Human Rights Act 2004

Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the Mental Health (Treatment and Care) Amendment Bill 2005. In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the *Human Rights Act 2004*. I base my opinion on the considerations in the attached Statement of Reasons.

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Jon Stanhope
Attorney General

ACT Department of Justice & Community Safety

Statement of Reasons

Supporting the Compatibility Statement for the Mental Health (Treatment and Care) Amendment Bill 2005

Summary

It is clear from the consultation process leading up to its introduction that the Mental Health (Treatment and Care) Amendment Bill 2005 has created a considerable level of public interest. On this basis, the Department of Justice and Community Safety has taken the unusual step of providing a summary of the reasons supporting the compatibility statement under the *Human Rights Act 2004*.

It must, of course, be emphasised that this statement is not an authoritative pronouncement on the consistency or otherwise of the Mental Health Bill with the Human Rights Act. It remains open for the Standing Committee on Legal Affairs and the Supreme Court, in exercising their respective functions under the Human Rights Act, to draw their own conclusions on human rights consistency.

The following statement of reasons provides:

- A brief overview of the Bill;
- An analysis of the provisions of the Bill which engage one or more of the sections of the Human Rights Act, including, where relevant, the justificatory material in each instance; and
- Our conclusion as to the Bill's consistency with the Human Rights Act.

Overview of the Bill

Under the *Mental Health (Treatment and Care) Act 1994*, involuntary electroconvulsive therapy (ECT) can only be administered where it has been authorised by the Mental Health Tribunal. As proceedings before the Tribunal cannot commence unless parties have been given three days notice, 'in a very few number of cases the notification period delays commencement of emergency treatment'. The Bill seeks to address this limitation by amending the *Mental Health (Treatment and Care) Act 1994* to enable the Tribunal to make involuntary emergency ECT orders.

What is ECT?

The Explanatory Statement to the Bill describes ECT as 'an evidence-based treatment for specific severe mental health conditions' like medication resistant severe depression, mania and severe catatonia. The medical literature indicates that ECT is an important treatment that can save lives, particularly in cases of severe depression, when no other treatment has been effective or available.

We understand that the ability to save life may arise in circumstances where, due to the fact that a depressive illness has proven unresponsive to medication or other treatment, a person is at increased risk of causing life-threatening self-harm or of avoiding potentially life-saving treatment. In such circumstances, we understand that ECT can have short-term benefits by simultaneously improving mood and energy, thereby allowing the safe administration of anti-depressant medication.

It can also have short-term side effects which the Explanatory Statement notes may include 'mild headaches, muscle stiffness and a brief period of confusion immediately following the procedure'. They may also include short-term memory loss, and, in rare cases, longer-term memory loss.

Human Rights Issues

Section 10(2) HRA: Right to consent to or to refuse medical treatment

> *No-one may be subjected to medical … treatment without his or her free consent.*

Section 10(2) of the Human Rights Act protects a person's right to autonomy and personal, mental and bodily integrity in the context of medical treatment. The UN Human Rights Committee has stated that medical treatment without consent may meet the general definition of cruel, inhuman and degrading treatment when it causes suffering or degradation.[1] The right to refuse applies whether or not the treatment will harm or benefit the person, or would save his or her life.[2] A person is presumed to have capacity to consent to medical treatment unless he or she is unable to give valid consent because of incapacity. To be valid, consent must be informed, voluntary and free of coercion.

Involuntary treatment is likely to also engage related rights, such as the prohibition on inhuman or degrading treatment (section 10(1)); the right to liberty and security of the person (section 18); the right to humane treatment when deprived of liberty (section 19); the right to privacy (section 12); protection of children (section 11); and right to equality and non-discrimination (section 8).

Section 28 HRA: Reasonable limits

> *Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society*

In effect, section 28 requires that any limitation or restriction of rights must pursue a legitimate

[1] See Concluding Comments on Japan (1998) UN doc. CCPR/C/79/Add. 102, para.31.
[2] *Mallette v Shulman* [1991] 2 Med LR 162; *Re MB* [1997] 8 Med LR 21; *Airedale NHS Trust v Bland* [1993] AC 789 at 863 – 4

objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. Proportionality requires that the limitation be necessary and rationally connected to the objective; be the least restrictive in order to accomplish the objective; and not have a disproportionately severe effect on the person to whom it applies.

That is, it is a matter of weighing:
- the significance in the particular case of the values of the HRA;
- the importance in the public interest of the intrusion on the particular right;
- the limits sought to be placed on the application of the particular right in the particular case; and
- the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

In essence, the inquiry into the proportionality of a limitation on rights is two-fold.
- whether the provision serves an important and significant objective; and
- whether there is a rational and proportionate nexus between that objective and the limitation.

International law and jurisprudence may be considered when interpreting human rights (section 31).

Important and significant objective

The *Mental Health (Treatment and Care) Act 1994* currently permits the administration of ECT in various circumstances (section 55). ECT may only be given where a person gives informed consent (section 55(1)) or where the Mental Health Tribunal authorises it in association with a Psychiatric Treatment Order (PTO) (section 55(2)). In effect, involuntary ECT can only be administered where the Tribunal is satisfied that a PTO and an ECT order are appropriate in all the circumstances.

The Act currently does not provide for emergency ECT treatment. Because proceedings before the Tribunal cannot commence unless parties have been given three days notice, this has resulted in delays to the commencement of emergency treatment in a few cases. The Act also does not provide for the administration of ECT to individuals without capacity who are not subject to a PTO. As a result, emergency treatment to such individuals is further delayed while a PTO hearing is conducted.

The amendments allow for an urgent application to the Mental Health Tribunal for emergency ECT treatment where such treatment is necessary to save a person's life. In such a case, the amendments seek to ensure that such treatment is not unnecessarily delayed by providing for limited ECT treatment under an order of the Tribunal while the outcome of a hearing is pending.

We consider that this objective is significant and important.

Rational and proportionate response

(i) Is the involuntary treatment necessary and rationally connected to the objective?

An application for an emergency ECT order may only be where a doctor and the Chief Psychiatrist believe on reasonable grounds that the administration of ECT is necessary to save the person's life (cl 55M(1)). In making the order, the Tribunal must also be satisfied that that the administration of ECT is necessary to save the person's life (s 55N(1)(d)).

Before making the order, the Tribunal must also be satisfied that the person is incapable of giving informed consent (cl 55N(1)(c)). We therefore note that an emergency ECT order cannot be made in relation to a person who has capacity to give consent but refuses to do so.

We therefore consider that any limitation on the right to consent to or to refuse medical treatment is necessary and rationally connected to the objective of saving the individual's life.

(ii) Is the involuntary treatment the least restrictive in order to accomplish the objective?

In making an emergency ECT order, the Tribunal must be satisfied **either** that all other reasonable forms of treatment available have been tried without success **or** that ECT is the most appropriate treatment reasonably available (cl 55N(1)(e)). The essential precondition is that emergency ECT will only be administered where it is necessary to save life.

Further, in order to prevent emergency treatments from being used to facilitate a full course of ECT treatment, and thereby bypassing the general requirements on ECT, an emergency ECT order must specify the number of occasions on which ECT may be given (a maximum of 3) and must also state the number of days that the order remains in force (a maximum of 7) (cl 55O). An emergency order is superseded by any subsequent order made by the Tribunal (for example after a full hearing).

We also note that under the stated objects of the *Mental Health Act 1994*, treatment of mentally dysfunctional or mentally ill persons must, in all circumstances, be 'the least restrictive of their human rights' (s 7(a)), and it must promote their dignity and self respect (s 7(c)).

We therefore consider that provisions of the Bill satisfy this limb of the proportionality test.

(iii) Does the involuntary treatment have a disproportionately severe effect on the person to whom it applies?

The Bill sets clear and stringent limits on the provision of ECT in emergency situations:.

- A high threshold criterion so that the emergency treatment is restricted to saving life;
- Emergency ECT treatment is prohibited for people with capacity to withhold consent.
- Emergency ECT orders must be made by a full Tribunal comprising a presidential member; a psychiatrist, psychologist or health services member; and a community member;
- A second doctor's opinion is required prior to seeking an application;
- Records must be kept in relation to each occasion on which ECT is administered
- A copy of an emergency ECT order must be given to a range of interested parties within 24 hours, including the person subject to the order, the parents of the person (if the person is a minor) and the Public Advocate;
- The number of treatments is capped, in accordance with international standards;
- A prohibition on emergency ECT treatment for minors under 16 in light of lack of data supporting the safety and need of this form of treatment in minors.

The Bill does not provide for express recognition of advance directives. However, we note that in comparable jurisdictions, the recognition of advance directives generally does not extend to emergency situations. For example, the United Kingdom Joint Committee on Human Rights, in its report on the 2002 draft Mental Health Bill, recommended 'the right of patients to give directions about their future treatment, during periods when they are capable of doing so, should be respected where doing so would not present a threat of death or serious harm to the patient or anyone else'.

Nevertheless, we note that the Tribunal must consider the views of people appearing at the hearing and, as far as practicable, the views and wishes of the person and of the people responsible for his or her care (cl 55N(2)). Persons entitled to give evidence before an emergency ECT order, who would know of the views of the patient regarding ECT, include: a person's parents (where the person is a child); the person's guardian; and a representative of the person. A further safeguard exists in that a person who has been granted a power of attorney must be notified of the making of an Emergency Order under section 105 of the Act. All of the persons mentioned above would have the opportunity to appeal the making of the Order to the Supreme Court. The Supreme Court has the power to issue injunctions to restrain implementation of the Order and to declare the Order void for *ultra vires*, &c.

We consider that these safeguards and procedures are adequate to ensure that this limb of the proportionality test is met.

Conclusion

The Department of Justice and Community Safety considers that the measures used to achieve the objective stated above are rational and proportionate. It follows that the provisions that might limit the rights affirmed in the Human Rights Act are justifiable under section 28 of that Act.

Tim Keady
Chief Executive
Department of Justice and Community Safety
30 June 2004