MINISTRY OF HEALTH
MANATŪ HAUORA

Memorandum

COPY

Draft Cabinet Paper: Mental Health Act Reform

Date due to MO:	27 May 2019	**Action required by:**	N/A
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To:	Hon Dr David Clark, Minister of Health		

Contact for telephone discussion

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Action for Private Secretaries

N/A

Date dispatched to MO:

Ministry of Health
27 MAY 2019
DISPATCHED

Draft Cabinet paper: Mental Health Act Reform

Purpose of report

1. This memo provides you with an updated draft Cabinet paper that reports back to Cabinet on the scope, timeframes and resources required to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Act), as agreed in December 2018 [CAB-18-MIN-0621 refers]. The paper also seeks agreement to a set of high-level principles to inform the development of detailed policy recommendations for repeal and replacement of the Act.

Key points

2. The Ministry of Health provided you with a working draft Cabinet paper for review on 7 May 2019 [HR20190719 refers]. s 9(2)(f)(iv) [redacted]

3. The draft Cabinet paper has been through inter-agency consultation, and the attached draft incorporates agencies' feedback, where possible.

4. We are continuing to engage with key stakeholders, including Māori and people with lived experience, to inform the principles proposed to underpin the reform of the Act and the development of policy options.

Next steps

5. Officials are available to discuss your feedback on the attached draft Cabinet paper, otherwise the attached draft could be circulated for Ministerial consultation.

6. The next steps for reporting back to Cabinet are outlined in the table below.

Process	Timeframe
Minister of Health receives draft Cabinet paper for Ministerial and cross-party consultation	Week of 27 May (approx. 2 weeks)
Minister of Health receives final Cabinet paper reflecting the outcomes of Ministerial and cross-party consultation	Week of 10 June
Lodge Cabinet paper	Thursday 13 June
Consideration by Cabinet Social Wellbeing Committee (SWC)	Wednesday 19 June
Consideration by Cabinet	Monday 24 June

Robyn Shearer

Deputy Director-General

Mental Health and Addiction

In Confidence

Office of the Minister of Health

Chair, Cabinet Social Wellbeing Committee

MENTAL HEALTH ACT REFORM

Proposal

1. In this paper, I provide my report back to Cabinet regarding the scope, timeframes and resources required to repeal and replace the Mental Health Act as agreed in December 2018 [CAB-18-MIN-0621 refers]. The paper also seeks agreement to a set of high-level principles to inform the development of detailed policy recommendations.

Executive Summary

2. This Government has committed to repealing and replacing the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) [CAB-19-MIN-0182 refers]. This represents a crucial component of our response to *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (*He Ara Oranga*) and the transformation of our approach to mental wellbeing.

3. *He Ara Oranga* raises significant concerns with our current legislation that we must address. The current Mental Health Act does not require consideration of a person's capacity (or competence) to consent to treatment, and thus allows for overriding a competent person's wishes with respect to decisions about mental health care and treatment. The legislation is not aligned with international obligations under the Convention on the Rights for Persons with Disabilities (CRPD). Further, the current legislation has yielded significant inequities for Māori, and at times has been used inappropriately as a mechanism to enable individuals to access services.

4. We are taking steps to address these concerns as best as possible under the current legislative framework. There is work underway across Government, including a revision of the Mental Health Act Guidelines to ensure that they incorporate a human rights focus and to align the administration of the legislation as closely as possible to the CRPD. However, complete reform of the legislative framework is needed to adequately address the concerns raised.

5. As we work to develop new legislation, it is critical to maintain a clear objective of what we intend to achieve through this reform. New legislation must improve equity and outcomes for those populations currently facing inequities and poorer outcomes under the current framework. To achieve this, respect and protection of individual human rights must be a key overall objective. We must also ensure that any future compulsory treatment is strictly limited, with mechanisms in place to closely monitor its use.

6. To fully realise these objectives, our commitment to expand access and choice of mental health and addiction services in our response to *He Ara Oranga* must underpin legislative reform. This will ensure New Zealanders can access the support they need, when and where they need it.

7. The policies developed for the new legislation must be guided by strong principles to ensure a consistent and ethical approach that places people at the centre of the new framework. These principles will ensure all options developed are aligned to human rights conventions and Te Tiriti o Waitangi, and that the policies consider the positive duty of care and responsibility to promote and enhance an individual's wellbeing when intervening in their life.

8. s 9(2)(f)(iv) [redacted]

9. s 9(2)(f)(iv) [redacted]

Background

10. In December 2018, I brought an initial response to the Government Inquiry into Mental Health and Addiction (the Inquiry) to Cabinet [CAB-18-MIN-0621 refers]. I committed to report back to the Cabinet Social Wellbeing Committee with options on the scope, timeframes and resourcing required to reform the Mental Health Act by June 2019 [CAB-18-MIN-0621 refers].

11. *He Ara Oranga* sets out a future vision of mental health and wellbeing for all. We have committed to transforming our approach to mental health and addiction to deliver on this vision. Repealing and replacing the Mental Health Act, to ensure our legislation is fit-for-purpose and upholds New Zealanders' rights, is a critical component of this transformation.

Reasons for Reform

Outdated Framework

12. The recommendation made in *He Ara Oranga* to repeal and replace the Mental Health Act is not new. There have been calls to repeal and replace the Act for some time, including from the United Nations (UN) Committee on the Rights for Persons with Disabilities and the Health and Disability Commission, among others. New Zealand has faced continued criticism both domestically and internationally (through various United Nations human rights committees) for failure to respond to these calls for significant legislative reform.

13. *He Ara Oranga* describes a fundamental issue of the current Act:

> "...under the Act, a 'competent' person's wishes can be overridden, based on an assessment of their 'risk' or 'dangerousness', even if they have the capacity to make their own decisions."

14. To adequately address this central issue requires significant reform of the underlying framework of the current legislation. This reform must carefully balance the protection of individual human rights with the affirmative duty of care the government has to ensure vulnerable individuals, and those around them, are safe and have access to critical care and treatment. This will require consideration of a capacity assessment as part of the framework for imposing a compulsory treatment order.

Inequitable Outcomes and Improper Utilisation

15. The current application of the Mental Health Act, as well as the inequitable treatment and outcomes across population groups, particularly Māori, is alarming.

    15.1. In 2017, 10,286 people were subject to a compulsory treatment order under the Mental Health Act. This is approximately 5.8 percent of specialist mental health and addiction service users.

    15.2. The majority of compulsory treatment orders in New Zealand are community treatment orders which have been increasing over time. The rate of community treatment orders in New Zealand is higher than international comparative jurisdictions. Regional variation of rates of community treatment orders indicates there is scope to reduce overall use.

    15.3. Māori are disproportionately represented in the population under the Act (almost four times more likely to have a compulsory treatment order) and are much more likely to experience seclusion events than non-Māori.

16. I am also concerned by anecdotal reports that the current Mental Health Act may be used as a mechanism to ensure an individual receives access to services, rather than as a last resort for an individual with a mental disorder of the nature defined in the legislation. This is not in keeping with the requirement that an individual receive care in the least restrictive manner possible.

Human Rights Work Underway

17. In recognition of the concerns and issues identified above, this Government is already taking steps to respond. The Ministry of Health has begun work to improve the recognition and protection of human rights under the current Mental Health Act. Work is underway to revise the Guidelines for administration of the Mental Health Act. This is aimed at incorporating a stronger and more explicit emphasis on human rights. Following publication of the revised Guidelines, the Ministry of Health will work with providers to apply the new Guidelines and embed a human rights focus in practice.

18. There is also work underway across government to strengthen the emphasis on protecting and respecting individual human rights. This work includes the development of the 2019-22 Disability Action Plan, efforts to eliminate the use of seclusion in places of detention, and projects to develop tools and resources related to supported decision-making.

19. While this work is moving us closer to an approach grounded in human rights, we must do more to ensure New Zealanders receive appropriate care and treatment. This is why we have committed to repealing and replacing the Mental Health Act.

Scope for Reforming the Mental Health Act

20. The options available to reform the Mental Health Act range in scope from education and training to embed a human rights focus, to minor legislative amendments, to full legislative repeal and replacement.

21. As part of our response to the *He Ara Oranga* in May 2019, we considered the full range of options, and concluded that a full repeal and replacement of the Mental Health Act is necessary to address the significant issues with the current legislation [CAB-19-MIN-0182 refers].

Principles of Reform

Objectives

22. The overall objective of the new legislation must be to ensure individual and whānau human rights are protected and respected. If this objective is met, the new legislation will improve equity and outcomes for populations that continue to experience poorer outcomes under the current framework.

23. The use of compulsory treatment under new legislation must also be limited, with mechanisms in place to closely monitor its use. This change will be underpinned by our commitment to expand access and choice of mental health and addiction services in our response to *He Ara Oranga*. This will ensure New Zealanders can access the appropriate support they need, when and where they need it, outside of the application of the Act.

Principles

24. In order to deliver on the objectives set out above, it is essential policy development be underpinned and guided by a clear set of strong principles. I recommend Cabinet agree to the following overarching principles to guide the development of policy options for repealing and replacing the Mental Health Act.

    24.1. **Human rights approach**: Persons receiving mental health services and their whānau should have their rights, cultures, dignity and autonomy respected and protected. There is a presumption that the legislation will comply with our international obligations.

    24.2. **Maximum independence; inclusion in society; and safety of individuals, their whānau and the community**: State intervention into an individual's and their whānau's lives creates a positive duty to ensure any actions are done in a manner that promotes wellbeing, enhances the ability of the individual to participate as a full member of society, and ensures the safety of the individual, their whānau and the wider community.

    24.3. **Te Tiriti o Waitangi**: Recognition and incorporation of, and respect for, the spirit and principles of Te Tiriti o Waitangi is paramount. This includes an aspiration for a Crown/Māori partnership in the design and delivery of mental health services.

    24.4. **Improved equity of care and treatment**: Persons needing mental health services should have equitable access to quality care and treatment, and legislation should support equitable outcomes for all population groups. Legislation permitting state intervention into an individual's and their whānau's lives should be applied equitably across populations.

    24.5. **Recovery approach to care and treatment**: Modern approaches to ethical care and treatment which emphasise a person and whānau-centred recovery approach should be embedded into new mental health legislation.

    24.6. **Timely service access and choice**: People with mental health needs, regardless of status under legislation, should be able to access appropriate, high-quality, culturally-responsive services and support when and where they need it. People should have their individual and whānau needs and preferences recognised and responded to. Services should act with an understanding of the age, culture and maturity of the individual. Māori and whānau should be able to choose and access kaupapa Māori services.

    24.7. **Provision of least restrictive mental health care**: People will be provided with assessment and treatment in the least restrictive way possible.

    24.8. **Respect for family and whānau**: Support and inclusion of family and whānau in care and treatment can be critical to wellbeing and positive outcomes. Individuals, including children and young people, need to be seen in the wider context of their family and whānau.

25. I also expect these principles to be used to inform the wider mental health and addiction system transformation.

Process and Timeframe for Reform

26. Complete repeal and replacement of the Mental Health Act is not a simple task. The issues involved in legislation of this nature are complex and will have impacts on legislation and work programmes implemented and overseen by many agencies across the government. This includes the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, the Criminal Procedure (Mentally Impaired Persons) Act 2003, and the Protection of Personal Property Rights Act 1988.

27. s 9(2)(g)(i) [redacted]

28. s 9(2)(f)(iv) [redacted]

29. s 9(2)(f)(iv) [redacted]

30. s 9(2)(f)(iv) [redacted]

Resourcing

31. I am not requesting any additional resources; I have directed my officials to operate within baseline funding.

32. This reform will have impacts across many sectors, and the changes experienced will not be limited to the health sector. In addition to Health officials' input, it will be essential for officials across sectors to engage and provide input during the policy development stage.

Consultation

33. The Ministry of Health has prepared this paper in consultation with the Ministries of Education, Justice, Social Development, Primary Industries, Housing and Urban Development, Women, Pacific Peoples, and Business, Innovation and Employment; the Department of Corrections, the New Zealand Police, Oranga Tamariki–Ministry for Children, Te Puni Kōkiri, the Office for Disability Issues, the Accident Compensation Corporation, the Social Investment Agency, the State Services Commission, the Department of Prime Minister and Cabinet (Policy Advisory Group and the Child Wellbeing Unit), and the Treasury.

34. In addition, Ministry of Health officials have engaged with Māori partners; people with lived experience; Crown entities including the Health Promotion Agency, the Health and Disability Commissioner, the Office of the Ombudsman, and representatives of district health boards; and other sector stakeholders. Financial Implications

35. There are no financial implications from this paper.

Legislative Implications

36. Cabinet has previously agreed to repeal and replace the Mental Health Act [CAB-19-MIN-0182 refers]. A bill will be required to implement proposals. 9(2)(ba)(ii) [redacted] 9(2)(ba)(ii)

Impact Analysis

37. The requirements of this section do not apply to this paper.

Human Rights

38. The proposals in this paper are consistent with, or will improve consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The proposals will also help improve consistency with United Nations conventions such as the United Nations Convention on the Rights of People with Disabilities.

Gender Implications

39. There are gender differences in rates of compulsory treatment orders, with males more likely to experience a compulsory treatment order than females. Policy development for new mental health legislation will have a strong focus on supporting equitable outcomes, including in relation to gender equity.

Disability Perspective

40. The repeal and replacement of the Mental Health Act will improve consistency with the New Zealand Disability Strategy 2016-2026 and international obligations, such as the United Nations Convention on the Rights of Persons with Disabilities.

Publicity

41. To support transparency, build momentum and foster public engagement with this work, I propose to publish a press release that makes this paper available publicly.

Proactive Release

42. This paper will be proactively released as soon as practicable following Cabinet's decisions. Release will be subject to redactions as appropriate under the Official Information Act 1982.

Recommendations

The Minister of Health recommends that the Committee:

1. **note** this paper provides the agreed report back regarding scope, timeframes, and resources to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act 1992 [CAB-18-MIN-0621 refers]

2. **note** that the reform of the Mental Health Act to ensure our legislation is fit-for-purpose and upholds New Zealanders' rights is a critical component of this Government's commitment to transform our approach to mental wellbeing

3. **note** the work already underway across government to incorporate stronger emphasis on protecting and respecting individual human rights

4. **note** that Cabinet has agreed to the scope of reform as a full repeal and replacement of the Mental Health Act [CAB-19-MIN-0182 refers]

5. **agree** to the following set of high-level principles to guide the policy development for repealing and replacing the Mental Health Act, and the process of transforming New Zealand's approach to mental health and addiction:

    5.1. human rights approach

    5.2. maximum independence; inclusion in society; and safety of individuals, their whānau and the community

    5.3. Te Tiriti o Waitangi

    5.4. improved equity of care and treatment

    5.5. recovery approach to care and treatment

    5.6. timely service access and choice

    5.7. provision of least restrictive mental health care

    5.8. respect for family and whānau

6. s 9(2)(f)(iv) [redacted]

7. **direct** officials across Government to work together in the development of detailed policy proposals

8. s 9(2)(f)(iv) [redacted]

9. s 9(2)(f)(iv) [redacted]

Authorised for lodgement
Hon Dr David Clark
Minister of Health