

**MENTAL HEALTH FOUNDATION OF NEW ZEALAND:
SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW
RELATING TO THE SITUATION IN NEW ZEALAND OF PEOPLE LIVING
WITH MENTAL ILLNESS**

Introduction

1. The Mental Health Foundation of New Zealand is a charitable trust, established in 1974, that promotes mental health and wellbeing throughout Aotearoa New Zealand. It is the largest and longest standing nongovernmental organisation promoting the concerns of mental health consumers and advocating on their behalf. Its objectives include promoting the mental health and wellbeing of the inhabitants of New Zealand of whatever ethnic origin, age, gender or sexual orientation and taking all measures designed or likely to prevent the incidence of mental ill health in the community. The Foundation aims to reach a wide range of people and organisations with information and resources and work with them to develop capacity for autonomy and self determination, reduce discrimination and increase equity and social inclusion through advocacy, education, policy and practice.

2. The Foundation welcomes this opportunity to contribute to the UPR. The submission is based on the work done over the relevant period by the Foundation and other NGOs and in collaboration with agencies such as the Mental Health Commission, the Human Rights Commission and the Ministry of Health through the *Like Minds Like Mine* project.

3. Although all these agencies regularly consult with consumer groups, the time available for preparing this first report has meant that it has been impossible to consult effectively and meaningfully with people with experience of mental illness. The Foundation hopes that this will not continue to be the case as the process becomes better understood.

I. BACKGROUND AND FRAMEWORK

A. Scope of the international obligations

4. New Zealand has a good record of ratifying international instruments. As a general principle it endeavours to ensure that its domestic legislation complies with the international standards before ratification. As a result it records few reservations and actively works to remove any it has made.

5. New Zealand has ratified most of the instruments that are relevant for people with mental illness. Most recently, it ratified the United Nations Convention on the Rights of People with Disabilities (the Disability Convention) with no reservations after playing a significant role in its development. During the period under review New Zealand also ratified the Optional Protocol to the Convention against Torture and established a number of national preventive mechanisms to give effect to it.

6. In anticipation of its ratification of the Disability Convention, New Zealand carried out a National Interest Analysis to identify domestic legislation that was non-Convention compliant. The Disability (United Nations Convention on the Rights of

Persons with Disabilities) Bill 2008 (inter alia) amended all legislation which contained provisions that reflected the stereotypical assumption that a person was incapable of performing certain public or fiduciary roles because they were mentally disordered.

B. Constitutional and legal framework

7. New Zealand does not have an entrenched constitution. Its constitutional arrangements consist of a number of pieces of legislation that can be repealed by a simple majority. Social and economic rights, which are reflected mainly in policy and practice, are particularly vulnerable. The present international financial crisis increases the likelihood that people such as those living with mental illness – already among the most vulnerable - will suffer more than most in these areas. This is especially so as regards the indigenous population as Maori are already disproportionately represented in mental illness statistics, experience poorer housing, economic status, educational achievement and consequently poorer health.

This situation would be greatly improved if there was more comprehensive, statutory protection for social and economic rights.

8. The New Zealand Bill of Rights Act 1990 has been described as having quasi-constitutional status¹ but it is only recently that it has been accepted that provisions such as the right to be treated with dignity and humanity if detained² or not to be subjected to cruel or degrading treatment³, applied to people undergoing compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the MH(CAT) Act).

9. The MH(CAT) Act itself was designed to comply with the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles) and for the most part it meets many of the necessary standards. However, when the MH(CAT) Act was reviewed for consistency with the Disability Convention anomalies were identified in both the legislation itself – for example, there is inadequate provision for patients to be informed of the reason for their continuing detention – and in how aspects of the legislation were implemented in practice – for example, the lack of a genuinely independent second psychiatric opinion where a patient refuses consent to the administration of electro-convulsive therapy.

10. A further problem with the legislation is that it is silent on the issue of capacity. The assumption being that if a person is committed under the MH(CAT) Act then they are automatically deemed to be incompetent to consent to treatment and they can be treated against their will.

11. The Foundation considers that, given New Zealand's ratification of the Disability Convention and improvements in best practice internationally, consideration should be given to reviewing of New Zealand's mental health law and other related legislation.

¹ Rishworth et al. *The New Zealand Bill of Rights Act 1990* OUP (2003) at 2

² Section 23(5) NZBORA

³ Section 9 NZBORA

II. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND: IMPLEMENTATION OF THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Equality and non-discrimination

12. For people with experience of mental illness, social exclusion and discrimination has been endemic in New Zealand society and continue to create barriers to their ability to live successful, fulfilling lives. In 1996, an inquiry into mental services⁴ highlighted the need to reduce stigma and discrimination against people with mental illness in New Zealand. Two significant outcomes of the Inquiry were the establishment of the Mental Health Commission and a project by the Ministry of Health – *Like Minds Like Mine Project to Counter Stigma and Discrimination Associated with Mental Illness*.

13. The Government is to be commended on the success of the *Like Minds* project and the accompanying advertising campaign. Both projects were the recipient of a number of prestigious awards and have succeeded in bringing about significant attitudinal change⁵. However, stigma and discrimination against people with mental illness persists and needs to be further addressed at all levels of society⁶.

14. The establishment of the Mental Health Commission was a positive outcome of the Mason Inquiry. Established under the Mental Health Commission Act 1997, the Commission was subject to a sunset clause which would have seen its demise in 2007 but was extended to 2015 by an amendment last year. The Foundation supported and welcomes this extension but has concerns about the Commission's mandate and limitations.

15. Under its current mandate the Commission does not have oversight of the operation of the Act as, for example, the Mental Health Act Commission in England and Wales. The Foundation considers that the needs and requirements of people with experience of mental illness would be better served if the Mental Health Commission was made a permanent fixture and its statutory mandate was extended to give it oversight of the operation of the MH(CAT) Act and to allow it to deal with complaints from individuals about their treatment if detained under the Act.

Right to life, liberty and security of the person

16. In 2004 the Human Rights Commission published *Human Rights in New Zealand Today: Nga Tika Tangata O Te Motu*. This was the first comprehensive review of human rights in New Zealand and formed the basis for the subsequent Action Plan for Human Rights. While mental health services attracted some positive feedback, the use of compulsion was criticised along with the inappropriate use of seclusion.

⁴ *Inquiry under s.47 of the Health and Disability Services Act 1993 in Respect of Certain Mental Health Services: Report of the Ministerial Inquiry to the Minister of Health Hon Jenny Shipley (the Mason Inquiry)* Wellington: Ministry of Health, 1996

⁵ *Journeys Towards Equality: Taking Stock of New Zealand's Efforts to Reduce Discrimination against People with Experience of Mental Illness*, Mental Health Commission (2004) at 13

⁶ *Respect Costs Nothing: Self Stigma and Mental Illness*: Mental Health Foundation
Fighting Shadows: Self-stigma and Mental Illness, Mental Health Foundation (2007) at 73

17. The Action Plan prioritised seclusion as an issue that needed for further attention and undertook to collaborate with the Mental Health Commission on a project to clarify the human rights issues around the use of seclusion. The resulting paper can be found at [www.hrc.co.nz/home/hrc/newsand issues/seclusioninmentalhealthservices.php](http://www.hrc.co.nz/home/hrc/newsand%20issues/seclusioninmentalhealthservices.php).

The Mental Health Foundation prioritised in its 2006 – 2010 Strategic Plan the elimination of discrimination including policy and advocacy to question the use of seclusion.

18. While there has been some attempt to change how seclusion is used in New Zealand - the Ministry of Health, for example, recognises that it should only be used when there is an imminent risk of danger to the individual or others and no safe and effective alternative is possible⁷ - the use of seclusion remains unacceptably high. Between 1 October 2006 and 31 December 2006, for example, of the 2374 patients who spent time in an adult mental health unit 383 (16.1%) were secluded⁸ with Maori being more likely to be secluded than any other ethnic groups. The use of seclusion also varied widely according to geographic location.

19. Given the potential abuse of human rights that can result from the misuse of seclusion, the Foundation considers it should either be eliminated entirely as a management tool or there should be a stronger commitment to ensuring its use is restricted to very limited, clearly specified circumstances and used only in extreme situations where it is the least intrusive way of managing dangerous behaviour.

20. Electro-convulsive therapy (ECT) is used for therapeutic purposes in New Zealand. The conditions under which it can be administered are found in the MH(CAT) Act. Under section 60(a) ECT may be given with the person's written consent. If the person does not consent, ECT may still be administered if it is considered to be in their interest by a psychiatrist appointed by the Review Tribunal.⁹

21. There is no requirement that the opinion needs to be supported by any evidence. Treatment does not even need to be in the patient's best interests. It may simply be clinically expedient and overlook other more benign treatments that are less intrusive but have the same effect. Further the psychiatrist appointed to provide the second opinion may often not be truly independent.

22. In response to public concern there have been two reviews of the administration of ECT in New Zealand over this period¹⁰. Both made it clear that it was not acceptable to use the MH(CAT) Act to administer ECT to competent patients who did not consent and recommended that the Act should be amended to ensure that ECT is only administered with consent or at the very least more stringent controls are established either by ensuring a truly independent second opinion or developing an objective best interests test. To date this has not happened.

⁷ *Annual Report 2006*, Office of the Director of Mental Health at 27

⁸ *Ibid.* at 27

⁹ Section 60(b) MH(CAT) Act

¹⁰ Ministry of Health *Use of Electroconvulsive Therapy (ECT) in New Zealand: A Review of the Efficacy, Safety and Regulatory Controls* Wellington (2004) and an inquiry by the Health Select Committee *Electroconvulsive Treatment* in 2007.

The Mental Health Foundation provided a submission to the 2007 proposing that ECT should never be used without the informed and genuine consent of the recipient.

23. Part 8 of the MH(CAT) Act sets out the provisions applicable to patients under the age of 17 years. In general, other than requiring the consent of guardians, a prohibition against brain surgery and the use of a child psychiatrist, patients under 17 are subject to the provisions of the MH(CAT) Act in the same way as any other patient. There is no requirement that children should be kept separate from adults and there is a notable lack of specialist facilities for children and young people with mental illness.

Right to work

24. The ability to access and retain employment is a critical factor in recovery from mental illness but a combination of discrimination and stereotypic assumptions means that people with mental illness face significant barriers to employment and inadequate access to services and support to enable them to overcome the barriers¹¹. A study in 2004 of 785 respondents found that 34% considered they had been discriminated against while looking for work and 31% when they had found a job¹².

People with long term mental illness problems are amount the most impoverished groups in the community and are three times more likely to be in debt than others.

25. Generic services to assist people gain and keep employment have not performed well for people with mental illness and public policy initiatives tend to be poorly integrated and thought through. Government departments need to develop a shared information base (with disaggregated data) to develop effective employment solutions.

Maori

26. Major strategies¹³ have been developed to address the situation of Maori, but Maori continue to be hospitalised for mental disorders at much higher rates than non-Maori. Maori men, in particular, are more likely than their non-Maori counterparts to be hospitalised. Maori experience the highest level of mental disorder for overall disorders and for disorder group.

27. While socio-economic factors play a role in this, they still do not explain it. To ensure better outcomes for Maori with serious mental illness is required about the nature and impact of barriers to access of services and about the effectiveness of services¹⁴.

KEY NATIONAL PRIORITIES, INITIATIVES AND COMMITMENTS

¹¹ Mental Health Commission *Employment and Mental Health (Issues and Opportunities): A Discussion Paper* (1999) at 29

¹² Mental Health Foundation, *Respect Costs Nothing: A Survey of discrimination faced by people with experience of mental illness in Aotearoa New Zealand* (2004)

¹³ For example, Ministry of Health *Te Kokiri: The Mental Health and Addiction Action Plan 2006-2015* Wellington (2006); *Te Puawaiwhero – The second Maori Mental Health and Addiction National Strategic Framwork*.

¹⁴ Joanne Baxter, *Maori Mental Health Needs Profile: A Review of the Evidence* Ministry of Health, Wellington (2008) at 130

The Foundation suggests that the following commitments would improve the human rights of people with mental illness:

- Reviewing and amending the mental health legislation to ensure it recognises that people with mental disorder do not automatically lose their capacity to consent to treatment;
- Extending the mandate of the Mental Health Commission and making it a permanent body;
- Obtaining a commitment to phasing out the use of seclusion;
- Amending the MH(CAT) Act to ensure that ECT is genuinely administered with informed consent;
- Better resourcing mental health services for children and young people and interagency strategy;
- Encouraging government departments to develop a shared information base interagency strategy to develop effective employment solutions for people with mental illness;
- Further investigate the reason for the disparities in hospitalisation of Maori and prioritise access to and effectiveness and responsiveness of community and primary services.