Advice on compulsory assessment and treatment processes for mental health services during COVID-19 Alert Level 2

Updated 17 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 Level 2. Alert Level 2 anticipates that the disease is contained, but the risk of community transmission remains. Health services are expected to operate as normally as possible, but physical distancing is required.

This information is about compulsory assessment and treatment during the COVID-19 Alert Level 2 for people subject to the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Mental Health Act).

The purpose of this advice is to help mental health services to 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 advice may not address all situations that will arise while we are under the COVID-19 Alert Levels. 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 the current COVID-19 Alert Level 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 Level 2

1.1. The Mental Health Act continues to apply during all COVID-19 alert levels. This document is intended to assist in ensuring processes under the Mental Health Act can continue as seamlessly as possible and consistently with the requirements of COVID-19 Alert Level 2.

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 mental disorder 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. 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. The Act is available at: http://www.legislation.govt.nz/act/public/2020/0013/latest/LMS339370.html

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 A greater range of activities are permitted under Alert Level 2. However, there is still a need to reduce the risk of transmitting COVID-19 through measures including physical distancing and taking extra precautions for people in the high-risk group (older people and those with existing medical conditions). Inpatient units will need to take precautions and manage visiting in a controlled way. See guidance on the Ministry of Health website at: https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-current-situation/health-and-disability-services-alert-level-2

3.2 Statutory assessments have the potential to result in restrictions on patients' rights. Timely access to services is therefore crucial to avoid unnecessarily prolonging the restrictions of rights. Experience in Alert Levels 3 and 4 has shown that some service users prefer engagement by AVL and that it has been possible to complete assessments using AVL.

3.3 As noted above, the recent COVID-19 Response (Further Management Measures) Legislation Act 2020 amends the Mental Health Act to clarify that the use of AVL is permitted where it is not practicable for the person to be physically present. This means that in-person assessment and examination is to be preferred, however, AVL can be used where this is necessary and appropriate.

3.4 Under Alert Level 2 it is expected that in-person appointments will be the usual method of engaging with patients. However, there are likely to be circumstances in which an in-person attendance is not practicable due to limitations arising under Alert Level 2. Therefore, there continues to be a need for flexibility in how assessments are carried out.

3.5 Services may use AVL where necessary to carry out Mental Health Act processes including assessment, examination, or a review of a patient or proposed patient, if in-person options are not practicable. Decisions about whether an in-person assessment is not practicable should take into account and balance the following factors.

- The preference and best interests of the patient or proposed patient
- The least restrictive manner of providing assessment and treatment
- Whether barriers to in-person attendance would prevent timely access to assessment and treatment
- The ability to maintain safety and adhere to the COVID-19 alert level requirements (such as where a person has suspected or confirmed COVID-19 infection)
- Whether the patient/proposed patient or the clinical assessor are in the high-risk group for COVID-19 (and arranging an alternative assessor would cause undue delays to the assessment)
- The effective facilitation of family/whānau engagement.

3.6 The use of AVL solely for reasons of convenience or efficiency for service providers is not acceptable.

3.7 Greater priority should be given to in-person assessments for the purposes of assessment under assessment sections 8B to 14 of the Mental Health Act as these relate to decisions that may result in a person being detained or limitations on the patient's rights.

3.8 The rationale for decisions to use AVL for should be documented and available for review by district inspectors.

3.9 Appropriate equipment should be available to ensure that assessments are conducted effectively with appropriate safeguards in terms of privacy and security.

Consent to AVL

3.10 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.

3.11 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 inaccurate and the individual could be made subject to the Mental Health Act when this is inappropriate.

3.12 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 should not use AVL unless in-person assessment is demonstrably not practicable for reasons other than just convenience for the service. 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.

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

3.14 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.

3.15 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 AVL may be used to fulfil the requirements of section 9(2)(d) where in-person is not practicable or if engagement by a family/whānau member or support person can be better facilitated through AVL (see section 3). 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 2

5.1 Services are advised to follow the guidance and protocols in place at their local District Health Board (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 aspects of a hearing other than examinations, assessments and reviews of the patient 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, the expectation under Alert Level 2 is that such access will generally occur in person. However, meeting via AVL technology or telephone (depending on the patient's preference) will continue to be acceptable if that is the patient's preference or if an in-person meeting is not practicable or safe.

7.2 If a remote meeting is to take place, the 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 Proper physical-distancing protocols must be maintained during in-person meetings.

8. Access to family/whānau

8.1 Every patient is entitled, at reasonable times and intervals, to receive visitors and make telephone calls. This right (section 72 of the Mental Health Act) can only be limited where the responsible clinician considers that such visits or calls would be detrimental to the patient's interests and to his or her treatment.

8.2 Under Alert Level 2, inpatient services should implement policies that allow visits from support people to the ward, with appropriate limits, controls and physical distancing protocols in place. https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-current-situation/health-and-disability-services-alert-level-2

8.3 However, AVL will remain a useful way for patients to connect with their family/whānau, especially if the circumstances make in-person visits impracticable or contrary to COVID-19 alert level restrictions, for example if the family/whānau live outside the area or are considered part of a vulnerable population.

9. Respect for cultural identity

9.1 Sections 5 and 65 of the Mental Health Act require services to ensure the powers they use when assessing and treating a patient or proposed patient are exercised in a manner that shows respect for the person's cultural identity.

9.2 It is critical for services to ensure access to necessary cultural assessments and supports is not unduly hindered by COVID-19 alert level restrictions. Cultural assessments and access to key cultural support workers or kaumātua, should be facilitated through AVL or audio teleconference technology where an in-person attendance is not practicable.

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

10.1 Under Alert Level 2, it is preferable that district inspectors conduct activities related to inquiries and visitations under sections 95 and 96 of the Act in person, provided that physical distancing can be maintained.

10.2 If the requirements of Alert Level 2 cannot be maintained during an in-person attendance, inquiries and visitations under sections 95 and 96 of the Mental Health Act may be met by video or audio-conference technology if the District Inspector is satisfied that they can conduct a visit using AVL means. If a district inspector requests to make a remote (AVL) inquiry or visitation the Director of Area Mental Health Services should assist in ensuring this occurs.

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. This will reduce the need for district inspectors to attend in person and help reduce the movement in and out of wards.

10.4 Please note that as the provisions of sections 95 and 96 are an important protection of patient rights services **must** facilitate a visit by a District Inspector by AVL means if an in-person visit is not 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 Alert Level 2 allows a continuation of leave on hospital grounds, and a cautious return to the use of leave in the community for recovery and rehabilitative purposes, where it is both safe and practicable to do so. Forensic Mental Health Services should consider leave plans on a case by case basis, balancing the risks related to COVID-19 as well as safety risks with the patient's recovery and rehabilitation needs. A blanket approach to leave eligibility will not be acceptable.

12.3 Leave plans should include details of how COVID-related requirements such as physical distancing will be maintained.

12.4 Leave outside of the region will generally continue to be restricted, unless for special circumstances (such as an emergency medical transfer or for compassionate reasons such as close family/whānau bereavements).

12.5 When considering applications for new section 52 leave, the Director of Mental Health will continue to prioritise granting applications for the purposes of urgent medical treatment, or other urgent needs/special circumstances, and where COVID-19 related concerns can be adequately managed.

12.6 However, rehabilitation leave applications will also be considered during Alert Level 2.

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 under Alert Level 2, it is necessary to continue the approach adopted under Alert Levels 3 and 4.

13.3 Under this approach, the patient returns to the hospital[1] for a full assessment by the responsible clinician and case manager or another member of the care team. The patient should be admitted overnight when it is clinically indicated. However, the patient may return to the community on the same day, provided:

- the patient is compliant with leave conditions
- their mental state is stable
- there are no safety issues of concern, they could then be granted leave for a further period of seven days.

13.4 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.

13.5 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 personal protective equipment (PPE) issued by New Zealand Police.

15.3 If a duly authorised officer (DAO) is needed, they should attend in person, unless it is not practicable to do so. See section 3 for guidance on considerations of practicability and best interest in relation to decisions about in-person or AVL attendance.

15.4 When present in person, a DAO must maintain the required physical distancing unless they have the required PPE. As a result, while DAOs typically ride in a car with police and a patient or proposed patient during transport, at this time DAOs are expected to use their own vehicle in convoy with the police transport, unless physical distancing can be maintained in the vehicle being used to transport the patient.

15.5 Where transportation is necessary for further assessment, it is important to consider the clinical safety requirements relating to transportation. DAOs must discuss with the 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.

[1] Remembering that from previous Court rulings, this includes the grounds that the hospital is on.

16. Mental Health Review Tribunal hearing

16.1 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.

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