

## **He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke** **Review of Adult Decision-making Capacity Law**

### **TERMS OF REFERENCE**

#### **Project Overview**

Te Aka Matua o te Ture | Law Commission (the Commission) will undertake a review of the law relating to adult decision-making capacity.

#### **The current law**

Under the current law, if a person is assessed as wholly or partly lacking decision-making capacity, their exercise of legal capacity may be limited. So, if a person is assessed as lacking the ability considered necessary to exercise legal rights and duties, their decisions may not be recognised as having legal effect. In these circumstances, another person can be given authority to make decisions on their behalf. This is commonly referred to as substituted decision-making.

The central statute that addresses adult decision-making capacity is the Protection of Personal and Property Rights Act 1989 (PPPR Act). Other law also addresses issues to do with decision-making capacity. Together these cover a wide variety of decisions we may all face over the course of our lives.

The current law regulating decision-making capacity affects a wide range of adults. Those particularly affected include people with dementia, people with acquired brain injuries, people with neurodisabilities (including learning/intellectual disabilities), people with mental health needs and people with other neurological or physical disability or health needs that affect their decision-making abilities. People sometimes fall into more than one of these groups. A person's decision-making abilities may be affected only some of the time, to differing degrees at different points in time or in relation to different types of decisions. Further, experiences of impairment are influenced by societal barriers and, frequently, by multiple forms of discrimination (such as race, gender and sexual orientation).



## **Societal changes and the need for reform**

There have been significant developments since the PPPR Act was passed over 30 years ago. Issues have arisen with the operation of the PPPR Act and other relevant law. Societal attitudes about disability have also shifted, and in 2008 Aotearoa New Zealand ratified (committed to implementing) the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention). This has led to recognition that there are barriers in our society that disable people, which need to be removed to enable disabled people to participate equally in society. In addition, as our population ages an increasing proportion of New Zealanders will require support to make decisions about their lives. These developments have all contributed to widespread calls for reform of the law in this area.

Further, the PPPR Act may not be compatible with ao Māori perspectives, te Tiriti o Waitangi | the Treaty of Waitangi and the rights of tāngata whaikaha Māori (Māori disabled people), their whānau, hapū, and iwi.

The Disability Convention reaffirms existing human rights, the general human rights principles of equality and non-discrimination, and the specific right of disabled people to enjoy legal capacity on an equal basis. This specific right establishes obligations on government to provide the support required for people to exercise this right (commonly referred to as supported decision-making), and to provide associated safeguards. The Disability Convention also emphasises that disabled people must be involved in the development of law and policies that affect them.

The Disability Convention guides the New Zealand Disability Strategy 2016-2026. The Strategy is guided by the principles of te Tiriti o Waitangi, in particular partnership, participation and protection. Ensuring that disabled people are involved in decision-making that impacts them is also a guiding principle of the Strategy. In pursuing its vision of a non-disabling society, the Strategy recognises the need to provide appropriate support to those who require it to communicate or make decisions. The Strategy also recognises the need to put safeguards in place that protect disabled people in the exercise of their rights, regardless of whether they need support to make decisions.

## **The Commission's review**

It is in this context that the Commission will examine the law and associated practice relating to adult decision-making capacity.

We will consider how issues relating to adult decision-making capacity should be regulated in Aotearoa New Zealand. In particular, we will consider whether our law and practice strike an appropriate balance between:

- enabling people to make decisions about their own lives (including with appropriate support from whānau, family, carers and caregivers, other professionals or the wider community); and
- safeguarding people from harm.



## A note on language

The language we use about disability is important. Some words are understood differently by different people, there are differing views around preferred language, and these views may change over time.

The language used in our law will be part of our review and we will be seeking disabled people's views on this matter.

We acknowledge the status of te reo Māori and New Zealand Sign Language as official languages of Aotearoa New Zealand and will seek to use these languages in appropriate ways in conducting our review.

## Scope of the review

The review will include (but not be limited to) consideration of:

- Ao Māori perspectives on decision-making capacity and its regulation, including how the law should address any matters of particular concern to tāngata whaikaha Māori, their whānau, hapū and iwi, and Māori more generally.
- How the law should recognise and provide for te Tiriti o Waitangi | the Treaty of Waitangi.
- How the law should protect and promote human rights, including consideration of:
  - Aotearoa New Zealand's international human rights commitments, particularly under the Disability Convention and the United Nations Declaration on the Rights of Indigenous Peoples; and
  - Domestic human rights laws, particularly the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993.
- The language used in our law.
- How to assess a person's ability to make decisions about exercising legal rights and duties.
- How the law should facilitate and regulate the provision of support to people who require support to be able to exercise legal capacity on an equal basis.
- How the law should recognise the role of whānau, hapū and iwi, family, carers and caregivers, and the wider community in the provision of such support.
- How the law should regulate the exercise of legal capacity in rare circumstances where decisions may need to be made on behalf of a person.
- What safeguards the law should provide around measures relating to the exercise of legal capacity.
- How the law should regulate situations where people, whose ability to make decisions may be limited, are deprived of their liberty (other than in the context of criminal proceedings).



The review will consider various laws and legal instruments as they relate to the regulation of adult decision-making capacity, and how they interact.

In particular, this will include:

- Protection of Personal and Property Rights Act 1988
- Mental Health (Compulsory Assessment and Treatment) Act 1992
- Substance Addiction (Compulsory Assessment and Treatment) Act 2017
- Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights established under that Act

We are aware that the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 are the subject of separate reviews. We will consider these reviews and their implications for our work.

The Commission will not review capacity under criminal law (which includes the Intellectual Disability (Compulsory Care and Rehabilitation Act 2003)), but may however comment on the implications of our review for criminal law.

Similarly, we will not review capacity in relation to children and young people (as defined under the Oranga Tamariki Act 1989), but we may comment on the implications of our review for children and young people, their families, whānau, hapū and iwi, and carers and caregivers, particularly as young people transition into adulthood.

## **Review process and timing**

In addition to the Commission's general commitment to consulting the public on our reviews, the Disability Convention requires that disabled people are involved in the development of legislation and policies to implement the Convention.

We will work with disabled people, tāngata whaikaha Māori, and their representative organisations to facilitate accessible consultation processes and maximise the participation of those individuals and communities most directly affected by the laws relating to adult decision-making capacity.

Engagement will also include a public consultation process in 2022.

People can subscribe to updates on this review, including opportunities to be involved, on our webpage. Take this link to subscribe for updates [huarahi-whakatau.lawcom.govt.nz](https://www.huarahi-whakatau.lawcom.govt.nz).

The Commission launched its review with the publication of these Terms of Reference in October 2021.

The Commission intends to report to the Minister Responsible for the Law Commission, the Minister of Justice by the end of 2023.

