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Submission to the Parliament on Substance Addiction (Compulsory Assessment and Treatment) Bill

1. The Wellington Community Justice Project (WCJP) (www.wellingtoncjp.org) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.

2. The research for this submission was carried out by students Peter Grieson, Charlie Harvey, Joshua Tan and Emily Butler as part of volunteer work for the project.

I International Efforts

The international response to the issue of drug addiction and its harms depends greatly on the country's geographic location and exposure to Western ideals about viewing the chronic addiction to substances as a health issue, rather than a criminal one. The Bill shows an approach similar to that of other commonwealth jurisdictions.

A Australia

The states of Australia have differing approaches to the issue. The Bill is most consistent with New South Wales, which allows family members or close friends to make an application to a medical practitioner to issue a 'dependency certificate' based on a number of factors to detain a patient for no more than 28 days.[1] This is a few weeks less than the length proposed in the Bill. An extension can then be issued but for no more than an additional 3 months.[2] Section 10 of the Alcohol and Drug Treatment Act (Austrlia) gives the accredited medical practitioner powers to enter and assess a patient in their premises by force if they fail to meet the practitioner.[3]

Victoria's approach is even more conservative in the detention of patients. Orders under the Severe Substance Dependence Treatment Act 2010 allow up to 14 days detention.[4] Applications are made to the Magistrates' Court that on the balance of probabilities that the patient satisfies the criteria for detention and treatment.[5] By comparison, in New South Wales, the applications are made to a medical practitioner. Concerns of the rights of the patient are central to both states and parties must be made aware of their detention and rights within 24 hours of their detention.[6]

Both states have a minimalist intervention approach. Although the legislation provides for different thresholds, both justify the compulsory detention on the mitigation of risk to the patient and the community around them.

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[1] Alcohol and Drug Treatment Act 2007 (NSW), s 14.
[2] Alcohol and Drug Treatment Act 2007 (NSW), s 36.
[3] Alcohol and Drug Treatment Act 2007 (NSW), s 36.
[4] Substance Dependence Treatment Act 2010 (Vic), s 20(3).
[5] Substance Dependence Treatment Act 2010 (Vic), s 20(2).
[6] Alcohol and Drug Treatment Act 2007 (NSW), s 17; Substance Dependence Treatment Act 2010 (Vic), s 25.

B United Kingdom

The approach in the United Kingdom achieves the same outcome however through different legislation. The United Kingdom does not have legislation directed specifically at the treatment and detention of addicts. It instead allows orders to be made under the Mental Capacity Act 2005, where a patient lacks capacity to make decisions regarding their welfare.[7] Substance abuse is one justification for granting an order. The court, in making an application must consider the least invasive course of action.[8] The legislation includes the provision of independent 'mental capacity advocates' to represent a person who is subject to such proceedings.[9]

C Asia

Much can be learned from the practices and attitudes in Asian countries. Some countries have liberalised their approach to substance abusers. However, many still catagorise addicts as criminals. In Vietnam, possession of illegal narcotics can result in a life sentence in prison. Their legislative framework does not differentiate between addicts and those who casually use substances.[10] However the implementation of compulsory treatment facilities in recent times has developed and the use of centres is becoming more widespread across their country. These treatment programs consist of one to two years of treatment followed by an additional one to two years of rehabilitation.[11] The potential for a total of four years from institutionalisation to release shows the archaic beliefs that still underpin the approach to these patients.

D United Nations

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[7] Mental Capacity Act 2005 (UK), s 2.
[8] Mental Capacity Act 2005 (UK), s 1.
[9] Mental Capacity Act 2005 (UK), s 36.
[10] The World Health Organisation *Assessment of Compulsory Treatment of People who use Drugs in Cambodia, China, Malaysia and Viet Nam: An Application of Selected Human Rights Principles* (2009), at 21.
[11] [11] The World Health Organisation *Assessment of Compulsory Treatment of People who use Drugs in Cambodia, China, Malaysia and Viet Nam: An Application of Selected Human Rights Principles* (2009) at 22.

Finally, the United Nations leads the way in terms of promoting a health focused approach. They recognise the potential for these centres to be more than merely a rehabilitation clinic. There are opportunities for education and retraining, as well as to increase the physical health of patients.[12] However, the United Nations is critical of the temporary removal of a person's liberty as a result of compulsory treatment. The United Nations cite a lack of evidence to the effectiveness of compulsory detention.[13] They are also concerned with a lack of judicial oversight of these centres and the broad range of perspectives on the appropriate balance that must be struck between the rights of individuals and communities.[14]

II Compulsory Treatment and Human Rights

This section will discuss the relationship between human rights and compulsory treatment. Overall, the Wellington Community Justice Project (WCJP) considers that there is a public interest to impose this regime against the severely addicted members of society. In particular, there is a need to get them treated so that they can contribute to the society again. It would also improve the emotional wellbeing of their family members.

New Zealand's legal position on compulsory treatment is stated in s 11 of New Zealand Bill of Rights Act 1990, where the patient has the right to refuse to undergo any treatment. This is, however, not an absolute right. WCJP submits that this is part of the situation where overriding the consent of the "perceived patient" is appropriate. In other words, WCJP recognises that the proposed Bill will breach the individual's liberty to refuse treatment. However, given the safeguards in the Bill, crossing this line would be a justifiable breach of the New Zealand Bill of Rights Act 1990.

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[12] Zunyou Wu *Arguments in Favour of Compulsory Treatment of Opioid Dependence* Bulletin of the World Health Organisation doi:10.2471/BLT.13.117184 (2013).
[13] Wayne Hall & Adrian Carter *Advocates Need to Show Compulsory Treatment of Opioid Dependence is Effective, Safe and Ethical* doi:10.2471/BLT.12.115196 (2013).
[14] Nicholas Clark, Anja Busse & Gilberto Gerra *Voluntary Treatment, Not Detention, in the Management of Opioid Dependence* doi:10.2471/BLT.12.115196 (2013).

A The Philosophical Viewpoint

1 Its Relationship with the Harm Principle

John Stuart Mills proposed the harm principle, where it will only be rightful for the state to exercise its power over the other person against his will if it was to prevent harm to others.[15] Substance addiction itself may be argued as an individual matter, where harm will not be inflicted upon persons other than own self. This is because in usual scenario, the person who had been addicted to a substance would usually self-destruct. On its strictest interpretation, the harm principle will not be violated as physical harm will only be upon themselves.

However, the addict may cause close friends and family members emotional distress. Consider a U.S. example, Natalie Ciappa, a newly turned 18 years old girl was addicted to heroin.[16] She had died eventually, due to restriction of New York law that prevented the parents to forcibly send her to a rehabilitation centre for compulsory treatment without her consent.[17] Tragedies like these could be prevented if the family members were able to make the decision on behalf of the severely addicted person. The Bill is remedying exactly this stated defect.[18] Natalie, in that scenario, will be deprived of the ability to make the decision for her best interest due to the influence of the drug. It follows that there is a need for the state to intervene so that the severely addicted member of society will be prevented from further harming himself or herself. In doing so, it also ameliorates the family pressure of attempting to assist the addicted person in living a life with dignity.

2 Tension between the Effectiveness of the Measure and the Patient's Rights

There is also an efficacy issue. Individual liberty is the central concern of this situation. As mentioned above, the patient has the right to refuse treatment under s 11

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[15] J S Mills *On Liberty* (St Martins, Boston, 2008) at 21-22.
[16] Rebecca L Abensur "What's so Civil About Civil Commitment?: Balancing the State's Interest in Treating Substance Dependence with the Protection of Individual Liberty Interests" (2009) 37 Hofstra L Rev 1099.
[17] Above n 2, at 1101.
[18] Substance Addiction (Compulsory Assessment and Treatment) Bill, Clause 7.

of New Zealand Bill of Rights Act 1990. There will be an effective check and balance system implemented to ensure that the extension to compulsory treatment will only be granted if the Court is satisfied that the patient's condition satisfy the statutory justification.[19]

There may be circumstances where the patients persistently refuse to actively participate in the mandatory treatment programme. It is unclear under the proposed Bill about how these groups of addicts will treated, as it would dangerously cross the line and became an arbitrary detention.[20] Conversely, it shows the limits of compulsory treatment. Whether or not the patient will be successfully rehabilitated is entirely dependent upon the patient's "will", which is, ironically, deemed to be defunct for the purpose of this Bill.

3 Risk of Social Stigma through Medicalisation

The State labelled a severely addicted member of society as a "patient" who needs treatment.[21] This is in effect saying that they had fallen sick. In involuntary treatment, the primary responsibility of the parties in charge of the programme is to the state instead of to the patients.[22] It was pointed out that in some circumstances one would be susceptible to severe addiction due to other prolonged external problems such as unemployment, a lack of a sense of self-existence or household issues.[23] This means that by labelling them as "patients", it may cost the addict's self-esteem.

Therefore, there would be inevitable social stigma attached to them if they were admitted into the rehabilitation programme under the proposed Bill. In effect, they were being treated as if they were the 'mentally ill' patients. The absence of consent would definitely intervening one's liberty to receive treatment or not. Hence, this could be another potential violation of human rights of the perceived "patients".

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[19] Clause 32.
[20] Law Commission *Compulsory Treatment for Substance Dependence: A Review of the Alcoholism and Drug Addiction Act 1966* (NZLC R118, 2010), at 28.
[21] R G Newman "Involuntary Treatment of Drug Addiction" (1973) 3 Yale Rev.Law & Soc.Act'n 246 at 247.
[22] Above n 7, at 249.
[23] Above n 7, at 247.

Nonetheless, WCJP submits that the proposed Bill is largely consistent with the harm principle. This is because the Bill concerns with the exceptional circumstances where the severely addicted member of society is deprived of their ability to consent. It is justifiable to mandate compulsory treatment if the situation is such that the severely addicted will be of high risk to self or others.[24] This notion is congruent with the harm principle and therefore the violation against human rights is justifiable.

B Welfare Guardian and the Rights of Patients

WCJP applauds the appointment of a welfare guardian for the severely addicted member of society. It does offset the intrusive nature of the state intervention that it enabled a person trusted by the severe addicted to participate in the rehabilitation process with them. However, the concern is that the welfare guardian might not have complete information with regards to the progress of his or her supported patient, despite the statutory mandate of cl 51.[25] It might invite subjective judgment from the physician team. This could be potentially contrary to the rights to movement of the patients, given that his movement throughout the treatment period is restricted within the assigned treatment centre.

C Conclusion

Studies conducted in Canada show that prison-based coerced treatment of substance addiction had positive outcomes.[26] WCJP submits that though it might have risk of breaching the rights of the patients despite the safeguard provided by the Bill, this is vital for the welfare of the patients and people around him or her. Also, WCJP recognises that this Bill has its application beyond criminal jurisdiction. This measure stated in the Bill is justifiable under harm principle. It works despite the possibility

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[24] United Nations Office on Crime and Drugs "Principles of Drug Dependence Treatment" (discussion paper, March 2008) at 10.

[25] Above 4.

[26] L O Lightfoot "Treating substance abuse and dependence in offenders: A review of methods and outcomes." In E.J. Latessa (Ed.), *Strategic solutions: The International Community Corrections Association examines substance abuse*. (1999, Lanham, MD, ACA Press).

that a social stigmatisation might attached to the patient. It is of WCJP's opinion that the person in charge should work out a plan to help the "treated" patient to reintegrate back to the society so that his or her dignity can be restored. However, this is beyond the ambit of this short article's discussion.

III. How Effective is the Bill Going to be in Practice?

A The debate on mandatory treatment

The debate on mandatory versus voluntary treatment has often centred on the effectiveness of mandatory treatment in rehabilitating those with serious drug and/or alcohol problems.

Generally, many have taken the view that involuntary treatment will be ineffective in helping an individual overcome their substance abuse due to the idea that a person needs to seek the treatment themselves in order to guarantee lasting change.[27] However, it has become increasingly more common that the notion of legal coercion is necessary for ensuring those with severe abuse issues get the help they need.[28]

Studies find mixed results. Involuntary treatment has been coined by different studies as either effective, ineffective or of little difference to voluntary treatment.[29] Consequently, it has been hard to determine just what the exact effectiveness of voluntary treatment is.

A review conducted by the UCLA Drug Abuse Research Centre looked at 11 published studies investigating the relationship between levels of coercion and treatment success.[30] Of the 11 studies, 5 found coerced treatment effective, 4 reported no difference and 2 observed negative effects.[31] Anglin, Prendergast and Farabee

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[27] M. Douglas Anglin, Michael Prendergast & David Farabee *The Effectiveness of Coerced Treatment for Drug Abusing Offenders* (Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, D.C., March, 1998), at 3.
[28] At 4.
[29] Dr Regine Ip, Dr Margot Legosz, Zoe Ellerman, Dr Angela Carr & Nadine Seifert. "Mandatory Treatment and Perceptions of Treatment Effectiveness" 7 Crime Misconduct Commission (2008), at 8.
[30] Above n 1, at 5.
[31] At 5.

suggested that the variation across studies and their finding of effectiveness was most likely due to methodological flaws and the failure to consider internal motivations.[32] Internal motivation is the term used to describe an addict's want or desire to create change in themselves. It has been suggested that entering treatment prior to self-recognition of the problem is likely to produce little positive change because the individual will rarely be open to intervention.[33] Here, instead of concluding whether coerced treatment was effective, they found that if and when an involuntary treatment programme is introduced, each individual should be assessed subjectively with an emphasis on internal motivation.[34]

In 2008, the Crime and Misconduct Commission of Queensland completed a study on mandatory treatment and the perception of its effectiveness.[35] The study found that there was little difference between those who had completed treatment through legal coercion to those who had done it voluntarily.[36] The Commission acknowledged the theory of internal motivation, saying that problem recognition, intention and action to change behaviour are all factors pointing toward an individual's readiness for change. [37] Similarly to the above UCLA Research Centre findings, this study recognised that a number of factors would play into the success of treatment, irrespective whether that treatment is involuntary or voluntary.

Leukefeld and Tims said:[38]

> Recovery from drug abuse is an interactional phenomenon involving… client factors with non-treatment factors, such as social climate, as well as treatment itself. Client factors include… external pressure and internal pressure. Legal referrals belong in the external pressure category. A stable recovery cannot be maintained by external (legal) pressures only; motivation and commitment must come from internal pressure. The role of external from this point of view is to influence a person to enter treatment.

[32] At 11.
[33] At 12.
[34] Above n 1, at 18.
[35] Above n 3, at 2.
[36] At 2.
[37] At 5
[38] M. Douglas Anglin, above n 1, at [12]-[13].

It appears as though the conclusion on the effectiveness of involuntary treatment is not an easy one to make. Many international studies have struggled to determine whether legal coercion is an effective option or not. The majority of studies have suggested that there is not a significant difference between the outcomes of voluntary and involuntary treatment. Few studies have shown that involuntary treatment produces serious negative effects on the individual. Studies have rather focused on how the regime of compulsory treatment should be applied in terms of what factors should be taken into account.

We support the Bill, but suggest a greater emphasis should be placed on the factors below when determining whether an individual needs involuntary treatment under the Act;

- The level of internal motivation in the individual,
- The severity of the individual's addiction problem,
- The individual's social situation, in particular,
    - Will involuntary treatment create more harm than good forcing the treatment?
    - Do they have a good support system to help with the recovery process following the treatment?
    - Will the individual's family suffer as a result of the forced treatment?
    - Can the individual afford to be in the treatment instead of working?

Undoubtedly the aims of coerced treatment relate generally to public safety and guaranteeing access to treatment for those who need it. The WCJP acknowledges the argument that the Bill and its provisions may intrude on an individual's human rights, but believes this is a necessary evil for the safety of not only the individual but their family and the wider public as well. As Leukefeld and Tims find, legal pressure can be one influential factor in helping an addict recover.

B New Zealand Law Commission Report on Compulsory Treatment for Substance Dependence

In 2010, the New Zealand Law Commission conducted a report on the issue of compulsory treatment.[39] The Law Commission proposed a complete repeal of the Alcoholism and Drug Addiction Act 1966 and the introduction of a new regime focused on compulsory treatment for substance abuse.

The new regime should aim to help those suffering from severe substance abuse by providing them treatment and facilitating their recovery back to a substance-free life. In order to do so the regime will allow for compulsory treatment when the following 4 factors are satisfied:[40]

a. The person has a severe substance dependence; and
b. Detention and treatment is necessary to protect the person from significant harm to himself or herself; and
c. The person is likely to benefit from treatment for his or her substance dependence but has refused treatment; and
d. No other appropriate and less restrictive means are reasonably available for dealing with the person.

The Commission also provided recommendations on the application of the provisions and how it should be regulated.[41] An emphasis was placed on the need for a new stand-alone Act rather than an amendment to an old Act due to the fact that the objectives of prior acts, such as the Misuse of Drugs Act, are not in line with the underlying rationale behind the new scheme.[42]

In the WCJP's opinion the recommendations from the Commission are well-founded. Again, the WCJP support the majority of them. However it must be noted that the

[39] New Zealand Law Commission *Compulsory Treatment for Substance Dependence: A Review of the Alcoholism and Drug Addiction Act 1966* (Law Commission Report; NZLC R118, September 2010), at 10.
[40] At 10.
[41] At [12]-[14].
[42] New Zealand Law Commission, above n 13, at [85]-[87].

WCJP place an emphasis on the considerations mentioned above, in particular internal motivation and the individual's surrounding circumstances.

The Commission's suggestion that there must be no other appropriate and less restrictive means may touch on the "surrounding circumstances" consideration. There may be a more appropriate means of help that may not involve them out of work or away from their family. However, it is uncertain how this limb will operate in practice and therefore the WCJP proposes an emphasis on the individual's surrounding circumstances, if not under this limb, then under another.

With respect to internal motivation it does not seem as though the Commission, nor the drafters have placed any weight toward this factor and yet this consideration could heavily influence the success of the Bill. Without internal motivation an individual may resist participation in the treatment and consequently waste precious time and resources. As a result, the government will be losing money in a scheme that has failed to draw its attention to the effectiveness of involuntary treatment for those with no internal drive.

The Commission's report was detailed and well supported, despite a lack of focus on surrounding circumstances and internal motivation it undoubtedly provided a helpful foundation for the drafters during the writing of this Bill. The WCJP would propose that in addition to the Commission's suggestions, the drafters also take into account our arguments on both internal motivation and an individual's surrounding circumstances.

B Conclusion

We support the Bill, with changes. The WCJP acknowledges that the underlying aims and objectives are well-founded, and at a time where drug use is becoming increasingly more common, the WCJP agrees that it is time the current laws are reviewed for change. Although the notion of compulsory treatment is inconsistent with internal motivation (usually those participating in compulsory treatment have little to no internal drive) the WCJP does propose that some consideration is given to

this idea as a way to ensure success of the Bill. Furthermore, consideration of an individual's surrounding circumstances cannot be forgotten if Parliament declares that the objective of the Bill is to help addicts and the wider public. If compulsory treatment is not the most appropriate form of help, because of an individual's social and economic factors, then the Act cannot be said to have carried out its underlying purpose.

With respect to the Law Commission's recommendations, our reasoning is much the same as above. Again, the WCJP agree with their suggestions, especially in terms of process, but do wish more of an emphasis was given to internal motivation and surrounding circumstances.