About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) welcomes the opportunity to provide feedback on the Mental Health Bill, from here on referred to as the Bill.

The RANZCP is the principal organisation representing the medical specialty of psychiatry in New Zealand and Australia and is responsible for training, educating, and representing psychiatrists on policy issues. The RANZCP represents more than 8400 members, including more than 5900 qualified psychiatrists and is guided on policy matters by a range of expert committees made up of psychiatrists and community members with a breadth of academic, clinical, and service delivery expertise in mental health.

Introduction

This submission has prepared in consultation with psychiatrists working in the field of forensic psychiatry, including members of the RANZCP's Aotearoa New Zealand Faculty of Forensic Psychiatry; the recommendations below are in relation to Part 4 of the Bill only. Recommendations on other aspects of the Bill have been provided separately to improve clarity and readability.

Key Messages

Tu Te Akaaka Roa supports the Bill's move towards a more rights-based framework to prioritise person-centred and culturally appropriate compulsory care. While we do not oppose the compulsory care criteria as they apply for the general population, we believe the unique circumstances of forensic mental health services need to be more carefully considered to avoid unintended consequences, and ensure the safety of tāngata whai ora, whānau, clinicians and our communities. Specifically, we recommend:

- providing alternative options for compulsory care for forensic patients with intact decision-making capacity, including
    - individuals found unfit to stand trial or acquitted on account of insanity,
    - forensic special patients who have previously been involved in serious offending, transitioning off special patient status,
    - individuals subject to forensic (special patient) orders transitioning back into the community,
    - restricted patients who the court have deemed present special difficulties because of the danger posed, and
- removing mental health care order expiry provisions for those on remand,
- shifting the responsibility for victim engagement and consultation regarding leave and reclassification decisions from the Director to the Forensic Patient Review Tribunal.

Recommendations

Alternative compulsory care options for forensic patients irrespective with intact decision-making capacity

Tu Te Akaaka Roa recommend that alternative options for compulsory care are made available for certain categories of forensic patients, irrespective of their decision-making capacity.

Compulsory care orders currently form an integral part of the care pathways for tāngata whai ora in the criminal justice system. With the introduction of a requirement for incapacity to meet compulsory care criteria, the Bill limits the availability of such orders without offering any feasible alternatives. Tu Te Akaaka Roa is concerned that this will compromise the safety and well-being of tāngata whai ora and communities and create undue pressure on forensic services.

Individuals deemed unfit to stand trial or acquitted on account of insanity

Under current legislation, individuals who have been found unfit to stand trial or have been acquitted on account of insanity under the Criminal Procedure (Mentally Impaired Persons) Act 2003, are disposed of to a compulsory treatment order managed by inpatient or community mental health services. Alternatively, tāngata whai ora may be released immediately or disposed to a forensic 'special patient' order. The latter is a highly restrictive order which sees detainment in a medium secure forensic unit, followed by years of recovery, rehabilitation, and community re-integration. For most people, this is not necessary, and disposition under a compulsory treatment would be most appropriate. While tāngata whai ora in this situation may have lacked capacity at the time of offending, many will have regained decision-making capacity by the time of disposition. Under the Bill, compulsory treatment orders are unavailable for anyone who does not lack capacity. Unless other options are provided, courts may feel compelled to order special patient status which, contrary to the intent of the Bill, would unnecessarily restrict individuals' autonomy, diminish their human rights, and increase the demand for already stretched forensic inpatient services.

Individuals convicted with mental disorder

Under current legislation, persons convicted of criminal offending with mental disorder can be sentenced to hybrid hospital orders (combining a custodial sentence with a forensic inpatient order) or sentenced to a therapeutic order with no sentence. These options give the court an ability to acknowledge the contribution of mental illness to offending and mitigate the sentence with a therapeutic order. However, due to the capacity criterion, the Bill would limit both options, even if they lacked capacity at the time of the offending, and therefore restrict the provision of critical care.

Community reintegration and reclassification

Similarly, compulsory care orders often form a critical part of the transitional care plans for individuals who have been classified as 'special patients' or 'restricted patients' as they reintegrate back to the community. For many 'special patients', capacity is restored before their risk can be safely managed in the community.[1] Under the current legislation, reclassification to a compulsory care order, and transition from forensic services to general adult services can occur seamlessly. However, as currently written, most special patients will not be eligible to step down to a compulsory order under the Bill, because most special

patients have capacity at the stage of reclassification. In this context, it is likely they will remain on special patient status longer. Consequently, forensic hospital discharge would likely become more delayed, forensic community service caseloads would inevitably increase, and tāngata whai ora would remain subject to unnecessary liberty restrictions, and the ongoing stigma of forensic status - contrary to the intent of the Bill.

Individuals with psychiatric illness or intellectual disability must not be subject to punitive responses but should instead be supported through high quality treatment and management that provides evidence-based, ethical pathways to recovery and development. Tu Te Akaaka Roa is concerned that, unless suitable alternative to compulsory care orders is provided for these forensic orders, people will be held in a more restrictive setting for longer and receive less support for the transition back into the community, resulting in poorer outcomes long-term.

Restricted Patients

Restricted patient status is a rarely used, highly restrictive intervention applied by courts following specific application from the Director of Mental Health. Under the current statute, it is reserved for those people who experience mental disorder and present with special difficulties because of the danger posed. In the current statute, if the test of mental disorder lapses, restricted patient status ceases, regardless of the ongoing degree of danger. This rarely occurs because of the broad ambit of mental disorder. The impact of the Bill's new compulsory care criteria on the maintenance of restricted patient status is unclear. However, a possible interpretation is that restoration of capacity would lead to cessation of restricted patient status, regardless of the ongoing danger posed.

Mental health care order expiry provisions

Tu Te Akaaka Roa recommends that the mental health care order remand expiry provisions (Clause 88) be removed from the Bill.

Clause 88 of the Bill requires the suspension of a mental health care order for people remanded in custody up to a maximum of three months after which the order will cease. We note that many prisoners are commonly remanded for periods longer than three months and it is unclear to us whether orders can be reviewed during the period of suspension.

We are concerned that the set expiry period will remove an important safety framework for individuals with mental health difficulties, particularly those who have engaged in low level offending behaviour without other psychosocial support systems. While terminated orders may be reinstated upon further assessment at the point of release from custody, this is unlikely to happen until the individual either presents in an acute crisis or reoffends. The risk of recidivism and preventable incarceration is particularly pertinent considering the proposed reintroduction of the three strikes legislation.

Victim input to status changes and applications for leave

Tu Te Akaaka Roa supports the transfer of decision-making powers regarding patient status and certain types of leave from the Minister of Health to the Forensic Patient Review Tribunal (FPRT). However, we recommend that victim consultations are part of the FPRT's decision making process rather than being managed by the Director of Mental Health.

The FPRT has an important role in balancing potentially competing interests to make these decisions and we believe the separation of victim consultation and decision-making power may compromise the FPRT's role and create unnecessary risk for all parties. We believe a more direct model of engagement between victims and decision-maker, such as the current operating model for parole decisions, would allow for the formulation of appropriate conditions to meet legitimate concerns while still being able supporting leave or reclassification.

Additionally, we recommend redefining 'leave' for more than one-week "long-term leave", or "short-term leave" to improve the clarity and usability of the legislation.

Resource Implications

Forensic mental health services and other social support services promote positive mental health and reduce a prisoner's risk of reoffending and the need for preventive measures to be imposed. [1, 2] However, this is only true if there is adequate access to such supports.

Approximately 91% of incarcerated New Zealanders have a lifetime incidence of a mental health condition and incarcerated New Zealanders are significantly more likely have experienced trauma, adverse childhood events, intergenerational trauma, and psychosocial disadvantages, compared to the general population. [3-5] Unfortunately, Aotearoa New Zealand's forensic mental health services are no longer able to provide timely treatment to those who need it, due to the increasing prison muster, underfunding, and nationwide workforce shortages.

Tu Te Akaaka Roa is concerned that the Bill, in its current form, will further limit people's ability to access adequate support within the criminal justice system and result in more vulnerable New Zealanders being held in prison, subject to solitary confinement and psychologically harmful conditions. Keeping tāngata whai ora with mental disorders incarcerated is not only unethical but also violates several legal statutes. [6, 7] Importantly, the purpose of the Bill is to provide care in a manner that will 'protect the safety and well-being of people who are subject to the legislation and all other New Zealanders'; we don't believe it currently version of the legislation will achieve this outcome and strongly recommend revision of Part 4 of the Bill in line with the recommendations described above.

Thank you for the opportunity to provide feedback on the Mental Health Bill. We would welcome the opportunity to engage further with the Committee to assist with addressing potential inadvertent consequences and ensure the Bill improves safety and equity in mental health outcomes for all New Zealanders.

References

1. Skipworth JJ, Dawson J, Ellis PM. Capacity of forensic patients to consent to treatment. Aust N Z J Psychiatry. 2013 May;47(5):443-50.

1. Gilbert J, Elley B. Reducing recidivism: an evaluation of the pathway total reintegration programme. New Zealand Sociology. 2015;30(4):15-37.
2. Simpson AI, Jones RM, Evans C, McKenna B. Outcome of patients rehabilitated through a New Zealand forensic psychiatry service: a 7.5 year retrospective study. Behavioral sciences & the law. 2006;24(6):833-43.
3. Muscatell KA, Morelli SA, Falk EB, Way BM, Pfeifer JH, Galinsky AD, et al. Social status modulates neural activity in the mentalizing network. Neuroimage. 2012;60(3):1771-7.
4. Sarigedik E, Naldemir IF, Karaman AK, Altinsoy HB. Intergenerational transmission of psychological trauma: A structural neuroimaging study. Psychiatry Research: Neuroimaging. 2022;326:111538.
5. Brinded PM, Simpson AI, Laidlaw TM, Fairley N, Malcolm F. Prevalence of psychiatric disorders in New Zealand prisons: a national study. Aust N Z J Psychiatry. 2001;35(2):166-73.
6. Monasterio E, Every-Palmer S, Norris J, Short J, Pillai K, Dean P, et al. Mentally ill people in our prisons are suffering human rights violations. The New Zealand Medical Journal (Online). 2020;133(1511):9-13.
7. Monasterio E. It is unethical to incarcerate people with disabling mental disorders. Is it also unlawful? 2024. p. 9-14.