Ministry of Health
Transforming our Mental Health Law
January 2022

Poipoia te kākano kia puāwai
Nurture the seed and it will bloom
About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry and addiction, supports and enhances clinical practice, advocates for people affected by mental health issues, and advises the government on mental health care. The RANZCP has over 900 members in Aotearoa New Zealand, including 675 fully qualified psychiatrists and almost 250 members who are training to become psychiatrists.

Introduction

The RANZCP welcomes the opportunity to contribute to the repeal and replacement of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Mental Health Act). As noted in previous submissions, we consider that the Act is outdated and poses risks to people who are subject to the Act and their whānau.

Who contributed to this submission?

This submission has been prepared by Tu Te Akaaka Roa (the RANZCP New Zealand National Committee), with input from Te Kaunihera (the RANZCP Māori Health Committee), the Community Collaboration Committee, and several New Zealand sub-Committees:

- Faculty of Forensic Psychiatry Committee (FFP)
- Faculty of Child and Adolescent Psychiatry Committee (FCAP)
- Section of Child and Adolescent Forensic Psychiatry Committee (SCAFP)
- Section of Psychiatry of Intellectual and Developmental Disabilities Committee (SPIDD)
- Faculty of Psychiatry of Old Age Committee (FPOA)
- Faculty of Addiction Psychiatry Committee (FAP)

These Committees are well positioned to provide assistance and advice due to the breadth of clinical, service delivery, and academic expertise that they represent. Tu Te Akaaka Roa and Te Kaunihera are also guided by kaumātua and have input from consumer representatives.

What have we included in this submission?

Due to the number and exploratory nature of the questions in the discussion document, coupled with the timeframe to comment, we have not provided detailed answers to all the questions raised.

The RANZCP has extensive knowledge and expertise that is relevant to any proposed change to the current mental health legislation. For psychiatrists, working with the Act is a core component of providing care for tāngata whai ora with acute, and or chronic, mental health needs.

The RANZCP contend that reviewing the new legislation requires a comprehensive assessment of the proposed changes, supported by evidence-based rationale. At this point in the consultation process, the details of legislative change are yet to be defined. This limits our ability to focus advice on the outcomes that reform may have on psychiatrists’ delivery of care for tāngata whai ora.

The RANZCP have selected key elements of the discussion to comment on, including:

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1 For example, the submission on the Draft Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992
1. **Legislative change must be supported by resources**

Reforms to the Mental Health Act must be contextualised within overall health provision. In doing this, it is important to acknowledge that developments in treatment and prevention need be underpinned by a fit-for-purpose and adequately resourced workforce. For example, advancements in human rights through the process of supported decision making are inevitably dependent on resourcing to give effect to a new process. In this respect, there is an unequivocal link between the Mental Health Act and the legislative intent of Pae Ora.

Adequate resourcing is critical to ensuring tāngata whai ora receive appropriate care through their journey with mental illness. That journey is unique for each tāngata whai ora and may require extensive support over long periods of time from secondary and primary health services, other government agencies, and community organisations. Prevention and support across the continuum of care is a collaborative effort between secondary health services and organisations working in communities. In a high demand and resource constrained healthcare environment, there are also implications for police, who are commonly required to attend call outs to manage acutely disturbed tāngata whai ora in community settings. A good working relationship with police is a critically important part of crisis work for mental health services which need be understood in the context of increased demand on police for urgent intervention.1 2

The RANZCP supports changes to the Mental Health Act that promote human rights, that are aligned with the principles of Te Tiriti o Waitangi and incorporate trauma-oriented person-centred care for those experiencing mental health difficulties and their whānau in Aotearoa New Zealand.

Proposed changes will have resourcing implications that need to be understood within the existing environment.3 Currently psychiatrists experience obstacles when supporting and treating tāngata whai ora in hospital settings where most consider their workplace as not fit for purpose. Resourcing implications also exist in relation to workforce capacity, which is an ongoing issue for psychiatric practice, and which subsequently impacts negatively on tāngata whai ora accessing timely care and support.

The RANZCP suggest there is a significant risk to improving the mental health journey of tāngata whai ora where blanket decisions are made without considering the unintended consequences that could affect the life experiences of extremely vulnerable populations. For example, psychiatrists are already aware that some people being cared for in secondary health services, exit the system only to later appear in the criminal justice system. We note there are limited opportunities to provide therapeutic care in custodial care. It is in the interest of all New Zealanders that the criminal justice system does not become the place where tāngata whai ora with mental health issues reside by default because there are inadequate inpatient facilities to meet their health needs.
2. Principles to guide new legislation

The RANZCP has identified the following principles that guide our thinking on mental health legislation: Te Tiriti o Waitangi; Recognising whānau; Recovery and wellbeing; Capacity and human rights; and Supported decision making.

Te Tiriti o Waitangi

The initial report for the WAI 2575 kaupapa inquiry found that the Crown has breached Te Tiriti o Waitangi by failing to address persistent health inequities for Māori and failing to give effect to tino rangatiratanga. While the report was focused on the primary care health system, there are also significant inequities for Māori in mental health and under the current Mental Health Act. New mental health legislation should be underpinned by Te Tiriti and aim to address these inequities.

Recognising and involving whānau

To achieve the best outcomes for individuals and their family / whānau / aiga should be involved as much as possible in all stages of care, regardless of the age of individuals (this is currently only a requirement for those under 18 years). The RANZCP has a position statement on Whānau Ora where the approach to care is based on the aspirations and challenges identified through a whānau lens to inform whānau-centered care. Clinicians use this approach to support whānau to work as a collective, or across services without losing sight of the individual health needs of tāngata whai ora. We note that a broad view of whānau should be adopted in new legislation to ensure that care is culturally appropriate, particularly for Māori and Pacific populations. Legislation should allow tāngata whai ora to determine who their whānau are, with the acknowledgement that they may not always be kin.

Recovery and wellbeing

There is no single definition of the concept of ‘recovery’ in mental health. However, important aspects include hope, self-determination, self-management, and empowerment. The concept of recovery is an ongoing process, rather than an end goal. Supporting recovery requires engaging in trauma-informed practice; recognising the diversity of how trauma is experienced and can present. Clinicians and services should aim to minimise re-traumatisation as much as possible.

For some tāngata whai ora, ‘recovery’ as a concept might not resonate as an aspiration for them. In these cases, tāngata whai ora should be supported to be well in a way that works for them.

Capacity and human rights

The RANZCP supports a move to bring legislation more in line with processes for people who may not have capacity to make a decision about physical health treatment, to improve consistency with the Convention on the Rights of People with Disabilities and the New Zealand Bill of Rights Act 1990. In some circumstances, upholding the human rights of individuals, whānau and the wider community will involve competing pressures. It is important to strike a balance that does not undermine the rights of individuals and whānau to access appropriate clinical care and other support.

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2 Tino rangatiratanga is a term that can describe self-determination, sovereignty of iwi and hapū.
3 Aiga is a Samoan word meaning ‘family’, which includes the whole union of families of a clan, whether related through blood, marriage, or adoption.
*Supported decision making*

Whatever level of capacity someone has, their involvement in decision making can be supported. This support is often provided by whānau, but there may also be a role for independent advocates. Clinicians have a role in providing advice and supporting tāngata whai ora and whānau to make decisions together. The RANZCP also strongly supports the use of advance directives, or similar tools.9

3. Key considerations for a new approach

While we support a review of the Mental Health Act, we note developing and implementing the legislation in practice will require robust consultation to get it right for both health providers and tāngata whai ora. We encourage the Ministry of Health to consider possible unintended consequences of applying a ‘one size fits all’ approach, for example, when determining how a civil regime may diverge from a process where a person’s mental health status means they are unable to stand trial.

Consent to mental health treatment

Pathways to consent

Obtaining informed consent to undergo mental health treatment is a fundamental ethical principle in medical practice, enabling clinicians to provide care for the needs of tāngata whai ora. In most circumstances, where clinicians have followed informed consent process, an agreement is reached for a treatment pathway to commence.10

The RANZCP supports using advanced directives by tāngata whai ora when consenting to treatment. As a tool, an advanced directive enables tāngata whai ora to specify their own choices and have greater control over their care.11 Advanced directives can be developed with clinicians when tāngata whai ora are well and used in times where capacity to give consent is diminished. This approach is feasible for tāngata whai ora who have episodic illness, but it may not be possible for those with chronic degenerative conditions.

Currently involving others who are close to tāngata whai ora in the informed consent process is recommended as good practice. The RANZCP supports the application of this practice and endorses moving to an expanded view of consent to treatment that gives prominence to a participatory engagement process where people including whānau, friends, carers, and key supporters of tāngata whai ora can contribute to and help navigate the process. Supported decision making is especially important where the informed consent is complicated by disability, disordered functioning, and/or impaired decision-making capacity of tāngata whai ora.

Participatory focused communication

Consultation with the RANZCP’s network of carers and people with lived experience of mental illness has provided additional information which we believe makes an important contribution to the process of supported decision making.

The RANZCP recommend that the Ministry of Health develop a template document that assessing clinicians are required to complete following the process of gaining consent to mental health treatment that summarises the consultation between tāngata whai ora and clinicians. Tāngata whai ora could also identify a supported decision-making network. The purpose of this document is to describe the intended treatment plan that has been agreed, including dates for review. With this new approach, tāngata whai
ora and supporting networks can provide input into the review. Where there is no network of supported decision makers, tāngata whai ora need be consulted regarding who receives the summary document. Currently there is no requirement for clinicians to provide this suite of information. This situation potentially disenfranchises tāngata whai ora and their support network from participating in their care. The summary document would form part of the audit process, ensuring due process has occurred. This proposed process requires resources to implement and manage e.g., sufficient staff with the prerequisite skills and time afforded to the tasks. The timing would need to be flexible in situations where tāngata whai ora require urgent intervention and it is not possible to undertake a supported decision-making process.

New legislation will also need to give guidance on how clinicians and services support decision making in situations where there is a divergence in views between tāngata whai ora and their whānau.

Non-consent to treatment and responsibility to protect

Whilst most informed consent processes result in agreement by tāngata whai ora to undertake a treatment plan to address their mental health conditions there is a small number of people who do not consent to treatment. People living with psychotic disorders such as schizophrenia, in which lack of insight is one of the most common symptoms, are disproportionately represented in this group. Current legislation allows clinicians to challenge non consent in circumstances where treatment is regarded as critical to prevent deleterious outcomes for tāngata whai ora or other people. The RANZCP believes it is important that there is a legislative mechanism by which an individual’s decision not to accept treatment can be overruled.

Psychiatrists have extensive knowledge and experience concerning circumstances where the care of tāngata whai ora might require compulsory treatment. We highlight some concerns within the specialist area of forensic psychiatry later in this submission. Currently the criteria by which compulsory treatment can be considered concern risks regarding the safety of tāngata whai ora and the danger they may pose to others. We acknowledge that determination of risk is not a binary proposition, rather the factor of risk sits on a spectrum that requires an evidential assessment related to severity of impact if treatment does not occur. If the current provision for compulsory treatment in the Mental Health Act is revised, we suggest the RANZCP can make a valued contribution to identifying the criteria and definition of factors that allow compulsory treatment orders to be issued.

Electroconvulsive therapy

The RANZCP consider that the provision in section 60 of the Mental Health Act allowing for Electroconvulsive therapy (ECT) to be given in life-threatening circumstances, where it is not practicable to gain consent, be retained in any rewriting of the law. There is good evidence that ECT has therapeutic benefit for tāngata whai ora with serious and specific mental illnesses and it is potentially a first-line treatment where symptoms require urgent clinical intervention. Examples of presenting conditions where ECT can be used for rapid clinical improvement include severe depression, psychotic depression, a high suicide risk or high levels of patient distress, psychosis, catatonia, and delirious mania. For intervention to occur, there need to be mechanisms to ensure access to swift, efficient procedures to obtain proxy consent from appropriately qualified experts (who will in turn be required to heed advance directives and views of whānau). The role of District Inspectors could be expanded to more closely oversee ECT administered without tāngata whai ora consent.

Developing a mechanism to support community-based mental health professionals

Community-based mental health professionals also sometimes need to consider compulsory treatment of acutely unwell tāngata whai ora when there are serious concerns about risk. Community-based mental health professionals will assess whether the mental illness of tāngata whai ora poses significant
risk when considering whether it is necessary to contravene the privacy rules surrounding their consultations. When a decision is made to breach confidentiality, community-based mental health professionals rely on the due process of consultation with clinicians concerning the risk associated with the mental health illness as a safety mechanism to protect tāngata whai ora and to demonstrate they have taken action to prevent life threatening outcomes. The consultation between a community-based mental health professional and clinician about the mental health concern for tāngata whai ora may lead to decision making as can currently occur by clinicians and a Court judge where a determination about compulsory treatment can be made. If there is no referral process, how would that change affect community-based practitioners who might break confidentiality to get an urgent mental health response to keep tāngata whai ora safe? It is important that mental health professionals have a reliable mechanism to work with mental health clinicians in the knowledge that an emergency response can be invoked where tāngata whai ora are acutely unwell. In situations where whānau are not equipped to provide the environment and enduring support that will best meet the care of tāngata whai ora, a compulsory treatment order could provide an important safety net.

Capacity assessment

The process of undertaking a decision-making capacity assessment of tāngata whai ora is part of medical practice and is embedded in a doctor’s code of ethics. There is no mention of capacity assessment in the Mental Health Act. The RANZCP acknowledges there is no universal process of decision making or right or wrong way to make decisions and the way decisions are made cannot be measured scientifically. Research also shows that approximately a third of general practitioners are not confident in their ability to conduct a capacity assessment. Complexity also exists in the fact that some tāngata whai ora can demonstrate high capacity in some regards whilst also presenting with factors that suggest they are not mentally competent to make decisions which safeguard against harm.

Capacity assessment is an important tool for determining ability to make decisions which psychiatrists apply in concert with detailed background information about tāngata whai ora. For example, the ability to look after oneself is one safety consideration amongst many which may have increased salience in an assessment of someone diagnosed with dementia. A capacity assessment requires clinical skill and knowledge, including a granular understanding of the factors that may affect the decision-making process. Assessment of decision-making capacity is best conducted by a clinician with expertise in areas that align with the person’s presenting conditions to ensure that underlying complexities are understood and factored into the assessment process.

Clinicians will undertake a capacity assessment in different ways depending on the person’s presentation, taking into consideration other factors such as their age. The contextual factor of advanced age, for example, highlights the potential need for specialist knowledge to appropriately adapt the assessment process. Factors such as having sufficient time and appropriately accessible information are likely required for conditions including impaired hearing and sight.

We note the upcoming review by the Law Commission of the Protection of Personal and Property Rights Act 1988 relating to adult decision-making capacity and highlight the intersect of that legislation with the Mental Health Act. Situations of interest to the RANZCP include where diminished capacity to make decisions triggered through the Mental Health Act prompts the process to appoint a power of attorney to manage decisions about the property of tāngata whai ora.
Capacity assessment and effectiveness for Māori

Clinicians undertaking capacity assessment must be cognisant of cultural considerations that affect the participation of tāngata whai ora and whānau. A person’s cultural background shapes their identity including their belief systems, values, and goals, which informs the choices they make. Capacity assessment with Māori is a cultural process requiring clinicians to exercise knowledge of tikanga and whakawhānaungatanga.19 The RANZCP recommends that capacity assessment is undertaken by clinicians with the skills and knowledge including an understanding of the cultural considerations that impact on the decision-making of tāngata whai ora Māori.

The RANZCP is in the final stages of formalising a mental health cultural competency framework for working with Māori. The Pae Ora Bill embeds the requirement for health services to implement cultural competency frameworks to ensure the needs of Māori and Pacific peoples are met. Implementation of these frameworks has workforce training implications for mental health practitioners. If adequately resourced, the implementation by clinicians of a mental health cultural competency framework for working with Māori will help mitigate institutional bias that might occur where a te Ao Māori lens is not factored into the process of clinical assessment. Mechanisms to monitor and assess the mental health sector’s application of cultural competency for Māori will provide valued repositories of information towards the achievement of equitable health outcomes for tāngata whenua. We support future action from the Ministry of Health to ensure monitoring, collection, and analysis of that data.

Appropriateness for forensic services

There is a small group of tāngata whai ora with serious mental issues who present with aggressive and violent behaviour, some of whom are managed in forensic services. It is important that new legislation takes account of this group and allows for appropriate responses that keep tāngata whai ora, their whānau, and staff safe.

Tāngata whai ora, especially tāngata whai ora Māori, are currently overrepresented in the prison population. Current capacity in forensic services is low, meaning that tāngata whai ora are waiting in prisons to receive care.20 A new approach will need to be careful not to exacerbate these issues and should seek opportunities to reduce inequities.

Previous research has found that forensic patients discharged to general mental health services are more likely to reoffend and be reimprisoned than those who remain in forensic care in the community.21 This highlights the importance of appropriate care in preventing tāngata whai ora being criminalised. If appropriate options are removed or reduced, some tāngata whai ora could end up in prison, which is not conducive to recovery.

Forensic patients and capacity

A capacity-based approach can also introduce complexities for people in forensic services. As acknowledged in the Ministry of Health’s discussion document, people detained in forensic services may retain (or regain) capacity to make decisions about treatment. If a capacity test is introduced for forensic patients, legislation will need to consider how to respond if someone is detained but refuses treatment. If a capacity test is not introduced for forensic patients but is introduced for other tāngata whai ora, this creates a separate regime for one group. The effects of having a separate regime would need to be considered and justified.
Compulsory treatment for children and young people

The current Mental Health Act can be applied to individuals of all ages. Although people under 16 years of age are usually treated with parental consent, the Act has been used to urgently contain and treat those as young as five with a range of conditions including eating disorders and severe behaviour disorders. One of the positive aspects of the use of the current Act with children and young people is routine involvement of family/whānau/aiga, and this is an approach that would be valuable to extend to tāngata whai ora of all ages. It would also be beneficial to widen the current concept of family/whānau/aiga to include foster families.

When assessing the capacity of children and young people, chronological age is not necessarily indicative of developmental age or capacity to consent to treatment. Assessing clinicians need to have sufficient developmental knowledge and also be able to take into consideration developmental disorders that could influence decision-making processes. Where practicable, clinicians with subject matter expertise in the developmental disorders of children and young people (i.e. child and adolescent psychiatrists or intellectual disability-trained psychiatrists) should conduct capacity-based assessments for this population.

There may be tensions between a capacity-based approach for children and the rights of parents or whānau to make decisions. Consideration also needs to be given to situations where the capacity of parents is diminished. In this situation, parents should remain involved in the process, but not as key decision makers. The RANZCP has a position statement about ways to support parents with mental illness, reduce risks to children and enhance their resilience.

Oversight of Mental Health Act processes for children and young people by District Inspectors should be encouraged to ensure that tāngata whai ora and families/whānau/aiga are adequately supported. Section 59 applications should also be available to tāngata whai ora of all ages so that second opinions are equitably available.

Current use of compulsory treatment for children and young people is often significantly influenced by limitations in the availability of mental health services and adjunct agencies which support children, young people and their whānau. To safely reduce compulsory treatment of children, additional investment will be needed to develop preventative approaches and less restrictive therapeutic options such as increased access to psychological therapies, in-home support, residential rehabilitation, and respite care options.

Mental health assessment issues concerning people with disabilities

People with disabilities are much more likely to experience mental distress than the general population. Despite this fact, mental health provision in Aotearoa New Zealand does not reflect a system where assessments, funding, supports, training, and services are tailored to the experience of people with disabilities. Unfortunately, these people are often caught at the interface of separate disability and mental health sectors, where there is the propensity to fall through the gaps, resulting in poor outcomes.

Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) upholds the right of people with disabilities to make their own decisions, have their choices respected and be protected against forms of coercion. The RANZCP supports Article 12 through the implementation of the New Zealand Code of Health and Disability Services Consumers' Rights Regulations 1996. Therefore, we support the retention of legislative provision to protect people from compulsory treatment determined through an assessment of their disability, intellectual and developmental conditions as key to maintaining the human rights of disabled people. It is important that
tāngata whai ora with disabilities are treated the same as people without disabilities regarding access to mental health services and compulsory treatment if it is required.

We suggest that there should be provision in the Mental Health Act, consistent with the recommendations regarding the capacity assessment of children and adolescents, that wherever practicable capacity assessment of people with intellectual and neurodevelopmental disabilities is completed by a psychiatrist with expertise in disability. Assessment by appropriately trained psychiatrists ensures they have the knowledge to understand the parameters of disability, and how mental disorders are interpreted when capacity is variable and not necessarily related to mental illness. A determination of diminished capacity is dependent on context, the specificities of a task, the availability of resources, assistance, aids, and the adjustments that can reasonably be made.

Supported decision making is especially important for people with disabilities who interact with the mental health system to ensure that consultation is informed and individually tailored. We support enhancing the communication that occurs between decision-making parties concerning the assessment and treatment pathway.

**Summary of key messages and recommendations**

The RANZCP supports the extension of human rights through the repeal and replacement of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

As the key body representing specialists in the field of psychiatry and addiction, the RANZCP should be involved in the development of legislation replacing the current Mental Health Act. In particular, we would like to be involved in drafting the statutory test for capacity and operationalising statutory capacity assessment.

There are significant resource implications to any repeal and replacement of the Mental Health Act, and such resource implications will need to be addressed. For example, the consultation and paperwork associated with reporting a supported decision-making process will demand more of clinicians’ time than it does at present. Adequate resourcing, including the allocation of time for clinicians to complete documentation, is required if efforts to enhance human rights and the wellbeing of tāngata whai ora are to be successful.

We recommend:

- Approaches to mental illness and treatment pathways have a holistic view, encapsulating the enduring care that tāngata whai ora need. The provision of care is a collaborative effort requiring adequate resourcing of secondary health services and community supports.

**Supported decision making**

- That the new Mental Health Act requires assessing clinicians to issue a summary document relating to the process of consent to treat the mental illness of tāngata whai ora and that the document describes the treatment pathway, date for review and how supporters of tāngata whai ora can contribute to the review process. Tāngata whai ora and people participating in the supported decision-making process would receive the summary document and where there were no supporting parties present during consultation tāngata whai ora would nominate a third party to receive the document.
Compulsory treatment

- Retaining law which allows the testimony of clinicians and whānau and consideration by a Court judge to determine whether a compulsory treatment order is necessary to keep tāngata whai ora, their whānau, and others safe.

- If the ability to issue a compulsory treatment order is not provided for in mental health legislation, the Government should give due consideration to the adverse consequences that could occur.

Capacity

- Approaches to capacity assessment will necessarily differ depending on the presenting conditions of tāngata whai ora and may require adaptions to accommodate a participatory process.

- Capacity assessment is ideally conducted by a clinician with expert knowledge in the presenting condition of tāngata whai ora.

- Clinicians implementing an assessment of the decision-making capacity of tāngata whai ora are culturally competent to work with Māori and understand the potential influence Te Ao Māori has on decision making.
References


