

7th March 2023

Geof Shirtcliffe
Kaikōmihana | Commissioner
Office of Ngā Huarahi Whakatau | Review of Adult Decision-Making Capacity Law
Te Aka Matua o te Ture | Law Commission
Wellington
Aotearoa New Zealand

By email to: huarahi.whakatau@lawcom.govt.nz

Tēnā koe Commissioner Shirtcliffe,

Re: Ngā Huarahi Whakatau | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) and Tu Te Akaaka Roa, the New Zealand National Committee, would like to thank you for the opportunity to submit feedback on the Ngā Huarahi Whakatau | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper. We have taken the time to consider the guidance and have presented our feedback in the submission below.

The RANZCP is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people experiencing mental health conditions, and advises governments on mental health care. The RANZCP is guided on policy matters by a range of expert committees, including the New Zealand Faculty for Psychiatry of Old Age, the New Zealand Faculty for Consultation–Liaison Psychiatry, and the New Zealand Faculty of Addiction Psychiatry.

The Aotearoa New Zealand-based RANZCP committees we represent offer vast and varied experience working in the mental health sub-specialties most closely associated with, and most likely to be impacted by changes to, adult decision-making law and policy. Our psychiatrists work alongside people living with a range of conditions that impact on their cognition: including people with dementia, traumatic brain injury, intellectual disability, alcohol-induced cognitive impairment, psychosis, and other mental health issues. Your work is, therefore, of great interest to us and the psychiatrists who have contributed their experiences and concerns to shape this response.

The RANZCP acknowledges the significance of this review, alongside concurrent and ongoing reform to the Mental Health (Compulsory Assessment and Treatment) Act 1992. Tu Te Akaaka Roa strongly supports the Law Commission's consideration of the many complex and cross-jurisdictional implications of reform to decision-making law, particularly pertaining to the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Substance Addiction (Compulsory Assessment and Treatment) Act 2017.

Acknowledging the many domains implicated in decision-making law, policy and practice, Tu Te Akaaka Roa recommends the development of clear definitions to support health and disability providers to make consistent and well-informed capacity assessments and other treatment/care decisions.

The use of the term ‘person experiencing mental distress’ may be exclusionary as it does not necessarily represent those with severe & enduring mental health or addiction issues. These individuals may interact with decision-making law and capacity assessments throughout their lifetime at various stages, rather than at a single point in time, and should have their own specific needs, and those of their whānau and supporters, considered thoroughly. Additionally, there is currently no formal definition of capacity in the context of addiction, an issue that has been highlighted by psychiatrists specialising in this domain.

Decision-making capacity assessments are complex and require a nuanced approach. Competence is decision-relative and can only be understood appropriately in relation to individual ability to perform a specific task or make a specific decision. Furthermore, the experiences of tāngata whai ora living with severe & enduring mental health or addiction issues are dynamic. The status of their condition and wellbeing may fluctuate over time, as will their capacity to make decisions for themselves or others, and their ability to give informed consent for health or disability services. Subsequent law, policy and practice must consider those who may iteratively gain or lose decision-making capacity during their lifetime.

The RANZCP advocates for the application of supported decision making (SDM) principles within psychiatry as a core competency, embedded within routine clinical practice. For SDM practices to be provided comprehensively and consistently for adults with impaired decision-making, adequate and equitable workforce training and support, in addition to appropriate facilities and resources for mental health and disability services, must be considered.

The RANZCP also highlights the need for a targeted approach towards monitoring and stewardship processes, to ensure these laws are practiced in manner that is consistent, well informed and up to date, evaluated via auditing or other means. To achieve this, Tu Te Akaaka Roa wishes to suggest the establishment of an independent body, similar to the Independent Monitoring Mechanism (IMM) for the United Nations Convention on the Rights of Persons with Disabilities. Furthermore, our members have indicated the need for transparency, particularly with court-appointed lawyers. Suggestions to improve the current situation include establishing and maintaining a central register of enduring power of attorney documentation, and the provision of regular updates throughout court processes.

In addition to the proposed seven guiding principles outlined in the Preliminary Issues Paper, Tu Te Akaaka Roa suggests the addition of an eighth principle: that subsequent changes to law, policy and practice are accompanied by a comprehensive communication plan. This principle aims to ensure that everybody in Aotearoa may be supported to access and interpret Adult Decision-Making Capacity law in a way that is accessible and suitable to individual requirements including cultural needs. A comprehensive communication plan would facilitate certainty and transparency to those who intersect with the legislation. Under the United Nations Convention on the Rights of Persons with Disabilities access to information in appropriate and accessible alternate formats is a human right.

We note that the Preliminary Issue paper uses the term ‘learning disabilities’ to describe the impediment of some populations. As a descriptor it has limitations including precise identification of the issue. The RANZCP’s position statement regarding dementia, currently in review, uses the descriptor cognitive impairment to identify the condition facing those with dementia.

We are interested in hearing the outcome of the consultation on this work and look forward to accessing the final review document when it becomes available. If you have any questions regarding this letter, or require additional information, please contact Ms Jane Renwick, Manager New Zealand National Office. Jane can be contacted at jane.renwick@ranzcp.org, or by phone at (04) 830 7184.

Naku noa, nā



Professor Susanna Every-Palmer FRANZCP
Chair, *Tu Te Akaaka Roa* – New Zealand National Committee