

Guidance for Aged Residential Care – Legal Authority for the Placement of People in Secure Care

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Executive Summary

1. This guidance was produced in response to recommendations made by the former Chief Ombudsman in an Optional Protocol to the Convention Against Torture (OPCAT) investigation report, issued under the Ombudsman's jurisdiction to monitor the conditions and treatment of people who are living in secure dementia mate wareware units and psychogeriatric units. The Ombudsman's OPCAT Aged Care Monitoring Report, *Chief Ombudsman's Observations 2021-2024*¹ recorded: (at page 14)

“I have observed varying levels of understanding on the part of facility management, medical professionals, and whānau of what is legally required and why it is required for placement of someone in a secure aged care facility.”

2. The Ombudsman's Aged Care OPCAT Monitoring Report identified a need for managers of aged residential care (**ARC**) facilities to improve their understanding of, and compliance with, the legal framework under which people can be placed in secure care. The Ombudsman recommended that Health New Zealand | Te Whatu Ora (Health NZ) prepare clear guidance to assist facility managers with this.
3. This document sets out guidance for ARC facilities providing secure dementia mate wareware care or psychogeriatric care (secure care) on how to verify and record that each person has a valid legal basis for their placement in secure care. This guidance only applies to the placement of people in secure units (where people are unable to leave at will).
4. This document is not a formal policy and is not a substitute for legal advice.
5. This document deals with legal authority for the placement of people in secure care and therefore involves the ability of legal representatives to make decisions about an individual's personal care and welfare. It does not deal with decisions relating to an individual's property or funding for their care.
6. Where a person has been assessed by Health NZ as requiring secure care, Health NZ will have confirmed and documented that there is a valid legal basis for the person's placement in secure care prior to admission.

Context

7. Placement of a person in secure care constitutes “detention” under international law², which must be lawful. New Zealand is a signatory to the Convention Against Torture (**CAT**) and the Optional Protocol to CAT (**OPCAT**). Our obligations under these and other international human rights conventions and normative commitments require lawful authority for detention of any person, as part of respecting individual freedom

¹ <https://www.ombudsman.parliament.nz/sites/default/files/2025-03/OPCAT%20Aged%20Care%20Report%202025.pdf>

² See Optional Protocol to the International Convention against Torture (OPCAT), available: <https://www.ombudsman.parliament.nz/sites/default/files/2024-04/OPCAT%20Aged%20Care%20Expectations%202024.pdf>

and liberties, including freedom of movement and the need for any deprivation of liberty to be legally authorised.

8. It is important for facilities to understand the relevant legal framework and what documentation is needed to demonstrate a person's legal status.
9. People admitted to long-term secure care will have received a Needs Assessment and Service Coordination (NASC) assessment and confirmation that they require secure care. This is a clinical assessment of the level of care required by the person. This assessment does not equate to, or replace, the need for lawful consent to the person's placement in secure care or another lawful basis for that placement.
10. An individual may be placed in secure care on a short-term basis e.g. for respite care, provided there is a lawful basis for their placement. Depending on how the person's care is being funded, a NASC assessment confirming the person requires secure care may or may not be required. Many Health NZ contracts/ funding arrangements require a level of care assessment prior to placement in secure care.
11. People who are receiving care in a secure unit will not have sufficient capacity to make some decisions regarding their personal care and welfare. Where this is the case, the person will not be able to consent to their own placement in a secure unit and there will need to be another lawful basis for their admission, as set out below.

Code of Health and Disability Services Consumers' Rights

12. The provision of health and disability services is governed by a legal framework. This framework includes the Code of Health and Disability Services Consumers' Rights (the HDC Code)³. Right 7 of the HDC Code is especially relevant and governs informed consent, a core aspect of determining legal authority to place a person in secure care. Under Right 7 of the HDC Code, health and disability services cannot be provided without a person's informed consent. Every person is presumed competent unless there are reasonable grounds for believing that the person is not competent (Right 7(2) of the HDC Code).
13. A person is not incompetent just because of their age, illness, or the way they look and behave. It also does not mean that all dementia patients are considered incompetent. The capacity to make decisions is assessed on an individual basis and a dementia mate wareware diagnosis does not necessarily indicate that a person lacks capacity for all decisions.
14. Where a person has diminished competence, that person retains the right to make informed choices and give informed consent, to the extent appropriate to their level of competence (Right 7(3) of the HDC Code). People with conditions such as dementia or delirium may have varying competence, meaning a person may have capacity to make some decisions, but not other decisions. However, as a person's dementia mate wareware progresses, they may lose the ability to make decisions about their finances, health, care, or welfare including about their living arrangements.

³ <https://www.hdc.org.nz/your-rights/about-the-code/code-of-health-and-disability-services-consumers-rights/>

Legal Authority – Enduring Power of Attorney, Orders under Protection of Personal and Property Rights Act 1988, Mental Health (Compulsory Assessment and Treatment) Act 1992, and Right 7(4) of the HDC Code

15. The legal authority for placing individuals who lack sufficient capacity to consent to their placement in secure care may be:
- (a) the consent of an attorney under an activated Enduring Power of Attorney (“EPOA”) for personal care and welfare;
 - (b) the consent of a welfare guardian appointed by the Family Court under the Protection of Personal and Property Rights Act 1988 (**PPPR Act**);
 - (c) a personal order for placement made by the Family Court under the PPPR Act;
 - (d) leave granted to an inpatient under s 31 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**Mental Health Act**);
 - (e) Right 7(4) of the HDC Code.

Enduring Powers of Attorney

16. Enduring powers of attorney (EPOAs) can only be created when an individual has capacity to make decisions and can be for either personal care and welfare or property, or both. Only an attorney appointed under an EPOA for personal care and welfare (not an attorney appointed under an EPOA for property) can consent to a person being placed in secure care.
17. Because placement in secure care is a significant matter relating to a person’s personal care and welfare, an attorney cannot make that decision until the EPOA for personal care and welfare has been “activated” by a health practitioner. That involves a health practitioner who has assessment of mental capacity within their scope of practice (such as a General Practitioner, Nurse Practitioner, Geriatrician, Psychogeriatrician, or Psychiatrist) certifying that the person is mentally incapable. A completed health practitioner’s certificate of mental incapacity should be placed on the person’s file. The information contained in a health practitioner’s certificate of mental incapacity is described in Regulation 5 of the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008 (the prescribed information).
18. ARC facilities should ensure that the attorney who is acting under an activated EPOA for personal care and welfare signs an admission form or similar document. This confirms that they consent to the person being placed in secure care.
19. The documentation of consent, a copy of the EPOA document and the health practitioner’s certificate of mental incapacity should be kept on the person’s file so that the facility can ensure that there is a legal basis for placement to protect against any risk of arbitrary deprivation of liberty.

Welfare Guardian Orders

20. A welfare guardian may be appointed by the Family Court under s 12 of the PPPR Act where a person wholly lacks capacity to make decisions about their personal care and welfare. An interim order appointing a Welfare Guardian can also be obtained for a period of up to six months under section 14 of the PPPR Act.
21. A welfare guardian order may be made by the court in respect of such aspects of the personal care and welfare of the person as the court specifies in the order. If a welfare guardian order applies to all aspects of the person's personal care and welfare or to their living arrangements, the appointed welfare guardian will be legally authorised to consent to placement of the person in secure care.
22. A welfare guardian order needs to be current at the time of the person's placement in secure care. The order will specify a date (being no more than 3 years after the date of the order), by which time the welfare guardian must apply for a review of the order from the Court. If the term of a welfare guardian order has expired the welfare guardian will not be able to consent to placement of the person in secure care.
23. ARC facilities should ensure that a welfare guardian who is acting under a current welfare guardian order signs an admission form or similar document which confirms that they consent to the person being placed in secure care. The documentation of consent and a copy of the welfare guardian order should be kept on the person's file so that the facility can ensure that there is a legal basis for placement against any risk of arbitrary deprivation of liberty.

Personal Order for placement

24. A personal order for placement can be obtained under section 10 the PPPR Act to authorise the placement of a person who lacks capacity in secure care. An interim personal order for placement can also be obtained for a period of up to six months under section 14 of the PPPR Act.
25. A personal order for placement does not need to specify the name of the particular secure unit to which the person is being admitted. However, it should be expressed in a way that means it authorises placement of the person in that facility. For example, the order may authorise placement in "secure dementia level care" or "psychogeriatric care" or may be more broadly drafted and refer to placement in "an aged residential care facility" or "aged residential care".
26. A personal order for placement will need to be current at the time of the person's placement in secure care. If the term of a personal order has expired, the order will not provide a lawful basis for placement of the person in secure care. A personal order will expire on a date specified in the order. If a personal order for placement does not have an expiry date, it will expire 12 months from the date the order was issued. In those circumstances an application will need to be made to the Court to review the personal order. Applications to review a personal order for placement can be made by the original applicant or by the Principal Manager of the ARC facility (and by others, with permission of the Court).

27. A copy of the personal order for placement should be kept on the person's file so that the facility can ensure that there is a legal basis for placement to protect against any risk of arbitrary deprivation of liberty.

Right 7(4) of the HDC Code

28. Right 7(4) of the HDC Code provides an exception to the usual requirement for health and disability services to be provided with informed consent of the individual. It provides that where a person is not competent to consent or refuse consent to the provision of services, and there is no one lawfully entitled to consent on their behalf, then services can be provided lawfully in some circumstances.
29. Services must be in that person's best interests. Treatment must be consistent with what they would have decided if competent (if their views are ascertainable), or the provider must have taken account of the views of others interested in their welfare who are available to advise. Right 7(4) is employed widely in the health and disability sector and plays an important role in the provision of services to adults who do not have sufficient capacity to make decisions around their health and/or disability care.
30. Right 7(4) of the HDC Code should not be relied on as the legal basis to provide care in a secure unit indefinitely. However, while an application for a personal order or a welfare guardian order (or for review of such an order) is being processed by the Family Court, an ARC facility can lawfully continue to provide secure care to a person under right 7(4).
31. In those circumstances there should be some evidence placed on the person's file that an application is being made for orders under the PPPR Act. That could be a copy of email correspondence between the applicant and the Family Court or a copy of the notice of application for a welfare guardian order or personal orders. The ARC facility should also record that the person has been admitted into secure care under right 7(4) pending a court order being made.
32. Right 7(4) may also be relied on as the lawful basis for the placement of a person in secure care, on a short-term basis, for respite care.
33. Where right 7(4) of the HDC Code is relied on as the legal basis for placement in secure care, the **ARC facility should confirm and document that all the requirements of right 7(4) are met**, namely:
- The person is not competent to consent or refuse consent to the provision of services
 - There is no one lawfully entitled to consent on the person's behalf
 - Placement in secure care is in the person's best interests
 - Reasonable steps have been taken to obtain the person's views
 - Placement in secure care is consistent with what the person would have decided if competent (if their views are ascertainable); or
 - The provider has taken account of the views of others interested in the person's personal care and welfare.

34. Where a person has been assessed by Health NZ as requiring secure care and right 7(4) is being relied on as the legal basis for the person's placement in secure care, Health NZ will have confirmed and documented that the requirements of right 7(4) have been met.
35. Right 7(4) does not state the length of time for which a provider may rely on that right to continue to treat a person without informed consent. Nevertheless, consideration of whether it remains in the person's best interests should be ongoing throughout the period they reside in the secure unit, as the person's condition could change.

Mental Health Act

36. A person who is receiving compulsory mental health services in a hospital pursuant to an inpatient order under the Mental Health Act may be lawfully placed in a secure unit on inpatient leave for a limited period pending the grant of orders under the PPPR Act.
37. The Mental Health Act allows a patient's Responsible Clinician to place an inpatient on leave under s 31 of the Act for a period of up to 3 months. Inpatient leave can be extended by a further 3 months, however the maximum period an inpatient can be on leave under the Mental Health Act is six months.
38. Where s 31 of the Mental Health Act is relied on as the legal basis for placement in secure care, the ARC facility should record that the person has been admitted into secure care under s 31 of the Mental Health Act. The ARC facility should ensure that there is a s 31 leave form signed by the Responsible Clinician on the person's file and make a note of the date when the leave period expires. Once that leave period expires the person would need to return to hospital if the inpatient order is not discharged. If a personal order or welfare guardian order is issued within the period of leave, that will become the legal basis for the person's placement in secure care. The person's Responsible Clinician should be informed when an order under the PPPR is issued so that they can make a decision regarding the person's ongoing status under the Mental Health Act.

Checklist

39. Health NZ has created a checklist that can be used by secure care facilities and Health NZ staff to verify that documentation for the above legal basis for placement of a person in secure care has been sighted and is contained on the person's file. The checklist is included in this document as Appendix A. [Link to the Checklist](#). xxx

Aged Residential Care Agreements

40. As provided for in the Age-Related Residential Care Agreement and the Age-Related Residential Hospital Specialised Services Agreement, ARC facilities must keep and preserve records and protect their security in accordance with their statutory obligations.

Ngā Paerewa Health and Disability Services Standard

41. The Ngā Paerewa Health and Disability Services Standard (HDSS) [NZS 8134:2021] also provides in section 2.5.1 that “Service providers shall maintain quality records that comply with the relevant legislation, health information standards, and professional guidelines, including in terms of privacy”.
42. Section 2.5.2 of the HDSS states:
“Service providers shall maintain an information management system that:
- (a) Ensures the captured data is collected and stored through a centralised system to reduce multiple copies or versions, inconsistencies, and duplication;
 - (b) Makes the information manageable;
 - (c) Ensures the information is accessible for all those who need it;
 - (d) Complies with relevant legislation;
 - (e) Integrates an individual’s health and support records.”
43. In compliance with section 2.5.2 of the HDSS, ARC facilities must ensure that the documentation confirming the legal basis for placement of the person in secure care mentioned above is also captured in their information management system.
44. There should be an alert on a person’s file to identify the review dates of a welfare guardian order or personal order for placement so that the facility can then follow up when orders lapse. Right 7(4) of the HDC Code can be relied on as the legal basis for placement while an application for updated orders under the PPPR Act is processed.

Relevant resources

45. Relevant resources relating to EPOAs and orders under the PPPR Act can be found on the following websites:
- **Age Concern:** <https://www.ageconcern.org.nz/>
 - **MSD Office for Seniors:** <https://www.officeforseniors.govt.nz/>
 - **Ministry of Justice:** <https://www.justice.govt.nz/>
 - **Public Trust** <https://www.publictrust.co.nz/>
 - **Community Law – for Community Law Centres across Aotearoa New Zealand:** <https://communitylaw.org.nz/>
46. Template forms for making applications for orders under the PPPR Act can be found on the Ministry of Justice website:
- <https://www.justice.govt.nz/family/powers-to-make-decisions/personal-orders/how-a-personal-order-works/apply-for-a-personal-order/>;
<https://www.justice.govt.nz/family/powers-to-make-decisions/ask-for-a-review-of-an-order/>
47. While it is not necessary to have a lawyer involved in making an application for orders under the PPPR Act, legal advice may be sought from a lawyer who practices in

Family Law. Family lawyers may be located via the New Zealand Law Society website: <https://www.lawsociety.org.nz/for-the-public/find-a-lawyer/>

48. Some lawyers may have access to legal aid for people on low incomes or facing material hardship.

49. A glossary of relevant terms is included in Appendix B.

Appendix A: Checklist

Checklist for when admitting a person to secure Dementia or Psychogeriatric care (secure care) in an Aged Residential Care (ARC) facility

For use in Aged Residential Care (ARC) facilities and by Health New Zealand /Te Whatu Ora (Health NZ) staff

Purpose

This Checklist is designed to ensure there is a **valid legal basis** for admission of a person into a secure dementia or psychogeriatric care (**secure care**) setting. A copy of the checklist and supporting documentation should be stored on the person's clinical record.

Section 1: Resident Details

Resident Name: _____

Resident NHI: _____

Section 2: Assessment for secure care

Person assessed by Health NZ as requiring secure care.

Permanent / Long term care: Yes / No Short-term care: Yes / No

Date of assessment: ____ / ____ / ____

If no, state why assessment has not been completed:

Section 3: Confirmation of legal authority for admission

- ☒ Choose one process only
- ☒ Confirm the following documents are stored on the person's clinical record (where applicable):

1.	Activated EPOA	
a)	A completed registered health practitioners' certificate of mental incapacity	
b)	Copy of EPOA for Personal Care and Welfare Signed admission form, signed by EPOA	
c)	Signed admission form, signed by EPOA	
2.	Consent of the person's welfare guardian	
a)	Signed admission form, signed by Welfare Guardian	
b)	Current Interim or Final Welfare Guardian Order	
c)	Expiry date for Welfare Guardian Order: ____ / ____ / ____	

3.	Personal Order for placement under PPPR Act	
a)	Current Interim or Final Personal Order for Placement	
b)	Expiry date for Personal Order: ____ / ____ / ____	
4.	Right 7(4) of the HDC Code	
a)	Evidence that Application for a Welfare Guardian / Personal Order has been filed in Court	
b)	Date Court documents submitted: ____ / ____ / ____ FAM Order Number(s):	
c)	If no application for Court orders has been filed, explain circumstances in which Right 7(4) is being used:	
d)	<p>Confirm that Right 7(4) criteria have been met and are documented on patient file (Note: these may have been confirmed by Health NZ on discharge from hospital/placement in care)</p> <ol style="list-style-type: none"> 1. Person is not competent to consent or refuse the provisions of services 2. No one lawfully entitled to consent on their behalf 3. Placement is in the person's best interests 4. Reasonable steps taken to obtain person's views 5. Placement aligns with what they would have decided (if known) 6. Views of others interested in their care have been considered <p>NOTE: Right 7(4) criteria to be reconsidered at 3 monthly intervals</p>	
5.	Section 31 Leave - Mental Health Act	
a)	Section 31 Leave form signed by person's Responsible Clinician	
b)	Note: If Personal Order for placement or Welfare Guardian Order are issued during period of leave, that order will become the legal basis for placement (appropriate part of this checklist should then be completed)	
c)	Leave expiry date: ____ / ____ / ____	
Additional Comments:		

Section 4: Review and Final Sign-Off Aged Residential Care (ARC) Secure Care Facility

Has the legal basis for lawful admission to secure care been confirmed by a manager or other authorized person? (Yes / No)

Completed by: _____

Position: _____

Organisation: _____

Date: _____

Appendix B: Glossary

Term	Definition
Enduring power of attorney (EPOA) - Welfare	Enduring Power of Attorney – Personal Care and Welfare. A legal arrangement where a person (called the donor) appoints another person (called the attorney) to make decisions about their personal care and welfare when the donor no longer has decision making capacity. Decisions may include agreement to medical treatment, admission to residential care or choice of a residential home.
Activated Enduring Power of Attorney	Enduring Power of Attorney (EPOA) which has been “activated” by a health practitioner (whose scope of practice includes the assessment of a person’s mental capacity) completing a medical certification of incapacity relating to the donor of the EPOA.
Health Practitioner’s Certificate of Mental Incapacity	A certificate completed by a health practitioner (whose scope of practice includes the assessment of a person’s mental capacity) confirming that the donor of an EPOA lacks the capacity to make decisions relating to their personal care and welfare or property (or both) – which contains certain information required to be included under the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008.
Competence / capacity	<p>Individuals are presumed to be competent to manage their property and to make decisions about their personal care and welfare (including decisions about medical treatment and residential care) unless there are reasonable grounds for believing that the individual is not competent.</p> <p>Where there are concerns about an individual's competence, the individual's competence will be assessed by a relevant health practitioner. That assessment will consider whether the individual can understand the nature and foresee the consequences of a decision (or decisions) relating to the individual's personal care and welfare.</p>
Needs Assessment and Service Coordination (NASC)	<p>A Needs Assessment is a discussion with an individual about the supports the person needs with their day-to-day life. The aim of the needs assessment is to help people to maintain their independence, or help a person access residential supports to maintain their quality of life.</p> <p>A team of experienced health professionals are responsible for assessment and coordination of health-related services for older people. This group has the authority to assess the care needs of an individual, authorise access to publicly funded residential care, and allocate supports for a wide range of services.</p>
Personal Order	Relatives and non-relatives including doctors and Social Workers can apply to the Family Court for a Personal Order for a person who does not have the capacity to make personal decisions for themselves or is unable to communicate these decisions.

Term	Definition
	Personal Orders are specific and wide ranging and may include medical care the person will receive or where the person will reside.
Protection of Personal and Property Rights Act 1988 (PPPR Act)	<p>The Protection of Personal and Property Rights Act 1988 is the Act which provides for the protection and promotion of the personal and property rights of persons who are not fully able, or unable, to manage their own affairs.</p> <p>It sets out a process by which a person can appoint others to make decisions on their behalf when they no longer have capacity to make decisions (EPOA), as well as a process for applications to the Family Court for Personal Orders, Welfare Guardian, Property Manager and Property Administrator Orders.</p>
Subject Person	The “Subject Person” is the person who any application for Personal Orders or Welfare Guardian orders is about. It is the individual who does not have capacity to make decisions.
Welfare Guardian	A person appointed by the Family Court as a Welfare Guardian to make care and welfare decisions on behalf of a person who no longer has capacity to make those decisions for themselves.

