NEW ZEALAND LAW SOCIETY

NZLS EST 1869

THE HEALTH (PROTECTION) AMENDMENT BILL

13/02/2015

Submission on the Health (Protection) Amendment Bill

1 Introduction and summary

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Health (Protection) Amendment Bill (Bill).

1.2 The Law Society supports the important public health objectives the Bill aims to advance, and commends the policy work invested in striking an appropriate balance between those objectives and individual rights and freedoms. The provision of intervention options more tightly calibrated to the risks presented by affected individuals will be a significant improvement on the current regime. The alignment of the proposed new regime and the Tuberculosis Act, allowing for the complete repeal of that Act, is also a welcome simplification of the administrative landscape.

1.3 The Law Society's recommendations are limited to a small number of proposals to promote greater clarity in the operation of the Health Act 1956, and to provide further protection for individual rights. In summary, the Law Society recommends that:

(a) The Committee inform the House that the inclusion of the overarching principles in the Act in a form restricted to Part 3A is not intended to signal that the fundamental rights and freedoms underpinning the principles are irrelevant to the rest of the Act.

(b) Further consideration be given to the involvement of affected individuals in the process by which medical officers of health may make directions with respect to those individuals, and whether Sub-part 3 should include the express right (perhaps with exceptions) of an individual to be heard and provide evidence in relation to an application for a public health order.

(c) The relationship between the contact tracing provisions and the Health Information Privacy Code 1994 (HIPC) be clarified, and that the Bill provide that the contact tracing powers must be applied, and information obtained pursuant to the powers handled, consistently with the HIPC unless the HIPC is expressly excluded.

(d) Areas of inconsistency or overlap between the Health Act, the Venereal Diseases Regulations 1982, and the Bill be identified, inconsistencies removed and redundant provisions repealed.

2 Overarching principles

2.1 Sub-part 1 of Part 3A of the Bill (proposed sections 92A – 92F) sets out overarching principles to be taken into account when performing a function under Part 3A. The principles include voluntary compliance (s 92B), adopting the least restrictive alternative (s 92C), respect for individuals (s 92D), that individuals are informed (s 92E), and that measures should apply no longer than necessary (s 92F). The principles reflect human rights values such as autonomy, dignity and proportionality (the notion that measures which restrict rights and freedoms should impair the right as little as possible in order to

achieve the objective for which the rights-infringing power is conferred). The inclusion of these principles has informed the advice from officials to the Attorney-General which concludes that the Bill appears consistent with the New Zealand Bill of Rights Act 1990.

2.2 While the Law Society supports the inclusion of the overarching principles in the Bill, it recommends the Committee take steps to reduce the risk that the balance of the Health Act is interpreted inconsistently with Part 3A. The risk arises because the Health Act as currently enacted makes no reference to overarching principles generally, and because the proposed section 92A requires the principles to be taken into account only by persons and courts performing functions under Part 3A. As there are a number of other coercive powers in the Health Act, the restricted application of the principles to Part 3A risks creating an inference that the values the principles embody are not relevant to the rest of the Act.[1]

2.3 The Bill is a targeted reform directed at protecting the public from harm associated with infectious diseases and UV tanning. It is not a wholesale review of the 1956 Act. The broader application of the principles will no doubt be considered as part of wider reform of the Health Act as a whole.

Recommendation

2.4 The Law Society recommends that, in the meantime, the Committee inform the House that the inclusion of the principles in the Act in a form restricted to Part 3A is not intended to signal that the values underpinning the principles are irrelevant to the rest of the Act.

3 Directions and Orders (proposed sections 92G – 92ZM)

3.1 Consistently with the principles of voluntary compliance (s 92B), respect for individuals (s 92D), and that individuals are informed (s 92E), the Bill should more clearly address the participation of individuals in the processes by which directions and orders which affect them are made. Presently, the extent of natural justice protections for affected individuals is unclear after the point at which attempts to secure voluntary compliance have failed.

3.2 Sub-part 2 of Part 3A (proposed sections 92G to 92S) empowers a medical officer of health to issue directions to individuals posing a risk to public health. While the direction must be served on the affected individual in accordance with proposed section 92K, it is not clear whether the medical officer of health is required to involve the individual in the process prior to making the direction once attempts to secure voluntary compliance have proved unsuccessful. Further, proposed section 92E, which sets out the principle that a person or court exercising power under Part 3A must insofar as practicable "promptly inform" the affected person about the power which is "being" exercised, is vague as to when the person should be informed. On the current drafting of proposed section 92E, the person could be informed at the time they are served with the direction – at which point they will have no opportunity, beyond an appeal from the direction under proposed section 92Q, or an application for judicial review, to participate in the process or have input into the content of the direction.

[1] For example, it is unclear why the principles ought not apply for the general administration of the Act under Part 1, the powers and duties of local authorities under Part 2 and other specific interventions authorised, for example the quarantine provisions in Part 4.

3.3 Sub-part 3 of Part 3A (proposed sections 92T to 92ZM) empowers the District Court to make public health orders on the application of a medical officer of health. If considering applying to the court for an order, the relevant medical officer of health must consult with the individual under proposed section 92ZI(1). Proposed section 92ZF also provides that the "parties" to the proceeding may be present at the hearing, and proposed section 92ZN provides individuals against whom an order is made a right of appeal to the High Court. While these provisions suggest that the affected individual will be "party" to the proceeding, the scope of their involvement is unclear beyond the right to be present at the hearing. This uncertainty is compounded by provisions such as proposed section 92U(1)(e) expressly directing the court to consider the "views" of the individual in relation to a particular matter (in that case, surveillance). The power conferred on the presiding judge by proposed section 92ZF(1) to exclude the party (and others) from the hearing may also entail that applications may be heard ex parte, though this is unclear.

3.4 The Part 3A jurisdiction authorises the court to order significant intrusions into personal autonomy including the detention and compulsory treatment of an individual. In analogous regimes such as the Mental Health (Compulsory Assessment and Treatment) Act 1992 there is an express requirement that the individual be present at a hearing for a compulsory treatment order, present evidence and be heard. The same procedural protections should apply under Part 3A. If that is the intention behind according the affected individual party status, their right to present evidence and be heard should nevertheless be made clear. The provision for urgent public health orders from a medical officer of health in section 92Z, and the court's ability to make an order on a time-limited or interim basis, should remove any risk associated with individuals attempting to game the system.

3.5 The participation of persons in legal processes which affect them promotes good decision making and public confidence in decision-makers. It promotes the rule of law by making it more difficult for decision makers to act arbitrarily. If there are good policy reasons why a medical officer of health or court should not involve the individual then these should be stated in the legislation. Full participation should be the rule with exceptions carved out only where justifiable.

Recommendation

3.6 The Law Society recommends that further consideration be given to the involvement of affected individuals in the process by which medical officers of health may make directions with respect to individuals, and whether Sub-part 3 should include the express right (perhaps with exceptions) of an individual to be heard and provide evidence in relation to an application for a public health order.

4 Contact tracing, information gathering, and privacy

4.1 The Law Society supports the objectives of the Bill's contact tracing and other information gathering provisions. Information acquired through the exercise of these provisions will be highly sensitive, however, and so the relationship between the contact tracing provisions and the Health Information Privacy Code 1994 (HIPC) should be clarified to ensure that the extent of disclosure of such information is contained so far as possible. In particular, the Bill should provide that the contact tracing powers must be applied, and information obtained

pursuant to the powers handled, consistently with the HIPC unless the HIPC is expressly excluded. As a result, the circumstances where the Bill's new provisions are intended to displace the HIPC should be expressly identified.

Recommendations

4.2 The Law Society recommends the following amendments to the contact tracing provisions:

(a) That a new clause be inserted in the Bill along the following lines:

> (a) the contact tracing powers must be exercised consistently with the Health Information Privacy Code 1994 (HIPC);
>
> (b) subject to section 22C of the principal act, the HIPC applies to all information:
>
> i. acquired by the use of those powers;
>
> ii. required under the amended sections 74(3B) and 74AA(2B) (medical practitioners and laboratories to give notice of cases of notifiable disease)

(b) That proposed section 92ZY of the Bill be amended to include new subsections (4) and (5) along the following lines:

> (4) Except as provided for in the HIPC, a contact tracer which requires a person specified in subsection (2) to provide information under subsection (1) must not disclose the nature of the individual's infectious disease to that person.
>
> (5) On requiring a person specified in subsection (2) to provide information under subsection (1), the contact tracer must inform that person that he, she or it must:
>
> (a) not disclose to any other person, body or agency (whether an employee, contractor, student or member of that person, or a person, body, or agency external to that person) any information about the individual provided by the contact tracer, other than in accordance with the Privacy Act 1993; and
>
> (b) otherwise treat any information about the individual provided by the contact tracer in accordance with the Privacy Act 1993.

(c) That proposed section 92ZZ (duty of confidentiality) be amended along the following lines (additions in italics):

> *(1)* A contact tracer who approaches a contact under this Part must not, as far as practicable, disclose to the contact the identity of the individual who may have-
>
> (a) transmitted the infectious disease to the contact; or
>
> (b) exposed the contact to the risk of contracting the infectious disease.
>
> *(2) If the contact tracer discloses to the contact the identity of the individual, the contact tracer must advise the contact that he or she must:*
>
> *(a) not disclose to any other person, body or agency that the individual has the infectious disease, other than in accordance with the Privacy Act 1993; and*
>
> *(b) otherwise treat that information and any other information about the individual provided by the contact tracer in accordance with the Privacy Act 1993.*

(d) That proposed sections 92G and 92H be amended to include a new subsection (8) (to be inserted before the current new subsections 92G(8) and 92H(8)) along the following lines:

(8) On contacting a person in accordance with subsection (7), the medical officer of health must inform the person that he, she or it:

(a) must not disclose to any other person, body or agency (whether an employee, contractor, student or member of that person, or a person, body, or agency external to that person) any information about the individual provided by the medical officer of health, other than in accordance with the Privacy Act 1993; and

(b) must otherwise treat any information about the individual provided by the medical officer of health in accordance with the Privacy Act 1993.

5 Consequential amendments and overlapping regimes

5.1 There appear to be areas of inconsistency or overlap between the Health Act, the Venereal Diseases Regulations 1982 (VDR), and the Bill. The Law Society recommends these be identified, inconsistencies removed and redundant provisions repealed.

5.2 Section 79 of the Health Act allows a medical officer of health or any health protection officer to isolate (i.e. detain) any person he or she believes is likely to cause the spread of any infectious disease, and to require that person to undergo treatment. As the Bill does not refer to section 79 of the Act, it appears that there is presently no intention to modify or remove the section 79 powers. However, under the new Part 3A to be established by the Bill, only the District Court has the power to order the detention of an individual posing a public health risk (other than in the case of urgent public health orders issued in accordance with the new section 92Z of the Bill). Given this, the section 79 powers seem redundant. They also seem inconsistent with the new Part 3A regime. Accordingly, the Law Society recommends that consideration be given to deleting section 79 from the Act.

5.3 Confusing overlap with Part 3A also arises in relation to section 88 of the Act, which requires persons suffering from "venereal disease" to undergo treatment, and makes it an offence not to do so. The Act's definition of "venereal disease" includes gonorrhoea and syphilis (which under the Bill will be notifiable infectious diseases).[2] In addition, the VDR set out certain duties and discretions for medical practitioners treating venereal disease (also defined in the VDR as including gonorrhoea and syphilis). These include:

(a) A duty to notify a medical officer of health if a patient suffering from venereal disease in communicable form, who is being treated by the medical practitioner, does not attend for treatment or further treatment within specified timeframes.[3] This obligation to notify includes a requirement to provide the patient's name, address and occupation.

(b) A discretion to notify the medical officer of health of the name, address, or description of a person who the medical practitioner has reason to believe has had intimate sexual contact with the patient.[4]

(c) A duty to give any patient of at least 16 years of age and who is suffering from venereal disease a form stating that he or she is suffering the venereal disease and,

---

[2] Section 2(1) of the Act.

[3] Clause 7(1) and Form 1 of the VDR.

[4] Clause 7(2) and Form 2 of the VDR.

amongst other matters, that he or she must receive medical treatment until pronounced cured.[5]

5.4 Clause 13 of the VDR establishes various offences. These include failing to carry out the directions of a medical practitioner while being examined or treated for venereal disease, and not complying with any requirement of a medical officer of health under clause 8 of the VDR (e.g., failing to submit to a medical examination when required).

5.5 New section 92U(1)(f) of the Bill provides that a public health order imposed by the District Court may include a requirement that an individual be treated for an infectious disease (including gonorrhoea and syphilis) by a specified health provider. This appears to overlap with an individual's obligation under section 88 of the Act to undergo treatment for venereal diseases such as gonorrhoea and syphilis, and with the related obligations set out in the VDR. As the Bill is currently drafted, not submitting to such treatment could be an offence under not only the current section 88(3) of the Act, but also new section 92ZQ(1) of the Bill (if a treatment order had been made in accordance with new section 92U(1)(f)). Different penalties would apparently be prescribed for the same conduct (see section 136 of the Act and new section 92ZQ(2) of the Bill). Further, section 88 and its offence provisions, and the duties and powers of a medical practitioner pursuant to the VDR to require that a patient suffering from an infectious venereal disease receive treatment, will not be subject to the overriding principles guiding the exercise of powers under the new Part 3A regime.

5.6 Proposed section 92I of the Bill also appears to overlap, and is different in some respects from, clause 8 of the VDR. Clause 8(1) of the VDR provides that where a medical officer of health has reason to believe that a person may be suffering from venereal disease in a communicable form, the medical officer may require the person to submit to a medical examination, and provide a medical certificate in a prescribed form, regarding the state of the person's health in relation to the venereal disease.[6] Proposed section 92I of the Bill provides a medical officer of health with a power to direct an individual who may have an infectious disease (including gonorrhoea and syphilis) to undergo a medical examination.[7]

5.7 It is undesirable for provisions which substantially duplicate or extend or refine existing requirements to sit alongside those requirements without any guidance as to how the distinct regimes are intended to interact.

Recommendations

5.8 If there are sound policy justifications for the overlapping application of parts of the Act, the Bill and the VDR, the Law Society recommends that these be addressed. (For example, is it significant that section 88 of the Act applies only to venereal disease whereas proposed section 92U of the Bill applies more broadly to infectious diseases?).

5.9 If, on the other hand, the overlap is merely an unintended consequence of incremental reform, the Law Society recommends that the relationship between the Act's venereal

---

[5] Clause 7(3) and Form 3 of the VDR.

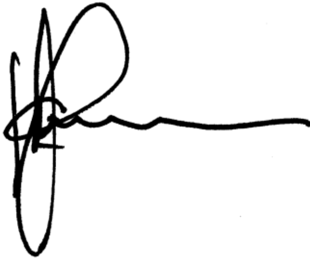
[6] Clause 8(1) and Form 4 of the VDR. Note also the additional power in clause 8(4) (and Form 5) to require a further medical examination.

[7] See also the District Court's powers in new section 92ZB to make medical examination orders.

disease provisions, the VDR and the Bill be clarified and that areas of overlap and potential inconsistency be removed. Where the Bill supplants or overrides the Act's current venereal disease provisions and the VDR, that should be expressly stated. Redundant provisions which are replicated or replaced in the new regime should be repealed.

6 Conclusion

6.1 The Law Society does not wish to appear in support of this submission, but is happy to do so or to meet with officials advising the Committee if that would be of assistance.



Chris Moore
President
13 February 2015