New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Mental Health & Addiction Directorate
Ministry of Health

By email: mhactreview@health.govt.nz

Re: Transforming our Mental Health Law – A public discussion document

1. The Law Society welcomes the opportunity to provide feedback on the Ministry of Health's discussion document, *Transforming Our Mental Health Law* (**Discussion Document**).

2. The Discussion Document is a response to the 2018 report, *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* which recommended that the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**MHA**) be repealed and replaced with a new statute that "reflects a human rights-based approach, promotes supported decision-making, aligns with the recovery and wellbeing model of mental health, and provides measures to minimise compulsory or coercive treatment".

3. The Law Society notes the presumption in the discussion document that the MHA be replaced with mental health legislation, with the focus of the discussion document being on the form of that legislation. The Law Society suggests that consideration ought to be given to whether there is a need for specific mental health legislation at all, and raises the question of whether it might be appropriate to consider replacing the MHA, the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (**SACATA**) and the Protection of Personal and Property Rights Act 1988 (**PPPRA**) with legislation which sets out the basis on which, and the processes to be followed in relation to, people who lack decision-making capacity in relation to any assessment and treatment, regardless of the cause of that incapacity (i.e. regardless of whether the incapacity was caused by mental illness, brain injury, intellectual disability, or a physical condition such as delirium, dementia etc).

4. With that in mind, the Law Society also notes that the Law Commission | Te Aka Matua o te Ture is currently reviewing the laws relating to adult decision-making capacity. Whilst the Law Commission | Te Aka Matua o te Ture has noted that the MHA and the SACATA are subject to separate reviews, and that it will consider these reviews and its implications, it is the Law Society's view that some formal mechanism for a combined review or incorporation of the reviews' recommendations should be considered in order to best serve New Zealanders.

General comments

5. The Discussion Document has identified that any new legislation must align with the following guiding principles:

   (a) maintaining consistency with Te Tiriti;

   (b) taking a human rights approach;

   (c) encouraging maximum independence, inclusion in society and the safety of individuals, their whānau, and the community;

   (d) improving equity of care and treatment;

   (e) taking a recovery approach to care and treatment;

   (f) providing timely service access and choice;

   (g) providing the least restrictive mental health care options;

   (h) respecting family and whānau.

6. The Law Society agrees with these guiding principles, which have informed its feedback.

Part 3 - Embedding Te Tiriti and addressing Māori cultural needs

7. The Law Society emphasises the importance of ensuring any legislative reform better reflects Te Ao Māori and the wider multicultural nature of Aotearoa's society. Any legislation ought to explicitly reference Te Tiriti in its purpose and principles, and require actions under the legislation to be undertaken in a manner consistent with Te Tiriti or with the principles of Te Tiriti.

8. We support the incorporation of Te Ao Māori processes into mental health legislation and any hearing (and other Family Court proceedings). The Law Society further encourages consideration of appropriate procedures for other ethnic groups and cultures.

Part 4 – Defining the purpose of mental health legislation

9. The Law Society notes Aotearoa New Zealand's obligations under international human rights law, as well as the rights affirmed under the New Zealand Bill of Rights Act 1990 (**BORA**). Careful consideration and analysis of those obligations is required. Any restriction of rights by way of replacement (mental health) legislation, including (but not limited to) a restriction on the right to refuse medical treatment,[1] must be evidence based, justified, and as limited as possible.

[1] Section 11, New Zealand Bill of Rights Act 1990.

Part 5 – Capacity and Decision-making

10. Under the current law, compulsory mental health treatment can be imposed even where a person has capacity to refuse medical treatment.

11. The Law Society submits that lack of capacity should be required before any compulsory treatment is permitted under new legislation. This is consistent with the statutory presumption of competence set out in both the PPPRA and Right 7(1) of the Code of Health and Disability Services Consumers' Rights.[2]

12. Any compulsory treatment regime should also address the use of advance directives.

Part 6 – Supported decision-making

13. It is critical that any replacement legislation incorporates supported decision-making principles and ensures that the will and preferences of a person are taken into account (including in circumstances where a person has been assessed as lacking capacity to make decisions about their assessment and treatment).

Part 7 – Seclusion, restraint and other restrictive practices

14. In the event any new legislation allows for the use of restrictive practices, it must include clear limits and robust monitoring and overview mechanisms to ensure consistency with human rights.

Part 8 – Addressing specific population needs

15. The Law Society acknowledges the importance of the appropriate involvement of family and whānau in any compulsory assessment and treatment process, but considers that due regard must be had to the privacy rights of a person subject to that process, including any capacitous wishes of the person concerned.

Part 9 – Protecting and monitoring people's rights

Who should be responsible for approving the use of compulsory mental health treatment?

16. The ultimate decision on compulsory treatment should be vested in a judge who determines whether the legal tests for compulsory treatment are established, including in respect of capacity.

17. At paragraph 9.2.2, the Discussion Document raises concerns about the workload of judges in the Family Court and their reliance on mental health advice to progress mental health cases

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2 Which provides *"Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise."*

and suggests that these issues could be addressed by allocating mental health cases to a Tribunal.

18. It is important that the health and justice sector agencies offer the best level of protection to those members of our society who become subject to compulsory mental health treatment.

19. The level of intervention required when a compulsory treatment order is made requires a high level of external, independent oversight. For this reason, the Law Society considers that a judge should remain responsible for determining whether a person should be subject to a compulsory treatment order.

20. Mental health hearings are treated with priority by the Family Court and place a relatively small demand on the Court's time. Statistics provided to the Law Society on 9 December 2021 by the office of the Principal Family Court Judge show that mental health proceedings make up only 1.1% of the total Family Court workload.

21. The recent appointment of additional judges, coupled with improved case management, may address concerns regarding the capacity of the Family Court to manage hearings in a timely manner. In addition, the Ministry of Justice has recently established the new role of Family Court Associate. The role is a quasi-judicial one that will significantly free up the time of Family Court judges to hear more cases across the breadth of the Family Court's jurisdiction.

22. By their nature, mental health hearings in a Family Court context are often less formal than other court processes whilst retaining the appropriate level of oversight, scrutiny and skill required in respect of a compulsory treatment order.

What should be the process for approving the use of compulsory mental health treatment?

23. We consider the Family Court to be the most appropriate forum for determining whether a person should be placed under a compulsory mental health treatment order. The Family Court has a dual role embodied in most of the statutes under its jurisdiction: it is a court of law that has a judicial role to make determinations based on the evidence before it; and when exercising that role, it has a protective and therapeutic jurisdiction to ensure a person's welfare and best interests are paramount.

24. Independent legal representation for a person subject to compulsory mental health assessment and treatment is essential to ensuring due process and to protect human rights. Legal Aid must be remain available for this purpose.

25. Concerns raised in the paper regarding the knowledge of mental health issues by lawyers could be addressed by continuing legal education requirements for lawyers undertaking mental health work. Alternatively, a scheme such as that used for the appointment of lawyers under the PPPRA (including robust requirements for lawyers who wish to participate) could be implemented.

26. Decisions in respect of compulsory treatment should be based on solid clinical evidence, due to the acute nature of the mental illness and the significant human rights issues involved.

What information should be required for requests to approve the use of compulsory mental health treatment?

27. Any requests for compulsory mental health treatment should be underpinned by detailed clinical evidence reports.

28. The participation of a community key worker as a second health professional in many hearings provides a different lens from the responsible clinician in terms of the provision of professional information to the court. Such participation from a key worker or a nurse is an additional source of useful information.

29. The commissioning of second opinion reports by the court should be available in certain circumstances.

What supports could be made available to make it easier for people to engage with the process for approving the use of compulsory mental health treatment?

30. We support the involvement of family, whānau, and wider supports for people going through the compulsory mental health assessment and treatment process. Such supports could include a peer support worker.

31. However, we note the need for any process to consider and appropriately balance the privacy of a person who may not wish to have family and whānau involvement.

What would be the effect for particular population groups (for example children, disabled people, etc) of having either the District Court or a Tribunal responsible for approving the use of compulsory mental health treatment?

32. The Family Court already has jurisdiction in respect of decisions regarding children and population groups such as the elderly and those with intellectual disability. The Law Society considers it should retain this jurisdiction.

33. The mental health sector is grossly under resourced. Investment must be made to ensure the availability of mental health support so that individuals can remain in the community with access to adequate support and treatment.

What should the process be when a person disagrees with a compulsory mental health treatment chosen for them by a health practitioner?

34. When compulsory mental health treatment is approved, the individual subject to that treatment should be able to disagree with the order. Options to facilitate this could include:

a. the right to a second opinion;
b. the right to apply to discharge a compulsory treatment order; and
c. assistance from a District Inspector of Mental Health.

35. The Mental Health Review Tribunal also exists as a check and balance for those under a compulsory treatment order, with a subsequent right of appeal to the court. It is important that these processes (or similar) are retained and that individuals retain the right to legal advice in respect of these options.

What role if any should Police have in the new legislation?

36. The Law Society agrees that there must be careful consideration of whether any new legislation should retain the ability to involve Police for the purposes of enforcing a compulsory treatment order.

37. If the legislation is to include Police involvement, the Law Society considers it must be carefully prescribed, to ensure Police engagement is appropriate and reasonable in this context. Provisions should also be included to ensure oversight and review.

38. The Law Society also recognises and supports the need for appropriate funding and specialist training to be provided to any Police who are involved in mental health processes, and consideration to be given for the involvement of Police in a manner as consistent with therapeutic principles as possible (such as, for example, the development of a multi-disciplinary team within the police which responds to mental health related events).

39. Overseas legislation such as the Mental Capacity Act (Northern Ireland) 2016 includes powers for the Police in respect of persons under that Act and may be instructive in terms of any legislative reform.

What monitoring and oversight role should be created in new legislation?

40. The ability to apply to the Mental Health Review Tribunal is a valuable tool for monitoring and oversight, which any new legislation should retain.

41. The Law Society supports the continuation of independent monitoring by a District Inspector (or similar) and notes the importance of available complaint processes in respect of health and disability service providers. Continued access to the Health and Disability Commissioner is important.

Nāku noa, nā

Herman Visagie
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