Updated advice on compulsory assessment and treatment processes for mental health services during COVID-19 Alert Levels 3 and 4

14 August 2020

This information is about compulsory assessment and treatment process under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) during the COVID-19 epidemic while at Alert Levels 3 and 4. Alert Levels 3 and 4 attempt to eliminate COVID-19 by keeping people at home and restricting activities.

The purpose of this advice is to help services continue to provide safe and effective assessment and treatment to people that respects their rights to the greatest extent possible in the circumstances. It is critical to ensure the rights of patients and proposed patients under the Mental Health Act are protected and balanced with the need to ensure patients and proposed patients receive appropriate care and treatment.

This guidance anticipates situations such as a shortage of mental health and addiction professionals to provide services, unit closures, and/or service users being unable to attend hospital appointments due to isolation or other COVID-19 public health directives.

This guidance has been amended to incorporate changes between Alert Levels 4 and 3. While best efforts have been made to ensure this guidance is accurate and reflects legal requirements and best practice, it may be refined or updated from time to time as the situation evolves further. Please always ensure you are referring to the most recent and up-to-date guidance document

This advice may not address all situations that will arise while we are at Alert Levels 3 or 4. Therefore, in situations where specific advice has not yet been provided and it is not possible to follow usual best practice and adhere to standard operating procedures, guidelines and policies, services will need to consider alternative approaches. When considering alternatives, services should question whether the action:

- is in the best interests of the patient
- is necessary to protect the health and safety of the patient, and others
- meets legislative requirements and aligns with the intent of the legislation
- upholds the rights of the patient and others to the maximum extent possible in the circumstances
- complies with COVID-19 Alert Levels 3 and 4 requirements.

This guidance is interim and may be amended as the COVID-19 Alert Levels evolve. This guidance should be read in conjunction with information available at health.govt.nz/covid-19 and covid19.govt.nz.

1. Use of the Mental Health Act during Alert Levels 3 and 4

1.1. The Mental Health Act continues to apply during Levels 3 and 4. The guidance provided in this document is intended to assist in ensuring processes under the Mental Health Act can continue as seamlessly and consistently as possible within the requirements of COVID-19 Alert Levels 3 and 4.

1.2. The Mental Health Act is intended to permit compulsory mental health assessment and treatment of individuals who meet, or are reasonably believed to meet, the definition of mentally disordered in the Mental Health Act. When the Mental Health Act is used it is important that the least restrictive option is used.

1.3. The Mental Health Act cannot be used to enforce assessment, treatment, or isolation for reasons unrelated to the assessment, treatment, or management of a person's mental disorder.

2. COVID-19 temporary amendments to the Mental Health Act

2.1 On 13 May 2020 the COVID-19 Response (Further Management Measures) Legislation Act 2020 was passed into law. It included a number of temporary amendments to the Mental Health Act to enable the effective operation of the Act during the COVID-19 response. The Act is available at the following link: http://www.legislation.govt.nz/act/public/2020/0013/latest/LMS339370.html. Please note that these changes are temporary and apply only during the response to COVID-19 and will expire on 31 October 2021, or earlier if they are no longer necessary.

2.2 These temporary amendments are to:

- clarify that the use of audiovisual technology is permitted for clinical assessments, examinations, and reviews of patients and proposed patients, and for judicial examinations of patients;
- clarify that Mental Health Review Tribunal reviews can be conducted using remote technology;
- clarify that district inspectors and official visitors are permitted to complete their visitation and inspection duties using remote technology, if the district inspector or official visitor is satisfied that this is appropriate (this amendment expires when the Epidemic Notice expires);
- change references to medical practitioner and health practitioner to mental health practitioner and references to medical examination to examination in certain sections to provide more clear and consistent terminology and to facilitate timely assessment of patients and better usage of the health workforce, which is likely to come under pressure during the outbreak of COVID-19.

2.3 These temporary amendments are described in the following paragraphs.

Use of audiovisual link (AVL) technology during COVID-19 response

2.4 The COVID-19 Response (Further Management Measures) Legislation Act 2020 amends the Mental Health Act to clarify that the use of AVL is permitted to access a person to exercise a power under the Act where it is not practicable for the person to be physically present. This applies to:

(a) a clinician, psychiatrist, or mental health practitioner exercising a power under this Act that requires access to a person; or

(b) a Judge, any person directed by a Judge, or a member of a Review Tribunal that is required to examine a person under this Act.

2.5 Audiovisual link (AVL) is defined as facilities that enable both audio and visual communication with the person.

2.6 Audio link only is not permitted to exercise any of these powers or perform any of these assessments.

2.7 See guidance on the use of AVL in section 3 below.

Changes to meaning of health practitioner, examination and medical certificate during COVID-19 response

2.8 The COVID-19 Response (Further Management Measures) Legislation Act modifies the existing definition of medical and health practitioners to a new defined term of 'mental health practitioner', medical examination to 'examination', and medical certificate to 'assessment certificate' for purpose of enabling timely assessment of patients and better use of the health workforce. In practice this will permit a wider range of practitioners to complete an examination and issue a certificate under section 8B regardless of which section of the Mental Health Act is used to initiate an examination under section 8B.

2.9 The meaning of "mental health practitioner" in the COVID-19 Response (Further Management Measures) Legislation Act is:

(a) a medical practitioner; or

(b) a nurse practitioner; or

(c) a registered nurse practising in mental health

registered nurse practising in mental health means a health practitioner who—

(a) is, or is deemed to be, registered with the Nursing Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of nursing and whose scope of practice includes the assessment of the presence of mental disorder as defined under this Act; and

(b) holds a current practising certificate.

Modifications to section 9A

2.10 Modifications to section 9A enable duly authorised officers (in addition to Director of Area Mental Health Services) to carry out the requirements of section 9(1). In addition, "health practitioner" is modified to "mental health practitioner" in sections 9(1) and (3).

District inspector visits during COVID-19 response

2.11 The addition of section 97A permits district inspector visitations for the purposes of section 97 of the Mental Health Act to be undertaken by remote technology permitted while the epidemic notice is in force for COVID-19.

2.12 See section 10 for further guidance on district inspector visits and inquiries.

3. Assessments, examinations, and reviews of patients and proposed patients subject to the Mental Health Act, including second opinions

3.1 In general, to minimise the need for in-person contact, where the Mental Health Act calls for an assessment, examination, or a review of a patient or proposed patient, such reviews should be done by audio-visual link (AVL) as permitted by the COVID-19 temporary amendments described above. Appropriate equipment will need to be available to ensure that assessments are conducted effectively. If a face-to-face appointment is absolutely necessary, services must ensure proper physical-distancing protocols are in place or the use of proper personal protective equipment (PPE) as per the Ministry of Health's guidance.

3.2 A face-to-face appointment may be necessary when:

- appropriate technology is not available, or the technology is insufficient to accomplish the needs of the assessment
- it is in the interests of the patient or proposed patient to conduct the assessment face-to-face, which may include consideration of any potential negative impacts of AVL on the person's wellbeing
- the patient refuses to participate in an AVL.

3.3 Consent by the patient or proposed patient to conduct an assessment, examination, or review by AVL is not required, but services are encouraged to seek and document consent whenever possible.

3.4 A lack of consent does not make it unlawful to do an assessment by AVL in itself. However, it may indicate that the approach will not adequately meet the purposes behind doing the assessment (getting an accurate view of the person's mental health status and risk), which may increase the risk that the assessment could be inappropriate or contrary to legal requirements.

3.5 Where an individual is not cooperative in relation to the use of AVL, services are encouraged to think carefully about whether the use of AVL remains appropriate in the circumstances, and

consider alternatives such as an in-person assessment. Services should document the decision making process, including recording how the interests and clinical safety of the patient were better served by an AVL assessment in the situation, and consider guidance provided by relevant professional practice standards.

3.6 Services will need to have appropriate protocols in place for conducting and documenting assessments by AVL.

3.7 Services must ensure that AVL arrangements respect the privacy of the individual, and requirements under the Health Information Privacy Code and Privacy Act 1993 are complied with.

3.8 Using AVL in mental health consultations is supported by the Royal Australian and New Zealand College of Psychiatrists, which notes that "Telepsychiatry can greatly improve access to psychiatric services for people in rural and remote areas, and in other situations where face-to-face consultations are impracticable." Resources to help implement telepsychiatry are provided on the College website at https://www.ranzcp.org/practice-education/telehealth-in-psychiatry

4. Section 9(2)(d) explanation of notice of assessment

4.1 It is mandatory for an explanation of the purpose of the assessment to take place in the presence of a support person under section 9(2)(d). An assessor must offer to organise the attendance of a support person known to the applicant, such as a family member, caregiver or friend, if such a person is available. If no such person is available, an independent person should be engaged (Justices of the Peace (JPs) are available for this purpose).

4.2 The use of video technology should be used to fulfil the requirements of section 9(2)(d) unless it is not possible. If video technology is not available in the circumstance, a teleconference is also permissible.

4.3 Care must be taken to ensure that all parties can adequately participate in the interaction, and that all parties have understood the information provided.

5. Discharge of patients from inpatient units while at Alert Level 3

5.1 Services are advised to follow the guidance and protocols in place by their local DHB with respect to discharge of patients from hospital generally. It is not necessary to apply different standards or protocols for mental health patients. If there is uncertainty about the discharge of a particular patient, this should be escalated within local DHB management structures.

6. Court hearings under the Mental Health Act

6.1 Services should familiarise themselves with the protocols for District Court proceedings during the different COVID-19 Alert Levels which are available on the District Courts website at: https://www.courtsofnz.govt.nz/publications/announcements/covid-19/court-protocols .

6.2 Services are expected to follow the directions of judges presiding in relation to the use of AVL and should assist patients to access AVL technology for participation in hearings. This includes assisting them to set up and access AVL devices, in which case proper physical distancing protocols should be complied with.

6.3 There may be times when a judge directs that a hearing take place by audio teleconference technology. In these instances, services must follow the direction of the judge.

7. District inspector and lawyer access to patients

7.1 With respect to the ability for a district inspector or lawyer to have access to a patient, such access should be facilitated through AVL technology or telephone (depending on the patient's preference) during Alert Levels 3 and 4.

7.2 A service must ensure a process is in place to enable private and confidential conversations between a district inspector, or lawyer, and a patient. This may be accomplished by setting up an AVL or phone call in a private room that the patient can use for the purpose of the conversation.

7.3 In a situation where a patient insists on a face-to-face meeting with a district inspector or lawyer, proper physical-distancing protocols must be maintained.

8. Access to family/whānau

8.1 Section 72 entitles patients and proposed patients to receive visitors and make telephone calls (unless the responsible clinicians considers this detrimental to the patient's interests or treatment). Services should ensure that patients are able to maintain links with family/whānau through the use of AVL or phone calls if visits to the facilities are not possible.

9. Respect for cultural identity

9.1 Sections 5 and 65 of the Mental Health Act require services to ensure their powers and the treatment of a patient or proposed patient are exercised in a manner that is respecting of their cultural identity.

9.2 It is critical for services to ensure access to necessary cultural assessments and supports is not unduly hindered by Alert Level 3 and 4 restrictions. Where possible and necessary, cultural assessments may be carried out through the use of AVL technology, and access to key cultural support workers, such as kaumatua, should be facilitated through AVL or audio teleconference technology.

10. Inquiries and visitations by district inspectors under sections 95, 96, and 97 of the Mental Health Act

10.1 Under Alert Level 4, it is advised that district inspectors conduct activities related to inquiries and visitations under sections 95 and 96 of the Act by video or audio-conference technology.

10.2 Under Alert Level 3, district inspectors are still encouraged to conduct activities related to inquiries and visitations under sections 95 and 96 of the Act by video or audio-conference technology. However, district inspectors have the discretion to determine if an in-person inquiry or visitation is more appropriate or necessary for particular situations. If a district inspector requests to make an in-person inquiry or visitation, the Director of Area Mental Health Services should assist in ensuring this occurs. Physical-distancing requirements must be maintained.

10.3 Services are advised to make all registers and records required by a district inspector under section 97 of the Mental Health Act accessible electronically wherever possible.

11. District inspectors as essential services

11.1 District inspectors have been determined to provide an essential service under the umbrella of DHB essential services and are therefore permitted to travel as needed at all alert levels to carry out their functions.

11.2 District inspectors are advised to carry their official district inspector identification with them when traveling for the purposes of district inspector activities. If a district inspector has not

yet received their official identification, they are advised to carry a hard-copy of the letter of appointment to the role of district inspector. An official letter identifying them as an essential service worker during COVID-19 is not required.

12. Section 52 leave during COVID-19

12.1 The COVID-19 pandemic emergency has given cause to review the use of leave under section 52 of the Mental Health Act.

12.2 Under usual circumstances a Special Patient may be granted short-term leave under section 52 of the Mental Health Act for both medical appointments and for rehabilitative progress into a community setting.

12.3 However, COVID-19 Alert Levels place restrictions to minimise direct contact between people including restrictions on how non-essential businesses operate, restrictions on travel and requiring people to stay at home.

12.4 The Ministry appreciates that limitations on special patient movements will have impacts on their rehabilitative progress. However, to minimise the risk of patients, staff, whānau and the public from contracting and spreading COVID-19 it is necessary to limit patient movements in and out of a ward.

12.5 Therefore, at this time, when considering applications for new section 52 leave, the Director of Mental Health will prioritise granting applications where the leave is considered urgently necessary. For example, for the purposes of urgent medical treatment, or other urgent needs/exceptional circumstances, and where COVID-19 related concerns can be adequately managed.

12.6 However, services may continue to implement existing leave plans if it is safe and practicable to do so and is consistent with the current COVID-19 Alert Level requirements.

13. Patients currently on full section 52 overnight leave

13.1 The usual procedure requires a Special Patient on section 52 overnight leave to return to hospital to stay overnight after being out of hospital for six nights (6:1 leave category). The patient is assessed the following day and, if deemed to be safe, they are granted another period of leave for a further seven days.

13.2 In order to ensure service continuity and minimise the risk of infection for patients and staff, it is necessary to modify the approach, as follows.

13.3 The patient will return to the hospital (remembering that from previous court rulings, this includes the grounds that the hospital is on) for a full assessment by the responsible clinician and case manager or another member of the care team.

13.4 Provided the patient is compliant with leave conditions, their mental state is stable and there are no safety issues of concern, they could then be granted leave for a further period of seven days, without the need to admit overnight.

13.5 This approach would require the Director of Area Mental Health Services and Clinical Director of the service to think about where in the hospital, or on hospital grounds, would be the safest place for the return and assessment to take place while still maintaining physical distancing requirements.

13.6 Please note that it is not possible to dispense with the return to hospital as that would in effect give the patient a form of Ministerial Long Leave.

14. Police assistance for people with acute mental health needs

14.1 Services may call on police to assist when a person refuses to attend a health facility or other location for the purposes of mental health assessment, or if there are threats or acts of violence. As always, police and health staff need to work together to make decisions on a case by case basis, taking into the account a person's needs and any clinical safety risks, as well as COVID-19 physical distancing requirements. Police have protocols for attending a known COVID-19 address which will apply to the assistance they are able to provide.

15. Police and duly authorised officer transport of patients and proposed patients

15.1 Services may request police assistance for transportation of a patient or proposed patient for assessment or compulsory treatment.

15.2 If the patient or proposed patient is being transported from a known COVID-19 address, or is suspected of having COVID-19, police will follow their guidance regarding contact and PPE issued by New Zealand Police.

15.3 If a duly authorised officer is needed, in the first instance police are encouraged to facilitate the duly authorised officer to assist by audio-visual link technology, such as a video call through a mobile phone. This is intended to limit the potential COVID-19 exposure to, or by, the duly authorised officer.

15.4 When present in-person, a duly authorised officer must maintain the required physical distancing unless a duly authorised officer has the required PPE that would permit coming within less than two metres of the patient or proposed patient. As a result, while duly authorised officers typically ride in a car with police and a patient or proposed patient during transport, at this time duly authorised officers are expected to use their own vehicle in convoy with the police transport.

15.5 Where transportation is necessary for further assessment, it is important to consider the clinical safety requirements relating to transportation. Duly authorised officers must discuss with police such things as the person's clinical condition, the potential for violence, the need for restraint, the type of vehicle available and the distance to be travelled.

16. Mental Health Review Tribunal hearings

15.1 The Mental Health Review Tribunal has previously developed policies for conducting hearings under Alert Levels 3 and 4 (dated 24 March 2020) and 1 and 2 (dated 4 June 2020). These are available on our website under Mental Health Review Tribunal resources. For any questions about how hearings will operate not addressed by this guidance, please contact the Tribunal secretariat on 0800 114 645 or email secretariat@mhrt.co.nz.

Robyn Shearer
Deputy Director-General
Mental Health and Addiction

John Crawshaw
Director of Mental Health and Addiction Services
Mental Health and Addiction