



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

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**MEMORANDUM**  
**[Confidential]**

**TO** : **Joint Tagging Mechanism**

**FROM** : **Adv Z Adhikarie**  
**Chief Legal Adviser**

**DATE** : **28 November 2012**

**SUBJECT** : **Classification of Mental Health Care Amendment Bill**  
**[B39 – 2012]**


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**MESSAGE** : Attached please find opinion for your attention

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Adv Z Adhikarie  
Chief Legal Adviser

I agree with the view of Legal Services that the State Law Advisers have in concert proposed that this is a s 75 Bill. This Bill is a s 76 Bill as it deals with 'health services' as listed in schedule 4 of the Constitution



28/11/12



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**CLASSIFICATION OF MENTAL HEALTH CARE AMENDMENT BILL [B 39 – 2012]**

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**LEGAL OPINION**

1. The Bill was introduced as a section 75 Bill.
2. I disagree with the view of the State Law Advisers responsible for the Bill that it is a section 75 Bill. In my view the Bill is a section 76 Bill since the Bill falls within a functional area listed in Schedule 4, namely health services and also deals with a matter provided for in legislation envisaged in section 195(3) and (4), namely the Public Service Act, 1994. After consulting the State Law Adviser responsible for certifying the Bill, she agreed that the Bill is a section 76 Bill.
3. I agree with the view of the State Law Advisers that the Bill does not contain any provisions pertaining to customary law or customs of traditional communities and therefore does not have to be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 41 of 2003.
4. In my opinion the Bill contains no provision to which the procedure set out in section 75 of the Constitution applies. The Bill is constitutionally and procedurally in order within the meaning of Joint Rule 161.

**RECOMMENDATION**

I recommend that the Bill be classified as a section 76 Bill, and that the JTM makes the following finding:

1. In terms of Joint Rule 160(4) the JTM finds that the Bill-
  - (a) is a section 76 Bill, and should be dealt with in terms of subsection (3);
  - (b) includes no provision to which the procedures prescribed in section 75 of the Constitution applies; and
  - (c) is constitutionally and procedurally in order.



2. In terms of Joint Rule 160(5A) the JTM finds that the Bill contains no provision pertaining to customary law or customs of traditional communities in accordance with section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003.

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**CLASSIFICATION OF MENTAL HEALTH CARE AMENDMENT BILL [B 32 – 2012]**

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3. In terms of Joint Rule 160(6)(d) the Bill is classified as a section 76 Bill.

  
MR NJ VANARA

SENIOR PARLIAMENTARY LEGAL ADVISER

27/11/12.  
DATE

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RECOMMENDATION AGREED TO:

  
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SPEAKER OF THE NATIONAL ASSEMBLY

7/12/2012  
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DATE

  
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CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES

07/12/2012  
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DATE

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DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY

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DATE



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DEPUTY CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES

DATE

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REPUBLIC OF SOUTH AFRICA

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# MENTAL HEALTH CARE AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 35871 of 12 November 2012)  
(The English text is the official text of the Bill)*

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(MINISTER OF HEALTH)

[B 39—2012]

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**GENERAL EXPLANATORY NOTE:**

- [                            ]    Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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**BILL**

To amend the Mental Health Care Act, 2002, so as to insert a new section; to provide for the delegation of powers by the head of the national department to officials in the national department; to repeal the Mental Health Act, 1973; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of Act 17 of 2002**

1. The Mental Health Care Act, 2002 (Act No. 17 of 2002), is hereby amended by the insertion after section 72 of the following section: 5

**“Delegation of powers**

- 72A.** (1) The head of the national department may, in writing, delegate any power conferred upon him or her by this Act to any person in the employ of the national department, except the powers referred to in sections 5, 6(3), 13(2), 41 and 49. 10
- (2) The head of the national department may, at any time—
- (a) withdraw a delegation made under subsection (1); or
  - (b) withdraw or amend any decision made in the exercise of such delegated power.
- (3) A decision made in the exercise of any delegated power, unless withdrawn or amended, is deemed to have been made by the head of the national department. 15
- (4) Any right or privilege acquired or any obligation or liability incurred as a result of a decision made in terms of a delegated power referred to in subsection (1) cannot be affected by any subsequent withdrawal or amendment of that decision. 20

**Repeal of law**

2. The Mental Health Act, 1973 (Act No. 18 of 1973), is hereby repealed.

**Short title and commencement**

3. This Act is called the Mental Health Care Amendment Act, 2012, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

**MEMORANDUM ON OBJECTS OF MENTAL HEALTH CARE  
AMENDMENT BILL, 2012**

**1. OBJECTS OF BILL**

- 1.1 The main object of the Mental Health Care Amendment Bill, 2012 (“the Bill”), is to amend the Mental Health Care Act, 2002 (“the Act”), so as to provide for the delegation of powers by the head of the national department (“the Director-General”) to officials in the national department to improve the application and the effective implementation of the Act.

**2. ANALYSIS OF BILL**

- 2.1 The Bill seeks to amend the Act by providing for the delegation of powers by the Director-General to officials in the national department to promote the effective implementation of the Act. Once the Bill has been passed into law, the Director-General will be able to sub-delegate some of the powers so as to improve service delivery in the area of involuntary health care users.
- 2.2 The proposed insertion enables the Director-General to delegate powers—
- (a) to determine the transfers of state patients from detention centres to health establishments pursuant to court orders issued in terms of the Criminal Procedure Act, 1977;
  - (b) to determine the transfers of state patients between the designated health establishments upon an order issued by the Mental Health Review Board; and
  - (c) to review the mental health status of state patients.
- 2.3 The Bill also seeks to repeal the remaining Chapter 8 of the Mental Health Act, 1973 (Act No. 8 of 1973). This Chapter dealt with hospital boards and is no longer necessary since Chapter 6 of the National Health Act, 2003 (Act No. 61 of 2003), deals with that subject.

**3. DEPARTMENTS/BODIES CONSULTED**

The draft Bill has been forwarded to—

- (a) Justice and Constitutional Development;
- (b) Basic Education;
- (c) Correctional Services;
- (d) Defence;
- (e) Higher Education and Training;
- (f) Home Affairs;
- (g) Social Development;
- (h) South African Police Service; and
- (i) Provincial Departments of Health.

**4. FINANCIAL IMPLICATIONS FOR STATE**

None.

**5. PARLIAMENTARY PROCEDURE**

- 5.1 The State Law Advisers and the Department of Health are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.