BUDDLE FINDLAY
NEW ZEALAND LAWYERS

Informed consent.

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Iris Reuvecamp

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Overview

- Key principles of informed consent
- What happens when a person is no longer able to consent
  - Emergency Situations
  - Advance Directives
  - Medically Initiated Not for CPR orders
  - Court Orders
  - Enduring Powers of Attorney/Welfare Guardians
  - Right 7(4)

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The law relating to consent in NZ

- Code of Health and Disability Services Consumers' Rights ("Code of Rights")
- Common Law
- NZ Bill of Rights Act
- Crimes Act

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Key principle

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body"

(Schloendorff v Society of New York Hospital 105 NE 92 (NY, 1914), p93)

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Code of Rights

- A major source of the law on informed consent in NZ:
  - Right 5 – Right to effective communication
  - Right 6 – Right to be fully informed
  - Right 7 – Right to make an informed choice and give informed consent
- By law, all providers must comply with the rights set out in the Code of Rights when providing health and disability services

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Common Law

"An individual patient must, in my view, always retain the right to decline operative investigation or treatment however unreasonable or foolish this may appear in the eyes of his medical advisers"

(SMITH V AUCKLAND HOSPITAL BOARD [1965] NZLR 191 (CA), P219, PER T A GRESSON J)

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New Zealand Bill of Rights Act

- Section 10 – “Every person has the right not to be subjected to medical or scientific experimentation without that person’s consent”

- Section 11 – “Everyone has the right to refuse to undergo any medical treatment”

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Crimes Act

- **Assault** – “means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly....”
- **Unless there is a lawful excuse** – e.g. consent or other lawful basis for proceeding in the absence of consent

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What obtaining informed consent means in practice

- A competent person…
- Making a voluntary choice…
- About information communicated effectively…
- Which is sufficient to make an informed decision

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When a person can no longer consent

- Emergency Situations
- Advance Directives
- Medically initiated Not for CPR orders
- Enduring Powers of Attorney/Welfare Guardians
- Court Orders
- Right 7(4)

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Emergency situations

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Emergency situations

- Treatment can be provided in an emergency
- Must be necessary to preserve life, health and well being and is in the best interests of a person
- However:
  - Treatment will not be justified if it is contrary to the known wishes of a competent person
  - The treatment must not be inconsistent with a valid Advance Directive given by a person
  - The treatment must be, and be no more than, what a reasonable person would expect to receive in all the circumstances

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Advance Directives

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Advance decisions regarding CPR

- **By resident/patient - Advance Directive**
  - Individual autonomy and right to refuse services/treatment
  - Still valid even if medically appropriate to attempt resuscitation
  - In effect this is a "patient initiated Not For CPR order"
- **By doctor – Not For CPR Order**
  - In the course of treatment planning
  - Ideally following discussion with patient and/or family
  - CPR deemed clinically inappropriate

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Advance directives

- Everyone has the right to use an advance directive in accordance with the common law (Right 7(5) of the Code of Rights)
- "Advance directive" means a written or oral directive by which a person makes a choice about a possible future health care procedure that is intended to be effective only when he or she is not competent

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Advance directives

- An advance directive will be **valid** if the patient:
  - was **competent** to make the advance directive at the time it was made;
  - made the advance **free from undue influence**;
  - was **sufficiently informed** at the time the advance directive was made; and
  - **intended the advance directive to apply in the current circumstances**

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Advance directives – common examples

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Advance directives – common examples

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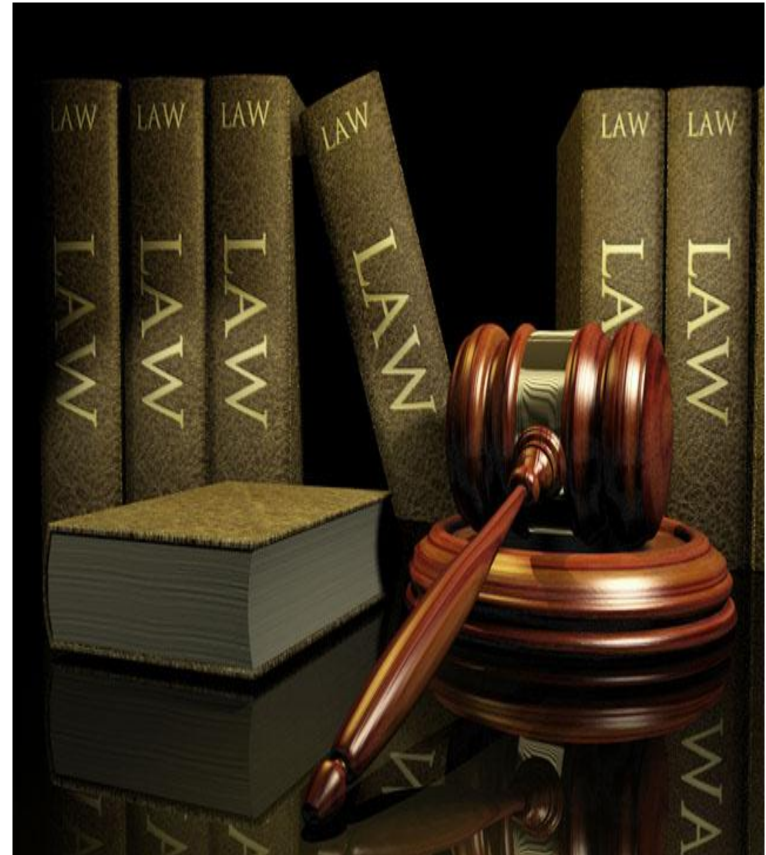
Advance directives

- Law on advance directives still relatively untested in NZ
- Need to be sure about circumstances in which advance directive was provided where a patient is refusing treatment
- If no concerns about validity of advance directive, must comply



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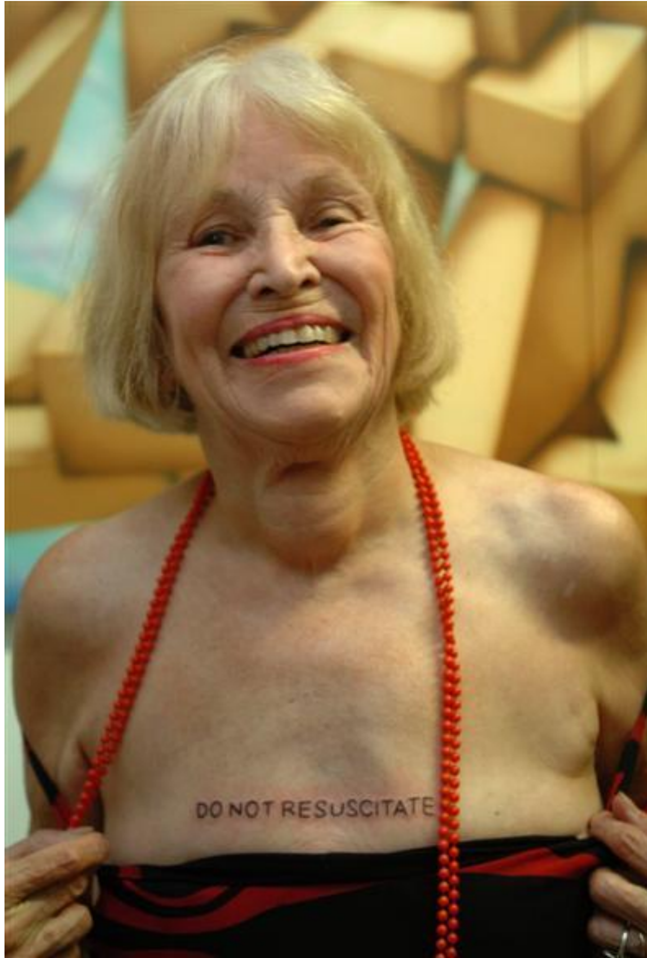
Grandmother's chest tattoo makes wishes clear



- "*I wanted to add 'If you do I will sue' at the bottom of it, but you have to stop at some point*"
- St John's Southern Region operations manager Doug Third said a tattoo saying "*Do not resuscitate*" would not stop him from saving a life.
- "*I would hesitate for a second but I would still do my job*"

(Otago Daily Times)

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Medically Initiated Not for CPR orders

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Medically initiated Not for CPR orders

- **Medical decision** not to attempt CPR in the event of a cardiac arrest
- CPR not clinically indicated or appropriate
- Ideally follows discussion with patient and/or family
- Is part of the patient’s future treatment plan
- Does not require the patient’s consent

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Health and Disability Commissioner

- Helpful to have different standard forms for Advance Directives by consumers regarding resuscitation, and Do Not Resuscitate Orders put in place by clinicians as part of the treatment plan
- Health practitioners are NOT required to provide CPR where it is not clinically indicated or appropriate
- A standard policy to attempt CPR on ALL residents/patients may not be good medical or legal practice

"not for the good that it will do, but that nothing may be left undone on the margin of the impossible" *(T S ELLIOT)*

(NZ Resuscitation Council Consultation Meeting, 6 April 2009)

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Can family consent on an incompetent adult's behalf?

- Being someone's next of kin does not give you any specific legal rights when that person is alive
- A family member CANNOT consent on a person's behalf unless they hold an Enduring Power of Attorney in relation to personal care and welfare or have been appointed a Welfare Guardian

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Orders and powers under the PPPR Act

- The Act allows a competent person to give an "**enduring power of attorney**" to another person in relation to personal care and welfare and/or property matters
- The PPPR Act provides for a court to:
  - appoint a **Welfare Guardian**
  - make **personal order(s)** that deal with the care and welfare of the person in question
- A court may also make a personal order for the administration of property or appoint a property manager

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What is an Enduring Power of Attorney?

- The purpose of a power of attorney is to enable a person to grant someone else the power to act on their behalf in relation to their property and/or their personal welfare
- Difference between a "power of attorney" and an "enduring power of attorney" ("EPOA")
- The prime characteristic of an **EPOA** is that it **continues to have effect after the donor becomes mentally incapable**

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Creation of an EPOA

- An EPOA must be in the prescribed form
- Must be signed by the donor and the attorney
- Signatures must be witnessed by an independent lawyer, legal executive, or employee of a trustee corporation
- The witness to the donor's signature must complete a certificate confirming that:
  - they have explained the effect of the EPOA
  - there is no reason to suspect incapacity of the donor
  - they are independent

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EPOA - Property

- May cover part or whole of property
- Donor may impose conditions
- Depending upon donor's instructions may be effective while donor has capacity, or upon incapacity

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EPOA – Personal Care and Welfare

- Donor may appoint **one** attorney to act in a general or specific manner in respect of personal care and welfare
- The donor may impose certain conditions and restrictions
- **Only effective upon incapacity**
- Attorney must not act on a "significant matter" unless a "relevant health practitioner" has certified (or the Court has determined) that the donor is mentally incapable
- Certificate must be in the prescribed form

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Duties of an EPOA for care and welfare

- Obligation to act in the donor's best interests
- Specific duties include a duty to:
  - encourage donor's independence
  - re-integrate into the community as much as possible
  - consider donor's $ situation when making decisions
  - consult donor and any persons identified in the EPOA
  - provide information on request of listed person
  - consult with property attorney (mutual)
- May have regard to donor's advance directive but attorney's powers subject to (statutory) limitations

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Limits on EPOA for care and welfare

- An EPOA for personal care and welfare has **NO** power to:
  - Make decisions about entering marriage or divorce
  - Make decisions about adoption of donor's child
  - Refuse consent to standard medical treatment to save life or prevent serious damage to health
  - Consent to ECT
  - Consent to surgery which destroys any part of the brain or brain function for the purpose of changing the person's behaviour
  - Consent to experimental treatment
- Same limits apply to welfare guardians

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Welfare Guardians

- Effectively the same as an EPOA for care and welfare, but **court appointed**
- Before appointing a welfare guardian the Court must be satisfied that:
  - The person **wholly** lacks capacity to make *or* communicate decisions relating to any particular aspect(s) of their personal care and welfare; and
  - Such an appointment is the *only* satisfactory way to ensure the appropriate decisions are made
- Statutory limitations apply (same as EPOA)

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Provision of services

- **"Consumer"** in the Code of Rights means a health consumer or a disability services consumer

and

- **Includes** a person entitled to give consent on behalf of that consumer for the purposes of:
  - Right 5 – Right to effective communication
  - Right 6 – Right to be fully informed
  - Right 7(1) and 7(7) to (10) – Right to make an informed choice and give informed consent, right to refuse or withdraw consent to services, removal of body parts
  - Right 10 – Right to complain

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What this means in practice

- The **consent** of the EPOA or WG must be obtained before carrying out any medical treatment on the person for whom the EPOA or WG is acting
- The EPOA or WG:
  - Must be kept informed about the person's condition
  - Must be involved in decisions about the person's care
  - Is entitled to the information the person themselves would require to make an informed decision

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What this means in practice

- The EPOA or WG:
  - Must be given accurate answers to questions about the person's care and condition
  - May refuse services and withdraw consent (subject to the statutory limitations)
- The EPOA or WG can only consent to treatment that falls within the ambit of the empowering document

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What this means in practice

- A decision by an EPOA or WG has the same effect as if it had been made by the person themselves
- The person for whom the EPOA or WG is acting does not have to agree
- Do not have to inquire into whether the person, or any other person, concurs with the decision
- Consent not affected by notice that the person or any other person does not agree with the decision

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Responsibilities when providing care

- Staff should **always** check the document empowering the EPOA or WG
- If in any doubt seek advice
- A copy of the document and any certificate of mental incapacity must be filed in the person's clinical record
- Document the consent process as in the same way as if the patient was making the decision themselves

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Responsibilities when providing care

- Remember - EPOA only takes effect once a person becomes mentally incapable:
  - Still need to assess competence of a person to consent or refuse medical treatment on own behalf
  - Significant matter? Need certification of incapacity before EPOA can act
  - EPOA ceases to be operative if the person regains capacity
  - Right 7(3) - a person with diminished competence retains the right to make an informed choice and give informed consent to extent appropriate to his or her level of competence

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Case study – HDC 08HDC17105

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Case study

- A patient with dementia was being cared for in dementia unit. Over time, behavioural problems increased and the patient was unwilling to take medications, to shower or wash, and often refused routine cares
- Two daughters were recorded as holding EPOA, allowing them to consent on patient's behalf if she was not competent to do so
- In addition, all four sisters were actively involved in their mother’s care and, at times, expressed differing views on what should be done

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Case study

- Patient became aggressive and medical staff recommended a PRN medication regime to assist with personal cares
- Care manager sought consent of EPOAs
- One EPOA gave 'conditional' consent to medication regime
- Care manager was aware of family's wishes to be consulted on proposed changes before decisions were made but took no steps to clarify the consent

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Case study

- Family later requested a meeting to review medication:
  - Agreed to PRN medication provided family notified before use
  - A week later family requested medication be stopped because patient was 'drowsy'
  - Care manager told medical staff that family had 'insisted' medication not be used
  - Family later stated had only wanted a lower dose used
  - Doctor increased dosage to manage patient
- Family complained to HDC about consent to the medication regime

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Case study

Mrs A had dementia and her condition was clearly deteriorating. Informed consent was needed for her treatment plan, including the administration of medication but ***there was a lack of clarity about who was legally entitled to give consent on Mrs A's behalf*** *when consent was needed.*

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Case study

Conditional consent to medication regime insufficient:

> *Mrs E advised that if the rest of the family disagreed she would abide by their decision…**This is not adequate informed consent and there was a missed opportunity here to clarify the situation***

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Case study

- The Deputy Commissioner noted that it was not unusual for family members to have different views
- Rest homes and dementia units need to have clear strategies for dealing with this:

> *Ideally there should be dialogue with all interested parties and a plan of treatment agreed, but in this case there was clear failure…to recognise where this was appropriate, and to properly manage the ongoing consent process, particularly once difficulties occurred…*

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Case study

- The Deputy Commissioner noted that staff in the dementia unit:

  ..should and must know the requirements of the PPPR Act. Staff should have communicated better with the family about requirements, ***such as the need to have only one EPOA, and that it was not appropriate to refuse standard medical treatment.***

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Case study

- The Deputy Commissioner noted that:

  Rather than allowing the input from various family members to impede the provision of good care to Mrs A, [the care manager] ***should have sought consent from one EPOA alone.*** *The EPOA holder needed to be made aware that although they should be informed and consulted…they cannot refuse consent to standard medical treatment*

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Case study

- The Deputy Commissioner also noted that the dementia unit:

  > *…could have sought the direction of the court under s102(2)(a) of the PPPR Act when Mrs A's daughters disagreed about the proposed treatment options, particularly as this conflict was affecting the provision of care.*

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Case study

- The Deputy Commissioner found that:
  - The Facility Manager, Care Manager and rest home had breached the Code of Rights
  - The rest home was found vicariously liable for the managers' breaches of the Code

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Court orders

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Personal Orders

- Where a person **wholly or partly lacks mental capacity** to manage their affairs a court may make personal orders authorising certain actions or allowing others to manage those affairs, e.g:
  - Particular medical advice or treatment
  - Rehabilitative, therapeutic, or other services of a specified kind
  - Living arrangements specified in the order
  - That the person shall enter, attend at, or leave an institution specified in the order (but not a psychiatric hospital)
  - Appointing a welfare guardian to make decisions about the person's care and welfare
  - To administer property

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Personal Orders

- Personal orders expire on the date specified in the order or after 12 months (sooner where the effect of the order is spent)
- To assist in the implementation of a personal order a court may make further orders as are considered necessary

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Orders in relation to property

- Two types of property orders:
  - **For smaller amounts of property –** a court can make a **personal order** appointing a person to administer the property:
    - Property must be worth no more than $5,000, or
    - Income or benefit no more than $20,000 a year
  - **For larger amounts of property –** a court can make a **property order** appointing a Property Manager

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Interim orders

- The Court is able to make interim orders:
  - No more than six months for a personal order;
  - No more than three months for a property order
- Interim order may be made if considered necessary pending final determination of the application (e.g. where urgent medical treatment is required)
- There will be a hearing for an interim order if any of the parties involved requests it

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Case study – HDC 08HDC20957

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Case study

- Ms A was a 43 year old woman with a complex personal history, which included severe psychological trauma, depression and alcohol abuse
- She was admitted to hospital in May 2007 in a confused state and was assessed as not having the capacity to make decisions relating to her personal care and welfare and therefore she could not give informed consent
- It was decided that an application should be made for a court order to place Ms A in an appropriate residential facility
- The application was prepared but never filed with the Court

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Case study

- In August 2007, Ms A was discharged from hospital and placed at a secure rest home caring for older people with dementia
- Ms A understood that she was legally required to live there
- She was assessed three times over the following ten months, and on each occasion she expressed her wish to leave the home
- Nearly a year after her admission, Ms A was assessed as being too well to be in a secure unit, and competent in relation to her personal care and welfare

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Case study

- Staff discovered that there was no court order and therefore no legal requirement for Ms A to remain at the home if she did not wish to be there
- Ms A complained to HDC that she had been incarcerated in a secure rest home for more than a year without legal authority

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Case study

- The Commissioner reviewed the care provided by the DHB, the Trust involved in placing Ms A in the home, and the residential facility
- The DHB acknowledged a breakdown in its processes and identified a number of contributing factors including:
  - The lack of a formal process to deal with PPPR Act application
  - Poor communication between its staff/teams
  - That no individual or team was responsible for coordinating the application

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Case study

- The DHB breached Rights 4(1) and 4(5) for:
  - Failing to have adequate systems in place to deal with the court order application – no follow up process
  - Failing to take sufficient or appropriate action in relation to Ms A's discharge
  - Poor communication and co-operation between staff and with other providers

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Case study

- The breakdown in the DHB's processes had significant and unacceptable consequences for the patient:

…the challenges she faced made her particularly vulnerable. Those working with her needed to pay careful attention to her needs and to observing and protecting her rights. This did not occur…she was seriously let down by health and disability services.

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Case study

- The Trust and the home breached Right 4(1) by:
  - Failing to verify Ms A's legal status
  - Failing to ascertain who could consent on her behalf and who it should consult and communicate with in relation to her residential placement

…in order to establish a legal basis for it to provide services to Ms A [the Trust] needed to promptly obtain verification that a court order had been made and be aware of the conditions set out in the order. This could be done relatively simply by contacting the Family Court. A copy of the order needed to be on Ms A's file

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Case study

- The Commissioner noted:

  It is deeply disturbing that a provider of services for consumers where competence may be at issue, and its staff, should apparently have so little understanding of the legal requirements

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Case study

- The Commissioner also noted:

 …What happened to Ms A should be a salutary lesson to all health and disability providers to be cognisant of the legal basis for providing services, and the associated responsibilities.

- The Trust and the home were referred to the Director of Proceedings

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Right 7(4) of the Code of Rights

HDC HEALTH & DISABILITY COMMISSIONER
TE TOIHAU HAUORA, HAUĀTANGA

Your Rights when receiving a Health or Disability Service

- **Respect**
  You should be treated with respect. This includes respect for your culture, values and beliefs, as well as your right to personal privacy.
- **Fair Treatment**
  No one should discriminate against you, pressure you into something you do not want or take advantage of you in any way.
- **Dignity and Independence**
  Services should support you to live a dignified, independent life.
- **Proper Standards**
  You have the right to be treated with care and skill, and to receive services that reflect your needs. All those involved in your care should work together for you.
- **Communication**
  You have the right to be listened to, understood and receive information in whatever way you need. When it is necessary and practicable, an interpreter should be available.
- **Information**
  You have the right to have your condition explained and to be told what your choices are. This includes how long you may have to wait, an estimate of any costs, and likely benefits and side effects. You can ask any questions to help you to be fully informed.
- **It's Your Decision**
  It is up to you to decide. You can say no or change your mind at any time.
- **Support**
  You have the right to have someone with you to give you support in most circumstances.
- **Teaching and Research**
  All these rights also apply when taking part in teaching and research.
- **Complaints**
  It is OK to complain – your complaints help improve service. It must be easy for you to make a complaint, and it should not have an adverse effect on the way you are treated.

If you need help, ask the person or organisation providing the service. You can contact the local advocacy service on 0800 555 050 or the Health and Disability Commissioner on 0800 11 22 33 (TTY).

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Right 7(4) of the Code of Rights

- A consumer who is not competent to make an informed choice

  AND

  there is no person entitled to consent

  AND

  - Treatment is in best interests of the consumer; and
  - Reasonable steps to ascertain consumer's views; and
  - Views of consumer or other suitable person taken into account

"Wake up! You've got to take a new disability test..."

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Questions?

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