In Confidence

Office of the Minister for Health

Chair, Cabinet Legislation Committee

Mental Health and Wellbeing Commission Bill: Approval for Introduction

Proposal

1. This paper proposes that the Mental Health and Wellbeing Commission Bill (the Bill) be approved for introduction to the House of Representatives. It also seeks decisions on outstanding policy matters for the Mental Health and Wellbeing Commission (the Commission).

Policy

2. On 1 July 2019, Cabinet agreed to the functions, form and establishment process for the Commission [CAB-19-MIN-0329.01 refers].
3. Cabinet agreed the Commission will be an autonomous Crown entity established by legislation to provide system oversight and leadership for mental health and wellbeing, hold the government to account for improving mental health and wellbeing in New Zealand, and uphold and actively promote the principles of Te Tiriti o Waitangi in relation to the promotion of mental wellbeing in New Zealand.
4. The Bill gives effect to these decisions. The Bill also contains one more significant change from Cabinet's previous decisions. I seek Cabinet's agreement to establish the Commission as an independent Crown entity rather than an autonomous Crown entity previously agreed.

Drafting of the specific functions of the Commission

5. Cabinet agreed to a number of system level oversight and leadership functions and monitoring and advocacy functions for the Commission.
6. The proposed functions for the Commission are:
    - 6.1. to assess and report publicly on the mental health and wellbeing of people in New Zealand
    - 6.2. to assess and report publicly on factors that impact on people's mental health and wellbeing
    - 6.3. to assess and report publicly on the effectiveness, efficiency, and adequacy of approaches to mental health and wellbeing (including mental health services and addiction services)
    - 6.4. to promote alignment, collaboration, and communication between entities involved in mental health and wellbeing

6.5. to advocate for the collective interests of people who experience mental distress or addiction (or both), and the persons (including family and whānau) who support them.

7. The Bill provides that when performing its functions, the Commission must have particular regard to the experience of, and outcomes for, Māori.

Cabinet authorised the Minister of Health to make subsequent policy decisions

Monitoring and advocacy relating to mental health and addiction services

8. Cabinet agreed that the Health and Disability Commissioner Act 1994 will be amended to remove the position of Mental Health Commissioner and functions for monitoring and advocacy in relation to mental health and addiction services. I was invited to give further consideration to where in the system the service monitoring and advocacy functions should be [CAB-19-MIN-0329.01 refers].

9. I recommend section 14(1)(ma) of the Health and Disability Commissioner Act, 'to monitor mental health and addiction services and to advocate improvements to those services', is shifted to the Commission. The Office of the Health and Disability Commissioner and the State Services Commission support this recommendation.

10. By monitoring service performance, the Commission will have access to a key contributor of system performance. For instance, a service-level trend may reveal system failures the Commission could assess and report on.

11. I considered other locations, such as the Health Quality and Safety Commission and the Health Promotion Agency. However, the monitoring and advocacy functions do not align with the purpose and functions of these agencies. I also considered the form best suited to these functions. The Health Quality and Safety Commission and Health Promotion Agency (both Crown agents) do not provide the independence required of a body tasked with monitoring and advocating for improvements to services provided by Government.

12. The service monitoring role is reflected in the Bill under the functions, in particular clause 11(c) of the Bill which states a function of the Commission is 'to assess and report publicly on the effectiveness, efficiency, and adequacy of approaches to mental health and wellbeing (including mental health services and addiction services)'.

13. Individual complaints will continue to be considered by the Health and Disability Commissioner, among others. I anticipate the Commission and the Health and Disability Commissioner, which considers individual complaints relating to mental health and addiction services, will coordinate and share information where it is consistent with their respective functions.

Information gathering powers of the Commission

14. To be able to provide system level oversight and hold decision makers to account for the mental health and wellbeing of people in New Zealand, the Commission will require information on government strategies, policies, investment, programmes and services related to mental health and wellbeing.

15. Cabinet agreed the Commission should be able to obtain information or data from government departments and statutory Crown entities [CAB-19-MIN-0329.01 refers].

Cabinet also invited further work to be done prior to drafting of legislation on the details of the powers including the scope of the information the Commission is likely to require, and from whom.

16. I recommend the information gathering powers apply to government departments and statutory Crown entities.

17. As agreed previously by Cabinet, the Commission will not require personal information related to identifiable individuals given that the Commission will not investigate individual cases.

18. I propose that the Commission have powers to obtain information from:

    18.1. a department named in Schedule 1 of the State Sector Act 1988 (excluding the Government Communications Security Bureau and the New Zealand Security Intelligence Service)

    18.2. a departmental agency named in Schedule 1A of the State Sector Act 1988

    18.3. a statutory entity named in the Schedule 1 of the Crown Entities Act 2004

    18.4. the New Zealand Defence Force

    18.5. the New Zealand Police.

19. The Commission cannot obtain personal information, information held by the Government Statistician collected under the Statistics Act 1975, and confidential tax information. An entity may refuse a request for information if the information can be properly withheld under certain sections of the Official Information Act 1982 or if the supply of information would limit the ability of the entity to carry out any statutorily independent functions.

20. The Bill sets out that the Commission cannot publish or disclose information it obtains unless certain exceptions apply. These exceptions include that the information is already publicly available, the information is in a statistical or summary form, the Commission is required by law to publish or disclose the information, or publication or disclosure is with the consent of the entity from whom the information was obtained.

21. These information gathering powers will ensure the Commission can readily access information about government agencies' own activities, as well as, information these agencies hold about services they fund that are delivered by third parties.

22. I also considered whether the Commission should have powers to obtain information directly from third parties that are funded by government to undertake activities relating to mental health and wellbeing.

23. This information is best obtained through the funding department to avoid third parties being asked to provide similar information to both the funding department and the Commission. The funding department itself has an interest in ensuring that the services it funds are effective and efficient so should be obtaining the sorts of information for its own management purposes that would be of interest to the Commission. Where this information is inadequate, the Commission can:

    23.1. seek information directly from third parties but without any power to compel them to provide it should they decline

23.2. comment publicly or make recommendations to any Minister about inadequacies in the information held by a government agency relating to the third party services it funds.

24. A number of other government agencies, including the Health Quality and Safety Commission, request and successfully obtain information from both government and non-government entities without legislative powers to compel the information.

25. The proposed approach means that the Commission may have less certainty that it can obtain the information it needs to perform its functions. However, over time this information should be more readily available as the Commission creates incentives for funding departments to improve their contracting practices.

26. Some parts of the mental health and wellbeing system are neither funded nor delivered by the government, for example, privately-funded health services and activities by businesses, non-government organisations and individuals.

27. Given the potential compliance costs in responding to information requests, I recommend that the Commission should not be able to compel information from these entities. The Commission would be able to seek information from these entities where it requires it (as other government agencies such as the Health Quality and Safety Commission do) but these entities would be able to decline.

Responsible Minister and monitoring agency

28. Cabinet agreed that the Minister of Health be the responsible Minister for the Commission and invited the Minister of State Services and Minister of Health, in consultation with the Prime Minister, to give further consideration to which department should be the monitoring department for the Commission [CAB-19-MIN-0329.01 refers].

29. It is not necessary for the legislation to specify which Minister will be responsible for the Act. The Bill is drafted so that the Prime Minister has the power to assign a Minister responsible for the Act, providing for future flexibility. Parliamentary Counsel Office has advised that this is standard practice. Similarly, the Bill does not need to specify the monitoring department (or departments).

30. I will provide advice (in consultation with the Minister of State Services) to the Prime Minister on the monitoring department(s) before the Bill is passed.

31. As the Responsible Minister, I intend to progress recruitment of the Chair and members of the Commission. My intention is to seek Cabinet Appointments and Honours Committee support for the appointments as soon as the Bill has been passed.

The form of the Commission

32. Cabinet agreed the Commission will be established as an autonomous Crown entity [CAB-19-MIN-0329.01 refers].

33. The main potential advantage of an autonomous Crown entity is that this form allows the responsible Minister the power to direct the Commission to have regard to government policy in limited situations. For example, when the government shifts its mental wellbeing priorities, the responsible Minister would be able to request the Commission to start monitoring progress in new areas.

34. Since Cabinet's decision, I have become aware of some strong stakeholder views, including from the Health and Disability Commissioner, the Mental Health Commissioner, the Mental Health Foundation, and the Human Rights Commission, that the Commission should be established as an independent Crown entity.

35. I seek Cabinet agreement to establish the Commission as an independent Crown entity rather than an autonomous Crown entity as previously agreed. I have discussed the form of the Commission with the Minister of State Services who supports my recommendation. Officials have advised me the Commission could perform its functions in either form.

36. An independent Crown entity has greater independence from government than an autonomous Crown entity and is not required to have regard to Government policy unless set out in legislation. However, as an independent monitor tasked with holding the government of the day to account for improving mental health and wellbeing, the Commission would likely choose to comment on government priorities concerning mental health and wellbeing, regardless of whether it is an autonomous Crown entity or an independent Crown entity.

37. The perceived independence from the Government an independent Crown entity provides is important given the Commission's purpose to hold the current and future governments to account for the mental health and wellbeing of people in New Zealand.

38. Although the Commission will not perform a statutory decision-making role and will not have coercive powers like some independent Crown entities, the Commission's role as an independent watchdog is more closely aligned with several independent Crown entities that have monitoring and advocacy roles, such as the Health and Disability Commissioner, the Human Rights Commission and the Office of the Children's Commissioner.

39. Establishing the Commission as an independent Crown entity will send a stronger message to the public and stakeholders that the Commission is a strong and independent monitor of the government of the day, and the mental health and wellbeing system more generally.

Impact analysis

40. A regulatory impact assessment was prepared in accordance with the necessary requirements and was submitted at the time that Cabinet approved the policy decisions for the Commission [CAB-19-MIN-0329.01 refers].

Compliance

41. The Bill complies with:

    41.1. the principles of the Treaty of Waitangi

    41.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

    41.3. the disclosure statement requirements

    41.4. the principles and guidelines set out in the Privacy Act 1993

    41.5. relevant international standards and obligations

41.6. the Legislation Design and Advisory Committee's Legislation Guidelines (2018 edition).

Consultation

Stakeholder consultation

42. Targeted consultation on key components of the Bill was undertaken with stakeholder reference groups that represent Māori, people with lived experience of mental health and wellbeing issues, and disabled people.

43. There was widespread support for the functions, which were considered appropriate for an independent monitor tasked with holding the government of the day and other decision makers to account. There was also strong support for the Commission to look beyond the health and disability sector and consider other factors that contribute to mental health and wellbeing.

44. Following consultation, the Bill was updated to give more focus to addictions, groups that experience disproportionately poorer mental health and wellbeing outcomes, and be more explicit about the Commission's role in influencing better and more equitable mental health and wellbeing outcomes for Māori.

The Mental Health Commissioner

45. The Mental Health Commissioner supports the functions and scope of the Commission, as well as the Commission being an independent Crown entity.

46. The Mental Health Commissioner considers that the information gathering powers should be wider than proposed and extend beyond government funded services. As previously outlined, I consider these powers should be limited to government agencies due to potential compliance costs for non-government entities (refer paragraphs 22-28).

47. The Mental Health Commissioner also recommends that the Bill includes a function for the Commission to monitor Government's progress against a mental health and wellbeing strategy which would require a consequential amendment to the New Zealand Public Health and Disability Act 2000 to require the government to produce such a strategy.

48. I consider that that functions outlined in the Bill provide that the Commission can assess and report on any government strategy concerning mental health and wellbeing. Whether the government should be required to produce a mental health and wellbeing strategy is a matter that requires further consideration.

Other government agencies

49. The following departments and agencies were consulted on the Cabinet paper and the Bill: State Services Commission, Ministry for Pacific Peoples, Te Puni Kōkiri, Department of Prime Minister and Cabinet (Policy Advisory Group), Department of Prime Minister and Cabinet (Child Wellbeing Unit), Ministry for Primary Industries, Ministry of Education, Ministry of Justice, Ministry of Social Development, New Zealand Police, Oranga Tamariki, Ministry of Business, Innovation, and Employment, Accident Compensation Corporation, Social Investment Agency, Inland Revenue, Department of Corrections, The Treasury, Health Promotion Agency, Health Quality and Safety Commission, Human Rights Commission, Office of the Children's

Commissioner, Office of the Health and Disability Commissioner, Office of the Ombudsman, WorkSafe New Zealand and the Office of the Privacy Commissioner.

Binding on the Crown

50. I propose the Bill will be binding on the Crown.

Creating a new agency

51. The legislation will create a new agency, the Mental Health and Wellbeing Commission.
52. Subject to Cabinet's agreement, the Commission will be an independent Crown entity under the Crown Entities Act 2004.
53. The Commission will be subject to the Official Information Act 1982 and Privacy Act 1993. The Ministry of Health has consulted with the Office of the Ombudsman, which agrees with this standard approach.

Allocation of decision making powers

54. The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

Associated regulations

55. Regulations are not needed to bring the Bill into operation.

Other instruments

56. The Bill does not include any provision empowering the making of legislative instruments.

Definition of Minister/department

57. The Bill defines the 'responsible Minister' as a Minister who, under the authority of any warrant or with the authority of the Prime Minister, is the person for the time being responsible for the administration of the Act. The Ministry of Health has consulted with the Cabinet Office, which agrees with this standard approach.

Commencement of legislation

58. I propose the Bill comes into force on 9 February 2021.
59. This date allows time to establish the Commission and the timing aligns with the term of the current Mental Health Commissioner which finishes on 8 February 2021 (Cabinet has agreed to amend the Health and Disability Commissioner Act to remove the role of Mental Health Commissioner to enable roles called 'Mental Health Commissioners' to be established in the Commission [CAB-19-MIN-0329.01 refers]).
60. The Initial Mental Health and Wellbeing Commission will be in place until the Bill comes into force. The Initial Commission will provide scrutiny of the Government's progress in improving mental health and wellbeing, promote collaboration between

entities that contribute to mental health and wellbeing, and develop advice for the permanent Commission to allow it to make swift progress once established.

Parliamentary stages

61. I propose the Bill should be introduced on 18 November 2019 to allow for a first reading on 21 November 2019.

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

63. The Bill should be enacted, if possible, by May 2020. Achieving enactment by this date will require the select committee be given a four month deadline to consider the Bill.

64. I intend to refer the Bill to the Health Committee for consideration, with a four month deadline to report the Bill back to the House of Representatives.

Proactive Release

65. I intend to proactively release this paper in accordance with Cabinet Office guidelines. Proactive release is subject to redaction as appropriate under the Official Information Act 1982, such as to maintain legal privilege.

Recommendations

The Minister for Health recommends that the Committee:

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

2. **note** that the Bill establishes the Mental Health and Wellbeing Commission as a Crown entity with the main functions being:

    2.1. to assess and report publicly on the mental health and wellbeing of people in New Zealand

    2.2. to assess and report publicly on factors that impact on people's mental health and wellbeing

    2.3. to assess and report publicly on the effectiveness, efficiency, and adequacy of approaches to mental health and wellbeing (including mental health services and addiction services)

    2.4. to promote alignment, collaboration, and communication between entities involved in mental health and wellbeing

    2.5. to advocate for the collective interests of people who experience mental distress or addiction (or both), and the persons (including families and whanau) who support them.

3. **approve** the further policy decisions of the authorised Minister, that:

    3.1. the Commission's information gathering powers will apply to government departments, agencies and statutory Crown entities (excluding the Government Communications Security Bureau and the New Zealand Security Intelligence Service)

    3.2. the monitoring and advocacy of mental health and addiction services (currently a function of the Mental Health Commissioner under section 14(1)(ma) of the Health and Disability Commissioner Act 1994) will be undertaken by the Mental Health and Wellbeing Commission.

4. **agree** that the Commission be established as an independent Crown entity.

5. **note** the Minister of State Services supports the recommendation to establish the Commission as an independent Crown entity.

6. **note** that the Minister of Health will provide advice to the Prime Minister (in consultation with the Minister of State Services) on the monitoring department(s) before the Bill is passed.

7. **note** that, as the Responsible Minister, the Minister of Health will progress recruitment of the Chair and members with the intention of making appointments soon after the is passed.

8. **agree** that the Bill bind the Crown.

9. **approve** the Mental Health and Wellbeing Commission Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives.

10. **agree** that the Bill be introduced on 18 November 2019.

11. **agree** that the Government propose that:

    11.1. the Bill be referred to the Health Committee for consideration

    11.2. the Health Committee be given a four month deadline to report back the Bill

    11.3. the Bill be enacted by May 2020 and

    11.4. the Bill will come into force on 9 February 2021.

Authorised for lodgement

Hon Dr David Clark
Minister of Health