



HE AROTAKE I TE TURE MŌ NGĀ HUARAHĪ WHAKATAU A NGĀ PAKEKE REVIEW OF ADULT DECISION-MAKING CAPACITY LAW

KEY TOPICS SUBMISSION FORM

Te Aka Matua o te Ture | Law Commission is reviewing how the law should respond when an adult's decision-making is affected. We are consulting on our Second Issues Paper. Submissions are due by 5pm on 21 June 2024.

This submission form contains information and consultation questions from our Key Topics. You can answer one, some, or all of the questions.

The content in this submission form is grouped by the four Key Topics. There are links to the Key Topics at the start of each section in the form.

Please tell us about yourself

You do not have to give any information about yourself. However, the information we ask for below is useful to us when we consider submissions. It will also help us if we would like to contact you to ask questions about your submission.

Name (optional):

Click or tap here to enter text.

Email (optional):

Click or tap here to enter text.

Alternative contact details if preferred to email, such as phone or post (optional):

Click or tap here to enter text.

In which category are you making a submission to the Law Commission?

- Personal On behalf of an organisation

If you selected 'personal' above, please give us some more information by choosing the best fit from the categories below (you can select more than one):

- Lived experience Lived experience as family or whānau member
 Legal professional Health professional
 Service provider Government organisation
 Advocacy organisation Academic
 Other [please specify below]

NA

If you selected 'on behalf of an organisation' above, please tell us the name of your organisation (because we will publish the names of organisations that make submissions) and give us some more information by choosing the best fit from the categories below (you can select more than one):

New Zealand Aged Care Association (ACA)

- Legal professional Health professional
 Service provider Government organisation
 Advocacy organisation Academic
 Other [please specify below]:

Click or tap here to enter text.

Please tick if you wish to request that we do not publish your name or any other identifying information in your submission.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. However, if you make a submission on behalf of an organisation, we will publish the name of the organisation.

Please tick if you would like to receive future updates on this review by email.

Please note: by sending us your submission, you confirm that you have read and understood how the Law Commission will use your information (see below).

How we will use your information

Information you give us is subject to the Official Information Act 1982 and the Privacy Act 2020.

For more information about the Official Information Act, please see the [Ombudsman's website](#). For more information about the Privacy Act, please see the [Privacy Commissioner's website](#).

If you send us a submission, we will:

- Consider the submission in our review.
- Keep the submission as part of our official records.

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.

Your submission may contain personal information. You have the right to access and correct your personal information at any time.

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.

If we receive a request under the Official Information Act that includes your submission, we may be required to release it. If you have requested that we not publish your name or other identifying information, we will not release that information under the Official Information Act without consulting with you.

If you have questions about the way we manage your submission, you can contact us at huarahi.whakatau@lawcom.govt.nz

About the New Zealand Aged Care Association (ACA)

This submission is from the New Zealand Aged Care Association (NZACA), the peak industry body for the aged residential care (ARC) sector in New Zealand. We represent over 90 percent of the ARC bed supply in the country. Our members' services include four categories of care – rest home, hospital, dementia and psychogeriatric, as well as short-term care, such as respite.

Thirty-four percent of services are operated by publicly listed companies, and the remaining 66 percent are made up of religious institutions, charitable trusts, family-owned, not-for-profits, and privately owned facilities.

We provide leadership, policy, and advocate for a sustainable and thriving aged residential care sector where every person can access care where and when they need it.

We offer professional development, research, information, and publications to help our members make informed business decisions, improve capability (both business and clinical) and keep them up to date with sector developments.

The ACA welcomes the opportunity to make a submission to Te Aka Matua o te Ture | Law Commission and assist in shaping the very important law on adult decision-making capacity.

Key Topic 1: Court-appointed representatives

[Read Key Topic 1](#) here before completing this section

In this Key Topic, we ask questions about how the role of court-appointed representatives, like welfare guardians and property managers, could be improved.

Q1.1	<p data-bbox="304 524 1182 562">In what kinds of situations might a representative be needed?</p> <p data-bbox="304 595 1369 1346">Aged residential care (ARC) facilities across the country provide varying levels of service across four care level units – rest home, hospital, dementia and psychogeriatric. For admission into dementia or psychogeriatric units, we heard from our members that most facilities do not admit patients if they do not have an EPOA in place. A few facilities said they do at the moment, with assurance from the family that they will get a court-ordered arrangement. This is a part of a contractual obligation for the facilities. For ARC, currently, Designated Auditing Agencies (DAAs) regularly audit all care homes on behalf of HealthCERT/Ministry of Health (MOH). The MOH DAA Handbook, under Consumer Rights, states that, in relation to specialist dementia services, an auditor shall check that “all residents have an Enduring Power of Attorney that has been enacted, where an EPOA is not in place the provider is supporting actions to have one appointed.”¹</p> <p data-bbox="304 1384 1369 1803">However, given that the ‘ageing at home’ strategy has resulted in patients entering aged care at relatively later stages in life with increasing acuity, we have heard from some of our member facilities that a shift from the ‘best interest’ to the ‘rights, will and preferences’ approach, would strengthen the need for residents to mandatorily have an EPOA at the time of admission into all levels of care. The EPOA can be activated at a later date if need be, as their conditions, including cognitive abilities, can sometimes deteriorate rather rapidly due to various medical conditions.</p>
------	--

¹ Ministry of Health. (2023). [Designated Auditing Agency Handbook: Ministry of Health Auditor Handbook \(revised 2023\)](#). Wellington: Ministry of Health.

	<p>A 2016 report by the Human Rights Commission, NZ, noted that about 65% of ARC residents lacked capacity to consent to their residence in the facility.²</p> <p>Given what we have heard from our members, the Association strongly recommends that a new Act make it essential for any person seeking admission into ARC across all four levels to have an EPOA, or at the very least, a court-ordered representative. At the dementia and psychogeriatric levels of care, the representative or attorney can be closely consulted to help interpret the person’s will and preferences. At the rest home and hospital levels of care, the representatives can be consulted if and when the care staff notices a decline in their cognitive functions, either as a result of onset of dementia made wareware, or other medical conditions.</p> <p>Further, we recommend that the new Act include provisions to ensure equity of access to have court-ordered arrangements and EPOAs in place.</p>
Q1.2	<p>What factors should a court consider in deciding whether to appoint a representative?</p> <p>We agree with the Second Issues Paper’s recommendation under 9.34 which outlines four possible circumstances when a person might need another person to make decision for them. We believe that the identified factors, including the need to prevent significant harm or medical risk, to the person, are valid factors, particularly from the point of view of aged care providers.</p>
Q1.3	<p>What should a representative consider when working out a represented person’s will and preferences?</p> <p>In very rare circumstances do ARC providers themselves work as a representative. As such, we do not believe we have the sufficient information or experience to comment on this.</p>

² Fisher, M., & Anderson-Bidois, J. (2018). [This is not my home](#). New Zealand Human Rights Commission.

Q1.4 When might it be impossible or inappropriate to make a decision based only on a person's will and preferences?

At an ARC facility, there may be several instances when it might be impossible to make a decision based only on a person's will and preferences. Some of those may include:

- ARC location and conditions: A person may have expressed a desire for what kind of conditions and where they'd like to go, should they reach a point in life where they need ARC admission. ARC providers across the country have a contract with Health New Zealand | Te Whatu Ora which outlines the terms for delivery of services to older people.³ A person may wish to live at a particular place with specific facilities, but it may not be possible due to financial reasons, or lack of an available bed in the facility, or due to misalignment with the Te Whatu Ora agreement. There may also be other reasons pertaining to the primary carer's financial and personal well-being. In addition, a person may have expressed certain conditions for their stay (for instance, having a full-time carer, or having a family member live with them) which may not be possible due to financial or other reasons concerning the rights and will of the carer/family member as well.
- Emergency medical situations requiring immediate action: During a medical emergency, the health practitioner may not have adequate time to consult the representative to make a decision based on the person's will and preferences. At such instances, the new Act must recognise the right of the health practitioners, legally empowered under the Right 7(4) of the Code of Rights, to take necessary decisions for providing health and disability services without consent. We implore that the ongoing review of the Health and Disability Commission Act and Code 2024⁴ also align with the

³ Te Whatu Ora – Health New Zealand. (2023). [Age-Related Residential Care Services Agreement](#).

⁴ Health & Disability Commissioner. (2024). [Review of the Act and Code 2024](#)

	<p>purposes of the new Act to eliminate any unintended consequences for aged care providers in their delivery of care.</p> <ul style="list-style-type: none"> • When doing so might potentially increase a risk of medical harm to the person or persons around them: For instance, a resident may wish to live with a long-term partner or family member, but may be prone to aggressive behaviour potentially risking their personal carer’s well-being. At such an instance, representatives must acknowledge the health practitioner’s (we recommend a GP or mental health nurse) judgement and recommendation, which may include admitting the person in a secure facility in ARC. • When a person’s will and preferences on a particular subject requiring decision may not be clearly known by the representative: In such cases, in the context of providing medical care, health practitioners and care providers in ARC must be encouraged to act under Right 7(4) of the HDC Code⁵.
Q1.5	<p>How should representatives make decisions in these circumstances?</p> <p>In very rare circumstances do ARC providers themselves work as a representative. As such, we do not believe we have the sufficient information or experience to comment on this. However, from the ARC providers perspective, the Association would strongly emphasis on encouraging health practitioners to act under Right 7(4) of the HDC Code.</p>
Q1.6	<p>What steps should a representative take when making a decision for a represented person?</p> <p>In very rare circumstances do ARC providers themselves work as a representative. As such, we do not believe we have the sufficient information or experience to comment on this.</p>

⁵ Health & Disability Commissioner. [Health and Disability Commissioner \(Code of Health and Disability Services Consumers' Rights\) Regulations 1996.](#)

Q1.7	<p>How should representative arrangements be monitored to make sure they're working well?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>
Q1.8	<p>Is there anything else you would like to tell us about the role of court-appointed representatives?</p> <p>We agree with point 7.74 of the report that Family Courts should continue to determine decision-making capacity for court-ordered arrangements. However, we would also recommend that the new Act put in place provisions to address some of the existing challenges. For instance, significant Court delays on applications for welfare guardian and property manager has been well-documented. A 2016 report noted that with lawyers generally charging on a time and attendance for any applications to the Family Court, the whole process can be expensive and often unaffordable for people on low incomes⁶. The report also noted that legal aid, while available to a certain extent, can be difficult to secure. We urge that these challenges are looked into and addressed in the new provisions, to ensure that any person lacking decision-making capacity, has the required access to appoint representatives who can help them make decisions. This is particularly important as the 2016 report also noted that only 37.1% of those who lacked capacity had proper evidence of having a legal authority in place.</p> <p>To ensure that care providers, such as ARC facilities, provide appropriate care that take into account the person's will and preferences, the need for EPOAs or court-appointed representatives must be legal requirements under this Act before admission into ARC. But at the same time, provisions must be put into place to ensure that these are accessible physically and financially.</p>

⁶ Fisher, M., & Anderson-Bidois, J. (2018). [This is not my home](#). New Zealand Human Rights Commission.

Key Topic 2: Decision-making support

[Read Key Topic 2 here](#) before completing this section

In this Key Topic, we ask questions about some ways that the law might address issues with decision-making support.

Q2.1	<p>What barriers prevent people from getting good decision-making support?</p> <p>Based on what we have heard from our members, in ARC, a person may be unable to seek good decision-making support during following cases:</p> <ol style="list-style-type: none">The person does not have any close family members or friends who know them well enough to offer decision-making support.The person’s close family members or friends may not be living in the same region or country, or may be inaccessible due to other reasons at times when decision-making support is required.The person may be experiencing abuse at the hands of their close family members, and may therefore not find “good” or reliable support. It has been widely reported that a vast majority of reported elder abuse occurs at the hands of family members.The primary carer of the person may themselves be stressed and in need of respite care.
Q2.2	<p>What do you think of the options we have identified for improving decision-making support?</p> <p>We heard from our members that it’s important that the new Act recognise fluctuating decision-making capacities. For instance, polypharmacy could at times have an effect on the person’s cognitive functioning. In addition, “somebody who is of sound mind could be having an off day or have a medical condition that stops them from having clarity for a limited time,” noted another member. So, for activation of an EPOA or even having a court-ordered arrangement in place, health practitioners must ensure that the person was displaying poor or complete lack of decision-making capacity for an extended period of time and not just on a particular day.</p>

But at the same time, they also raised concerns about how the interpretation of a person's will and preferences could be a subjective opinion when their will and preferences may not be explicitly stated in their care plan or advance directive. In such instances, the care providers would have to follow the judgement of the representative. **The Association recommends that the new Act must outline specific instances where a health practitioner may decide over a representative's decision as per their medical opinion, to prevent abuse.** But at the same time, the law must not be punitive towards health practitioners, if they were acting under the new Act as suggested by the representative.

Regarding the paper's suggestion about enabling more people to undertake capacity assessments, some of our members were not in favour of that. They are concerned that it would add to their already burdened workforce in ARC. They mentioned that the current process, wherein the nurses refer a person to a GP when they note an extended issue with decision-making capacity for the activation of an EPOA or to have a court-ordered arrangement, works well for them. **The Association therefore recommends that the new Act must only recognise health practitioners as capable authorities to assess and determine decision-making capacity.**

Regarding the paper's query on whether a court should enable multiple representatives, we would like to submit that while supported decision-making relationships generally work well in ARC, they can become complicated when multiple parties disagree over the care of a loved one. Managing these relationships and the expectations of different family members can be difficult and time consuming for care home staff. **We would recommend that in such cases, a primary representative still be mentioned, who will be the point of contact for health providers and other welfare providers, including ARC, who can then in turn consult or disseminate the information to others.**

Q2.3

Is there anything else you would like to tell us about how decision-making support could be improved?

Nothing beyond what has been submitted under Q2.2.

Key Topic 3: Enduring powers of attorney

[Read Key Topic 3](#) here before completing this section

In this Key Topic, we ask questions about how enduring power of attorney arrangements (EPOAs) could be improved.

Q3.1

How could the law make it easier to set up an EPOA, while still providing enough protection for people?

For ARC, currently, they are obligated as per the MOH DAA Handbook to check that “all residents have an Enduring Power of Attorney that has been enacted, where an EPOA is not in place the provider is supporting actions to have one appointed.”

However, as mentioned in our previous submission on the Preliminary Issues Paper, we have heard that, on occasion, our members will pay out of their own pocket for an EPOA to be organised for a resident in their care, because they consider that not doing so would represent a greater financial risk. Others will support a next of kin through the Family Court process, which we hear is long and many families find the amount of paperwork daunting.

However, a reality for ARC is also that over half of the providers made a net loss in the year 2022-23. With the historic and chronic underfunding of the sector, such additional cost burdens on the providers can be detrimental to their operational sustainability. **The Association recommends that the new Act identify provisions for ARC providers to access government funding in such cases where they may be**

	required to support their residents to organise an EPOA or a welfare guardian.
Q3.2	<p>What protections are needed once an EPOA is in place to prevent abuse and ensure the attorney performs their role well?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>
Q3.3	<p>What should an attorney consider when working out a donor's will and preferences?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>
Q3.4	<p>When might it be impossible or inappropriate to make a decision based only on a person's will and preferences?</p> <p>Same as 1.4</p>
Q3.5	<p>How should attorneys make decisions in these circumstances?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>
Q3.6	<p>What steps should an attorney take when making a decision for a donor?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>
Q3.7	<p>Is there anything else you would like to tell us about EPOAs?</p> <p>We heard from several of our members that they do not take in residents in their dementia care units, unless the resident has an activated EPOA. Some others submitted that they do take residents without an EPOA but only if they commit to having a court-ordered arrangement within the next 3 months.</p> <p>We were also informed that in cases where a resident's decision-making capacity deteriorates after coming into the facility, they usually refer to the GP to take a decision as empowered under the Right 7(4) in the Code.</p> <p>We believe that the shift from a best interests approach to the rights, will and preferences of the represented person might push more facilities to</p>

	<p>mandatorily require all residents to have an EPOA, as the GP or the care staff may not know the resident well enough to make a decision based on their will and preferences, in circumstance when the resident’s decision-making might be affected. This may, in turn, cause further delays in the discharge of a person from DHB hospitals into aged care, unless there are provisions put in place to improve access to creating EPOAs.</p> <p>The Association would, therefore, strongly reiterate that the new Act must make the creation of EPOAs a mandatory requirement for admission into all levels of ARC.</p>
--	--

Key Topic 4: Practical improvements and court processes

[Read Key Topic 4 here](#) before completing this section

In this Key Topic, we ask questions about what changes could be made to systems and processes, including court processes, to address practical issues and help things work better when an adult’s decision-making is affected.

Q4.1	<p>What information and guidance would be helpful?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>
Q4.2	<p>What options should there be for people to make complaints or raise concerns if things aren’t going well?</p> <p>We agree with the report’s suggestion that there must be mechanisms outside of court processes for a person to raise concerns about how a representative or an attorney is discharging their roles. However, putting in place these mechanisms, such as having an agency or organisation to investigate complaints, must not add to the cost of creating an EPOA. In addition, care providers within ARC must not be seen as a party for mediation. ARC facilities, which are already underfunded and overburdened, do not have the resource nor expertise in this area.</p>

	<p>Furthermore, as we mentioned above, the interpretation of a person’s will and preferences, where it’s not explicitly stated, could be a very subjective exercise and different family members may feel differently about how the decision should be taken. The law must explicitly state sufficient grounds for requesting an investigation.</p> <p>In addition, the Association recommends that the law state how the delivery of medical services must progress when an investigation is underway, most importantly, who would be the representative in charge of taking decisions for the person lacking decision-making capacity.</p>
Q4.3	<p>How do you think we can improve the way the system works?</p> <p>We agree with the report that there should be a provision of free or low-cost services for establishing arrangements like enduring powers of attorney, and access to a panel of supporters for people without those support in their lives.</p> <p>The Report’s observation of the advantages and disadvantages of having a national register of EPOAs, is well-appreciated. While we understand the resource implications, and concerns around data privacy which may deter people from creating EPOAs, we still believe that the advantages would far outweigh the disadvantages. A national register would be greatly beneficial for ARC providers to access EPOAs when they need them. The Association, therefore, reiterates its submission from the previous year, to support the creation of a central register of EPOAs, which can be accessed by the Registered Nurses in ARC.</p>
Q4.4	<p>What would help make court processes around decision-making arrangements easier to participate in?</p> <p>We do not believe we have the sufficient information or experience to comment on this.</p>

Q4.5

Is there anything you else you would like to tell us about how systems and court processes could be improved?

Nothing beyond what has been submitted above.