

# Capacity Assessment GP CME March 2023

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# Background

- Orthogeriatrician Waitemata District
  - Perioperative Medicine Clinic for elective joint arthroplasty
  - Medical oversight Interim Care Service
- Special Interest Group Perioperative Medicine for Older Adult ANZSGM
  - Co-chair Research Sub-committee
- Honorary Senior Lecturer, Department Medicine, University of Auckland
  - Research Interest in frailty, polypharmacy, perioperative medicine, cognitive disorders
- PhD thesis "Circulating anti-Mullerian hormone in the older man" University of Otago
- Clinical Examiner RACP
- Private practice with GLMS



# Why discuss capacity assessment



# Understanding the law

Disclaimer: I am not a lawyer, and not qualified to provide legal advice

# Resources

Alison Douglass: Mental Capacity: Updating New Zealand's law and practice

A Douglass, G Young and J McMillan *A Toolkit for Assessing Capacity*

HDC Code of Rights

Protection of Personal and Property Rights Act 1988

Forms attached supplementary download

# Legal framework

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Protection of Personal and  
Property Rights Act 1988

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HDC Code of Rights  
(Health & Disability  
Commissioner Act 1994)

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Mental Capacity Act 2005  
(UK)

# Presumption of Competence

- PPPR Act 1988:
    - “every person is presumed, until the contrary is shown - “
- (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.

# Substitute Decision-Making

- PPPR Act the Guardianship Law for Adults lacking capacity
  - Deinstitutionalisation psychiatric facilities in 1980s
  - Previously under Mental Health Act
  - Administered by Family Court (High Court back-up)
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- Enduring Power of Attorney
  - Family Court appoint substitute decision-maker
  - Family Court to appoint personal orders



# What PPPR Act isn't

Distinct to the Mental Health Act

- Mental Health Compulsory Assessment & Treatment Act 1992 (2 limbs)
  - To detain and treat person with “mental disorder” without consent
    - Not diagnostic but descriptive: Delusions, disorders of mood/perception/volition/cognition
  - For people serious harm to self or others, or severely diminished capacity to care for self
  - Not solely for severe substance use (Use Substance Addiction Compulsory & Treatment Act 2017)
- PPPR support decision-making process

# Blur between HDC 7(4) and PPPR

- HDC Right 7: Health consumer has right to make informed choice and give informed consent.
- (2) Presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent.
  - NB this is not specified further
- Legal protection for health professional
- Common law principle provision of necessity
- Specific treatment vs ongoing management

- (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.

# Incapacity common amongst inpatients

34% medical inpatients lack capacity for treatment-related decisions (95% CI 25 - 44%)

(Lepping et al, 2015)

Clinicians only recognise 42% of those with incapacity (Sessums et al, 2011)



# The when, why & what in assessing capacity

- Capacity is time-specific: only applies to time assessed
- Decision-specific: not carte blanche
- Assessor has to understand decision AND consequences
- Trigger: Why now?
- What is the legal framework being tested: e.g PPPR Act, or HDC Right 7(4), or MHA, etc

# Case Example: Maureen

- Beneficiary to assets of deceased sister's Trust
- Trustees wants to close Trust and distribute assets to beneficiaries
- Complex indemnity clauses in contract
- Background of progressive cognitive impairment
  
- Question: Does Maureen have capacity to sign legal document releasing indemnity?
  
- Trigger: Time-sensitive contract, & cognition concern



# Assessment of capacity

# PPPR Act in relation to property

Donor nominate > 1 attorney

Attorney may act in whole, or specified part of donor's affairs in relation to her property

- Deemed retain capacity
- ONLY when lacking capacity

the applicant is not wholly competent to manage his or her own affairs in relation to his or her property; and

The paramount consideration of the attorney is to use the donor's property in the promotion and protection of the donor's best interests, while seeking at all times to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.



# Framework for assessing capacity

Understand

Appreciate

Communicate

Retain

Optimised environment

Assessment of medical aetiology

## **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.

# Assessment outcome

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Assessment: Retain capacity

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Wholly lacking capacity

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Partially lacking capacity

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Duration of incapacity

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Reasons for incapacity

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Plan (which legal framework)



# Assessment for Personal Care & Welfare

# Case Example: Myrtle

85 years old living alone

Progressive amnestic cognitive decline 2 - 3 years, recurrent falls from imbalance

MRI brain hippocampi 3<sup>rd</sup> centile, ACE III: 69/100

Argument with supportive son

Amnestic pattern, stove on, unsafe walking, avoid GP

Home visit capacity assessment

- (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.

# Consequences of lacking capacity

- Substitute decision-maker vs Supported decision-making
- Autonomy vs beneficence/duty of care
- “clinical” best interest & not negligent vs subject-person-defined best interest



# Duty of Attorney for PC&W EPOA

- (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.
- (4) 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.

## 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 electro-convulsive 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; or
  - (g) to request, on behalf of the person, the option of receiving assisted dying under the End of Life Choice Act 2019.



# Capacity to appoint an EPOA

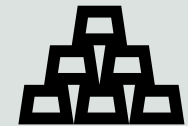
- (ab) in the case of an enduring power of attorney signed by the donor after the commencement of this paragraph, the witness believes on reasonable grounds that the donor—
  - (i) understands the nature of the instrument; and
  - (ii) understands the potential risks and consequences of the instrument; and
  - (iii) is not acting under undue pressure or duress; and
- (b) the witness has no reason to suspect that the donor was or may have been mentally incapable at the time the donor signed the instrument; and
- (c) the witness is independent of the attorney (or of each attorney) or that subsection (8)(a) or (b) applies or, if subsection (4A)(b) applies, the witness is satisfied that no more than a negligible risk of a conflict of interest arises.

# Cost of EPOA

## Public Trust

In person consultation	
Property EPA	<b>\$342*</b>
Property Mirror EPA's for you and your partner	<b>\$625*</b>
Personal care and welfare EPA	<b>\$342*</b>
Personal care and welfare mirror EPA for you and your partner	<b>\$625*</b>

## Law Firm





# Application for Welfare Guardian

Process

# Process

Submit forms to Family Court (free):

- Medical expert report
- Application for appointment of welfare guardian (self or other)
- Information sheet for PPPR application (similar to cover letter)
- Affidavit letter of support for applicant
- Statement of consent to appointment of welfare guardian

Provision of filing number

Appointment Lawyer to represent subject-person and file lawyer report

Judge decision: make the Order, hold a hearing, seek further information

Court set date for review of Order (maximum 3 years time)

**REPORT OF REGISTERED MEDICAL PRACTITIONER  
(IN APPLICATION FOR PROPERTY AND WELFARE ORDERS)**

In the District Court  
at .....

FAM:

APPLICANT  
Peter Parker

.....  
(Full name of applicant)

20 Ingram Street, Queens, New York

.....  
(Address)

Spiderman/photographer

.....  
(Occupation)

PERSON IN RESPECT OF WHOM THE APPLICATION IS MADE

Yih Harg Chong

..... ("the Subject Person")

(Full name of person in respect of whom the application is made)

of a/93 Ascot Avenue, Remuera, Auckland

.....  
(Address)

Mad professor

.....  
(Occupation)

- 1 I am a duly qualified medical practitioner practising as a [Geriatrician](#)
  
- 2 a The abovenamed person in question ("the Subject Person") is a patient of mine and has been since [2015](#)  
I last visited and/or examined him/her on [20<sup>th</sup> March 2023](#)
- b I examined the Subject Person for the purposes of this application on [20<sup>th</sup> March 2023](#)
  
- 3 His/her general state of health is [frail](#)
  
- 4 He/she suffers from the following disorder(s):  
[Alzheimer Dementia](#)  
[Sarcopenia & Malnutrition](#)  
[Hearing impairment severe](#)  
[Type II Diabetes Mellitus with microvascular and macrovascular complications](#)  
[Ischaemic cardiomyopathy with previous NSTEMI](#)  
[Peripheral arterial disease](#)  
[Proliferative diabetic retinopathy](#)  
[Stage 3 diabetic nephropathy](#)  
[Orthostatic hypotension](#)  
[Hypertension](#)  
[COPD](#)  
[Significant alcohol consumption](#)  
[Urinary incontinence](#)  
[Osteoarthritis hips and knees](#)  
[Recurrent falls multifactorial](#)  
[Polypharmacy](#)

- 5 a Does he/she lack competence to manage his/her own affairs in relation to property? **Yes**
- b If answer to the last question is yes, is the lack of competence total or partial? **Total**
- c If the lack of competence is partial, in what respects does it inhibit the Subject Person's competence to manage property affairs  
**N/A**
- d Does he/she lack capacity to understand the nature and foresee the consequences of decisions relating to his/her personal care and welfare? **Yes/No**
- e If the answer to the last question is yes, is the lack of capacity total or partial? **Total**
- f If the lack of capacity is partial, in what respects, or in relation to what aspects of personal care and welfare, does it inhibit the Subject Person's ability to do the above things?  
**N/A**
- g Is he/she wholly unable to communicate his/her own decisions relating to:
- i Property or welfare generally **All aspects** and/or
  - ii Any particular aspects of his/her property or welfare (and if so, which) **N/A**
- h Your further comments (if any) **N/A**
- 6 Is the Subject Person's condition such as would render him/her susceptible to undue influence in the management of his/her property affairs? **Yes/No**  
If so, to what extent? **Vulnerable to any undue influence arising from strangers due to significant liquidated assets**
- 7 If the Subject Person suffers from any degree of incapacity, is it possible that he/she might recover competence to manage his/her own affairs? **Yes/No**  
If so:
- a Is such a recovery likely? **N/A**
  - b Within what time period is such recovery possible? .....
- 8 If a solicitor is appointed to represent him/her and to explain the nature of the present application for appointment of a welfare guardian and/or a property manager, would he/she be likely to:
- a Understand the nature of that advice? **No**
  - b Understand the purpose of these proceedings? **No** and/or
  - c Foresee the consequences of any order made? **No**
- 9 In your opinion would the Subject Person suffer any serious mental, emotional or physical harm from:
- a Notification of the existence of these proceedings? **yes** or
  - b Participation in the proceedings? **Yes**
- If so, what sort of harm? **Emotional harm**
- 10 In your opinion are the following measures likely to promote and/or protect the welfare and best interest of the Subject Person:
- a i Appointment of a Welfare Guardian in relation to any aspects of the Subject Person's personal care and welfare? **Yes/No**

ii If so, in relation to which aspects? [All aspects of personal care and welfare](#)

b i Appointment of a Property Manager in respect of any property owned by the Subject Person? Yes/No

ii If so, in respect of what property? [All aspects of property](#)

11 Given that a primary object of the Court is to make the least restrictive intervention possible in the management of his/her affairs, is there any limitation you would suggest in the nature of the order to be made (e.g. with regard to the type of person appointed, frequency or nature of contact with Subject Person, property affected, duration of order or anything else)?

[There are concerns around should the Court appoint Norman Osborn given his psychotic tendencies when adopting the Green Goblin moniker.](#)

12 Are you able to suggest any measure which would enable or encourage the Subject Person to exercise and to develop such competence as he/she may have to manage his/her own personal welfare and/or property affairs?

[Ensuring hearing aids are worn at all times, and consultation be made with Aunt May to facilitate supportive decision-making process](#)

13 Do you have any further comments for the assistance of the Court? [No](#)

14 My comments are answers are as above.

(Signature) .....

Date .....

Full name and address of medical practitioner:

[Dr Stephen Strange](#)  
[177A Bleeker Street](#)  
[New York City](#)



# Summary



# Capacity Assessment

What specific capacity, Right time and place to conduct, Why now

Capacity assessment framework:

- Understand
- Appreciate (consequences)
- Communicate
- Retain

Outcome: retain capacity, partial/wholly lacking

Medical reason/aetiology and duration

Activate EPOA or apply under PPPR Act for Welfare Guardian/Property Manager/Court Order

Can we vs should we?



# Discussion time

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