

Appendix C

Legislation and International Human Rights Conventions

This Appendix sets out the relevant sections of the mental capacity legislation, the Code of Health and Disability Services Consumers' Rights (the HDC Code) and the international human rights conventions referred to in this report. These are:

- **Mental Capacity Act (England and Wales) 2005 (MCA)**
- **Protection of Personal and Property Rights Act 1988 (PPPR Act)**
- **Code of Health and Disability Services Consumers' Rights Regulation 1996 (HDC Code)**
- **United Nations Convention on the Rights of Persons with Disabilities 2006 (CRPD)**
- **European Convention on Human Rights 1950 (ECHR)**

Mental Capacity Act (England and Wales) 2005 (MCA)

PART 1

PERSONS WHO LACK CAPACITY

The principles

1. The principles

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Preliminary

2. People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
 - (a) a person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person ("D") may exercise under this Act—
 - (a) in relation to a person who lacks capacity, or
 - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

3. Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
 - (a) deciding one way or another, or
 - (b) failing to make the decision.

4. Best interests

- (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
 - (a) the person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
- (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
- (3) He must consider—
 - (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
 - (b) if it appears likely that he will, when that is likely to be.
- (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
- (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
- (6) He must consider, so far as is reasonably ascertainable—
 - (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
 - (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
 - (c) the other factors that he would be likely to consider if he were able to do so.

- (7) He must take into account, if it is practicable and appropriate to consult them, the views of—
- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
 - (b) anyone engaged in caring for the person or interested in his welfare,
 - (c) any donee of a lasting power of attorney granted by the person, and
 - (d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
- (8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—
- (a) are exercisable under a lasting power of attorney, or
 - (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
- (9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.
- (10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.
- (11) "Relevant circumstances" are those—
- (a) of which the person making the determination is aware, and
 - (b) which it would be reasonable to regard as relevant.

Mental Capacity Act 2005 ss 30-34

30 Research

- (1) Intrusive research carried out on, or in relation to, a person who lacks capacity to consent to it is unlawful unless it is carried out—
 - (a) as part of a research project which is for the time being approved by the appropriate body for the purposes of this Act in accordance with section 31, and
 - (b) in accordance with sections 32 and 33.
- (2) Research is intrusive if it is of a kind that would be unlawful if it was carried out—
 - (a) on or in relation to a person who had capacity to consent to it, but
 - (b) without his consent.
- (3) A clinical trial which is subject to the provisions of clinical trials regulations is not to be treated as research for the purposes of this section.
- (4) “Appropriate body”, in relation to a research project, means the person, committee or other body specified in regulations made by the appropriate authority as the appropriate body in relation to a project of the kind in question.
- (5) “Clinical trials regulations” means
 - (a) the Medicines for Human Use (Clinical Trials) Regulations 2004 (S.I. 2004/1031) and any other regulations replacing those regulations or amending them, and
 - (b) any other regulations relating to clinical trials and designated by the Secretary of State as clinical trials regulations for the purposes of this section.
- (6) In this section, section 32 and section 34, “appropriate authority” means—
 - (a) in relation to the carrying out of research in England, the Secretary of State, and
 - (b) in relation to the carrying out of research in Wales, the National Assembly for Wales.

31 Requirements for approval

- (1) The appropriate body may not approve a research project for the purposes of this Act unless satisfied that the following requirements will be met in relation to research carried out as part of the project on, or in relation to, a person who lacks capacity to consent to taking part in the project (“P”).
- (2) The research must be connected with—

- (a) an impairing condition affecting P, or
 - (b) its treatment.
- (3) “Impairing condition” means a condition which is (or may be) attributable to, or which causes or contributes to (or may cause or contribute to), the impairment of, or disturbance in the functioning of, the mind or brain.
- (4) There must be reasonable grounds for believing that research of comparable effectiveness cannot be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it.
- (5) The research must—
- (a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, or
 - (b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition.
- (6) If the research falls within paragraph (b) of subsection (5) but not within paragraph (a), there must be reasonable grounds for believing—
- (a) that the risk to P from taking part in the project is likely to be negligible, and
 - (b) that anything done to, or in relation to, P will not—
 - (i) interfere with P’s freedom of action or privacy in a significant way, or
 - (ii) be unduly invasive or restrictive.
- (7) There must be reasonable arrangements in place for ensuring that the requirements of sections 32 and 33 will be met.

32 Consulting carers etc.

- (1) This section applies if a person (“R”)—
- (a) is conducting an approved research project, and
 - (b) wishes to carry out research, as part of the project, on or in relation to a person (“P”) who lacks capacity to consent to taking part in the project.
- (2) R must take reasonable steps to identify a person who—
- (a) otherwise than in a professional capacity or for remuneration, is engaged in caring for P or is interested in P’s welfare, and

- (b) is prepared to be consulted by R under this section.
- (3) If R is unable to identify such a person he must, in accordance with guidance issued by the appropriate authority, nominate a person who—
 - (a) is prepared to be consulted by R under this section, but
 - (b) has no connection with the project.
- (4) R must provide the person identified under subsection (2), or nominated under subsection (3), with information about the project and ask him—
 - (a) for advice as to whether P should take part in the project, and
 - (b) what, in his opinion, P's wishes and feelings about taking part in the project would be likely to be if P had capacity in relation to the matter.
- (5) If, at any time, the person consulted advises R that in his opinion P's wishes and feelings would be likely to lead him to decline to take part in the project (or to wish to withdraw from it) if he had capacity in relation to the matter, R must ensure—
 - (a) if P is not already taking part in the project, that he does not take part in it;
 - (b) if P is taking part in the project, that he is withdrawn from it.
- (6) But subsection (5)(b) does not require treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.
- (7) The fact that a person is the donee of a lasting power of attorney given by P, or is P's deputy, does not prevent him from being the person consulted under this section.
- (8) Subsection (9) applies if treatment is being, or is about to be, provided for P as a matter of urgency and R considers that, having regard to the nature of the research and of the particular circumstances of the case—
 - (a) it is also necessary to take action for the purposes of the research as a matter of urgency, but
 - (b) it is not reasonably practicable to consult under the previous provisions of this section.
- (9) R may take the action if—
 - (a) he has the agreement of a registered medical practitioner who is not involved in the organisation or conduct of the research project, or
 - (b) where it is not reasonably practicable in the time available to obtain that agreement, he acts in accordance with a procedure approved by the appropriate

body at the time when the research project was approved under section 31.

- (10) But R may not continue to act in reliance on subsection (9) if he has reasonable grounds for believing that it is no longer necessary to take the action as a matter of urgency.

33 Additional safeguards

- (1) This section applies in relation to a person who is taking part in an approved research project even though he lacks capacity to consent to taking part.
- (2) Nothing may be done to, or in relation to, him in the course of the research—
- (a) to which he appears to object (whether by showing signs of resistance or otherwise) except where what is being done is intended to protect him from harm or to reduce or prevent pain or discomfort, or
- (b) which would be contrary to—
- (i) an advance decision of his which has effect, or
- (ii) any other form of statement made by him and not subsequently withdrawn, of which R is aware.
- (3) The interests of the person must be assumed to outweigh those of science and society.
- (4) If he indicates (in any way) that he wishes to be withdrawn from the project he must be withdrawn without delay.
- (5) P must be withdrawn from the project, without delay, if at any time the person conducting the research has reasonable grounds for believing that one or more of the requirements set out in section 31(2) to (7) is no longer met in relation to research being carried out on, or in relation to, P.
- (6) But neither subsection (4) nor subsection (5) requires treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.

34 Loss of capacity during research project

- (1) This section applies where a person ("P")—
- (a) has consented to take part in a research project begun before the commencement of section 30, but
- (b) before the conclusion of the project, loses capacity to consent to continue to take part in it.
- (2) The appropriate authority may by regulations provide that, despite P's loss of capacity, research of a prescribed kind may be carried out on, or in relation to, P if—

- (a) the project satisfies prescribed requirements,
 - (b) any information or material relating to P which is used in the research is of a prescribed description and was obtained before P's loss of capacity, and
 - (c) the person conducting the project takes in relation to P such steps as may be prescribed for the purpose of protecting him.
- (3) The regulations may, in particular,—
- (a) make provision about when, for the purposes of the regulations, a project is to be treated as having begun;
 - (b) include provision similar to any made by section 31, 32 or 33.

Protection of Personal and Property Rights Act 1988 (PPPR Act)

Part 1

Personal Rights

4. Legal capacity of persons subject to orders under this Act

Except as provided by or under this Act or any other enactment, the rights, privileges, powers, capacities, duties, and liabilities of any person subject to an order under this Act whether in a personal, official, representative, or fiduciary capacity, shall, for all the purposes of the law of New Zealand (whether substantive, procedural, evidential, or otherwise), be the same as those of any other person.

5. Presumption of competence

For the purposes of this Part, every person shall be presumed, until the contrary is proved, to have the capacity—

- (a) to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; and
- (b) to communicate decisions in respect of those matters.

6. Jurisdiction of court under this Part

- (1) Subject to subsection (2), a court shall have jurisdiction under this Part in respect of any person who is ordinarily resident in New Zealand and who—
 - (a) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
 - (b) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.
- (2) Subject to section 12(3), no court has jurisdiction under this Part in respect of a person who has not attained the age of 18 years and who—
 - (a) is not, and never has been, married or in a civil union; or
 - (b) is 16 years old or older and is not living, and never has lived, with another person as a de facto partner.
- (3) The fact that the person in respect of whom the application is made for the exercise of the court's jurisdiction has made or is intending to make any decision that a person exercising ordinary prudence would not have made or would not make given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the court.

...

8. Primary objectives of court in exercise of jurisdiction under this Part

The primary objectives of a court on an application for the exercise of its jurisdiction under this Part shall be as follows:

- (a) to make the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of that person's incapacity:
- (b) to enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible.

9. Course to be followed by court

- (1) In considering an application for the exercise of its jurisdiction under this Part, a court shall determine whether or not the person in respect of whom the application is made is a person in relation to whom it has jurisdiction under this Part in accordance with section 6.
- (2) If the court is satisfied that the person in respect of whom the application is made is a person in relation to whom it has jurisdiction under this Part in accordance with section 6, the court shall determine whether or not it should make an order under section 10 or section 11 or section 12, and (if so) what kind of order or orders, having regard to the primary objectives specified in section 8.

10. Kinds of order

- (1) On an application for the exercise of a court's jurisdiction under this Part in respect of any person, the court may, subject to subsection (2), make any 1 or more of the following orders:
 - (a) *[Repealed]*
 - (b) an order that any parent of the person make suitable arrangements for the personal care of the person after the parent's death:
 - (c) an order that the arrangements made by any parent of the person for the personal care of the person after the parent's death be observed, or be varied in any particular specified in the order:
 - (d) an order that the person shall enter, attend at, or leave an institution specified in the order, not being a psychiatric hospital or a licensed institution under the Mental Health Act 1969:
 - (e) an order that the person be provided with living arrangements of a kind specified in the order:
 - (f) an order that the person be provided with medical advice or treatment of a kind specified in the order:
 - (g) an order that the person be provided with educational, rehabilitative, therapeutic, or other services of a kind specified in the order:
 - (h) an order that the person shall not leave New Zealand without the permission of the court, or shall leave New Zealand only on conditions specified in the order:

- (i) an order appointing a person named in the order as next friend or guardian ad litem for the person for the purposes of any proceedings in a District Court:
 - (j) an order under section 11 that a person named in the order administer any item of property specified in the order:
 - (k) an order under section 12 appointing a welfare guardian for the person.
- (2) No person (other than the person in respect of whom the application is made) shall be bound by a personal order unless that person is a party to the proceedings in which the order is made.
 - (3) In any order made under any of paragraphs (a) to (i) of subsection (1), the court may specify a date by which the order is to be reviewed by the court; and, if it does so, the court shall also specify in the order the person or persons who is or are to be responsible for applying to the court for a review of the order before the specified date.
 - (4) Where a court makes any personal order, it may also make such other orders and give such directions as may be necessary or expedient to give effect, or better effect, to the personal order.

11. Order to administer property

- (1) Where, on an application to a court for the exercise of its jurisdiction under this Part,—
 - (a) the person in respect of whom the application is made is not subject to a property order; and
 - (b) the court considers that the making of a property order or the giving of a direction under section 64(3) would not be in accordance with section 8; and
 - (c) the court considers the making of an order under this section necessary in all the circumstances,—

the court may, subject to subsection (2), by order, appoint any person (but only 1 person) named in the order to administer, on behalf of the person in respect of whom the application is made, any property or income or benefit, belonging to the person or to which that person is or may become entitled, and specified in the order.

- (2) No order may be made under this section in respect of either—
 - (a) any item of property that exceeds \$5,000 in value, or such other amount as is, from time to time, prescribed by Order in Council for the purposes of this paragraph; or
 - (b) any income or benefit in excess, in any one year, of \$20,000, or such other amount as is, from time to time, prescribed by Order in Council for the purposes of this paragraph.
- (3) Every person who administers any property, income, or benefit pursuant to an order made under this section shall do so in such a way as to enable or encourage the person for whom he or she is acting to exercise and develop such capacity as that person has to the greatest extent possible.

- (4) In any order made under this section, the court shall specify a date, being not later than 3 years after the date of the order, by which the person appointed to administer the property is required to apply to the court for a review of the order.

12. Court may appoint welfare guardian

- (1) Subject to the succeeding provisions of this section, on an application for the exercise of a court's jurisdiction under this Part, the court may make an order appointing a welfare guardian for the person in respect of whom the application is made in relation to such aspect or aspects of the personal care and welfare of that person as the court specifies in the order.
- (2) A court shall not make an order under subsection (1) unless it is satisfied—
 - (a) that the person in respect of whom the application is made wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person; and
 - (b) that the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made relating to that particular aspect or those particular aspects of the personal care and welfare of that person.
- (3) A court may make an order under subsection (1) in respect of a person of the kind referred to in section 6(2) if, but only if,—
 - (a) no parent or guardian of that person is then living; or
 - (b) no parent or guardian of that person is in regular contact with that person, and the court is satisfied in all the circumstances that it would be in the interests of that person to appoint a welfare guardian for that person.
- (4) No person under the age of 20 years, and no body corporate, shall be appointed a welfare guardian under this section.
- (5) A court shall not appoint any person as a welfare guardian under this section unless it is satisfied—
 - (a) that the proposed appointee is capable of carrying out the duties of a welfare guardian in a satisfactory manner, having regard to the needs of the person in respect of whom the application is made, and the relationship between that person and the proposed appointee; and
 - (b) that the proposed appointee will act in the best interests of the person in respect of whom the application is made; and
 - (c) there is unlikely to be any conflict between the interests of the proposed appointee and those of the person in respect of whom the application is made; and
 - (d) the proposed appointee consents to the appointment.
- (6) The court shall not appoint more than 1 welfare guardian for any person unless, in the exceptional circumstances of the case, the court is satisfied that it would be in the interests of that person to do so.

- (7) So far as is practicable in the circumstances, a court shall ascertain the wishes of the person in respect of whom the application is made when determining whom to appoint as welfare guardian under this section.
- (8) In any order under this section, the court shall specify a date, being not later than 3 years after the date of the order, by which the welfare guardian is required to apply to the court for a review of the order.

...

Part 2

Welfare Guardians

18. Powers and duties of welfare guardian

- (1) No court shall empower a welfare guardian, and no welfare guardian shall have power,—
 - (a) to make any decision relating to the entering into marriage or civil union by the person for whom the welfare guardian is acting, or to the dissolution of that person's marriage or civil union; or
 - (b) to make any decision relating to the adoption of any child of that person; or
 - (c) to refuse consent to the administering to that person of any standard medical treatment or procedure intended to save that person's life or to prevent serious damage to that person's health; or
 - (d) to consent to the administering to that person of electroconvulsive treatment; or
 - (e) to consent to the performance on that person of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person's behaviour; or
 - (f) to consent to that person's taking part in any medical experiment other than one to be conducted for the purpose of saving that person's life or of preventing serious damage to that person's health.
- (2) Subject to subsection (1), a welfare guardian shall have all such powers as may be reasonably required to enable the welfare guardian to make and implement decisions for the person for whom the welfare guardian is acting in respect of each aspect specified by the court in the order by which the appointment of the welfare guardian is made.
- (3) In exercising those powers, the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and best interests of the person for whom the welfare guardian is acting, while seeking at all times to encourage that person to develop and exercise such capacity as that person has to understand the nature and foresee the consequences of decisions relating to the personal care and welfare of that person, and to communicate such decisions.
- (4) Without limiting the generality of subsection (3), a welfare guardian shall—
 - (a) encourage the person for whom the welfare guardian is acting to act on his or her own behalf to the greatest extent possible; and

- (b) seek to facilitate the integration of the person for whom the welfare guardian is acting into the community to the greatest extent possible; and
- (c) consult, so far as may be practicable,—
 - (i) the person for whom the welfare guardian is acting; and
 - (ii) such other persons, as are, in the opinion of the welfare guardian, interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person; and
 - (iii) a representative of any group that is engaged, otherwise than for commercial gain, in the provision of services and facilities for the welfare of persons in respect of whom the court has jurisdiction in accordance with section 6, and that, in the opinion of the welfare guardian, is interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person.
- (5) In addition to subsection (4)(c), where the person for whom the welfare guardian is acting is subject to a property order, the welfare guardian shall consult on a regular basis with the manager of that person's property to ensure that the interests of that person are not prejudiced through any breakdown in communication between the welfare guardian and the manager.
- (6) A welfare guardian may apply to a court for directions relating to the exercise of the powers of the welfare guardian, and the court may give such directions as it thinks fit.

...

Part 3

Property rights

24. Presumption of competence

For the purposes of this Part, every person shall be presumed, until the contrary is proved, to be competent to manage his or her own affairs in relation to his or her property.

25. Jurisdiction of court under this Part

- (1) A court shall have jurisdiction under this Part in respect of any property owned by any person—
 - (a) who is domiciled or is ordinarily resident in New Zealand; and
 - (b) who, in the opinion of the court, lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property.
- (2) A court shall also have jurisdiction under this Part in respect of any property situated in New Zealand and owned by any person—

- (a) who is not domiciled nor is ordinarily resident in New Zealand; and
 - (b) who, in the opinion of the court, lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property so situated.
- (3) The fact that the person in respect of whom an application is made for the exercise of the court's jurisdiction is managing or is intending to manage his or her own affairs in relation to his or her property in a manner that a person of ordinary prudence would not adopt given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the court.
- (4) In determining whether or not it should exercise its jurisdiction under this Part in relation to any person, a court may have regard to the degree to which the person is subject, or is liable to be subjected, to undue influence in the management of his or her own affairs in relation to his or her property.

...

28. Primary objectives of court in exercise of jurisdiction under this Part

The primary objectives of a court on an application for the exercise of its jurisdiction under this Part shall be as follows:

- (a) to make the least restrictive intervention possible in the management of the affairs of the person in respect of whom the application is made in relation to his or her property, having regard to the degree of that person's lack of competence:
- (b) to enable or encourage that person to exercise and develop such competence as he or she has to manage his or her own affairs in relation to his or her property to the greatest extent possible.

...

Part 9

Enduring powers of attorney

93A. Purpose of this Part

- (1) The purpose of this Part is to enable a person (the donor) to—
- (a) grant to another person an enduring power of attorney to act in relation to the donor's personal care and welfare if the donor becomes mentally incapable:
 - (b) grant to another person or persons enduring powers of attorney to act in relation to the donor's property affairs—
 - (i) if the donor becomes mentally incapable; or
 - (ii) while the donor is mentally capable and if the donor becomes mentally incapable:
 - (c) grant to another person an enduring power of attorney to act in both capacities.

- (2) Accordingly, this Part—
- (a) states the requirements for creating an enduring power of attorney:
 - (b) defines when a donor is mentally incapable for the purposes of this Part:
 - (c) states the duties of an attorney (in addition to those set out in the enduring power of attorney):
 - (d) sets out the court’s jurisdiction in respect of an enduring power of attorney:
 - (e) provides for the review by the court of any decision of an attorney:
 - (f) establishes the circumstances in which an enduring power of attorney may be suspended or revoked.
- ...

93B. Presumption of competence

- (1) For the purposes of this Part, every person is presumed, until the contrary is shown,—
- (a) to be competent to manage his or her own affairs in relation to his or her property:
 - (b) to have the capacity—
 - (i) to understand the nature of decisions about matters relating to his or her personal care and welfare; and
 - (ii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and
 - (iii) to communicate decisions about those matters.
- (2) A person must not be presumed to lack the competence described in subsection (1)(a) just because the person manages or intends to manage his or her own affairs in relation to his or her property in a manner that a person exercising ordinary prudence would not adopt in the same circumstances.
- (3) A person must not be presumed to lack the capacity described in subsection (1)(b) just because the person makes or intends to make a decision in relation to his or her personal care and welfare that a person exercising ordinary prudence would not make in the same circumstances.
- (4) A person must not be presumed to lack the competence described in subsection (1)(a) or, as the case may be, the capacity described in subsection (1)(b), just because the person is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.
- ...

94. Interpretation

- (1) For the purposes of this Part, the donor of an enduring power of attorney is mentally incapable in relation to property if the donor is not wholly competent to manage his or her own affairs in relation to his or her property.
- (2) For the purposes of this Part, the donor of an enduring power of attorney is mentally incapable in relation to personal care and welfare if the donor—
 - (a) lacks the capacity—
 - (i) to make a decision about a matter relating to his or her personal care and welfare; or
 - (ii) to understand the nature of decisions about matters relating to his or her personal care and welfare; or
 - (iii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or
 - (b) lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare.
- (3) Nothing in subsection (1) or (2) affects any rule of law relating to capacity to give or to revoke a power of attorney.
- (4) In this Part—
 - health practitioner—
 - (a) has the meaning given to it by section 5(1) of the Health Practitioners Competence Assurance Act 2003:
 - (b) in the case of a certificate of mental incapacity issued outside New Zealand, means a person registered as a medical practitioner by the competent authority of the State concerned
 - lawyer has the meaning given to it by section 6 of the Lawyers and Conveyancers Act 2006
 - prescribed form means a form prescribed by regulations under this Act
 - relevant health practitioner means a health practitioner—
 - (a) whose scope of practice includes the assessment of a person's mental capacity; or
 - (b) whose scope of practice—
 - (i) includes the assessment of a person's mental capacity; and
 - (ii) is specified in the enduring power of attorney (for example, a specialist).

...

98. Enduring power of attorney in relation to personal care and welfare

- (1) Subject to subsections (3) and (4), a donor of an enduring power of attorney may authorise the attorney to act in relation to the donor's personal care and welfare, either generally or in relation to specific matters, and in either case such authorisation may be given subject to conditions and restrictions.
- (2) Notwithstanding section 95(3), an enduring power of attorney may not appoint a trustee corporation to be an attorney, nor may it appoint more than 1 individual to be attorneys, to act in relation to the donor's personal care and welfare.
- (3) The attorney—
 - (a) must not act in respect of a significant matter relating to the donor's personal care and welfare unless a relevant health practitioner has certified, or the court has determined, that the donor is mentally incapable; and
 - (b) must not act in respect of any other matter relating to the donor's personal care and welfare unless the attorney believes on reasonable grounds that the donor is mentally incapable.
- (3A) For the purposes of subsection (3), a donor's mental capacity is determined—
 - (a) at the time a decision about the matter relating to the donor's personal care and welfare is being made or is proposed to be made; and
 - (b) in relation to the personal care and welfare matter concerned.
- (3B) Despite subsection (3A),—
 - (a) if the donor is certified as mentally incapable because of a health condition that is likely to continue indefinitely, no further certificates are required under subsection (3)(a) in relation to any further personal care and welfare matters:
 - (b) if the donor is certified as mentally incapable because of a health condition that is likely to continue for a period specified in the certificate, no further certificates are required under subsection (3)(a) in relation to any further personal care and welfare matters that arise during the specified period.
- (4) The attorney shall not act in respect of any matter relating to the donor's personal care and welfare where, if the attorney were the welfare guardian of the donor, the attorney would be denied the power to act by section 18.
- (5) Subject to subsections (3) and (4), any action taken by the attorney in relation to the donor's personal care and welfare shall have the same effect as it would have had if it had been taken by the donor and the donor had had full capacity to take it.
- (6) In subsection (3)(a), a significant matter relating to the donor's personal care and welfare means a matter that has, or is likely to have, a significant effect on the health, well-being, or enjoyment of life of the donor (for example, a permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure).

98A. Exercise of enduring power of attorney in relation to personal care and welfare

- (1) This section applies to an attorney acting under an enduring power of attorney in relation to the donor's personal care and welfare.
- (2) The paramount consideration of the attorney is the promotion and protection of the welfare and best interests of the donor, while seeking at all times to encourage the donor to develop and exercise his or her capacity to—
 - (a) understand the nature and foresee the consequences of decisions relating to his or her personal care and welfare; and
 - (b) communicate such decisions.
- (3) Without limiting the generality of subsection (2), the attorney must—
 - (a) encourage the donor to act on his or her own behalf to the greatest extent possible; and
 - (b) seek to facilitate the integration of the donor into the community to the greatest extent possible.
- (5) When deciding any matter relating to the donor's personal care and welfare, the attorney must give due consideration to the financial implications of that decision in respect of the donor's property.

...

99D. Medical certification of incapacity

- (1) A certificate of the donor's mental incapacity under this Part must be—
 - (a) in the prescribed form; or
 - (b) if the certificate is issued outside New Zealand, in a form acceptable to the competent authority of the State concerned.
- (2) The donor may specify in an enduring power of attorney that the assessment of his or her mental capacity for the purposes of this Part be undertaken by a health practitioner with a specified scope of practice, but only if the scope of practice specified includes the assessment of a person's mental capacity.
- (3) The cost of any medical assessment or examination reasonably required for the purpose of certifying whether the donor is mentally incapable under this Part is recoverable as a debt from the donor's property.

Code of Health and Disability Services Consumers' Rights Regulation 1996

(HDC Code)

RIGHT 5

Right to Effective Communication

- 1) Every consumer has the right to effective communication in a form, language, and manner that enables the consumer to understand the information provided. Where necessary and reasonably practicable, this includes the right to a competent interpreter.
- 2) Every consumer has the right to an environment that enables both consumer and provider to communicate openly, honestly, and effectively.

RIGHT 6

Right to be Fully Informed

- 1) Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including -
 - a) An explanation of his or her condition; and
 - b) An explanation of the options available, including an assessment of the expected risks, side effects, benefits, and costs of each option; and
 - c) Advice of the estimated time within which the services will be provided; and
 - d) Notification of any proposed participation in teaching or research, including whether the research requires and has received ethical approval; and
 - e) Any other information required by legal, professional, ethical, and other relevant standards; and
 - f) The results of tests; and
 - g) The results of procedures.
- 2) Before making a choice or giving consent, every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, needs to make an informed choice or give informed consent.
- 3) Every consumer has the right to honest and accurate answers to questions relating to services, including questions about -
 - a) The identity and qualifications of the provider; and
 - b) The recommendation of the provider; and
 - c) How to obtain an opinion from another provider; and

- d) The results of research.
- 4) Every consumer has the right to receive, on request, a written summary of information provided.

RIGHT 7

Right to Make an Informed Choice and Give Informed Consent

- 1) Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise.
- 2) Every consumer must be presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent.
- 3) Where a consumer has diminished competence, that consumer retains the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence.
- 4) Where a consumer is not competent to make an informed choice and give informed consent, and no person entitled to consent on behalf of the consumer is available, the provider may provide services where -
 - a) It is in the best interests of the consumer; and
 - b) Reasonable steps have been taken to ascertain the views of the consumer; and
 - c) Either, -
 - i) If the consumer's views have been ascertained, and having regard to those views, the provider believes, on reasonable grounds, that the provision of the services is consistent with the informed choice the consumer would make if he or she were competent; or
 - ii) If the consumer's views have not been ascertained, the provider takes into account the views of other suitable persons who are interested in the welfare of the consumer and available to advise the provider.
- 5) Every consumer may use an advance directive in accordance with the common law.
- 6) Where informed consent to a health care procedure is required, it must be in writing if -
 - a) The consumer is to participate in any research; or
 - b) The procedure is experimental; or
 - c) The consumer will be under general anaesthetic; or
 - d) There is a significant risk of adverse effects on the consumer.
- 7) Every consumer has the right to refuse services and to withdraw consent to services.

- 8) Every consumer has the right to express a preference as to who will provide services and have that preference met where practicable.
- 9) Every consumer has the right to make a decision about the return or disposal of any body parts or bodily substances removed or obtained in the course of a health care procedure.
- 10) No body part or bodily substance removed or obtained in the course of a health care procedure may be stored, preserved, or used otherwise than
 - a) with the informed consent of the consumer; or
 - b) For the purposes of research that has received the approval of an ethics committee; or
 - c) For the purposes of 1 or more of the following activities, being activities that are each undertaken to assure or improve the quality of services:
 - i) a professionally recognised quality assurance programme:
 - ii) an external audit of services:
 - iii) an external evaluation of services.

United Nations Conventions on the Rights of Persons with Disabilities (CRPD)

Article 1 - Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

...

Article 3 - General principles

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

...

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the

exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

...

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

European Convention on Human Rights (ECHR)

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.