Submission to Repealing and replacing the Mental Health Act

January 2022

Asian Family Services

Together enriching lives

Contents

Submission to Repealing and Replacing the Mental Health Act 2
The Focus Of This Submission 2
Asian Population 3
Repealing and replacing the Mental Health Act 3
Part 3: Embedding Te Tiriti o Waitangi and Addressing Moari cultural needs 4
Part 4: Defining the purpose of mental health legislation 5
Part 5: Capacity and decision-making 6
Part 6: Supporting people to make decisions 7
Part 7: Seclusion, restraint and other restrictive practices 8
Part 8: Addressing specific population group needs 8
Addressing cultural needs 8
Respecting families and whānau 9
Children and young people 9
Part 9: Protecting and monitoring people's rights 9
Challenging clinical decisions 9
The role of police 10
Monitoring individuals' rights 10
Health Equity 11
About the Asian Family Services 11
Reference 13

Submission to Repealing and Replacing the Mental Health Act

Thank you for the opportunity to comment on repealing and replacing the Mental Health Act. This submission is made by Asian Family Services.

Asian Family Services (AFS) welcome further discussion on this submission and look forward to engaging with those working on the repeal and replacement of the current Mental Health (Compulsory Assessment and Treatment) Act 1992, which is a unique opportunity to transform and rethink about the mental health law in Aotearoa New Zealand.

The Focus Of This Submission

Asian Family Services are delighted to see the repeal and replacement of the Mental Health (Compulsory Assessment and Treatment) Act 1992. We hope the new legislation reflects a human rights-based approach, promotes supported decision-making, aligns with the recovery and wellbeing model of mental health, and provide measures to minimise compulsory or coercive treatment.

The submission from Asian Family Services reflects the direct experiences working with Asian and ethnic lived experience groups and family members. Asian Family Services witnessed how the current Mental Health Act created systematic barriers for Asian and ethnic minority groups to receive fair mental health treatment and care that has an approach based on human rights and recovery. With over 20 years of experience as the Asian and ethnic groups mental health and addiction primary health care provider in New Zealand, our responsibility is to authentically represent their voices, especially those who suffer silently from mental health and addiction issues due to the current Mental Health Act, which unfortunately is not well understood by the general population. Many individuals from the Asian and ethnic minority groups were unable to share their shame and frustration that were buried deep inside, leaving them to feel invisible and highly vulnerable at the time when their cultural and linguistic needs were not being met, respected, or understood under the Mental Health Act.

Asian Population

The landscape of the population in New Zealand has significantly changed. The 2018 Census indicated that over 27 per cent of New Zealand's population was born overseas with over 200 ethnicities.

707,598 people identified as part of the Asian group at the 2018 New Zealand census, making up 15.1% of New Zealand's population. This is an increase of 235,890 people (50.0%) since the 2013 census and 353,046 people (99.6%) since the 2006 census. The Asian population is the fastest-growing population and will make up a quarter of the New Zealand population in 20 years.

The term Asian in New Zealand represents many cultures and ethnicities, from Afghanistan in the west, India, China, Japan in the east, and Indonesia in the south[1]. Ethnic refers to MELAA, former refugees or asylum seekers.

Distinguished Professor Paul Spoonley FRSNZ (Fellow of the Royal Society of New Zealand) reminds New Zealanders should consider the country's future regarding the disruptive consequences of the underway demographic transformation[i] . We strongly advocate for the replacing and repealing of the Mental Health Act to consider such demographic changes to ensure the new legislation will be equipped to respond to the Asian and ethnic minority that is culturally and linguistically responsive.

Repealing and replacing the Mental Health Act

Asian Family Services' vision is that "all people of Asian heritage and background lead flourishing and fulfilling lives in an equitable Aotearoa, New Zealand".

The Mental Health (Compulsory Assessment and Treatment) Act 1992 (the current Act) is almost 30 years old. It is not working the way it should be or adequately supporting improved mental health outcomes or the wellbeing of individuals from Asian and ethnic minority groups and is contributing to significant inequities.

Asian Family Services believe that the new mental health legislation needs to reflect a human rights-based and recovery approach to care, promote supported decision-making and eliminate compulsory care and coercion. We firmly support the new legislation that must

[1] Categorisation of census for six major ethnic groups in New Zealand: European, Māori, Pacific peoples, Asian, MELAA (Middle Eastern / Latin American / African), and 'Other ethnicity'.

recognise Te Tiriti and support the rights of Māori as Tangata Whenua, consistent with the United Nations Declaration on the Rights of Indigenous Peoples[ii] (UNDRIP) and align with the United Nations Convention on the Rights of Persons with Disabilities[iii] (CRPD).

Therefore, recommendations for new legislation must include these principles:

- Maintaining consistency with Te Tiriti o Waitangi
- Taking a human rights approach
- Encouraging maximum independence, inclusion in society and the safety of individuals, their whānau and the community
- Improving equity of care and treatment
- Taking a recovery approach to care and treatment
- Providing timely service access and choice, especially for language and cultural support
- Eliminate any form of restriction of mental health care
- Respecting and enhancing the mana of family and whānau.

The new mental health legislation needs to move away from risk-based approaches to caring for and treating people in vulnerable and distressed states. A shift in focus from reactive risk management to proactively supporting the safety of people, with the concept of safety defined from the perspective of the person rather than the practitioner, is a must. Finally, the care and treatment provided through legislation should be delivered in a way that recognises a person's strengths rather than minimising perceived deficits. The new legislation should promote the safety of people, whānau and the community. Asian Family Services believe we have the opportunity to set in place clear guidelines for eliminating restrictive practices and for supporting specific populations.

Part 3: Embedding Te Tiriti o Waitangi and Addressing Moari cultural needs

Asian Family Services believe that the new legislation should formally acknowledge Te Tiriti and have precise requirements around how practitioners must give proper respect for cultural and ethnic identity. Recognition and incorporation of Te Tiriti are vital in the context of the new Mental Health legislation, given that Māori continues to be disproportionately placed under the current Act. Example to have Mental health services to have kaupapa Māori models of care available for Māori and to use traditional Māori processes to better welcome and support Māori individuals who are coming into care.

Asian Family Services, as the Asian and ethnic minority groups mental health and addiction service, believe that if the new legislation is to be done appropriately, legislation that supports

Māori cultural needs can also ensure better support for all people, especially Asian and ethnic minority groups who hold similar collective cultural worldview.

Part 4: Defining the purpose of mental health legislation

Asian Family Services want to see the new legislation have a strong 'recovery approach' and uphold people's human rights that are mana protected and enhanced, experience respect, engage in shared decision-making, and receive support to achieve their health and wellbeing goals, including the right to good health and health services for people in a vulnerable and distressed state. Collective culture is reflected where family or whānau also plays an essential role in a person's recovery and support to become and stay well.

Asian Family Services believe the legislation of compulsory treatment can never be used, ensure people are not pressured to accept mental health treatment they may not want through other ways and ensure the rights of individuals in a state of vulnerability are recognised and protected.

In the most disappointing scenario, If the compulsory assessment or treatment is allowed under the new legislation. In that case, the legislation must also clearly define where compulsory treatment can and should occur (for example, in a hospital only or both hospital and community settings) and what types of health professionals are allowed to assess whether a person needs compulsory mental health treatment and language and cultural support to be mandated and define phrases such as 'mental disorder'.

Asian Family Services strongly recommend the new Mental Health legislation must include:

- The Mental Health Act be amended to align with the CRPD
- Require informed consent to treatment is a must
- Require the need to determine whether a person has the capacity to give informed consent to treatment
- Explicitly require people to be involved in decisions about their own treatment
- The right to good health
- Explicitly require compulsory treatment only as a last resort if were allowed.

Part 5: Capacity and decision-making

Asian Family Services understand that a person may lack the capacity to make an informed choice or give informed consent. However, under this circumstance, there will be another person who might be legally authorised to give consent on their behalf, such as a welfare guardian or a person holding an enduring power of attorney for personal care and welfare. In the situation when this is not possible, treatment can be provided if:

- It is in the best interests of the person
- Reasonable steps have been taken to ascertain the person's views
- The health practitioner either has reasonable grounds to believe the treatment is consistent with the person's views or has consulted with others interested in the person's welfare.

Even in the presence of a severe mental health condition, a person may retain capacity concerning a range of decisions, including about their treatment. However, this capacity may come and go at different times.

Code of Rights, The Right 7(3)[iv] states that where a person has diminished competence (capacity), that person retains the right to make informed choices and give informed consent to the extent appropriate to that person's level of competence. And in a health context, a health practitioner may make a 'capacity assessment' of a person's decision-making process. Under this approach, the person is entitled to make decisions that others might not agree with.

Given that a person may have capacity one day but not the next, it is essential that assessment of a person's capacity is made as close as possible to when the decision needs to be made and that mental health services are always mindful that capacity may be regained. In some cases, despite individuals from the Asian and minority groups being fluent in English, language and culture, support is critical to be included as a supporting tool during their vulnerable and distress times.

The new legislation must consider how the idea of a capacity test aligns with te ao Māori, such as a collective worldview where the whānau and the wider community can play equal weight in the decision-making process, which requires careful consideration. This collective culture is equally important to many Asian and ethnic minority groups that take a more collective approach to interpret the will and preferences of someone who may need compulsory mental health treatment.

Finally, the new legislation must include how individuals who live independently are supported and helped while receiving mental health treatment and care are away from home.

Many Asian and ethnic minority groups, especially new migrants, international students, and older adults, live independently without their families or support systems available in New Zealand. Anecdotally, some faced late payment penalties or eviction after being released from inpatient services while under compulsory treatment. Some were in great distress because pets were left behind without anyone to care for them.

Part 6: Supporting people to make decisions

Asian Family Services believes that the new legislation must be aligned with the Code of Rights:

> "*people have the right to make informed choices and give informed consent to the extent appropriate for their level of competence, and it recognises a person's right to have support to do so if needed"* (right 7(3) and right 8 of the Code of Rights)[v].

Article 12 of the CRPD[vi] (equal recognition before the law) clearly states that:

> *"disabled people, including those with mental illness, have the right to control decisions about their lives with whatever kinds of support they need"*.

Countries including New Zealand must establish arrangements to make this possible. This includes the right to give consent for medical treatment. It also clarifies that New Zealand should have safeguards for people who need another person to present their will and preferences when a decision must be made to ensure the person is protected. Besides that, language support must be provided for Asian or ethnic minority groups, including friends or families.

Therefore, the new Mental Health legislation must require people to decide on their own mental health treatment. It must encourage people and health practitioners to use supported decision-making tools, such as

- An advance directive - all consumers have the right to use advance directives under right 7(5) of the Code of Rights[vii].
- Nominated people may call on one or more trusted people to help them make decisions.
- Independent advocacy - a person who is separate from mental health services and free from conflicts of interest from mental health service providers or funders who specialise in supporting people to understand their rights and participate in decisions about the care and treatment of the person they are advocating for.

- To recognise that all people have the will and preferences and that steps must be taken to find out the will and preferences of people as much as possible, even when this takes considerable effort.

It is important to note that family, whānau and friends are part of a person's natural support for decision-making; this is paramount for the harmony of collective culture.

Finally, Asian Family Services support the idea from the Swedish law[viii] to be considered in the new legislation where the stats provide for a legal mentor or personal ombudsman (PO) to assist people in making legal decisions.

Part 7: Seclusion, restraint and other restrictive practices

Asian Family Services believe that the new Mental Health legislation must explicitly eliminate all forms of restraint to recognise human rights and ethical concerns. Further work will be required to support the changes, especially in upskilling the workforce and improving mental health facilities.

Part 8: Addressing specific population group needs

Asian and ethnic minority children and young population groups should also have special consideration under the new mental health legislation.

Addressing cultural needs

Asian Family Services believe the Mental Health legislation requires that all powers and proceedings under the Act must be carried out with proper recognition of the importance and significance to the person and their ties with their family and family group with proper respect for the person's cultural and ethnic identity, language and religious or ethical beliefs.

The new Mental Health legislation must have clear requirements around how practitioners must give proper respect for cultural and ethnic identity, language and religious or ethical beliefs. For example, requirements for a person to receive an evidence-based cultural assessment and treatment with language and cultural support must be provided free to assist professionals in treating the person.

To strengthen the Mental Health Act in recognising the importance of people's cultural and ethnic identities, the current Mental Health Act provisions have unfortunately not been enough, especially when supporting Asian and ethnic minority groups. It is important to note that there is often a difference between the cultures of the people giving and receiving treatment.

The Guidelines to the current Mental Health Act emphasise the need to provide culturally appropriate care and treatment, including specific suggestions for delivering this care. However, these do not have the same force of law as legislation. The current Mental Health Act does not ensure cultural needs are met, especially regarding culturally appropriate care

and treatment for Asian and ethnic minority groups. The current provisions in the legislation do not provide enough clear direction for practitioners to know what they need to be doing, and there are not enough clear requirements in the legislation.

The new legislation must have particular and detailed requirements, such as requirements for specific cultural models of care to be used. Language support must be provided in the presence of the person for Asian and ethnic minority groups.

Respecting families and whānau

The new legislation can better respect family and whanau. The CRPD recognises the family as the natural and fundamental group unit of society and has a vital role in supporting people with disabilities, including mental health needs[ix]. The essential perspective for defining family and whānau is that of the patient or proposed patient. Therefore, any new mental health law must consider how to facilitate the best culturally-appropriate inclusion of family, whānau, āiga and carers, especially for Asian and ethnic minority groups.

Children and young people

The UNCROC obligates the government to ensure that the child's best interests are considered in policy decisions. This includes children's right to protect from discrimination[x], be heard and informed about, participate in achieving their rights and the right to life. It should also include special measures to protect those belonging to minority groups.

Asian Family Services believe that the role of the family in the collective culture must also be a central consideration when considering how the new legislation might apply to children and young people. New Zealand's First Child and Youth Wellbeing Strategy[xi] conclude that we must put families and whānau at the centre of solutions to improve child and youth wellbeing.

The compulsory mental health treatment should be eliminated instead, and be replaced by the requirements to enable a child or young people to make decisions about their care or treatment if they can make such a decision. The new legislation should also clarify what must be done when mental health clinicians and parents or caregivers do not agree about consent or treatment issues.

Part 9: Protecting and monitoring people's rights

Asian Family Services strongly advocates for appropriate cultural support, including language and cultural competency trained professionals for people experiencing Court proceedings under the new legislation (if compulsory mental health treatment was still allowed after the new mental health legislation).

Challenging clinical decisions

The new legislation needs to ensure people are given adequate information about all available treatment options and are offered the opportunity to choose the treatment option they wish to use to align with the recovery approach to care and treatment.

The role of police

Instead of utilising the police to respond to individuals in a mental health crisis in the community and be detained in police cells waiting for an examination, The new legislation should include policies to seek alternatives and more appropriate places of safety such as an emergency department. For example, New South Wales in Australia has moved this role to the ambulance service.

Asian and ethnic minority groups and their family members feel extreme shame, while also feeling frightened and confused when they are involved with the police to pick-up or be placed in a police cell. The experience of detention in people needing mental health assistance further exacerbated the stigma and criminalisation of people with mental health needs in the Asian and ethnic minority group communities.

Monitoring individuals' rights

The new legislation must have specific roles with clear responsibilities to oversee and ensure people's rights are protected, including promptly providing cultural and language support. Examples include specific reporting requirements to ensure transparency. Also, create a transparent process for individuals who wish to make complaints about their care or treatment or the care and treatment of others in their native language.

Health Equity

Health equity recognises that each person has different circumstances and needs to allocate resources and opportunities to achieve an equal outcome. Therefore it is paramount to have the new legislation enforcing support Asian and ethnic minority groups individuals and families in mental health treatment and care with appropriate cultural and language support to obtain consent that is understood in their native languages and context of New Zealand.

Asian peoples commonly encounter language and cultural barriers to appropriate mental health healthcare. Many New Zealand mental health professionals cannot effectively communicate with or provide culturally relevant care for Asian and ethnic minority groups.

The Asian Mental Health and Wellbeing research[xii] found

- 47.9% of Asians could not access language and cultural support regularly when using health services in New Zealand;
- 49.2% cultural and social support;
- 39.7% free interpreting services;
- 39.5% culturally appropriate clinical services;
- 35.7% culturally appropriate psychological intervention;
- 32.5% translated health resources and
- 24.7% for ongoing updates and health-related articles[xiii].

About the Asian Family Services

Asian Family Services (AFS) has been providing support to the Asian community living in New Zealand since 1998. The organisation is a charitable trust.

AFS is New Zealand's only service provider for people of Asian backgrounds affected by gambling harm. Our gambling harm minimisation services are delivered under a Ministry of Health contract and funded from the gambling levy. The service operates in three areas; the Asian Helpline, clinical intervention, and public health work.

Nationwide, the Asian Helpline provides immediate emotional support or brief interventions over the phone and provides culturally appropriate information for all Asians living in New Zealand. The helpline offers eight languages where people can get support from counsellors, psychologists and social workers who speak Cantonese, English, Hindi, Japanese, Korean, Mandarin, Thai and Vietnamese. The counsellor will provide support and make appropriate referrals for face to face psychological services if needed.

Asian Wellbeing Services (AWS) is part of AFS. It was established in 2016 to provide professional psychological interventions and tailor-made psychoeducation workshops for clients with non-gambling issues. The AWS teamwork across many GP clinics and schools

provides on-site support services. This has been a proven model of care that reduces the barriers to accessing psychological services and achieves better outcomes for our clients.

Asian Family Services completed two research projects funded by the MOH innovation fund. One is called “Reaching Out” to improve Asians’ access in the primary care space, and the other “Remarking Lives” focused on peer support and codesign work for youth wellbeing. The other completed research project on Asian Perinatal Mental Health was under the funding of WDHB.

Asian Family Services has received funding from MSD Community Connection services and currently are providing free counselling, social support, food parcels and essential items for Asians.

Asian Family Services is also developing a suite of resources to support wellbeing and help people who are currently struggling with their mental health by providing simple, tangible actions anyone can do.

For further information, visit www.asianfamilyservices.nz, Facebook, Instagram, YouTube, WeChat, where resources are shared daily in different languages.

Ngā mihi nui,

Kelly Feng
National Director. Asian Family Services

Reference

[i] Spoonley, P. (2020). The New New Zealand, Facing demographic disruption. Auckland: Massey University Press

[ii] United Nations. (n.d.). United Nations Declaration on The Rights of Indigienous Peoples. Department of Public Information, United Nations.

[iii] United Nations. Convention on the Rights of Persons with Disabilities (CRPD). United Nations. https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[iv] Health & Disability Commissioner. (2022). Code of Health and Disability Services Consumers' Rights. Health & Disability Commissioner. https://www.hdc.org.nz/your-rights/about-the-code/code-of-health-and-disability-services-consumers-rights/#:~:text=Every%20consumer%20has%20the%20right%20to%20be%20free%20from%20discrimination,sexual%2C%20financial%20or%20other%20exploitation.&text=Every%20consumer%20has%20the%20right%20to%20have%20services%20provided%20in,and%20independence%20of%20the%20individual.

[v] Health & Disability Commissioner. (2022). Code of Health and Disability Services Consumers' Rights. Health & Disability Commissioner. https://www.hdc.org.nz/your-rights/about-the-code/code-of-health-and-disability-services-consumers-rights/#:~:text=Every%20consumer%20has%20the%20right%20to%20be%20free%20from%20discrimination,sexual%2C%20financial%20or%20other%20exploitation.&text=Every%20consumer%20has%20the%20right%20to%20have%20services%20provided%20in,and%20independence%20of%20the%20individual.

[vi] United Nations.(n.d.). Article 12 – Equal recognition before the law. United Nations. https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html

[vii] Health & Disability Commissioner. (2022). Code of Health and Disability Services Consumers' Rights. Health & Disability Commissioner. https://www.hdc.org.nz/your-rights/about-the-code/code-of-health-and-disability-services-consumers-rights/#:~:text=Every%20consumer%20has%20the%20right%20to%20be%20free%20from%20discrimination,sexual%2C%20financial%20or%20other%20exploitation.&text=Every%20consumer%20has%20the%20right%20to%20have%20services%20provided%20in,and%20independence%20of%20the%20individual.

[viii] Council of Europe.(2021). Community-Based Initiatives. *Personal Ombud Programme – Sweden.* Council of Europe. https://www.coe.int/en/web/bioethics/-/personal-ombud-programme-sweden

[ix] United Nations. (n.d.). Preamble. United Nations. https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html

[x] United Nations. (n.d.). Convention on the Rights of the Child. United Nations. https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

[xi] Department of the Prime Minister and Cabinet. (2019). Child and Youth Wellbeing Strategy. The Department of the Prime Minister and Cabinet.

[xii] Ning, Bo., Feng, K., Zhu, A. (2021). New Zealand Asian Wellbeing & Mental Health Report 2021. Auckland: Asian Family Services.

[xiii] Ning, Bo., Feng, K., Zhu, A. (2021). New Zealand Asian Wellbeing & Mental Health Report 2021. Auckland: Asian Family Services.