does not contain any provisions that could result in the compulsory acquisition of private property.	

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>NO</b>
This Bill does not create or amend a power to impose a fee, levy or charge in the nature of a tax.	

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>NO</b>
This Bill does not affect rights, freedoms, or impose obligations retrospectively.	

### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>
This Bill does not create or amend a strict or absolute liability offence and does not reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding.	

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>NO</b>
This Bill does not create or amend a civil or criminal immunity for any person.	

## Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>YES</b>
<p>Clauses 6, 7, 8, 10 and 12 will eliminate the possibility of indefinite compulsory treatment orders that have no regular independent court review. This provision requires a responsible clinician to make an application for extension of a compulsory treatment order every 12 months after the first two extensions have been granted. A court must review the application for an extension, including an examination of the patient, before granting an extension to the order. This requirement will strengthen protections for individuals subject to compulsory treatment orders to reduce the potential for arbitrary detention and restrictions on their individual rights for longer than necessary or appropriate.</p> <p>Clauses 9 and 11 will permit agreements between the custodian of a special patient and another agency that allow the use of reasonable force or restraint by the non-custodial agency assisting in the transport of a special patient. To ensure this power is appropriately limited, the provision requires the approval for use of reasonable force, including restraint, to be made on a case-by-case basis and prior approval as part of a transport management plan must be obtained for each instance from the Director of Mental Health. The use of reasonable force or restraint will only be permissible and approved if it is the least restrictive option to protect the safety of the patient, staff, and/or public. The Director of Mental Health will monitor and oversee the approval and use of the power and will provide guidance on the requirements for approval to be granted.</p>	

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>
<p>This Bill does not create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation.</p>	
<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>NO</b>
<p>This Bill does not create or amend any other powers to make delegated legislation.</p>	

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
<p>This Bill does not contain any provisions other than those noted above in 4.6 that are unusual or call for special comment.</p>	

