

He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke

Review of Adult Decision-making Capacity Law

Summary of Preliminary Issues Paper

1. This is a summary of the Preliminary Issues Paper for He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law. This review is being carried out by Te Aka Matua o te Ture | Law Commission (Law Commission).
2. This summary has the main information from each chapter of the Preliminary Issues Paper. It sets out the consultation questions about things we will consider in our review.

3. We want to hear your views. Your feedback will help us make recommendations on the law about affected adult decision-making. You can answer one, some, or all of the questions.
4. You can make a submission by:
 - Visiting our [project website \(https://huarahi-whakatau.lawcom.govt.nz\)](https://huarahi-whakatau.lawcom.govt.nz) and filling out a survey.
 - Emailing us at huarahi.whakatau@lawcom.govt.nz
 - Texting us at 029 77 99 009.Writing to us at:
Review of Adult Decision-making Capacity Law
Law Commission
PO Box 2590
Wellington 6140
5. Submissions close at 5pm on Friday 3 March 2023.

How will we use your submission?

6. Information given to the Law Commission is subject to the Official Information Act 1982 and the Privacy Act 2020. For more information about the Ombudsman and the Official Information Act, please see the Ombudsman's [website \(https://www.ombudsman.parliament.nz/\)](https://www.ombudsman.parliament.nz/) For more

information about the Privacy Act, please see the Privacy Commissioner's [website](https://www.privacy.org.nz/) (<https://www.privacy.org.nz/>)

7. If you send us a submission, we will:
 - Consider the submission in our review.
 - Keep the submission as part of our official records.
8. We may also:
 - Publish the submission on our website.
 - Refer to the submission in our publications.
 - Use the submission to inform our work in other reviews.
9. Your submission may contain personal information. You have the right to access and correct your personal information at any time.
10. You can request that we do not publish your name or any other identifying information in your submission. If you request this, we will not publish your name or any other information that we think might identify you or others on our website or in our publications.
11. If we receive a request under the Official Information Act that includes your submission, we must consider releasing it. If the request includes your personal information, we will consult with you.

12. If you have questions about the way we manage your submission, you are welcome to contact the Law Commission's General Manager (gm@lawcom.govt.nz).

Part 1: What is this review about?

13. We all make decisions every day. Some of these decisions may be minor or routine, like what to eat for breakfast. Others may be bigger decisions, like where to live or whether to have an operation.
14. In this review, we are considering how the law should respond when an adult's decision-making is affected.
15. There are many things that can affect a person's decision-making. These can include dementia, acquired brain injuries, learning disabilities and experiences of mental distress.
16. If an adult's decision-making is affected, the law may treat their decisions differently. This is based on a concept of 'decision-making capacity'. If a person is assessed not to have 'decision-making capacity', their decision might not have legal effect. Another person might be appointed to make the decision for them.

17. Many people think the law in this area needs to be reviewed to make sure it works well for people with affected decision-making and those around them. The Minister of Justice has asked the Law Commission to carry out a review to look into this.
18. The scope of our review is set out in a document called our ‘Terms of Reference’. This is available on our [website](https://huarahi-whakatau.lawcom.govt.nz/) (<https://huarahi-whakatau.lawcom.govt.nz/>) including in accessible formats.

Part 2: How will we approach language in this review?

19. The language we use in this review is important. Some words are understood differently by different people. There are also differing views about preferred language, and these views can change over time.
20. We need to decide on some consistent terms so our documents are clear. We know that people will have a range of views about what words we use and we want to know your thoughts.
21. When engaging with people individually we will seek to use their preferred language. Sometimes this may be different to the language we use in our written work.

22. Some important terms we propose using in our documents are:

- (a) Disabled person (rather than person with a disability).
- (b) Learning disability (rather than intellectual disability or cognitive impairment).
- (c) Tāngata whaikaha Māori (for Māori disabled people).
- (d) Person experiencing mental distress (rather than person with mental health needs, mental illness, or mental disorder).
- (e) Personal lived experience (for adults who have personal experience of having affected decision-making).
- (f) Lived experience as family, whānau member, friend or carer (for people who are a family or whānau member, friend or carer of someone who has personal experience of affected decision-making).

Consultation question:

- 1. Do you agree with the terms we propose to use in our review? If not, what changes should we make?**

Part 3: Why is reform needed?

23. Many people have called for reform of the laws and practice concerning affected decision-making. Some of the reasons are:

- (a) **Attitudes towards disability have shifted.** Many people think the law should reflect a ‘social model’ of disability, which focuses on identifying and removing social and physical barriers that stop disabled people from being fully included. Historically, disability was viewed in a ‘medical model’, where disability was treated as a problem to be ‘fixed’ by medical intervention.
- (b) **The current law does not generally take into account te Tiriti o Waitangi | Treaty of Waitangi, te ao Māori or tikanga Māori.** In recent decades, there has been greater recognition of the significance of te Tiriti, te ao Māori and tikanga Māori for law reform.
- (c) **Greater legal protection of human rights.** In recent decades, human rights have become more protected. In 2008, Aotearoa New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities.

- (d) **Changes in our population.** Aotearoa New Zealand continues to become more diverse. It is important that the law reflects the perspectives of people from different cultural backgrounds. Also, New Zealanders are living longer and so rates of dementia are expected to rise. The law needs to work for the increasing numbers of people who may experience affected decision-making.
- (e) **Greater understanding of the limitations of ‘decision-making capacity’.** Most current law treats people as either having or not having ‘decision-making capacity’. This doesn’t reflect real life. In practice, decision-making may be more affected at some times than others, or more affected for some decisions than others. This can also change over time.
- (f) **Particular issues with the current law.** There are practical issues with our current laws that need fixing.

Part 4: What are some important legal concepts and laws?

24. There are many legal concepts and laws about affected adult decision-making. This section explains some of the important ones.

‘Decision-making capacity’

25. ‘Decision-making capacity’ is a legal concept. It refers to the tests that our law uses to decide whether a decision made by a person with affected decision-making has legal effect. It often looks at whether the person understands the nature and consequences of their decision and can communicate the decision they have made.

‘Supported decision-making’ and ‘substituted decision-making’

26. When a person’s decision-making is affected, other people may be involved in their decisions. There are different ways they can be involved. People sometimes talk about these different ways by using the terms ‘supported decision-making’ and ‘substituted decision-making’.

27. Supported decision-making is where support is provided to someone with affected decision-making so they can make their own decision, based on their own will and preferences. Support can include things like being given time, explanations or advice to help make the decision.

28. Substituted decision-making is where one person makes a decision for another person. The decision is often made in the person's 'best interests'. Our current law has many substituted decision-making processes. For example, if a person is assessed not to have decision-making capacity to decide where they should live, another person can be appointed to make that decision for them.
29. Some people think substituted decision-making is never okay and that people with affected decision-making should always be able to make their own decisions. This is an important issue we are thinking about in our review.

Current law

30. In Aotearoa New Zealand, the law relating to adults with affected decision-making is in lots of places. These laws all use a similar approach of treating some people as not having 'decision-making capacity' to make decisions.
31. Some of the main laws in this area are:
- (a) **Protection of Personal and Property Rights Act 1988.** The focus of this Act is on what happens if a person is assessed as not having decision-making capacity. It allows Te Kōti Whānau | Family Court to make decisions, or

appoint another person to make decisions, about what happens to the person

- (b) **Mental Health (Compulsory Assessment and Treatment) Act 1992.** This Act sets out when people may be required to have mental health assessment and treatment.
- (c) **The Substance Addiction (Compulsory Assessment and Treatment) Act 2017.** This Act sets out the circumstances where a person may be required to have medical treatment if they have a severe substance addiction.
- (d) **Code of Health and Disability Services Consumers' Rights (the Code).** The Code concerns the rights of people using health and disability services. One matter the Code covers is the right to give informed consent, and what happens if someone is assessed not to have decision-making capacity to give informed consent.
- (e) **The common law (law that is found in court decisions).** The common law concerns things like what happens if a person with affected decision-making makes a contract.

32. There are other areas of law that are also important for us to think about, such as human rights.

Part 5: How are we considering te ao Māori and tikanga Māori?

33. We are considering tikanga Māori and Māori concepts that might be particularly relevant to adult decision-making.
34. The idea of ‘decision-making capacity’ in our current law might be said to reflect a ‘Western’ perspective focused on individual autonomy. Māori understandings of decision-making may place more emphasis on collective considerations.
35. At a wānanga we held, six tikanga principles were identified that may be particularly relevant to affected decision-making in te ao Māori:
 - (a) **Whanaungatanga.** This can be described as the reality of whakapapa-based relationships in te ao Māori. Whanaungatanga recognises that personal decisions are made in a collective context and so may involve whānau, hapū and iwi.
 - (b) **Aroha.** Aroha can broadly be described as love, compassion, sympathy, empathy and concern for others.
 - (c) **Mana.** Mana involves concepts of spiritual force and vitality, and recognised authority, influence and prestige. Mana derives from the collective,

and so carries with it an obligation to exercise it for collective wellbeing.

- (d) **Tiaki.** Tiaki can be defined as to care for or support. It is concerned with providing care for and preserving taonga or precious things.
- (e) **Wairua.** This can be defined as the inherent spiritual essence of a person. A related concept is ‘mauri’ or the life force of a person or object.
- (f) **Rongo.** In this context we refer to rongo as a state of internal balance or peace. A person’s decision-making might be affected by their spiritual and mental balance. Rongo might be considered to emphasise the importance of restoring that balance.

36. Three key concepts were also identified that may be particularly relevant to affected decision-making in te ao Māori. These are sometimes used as translations for Western concepts of the mind, but have broader meanings which contain emotional and spiritual ideas:

- (a) **Hinengaro.** This is sometimes translated as ‘mind’ but can be thought of more broadly as how a person communicates, thinks and feels.
- (b) **Wairangi.** This has been explained as describing someone who is confused or troubled such that their decision-making is affected.

(c)**Pōrangī**. This can refer to someone who is permanently in a state of deep unrest, and who therefore cannot make decisions for themselves or their whānau.

37. We understand that, while some Māori may primarily live according to tikanga Māori, this is not the case for all Māori. Some may feel different degrees of connection to te ao Māori, or there may be things that prevent them from living in accordance with tikanga Māori on a daily basis.

Some might find that it is hard to act consistently with tikanga Māori given the current law.

38. We are interested in how relevant tikanga Māori is to Māori today in relation to decision-making and, in particular, when someone's decision-making is affected. We are also interested in how the current law affects the ability to live in accordance with tikanga Māori, and how the law could be changed to address this.

Consultation questions:

2. Have we identified the tikanga principles and concepts most relevant to decision-making? If not, what changes should we make?

3. How is tikanga Māori relevant to you in relation to decision-making, and to affected decision-making?

4. In situations when someone's decision-making has been affected, have you and your whānau/hapū/iwi been able to act in accordance with tikanga Māori in the way you would want? If not, how could this be improved?

Part 6: What are the guiding principles for this review?

39. We use guiding principles to help us analyse issues and consider options for law reform.

40. We have developed seven guiding principles for this review. We think the law relating to adult decision-making should:

- (a) Respect and uphold the human rights of people with affected decision-making.
- (b) Uphold the Crown's obligations under te Tiriti o Waitangi.
- (c) Recognise and provide for tikanga Māori.
- (d) Empower people with affected decision-making to live flourishing lives.

- (e) Recognise and facilitate relationships built on trust.
- (f) Keep people safe from abuse and neglect, and promote accountability.
- (g) Be accessible and strike an appropriate balance between flexibility and certainty.

Consultation question:

5. Do you agree with the seven guiding principles we have developed? If not, what changes should we make?

Part 7: What decision-making arrangements are we thinking about?

41. When a person's decision-making is affected, other people might be involved in their decisions.

Sometimes people are involved in another person's decision without the law needing to step in. Other arrangements are set out in law.

42. People's experiences of affected decision-making can vary widely. We think the law will need to provide for a range of decision-making arrangements. We describe some possible ways below.

Decision-making supporters

43. Many people with affected decision-making are already supported informally to make decisions by friends and family. For example, someone might help their sibling to understand information about a decision or to communicate a decision.
44. There will always be an important role for this kind of informal decision-making support. However, we have heard that sometimes it can be difficult for informal supporters to help because they have no legal powers or status. For example, they might not be given access to personal information about the person they are supporting. We are thinking about how the law could make it easier for people to provide decision-making support.

Consultation question:

6. Has someone supported you to make a decision, or have you been a decision-making supporter to someone with affected decision-making? If so, how well do you think that process worked? What could be improved?

Advance directives

45. This is when a person records in advance what they want to be done if something happens to them in the

future, for example if they become unwell. Advance directives are sometimes used in Aotearoa New Zealand for healthcare decisions, but their legal status is unclear.

Consultation question:

7. Have you experienced making, or been involved in using, an advance directive? If so, how well did you think that process worked? What could be improved?

Enduring powers of attorney

46. This where a person appoints another person to make decisions for them if they are assessed not to have decision-making capacity in the future, for example due to developing dementia. These already exist in the current law but some people think they could work better.

Consultation question:

8. Have you made, or been involved in using, an enduring power of attorney? If so, how well did you think that process worked? What could be improved?

Making decisions for someone else under a court order

47. A court can make decisions for people whose decision-making is affected, such as where they must live or what medical treatment they must have. A court can also appoint someone else to make decisions on behalf of a person (for example a welfare guardian or property manager).
48. These kinds of court orders can only be made if the person is assessed not to have ‘decision-making capacity’. They can be made without the person’s consent.

Consultation question:

- 9. Have you been involved in a process of making decisions for someone else under a court order, or having decisions made for you under a court order? If so, how well did you think that process worked? What could be improved?**

Collective decision-making processes and decisions

49. Some people think the law should provide more ways for other people, like family and whānau, to participate in decision-making arrangements, or to jointly make

decisions with a person whose decision-making is affected.

Consultation questions:

- 10. Do you think there should be more ways for other people to be involved, in a more collective way, in decision-making arrangements when a person's decision-making is affected? If so, how?**
- 11. Do you think there are any other decision-making arrangements we should explore? If so, what are they?**

Making decision-making arrangements work better

50. We are also thinking about whether there are other things that could make decision-making arrangements easier or more effective for people with affected decision-making and those around them. These could be practical things like providing template documents, or offering training to supporters who are helping people to make decisions.

Consultation question:

- 12. What things might make decision-making arrangements easier or more effective?**

Part 8: What safeguards and accountability mechanisms might be needed?

51. Much of the time, decision-making arrangements for a person with affected decision-making work well and there are no issues. However, sometimes things can go wrong.
52. We are thinking about what safeguards and accountability mechanisms might be needed. This means what the law should do to keep people with affected decision-making and their supporters safe from harm and to hold people accountable for doing what they are supposed to.
53. To help think about when safeguards and accountability mechanisms might be needed if things go wrong, we have used some examples below.

The role of decision-making supporters

54. Hēmi has a learning disability and his mum supports him to make decisions. Hēmi's mum controls his money and how he spends it. Hēmi wants to make more choices about how he spends his money, but his mum is worried that he will not make 'responsible' decisions.

55. Hēmi's mum is supporting him informally, so there are no legal arrangements in place. This means that there are no formal safeguards and accountability mechanisms to manage difficult situations, such as when a person with affected decision-making wants to do something and their supporter disagrees.

Consultation question:

13. Do you think there needs to be safeguards or accountability mechanisms when a person with affected decision-making has an informal decision-making supporter? If so, what should they be?

Enduring powers of attorney and elder abuse

56. Priya has dementia and her son, Sam, is her attorney under an enduring power of attorney. Sam is not properly looking after Priya and is spending her money on himself. Priya's other children are concerned that Priya is experiencing elder abuse.

57. Some safeguards and accountability mechanisms for enduring powers of attorney already exist in law, such as requirements to keep financial records. We have heard that they might not always work well, or apply in every situation.

Consultation question:

- 14. Do you think there needs to be safeguards or accountability mechanisms when a person uses an enduring power of attorney? If so, what should they be?**

Moving to a rest home or care facility

58. Linda is in her 80s and her family are worried she is not able to look after herself at home. They do not have legal powers to make decisions for Linda, but they arrange for her to move into a secure rest home. She does not strongly say no to the move, but she does not agree either.
59. Once Linda is living in the secure rest home, she is effectively ‘detained’. This means that she cannot choose to leave. There are no specific legal processes for Linda’s move to long-term residential care or to make sure her detention is monitored.

Consultation question:

- 15. Do you think there needs to be safeguards or accountability mechanisms when a person moves to a rest home or care facility? If so, what should they be?**

Welfare guardian making decisions which might cause harm

60. Deborah has experienced a traumatic brain injury, and her aunt Lucy has been appointed as her welfare guardian to make decisions for her. Deborah gets sick and the doctors think she should take medication, but Lucy does not want to follow that medical advice. Deborah becomes more unwell.

61. There are existing safeguards and accountability mechanisms for welfare guardians and other people who are appointed by a court to make decisions for another person, such as requirements for appointments to be reviewed. We have heard that they might not always work well, or apply in every situation, like when a welfare guardian makes decisions that might cause harm.

Consultation question:

16. Do you think there needs to be safeguards or accountability mechanisms if a person has a welfare guardian? If so, what should they be?

Supporting people who provide support

62. Alex is supporting their elderly father to make decisions. Alex is doing their best to help but finds this role difficult. Alex's siblings say that Alex is doing a

bad job. Alex also has their own experiences of mental distress, and they are struggling to cope.

63. We have heard that the safety and wellbeing of decision-making supporters is important, both for the supporter, and for the person being supported. We have heard that there is not always enough support to keep supporters safe and well.

Consultation question:

17. Do you think there needs to be safeguards or accountability mechanisms to help supporters? If so, what should they be?

Part 9: is there anything else you would like to tell us?

64. There may be things that we have not covered that you think we should consider. We would like to hear anything else you think we should know for our review.

65. We also want to know how you found the process of making a submission, and whether there is anything we could do to make it easier for you to make a submission in the future.

Consultation questions:

- 18. Is there anything else you would like to tell us for our review?**
- 19. How easily could you access information about the review and how to make a submission? What could we do better?**
- 20. How easy did you find making a submission? What could we do better?**