Privacy Commissioner
Te Mana Mātāpono Matatapu

Privacy Commissioner's submission to the Health Committee on the Mental Health Bill

Introduction

1. Thank you for this opportunity to submit on the Mental Health Bill ("Bill"). Under the Privacy Act 2020, the functions of the Privacy Commissioner include examining new legislation for possible impacts on individual privacy.

2. I welcome this Bill, which aims to repeal and replace the legal framework for compulsory mental health care, minimising compulsory or coercive treatment and implementing an approach centred on human rights and patients making their own decisions.

3. Privacy is a human right and is critical for effective and ethical health care. Accessing health care often requires intimate exposure to strangers when we are most vulnerable, trusting those people to care for our information, our bodies, and our choices.

4. The Bill takes steps to recognise those privacy interests and centre patients in decisions about their mental health care, including who can be involved when patients need support or cannot make health care decisions for themselves.

5. My submission focuses on ensuring that the legal framework for compulsory care upholds privacy interests and is consistent with the Privacy Act. Below I comment on provisions relating to:

   - compulsory care principles that centre patient rights
   - involvement of whānau and other people to support patients
   - communications during compulsory care.

6. My only recommendation for changes to the Bill is an amendment to clause 35. Clause 35 lists categories of people and organisations whose communications to and from a patient cannot be withheld or read. I recommend:

   - adding the Office of the Privacy Commissioner under section 35

7. considering adding other relevant bodies with a role in upholding human rights, such as the Human Rights Commissioner, the Health and Disability Commissioner, and the Approved Agency under the Harmful Digital Communications Act 2015.

I support a focus on patient rights and wellbeing in compulsory care decisions

8. Patients have a right to privacy, and it is critical that this right is adequately protected by the legal framework for compulsory care.

9. I welcome the compulsory care principles at clause 6(1), which state that compulsory care should only be used for a therapeutic purpose, should be applied in the least restrictive manner, and should reflect a patient's choices, needs, and preferences as well as their whānau ties and relationships.

10. I also welcome compulsory care criteria at clause 7, which set a high threshold and focus on a lack of capacity to make decisions about mental health care rather than on broader matters. In my view this is necessary and appropriate to protect against the undue intrusion on privacy which could result from a lower threshold for compulsory care.

11. Provisions at Part 2, Subpart 4 of the Bill explicitly set out patients' rights, including rights to information under clause 26. I welcome these provisions, which complement and align with a person's rights under the Privacy Act 2020, including the right to access information held about them under Information Privacy Principle 6.

The Bill offers an appropriate balance of whānau involvement and privacy

12. One clear theme from the Ministry of Health's summary of public submissions is that whānau often feel excluded and wish to be involved in a patient's mental health care.[1] Some submitters discussed feeling excluded where clinicians had invoked the Privacy Act in accordance with a patient's wishes.[2]

13. These comments reflect a misunderstanding of the Privacy Act. When a clinician decides not to share a patient's information with whānau in accordance with the patient's wishes, that is primarily a clinical decision governed by professional obligations, not a decision required by provisions of the Privacy Act.

14. The Privacy Act is a legal framework enabling collection, use, and sharing of personal information. It sets out Information Privacy Principles which allow agencies to collect, use, and share personal information while upholding privacy expectations, while balancing the need for privacy protection with other important policy interests. It explicitly allows for sharing a person's information where this is necessary to address a serious threat to the life or health of an individual.[3]

15. The Office of the Privacy Commissioner administers the Health Information Privacy Code 2020 which specifically provides for uses of personal information in health care.[4] This Code also provides for sharing of information where necessary to prevent or lessen a serious threat to the life of an individual.

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[1] https://www.health.govt.nz/system/files/2022-08/repealing-replacing-mha-consultation-submissions_analysis-august-2022.pdf See also https://www.health.govt.nz/publications/repealing-and-replacing-the-mental-health-act-analysis-of-public-consultation-submissions

[2] Summary of Submissions pp 63, 145.

[3] Privacy Act 2020, Information Privacy Principles at IPP 11(1)(f)(ii).

[4] Office of the Privacy Commissioner, Health Information Privacy Code 2020, <privacy.org.nz>

16. I welcome clause 16 in the Bill which encourage patient understanding of and participation in decision making.

17. Involving whānau and other people in care will often be welcomed by patients, helping to support positive experiences of care and improved health outcomes. At the same time, patients have a right to privacy which includes making their own choices about who is involved in their care and who has access to their health information.

18. I welcome provisions at clause 46 which allow for involvement in a patient's care planning by whānau and other support people, but also allow for this involvement to be limited where it would have a detrimental effect or be contrary to a patient's wishes, based on the assessment of a responsible practitioner.

19. While the Privacy Act allows for information sharing which is necessary to support ethical and beneficial healthcare, upholding patients' privacy interests is also important. Steps to enable support by whānau and others should not prevent patients making their own choices, including choices to maintain their privacy when receiving care.

20. The Bill provides new options for involving whānau or other support people in mental health care for a patient as below.

Clause(s)	Provides for	Summary
12-15	Compulsory care directives	Enables a person to make a compulsory care directive setting out methods of care they do and do not consent to receive.
16	Patient participation	Requires that patients are encouraged and assisted to understand and participate in proceedings and decisions about their care.
17	Hui whaiora	A meeting of people involved in the patient's support network and care to help support decisions in the best interests of the patient.
18	Support network	The people a patient has nominated to be involved in care decisions, as well as their whānau for specific purposes.
19-22	Nominated person	A patient may nominate one or more people to receive information about them and represent their views in decision processes.
23	Independent support person	Health New Zealand must make available independent people who can advise and support patients through care processes.
24	Advocate	Health New Zealand must make available advocates who can help patients to exercise their rights.

21. I welcome these provisions, which provide patients with a range of ways to access support while centring on the patient's own decisions and needs, which may include the need for privacy.

22. It will be critical that these provisions are applied in line with the compulsory care principles at clause 6, to avoid involvement of other people in accessing information or making decisions in ways that unduly intrude on a patient's privacy.

Patients need to communicate with my office and other human rights agencies

23. Under clause 35, patients under compulsory care may have their communications opened or withheld, with exceptions for communications to or from an MP, a Judge, a district inspector, the Ombudsman, a lawyer, and other listed people and organisations.

24. The list appears to be based on a similar list at section 123 of the existing Mental Health (Compulsory Assessment and Treatment) Act 1992. As I understand it, the purpose is to enable communications which might be necessary to uphold the fundamental rights of people subject to compulsory care.

25. I understand this provision in the 1992 Act would have pre-dated the establishment of some of the independent entities which have a role protecting New Zealanders' fundamental rights in healthcare or otherwise, including my own Office.

26. I **recommend** that the list in clause 35 be amended to include agencies whose function includes receiving complaints from individuals to uphold their fundamental rights, including:
    - the Office of the Privacy Commissioner
    - the Human Rights Commissioner
    - the Health and Disability Commissioner
    - the Approved Agency under the Harmful Digital Communications Act 2015.

Amendments to the Privacy Act 2020

27. Schedule 2 of the Bill proposes consequential amendments to the Privacy Act 2020. These are changes in wording which correspond to other provisions of the Bill, and I am comfortable with those amendments advancing into law.

Conclusion

28. I thank the Committee for the opportunity to submit on this Bill. I do not seek to be heard in person.

Ngā mihi nui,

Michael Webster
Privacy Commissioner