

Date 27/06/2024

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Tēnā koe Geof

Submission on the Second Issues Paper for the review of adult decision-making capacity law

Background to my role

1. Thank you for the opportunity to provide comments on the Law Commission's Second Issues Paper on the review of Adult Decision-Making Capacity Law | He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke (Second Issues Paper).
2. This submission reflects my role under the United Nations Convention on the Rights of Persons with Disabilities (the Disability Convention) as part of the Independent Monitoring Mechanism (IMM), constituted under Article 33(2), to protect and monitor disability rights in New Zealand.
3. The submission also takes into account the perspective of my complaint-handling and investigations¹ role in respect to the administrative conduct of public sector agencies.
4. Moreover, my feedback also takes into account my function as a National Preventative Mechanism (NPM) with the designation for monitoring and examining the conditions and treatment experienced by people in places of detention, including health and disability places of detention such as inpatient mental health services and aged residential care. My role as an NPM emanates from the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).
5. In light of my NPM role, my submission will often focus on the experience of people in health and disability facilities who are unable to leave at will (i.e. detained), for whom decision making capacity (or assessed lack of it) is a key factor in their placement in such a facility, as well as their experience within it. I am aware that the scope of the Second Issues Paper is broader than this, and trust that my comments will be of use in

¹ Oversight: An investigation into the Ministry of Health's stewardship of hospital-level secure services for people with an intellectual disability, Office of the Ombudsman, 2021, as an example.

<https://www.ombudsman.parliament.nz/resources/oversight-investigation-ministry-healths-stewardship-hospital-level-secure-services>,

a wider context also. However, given that deprivation of liberty is one of the most serious infringements of rights the state can impose, I consider that it is a matter that warrants particular and specific consideration in the review of decision-making capacity law. While Chapter 10 makes reference to this (at 10.86) I encourage further consideration of whether the law should allow for *de facto* deprivation of liberty when a person is considered to lack decision-making capacity and is in a secure environment based on the consent or instruction of a substituted decision maker. Or whether explicit provisions with unequivocal safeguards would better align with a human rights based approach².

Accessibility and Language

6. In line with Article 9 of the Disability Convention on the need for appropriate measures for disabled people to access information on an equal basis to others, I am pleased to see that the key topic documents for this Second Issues Paper are available in a number of alternate formats which are accessible to disabled people, including Easy Read, Large Print and Braille ready formats, and that content is available in New Zealand Sign Language. These also support for people with English as a second language and those with low literacy skills. The availability of multiple channels for submission, including the use of the New Zealand Relay Service and via email is also positive to see.
7. Decision-making capacity laws should be co-designed with people who have lived experience of the current law, in particular disabled people and those who have had decisions made on their behalf, or have made decisions on behalf of others. The availability of diverse and accessible channels for people to interact with, and have input into the review is therefore essential to the review process to embed a human rights approach that maximises participation in decisions affecting people.
8. It is again pleasing to see, as in the preceding preliminary issues paper³, the use of disability friendly language, as is the focus on the use of the social model of disability in addressing disability throughout the paper. This is particularly important as much of New Zealand's decision-making capacity legislation is written using outdated language which reflects a medical model approach to disability.

Concepts of Disability and the Disability Convention

9. I continue to agree with the premise expressed in both this Second Issues Paper, and the preceding preliminary issues paper, that attitudes towards, and understandings of disability have shifted in recent decades, and that the Protection of Personal and

² Noting that other jurisdictions have specific provisions on this. For example Schedule A1 and AA1 of the Mental Capacity Act 2005 (United Kingdom).

³ He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper (NZLC IP49, 2022)

Property Rights Act 1988 (the PPPR Act) in its current form does not adequately meet the requirements of the Disability Convention, as ratified by New Zealand in 2008.

10. It is pleasing to see that the Second Issues Paper proposes that the purpose of a new Act must be closely informed by human rights, including concepts of rights, will and preferences, and dignity (for example in Chapter 3). This approach is in line with the recommendation of the Concluding Observations of the UN Committee (2022)⁴, that action be taken to repeal any laws which effectively deny or diminish the recognition of disabled people before the law, and implement a supported decision making framework based around these concepts. It also closely aligns with Article 1 of the Convention, focussed on the protection and ensuring of human rights for disabled people, and promotion of their inherent dignity.
11. I am pleased to see the repeated commitment in this Second Issues Paper to Article 12 (with particular focus on Articles 12(2), 12(3) and 12(4)) of the Disability Convention as fundamental to this review, with their focus on disabled people's rights to equal recognition before the law, the right to enjoy legal capacity on an equal basis with others, and to receive required support to make legal decisions with appropriate safeguards in place.
12. The efforts within the Second Issues Paper to put into context that within the disability community there are specific groups of people which are subject to welfare guardianships, property orders and/or enduring powers of attorney are positive to see. These include people with complex learning disabilities and severe cognitive impairments, and people experiencing acute or long term chronic mental illness.

Te Tiriti o Waitangi

13. I welcome the Second Issues Paper's robust discussion on Te Tiriti o Waitangi/the Treaty of Waitangi (Te Tiriti)⁵ and tikanga. I also welcome the consideration given to enabling Māori to live according to tikanga and to facilitating collective involvement in decision-making. I am interested to see how a new Act might make specific provision for the exercise of active protection, equity, options and tino rangatiratanga (in the context of adult decision-making arrangements).
14. I have outlined my own commitments to uphold Te Tiriti, its principles, and tikanga in my own processes and decision-making, as well as ensuring public sector bodies are upholding and applying these obligations⁶. From the perspective of my NPM role, I

⁴ *Concluding Observations on the combined second and third periodic reports of New Zealand*, United Nations Committee on the Rights of Persons with Disabilities, 26 September 2022, [Recommendation 22](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNZL%2fCO%2f2-3&Lang=en).
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNZL%2fCO%2f2-3&Lang=en,

⁵ I acknowledge there are two texts with different meanings.

⁶ *Strategic Intentions 2021-26*. Office of the Ombudsman. 2021.
https://www.ombudsman.parliament.nz/sites/default/files/2021-11/Strategic%20Intentions%202021-26_1.pdf

note that guidance and consideration of how to implement the Government's Te Tiriti obligations and incorporate tikanga into the treatment and conditions experienced by people in health and disability places of detention continues to develop and evolve. This includes the treatment and conditions experienced by people in detention who have been assessed as no longer having decision-making capacity or having fluctuating capacity. The discussion and recommendations resulting from the Law Commission's review of this topic are likely to assist in the development of guidance in this area.

Supported Decision Making

15. It is worth reiterating that as noted in my submission to the preceding preliminary issues paper, Article 12 of the Disability Convention recognises disabled people's right to exercise legal capacity on an equal basis with others. All measures must be taken to respect a disabled person's rights, will and preferences; and to prevent abuses, conflicts of interest, or undue influence over the exercise of legal capacity. Any restrictions on legal capacity must be of the shortest possible duration, and be subject to independent and impartial review and oversight. Article 13 (access to justice) of the Disability Convention should also be considered here, in terms of appropriate accommodations to facilitate access to justice on an equal basis with others.
16. In both my role as a member of the IMM, and in my submission to the Committee against Torture (2023)⁷ I have stated that genuine fulfilment of Article 12 of the Disability Convention requires a transformational shift in domestic legislation and practice; moving from substitute decision-making to supported decision-making, fully respecting disabled people's autonomy, and their right to appropriate decision making support. Access to diverse and guaranteed systems of supported decision-making is critically important for many New Zealanders, particularly those in the disabled community and those in places of detention. This is particularly so for people experiencing mental distress, and those with learning disabilities, who in some cases continue to be detained in institutional settings without their own consent, and lack independent support or advocacy.
17. I support the efforts within the Second Issues Paper to consider explicitly how any proposed changes could ensure better support for a person's rights, will and preferences and the role that these should play in decision making processes.
18. As I highlighted in my submission to the preceding preliminary issues paper, the sporadic momentum for building competence in supported decision-making in New Zealand is disappointing. There has not been the necessary urgency, resource or sustained focus needed to progress this fundamental right. It also remains an important consideration in the design of any competence building process that sufficient resource is provided to ensure that a broad range of persons and

⁷ *Submission to 77th session of the Committee against Torture, for consideration of the Seventh periodic report submitted by New Zealand.* Office of the Ombudsman.

<https://tbinternet.ohchr.org/layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCAT%2FINP%2FNZL%2F53074&Lang=en>

organisations are able to participate in supported decision making capacity initiatives. The IMM recommended in 2019 that the Government:

Ensure disabled people and their representative organisations have sustainable resources to lead the development of supported decision-making capability for disabled people, whānau, and duty bearers such as the health and disability workforce, legal profession, and financial institutions.⁸

19. In my submission to the preceding preliminary issues paper I stated that sufficient, diverse, and guaranteed systems of supported decision-making must be developed. While I acknowledge the decision-making supporter system proposed in the Second Issues Paper is envisioned as a key means to enable this, I would encourage the Law Commission to further consider what safeguards may be necessary to ensure that supporter system works in practice, and that it cannot lead to coerced or substitute decision-making.
20. I welcome the recognition, in sections such as 8.26 of the Second Issues Paper, that many people have limited awareness and accessibility to information about decision-making processes under the PPPR Act. I consider that efforts to produce explanations of arrangements and related processes in concise and plain language, and to make these available in a wide range of accessible formats would be a significant and important step towards addressing this, and in line with the requirements of Article 9 of the Disability Convention.

Decision-Making Capacity

21. In my submission to the preceding preliminary issues paper, I noted that decision-making capacity should not be viewed as ‘black or white’ – that is, people either ‘have’ or ‘do not have’ decision-making capacity. My engagement with disabled people has contributed to my understanding that a deterioration or change in capacity does not necessarily mean a loss of capacity. The Law Commission may wish to consider how assessment of decision making capacity could be used to identify and respond to the support needs of individuals to maximise their involvement in decision making, as well as provide greater specificity about the scope of decision-making capacity being assessed.
22. While the Second Issues paper acknowledges that a binary framing is a key criticism of the concept, it does not clearly indicate how this could be overcome in new legislation. Should the concept of decision-making capacity be retained in a new Act, it must clearly reflect the decision and time specific nature of capacity. I agree with the Second Issues Paper that it must be conceived in such a way that cannot result in discrimination of disabled people.

⁸ *Making Disability Rights Real, Whakatūturū Ngā Tika Hauātanga – 2014-2019*, New Zealand Independent Monitoring Mechanism, p.21 available: <https://www.ombudsman.parliament.nz/resources/making-disability-rights-real-2014-2019-0>

23. I welcome the efforts to explore ways to include support or reasonable accommodations (as defined in Article 2 of the Disability Convention) for people undergoing capacity assessment outlined in section 7.63 of the Second Issues Paper.
24. A key argument presented in the Second Issues Paper for retaining the concept of decision-making capacity in new legislation is that the concept continues to be used in other legislation and in common law rules. I consider it to be of critical importance that, if the use of the concept continues to be adopted in new legislation, work must be undertaken to ensure coherence across the health and disability system. Given the purpose of legislation in this area, it is essential that relevant law is compatible with each other and provide user-friendly and accessible pathways for people and their whānau.
25. In my role as NPM I have observed a lack of clarity and understanding of the relationship between legislation related to compulsory care such as the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Mental Health Act), and the PPPR Act, including which takes precedence. For example, where a person who has an activated enduring power of attorney (EPOA) in place is transferred to a hospital Mental Health for Older Persons Service (MHOPS) what requirements are there in relation to the Mental Health Act.
26. In relation to this, I consider it important that provisions for decision-making capacity are cognisant of, but distinct from, assessment and management of care needs. At present, processes under the PPPR Act often come into play when certain types of care or placement are considered to be required. For example, when a person is assessed as requiring secure dementia care. While this is to be expected, the outcome of one should not pre-determine the outcome in another and it should, in my view, be possible for people to have their care needs met in a suitable environment while being supported to retain their decision-making capacity under the law to the greatest extent possible.
27. I consider further thought could be given as to what appropriate safeguards may look like in any proposal. Wherever decisions are made which infringe on, or restrict, the rights of a person, it is appropriate that there are avenues for review, appeal and complaint. The Law Commission may wish to consider:
- a. Whether an assessment requires a second-opinion by a different assessor.
 - b. Whether an assessment requires review and approval by a responsible person or body⁹.
 - c. Whether there should be a right to request a second opinion, or independent review, of an assessment.

⁹ This may also include requirements to review where an assessment was made following a medical event, such as operation or infection that may affect capacity for a brief period.

- d. Whether a process for facilitating regular reviews of decision-making capacity, or re-assessment following a significant event or change, and robust monitoring mechanisms, as part of review, should be established.
 - e. The extent to which decision-making capacity assessments in relation to one decision/decision-making area informs other potential assessments or areas of decision-making.
28. The Second Issues Paper considers whether a new body, with oversight and guidance functions, should be established. If this is progressed, such a body may have a role to play in the matters outlined above. I would like to highlight at the outset that where new bodies are being established to exercise public power, the general expectation is that they should be accountable and subject to the Ombudsmen Act and official information legislation.¹⁰
29. On face value, expanding the range of people who may conduct, or be involved in, assessment may be an option. As the Second Issues Paper identifies, effective training and guidelines to ensure high quality assessment processes and outcomes would be important. Similarly, such a proposal may bolster the rationale for having effective oversight and accountability mechanisms.
30. Again the Law Commission may wish to consider the extent to which those involved in assessing decision-making capacity should reflect the nature and extent of the decision-making in question. For example, if a decision relates to a specific medical intervention, legal question or financial decision, then it may be appropriate for a person with a sound understanding of that matter, the options available and the consequences of different decisions be involved. Other factors to consider which may support proposals in this area, including around reasonable accommodations, may include:
- a. Whether an assessment is undertaken as a 'single-event' (i.e., a single assessment at a single time and place), or whether any assessment should take place over two or more sessions, with appropriate and reasonable accommodations in place.
 - b. Whether, as in some other jurisdictions¹¹, legislation should require the provision of guidance and/or training to specific parties, and if so, who should be responsible for this. The Second Issues Paper considers this in Section 16 and I support further development of these proposals.

¹⁰ The Legislative Design Advisory Committee's guidance states, '*All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987)*' unless '*there are compelling reasons for them not to*'. The Committee's guidance represents an important constitutional principle that entities performing a public function—whatever their nature— should be subject to the same accountability mechanisms that apply to public sector bodies.

¹¹ See, for example, the United Kingdom Mental Capacity Act 2005, at Sections 42 and 43.

Access to Justice and improving the Court Process

31. I support the Second issues Paper's consideration, in section 17.2, regarding the need for court processes to be accessible to the people who might use them. In addition to the need for effective safeguards, and for disabled people to have equal and effective safeguards (as outlined in section 17.3 of the Second Issues Paper), it is also important to consider the '*provision of procedural and age appropriate accommodations*' (Article 13 of the Disability Convention) in the delivery of these processes.
32. The intent of the current PPPR Act is that when a person cannot make their own decisions, or 'lack legal capacity'¹², then the court should make the least restrictive intervention possible in the life of the person and to enable or encourage the person to exercise and develop their capacity to the greatest extent possible¹³. This does not fully align with Article 12(3) to exercise legal capacity, and Article 12(4) of the Disability Convention that appropriate measures or supports be put in place to provide safeguards for a person to exercise their legal capacity including that their rights and choices (their will and preferences) be respected. Any new Act should comply with Article 12 of the Disability Convention.
33. Article 12 of the Disability Convention also states that appropriate measures shall be taken to provide access by disabled people to the support they may require in exercising their legal capacity. As noted in section 17.13 of the Second Issues Paper, concerns have been noted about access to this support, particularly if the person concerned has subsequent issues with their representative. Considerations within section 17.14 of the Second Issues Paper for options to address the availability of this support should align with the requirements of Article 13 of the Disability Convention including that appropriate training for staff be promoted in court processes.
34. As outlined earlier in my submission I consider that it is imperative that legislation properly reflects the right to liberty and security of person¹⁴ to ensure that any denial or infringement of this right is lawful, including with appropriate statutory safeguards. My submission on the Preliminary Issues Paper, and again here, highlight the challenges I see in this area, particularly in the aged residential care sector. As well as the matters identified and discussed in the Second Issues Paper, I would highlight the following:
 - a. There is a significant gap in clarity of roles and responsibilities, and at present it often falls to health and disability providers to administer a complex area of law in which they are understandably of varying degrees of familiarity, with limited oversight. Providers of aged residential care can be put in a difficult position when they are asked to provide secure care for a resident but the relevant legal processes have not been followed prior to admission. The involvement of service

¹² The term "legal capacity" is also the terminology used with Article 12 of the Disability Convention.

¹³ Section 8 of the PPPR Act.

¹⁴ As enshrined in the United Nations International Covenant on Civil and Political Rights, Article 9, the Disability Convention, Article 14, and the New Zealand Bill of Rights Act 1990, Section 22, amongst others.

providers in these processes could be perceived as a potential conflict of interest considering they are funded or receive payment for service provision. The Law Commission may wish to consider how new legislation could provide more clarity around roles and lines of accountability.

- b. Given the complexity (including administrative, time, and financial considerations) of processes under the PPPR, the provisions outlined in Right 7(4) of the Code of Health and Disability Services Consumers' Rights (the Code) are relied upon. The Law Commission may wish to consider whether this is appropriate, both in terms of what is envisioned by the Code and how this is used in practice. In particular, the circumstances and duration for which Right 7(4) is appropriate, and what if anything is required in terms of assessment of decision-making capacity, scope of application for the individual, and documentation. The Second Issues Paper does not appear to directly consider situations where decision making is required in an urgent or emergency situation, or pending the court ordered decisions/arrangements or activation of an EPOA that are discussed.

Enduring Power of Attorney

Establishing a register

35. I welcome the discussion in sections 13 and 14 in the Second Issues Paper on the role of the Enduring Power of Attorney (EPOA) and consider there would be significant benefit in establishing a centralised register under a new Act.
36. As NPM with responsibility for monitoring privately run aged residential care¹⁵, my expectation is that no person is deprived of their liberty unless in accordance with the law, and with all associated legal protections. I expect that when people are admitted to secure aged residential care there will be a thorough assessment with legal processes followed and documented appropriately. Further, my expectation is that residents are the primary decision-makers in processes and decisions around their care to the fullest extent possible¹⁶.
37. I routinely look at the legal basis for each resident's placement in a secure unit when examining aged residential care, which includes reviewing documentation of the basis for admission into secure care. I have found variable records of the legal authority for placement in secure aged residential care¹⁷, including decision-making capacity assessments and the 'consent' of an authorised representative or a court order.

¹⁵ [Designation of National Preventive Mechanisms, Gazette Notice 2023-go2676](#).

¹⁶ *Expectations for conditions and treatment of residents in health and disability places of detention – aged residential care*. Office of the Ombudsman. April 2024.
<https://www.ombudsman.parliament.nz/sites/default/files/2024-04/OPCAT%20Aged%20Care%20Expectations%202024.pdf>

¹⁷ This includes secure dementia care and specialised hospital/psychogeriatric care.

38. This includes EPOAs not being followed or activated, or being incomplete, or no records¹⁸ found on file at residences, and whānau and/or staff having difficulty in locating EPOAs¹⁹, and confusion within the system (including professionals) on how the legal framework works. In several instances I have highlighted my concerns about the lack of consistent or reliable processes to verify and record the legal basis for consent to a resident's placement in a secure unit. I consider that this may present a risk of arbitrary deprivation of liberty.
39. I note that these concerns have also been raised by the UN Working Group on Arbitrary Detention, which has highlighted that *'protection gaps exist [in] the reclusion of older persons, particularly those suffering from dementia, in secure facilities and rest homes.'*²⁰
40. I am aware of varying levels of understanding among aged residential care service providers, medical professionals, as well as residents, their whānau, and others of the current law and its operation as a safeguard against arbitrary detention. In particular, I am concerned that in some cases the relationship between care needs and decision-making capacity may currently be unclear, not well understood, or not well-practised.
41. It often falls to health and disability providers to administer a complex area of law with which they have varying degrees of familiarity, and with limited oversight. This is in addition to the fact that, as with other legislation, the current law under the PPPR Act largely provides for substitute rather than supported decision-making.
42. A centralised register (supported by national guidance) could potentially address these issues, with appropriate mechanisms in place to mitigate any matters regarding cost or privacy concerns. Consequently, if there is a robust, well resourced, equitable, culturally responsive, and accessible EPOA registration system in place this may reduce the need to apply for welfare guardianships or personal orders under the PPPR Act.

Decision-making under an EPOA

43. I note section 13.70 of the Second Issues Paper discusses the wide powers often conferred under EPOAs and raises questions regarding scope. My expectation is that people admitted to a secure health or disability facility under an EPOA are assumed to be the primary decision-makers and are still supported to make as many of their own decisions as possible, such as day-to-day living decisions and personal preferences. This is particularly so considering that these people may have fluctuating capacity and require different levels of support at different times.

¹⁸ Including EPOA or any other authority (such as a Welfare Guardian or other Court order).

¹⁹ For example via Te Whatu Ora, if this documentation is not held at facility level.

²⁰ Paragraph 101, United Nations General Assembly, Human Rights Council, Report of the Working Group on Arbitrary Detention: Addendum: Mission to New Zealand, A/HRC/30/36/Add.2, 6 July 2015.

44. Where this is not possible, my expectations is that the appropriate combination of the individual concerned, their authorised representatives, and whānau are informed about and consulted on decisions or actions that impact the individual²¹.
45. Unique challenges are also presented with an aging prison population, as well as people with insecure financial and housing status, who will likely not have an EPOA in place. Where a Welfare Guardian may be required, it is unclear who would hold these powers especially in cases where people are without whānau or community connections able or willing or financially able to do so.
46. I encourage the Law Commission to consider measures that safeguard a person's autonomy, ensuring EPOA powers are activated on a case-by-case basis.
47. When someone is assessed as not having decision-making capacity and detained in secure health or disability facilities (either with the consent of an EPOA/Welfare Guardian, or to receive compulsory treatment), this increases the requirement for autonomy to be exercised and promoted in other aspects of life. The Law Commission may wish to consider how this could be achieved via legislation through recognition of decision-maker support.

Nāku noa, nā



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Chief Ombudsman

²¹ *Expectations for conditions and treatment of residents in health and disability places of detention – aged residential care.* Office of the Ombudsman. April 2024.
<https://www.ombudsman.parliament.nz/sites/default/files/2024-04/OPCAT%20Aged%20Care%20Expectations%202024.pdf>