

Submissions on the Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights | Ko te arotakenga o Te Ture Toihau Hauora, Hauātanga 1994 me te Tikanga o ngā Mōtika Kiritaki mō ngā Ratonga Hauora, Hauātanga (A consultation document | He tuhinga uiui, April 2024 | Āpereira 2024)

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I have written and taught health law and family law over many years. I do not represent any particular group.

Thank you for the opportunity to make submissions on the revision of the Code. They focus on a few points only. I am pleased that the review of the Code is taking place. I am aware that it takes account of the UN Convention on the Rights of Persons with Disabilities (CRPD). This is appropriate.

“Affected”

The review also draws on the work of the Law Commission and its project on decision-making capacity. The latter has produced two Issues Papers and a final report will be published in due course. Given the stage of the project, the review of the Code should draw cautiously on the Law Commission's Papers. One example of this is the use of the phrase **“affected decision-making capacity”**. The word “affected” is ambiguous and the Law Society has submitted that it should be avoided. At one level, it may simply mean that something has caused a change to a person's capacity, or has had that effect. However, the word “affected” can also be linked to “affectation”. It may mean false or pretended. Affected capacity may mean that someone is pretending to have capacity when that is moot. I submit that the word “affected” should be avoided.

“Will and preferences”

A further change in terminology is the replacement of “views” with **“will and preferences”**. This is in line with language found in the CRPD, eg art 12(4). It represents a shift in focus from the best interests of the person to their subjective perspective, even if that departs from their best interests. The word “views” is broad. It replaced “wishes” when the Care of Children Act 2004 was enacted. It is wider than “preferences” and arguably “will” is closer to “wishes”. See Randerson J in *C v S [Parenting orders]* [2006] NZFLR 745 at [31]. I therefore recommend that “will and preferences” be added to “views”, not be in substitution of “views”. There also ought to be a definition of the terminology. I realise that this is mentioned at p 12 of the consultation document but I am not sure that it is well tailored for inclusion in the code. More work should be done on this.

Right 7

This Right is an important one. There is an opportunity to make further improvements.

Right 7(2)

Right 7(2) would read better if it said “Every consumer **is** presumed...”. This is a statement of the present position, whereas “must be” implies that somebody must do something for the presumption to apply.

The latter part of Right 7(2) is somewhat misleading. Capacity can vary. A person may have capacity for some things and not others. In some cases, a person has a total lack of capacity. The presumption may be rebutted for some purposes and not others. Right 7(2) is ambiguous because it is not clear whether it is referring to total or partial lack of capacity. As Right 7 is about the provision of services, it should read “...unless there are reasonable grounds for believing that the consumer does not have decision-making capacity **in relation to the relevant services**”. This amendment would fit with Right 7(3).

Right 7(3)

Right 7(3) could be better drafted “Where a consumer does not have full capacity” or “has partial capacity”. As submitted above, the Code should not use “affected”.

Right 7(3) adds a reference to “the right to support”. I do not oppose this. It reflects debates about “supported decision-making”. However, as indicated in the Law Commission’s Issues Paper, the implications of a right to support are not clear and may contain fishhooks. The simple statement that it is proposed to add belies a range of questions that might arise: who is a supporter, who chooses them (contrast the process for an attorney under an enduring power), what is their legitimate role, how can a provider be sure that there is no undue influence or duress (a matter of concern under art 12 of the CRPD), how does the presence of a supporter change what a provider considers to be a consumer’s doubtful capacity to consent, etc? Right 8 covers aspects of these issues but only in part. So, while not opposing the proposed change, we need to be mindful that it may open up a can of worms that the Law Commission is still grappling with.

Right 7(4)

This provision enables services to be provided in the absence of consent. It thus raises major issues of human rights.

Personally I find Right 7(4) hard to follow and in need of major re-writing. The proposed changes are cosmetic. It is not intended to move away from the “best interests” test set out in Right 7(4)(a). This test is controversial in the light of the CRPD and the Law Commission’s work. While the rest of Right 7(4) refers to will and preferences, these are subject to best

interests. It means that if the consumer prefers the second best option, the best one must nevertheless apply. In my submission, Right 7(4) should be redrafted along the following lines:

- (i) The first statement should be that services may be provided where consent has been given by a person entitled to consent on behalf of the consumer (eg an attorney, welfare guardian, guardian of a child) or where a court has made an order to that effect.
- (ii) Where (i) does not apply and the consumer's will and preferences [and views] have been ascertained, consent to services consistent with the consumer's will and preferences can be inferred.
- (iii) (ii) does not apply where there are reasonable doubts about whether the person's will and preferences have changed, or have been subject to undue influence or exploitation.
- (iv) Where the consumer's will and preferences have not been ascertained or are unclear, the provider may seek the views of other suitable persons who are interested in the welfare of the consumer and may offer services so long as they are consistent with the views of those other persons.
- (v) Where none of the above applies, consent of a court under the Protection of Personal and Property Rights Act 1988 must be obtained.

This list is tentative but I believe clearer and more appropriate than the present clause. No mention of best interests is made. It is axiomatic that a provider is not required to provide services that are contrary to the person's interests (see clause 5 "Other enactments").

Definitions

Advance directive - this has not been fully updated. The end should read "... when the consumer lacks decision-making capacity".

Exploitation – consideration should be given to including "psychological abuse" as defined in the Family Violence Act 2018.

Representative – it would be clearer if this also explicitly referred to someone whom a court has appointed.

Other enactments

The drafting should be updated so that it reads "Nothing in this Code **requires** a provider...".

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