

27 January 2022

Tēnā koe,

Ministry of Health – Mental Health Act Review Team

Atamira | Platform Trust (Platform) welcomes the opportunity to comment on the Ministry of Health public discussion document Transforming our Mental Health Law. This is in reference to repealing and replacing the Mental Health (Compulsory Assessment and Treatment) Act 1992 ‘the current Act’.

About Platform

Platform is a peak body representing Mental Health and Addiction (MHA) Non-governmental organisations (NGO) and community sector organisations. Notably, some of these MHA NGO and community organisations include Māori and Pasifika providers, organisations that are run by people and whanau with lived experience of mental distress and addiction and provide peer support services. Also, organisations who provide disability services, alongside MHA services. As a part of this submission, Platform sought input from, and consulted with these member organisations.

In addition, Platform represents a wider network of MHA NGOs (approximately 240) who share the same aspiration of an MHA system and sector that is driven by the need for better and more equitable outcomes for all. Collectively, during the year 2019/20 the whole MHA NGO & community sector organisations supported over 75,940 tangata whaiora, and their whānau, that are directly impacted by MHA issues.

Introduction

Platform welcomes and supports the aim to repeal and replace the current Act by creating Mental Health law (the Legislation) that protects and respects the human rights, implements the principles of Te Tiriti o Waitangi (Te Tiriti) and improve equity. Further, the new Legislation should:

1. Reflect a te ao Māori world view. One where Māori world views are normalised as opposed to the exception and where te whare tapu wha models are fully understood and integrated into mental health, addiction and wellbeing support and services;

2. Take account of the need for a whole of system response: We need a whole of system response to mental health, addiction and wellbeing in Aotearoa that starts with health prevention, protection and promotion. Mental health and addiction support needs to be coordinated, accessible and close to communities. This includes acute alternatives to care and peer led services based in the communities with strong links to specialist services. A whole of system approach and society response based on provision of least coercive and restrictive mental health and addiction services and support to tangata whaiora and their families. Services geared to honour and support tangata whaiora to have equal rights, ability to make informed choices and decisions about safe supports to enable recovery;
3. Support transformation of the system to place less reliance on the need for legislated provisions for compulsory assessment and treatment to reduce the use of restrictive practices and models of care (environment, physical and use of medicines). Supporting the system to further re-orientate to reducing limits on rights, based on the current Act, and to strengthen human right principles, the right to autonomy, life and liberty, to be equal before the law and not be discriminated against, and not to be tortured or subject to cruel treatment. Support sustainable Government funding to realise and achieve the implementation of the Legislation;
4. Enable a coordinated Government and cross-sector response, that addresses the [social determinants](#) of health. If people have stable and sustained access in their community to education, employment and job security, good working life conditions, food security, housing, early childhood development, social inclusion and affordable health care they are likely to get their wholistic needs met. This can influence the Law to a more human rights-based approach, minimising the need to use it to limit rights when people are unwell; and
5. Enable and empower a well-trained and resourced diverse workforce to be culturally competent. Have access to the right tools and processes to support people to make their own choices and decisions about their mental health and addiction recovery plan, support or care and treatment. Ensuring use of the Law in the least restrictive way. To support people to get better quickly so to prevent the need to use the Law or that they can be discharged from the Law quickly.

Our submission will focus on the parts identified in the Ministry of Health public discussion document. For ease of reference the same headings as in the public discussion document have been used.

Part 3: Embedding Te Tiriti o Waitangi and addressing Māori cultural needs

The Legislation should draw on Te Tiriti o Waitangi by directly including the principles of:

- Tino rangatiratanga
- Partnership
- Active protection

- Option
- Equity

This will enable the Legislation to have mechanisms to respond to the needs of Māori, reflect te ao Māori and increase workforce cultural competence. Consequently, leading to a reduction in the over-representation of Māori and the use of the Legislation for limiting one's rights.

The Legislation should incorporate Kaupapa Maori principles similar to those expressed in the [Kaupapa Maori Wellbeing Framework](#) "Whānau violence prevention and intervention" which are as follows:

- Whakapapa "kinship that determines the collectivity between whānau, hapū, iwi; collective consciousness".
- Tikanga "the practice of Māori beliefs and values; collective practice".
- Wairua "spirituality expressed as awareness of wairua and passion for life self-realisation".
- Tapu "brings us to a state of our own knowing; self-esteem".
- Mauri "inner values; sense of power, influence and identity"; and
- Mana "outer values; external expression of achievement, power and influence"

The use of cultural principles, for example, whakapapa, tikanga, wairua, tapu, mauri, and mana, has the potential to inform wellbeing in intimate partner and whānau relationships, transform behaviours and provide alternatives to using the Legislation. Using these principles can guide transformative cultural practices and inform strategies for engaging with Māori and whanau to have equal rights, ability to make informed choices and decisions about safe supports to enable recovery within the context of an enabling Legislation.

The Legislation should support the need for cultural leaders, advisors and healers to be part of a workforce which enable the implementation of the Legislation to limit use of restriction in health care settings.

We encourage and reserve for Māori to make the final decision about which Kaupapa Māori principles should be embedded in the Legislation.

Part 4: Defining the purpose of mental health legislation

The purpose of the Legislation should be as stated in [He Ara Oranga](#). It should reflect:

- modern approaches to human rights, supported decision-making and informed consent; and
- a human rights-based approach, align with modern models for mental health care and minimise the use of compulsion, seclusion and restraint.

The purpose of the Legislation should support a recovery based approach to mental health. Under this approach, people should have their mana protected and enhanced, experience respect, be supported to make their own choices and

decisions about their mental health and addiction recovery plan, be active partners in the support or care and treatment they experience, to be able to reach their full potential in life. Furthermore, the purpose should seek to advance a holistic population-based approach to improve mental wellbeing outcomes for the whole population, and address inequities that lead to disparities in mental health and wellbeing outcomes for specific population groups as stated in [Kia Manawanui Aotearoa, Long-term pathway to mental health wellbeing](#).

To support such a purpose the Legislation should balance the different rights an individual holds with the right of others. The aim being to ultimately limit the use of restrictions on the rights of an individual through compulsory assessments and treatment. The legislation should target a reduction in the use of restrictions which limits people's rights across all population groups.

For changes in the Legislation, afore mentioned, to work effectively and to be sustainable, it requires the MHA system to be transformed along the lines referred to in Kia Manawanui Aotearoa Long-term pathway to mental health and wellbeing. A change in Legislation alone will not result in a necessary reduction in the use of restriction limiting people's rights. A whole of system change will be necessary to support a radical shift to less restrictive models of care, including setting of service delivery and community support.

Also, it will require a radical shift in society's perception of mental 'illness' and distress. Restrictions which limit people's rights are not necessarily effective nor appropriate in the understanding and management of safety, risk, and 'dangerousness'. To achieve this, will require funding not only for the implementation of Legislation but for improvement of services to achieve the purpose of the Legislation.

[He Ara Oranga's recommendation 35](#) stated "**Encourage** mental health advocacy groups and sector leaders, people with lived experience, families and whānau, professional colleges, DHB chief executive officers, coroners, the Health and Disability Commissioner, New Zealand Police and the Health Quality and Safety Commission to engage in a national discussion to reconsider beliefs, evidence and attitudes about mental health and risk"

We recommend that the Legislation should be preceded and informed by a national discussion about how a workforce and whole of system can be supported to change from a culture of risk aversion and defensive practice, to focus on people's rights, needs and interest, through enabling informed choices and decisions about safe supports to enable recovery.

Part 5: Capacity and decision making

In the first instance, if a capacity based approached is the preferred one, the Legislation should have a clear definition or interpretation of decision making capacity which includes te ao Maori perspectives. This should be aligned to the Purpose of the Legislation as suggested in the section, Part 4, above.

The criteria for decision making capacity should, as far as is possible, enable an individual or person to make informed choices and decisions about their mental health and wellbeing and the necessary recovery approach when considering whether restricting choice or using compulsory treatment is necessary. The criterion should limit the circumstances in which an individual or person's right can be restricted and for treatment or detention to happen without their consent.

The Legislation must include provision for a mandatory requirement for assessment of decision making capacity. This will require criteria to reduce or limit the ability to override a 'competent' person's wishes or informed choices and decisions, based on an assessment of their 'risk' or 'dangerousness', even if they have the capacity to make their own decisions.

The criteria should place greater weight on the rights and interests of a person or individual and the person's ability to understand, use, recall and weigh relevant information; to foresee consequences; and to communicate a decision as per the New Zealand's Substance Addiction (Compulsory Assessment and Treatment) Act 2017.

The assessment of whether a person has the capacity to make a decision about mental health treatment should be a joint one between the person and suitably informed health practitioners. The legislation must have legal provisions and pathway to ensure that the right checks and balance to prevent a health practitioner's perspective prevailing. This supports the presumption that people, or tangata whaiora, have the capacity to make their own decisions about mental health treatment and the capacity to make decision changes over time.

Lastly, the Legislation should account for appropriate relational, societal and environmental conditions to support assessment of decision making capacity. The intent being to limit, at every occasion, the need to limit rights through compulsory mental health treatment.

Criteria for compulsory mental health treatment in the Legislation should enable disabled people to make informed choices and decisions about their mental wellbeing and their lives, and the kinds of support they need in accordance with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

Part 6: Supporting people to make decisions

The role of supported decision making in the Legislation, should provide a mechanism to implement the aim of the Legislation to support a recovery based approach to mental health, and ensure one's mana is protected and enhanced, experience respect, be supported in their own choices and decisions about their mental health and addiction recovery plan, be partners in their support and treatment to achieve the goals they developed for themselves and to reach their full potential in life.

The role of supported decision making in the Legislation should include systems and processes to engage with, and provide people, individual or tangata whaiora with all

the necessary information and support they need to allow them to make informed choices and decisions about their mental wellbeing, the treatment and support they require for their recovery.

The role of supported decision making in the Legislation should also support any assessment of whether a person, individual or tangata whaiora, has the capacity to make informed choices or decisions about their mental wellbeing and mental health intervention or treatment. Even where a person does not have capacity, or has reduced capacity to make an effective decision, they play an important part in the decision-making process, and should be encouraged to participate as fully as possible in all decisions that affect them.

The role of supported decision making in the Legislation should have appropriate processes and systems to involve nominated people to assist a person who is unwell, to exercise their right; or an independent advocate to support a person to understand their rights and to participate in decision making.

The Legislation should have provisions to respect the involvement of family and whānau in the assessment of a person or individual mental wellbeing, the support, care or treatment to be provided to them and their recovery plan. Family and whānau involvement in the role of supported decision making, as well as assessment of capacity to make decisions, should not override the different rights that an individual holds to make informed choices and decisions about their mental wellbeing, treatment, care, support and recovery. A balance needs to be struck against the right of an individual with the rights of family and whānau.

Also, the Legislation should include provisions or processes to enable people, or tangata whaiora, to use advance directives as a tool to specify actions to be taken about their mental wellbeing, in the event they are no longer able to make informed choices and decisions due to illness or some other reason. The Legislation should require health professionals, practitioners or the workforce involved in administering the Legislation, to respect advanced directives, and to support planning for advance directives. Including this in the Legislation would further strengthen the right to use advance directives under right 7(5) of the Code of Rights.

Supported decision making should embed te ao Māori at all times and be founded on Te Tiriti principles mentioned in Part 3 above. We encourage and reserve for Māori to make the final decision about how te ao Māori should be reflected in supported decision-making processes.

Supported decision making should have appropriate provisions for disabled people to have the right to control decisions about the support, treatment and intervention they may require.

Subject to the legislation, defining the age that a person is considered to be a child or young person, children should be enabled to make informed choices and decisions about their mental wellbeing, support, care and treatment they require and recovery plans. Also, subject to the Legislation, to have provisions for assessment of whether a child has the capacity to make informed choices and decisions without

placing greater emphasis on the rights and interests of the child and their ability to understand the information about their mental health wellbeing situation.

Part 7: Seclusion, restraint and other restrictive practices

The Legislation should have provisions for a pathway to eliminate, or achieve zero seclusion, in line with the [Ministry of Health's goal](#) of reducing and eventually eliminating seclusion as stated Section 7.2, page 44 of the Ministry of Health Public Discussion document. This must include mechanisms for collecting data and information to enable reporting and monitoring of the use of seclusion or any restrictive practices.

The first premise of the Legislation should be to establish systems and processes which support a recovery based approach to mental health. To incorporate te ao Māori, in which people have their mana protected and enhanced, experience respect, are supported in their own choices and decisions about their mental health and addiction recovery plan, and are supported to reach their full potential in life without the use of restricted practices like seclusion and restraint.

The second premise of the Legislation should be to establish systems and processes which limit the use of restrictive practices like seclusion and restraint, and incorporate te ao Māori. These should be informed by the overriding need to strengthen human right principles, the right to autonomy, life and liberty, to be equal before the law and not be discriminated against, and not to be tortured or subject to cruel treatment.

These two premises should apply to disabled people but not to children.

If restrictive practices are to be used, the Legislation must state the minimum standards and least restrictive options to be used to enable a person or individual to continue to exercise informed choices and decisions about their mental wellbeing, treatment, support and recovery plans.

The Legislation should include the requirements in the [Health and Safety at Work Act 2015](#), New Zealand's workplace health and safety law. This will support the prioritisation of safety for individuals and tangata whaiora accessing and being supported by services. Equally, to support the safety and workplace wellbeing of the workforce or staff.

Supported decision making should embed te ao Māori at all times, and be founded on Te Tiriti principles mentioned in Part 3 above. We encourage and reserve for Māori to make the final decision about how te ao Māori should be reflected in supported decision-making processes.

For this part of the Legislation to work, to reduce and eliminate seclusion and restraint, it will require a whole of system change, workforce upskilling and use of alternatives to in-patient facilities which will need to be supported through a significant change process to embed new models of care alongside resourcing for this to occur.

Part 8 Addressing specific population group needs

Sub part 8.2 Addressing cultural needs

Refer to the points covered in part 3 above about what is needed in Legislation to ensure people receive culturally appropriate care and reflect te ao Māori.

Also, the Legislation should include provisions or other systems and processes to address, and support the cultural needs of diverse population groups and communities. In particular, mechanisms for proper respect for a person or individual's cultural and ethnic identity, language and religious or ethical beliefs. This includes cultural provisions to cater for children and disabled people. For example, in many situations the use of a New Zealand Sign Language (NZSL) interpreter for assessments would be insufficient and would also require specialist cultural advice to determine the capacity, needs and wishes of the Deaf person and their whānau.

Sub part 8.3 Respecting family and whānau

Refer to the point covered in paragraph five (5) in Part 6 above about the involvement of family and whānau in supported decision making and assessment of capacity to make decisions.

The Legislation should require the sharing of information with family and whānau consistent with the [Privacy Act 2020](#) and [Health Information Privacy Code 2020](#) in assessment and treatment, to the extent that this assists the individual to make informed choices and decisions and does not override or limit an individual's rights.

Sub part 8.4 Children and young people

Refer to Part 6 above paragraph nine (9) about supporting and involvement of children and young people.

Sub part 8.5 Disabled people

Refer to Part five (5) paragraph seven (7) and Part six (6) paragraph eight (8) regarding provisions to be considered for disabled people.

Sub part 8.6 People in the justice system (special patients)

If special patients do not lose their essential human rights, there is no legitimate reason to limit their other rights, such as the right to consent to treatment as stated on page 55 of the public discussion document. If that be the case, the Legislation should have provisions including specifying systems and process which allow for assessment of whether a special patient has the capacity to make informed choices/consent and decisions about mental health treatment. This should include provisions for supported decision making.

The Legislation should include recommendations from the 2010 New Zealand Law Commission review report Mental Impairment Decision-Making and Insanity Defence, regarding decisions about special leave or change of status applications, not to be made by Ministers, as is currently the case.

Part 9: Protecting and monitoring people's rights

Sub-Part 9.2: Court tribunal and other legal processes

The Legislation should have fair and transparent systems and processes for approving the use of compulsory mental health treatment. The Legislation should create a full-time tribunal, requiring all applications and processes related to the use of compulsory treatment to be considered by a tribunal. Tribunal processes should empower people or individuals to present information, with the support of an independent advocate, or a peer support worker and provision of cultural support.

The Legislation should have provisions to enable a person or individual to challenge a decision made about the use of compulsory mental health treatment.

Sub-Part 9.3 Challenging clinical decisions

The Legislation should make it a requirement for people or an individual to be given fulsome information about all available treatment options, to enable them to make an informed choice and decisions about the treatment option they wish to choose.

The Legislation should include provisions to enable people or individuals to disagree or challenge the compulsory mental health treatment chosen for them by their health practitioner.

The process should be simple, clear and outline what people or an individual can do.

Sub-Part 9.4: The role of Police

The Legislation should define a very limited support role to administering any part of the new legislation.

The Legislation should not include the use of police cells as a place to detain people or an individual for the purposes of administering the new Legislation.

Sub-Part 9.5: Monitoring individuals' rights

The Legislation should have provisions which require monitoring and reporting of the use of the new legislation and people or individual rights. Also the use of systems and processes for gathering of data and information about the use of the Legislation.

The Legislation should create roles which require monitoring and reporting of the use of the new legislation and people or individual rights at different system levels: service, local, regional and national.

The roles could be similar to that of the Director of Area Mental Health Services and District Inspector with a clear scope and stronger mandate to support and monitor that the rights of people and individuals are being upheld, as per the Legislation, and to align with the United Nations Convention on the Rights of Persons with Disabilities. Also, to have a resolution pathway where the rights of people or individuals are not being upheld.

The Legislation should include a complaints process for compulsory mental health treatment at each system level, and set clear parameters and timelines for resolution of complaints to support the upholding of people and individual rights.

Conclusion

Thank you for the opportunity to comment on Transforming our Mental Health Law, A public discussion document.

We believe repealing and replacing the current Act provides an opportunity to create Legislation that protects and respects human rights, implements the principles of Te Tiriti and supports equity. In doing so, the Legislation will require a whole of system response and support system transformation. It will enable a government and cross sector approach to addressing the social determinants of health, and empowering a well-trained and resourced diverse workforce to be culturally competent and responsive to meet the requirements of the Legislation. Further, the Legislation provides an opportunity to formalise accountabilities for capacity and decision making, supporting people to make decisions, and limiting the use of seclusion, restraint and other restrictive practices. Finally, we must monitor and measure the reduction in restrictive practices and implement corrective actions taken to address situations where this not occurring.

Nāku noa nā



Memo Musa
Chief Executive

memo@platform.org.nz