

**He Puka Kaupapa | Second Issues Paper 52**

# **He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke**

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## **Review of Adult Decision-Making Capacity Law**



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

***Kia whanake ngā ture o Aotearoa mā te arotake motuhake***  
***Better law for Aotearoa New Zealand through independent review***

**The Commissioners are:**

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Review of Adult Decision-Making Capacity Law

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We emphasise that the views expressed in this Second Issues Paper are those of the Commission and not necessarily those of the people who have helped us.

The Commissioner responsible for this project is Geof Shirtcliffe. The legal and policy advisers involved in the preparation of this paper include Rebecca Garden, Claire Browning, Sarah Fairbrother, Megan Rae, Rochelle Rolston, Fiona Thorp and Jesse Watts. The law clerks who have worked on this paper are Jack McNeill and Christie Wallace.

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# Glossary

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Key abbreviations and terms used in this Issues Paper are set out below. Our approach has been to define terms in a simple, clear way to assist readers who are unfamiliar with them. More precise explanations are provided where relevant in this Issues Paper. We acknowledge there may be different views on certain terms. For ease of understanding, we have adopted the most widely used and understood definitions.

We have included basic explanations of lesser-known Māori words throughout this Issues Paper to assist readers with understanding their meaning in the specific context in which they are used. These explanations are not intended to be prescriptive or reductive and do not necessarily reflect the depth and breadth of meaning of these words in te reo Māori.

advance directive	A statement given by a person about possible future medical decisions. Advance directives are one way people can communicate their choices about medical procedures or treatment that may be needed in the future at a time when they are not able to give their informed consent.
affected decision-making	We use the term ‘affected decision-making’ as a catch-all term for situations where a person’s decision-making has been affected. These can include a traumatic brain injury, dementia, learning disabilities and experiences of mental distress. People’s decision-making can be affected for one decision, for a series of decisions or for decisions more generally.
attorney	The person appointed by the donor under an enduring power of attorney to make decisions for the donor at some point in the future.

‘best interests’ approach	When a person is subject to a decision-making arrangement under the PPPR Act, the basis upon which decisions are made for them is heavily guided by what the decision-maker thinks is in the person’s best interests. This approach has been criticised by the UN Committee on the Rights of Persons with Disabilities as being inconsistent with the rights of disabled people.
court-appointed representative OR representative	A person appointed by the Family Court to make decisions for a person who has been assessed not to have decision-making capacity.
decision-making capacity	The concept used by the law in Aotearoa New Zealand to identify situations in which a person’s decision-making is considered to be so affected that they are not able (or the law should consider them to not be able) to make certain decisions. See Chapters 2 and 7.
decision-making support	Decision-making support is a broad term that can cover both informal and formal support arrangements of varying types and intensity that a person may need to make a decision or express their views about a decision. It includes such things as explanation of information and communication assistance. We use ‘decision-making support’ and ‘support’ interchangeably.
donor	The person who appoints an attorney under an enduring power of attorney to make decisions for them at some point in the future.
enduring power of attorney (EPOA)	An arrangement under which one person (the donor) grants another person (the attorney) the power to make personal care and welfare decisions for them and/or manage their property affairs. EPOAs generally only take effect if the donor

	ceases to have decision-making capacity for the relevant decisions.
legal capacity	The legal entitlement of a person to: (a) Hold rights and owe legal duties (legal standing). (b) Act on and exercise those rights and be accountable for the performance of those duties (legal agency).
mental distress	Circumstances where a person's mental health is negatively affected in a way that affects their thoughts, feelings or behaviour.
personal order	A type of order under the PPPR Act under which the Family Court makes a decision about a person's personal care and welfare such as that the person live in a particular place or receive medical treatment.
property manager	A person appointed by the Family Court under the PPPR Act to make decisions about another person's property.
Protection of Personal and Property Rights Act 1988 (PPPR Act)	The key piece of legislation that deals with adult decision-making capacity. It provides several decision-making arrangements for people who do not have decision-making capacity.
reasonable accommodations	Adjustments or modifications that are needed to ensure disabled people enjoy all human rights and fundamental freedoms on an equal basis with others. The modifications and adjustments must be necessary and appropriate and not impose a disproportionate or undue burden on the person providing the reasonable accommodations. Examples of reasonable accommodations include the provision of accessible information, extra time to make a decision, or enabling decisions to be made at a time of day when the person is better able to understand the relevant information.

representative decision-making	Decision-making arrangements under which one person makes a decision for another person who does not have decision-making capacity for it. The decision-maker may have been appointed by a court or by the person themselves.
rights, will and preferences	Article 12 of the UN Convention on the Rights of Persons with Disabilities requires legislation relating to the exercise of a person's legal capacity to respect the 'rights, will and preferences' of the person with affected decision-making. What this means is the subject of significant debate. See the discussion in Chapter 3.
statement of wishes	A non-binding statement under which a person provides information relevant to how they want decisions to be made for them in the future if they cease to have decision-making capacity.
substituted decision-making	Substituted decision-making is taken to mean different things by different people. There is general agreement that substituted decision-making includes at least some arrangements under which someone makes a decision for another person. However, there is disagreement as to whether it includes all such arrangements. We use the term 'representative decision-making' to refer to situations where one person is appointed to make decisions for another person. See the discussion in Chapter 9.
decision-making supporter arrangement	An arrangement under which one person helps a person with affected decision-making to make a decision but the decision is made by the person with affected decision-making.
welfare guardian	A person appointed by the Family Court to make decisions about another person's personal care and welfare.



# Overview

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1. Te Aka Matua o te Ture | Law Commission is undertaking a review of the Protection of Personal and Property Rights Act 1988 (PPPR Act).
2. This overview provides a brief, high-level introduction to the key matters addressed in each chapter of this Issues Paper to assist readers to understand the focus of that chapter and how it relates to the other chapters. It does not summarise each chapter or identify all significant matters addressed in it, and it does not repeat any of the questions that we ask throughout the Issues Paper.

## Chapter 1: Introduction

3. The PPPR Act is the primary piece of legislation relating to adult decision-making capacity in Aotearoa New Zealand.
4. There are many reasons to review the PPPR Act. Particularly important is article 12 of the UN Convention on the Rights of Persons with Disabilities (Disability Convention), which reflects a significant change in understandings of disability and has spurred calls for reform of adult decision-making capacity laws in numerous jurisdictions, including New Zealand. Other reasons to review the PPPR Act are noted below.

## PART 1: THE PPPR ACT AND OVERARCHING ISSUES

### Chapter 2: The case for a new Act

5. The PPPR Act provides for decision-making arrangements that can be used when a person is assessed to not have decision-making capacity for a decision or decisions. These decision-making arrangements include personal orders, welfare guardians, property managers and enduring powers of attorney (EPOAs). How decisions are made for people under these arrangements is heavily guided by an assessment of their best interests.

6. In our view, the PPPR Act requires significant reform. Some of the reasons for this are summarised in the following paragraphs. We think that the extent of the required reforms means that it would be preferable for the PPPR Act to be repealed and replaced with a new Act.
7. The PPPR Act is not founded on modern understandings of disability and does not adequately reflect the requirements of the Disability Convention. Significant change would be required for it to do so — in particular, to ensure proper respect for a person's rights, will and preferences. Making these changes to the PPPR Act would require grafting new policy onto existing frameworks, which can create complexity and would risk undermining the overall coherence of the legislative scheme.
8. Reform is also required for a range of other reasons. The PPPR Act does not refer to te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) or reflect Treaty considerations. It pre-dates official guidance to consider tikanga in law reform. It does not meet modern drafting standards. We also think that replacing the PPPR Act with a new Act would tangibly signal the extent of legal change and so underscore the changes in attitude and practice that we think are needed.
9. For all these reasons, we consider that an entirely new Act is to be preferred.

### **Chapter 3: Human rights**

10. Many human rights are relevant to this review. However, we focus on the aspects of human rights that are of particular relevance.
11. Article 12 of the Disability Convention is fundamental to this review. It concerns disabled people's right to equal recognition before the law. Like most human rights instruments, it is grounded in the concepts of dignity, autonomy and equality.
12. Article 12 insists on the right of disabled people to enjoy legal capacity on an equal basis with others. Legal capacity is necessary to exercise other rights. The denial of legal capacity to disabled people has led to their rights being denied.
13. There are three key requirements of article 12 that are particularly important to this review. First, disabled people must be provided with support and reasonable accommodations in exercising their legal capacity. Both support and

reasonable accommodations reflect the ‘social model’ of disability, which focuses on identifying the physical and societal barriers that prevent people with impairments from being fully included in society. They also reflect a ‘substantive’ approach to equality, which recognises that sometimes people need to be treated differently to ensure they access equal opportunities to participate in society on an equal basis. Requirements of support and reasonable accommodations recognise that people have different decision-making abilities and that some people will need support or accommodations to make decisions.

14. Second, legislation relating to legal capacity must respect the rights, will and preferences of the person with affected decision-making. What the phrase “respect the rights, will and preferences” requires is the subject of significant debate. In our view, the requirement to respect a person’s rights, will and preferences is fundamental to the design of a new Act. We discuss how it might be operationalised throughout the Issues Paper.
15. Third, any restrictions on legal capacity must not result in unjustified discrimination. Article 12 might be seen as a specific illustration of the general proposition that any limits on a person’s right to freedom from discrimination must be demonstrably justified.

#### **Chapter 4: Te Tiriti o Waitangi | Treaty of Waitangi**

16. The Treaty is an integral part of the constitutional framework of New Zealand. The importance of properly taking into account the Treaty in policy-making and legislative design is recognised in the guidance issued to public officials. However, the PPPR Act does not refer to the Treaty or reflect Treaty considerations.
17. We are considering ways to give effect to the Treaty in a new Act. There are differences between the reo Māori text and English text of the Treaty. We agree with Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal that precedence, or at least considerable weight, should be given to the Māori text when there is a difference between it and the English text. We have accordingly considered how a new Act might make provision for the exercise of tino rangatiratanga, the central concept of article 2 of the reo Māori text, in the context of adult decision-making arrangements.



18. We have focused on two closely-related considerations:
  - (a) Better enabling Māori to live according to tikanga.
  - (b) Better enabling Māori collective involvement in decision-making that concerns Māori with affected decision-making.
19. We consider a range of ways in which these considerations might be pursued throughout the Issues Paper. Importantly, as we discuss in Chapter 5, we think that a new Act should avoid unnecessary specification of what tikanga might involve in any particular circumstance. It follows, we think, that a new Act should not seek to specify the nature of the collective involvement that tikanga may require.
20. Article 3 of the Treaty (which addresses protection and equality) has been understood as a broad guarantee of equity, obliging the government both to care for Māori and to ensure outcomes for them equivalent to those enjoyed by non-Māori. Māori are currently disproportionately affected by experiences of impairment that may affect decision-making. Māori are also underrepresented in accessing many health and disability services, including decision-making arrangements under the PPPR Act. We think that enabling Māori to choose to live according to tikanga and better providing for the involvement of Māori collectives in decision-making could assist to address these disparities.

## Chapter 5: Tikanga

21. Tikanga is the set of values, principles and norms from which a person or community can determine the correct action in te ao Māori. Within te ao Māori, tikanga is a source of rights, obligations and authority that governs relationships. Tikanga may involve both tikanga Māori (values and principles that are broadly shared and accepted generally by Māori) and localised tikanga that are shaped by the unique knowledge, experiences and circumstances of individual Māori groups (such as iwi, hapū, marae or whānau).
22. Tikanga is significant to those engaging in state law review and reform in New Zealand. Guidance to public officials requires those engaging in review and reform of the law to consider tikanga. The PPPR Act pre-dates that guidance. It does not refer to tikanga.
23. More generally, the PPPR Act has a focus on the individual. It does not generally represent Māori perspectives, which may differ from those of non-

Māori by being more holistic and less individualised. Submitters on our Preliminary Issues Paper agreed that a new Act should better provide for tikanga and Māori perspectives. Submitters generally agreed with the tikanga values and principles we identified as important in our Preliminary Issues Paper, although some suggested other concepts or other ways of explaining the values and principles.

24. We have considered the best way for a new Act to recognise and engage with tikanga. Singling out and briefly summarising specific principles or values in a new Act risks distorting tikanga and neglects the extent to which tikanga may vary according to different localised expressions. We therefore think that a new Act should not specify which tikanga values and principles may be applicable. Rather, to enable Māori who wish to live according to tikanga, we consider it preferable for a new Act to enable tikanga to function on its own terms without seeking to statutorily specify what that might mean. We discuss how a new Act might enable this throughout the Issues Paper.
25. A number of submitters suggested that the mana of the person with affected decision-making could be an important guiding value for a new Act. These suggestions are consistent with the association of mana with individual dignity in other contexts. However, we have concluded that this is not desirable. Mana is a complex concept with both individual and collective aspects, closely interwoven with other tikanga and not necessarily the tikanga most aligned with concepts of individual dignity.
26. In our view, enabling Māori who wish to live in accordance with tikanga to do so might be better achieved by a general provision concerning tikanga, rather than provisions that identify specific tikanga values and principles. A new Act could, for example, require each person with a role under that Act (including courts, decision-makers and decision-making supporters) to take into account tikanga to the extent that it is relevant in the circumstances.

## **PART 2: KEY FEATURES OF A NEW ACT**

### **Chapter 6: The purposes of a new Act**

27. The long title of the PPPR Act explains that it is “[a]n Act for the protection and promotion of the personal and property rights of persons who are not fully able

to manage their own affairs”. Sections 8 and 28 of the PPPR Act state two primary objectives that the court must follow when exercising its jurisdiction under the Act. These are to make the least restrictive intervention possible in the life of the person and to enable or encourage the person to exercise and develop their capacity to the greatest extent possible. However, there is no clear purpose provision in the PPPR Act.

28. In the absence of a clear purpose provision, the purpose of the PPPR Act has been considered by the courts. Most cases have agreed that the purpose of the PPPR Act is protective. This has resulted in courts reading in welfare and best interests as a secondary objective of the PPPR Act. Te Kōti Matua | High Court has said that the PPPR Act is “all about the welfare and best interests” of the people who are subject to it.
29. In our view, the PPPR Act is not sufficiently clear about the policy objectives it seeks to achieve. We think the purposes of law in this area would benefit from reconsideration. A new Act should clearly articulate its purposes so that the ideas or values underpinning it are clear. We consider that protection from significant harm should be a purpose of the law. However, we also consider this should not be the sole purpose. We think that the purpose should also include the protection of human rights to recognise and give effect to the significant policy shift represented by the Disability Convention.

## **Chapter 7: Decision-making capacity**

30. Decision-making capacity is a complex and contested concept. It has been understood differently at different times and places. Different terms such as ‘capacity’, ‘competence’, ‘legal capacity’ and ‘mental capacity’ are used interchangeably and are also used to mean different things. The concept is particularly significant to the disabled community.
31. Decision-making capacity is the concept used by the law in New Zealand to identify situations in which a person’s decision-making is considered to be so affected that they are not able (or the law should consider them to not be able) to make certain decisions.
32. The legal test for decision-making capacity and the legal consequences of not having decision-making capacity are questions of policy. Currently, the law uses a ‘functional’ approach to assessing decision-making capacity. Broadly, this

asks whether the person understands the general nature and likely consequences of what they are doing and whether they can communicate the decision they have made. How the law responds when a person is assessed not to have decision-making capacity depends on the context.

33. Decision-making capacity is fundamental to the operation of the PPPR Act. For all court-ordered arrangements, an absence of decision-making capacity is necessary, but the absence of decision-making capacity alone is not sufficient reason for making an order. An absence of decision-making capacity is enough to activate an attorney's decision-making role under an EPOA.
34. While there are many criticisms of decision-making capacity, we think that decision-making capacity should continue to be used in a new Act. We think that a new Act will still need a concept to identify when a person's decision-making is so affected that a representative arrangement might be needed. In our view, decision-making capacity is the preferable concept. We are unaware of any alternative concepts that could be used. In addition, using a different concept in a new Act would raise profound questions about the integrity and coherence of the law that are beyond the scope of this project, given how many other areas of the law use the concept. There are also benefits to using a concept people are familiar with.
35. We do not consider that using decision-making capacity in the law necessarily results in unjustified discrimination. Whether it does or not depends on two broad issues:
  - (a) The legal standards and processes that apply to assessments of whether a person has decision-making capacity.
  - (b) The precise legal consequences that flow from an assessment that a person lacks decision-making capacity.
36. We consider various options for improving assessments of decision-making capacity, including use of a single test for decision-making capacity, the incorporation of support and initiatives to make assessments more culturally responsive.
37. Later chapters consider the consequences that might flow from an assessment that a person lacks decision-making capacity.

## Chapter 8: Decision-making support

38. The term ‘decision-making support’ refers to any support or accommodations a person may need to make a decision or express their views about a decision. The types of decision-making support that people need for decisions will vary as people’s decision-making abilities naturally differ. Sometimes, people have a trusted person to support them to make decisions, often called a ‘decision-making supporter’. Decision-making supporters support the person with affected decision-making to make the decision for themselves.
39. The importance of decision-making support is recognised in the Disability Convention. It requires countries to take appropriate measures to provide disabled people with access to the support they may require in exercising their legal capacity.
40. The law in New Zealand recognises decision-making support in a range of ways. In several contexts, people have the right to a support person. For example, in the health context, the law provides people with the right to have a support person ‘present’. However, there is no consistent approach to recognition of supporters or decision-making support. There is no express recognition of support or supporters in the PPPR Act, although there is some limited recognition that welfare guardians and property managers might provide decision-making support in practice.
41. There are several issues with decision-making support under the PPPR Act, including limited and inconsistent use of decision-making support by representatives and attorneys, gaps in the availability of decision-making support and challenges with third-party recognition of decision-making supporters. Sometimes, third parties are reluctant to provide supporters with information.
42. There are several ways a new Act might incorporate decision-making support, including in assessments of decision-making capacity (Chapter 7), when the court considers whether to appoint a representative to make decisions for someone (Chapter 10), and when court-appointed representatives and attorneys appointed under EPOAs are making decisions. In Chapter 8, we consider whether a new Act might also provide for a formal decision-making supporter arrangement and/or a co-decision-making arrangement.

## Chapter 9: Court-ordered arrangements

43. Court-ordered arrangements are decision-making arrangements that are ordered by the court under which another person or the court makes one or more decisions for the person with affected decision-making. There are two types of court-ordered arrangements: court-ordered decisions and court-appointed representatives. The PPPR Act contains provisions for both types of court-ordered arrangements.
44. A court-ordered decision is a decision made by the court for a person with affected decision-making, for example, that the person live in an aged care facility or receive medical treatment. Court-appointed representatives are people appointed by the court to make decisions for a person whose decision-making is affected. Under the PPPR Act, a welfare guardian may be appointed to make decisions about another person's personal care and welfare. A property manager may be appointed to make decisions about another person's property.
45. Whether the law should provide for court-ordered arrangements and what they might involve are controversial topics. There is disagreement about whether court-ordered arrangements are permitted under article 12 of the Disability Convention. In our view, such arrangements are permitted if properly designed. In particular, their focus must be on the rights, will and preferences of the person with affected decision-making, rather than on their best interests.
46. We consider that court-ordered arrangements should be included in a new Act. In our view, there are some circumstances where a person with affected decision-making may need another person to make decisions for them. We have identified four possible circumstances:
  - (a) When there is a need to make a decision but the person needs a representative to interpret their will and preferences.
  - (b) When there is a need to make a decision but what can be understood of the person's will and preferences does not provide a sufficient basis on which to decide.
  - (c) When there is a need to make a decision and there will be legal uncertainty if the decision is made by a person without decision-making capacity

(because the law relevant to that particular decision requires it to be made by a person with decision-making capacity).

(d) To prevent significant harm to the person.

## **Chapter 10: Court-appointed representatives: key features**

47. There are several features of court-appointed representative arrangements that we are considering. Two particularly important features are how a representative makes decisions and the test for appointing a representative.
48. We think that the way a representative makes decisions needs to change. Under the PPPR Act, the decision-making role of representatives (welfare guardians and property managers) is focused on the best interests of the person with affected decision-making. However, the Disability Convention requires the focus to be on the person's rights, will and preferences. To realise this, there are several matters that need to be considered. These include how a representative should identify a person's will and preferences. They also include when it may not be sufficient to reach a decision based solely on a person's will and preferences (for example, when it might result in significant harm to the person) and, in such cases, how decisions should be made. An important related consideration is the decision-making process that a representative should follow, including how their role can reflect the significance of decision-making support and what their consultation obligations should be.
49. In our view, the test for appointing a representative should also be reformed. Broadly, we think it should contain three elements:
  - (a) First, the court should be satisfied that the person with affected decision-making does not have decision-making capacity for the decision or decisions at issue.
  - (b) Second, the court should be satisfied that the circumstances of the person with affected decision-making give rise to a need for the appointment of a representative. There is a range of factors that might be relevant to assessing the need for a representative, such as the person's will and preferences, the views of family and whānau and the risks of harm if a representative is not appointed.
  - (c) Third, the court should be satisfied that less intrusive measures (such as support arrangements) are either not available or not suitable.

50. Other matters we are considering include when a representative should make decisions, the scope of a representative arrangement, whether any types of decisions should require express court approval or be excluded from representative arrangements, and how to ensure representative arrangements are in place no longer than they need to be and are subject to regular review.

### **Chapter 11: Court-appointed representatives: other aspects**

51. We also address a number of other matters relating to court-appointed representatives. Two key matters are the test for assessing the suitability of a person to act as a representative and the duties of a representative.
52. We have not heard that the suitability requirements in the PPPR Act and relevant case law are inappropriate. We therefore suggest that the court should consider the following factors when assessing a representative's suitability: the ability of the representative to carry out the role, the will and preferences of the represented person, any conflicts of interest, and social and cultural considerations. We do not consider that these factors should be exhaustive. The court should continue to be able to consider any other matter it considers relevant.
53. Under the PPPR Act, the exact scope and nature of the duties of welfare guardians and property managers is unclear. We think that representatives should owe duties to the represented person to ensure that they carry out their decision-making roles appropriately. There is a significant power imbalance between the representative and the represented person. It is important the law recognises this imbalance by way of appropriate duties to help ensure that representatives act properly. We are interested in hearing views on what duties a representative should owe to the represented person and whether these duties should be set out in a new Act.
54. Other matters we are considering include when a person might have more than one representative and how multiple representatives should work together, other requirements about who can act as a representative, the powers of a representative, record-keeping and reporting requirements of representatives, what should happen if a representative acts improperly, what should happen if a representative is unable or unwilling to continue acting, and reimbursement and remuneration of representatives.



## Chapter 12: Court-ordered decisions

55. Under the PPPR Act, the court can make orders that are tailored to particular, often one-off, decisions. There is no statutory preference in the PPPR Act for court-appointed representatives or court-ordered decisions. Different approaches exist overseas. We are interested in views on whether a new Act should contain a statutory preference for court-ordered decisions or for representative arrangements (and if so which it should prefer), or whether there should be no statutory preference on the basis that it will depend on the circumstances.
56. Under the PPPR Act, court-ordered decisions relate to a person's personal care and welfare. However, the court has used this power to make decisions about property. We are interested in views on whether it would be useful for a new Act to expressly allow the court to make one-off financial decisions.

## Chapter 13: Enduring powers of attorney

57. An EPOA is an arrangement under which one person (the donor) gives another person (the attorney) the power to make decisions for them, usually at some point in the future when the donor no longer has decision-making capacity. EPOAs are provided for under the PPPR Act. Submitters told us that EPOAs are useful. In our view, they should be retained in a new Act.
58. The law relating to EPOAs has two key objectives — usability and safeguarding. How best to balance these objectives is a difficult issue. If EPOAs are too easy to create and use, there is a risk they will be misused. However, if the safeguards are too stringent, people will be less likely to create and use EPOAs.
59. Despite previous reviews of the PPPR Act provisions relating to EPOAs, we heard that the balance between usability and safeguarding remains an issue. Submitters told us that the process to create an EPOA is difficult and expensive, the forms are too long and the role of the witness is complicated.
60. We are considering ways to make the process for creating EPOAs easier. We are interested in how to improve the EPOA forms, whether any changes should be made to the current witnessing and certification requirements, and whether a donor should be able to create an EPOA remotely. We think the signatures of

the donor and the attorney should continue to be witnessed. The process of witnessing has a protective function. However, we are interested in whether the signatures of the donor and attorney should continue to require different witnesses and who should be able to act as a witness.

61. We are also interested in whether any of the three additional safeguards that are currently included as part of the witnessing requirements to create an EPOA could be carried out in another way or are not required. These relate to ensuring that the donor understands the nature of the EPOA, the EPOA is not made under duress or undue influence and the donor has decision-making capacity to make the EPOA.
62. We are considering when an attorney can make decisions for the donor. In our view, an attorney should continue to be empowered to make decisions for which the donor lacks decision-making capacity. We are interested in hearing views on whether, once the EPOA comes into effect, the attorney should be able to act on any matter within the scope of the EPOA or whether those powers should be activated on a case-by-case basis. We are also considering when a professional should need to determine whether a person has decision-making capacity.
63. We also address how to tailor the scope of an EPOA, the decision-making role of the attorney and safeguards once an EPOA is in place.

#### **Chapter 14: An EPOA register and notification requirements**

64. Under the PPPR Act, there is no process for registering EPOAs or for notifying anyone that an EPOA has been created or that the attorney has begun making decisions for the donor. Submitters told us we should consider the introduction of a register.
65. The introduction of a register or notification requirements might help resolve several issues that people currently face. These include it being difficult to know whether there is an EPOA in place, the limited oversight of attorneys acting under an EPOA and a lack of information about the uptake and use of EPOAs.
66. Although a register may help to address these issues, there are potential downsides. An EPOA register will have resource implications and a registration scheme likely needs to be mandatory in order for it to fully realise the potential advantages. However, the costs and complexity associated with a mandatory

scheme, along with privacy concerns, may discourage people from creating EPOAs.

67. If a registration system were to be included in a new Act, several design questions would need to be considered. These include matters such as who should be responsible for maintaining a register, costs for registration and what information should be contained on a register.
68. Notification requirements may also help address some of the issues discussed above by making more people aware of the existence of an EPOA. However, they would also increase the level of complexity of the EPOA scheme, especially if they are mandatory, and so might make EPOAs less attractive as an advance planning tool.
69. If a notification requirement were to be included in a new Act, several design questions would need to be considered. These include when notification is required, whether notification should be voluntary or mandatory and who should be responsible for giving notice.

## **Chapter 15: Documenting wishes about the future**

70. An advance directive is an instruction given by a person to medical treatment decision-makers about future medical decisions. It is one way people can communicate their choices about medical procedures or treatment that may be needed in the future at a time when they are not able to give informed consent.
71. The PPPR Act sets out how advance directives are to be considered by attorneys acting under EPOAs. There is no equivalent provision for welfare guardians. The current law is unclear about how an advance directive will be considered by representatives and attorneys. We are considering how representatives and attorneys should consider advance directives in their decision-making, including who may act on an advance directive, whether representatives and attorneys require different safeguards, the weight to be given to an advance directive by representatives and attorneys, and whether a new Act might set out circumstances in which it may be appropriate not to follow a valid advance directive.
72. We are not considering reform to advance directives themselves, such as when an advance directive might be binding on health professionals. These issues extend beyond the scope of the PPPR Act.

73. In addition to advance directives, we are interested in whether a new Act could provide for people to say what is important to them more generally in the form of a non-binding statement of wishes that need not only be about medical care. This is a document in which a person could record their values, lifestyle preferences, preferences for how decisions are made and other matters particularly important to them. While statements of wishes do not need to be specifically addressed in legislation, we consider that recognising statements of wishes in a new Act may increase confidence that people's views will be considered in future decisions. We consider how a statement of wishes might interact with decision-making arrangements under a new Act.

## **PART 3: SYSTEMIC IMPROVEMENTS**

### **Chapter 16: Practical improvements and oversight**

74. We are considering practical ways to ensure the decision-making arrangements in a new Act work effectively. Two key matters are what information, guidance and training might be needed and how a new Act should provide for oversight of decision-making arrangements, including through complaints and investigation processes and the option of establishing an oversight body. We also consider how to increase the availability of people to act as attorneys and representatives.
75. Although a lot of information exists about the PPPR Act, we heard that some people are still unaware of the decision-making arrangements it provides for or struggle to find information when they need it. We are interested in ways to improve the availability and accessibility of information about decision-making arrangements under a new Act. We are also considering ways to improve the information and guidance that is available to representatives and attorneys and ways to increase the guidance and training for professionals conducting decision-making capacity assessments.
76. Currently, te Kōti Whānau | Family Court is the main forum for people who have complaints or disputes about decision-making arrangements. There are also other domestic or international bodies that may be involved in complaints. We have heard that the Family Court can be an inaccessible forum and that people lack options to raise concerns outside of court. Many other jurisdictions have a single body that carries out complaint and investigation functions for decision-

making arrangements. We are interested in hearing views on whether a similar body should be established in New Zealand.

77. Multiple bodies perform different oversight and guidance functions in the PPPR Act context. We are considering whether a new body should be established to consolidate oversight and guidance functions, including in relation to tikanga. Some functions that an oversight body might undertake include complaints and investigation, acting as a representative or attorney for people who do not have someone available to act in those roles, providing guidance on implementing decision-making arrangements, providing access to other forms of dispute resolution, and ensuring proper recognition of tikanga and proper regard for the Treaty in the operation of a new Act.

### **Chapter 17: Improving court processes**

78. Court processes will remain necessary under a new Act. These processes need to be accessible to people who might use them. We have heard that court processes are difficult to access and not always socially and culturally responsive. We are considering ways to improve court processes under a new Act.
79. We are thinking about ways to increase the participation of the person with affected decision-making in court processes. This could include ways to ensure the person has appropriate representation, is present at the hearing in appropriate cases, can provide their views to the court and has appropriate support to participate in the court process.
80. We also consider how Family Court processes might be changed to achieve the perceived benefits of a specialist court or tribunal, such as having simpler forms and requirements for making an application and a less adversarial approach.
81. In addition, we are considering ways to support people making an application to the court, ways to ensure court processes are socially and culturally responsive and whether other dispute resolution options should be provided for in a new Act.
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## CHAPTER 1

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# Introduction

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### WHAT THIS REVIEW IS ABOUT

- 1.1 Every day, adults make decisions. They make those decisions knowing that they have the right to make them. A person may decide to have another coffee, buy a phone or sell a house. Even though it might be better not to have the coffee, buy the phone or sell the house, the decision is theirs and theirs alone.
- 1.2 But not for everyone.
- 1.3 If an adult with affected decision-making does not have ‘decision-making capacity’, they may not have the same decision-making rights as other adults. The contract they sign to sell the house might not be valid. An attorney they previously appointed to control their bank account might not agree to pay for the phone. A welfare guardian appointed by the court might decide that they should not have another coffee.
- 1.4 The consequences of not having decision-making capacity are matters of law. The contract may be invalid, the attorney has control of the bank account and the welfare guardian is able to deny the coffee because relevant laws have made it so. Perhaps less obviously, the question of whether a person does or does not have decision-making capacity also involves questions of law. Whether a person has decision-making capacity depends on what the law says decision-making capacity is. In this review, we consider the legal test for decision-making capacity and how the law should respond if a person is assessed not to have decision-making capacity.

## WHY THIS REVIEW IS NEEDED

- 1.5 Over time, the legal test for decision-making capacity and the legal consequences of not having decision-making capacity have changed as society's understandings of disability and decision-making have changed.
- 1.6 In 2006, the UN Convention on the Rights of Persons with Disabilities (Disability Convention) was adopted. It reflects a significant change in understandings of disability. Article 12 of the Disability Convention insists on the right of disabled people to make legal decisions on an equal basis with others. It requires disabled people to have access to the support they need in making legal decisions. It requires that all measures relating to the making of those decisions provide for appropriate and effective safeguards. Among other things, those safeguards must ensure the person's rights, will and preferences are respected.
- 1.7 Article 12 has spurred calls for reform of adult decision-making laws in numerous jurisdictions, including Aotearoa New Zealand. In July 2019, we were asked by the Minister responsible for Te Aka Matua o te Ture | Law Commission to review the law relating to adults with impaired decision-making capacity. Of particular concern to commentators and United Nations bodies are the 'adult guardianship' provisions in the Protection of Personal and Property Rights Act 1988 (PPPR Act).<sup>1</sup> Under these provisions, if a person does not have decision-making capacity, the court may appoint a welfare guardian or property manager to make decisions for the person in (broadly) their best interests.
- 1.8 In this review, we focus on the PPPR Act. It is the primary piece of legislation relating to adult decision-making capacity, including providing for the criticised 'adult guardianship' arrangements. Article 12 is of direct and central relevance to PPPR Act reform, requiring consideration of fundamental questions such as:

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<sup>1</sup> See Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* UN Doc CRPD/C/NZL/CO/2-3 (26 September 2022) at [21]–[22]: the Committee on the Rights of Persons with Disabilities is “concerned about the lack of progress made in abolishing the guardianship system and substituted decision-making regime” and recommends that New Zealand “implement a nationally consistent supported decision-making framework that respects the autonomy, will and preferences of persons with disabilities”.

- (a) Whether the concept of decision-making capacity may legitimately play any role in how the law treats decisions made by people with affected decision-making — and, if so, how decision-making capacity should be defined and assessed.
  - (b) What a person's 'rights, will and preferences' are, and what is required for them to be respected.
  - (c) What is required to ensure that a person can access the support they require to make legal decisions.
- 1.9 There are further reasons to review the PPPR Act. It is now over 30 years old. Societal understandings of disability have changed, just as society itself has changed. For example, the incidence of dementia *mate wareware* has risen and is predicted to continue to rise, yet many people find the cost and delays involved in accessing arrangements under the PPPR Act to be prohibitive.
- 1.10 In addition, Cabinet processes now routinely require legislation to be assessed for consistency with the New Zealand Bill of Rights Act 1990, international law and *te Tiriti o Waitangi* | Treaty of Waitangi (the Treaty). Guidelines published by the Legislation Design and Advisory Committee further recommend that *tikanga* should be considered.<sup>2</sup> New Zealand is a more multicultural society than it was 30 years ago, making it important to also consider the needs of people from other cultures.
- 1.11 In addition to the PPPR Act, there are numerous other statutory provisions and rules of common law relating to decision-making capacity. Some of these statutes either have recently been or are currently the subject of separate reviews. Cabinet has agreed on policy proposals to repeal and replace the Mental Health (Compulsory Assessment and Treatment) Act 1992.<sup>3</sup> *Te Toihau Hauora, Hauātanga* | Health and Disability Commissioner is currently scoping the next review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights, with consultation

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<sup>2</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at [3.4] and [5.3].

<sup>3</sup> *Manatū Hauora* | Ministry of Health "Repealing and replacing the Mental Health Act" (21 October 2022) <[www.health.govt.nz](http://www.health.govt.nz)>.



planned to take place in 2024.<sup>4</sup> The Substance Addiction (Compulsory Assessment and Treatment) Act 2017 has also been recently reviewed.

- 1.12 With the exception of the PPPR Act, each statute and rule that addresses decision-making capacity does so within a specific context such as compulsory treatment for substance addiction, entry into a contract, litigation or emergency medical treatment. Each accordingly raises different practical and human rights considerations. Reviewing them therefore needs to be done on a case-by-case basis. That is not practicable in this review. However, reviewing the PPPR Act necessitates consideration of fundamental issues relevant to all law concerning decision-making capacity. The work we do in this review will therefore materially advance future consideration of those other provisions and rules.

## THE STRUCTURE OF THIS ISSUES PAPER

- 1.13 In this Issues Paper, we explain why we consider the PPPR Act requires significant reform involving material policy changes and reconsideration and redesign of some core features. One reason is the need to meet the challenges of article 12, but there is also a range of other reasons. In our view, the extent of reform required means it would be preferable for the PPPR Act to be repealed and replaced with a new Act rather than amended. In this Issues Paper, we therefore discuss the ways in which we consider reform is required and ask questions about different options for achieving that reform in a new Act.
- 1.14 This Issues Paper is over 300 pages long and traverses a great deal of ground. Not everyone will want to read or submit on everything in it. We have tried to structure it so that people can go to the sections they are interested in. The Issues Paper contains three parts.
- 1.15 In Part 1, we explain why we think a new Act to replace the PPPR Act is required and the foundational matters and analysis that inform our thinking in Parts 2 and 3:

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<sup>4</sup> Te Toihau Hauora, Hauātanga | Health and Disability Commissioner “Review of the Act and Code 2023” (27 February 2023) <[www.hdc.org.nz](http://www.hdc.org.nz)>.

- (a) Chapter 2 summarises the key features of the PPPR Act and why we consider it should be replaced with a new Act.
  - (b) Chapter 3 outlines the way in which human rights (in particular, article 12 of the Disability Convention) and the related values of dignity, autonomy and equality lie at the heart of this review.
  - (c) Chapter 4 concerns what is required of laws relating to adult decision-making to meet obligations under the Treaty.
  - (d) Chapter 5 outlines how we propose to address tikanga in this review.
- 1.16 Part 2 discusses the key features that a new Act might have in light of the foundational matters and analysis in Part 1:
- (a) Chapter 6 concerns the purposes of a new Act.
  - (b) Chapter 7 discusses the concept of decision-making capacity: what it is, why we consider that a new Act should continue to use it and how we consider it could be defined and assessed.
  - (c) Chapter 8 discusses possible ways in which a new Act might provide for decision-making support arrangements. In particular, it considers formal supporters and co-decision-making arrangements. In later chapters, we also discuss the relevance of support to court-appointed representatives and enduring powers of attorney (EPOAs).
  - (d) Chapter 9 explains why, in our view, a new Act should continue to make provision for court-ordered arrangements such as court-appointed representatives and court-ordered decisions.
  - (e) Chapters 10 and 11 concern the features of a court-appointed representative arrangement. Chapter 10 discusses the key features, including when a court should be able to appoint a representative and what it means for a representative to make a decision based on a person's rights, will and preferences. Chapter 11 concerns other matters relating to court-appointed representatives such as multiple representatives, the duties of representatives, conflicts of interest, record-keeping, removal and remuneration.
  - (f) Chapter 12 considers court-ordered decisions, including when a court should be able to make them and how they relate to court-appointed representatives.

- (g) Chapter 13 is the first of two chapters discussing EPOAs. This chapter considers how a new Act can strike the best balance between usability and adequate safeguards, when an EPOA should take effect, how an attorney should make decisions, and current safeguards such as monitoring and record-keeping obligations. Chapter 14 considers whether an EPOA register should be introduced. It also discusses whether there should be a process to notify specified people that an EPOA has been set up or that the attorney has begun making decisions for the donor.
- (h) Chapter 15 considers two ways of documenting a person's wishes about the future to give guidance to the person's representatives. It discusses how advance directives (which make medical decisions) should be considered and whether the law should provide more generally for a statement of wishes setting out a person's will and preferences.

1.17 Part 3 concerns systemic matters not related to particular decision-making arrangements:

- (a) Chapter 16 concerns possible practical improvements such as improved access to information, guidance and training for people making or supporting decisions. It also considers ways to effectively address complaints about decision-making arrangements, including whether there should be a specific oversight body.
- (b) Chapter 17 discusses court processes, including how to ensure that the person with affected decision-making is heard and their views taken properly into account. We also discuss other dispute resolution options and possible improvements in court processes.

## OUR PROCESS SO FAR

1.18 Our research of the law and issues included looking at relevant cases and commentary, international human rights authorities, and analysis of law and law reform recommendations in comparable jurisdictions.<sup>5</sup>

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<sup>5</sup> Relevant jurisdictions include Australia (including Victoria and New South Wales), New Brunswick and Ontario in Canada, Ireland, and England and Wales. Specific laws and law reform recommendations relating to particular issues in other jurisdictions are also discussed in the relevant chapters.

- 1.19 We also consulted with experts and a range of stakeholders to help us understand the issues with the law and practice in this area.
- 1.20 Building on our initial research and engagement, we published our Preliminary Issues Paper in November 2022. We also published a summary of the Preliminary Issues Paper in a range of accessible formats as well as in te reo Māori.
- 1.21 We received 207 submissions on our Preliminary Issues Paper. This included 67 submissions from organisations and 140 submissions made in a personal capacity. We were also aided by the insights from several focus groups held during the consultation period. These focus groups included adults with a diverse range of lived experience of disability and mental distress as well as family and whānau members and carers.
- 1.22 We used the insights from these submissions to refine our analysis of the issues with the current law and develop options for reform. We tested our early analysis and options with our two Expert Advisory Groups. We also discussed them with select government agencies to gauge their workability in practice.
- 1.23 Our Preliminary Issues Paper addressed topics in much more general terms than this Issues Paper, and the questions it asked were therefore also very general. Accordingly, when we refer in this Issues Paper to matters that submitters raised, we do not generally identify the number or identity of submitters who raised any particular issue.

## **NEXT STEPS**

- 1.24 The feedback we receive on this Issues Paper will help us develop our final recommendations for reform. We will deliver those recommendations in our final report to the Minister responsible for the Law Commission in 2025.
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**PART 1:**

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**THE PPPR ACT AND  
OVERARCHING ISSUES**

## CHAPTER 2

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# The case for a new Act

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## INTRODUCTION

- 2.1 The Protection of Personal and Property Rights Act 1988 (PPPR Act) is the key piece of legislation that deals with adult decision-making capacity in Aotearoa New Zealand and is the focus of this review.
- 2.2 In this chapter, we:
- (a) Briefly describe the evolution of laws relating to adult decision-making capacity in New Zealand before the PPPR Act.
  - (b) Provide an overview of key concepts and decision-making arrangements in the PPPR Act.
  - (c) Summarise who uses decision-making arrangements under the PPPR Act.
  - (d) Outline why we think the PPPR Act should be replaced by a new Act.

## THE CONTEXT OF THE PPPR ACT

### The origins of the laws relating to adult decision-making capacity

- 2.3 The laws relating to adult decision-making capacity in New Zealand are based in the ancient legal doctrine of ‘*parens patriae*’, which can be translated as ‘parent of the nation’.<sup>1</sup> The phrase ‘*parens patriae*’ reveals a key purpose

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<sup>1</sup> This doctrine can be traced back to the medieval kings of England. See James Munby “Protecting the Rights of Vulnerable and Incapacitous Adults — The Role of the Courts: An Example of Judicial Law Making” (2014) 26(1) CFLQ 64 at 66. Munby describes *parens patriae* being assumed by the medieval kings as part of their prerogative powers. See also Henry Theobald *The Law Relating to Lunacy*

underpinning the development of these laws — namely, the idea that some adults are unable safely to manage their own affairs and therefore require protection in the form of another adult acting as a ‘quasi-parent’ on their behalf.<sup>2</sup>

- 2.4 Under the *parens patriae* doctrine, the Crown had the authority and duty to assume control over and make decisions about the welfare and property of anyone who was considered to lack the ability to manage their own affairs.<sup>3</sup> This included children and young people as well as adults who were considered to lack decision-making capacity as a result of disability or because they were experiencing mental distress.<sup>4</sup> We explain more about the concept of decision-making capacity later in this chapter.
- 2.5 Over time, the Crown delegated the exercise of the *parens patriae* jurisdiction to the courts. The courts developed the practice of appointing decision-makers to manage and make decisions for the person with affected decision-making.<sup>5</sup>

### Early legislation

- 2.6 As time went on, legislation progressively replaced the operation of *parens patriae*. Laws were passed to regulate state intervention in the lives of certain groups of people that the state considered to need special care or protection.

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(Stevens, London, 1924) at 1, as cited by the Supreme Court of Canada in *E (Mrs) v Eve* [1986] 2 SCR 388 at [32]. Theobald described the origin of *parens patriae* as “lost to the mists of antiquity”, but “the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by [Edward I] taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties”.

<sup>2</sup> *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [10].

<sup>3</sup> John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 10.

<sup>4</sup> Margaret Hall “The Vulnerability Jurisdiction: Equity, *Parens Patriae*, and the Inherent jurisdiction of the Court” (2016) 2(1) CJCL 185 at 190–191.

<sup>5</sup> See also John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 10. This system was supplemented by a series of common law justifications for intervention — for example, the doctrine of necessity.

This included legislation in relation to children and young people, those experiencing mental distress and the “aged and infirm”.<sup>6</sup>

- 2.7 One of the early laws passed in New Zealand dealing directly with the capacity of adults to make decisions was the Aged and Infirm Persons Protection Act 1912. This gave te Kōti Matua | High Court the power to appoint a manager for a person’s property where the court was satisfied that the person was “by reason of age, disease, illness, or physical or mental infirmity ... unable, wholly or partially, to manage his affairs”.<sup>7</sup> Protection orders could also be issued under the Act if a person was using alcohol or any drug “in excess”.<sup>8</sup>
- 2.8 The Aged and Infirm Persons Protection Act dealt primarily with how the property of a person would be managed if their decision-making capacity was in question. Matters concerning the person’s welfare, including decisions about medical treatment, were not addressed. Where required, the *parens patriae* doctrine continued to be employed under the inherent jurisdiction of the High Court.

### The rising disability rights movement and the PPPR Act

- 2.9 The disability rights movement began to emerge in the 1970s and 1980s, as around the world disabled people, inspired by other social movements, became politicised.<sup>9</sup> The PPPR Act was enacted within this social context. The emerging disability rights movement and its strong human rights focus,

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<sup>6</sup> John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 11.

<sup>7</sup> Aged and Infirm Persons Protection Act 1912, s 4; and Bill Atkin “An Overview of the Protection of Personal and Property Rights Act 1988” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 111 at 111.

<sup>8</sup> Aged and Infirm Persons Protection Act 1912, s 5.

<sup>9</sup> Theresia Degener and Andrew Begg “From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 1 at 2.3.5.



including advocacy from IHC and allied organisations, was one of the main driving forces behind this law reform.<sup>10</sup>

- 2.10 The PPPR Act responded to concerns that the law did not treat disabled people as having the same rights as everyone else. It was intended to move away from the paternalistic approach of previous law and emphasise the rights of the person.<sup>11</sup>
- 2.11 It replaced the Aged and Infirm Persons Protection Act, addressing the gap in the earlier law in concerning only property management, not health and welfare matters.<sup>12</sup> The PPPR Act also replaced Part 7 of the Mental Health Act 1969. This part of the Mental Health Act had provided that the property of anyone committed under that Act was placed under property management automatically.<sup>13</sup>
- 2.12 Other legislation with a rights focus was passed in the early 1990s. The New Zealand Bill of Rights Act (NZ Bill of Rights) was enacted in 1990, giving effect to many guarantees in the International Covenant on Civil and Political Rights in New Zealand and also guaranteeing some common law rights.<sup>14</sup> Its guarantees include rights against cruel, degrading or disproportionately severe treatment, non-consensual medical treatment, arbitrary detention and deprivations of life that are not consistent with fundamental justice.<sup>15</sup>
- 2.13 The Mental Health (Compulsory Assessment and Treatment) Act 1992 was also passed to replace the Mental Health Act. This reflected the changed landscape of mental health services following deinstitutionalisation of

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<sup>10</sup> Bill Atkin “An Overview of the Protection of Personal and Property Rights Act 1988” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 111 at 113.

<sup>11</sup> Bill Atkin “An Overview of the Protection of Personal and Property Rights Act 1988” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 111 at 112.

<sup>12</sup> Bill Atkin “An Overview of the Protection of Personal and Property Rights Act 1988” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 111 at 111–112.

<sup>13</sup> Mental Health Act 1969, ss 86(1) and 87.

<sup>14</sup> New Zealand Bill of Rights Act 1990, long title.

<sup>15</sup> New Zealand Bill of Rights Act 1990, ss 8, 9 and 11.

psychiatric hospitals in favour of community-based services and an increased human rights focus.<sup>16</sup>

- 2.14 Alongside these domestic changes, there were increasing calls in the international human rights arena for disability to have greater prominence. This marked a turn to a rights-based approach, which asserted that denying or restricting rights because of impairment was discriminatory. In 2000, the Declaration on the Rights of People with Disabilities in the New Century called for a legally binding human rights treaty to promote and protect the rights of disabled people and enhance equal opportunities for their participation in society.<sup>17</sup> These calls culminated in the adoption on 13 December 2006 of the UN Convention on the Rights of Persons with Disabilities (Disability Convention). The Disability Convention opened for signature on 30 March 2007 and entered into force on 3 May 2008.<sup>18</sup> It was ratified by New Zealand on 25 September 2008.<sup>19</sup>
- 2.15 We explain more about the content of the Disability Convention and its implications for laws relating to adult decision-making capacity in Chapter 3.

## KEY CONCEPTS AND ARRANGEMENTS

- 2.16 In this section, we introduce the key concepts and decision-making arrangements in the PPPR Act. We expand on these explanations in later chapters.

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<sup>16</sup> Warwick Brunton “Mental health services — Closing the hospitals, 1960s to 1990s” (revised 5 May 2022) Te Ara — the Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

<sup>17</sup> Beijing Declaration on the Rights of People with Disabilities in the New Century (adopted 12 March 2000).

<sup>18</sup> United Nations “10th Anniversary of the Adoption of Convention on the Rights of Persons with Disabilities (CRPD)” (2016) <[social.desa.un.org](http://social.desa.un.org)>. The Disability Convention and Optional Protocol were formally adopted by the following General Assembly Resolution: *Resolution on the Convention of the Rights of Persons with Disabilities* GA Res 61/106 (2006).

<sup>19</sup> United Nations “Status of Treaties: Chapter IV Human Rights: 15. Convention on the Rights of Persons with Disabilities” United Nations Treaty Collection <[treaties.un.org](http://treaties.un.org)>.

## Decision-making capacity

- 2.17 The PPPR Act provides for decision-making arrangements that can be used when a person is assessed to not have decision-making capacity for a decision or decisions.
- 2.18 Broadly speaking, ‘decision-making capacity’ is the concept used by the law in New Zealand to identify situations where a person’s decision-making is considered to be so affected that they are (or the law should consider them to be) unable to make legally binding decisions.<sup>20</sup>
- 2.19 If a person is considered to lack decision-making capacity, the law may provide for some form of response to their decision-making. That response could be that their decision is not given legal effect. It could be that someone else makes a decision for them.
- 2.20 Decision-making capacity is a complex and contested concept. We discuss it in more detail in Chapter 7.

## Legal agency and legal capacity

- 2.21 Under the PPPR Act, people subject to decision-making arrangements still hold rights such as the right to hold property and the human rights guaranteed under the NZ Bill of Rights. However, because someone else is appointed to make decisions for them, their entitlement to act on those rights or duties is restricted. This means that their ‘legal agency’ is restricted.

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<sup>20</sup> For further discussion of the definition of decision-making capacity, see for example Alex Ruck Keene and others “Mental Capacity — Why Look for a Paradigm Shift?” (2023) 31 Med L Rev 340 at 341; and Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, Dunedin, 2016) at 10–12. Note that Alex Ruck Keene and others use the term ‘mental capacity’. These terms are often used interchangeably.

- 2.22 Legal agency is part of the more general (and fundamental) concept of ‘legal capacity’. Legal capacity refers to a person’s entitlement, as a matter of law, to:<sup>21</sup>
- (a) Hold rights and owe legal duties (legal standing).
  - (b) Act on and exercise those rights and be accountable for those duties (legal agency).
- 2.23 Legal capacity is central to a person’s autonomy and their ability to make legally effective decisions.
- 2.24 The law restricts legal capacity in different ways. Sometimes, it restricts aspects of a person’s legal standing such as the denial of voting rights to some prisoners.<sup>22</sup> At other times it restricts a person’s legal agency, such as restrictions on the ability of young people to enter binding contracts.<sup>23</sup> The nature of these restrictions has also changed over time, reflecting changes in society’s needs and values.<sup>24</sup> For example, historically, married women did not have legal standing to hold property, make contracts and sue.<sup>25</sup>

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<sup>21</sup> See Lucy Series and Anna Nilsson “Article 12 CRPD: Equal Recognition before the Law” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) at 11; United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at 15.

<sup>22</sup> See Electoral Act 1993, s 80(1)(d) as amended on 16 December 2010 by Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 4 and replaced on 30 June 2020 by Electoral (Registration of Sentenced Prisoners) Amendment Act 2020, s 5(1).

<sup>23</sup> Generally, a person must be over the age of 18 before they have full legal agency to enter into contracts. See Contract and Commercial Law Act 2017, ss 86–89.

<sup>24</sup> Law Commission of Ontario *Legal Capacity, Decision-Making and Guardianship: Discussion Paper* (May 2014) at 64.

<sup>25</sup> This was changed by the Married Women’s Property Act 1884.

## Decision-making arrangements

- 2.25 There are four main types of decision-making arrangements under the PPPR Act:
- (a) **Personal orders:** Te Kōti Whānau | Family Court may make a range of decisions about the person’s personal care and welfare, such as that the person live in a particular place or receive medical treatment.<sup>26</sup>
  - (b) **Welfare guardians:** The Family Court may appoint a welfare guardian.<sup>27</sup> A welfare guardian is someone who makes decisions for another person about their personal care and welfare. For this reason, the PPPR Act is sometimes said to involve an ‘adult guardianship’ regime.
  - (c) **Property managers:** The Family Court may appoint a property manager.<sup>28</sup> A property manager is someone who makes decisions about another person’s property.
  - (d) **Enduring powers of attorney (EPOAs):** The PPPR Act provides a process for one person to grant another person an EPOA to make personal care and welfare decisions for them and/or manage their property affairs at some time in the future.<sup>29</sup>
- 2.26 How decision-making arrangements are made or entered into varies. Personal orders, welfare guardians, and property managers are ‘court-ordered arrangements’. For court-ordered arrangements, a finding that a person does not have decision-making capacity does not automatically mean a decision-making arrangement will be imposed. Instead:
- (a) For personal orders and property managers, the court must go on to consider whether an order should be made. The PPPR Act contains primary objectives of imposing the least restrictive intervention and encouraging the person to develop their own capacity. Giving effect to

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<sup>26</sup> Protection of Personal and Property Rights Act 1988, ss 10 and 11.

<sup>27</sup> Protection of Personal and Property Rights Act 1988, s 12.

<sup>28</sup> Protection of Personal and Property Rights Act 1988, s 31.

<sup>29</sup> Protection of Personal and Property Rights Act 1988, s 94A.

these objectives may mean that an order should not be made or may be a reason to limit its scope.<sup>30</sup>

- (b) For welfare guardians, the court must be satisfied that the person “wholly lacks” decision-making capacity for the relevant decisions and that the appointment of a welfare guardian is “the only satisfactory way to ensure that appropriate decisions are made” in relation to the decisions at issue.<sup>31</sup>

- 2.27 EPOAs are voluntary arrangements. They are used to plan for decision-making in the future. One person (the donor) gives another person (the attorney) the power to make decisions for them at a later date. EPOAs are entered into before a person is assessed not to have decision-making capacity in anticipation that they may not have decision-making capacity in the future.
- 2.28 An attorney’s ability to make decisions for the donor comes into effect either when the donor does not have decision-making capacity or, for EPOAs in relation to property, at an earlier time if the donor chooses.<sup>32</sup>

### A ‘best interests’ approach

- 2.29 Under the PPPR Act, how decisions are made for people under decision-making arrangements is heavily guided by an assessment of their best interests. When making decisions for the person with affected decision-making, the best interests of the person with affected decision-making is the paramount consideration of welfare guardians, property managers and attorneys.<sup>33</sup> A court making personal orders can also consider what is in the best interests of the person.<sup>34</sup>

### Decision-making support

- 2.30 The term ‘decision-making support’ refers to any support or accommodations a person may need to help them make or express their views on a decision. The

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<sup>30</sup> Protection of Personal and Property Rights Act 1988, ss 8 and 28.

<sup>31</sup> Protection of Personal and Property Rights Act 1988, s 12(2).

<sup>32</sup> Protection of Personal and Property Rights Act 1988, s 98(3). Donors may choose to authorise a property EPOA to be activated immediately while the donor still has decision-making capacity: see s 97(4).

<sup>33</sup> Protection of Personal and Property Rights Act, ss 18(3), 36(1), 97A(2) and 98A(2).

<sup>34</sup> *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC) at 365–366.

types of decision-making support that people need for decisions will vary. For example, some people might need information in an accessible format while others might need sign language interpretation. Some might need a supporter to help them obtain or work through relevant information while others might need adequate time or access to a quiet and calm place in which to make a decision.

- 2.31 There is no requirement for court-appointed welfare guardians or attorneys acting under an EPOA to provide decision-making support. However, there are aspects of the PPPR Act that might lead to a welfare guardian or property manager providing decision-making support in practice. For example, the Act requires a welfare guardian to encourage the person to exercise their capacity and to communicate their decisions.<sup>35</sup> Similar provisions exist for attorneys.<sup>36</sup>
- 2.32 States parties to the Disability Convention are required by article 12 to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. We discuss decision-making support in Chapter 8.

## WHO IS USING THE PPPR ACT?

- 2.33 There is no comprehensive data on who uses or is subject to decision-making arrangements under the PPPR Act.
- 2.34 In 2022, there were 6,649 applications for PPPR Act orders.<sup>37</sup> While this represents a small proportion of the population, anyone who is assessed not to have decision-making capacity could theoretically use or be subject to a decision-making arrangement. This encompasses a potentially vast group of people as the decision-making of adults can become affected at any time and for a wide variety of reasons. For example, cases concern court-ordered arrangements being sought for people with acquired brain injuries, severe

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<sup>35</sup> Protection of Personal and Property Rights Act 1988, s 18(3). For EPOAs, for example, see s 98A(2).

<sup>36</sup> Protection of Personal and Property Rights Act 1988, s 36(1).

<sup>37</sup> Te Tāhū o te Ture | Ministry of Justice Analytics and Insights “PPPR Act breakdown by application types” (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).

alcohol abuse, brain tumours, dementia mate wareware and learning disabilities.<sup>38</sup>

- 2.35 We understand that court-ordered arrangements are often sought for or used by disabled people such as people with learning disabilities. This is partly because the PPPR Act was specifically intended to provide for decision-making arrangements for disabled people with affected decision-making.<sup>39</sup>
- 2.36 People with dementia mate wareware and other forms of cognitive decline may more commonly use EPOAs. This is because people set up EPOAs in advance in case they lose decision-making capacity in the future. EPOAs are privately made and held. This means there is no way to quantify the number of EPOAs that currently exist.
- 2.37 The people who are using or might want to use the PPPR Act are changing. While the PPPR Act was originally intended for disabled people, we heard anecdotally that court-ordered arrangements are being increasingly used for people with dementia mate wareware. New Zealanders are living longer, and the incidence of dementia mate wareware is therefore predicted to rise.<sup>40</sup> In recent decades, New Zealand's population has also become more diverse.<sup>41</sup> This means that an increasing, and increasingly varied, group of New Zealanders may need to use the PPPR Act in the future.
- 2.38 Te Tāhū o te Ture | Ministry of Justice statistics show that that the number of people using the PPPR Act is already growing. Over the last 10 years the number of applications filed annually has doubled from 3,370 in 2013 to 6,649 in 2022.<sup>42</sup>

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<sup>38</sup> See for example *Johnston v Schurr* [2015] NZSC 82, [2016] 1 NZFLR 403; *Re MK* DC Auckland PPPR 51–94, 15 March 1995; *B v B* FC Dunedin FAM-2007-012-28, 13 March 2007; *A v A* [2016] NZHC 1690, [2016] NZFLR 598 and *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253.

<sup>39</sup> (9 December 1986) 476 NZPD 5973.

<sup>40</sup> In 2020, the Dementia Economic Impact Report estimated that the number of people living with dementia mate wareware would more than double by 2050.

<sup>41</sup> For example, the 2018 Census recorded 27.4 per cent of people counted were not born in New Zealand. This was up from 25.2 per cent in 2015.

<sup>42</sup> Ministry of Justice Analytics and Insights “PPPR Act breakdown by application types” (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).



## THE NEED FOR A NEW ACT

- 2.39 The PPPR Act requires reform in a number of significant ways. These are discussed throughout this Issues Paper. In our view, the extent of those required reforms means that it would be preferable for the PPPR Act to be repealed and replaced with a new Act. The key reasons for this are briefly summarised here.
- 2.40 At the time of its passage in the late 1980s, the PPPR Act was seen as “something of a landmark on the way towards the recognition of rights”.<sup>43</sup> However, over subsequent decades, societal understandings of disability — and what is required for the rights of disabled people to be respected — have continued to develop.
- 2.41 A significant development has been in how disability is viewed. For a long time in Western society, disability tended to be viewed through the lens of a ‘medical model’. The medical model views disability as an individual issue — an illness, condition or impairment — that requires intervention, sometimes without the individual’s consent.<sup>44</sup>
- 2.42 In response to the medical model, different ways of thinking about disability developed. The ‘social model’ of disability has proved particularly influential. This model considers disability in a way that does not focus on a person’s impairment. Instead, the focus is on identifying the physical and societal barriers that prevent people with impairments from being fully included in society.<sup>45</sup> In doing so, it calls attention to areas in which reform is needed to ensure equality.<sup>46</sup> The social model of disability had a significant influence on the provisions of the Disability Convention and its adoption, almost 20 years after the PPPR Act was passed.

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<sup>43</sup> (9 December 1986) 476 NZPD 5977.

<sup>44</sup> Alice Mander “The Stories That Cripple Us: The Consequences of the Medical Model of Disability in the Legal Sphere” (2022) 53(2) VUWLR 337 at 343–346; Huhana Hickey and Denise Wilson “Whānau Hauā: Reframing disability from an Indigenous perspective” (2017) 6(1) MAI Journal 82 at 83.

<sup>45</sup> Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25(2) International Journal of Human Rights 348 at 364.

<sup>46</sup> Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25(2) International Journal of Human Rights 348 at 364.

- 2.43 As we explain throughout this Issues Paper, the PPPR Act is not founded on the social model of disability and does not adequately reflect the requirements of the Disability Convention. Significant change would be required for it to do so — in particular, to ensure proper respect for a person’s rights, will and preferences.
- 2.44 In assessing the case for a new Act, the Legislation Design and Advisory Committee (LDAC) guidelines state:<sup>47</sup>
- If existing legislation is to be heavily amended (or it is already old or heavily amended), consideration should be given to replacing it instead ... If multiple amendments will cause the resulting law to be so complex it becomes difficult to understand, replacing the legislation should be preferred. Complexity can arise through grafting new policies onto existing frameworks so that the overall coherence of the legislation is lost.
- 2.45 Amending the PPPR Act to reflect up-to-date understandings of disability and comply with the Disability Convention would, we consider, involve “grafting new policies onto existing frameworks”. We discuss the Disability Convention and disability in more detail in Chapter 3.
- 2.46 Reform is also required for a range of other reasons, which we discuss in later chapters. Their cumulative extent strengthens the case for passing an entirely new Act rather than amending the PPPR Act. They include:
- (a) Consideration of te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) implications is now recognised as a requirement of good law-making.<sup>48</sup> The PPPR Act does not refer to the Treaty. We discuss the Treaty in Chapter 4.
  - (b) The LDAC considers that new legislation should, as far as practicable, be consistent with tikanga.<sup>49</sup> Additionally, both higher court decisions and a range of statutes are prompting growing state recognition of and provision

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<sup>47</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at [3.1].

<sup>48</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 28–32.

<sup>49</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at [3.4].

for tikanga in the development of new law.<sup>50</sup> The PPPR Act makes no mention of tikanga. We discuss tikanga in Chapter 5.

(c) Legislation should be easy to find, navigate and understand.<sup>51</sup> The PPPR Act is over 35 years old and has been amended many times. We do not consider it meets modern drafting standards.

2.47 There is a further, significant, reason to prefer a new Act over an amended PPPR Act. Many of the legal changes that we discuss in this Issues Paper would necessitate, and rely for their effectiveness on, changes in attitude and practice.

2.48 A range of submitters on our Preliminary Issues Paper called for more holistic and support-focused practice. A number of submitters noted the need for a shift in attitudes regarding the ability of adults with affected decision-making to make their own decisions and increased understanding of the importance of decision-making support. Current assumptions about capacity were seen by some as leading to paternalistic decisions being made on behalf of people with affected decision-making. We heard that current practices are inconsistent. One submitter stated that law change alone would be insufficient to standardise practice. Replacing the PPPR Act with an entirely new Act would, we think, more tangibly signal the extent of legal change and thereby underscore the importance of changes in practice and attitudes.

2.49 For all these reasons, we consider that an entirely new Act is to be preferred. We therefore refer throughout this Issues Paper to a new Act rather than to an amended PPPR Act.

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<sup>50</sup> In particular, see *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

<sup>51</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 9.

## CHAPTER 3

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# Human rights

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## INTRODUCTION

- 3.1 A key question in this review is how to ensure that people with affected decision-making enjoy legal capacity on an equal basis with others as required by article 12 of the UN Convention on the Rights of Persons with Disabilities (Disability Convention).
- 3.2 Many human rights are relevant to this review. In this chapter, we do not explain all those rights in detail. We focus on the aspects of human rights that are the most relevant, which have informed our thinking throughout this Issues Paper. We:
- (a) Discuss briefly the key values of dignity, autonomy and equality.
  - (b) Discuss how understandings of disability and, consequently, the human rights of disabled people have evolved over time.
  - (c) Explain the importance of article 12 of the Disability Convention and what it means in this review.

## DIGNITY, AUTONOMY AND EQUALITY

- 3.3 Article 12 — and human rights generally — engage the fundamental values of dignity, autonomy and equality. In this section, we provide a high-level overview of what each of these concepts means in the context of human rights law
- 3.4 Dignity, equality and autonomy are intertwined. Rights to equality and non-discrimination are deeply embedded in international human rights law and thread through the Disability Convention. For example, article 1 of the

Convention states one of the Convention's purposes as being to promote, protect and ensure the "full and equal" enjoyment of all human rights.

- 3.5 There are many different views about what equality means and what it requires.<sup>1</sup> In broad terms, the concept of equality underlying the Disability Convention is a substantive one. In other words, it recognises that sometimes people need to be treated differently to ensure they access equal opportunities to participate in society on an equal basis.<sup>2</sup>
- 3.6 The idea of dignity also underpins human rights law. It is referred to in fundamental international human rights instruments. For example, the preamble to the Universal Declaration of Human Rights recognises that dignity is an inherent characteristic of all people.<sup>3</sup> More recently, the Disability Convention refers to the "inherent dignity" of disabled people.<sup>4</sup> Human rights cases in Aotearoa New Zealand have also emphasised the importance of dignity.<sup>5</sup>
- 3.7 At a high level, dignity signals the inherent worth of all people by virtue of their humanity.<sup>6</sup> It means "that each person's humanity *means something* and has *worth*".<sup>7</sup> Dignity is therefore necessarily linked to equality's insistence that all

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<sup>1</sup> Sheilah L Martin "Equality Jurisprudence in Canada" (2019) 17 NZJPIL 127 at 131; John Von Doussa "One Law For All" (2005) 13 Waikato L Rev 12 at 12.

<sup>2</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [10].

<sup>3</sup> The Declaration also provides that "all human beings are born free and equal in dignity and rights": see *Universal Declaration of Human Rights* GA Res 217A (1948), art 1.

<sup>4</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3.

<sup>5</sup> See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [338] per McGrath J; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [67], [73]–[74] and [105] per Elias CJ; *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [177]–[182] per Thomas J; and *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [196]–[203] per Hammond J.

<sup>6</sup> Mihiata Pirini and Anna High "Dignity and Mana in the 'Third Law' of Aotearoa New Zealand" (2021) 29 NZULR 623 at 629; *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [79].

<sup>7</sup> James May and Erin Daly "Why dignity rights matter" (2019) 2 EHRLR 129 at 129; *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [86].

people have the same or equal value.<sup>8</sup> Dignity is lost when “a person is treated as less than human, in a way which violates [their] right to equality in dignity and rights”.<sup>9</sup>

- 3.8 Dignity and equality are strongly linked with the concept of autonomy.<sup>10</sup> Some understandings of dignity rest on the premise that “humans have dignity because of their unique capacity for autonomy”.<sup>11</sup> In other words, dignity requires that people be treated as autonomous beings.<sup>12</sup> This link between dignity and autonomy is central to the Disability Convention. One of the principles of the Disability Convention is “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”.<sup>13</sup> If a person’s autonomy is regarded as less important than others’, their dignity is threatened. Equality therefore also buttresses autonomy and connects it more strongly to dignity.
- 3.9 Autonomy, dignity and equality underpin a concept of particular relevance to this review called the ‘dignity of risk’. The essence of this concept is that, for everyone, full personhood requires the ability to exercise choice, including the ability to make risky choices.<sup>14</sup> In other words, the right to make your own

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<sup>8</sup> James May and Erin Daly “Why dignity rights matter” (2019) 2 EHRLR 129 at 129; *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [86].

<sup>9</sup> *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [86].

<sup>10</sup> See *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [201] per Hammond J and *Seales v Attorney General* [2015] NZHC 1239, [2015] 3 NZLR 556 at [69]–[70].

<sup>11</sup> Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 629.

<sup>12</sup> Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 629.

<sup>13</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3.

<sup>14</sup> Piers Gooding “Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law” (2013) 20 *Psychiatry, Psychology and Law* 431 at 436, as cited by Jeanne Snelling and Alison Douglass “Legal Capacity and Supported Decision-making” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 168.

decisions, even where they might result in harm, is deeply tied to what it means to be human — and hence to dignity, autonomy and equality.<sup>15</sup>

- 3.10 On the other hand, the ideas of dignity, autonomy and equality also underpin the protective function of human rights law. Upholding them may sometimes require a person who is vulnerable to be protected from a risk of harm. Dignity of risk does not equate dignity with all risk. Rather, we think it requires the law to distinguish between situations in which dignity, autonomy and equality require respect for the running of a risk and situations in which they do not.

## HUMAN RIGHTS AND THE SOCIAL MODEL OF DISABILITY

- 3.11 Understandings of disability have shifted in recent decades alongside changes in how we understand human rights in the context of disability.
- 3.12 For a long time in Western society, disability was viewed through the lens of an individualised ‘medical model’. The medical model views disability as an individual issue — an illness, condition or impairment that requires intervention, sometimes without the individual’s consent.<sup>16</sup>
- 3.13 In response to the medical model, different ways of thinking about disability developed. Most common is the ‘social model’ of disability. At a high level, the social model describes disability in a way that does not focus on a person’s impairment. Instead, the focus is on identifying the physical and societal barriers that prevent people with impairments from being fully included in society.<sup>17</sup> In doing so, this model identifies where reform is needed to ensure equality.<sup>18</sup>

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<sup>15</sup> Law Commission of Ontario *Legal Capacity, Decision-making and Guardianship: Final Report* (March 2017) at 42.

<sup>16</sup> For an explanation of the medical model, see for example Alice Mander “The Stories That Cripple Us: The Consequences of the Medical Model of Disability in the Legal Sphere” (2022) 53 *VUWLR* 337 at 343–346.

<sup>17</sup> Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 *International Journal of Human Rights* 348 at 364.

<sup>18</sup> Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 *International Journal of Human Rights* 348 at 364.

- 3.14 The social model has been accompanied by changes in how people think about the human rights of disabled people. A consequence of the medical model is that disabled people are not treated equally.<sup>19</sup> Impairment is the basis for intervention, which can include restrictions on disabled people’s human rights. The focus on impairments and the consequent need for intervention means that the medical model does not properly acknowledge disabled people “as full subjects of rights and as rights holders”.<sup>20</sup>
- 3.15 The social model of disability draws attention to ways in which disabled people have been denied full realisation of their human rights. It played a key role in the development of the Disability Convention.<sup>21</sup> The Disability Convention acknowledges the social model, explaining that “[d]isability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.<sup>22</sup> Many of the rights in the Disability Convention articulate steps the state must undertake to ensure equality in light of the societal barriers disabled people face. For example, article 21, which deals with freedom of expression, specifies that disabled people must be able to use communication measures such as sign language, Braille and other alternative communication measures when interacting with government officials.<sup>23</sup> In this way, the Disability Convention sets out what is required to ensure the human rights of disabled people are respected.<sup>24</sup>

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<sup>19</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [8].

<sup>20</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [2].

<sup>21</sup> Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 *International Journal of Human Rights* 348 at 351.

<sup>22</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), preamble.

<sup>23</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), art 21.

<sup>24</sup> Office of the High Commissioner for Human Rights *The United Nations Human Rights Treaty System* Fact Sheet No 30 Rev 1 (2012) at 15.



## ARTICLE 12 OF THE DISABILITY CONVENTION

- 3.16 Article 12 of the Disability Convention is fundamental to this review. It concerns disabled people’s right to equal recognition before the law and describes what states parties must do to ensure the right to equality before the law for people with disabilities.<sup>25</sup>
- 3.17 Article 12 has a particular focus on legal capacity. As we discuss in Chapter 2, legal capacity is central to a person’s entitlement, as a matter of law, both to hold rights and duties (legal standing) and to exercise and perform those rights and duties (legal agency).
- 3.18 Legal capacity is necessary to exercise other rights. The denial of legal capacity to disabled people has led to rights being denied such as the right to vote, the right to found a family, parental rights and the right to consent to medical treatment.<sup>26</sup> Disabled people “remain the group whose legal capacity is most commonly denied in legal systems worldwide”.<sup>27</sup>
- 3.19 Article 12 is strongly grounded in the concepts of dignity, autonomy and equality. As explained by the Committee responsible for monitoring states’ compliance with the Disability Convention, “[f]reedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person”.<sup>28</sup>
- 3.20 Articles 12(2), 12(3) and 12(4) are most relevant to this review. These provide that disabled people enjoy legal capacity on an equal basis with others and articulate what is required for disabled people to enjoy legal capacity equally.<sup>29</sup>

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<sup>25</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [1].

<sup>26</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

<sup>27</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

<sup>28</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [33].

<sup>29</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), art 12(2). We acknowledge some commentators argue that art 12 creates a substantive right to legal capacity and that legal capacity is itself inalienable to

States must take appropriate measures to provide disabled people access to support to exercise their legal capacity.<sup>30</sup> They must also ensure that any measures that relate to the exercise of legal capacity respect the rights, will and preferences of the person, are free from conflicts of interest and undue influence, are tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review.<sup>31</sup>

### Relevance of article 12 to this review

- 3.21 There is significant debate about what equal enjoyment of legal capacity requires. There are two particular areas of contention: whether an assessment of decision-making capacity can play a role in restricting a person's legal capacity, and whether decision-making arrangements under which one person makes a decision for another are permissible. We discuss these issues in Chapter 7 (decision-making capacity) and Chapter 9 (representative arrangements).
- 3.22 In this section, we discuss three key requirements of article 12 which we consider particularly important to this review:
- (a) Disabled people must be provided with support and reasonable accommodations in exercising their legal capacity.
  - (b) Legislation relating to legal capacity must respect the rights, will and preferences of the person with affected decision-making.
  - (c) Any restrictions on legal capacity cannot result in unjustified discrimination.

### Support and reasonable accommodations

- 3.23 The requirements of article 12 to provide disabled people with both support and reasonable accommodations are separate but complementary.<sup>32</sup>

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people. See for example Tina Minkowitz "CRPD and Transformative Equality" (2017) 13 International Journal of Law in Context 77.

<sup>30</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), art 12(3).

<sup>31</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), art 12(3)–(4).

<sup>32</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [34].

- 3.24 The Disability Convention says that states “shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.<sup>33</sup> Support is a broad term that can cover “both informal and formal support arrangements, of varying types and intensity”.<sup>34</sup> It can include informal and formal support arrangements, peer support, accessible information or communication assistance.<sup>35</sup>
- 3.25 The Disability Convention also requires reasonable accommodations in the exercise of legal capacity to be provided to disabled people.<sup>36</sup> It defines “reasonable accommodation” as adjustments or modifications that are needed to ensure disabled people enjoy or exercise, on an equal basis with others, all human rights and fundamental freedoms. The modifications and adjustments must be necessary and appropriate and not impose a disproportionate or undue burden on the person providing the reasonable accommodations.<sup>37</sup> Examples of reasonable accommodations include the provision of accessible information, extra time to make a decision or enabling decisions to be made at a time of day when the person is better able to understand the relevant information. There is significant overlap between what support and reasonable accommodations look like in the context of decision-making.
- 3.26 Both support and reasonable accommodations reflect the social model of disability and a substantive approach to equality. They recognise that people have different decision-making abilities and that some people will need support or accommodations to make decisions. Failure to provide support or accommodations may have the effect of preventing some people from being

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<sup>33</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), art 12(3).

<sup>34</sup> United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

<sup>35</sup> United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

<sup>36</sup> Article 12 is an equality and non-discrimination right. Under the Disability Convention, a failure to provide reasonable accommodations is a type of discrimination on the grounds of disability: see Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2. The Convention also provides a right to reasonable accommodations in art 5(3).

<sup>37</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2.

able to make decisions. In this way, decision-making support and reasonable accommodations can empower people with affected decision-making to make decisions about their own lives on an equal basis with others.<sup>38</sup>

- 3.27 The requirements in the Disability Convention to provide support and reasonable accommodations extend beyond this review. As we discuss in Chapter 8, there are many ways to increase access to decision-making support and reasonable accommodations such as increasing public funding for support-related services.<sup>39</sup>
- 3.28 This review is focused on a new Act to replace the Protection of Personal and Property Rights Act 1988. Support and reasonable accommodations are relevant to many aspects of a new Act. In Chapter 8, we discuss ways in which the law might recognise decision-making support arrangements. It will also be relevant to other parts of a new Act such as decision-making capacity assessments and the operation of other decision-making arrangements.<sup>40</sup>

### **Rights, will and preferences**

- 3.29 Article 12(4) requires all measures relating to the exercise of a person's legal capacity to "respect the rights, will and preferences of the person". In our view, this requirement is fundamental to the design of a new Act, and we discuss how the phrase might be operationalised throughout this Issues Paper.
- 3.30 What the phrase "respect the rights, will and preferences" requires is the subject of significant debate. In our view, the following considerations are relevant:

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<sup>38</sup> See Jeanne Snelling and Alison Douglass "Legal Capacity and Supported Decision-making" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 166–167; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC DP81, 2014) at [2.70]; Victorian Law Reform Commission *Guardianship: Consultation Paper — Part 3* (VLRC CP10, 2011) at [7.3]; and Auckland Disability Law *Let's talk about Supported Decision Making*.

<sup>39</sup> The Accessibility for New Zealanders Bill would, if enacted, establish an Accessibility Committee to identify accessibility barriers and work towards preventing and removing them: Accessibility for New Zealanders Bill 2022 (153-2), cl 3(2). It is unclear whether this Bill will be progressed.

<sup>40</sup> See discussion in Chapter 7 (decision-making capacity), Chapter 10 (key features of court-appointed representatives), Chapter 13 (enduring powers of attorney) and Chapter 17 (court processes).

- (a) First, the phrase ‘will and preferences’ requires a focus on the individual and what they want — or should be taken to want — in the making of any particular decision. It requires proper acknowledgement of the individual dignity and autonomy of the person with affected decision-making, and recognition of the person’s individual agency in their decision-making.
- (b) Second, the phrase ‘will and preferences’ indicates that something more is meant than merely the wishes a person expresses at a particular time. It points towards a more authentic consideration of the whole person, including both their immediate wishes and their deeper values and aspirations.
- (c) Third, in addition to a person’s will and preferences, the phrase also refers to their ‘rights’. For the reasons discussed above in relation to the dignity of risk, a person’s rights will generally reinforce their will and preferences. However, as we also noted, that will not always be so. Sometimes, the protection of a person’s rights and their dignity and autonomy underlying those rights may sit in tension with actioning their will or preferences.
- (d) Fourth, article 12(4) refers to “respect” for a person’s rights, will and preferences. In our view, this is significant. ‘Respect’ is not the same thing as ‘obey’ or ‘comply with’. When a person’s rights, will and preferences are all aligned, it will likely amount to much the same thing. However, when they are in tension, it may not. In such a case, we think the requirement to respect a person’s rights, will and preferences means that each must be accorded proper weight and significance but that no one or two of them should be automatically determinative.

### ***Restrictions on legal capacity must not result in unjustified discrimination***

3.31 Article 12 might be seen as a specific illustration of the general proposition that any limits on a person’s right to freedom from discrimination must be demonstrably justified. There is broad agreement that article 12 prohibits restrictions on legal capacity that result in unjustified discrimination.<sup>41</sup>

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<sup>41</sup> See for example United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15]; Anna Arstein-Kerslake and Eilionóir Flynn “The Right to Legal Agency: Domination, Disability and the

Unjustified discrimination based on disability is also prohibited by section 19 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).

- 3.32 In New Zealand, discrimination is said to occur when a person is treated differently from others based on a prohibited ground of discrimination and that results in a material disadvantage to them.<sup>42</sup> Disability is a prohibited ground of discrimination and clearly includes cognitive impairment.<sup>43</sup>
- 3.33 A measure that restricts the exercise of legal capacity based on an assessment that a person does not have decision-making capacity may amount to discrimination based on disability because it treats the person differently from others in the community based on a cognitive impairment. There may be room for argument about whether this constitutes a material disadvantage (at least if the law is designed to protect people who lack capacity from serious harm). However, we think it safest to assume in this review that the resulting impact on the person's autonomy does qualify as a material disadvantage.
- 3.34 Just because something constitutes discrimination in this sense, however, does not necessarily mean it is incompatible with human rights law. Most rights, including the right to be free from discrimination, are capable of some limitation, and there can be good reasons to limit rights.
- 3.35 In New Zealand, the courts use different approaches to determine whether a limit on a right is demonstrably justified. However, they often require some common questions to be addressed. These include:<sup>44</sup>

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Protections of Article 12 of the Convention of the Rights of Persons with Disabilities" (2017) 13 International Journal of Law in Context 22 at 22–23; Lucy Series and Anna Nilsson "Article 12 CRPD: Equal Recognition before the Law" in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 354; and Wayne Martin and others *Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next?* (Essex Autonomy Project, 22 September 2014) at 14–16.

<sup>42</sup> *Ministry of Health v Atkinson* [2012] NZCA 184 at [109].

<sup>43</sup> Human Rights Act 1993, s 21(1)(h)(iii)–(v).

<sup>44</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103. The courts do not always apply these tests in such a formal and formulaic way. See *D*

- (a) Whether the reason for limiting the right is sufficiently important to justify restricting rights or freedoms.
  - (b) Whether the measure is sufficiently well designed to ensure both that it actually achieves its aim and that it impairs the right or freedom no more than is necessary.
  - (c) Whether the gain to society justifies the extent of the intrusion on the right.
- 3.36 These same questions are often also asked by international treaties bodies.<sup>45</sup>
- 3.37 As we note above, a key focus of the debate on article 12 is the question whether there is unjustified discrimination in every case in which an assessment of inadequate decision-making capacity plays a role in restricting a person’s legal capacity. We explain why we think this is not necessarily the case in Chapter 7.

## MANY OTHER RIGHTS ARE RELEVANT TO THIS REVIEW

- 3.38 As we discuss above, legal capacity includes a person’s entitlement to exercise their rights and duties. It is required to exercise civil, political, economic, social and cultural rights.<sup>46</sup> This means that restrictions on a person’s legal capacity necessarily affect enjoyment of their other human rights as well.
- 3.39 This is particularly relevant to court-appointed decision-making arrangements where the court or a representative is appointed to make a decision or decisions for another person. Some examples of the ways a person’s rights might be engaged under a court-ordered arrangement are:

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*(SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [100], in which members of the Supreme Court preferred a “simpler proportionality analysis”.

<sup>45</sup> In the United Nations Human Rights Committee, see for example: United Nations Human Rights Committee *General Comment No 18: Non-discrimination* (10 November 1989) at [13]; United Nations Human Rights Committee *General Comment No 22 (48) (art 18)* UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) at [8]; United Nations Human Rights Committee *General Comment No 10: Article 19 (Freedom of opinion)* (29 June 1983) at [4]. In the European Court of Human Rights, see discussion in Janneke Gerards *General Principles of the European Convention on Human Rights* (1st ed, Cambridge University Press, Cambridge, 2019) at chs 9 and 10.

<sup>46</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

- (a) A decision-maker might decide that a person should be held in residential care. In some circumstances, this may amount to a detention for the purposes of the NZ Bill of Rights and international law, engaging the right to freedom from arbitrary detention.<sup>47</sup> Even if there is no detention, directions about where people live may engage other freedoms such as freedoms of movement and assembly.<sup>48</sup>
- (b) A decision-maker might have the ability to make decisions about a person's property. The rights of disabled people to own and dispose of property on an equal basis to others is specifically protected in the Disability Convention, recognising that, historically, these rights have been restricted.<sup>49</sup>
- (c) A decision-maker may need to make a decision that a person receives medical treatment. Depending on the scenario involved, rights engaged may include the right to the highest attainable standard of health, the right to refuse medical treatment, the right not to be subject to torture or cruel or degrading treatment or punishment and the right to life.<sup>50</sup>

3.40 There may be instances where it is justified to limit the rights engaged. For instance, a representative may need to decide where a person lives. While people have the right to freedom of movement, the representative role also

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<sup>47</sup> New Zealand Bill of Rights Act 1990, s 23; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 9; Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 14.

<sup>48</sup> New Zealand Bill of Rights Act 1990, ss 16 and 18; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), arts 12 and 21; Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 18 and 19.

<sup>49</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(5).

<sup>50</sup> New Zealand Bill of Rights Act 1990, ss 8, 9 and 11; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976, arts 6 and 7; Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 10, 15 and 25; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force on 3 January 1976), art 12.



needs to be able to account for situations where a person's decision-making is so affected that they are no longer safe at home.

3.41 We also need to consider indigenous and minority rights. The right of indigenous peoples to self-determination is particularly significant.<sup>51</sup> Both the Tiriti o Waitangi | Treaty of Waitangi (the Treaty) and the United Nations Declaration on the Rights of Indigenous Persons (UNDRIP) protect the rights of Māori, with UNDRIP affirming the importance of recognising and observing the Treaty.<sup>52</sup> We discuss Treaty obligations in Chapter 4. As New Zealand is a multicultural society, the rights of minorities to practise their culture and religion and use their language are engaged. These rights are reflected in several international human rights instruments as well as in the NZ Bill of Rights.<sup>53</sup>

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<sup>51</sup> *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 3.

<sup>52</sup> *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 37(1).

<sup>53</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 18 and 27; *Universal Declaration of Human Rights* GA Res 217A (1948), arts 19 and 27; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force on 3 January 1976), art 15; Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 30; throughout the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007); and see too Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch 2 right 1(3).

## CHAPTER 4

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# Te Tiriti o Waitangi | Treaty of Waitangi

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## INTRODUCTION

- 4.1 In this chapter, we consider te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) and the steps that could be taken to give effect to it within the context of this review. We:
- (a) Introduce the Treaty texts and articles.
  - (b) Summarise important Treaty considerations.
  - (c) Discuss how a new Act to replace the Protection of Personal and Property Rights Act 1988 (PPPR Act) could better give effect to the Treaty.
- 4.2 The Treaty is an integral part of the constitutional framework of Aotearoa New Zealand.<sup>1</sup> It has been described as “of vital constitutional importance” and “part of the fabric of New Zealand society”.<sup>2</sup> For almost 40 years, consideration of the Treaty and an analysis of its implications has been required in policy-

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<sup>1</sup> Cabinet Office *Cabinet Manual 2023* (Department of the Prime Minister and Cabinet, Wellington, 2023) at 155. See also Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [2].

<sup>2</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 28, citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

making and a feature of Cabinet decisions. As recorded in guidance issued to public officials by the Cabinet Office:<sup>3</sup>

The Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry.

4.3 The importance of properly taking the Treaty into account in both the development of legislation and in the final product is also emphasised in the Legislation Design and Advisory Committee guidelines for good legislation.<sup>4</sup>

4.4 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also reinforces the Treaty's importance. As UNDRIP says:<sup>5</sup>

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

4.5 The PPPR Act does not refer to the Treaty or reflect Treaty considerations. Submitters who addressed this in their responses to our Preliminary Issues Paper considered that, as New Zealand's founding document and a core document for tāngata whaikaha Māori (disabled Māori people), the Treaty should underpin adult decision-making laws.

## THE TEXTS OF THE TREATY

4.6 The Treaty was signed in 1840 by representatives of the British Crown and rangatira representing many, but not all, hapū. There is a reo Māori text and an English text. The two texts have differences between them. The differences between the texts have been the subject of significant ongoing debate, scholarship and judicial consideration.

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<sup>3</sup> Cabinet Office Circular "Te Tiriti o Waitangi / Treaty of Waitangi Guidance" (22 October 2019) CO (19) 5 at [7].

<sup>4</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 28–32.

<sup>5</sup> United Nations Declaration on the Rights of Indigenous Peoples, art 37(1). UNDRIP was signed by the New Zealand Government in 2010.

- 4.7 The overwhelming majority of Māori signatories signed the reo Māori text, as did Lieutenant-Governor William Hobson on behalf of the Crown. It has long been acknowledged that signing would have followed debate and discussion in te reo Māori. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (the Tribunal) has said precedence or at least considerable weight should be given to the Māori text when there is a difference between it and the English text, given these circumstances and because this is consistent with the contra proferentum rule of the law of treaties that ambiguous provisions should be construed against the party that drafted or proposed them. For the reasons we have discussed in earlier reports, we agree with this approach.<sup>6</sup>
- 4.8 According to the Māori text:<sup>7</sup>
- (a) Article 1 provides that Māori rangatira grant the Crown kāwanatanga, the right to govern (ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu — te Kawangatanga katoa o o ratou wenua).
  - (b) Article 2 provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and all things valued and treasured (ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu — ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa).
  - (c) Article 3 provides that the Crown will care for Māori (ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani) and give to Māori the same rights and duties of citizenship as the people of England (ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani).

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<sup>6</sup> Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at [3.8]–[3.24]; Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person’s property on death* (NZLC R145, 2021) at [2.54]–[2.67]; Law Commission *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [2.6]–[2.29]; Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.24]–[2.65].

<sup>7</sup> Ian Hugh Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319–321. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal “Translation of the te reo Māori text” <waitangitribunal.govt.nz>.

## ARTICLES 1 AND 2

4.9 In this section, we discuss:

- (a) The meanings of *kāwanatanga* and *tino rangatiratanga* and the relationship between them.
- (b) Ways in which a new Act could give better effect to the Treaty guarantee of *tino rangatiratanga* in the context of adult decision-making arrangements.

### The relationship between *kāwanatanga* and *tino rangatiratanga*

- 4.10 *Kāwanatanga*, in the first article of the reo Māori text of the Treaty, has been translated as government or governorship. The Tribunal has said that *kāwanatanga* allows the Crown the right to govern and make laws for the “good order and security”, “peace and good order” or “the peace and good government” of New Zealand.<sup>8</sup> It has also said many times that *kāwanatanga* is qualified by the duty to respect the article 2 guarantee of *tino rangatiratanga*<sup>9</sup> and that the Treaty envisages the co-existence of different but intersecting systems of political and legal authority.<sup>10</sup> This means we must consider *tino rangatiratanga* in considering how the Crown should exercise its powers of *kāwanatanga* in the context of this review.
- 4.11 *Tino rangatiratanga*, the central concept of article 2 of the Treaty, has been explained as the exercise of the chieftainship of *rangatira*, which is unqualified except by applicable *tikanga*.<sup>11</sup> *Rangatiratanga* can embody the authority and

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<sup>8</sup> Waitangi Tribunal *The Manukau Report* (Wai 8, 1985) at 66; Waitangi Tribunal *The Wananga Capital Establishment Report* (Wai 718, 1999) at 45; Waitangi Tribunal *Matua Rautia | The Report on the Kōhanga Reo Claim* (Wai 2336, 2013) at 65. See further Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry — Pre-publication Version Part 1* (Wai 1040, 2022) at 22–23 and 38 for consideration of the “different conclusions about the agreement at Waitangi” that Tribunals have reached in various inquiries.

<sup>9</sup> See for example Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 269.

<sup>10</sup> Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 524.

<sup>11</sup> Ian Hugh Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319. Kawharu explained that the term emphasised to *rangatira* their

responsibilities of a rangatira to maintain the welfare and defend the interests of their people. It can also embody the authority and responsibilities of the wider kinship group.<sup>12</sup> The Tribunal has variously described tino rangatiratanga as the exercise by Māori of autonomy, authority, self-government and self-regulation.<sup>13</sup> With respect to articles 1 and 2 of the Treaty, the Tribunal has said:<sup>14</sup>

The guarantee of tino rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values.

- 4.12 Scholars reinforce these Tribunal statements, saying for instance that “the right for Māori to make decisions for Māori” is the essence of tino rangatiratanga,<sup>15</sup> tino rangatiratanga involves the capacity for Māori to “determine their own destiny within their own communities of interest”,<sup>16</sup> and tino rangatiratanga is a concept that, in all cases, “implies a high degree of Māori autonomy and speaks to the distribution of political authority, both within Māori society and between Māori and the state”.<sup>17</sup>

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complete control according to their customs. The term has also been translated as “paramount authority”: Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters — The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 16 at 25–26; and “absolute authority”: Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

<sup>12</sup> Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26–27.

<sup>13</sup> Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry — Pre-publication Version Part 1* (Wai 1040, 2022) at 39–40 and 42. The Tribunal has also recently identified that it prefers to use the term ‘tino rangatiratanga’ rather than ‘autonomy’, as this connects directly to the Treaty’s words: Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry — Pre-publication Version Part 1* (Wai 1040, 2022) at 53.

<sup>14</sup> Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 28.

<sup>15</sup> Matike Mai Aotearoa (2016) *He Whakaaro Here Whakaumu Mō Aotearoa*, Auckland, New Zealand at 8.

<sup>16</sup> Mason Durie “Tino Rangatiratanga” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Melbourne, 2005) at 17.

<sup>17</sup> Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 54.

## Providing for tino rangatiratanga in a new Act

- 4.13 We have considered how a new Act might make provision for the exercise of tino rangatiratanga in the context of arrangements relating to adult decision-making. In doing so, we have focused on two closely related considerations:
- (a) Better enabling Māori to live according to tikanga. As the Commission has previously noted, the article 2 guarantee of tino rangatiratanga extends to “values, traditions and customs”.<sup>18</sup> We consider tikanga in Chapter 5.
  - (b) Better enabling Māori collective involvement in decision-making that concerns Māori with affected decision-making.
- 4.14 As we discuss in more detail in the next chapter, we think a new Act should avoid unnecessary specification of what tikanga might involve in any particular circumstance. This will best enable Māori who wish to live in accordance with tikanga to do so. In our view, it follows that it is also preferable not to specify the nature of the collective involvement that tikanga may require. In addition to the matter of general principle, contemporary Māori experiences are diverse, meaning that not all Māori will retain strong whānau, hapū and iwi connections.<sup>19</sup> As Te Kāhui Tika Tangata | Human Rights Commission has observed in relation to tāngata whaikaha Māori:<sup>20</sup>

Many [tāngata whaikaha Māori] have ... have lost connection to their genealogical whakapapa. For some tāngata whaikaha Māori this has been replaced with Kaupapa based whānau, and disability whakapapa.

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<sup>18</sup> Law Commission *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R44, 2020); and see further Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 9. Williams expresses doubt as to whether it is conceptually sound to consider Māori custom as an incident of the concept of taonga protected under art 2 of the Treaty and states that he considers “it is better to think of customary law as a necessary and inevitable expression of self-determination”.

<sup>19</sup> See Te Tāhū o te Ture | Ministry of Justice *He Hinātore te Ao Māori: A Glimpse into the Māori World — Māori Perspectives on Justice* (March 2001) at 40; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 41–42.

<sup>20</sup> Te Kāhui Tika Tangata | Human Rights Commission *Whaka manahia Te Tiriti, Whakahaumarutia te Tangata | Honour the Treaty, Protect the Person* (December 2021) at 6.

- 4.15 This means that modern whānau or equivalent connections may often be kaupapa (purpose) based. They may include, for example, urban Māori authorities<sup>21</sup> or “kaupapa whānau”.<sup>22</sup>
- 4.16 The ways in which a new Act may better enable Māori to live in accordance with tikanga and provide for the involvement of Māori collectives in decision-making are considered throughout this Issues Paper. They include:
- (a) The best way for a new Act to ensure that tikanga is taken into account whenever it is relevant (Chapter 5).
  - (b) Ways to ensure that decision-making capacity is assessed and court-ordered decision-making arrangements considered in ways that minimise or eliminate conscious and unconscious bias and discrimination (Chapter 7).
  - (c) How to better recognise and provide for decision-making support, including from relevant collectives. This may be when assessing decision-making capacity (Chapter 7), in standalone support arrangements (Chapter 8) or in the context of decision-making arrangements (Chapters 8 and 9).
  - (d) Ways to ensure social and cultural considerations are properly taken into account in the appointment of representatives, including doing so in accordance with tikanga (Chapter 11).
  - (e) Enabling a court to appoint more than one representative for a person, which may better enable whānau and other collectives’ involvement in decision-making where that is required (Chapter 11).
  - (f) Enabling organisations to act as representatives (Chapter 11).

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<sup>21</sup> Regarding urban Māori authorities, see generally Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998).

<sup>22</sup> Dr Hinemoa Elder defines “kaupapa whānau” as a group “whose members work together for a common purpose (or agenda: kaupapa), as compared to a whakapapa whānau, where there are blood ties”: Hinemoa Elder “Te Puna a Hinengaro: he Tirohanga ki a Āheinga | The Wellspring of Mind: Reflections on Capacity from a Māori Perspective” in *A to Z of New Zealand Law Mental Health — Capacity* (online ed, Thomson Reuters) at [41.C.3.7]. See also Joan Metge “Te rito o te harakeke: conceptions of the whānau” (1990) 99 JPS 55 at 72; Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at xxi–xxiii.



- (g) Ways in which a body tasked with oversight of decision-making arrangements and implementation of a new Act may be comprised of (in part) or supported by Māori with tikanga knowledge who are able to provide guidance on relevant aspects of tikanga and tikanga processes (Chapter 16).
- (h) Enabling court processes to be better equipped to recognise tikanga and allow tikanga to “speak in its own context” (Chapter 17).<sup>23</sup>
- (i) Ways in which a new Act might facilitate resolution of disputes out of court, including by tikanga-based processes (Chapter 17).

### ARTICLE 3

- 4.17 We have also considered how article 3 of the Treaty is relevant to this review.
- 4.18 Article 3 (which addresses protection and equality) has additionally been understood as a broad guarantee of equity, obliging the government to exercise its kāwanatanga both to care for Māori and to ensure outcomes for them equivalent to those enjoyed by non-Māori.<sup>24</sup> These considerations have typically been addressed in the context of the principles of the Treaty of active protection, equity and options.<sup>25</sup> This can mean removing existing barriers experienced by Māori in accessing services and providing for Māori-led solutions that contribute to improving disparate outcomes.<sup>26</sup>
- 4.19 Māori are disproportionately affected by experiences of impairment that may affect decision-making. Māori are also underrepresented in accessing many health and disability services, including decision-making arrangements under the PPPR Act.
- 4.20 Studies of Māori mental health show the extent to which Māori experience disability and ill health that may affect their decision-making more often than

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<sup>23</sup> *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 at [4].

<sup>24</sup> Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 33–34.

<sup>25</sup> Treaty of Waitangi Act 1975: see the long title and preamble.

<sup>26</sup> See particularly Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 53–54, 56–57, 62 and 65; Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 31, 34–35 and 163.

the general population.<sup>27</sup> For example, Māori experience dementia mate wareware at both higher rates and more rapidly increasing rates than non-Māori.<sup>28</sup> Māori are also disproportionately affected by other health conditions such as diabetes, cardiovascular disease, strokes and a history of traumatic brain injuries that, in their later stages, can affect decision-making.<sup>29</sup> The prevalence of dementia mate wareware among Māori may exceed reported rates as older Māori are less likely to engage with either primary care or mental health services, and more likely to be cared for within the whānau where the progression of this condition may be less visible. Describing consequences for Māori of these inequities, academics from the University of Auckland conclude:<sup>30</sup>

Māori, Pacific and Asian people living with dementia and their carers are disadvantaged across multiple domains. They are disproportionately impacted by the lost productivity due to the higher prevalence of dementia in working age populations. They also utilise less social care resources which results in a higher cost of unpaid care being placed on families and whānau.

- 4.21 At the same time, although there is limited data on the use of PPPR Act legal mechanisms such as enduring powers of attorney, there is some evidence to suggest that Māori are significantly less likely than non-Māori to use these

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<sup>27</sup> See generally Joanne Baxter and others “Prevalence of Mental Disorders Among Māori in Te Rau Hinengaro: The New Zealand Mental Health Survey” (2006) ANZJP 40(10) 914; Te Kani Kingi “Māori Mental Health: A Māori Response” in Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tāngata: Politics of Empowerment* (Huia, Wellington, 2011) 173; Etuini Ma’u and others *Dementia Economic Impact Report 2020* (University of Auckland, Auckland, 2021); Katherine Elizabeth Walesby and others “Prevalence and geographical variation of dementia in New Zealand from 2012 to 2015: Brief report utilising routinely collected data within the Integrated Data Infrastructure” (2020) 39 Australasian Journal of Ageing 297.

<sup>28</sup> Katherine Elizabeth Walesby and others “Prevalence and geographical variation of dementia in New Zealand from 2012 to 2015: Brief report utilising routinely collected data within the Integrated Data Infrastructure” (2020) 39 Australasian Journal of Ageing 297 at 3.1.1; Etuini Ma’u and others *Dementia Economic Impact Report 2020* (University of Auckland, Auckland, 2021) at 15.

<sup>29</sup> Joanne Baxter “Māori Perspectives” in Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity — A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, 2019) 153 at 155; and see Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 19–20 and 23–24.

<sup>30</sup> Etuini Ma’u and others *Dementia Economic Impact Report 2020* (University of Auckland, Auckland, 2021) at 18.

statutory decision-making arrangements intended to support individuals and their whānau when a person's decision-making capacity is affected.<sup>31</sup>

- 4.22 Above, we have summarised the options that this Issues Paper explores for enabling Māori to choose to live according to tikanga and providing for the involvement of Māori collectives in respect of adult decision-making arrangements. There is evidence that outcomes for indigenous peoples generally improve and that indigenous peoples enjoy greater wellbeing when they are self-determining<sup>32</sup> and that the provision of culturally responsive services is an essential part of redressing inequities.<sup>33</sup> By enabling arrangements that are more accessible and culturally relevant for Māori, we think that these options would also reduce the barriers experienced by Māori in accessing those arrangements and thereby promote greater equity of outcomes. They could therefore assist the government to meet its obligations under article 3 of the Treaty, in addition to article 2.

**QUESTION 1:**

Do you agree with our description of the ways in which the Treaty is relevant to this review? Why or why not?

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<sup>31</sup> According to one study on the use of enduring powers of attorney (EPOAs) by older people in Counties Manukau, 63.5 per cent of New Zealand European participants in the study had made an EPOA, compared to 10 per cent of Māori participants: So-Jung Park and Heather Astell "Prevalence of enduring power of attorney and barriers towards it in community geriatric population in Counties Manukau Health" (2017) 130 NZMJ 35 at 39–40. Pākehā therefore were significantly more likely than Māori to have made an EPOA, with the proviso that the number of participants was small. Consistent with this, we also heard anecdotally that PPPR Act applications tend to most often involve older New Zealand Europeans.

<sup>32</sup> United Nations General Assembly *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples* (17 July 2018) A/73/176 at [71]–[72].

<sup>33</sup> Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 31; Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 56–57.

## CHAPTER 5

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# Tikanga

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## INTRODUCTION

- 5.1 In this chapter, we consider how a new Act to replace the Protection of Personal and Property Rights Act 1988 (PPPR Act) should engage with tikanga. We discuss:
- (a) Why a new Act should recognise tikanga and enable Māori to live according to tikanga.
  - (b) Our view that it will be better for a new Act not to specify individual tikanga values and principles.
  - (c) Whether an exception should be made for mana, which is often associated with dignity and was a focus for submitters.
  - (d) Whether a new Act should include a general provision requiring tikanga to be considered where it is relevant.

## WHAT IS TIKANGA?

- 5.2 Tikanga is “the set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori”.<sup>1</sup> Within te ao Māori, tikanga is a source of rights, obligations and authority that governs relationships. It provides a “koru ... of

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<sup>1</sup> Edward Taihakurei Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 Otago L Rev 449 at 452.

ethics” and a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.<sup>2</sup>

5.3 Tikanga may involve both:<sup>3</sup>

- (a) Tikanga Māori, being values and principles that are broadly shared and accepted generally by Māori.
- (b) Localised tikanga that are shaped by the unique knowledge, experiences and circumstances of individual Māori groups (such as iwi, hapū, marae or whānau).

5.4 In Aotearoa New Zealand today, tikanga is significant to those engaging in state law review and reform:

- (a) Tikanga is the first law of Aotearoa and has continuing significance as an independent source of rights, interests and obligations for Māori.
- (b) Tikanga is part of New Zealand law. As recently underscored by te Kōti Mana Nui | Supreme Court, tikanga will be a continuing part of developing state law that is both relevant to the courts and when writing new legislation.<sup>4</sup>
- (c) Tikanga is important to giving effect to rights and obligations under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).
- (d) New Zealand has international obligations in relation to Māori as indigenous people. These include, for instance, the rights affirmed by the United Nations Declaration on the Rights of Indigenous Peoples to “practise and revitalize their cultural traditions and customs” and to “maintain and strengthen their distinct political, legal, economic, social and

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<sup>2</sup> Bishop Manuhua Bennett “Pū Wānanga Seminar” (presented with Te Mātāhauariki Research Institute, University of Waikato, 2000) as cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

<sup>3</sup> See generally Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.22] and Figure 1.

<sup>4</sup> *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [19].

cultural institutions” while also retaining the right to choose to participate fully in the life of the state.<sup>5</sup>

- 5.5 Guidelines published by the Cabinet Office<sup>6</sup> and the Legislation Design and Advisory Committee<sup>7</sup> also require those engaging in review and reform of the law to consider tikanga.
- 5.6 This means we need to consider the relationship between tikanga and state law under the PPPR Act and in a new Act.

## A NEW ACT SHOULD RECOGNISE TIKANGA

### The PPPR Act does not refer to tikanga

- 5.7 The PPPR Act pre-dates the official guidance to consider tikanga noted above. While courts have recognised that cultural factors and tikanga can be considered and have confirmed a right under the PPPR Act to express one’s “cultural heritage”,<sup>8</sup> the PPPR Act itself does not refer to tikanga.
- 5.8 More generally, as we noted in our Preliminary Issues Paper, the PPPR Act has a focus on the individual. It does not generally represent Māori perspectives, which may differ from those of non-Māori by being more holistic and less individualised. As Dr Hinemoa Elder says, decision-making capacity in te ao Māori:<sup>9</sup>

... is not best understood as residing in an individual alone, rather as contained within a collective. The individual draws support and strength from the presence of kaumātua and other generations and the connections amongst whānau, both living and dead. The preference is for decisions to be made collectively, following discussion. This stands in contrast to mainstream views.

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<sup>5</sup> United Nations Declaration on the Rights of Indigenous Peoples, arts 5 and 11(1).

<sup>6</sup> Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [74] and [76].

<sup>7</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at [3.4] and [5.3].

<sup>8</sup> *Re [S]* [2021] NZFC 5911; *T-E v B [Contact]* [2009] NZFLR 844.

<sup>9</sup> Hinemoa Elder “Te Puna a Hinengaro: he Tirohanga ki a Āheinga | The Wellspring of Mind: Reflections on Capacity from a Māori Perspective” in *A to Z of New Zealand Law Mental Health — Capacity* (online ed, Thomson Reuters) at [41.C.3.8].

- 5.9 Justice Joseph Williams makes a similar (although more general) point, summarising the different perspectives of tikanga and of Western law.<sup>10</sup> Within tikanga, “[n]o one was ever just an individual”. Tikanga is “predicated on personal connectedness” and involved matters that were the responsibility of the wider kin group.<sup>11</sup> By contrast, Western law is founded on and shaped by considerations of personal autonomy. This is a fundamental difference in these two systems’ values.
- 5.10 It is important to recognise this difference in the context of this review. For example, it can raise questions about the suitability for Māori of decision-making capacity assessments and appointments of representatives that are overly focused on the individual alone and insufficiently sensitive to their wider social and cultural context.<sup>12</sup> It requires a new Act to acknowledge the importance of continuing whānau and hapū involvement and sustaining whanaungatanga connections and obligations.

### Our Preliminary Issues Paper

- 5.11 In our Preliminary Issues Paper, we identified some tikanga values and principles that our research suggested could be relevant to this review. We considered the importance of:
- (a) Whakapapa (referring to a person’s web of connections, often specifically genealogical connections).<sup>13</sup>

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<sup>10</sup> Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 5–6.

<sup>11</sup> Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 5–6.

<sup>12</sup> Hinemoa Elder “Te Puna a Hinengaro: he Tirohanga ki a Āheinga | The Wellspring of Mind: Reflections on Capacity from a Māori Perspective” in *A to Z of New Zealand Law Mental Health — Capacity* (online ed, Thomson Reuters) at [41.C.3.8]; and Keri Ratima and Mihi Ratima “Māori Experience of Disability and Disability Support Services” in Bridget Robson and Ricci Harris (eds) *Hauora: Māori Standards of Health IV: A study of the years 2000–2005* (Te Rōpū Rangahau Hauora a Eru Pōmare, Wellington, 2007) at 189.

<sup>13</sup> Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper* (NZLC IP49, 2022) (Preliminary Issues Paper) at [5.5].

- (b) Whanaungatanga (kinship, involving maintaining relationships, strengthening bonds and collective responsibilities).<sup>14</sup>
- (c) Aroha (involving loving concern for a person and acting with their welfare in mind).<sup>15</sup>
- (d) Mana (involving authority and responsibilities).<sup>16</sup>
- (e) Tiaki (guardianship or stewardship).<sup>17</sup>
- (f) Wairua (the spiritual essence of a person that can be damaged or disrupted).<sup>18</sup>
- (g) Mauri-ora (the healthy life force) of a person.<sup>19</sup>
- (h) Rongo (signifying a state of internal balance and peace).<sup>20</sup>

## Results of consultation

5.12 Some submitters considered that it was better for questions relating to tikanga and te ao Māori to be answered by Māori. However, submitters who did address the questions about tikanga widely agreed that a new Act should better provide for tikanga and Māori perspectives.

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<sup>14</sup> Preliminary Issues Paper at [5.6] and [5.13]; and see Law Commission *He Poutama* (NZLC SP24, 2023) at [3.36]–[3.44].

<sup>15</sup> Preliminary Issues Paper at [5.14]–[5.16]; defining “aroha” see Cleve Barlow *Tikanga Whakaaro: Key concepts in Māori culture* (Oxford University Press, Melbourne, 1991) at 8; and generally Law Commission *He Poutama* (NZLC SP24, 2023) at [3.121]–[3.123] discussing aroha in connection with whanaunga responsibilities.

<sup>16</sup> Preliminary Issues Paper at [5.17]–[5.23]; see further Law Commission *He Poutama* (NZLC SP24, 2023) at [3.73]–[3.86]; Natalie Coates and Horiaana Irwin-Easthope “Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence given in legal proceedings” (Appendix 2, NZLC SP24, 2023) at 95–103.

<sup>17</sup> Preliminary Issues Paper at [5.24]–[5.25]; and see Law Commission *He Poutama* (NZLC SP24, 2023) at [3.116]–[3.119].

<sup>18</sup> See generally Law Commission *He Poutama* (NZLC SP24, 2023) at [3.18]–[3.21].

<sup>19</sup> Preliminary Issues Paper at [5.26]–[5.29]; and see further Law Commission *He Poutama* (NZLC SP24, 2023) at [3.49]–[3.53].

<sup>20</sup> Preliminary Issues Paper at [5.30]–[5.32].



### ***Tikanga values and principles***

- 5.13 Submitters generally agreed with the tikanga values and principles we identified as important. However, some suggested other concepts or other ways of explaining why those values and principles are relevant and how they are interconnected. These included:
- (a) The importance of connecting whakapapa with whanaungatanga.
  - (b) The inseparability of mana from tapu (that which is sacred).
  - (c) The concepts of manaakitanga (the more well-known term for caring for one another) and kaimanaaki (caregivers) in preference to tiaki.
  - (d) ‘Mauri tau’ and ‘wairua tau’ (‘tau’ meaning to be settled) to more accurately portray a state of balance in preference to rongu and wairua.
  - (e) Whakapono (a belief that any decision made is in the best interest of the person).
  - (f) Ngākau (a doorway to the wairua, good and bad feelings, and being able to connect).
  - (g) Whatumanawa (a place for deepest feelings and trauma and supporting the person through these traumas).

### ***Mana***

- 5.14 A number of submissions particularly favoured mana as a guiding principle or value. As some submitters said, this may have been partly because ‘mana enhancing’ is one of the established Enabling Good Lives guiding principles.<sup>21</sup> Many submitters referred positively to the importance of mana, mana enhancing approaches or whakamana. One submitter said, for example:

We strongly advocate for Aotearoa to similarly prioritise the UNCRPD and supported decision-making mechanisms through our legal framework, education, and resourcing of supports that uphold the mana of those whose decision-making is affected.

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<sup>21</sup> “Enabling Good Lives approach: principles” <[www.enablinggoodlives.co.nz](http://www.enablinggoodlives.co.nz)>. According to these principles, mana enhancing means: “[t]he abilities and contributions of disabled people and their families are recognised and respected”.

5.15 Another said:

Enduring Powers of Attorney (EPOAs) ... are important ethically because they are a way in which those who are likely to lose the ability to say what will happen to them can continue to have their mana and wishes respected.

### ***Whānau and collective involvement***

5.16 Several submitters pointed to the importance of whānau in any decision-making process and/or suggested exploring a collective or collaborative approach to decision making to better align with Māori approaches and the values of whanaungatanga. One submitter said:

We do not believe the law as it currently stands sufficiently acknowledges or makes allowances for forms of decision making in a Kaupapa Māori way. Given that, for Māori it is the interconnectedness of whānau, and that mana is derived from the collective, the current legislation does not address this.

5.17 According to another submitter, if a person has affected decision-making, tikanga “begs the people to whom that individual belongs to step in and embody manaaki, supporting a collectivised decision-making process”. Not only the process but the outcome must “maintain the integrity, dignity and mana of the individual, whilst in many cases being carefully balanced against any other interests of, or factors affecting, the wider collective”.

5.18 However, the importance of acknowledging some of the risks and challenges that may be inherent in collective approaches were also noted by some submitters, such as the time involved in completing these processes and managing competing views.

## **PROVIDING FOR TIKANGA IN A NEW ACT**

5.19 In light of these submissions, we have further considered the best way for a new Act to recognise and engage with tikanga. In this section, we discuss:

- (a) Our view that a new Act should not refer to specific tikanga values or principles.
- (b) Whether an exception to this view should be made for mana. We conclude that it should not.

- (c) Our suggestion that a new Act contain a general provision relating to tikanga.

### Tikanga and the role of state law

- 5.20 As we said in our Preliminary Issues Paper, no aspect of tikanga should be viewed in isolation. Tikanga values and principles are intertwined and exist in “an interconnected matrix”.<sup>22</sup> As submissions suggested, singling out and briefly summarising specific principles or values may fail to capture this depth and complexity. It risks distorting tikanga. It also neglects the extent to which (as we earlier noted) tikanga may vary according to the localised expressions of different Māori groups.
- 5.21 For these reasons, we think that a new Act should not specify which tikanga values and principles may be applicable. Rather, to enable Māori who wish to live according to tikanga, we consider it preferable for a new Act to enable tikanga to function on its own terms without seeking to statutorily specify what that might mean.
- 5.22 This view informs our approach in this Issues Paper in various ways:
- (a) In Chapter 4, we consider a range of options that, in addition to addressing the Treaty, could better recognise tikanga in a new Act and advance how state law and those working with decision-making arrangements engage with it.
  - (b) In a number of chapters (including Chapters 3, 9 and 10) we consider how a new Act could ensure better respect for a person’s rights, will and preferences. This may enable decision-making to accord with tikanga to a greater extent than law that is guided by considerations of a person’s best interests and welfare. We acknowledge that there is some artificiality in conceiving of tikanga as a matter of a person’s will and preferences. From the perspective of tikanga, a person is not bound by tikanga because that is their will and preference, any more than a person is bound by state law because that is their will and preference. Nonetheless, a requirement for

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<sup>22</sup> *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239: see “Appendix: Statement of Tikanga” at [30]; Law Commission *He Poutama* (NZLC SP24, 2023) at [3.1]–[3.11].

decisions to reflect a person's rights, will and preferences would mean respecting their wishes for decisions (and how they are made) to be consistent with their tikanga obligations.

- (c) Later in this chapter, we discuss the potential of a general legislative provision to encourage and enable the appropriate recognition and development of tikanga in a new Act.

### Considering the relevance and importance of mana

- 5.23 As we note above, a number of submissions suggested that the mana of the person with affected decision-making could be an important guiding value in a new Act. This appears consistent with a widespread tendency to associate mana with dignity and with valuing the personhood and empowering the choices of those with disabilities. Mana is frequently connected with dignity, spanning case law,<sup>23</sup> legislation<sup>24</sup> and policy contexts.<sup>25</sup>
- 5.24 Given this, we discuss here whether an exception should be made to our wider view that reference to specific tikanga values and principles is not the best approach. We do so in some detail, not only because of the extent to which mana was raised as an important value by submitters but also to illustrate our view that isolating values and principles from their tikanga context has risks and that perhaps there is another way forward.
- 5.25 In an Act that has a purpose connected implicitly or explicitly with dignity, we think there could be a natural tendency by people performing roles under that Act to refer also to mana. However, mana is a complex concept that does not map clearly onto the concept of individual dignity that the UN Convention on the Rights of Persons with Disabilities requires to be protected. While some aspects of mana do seem to make it a natural fit in this context, the tendency

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<sup>23</sup> Mihiata Pirini and Anna High "Dignity and Mana in the 'Third Law' of Aotearoa New Zealand" (2021) 29 NZULR 623; Mihiata Pirini and Anna High "Dignity and mana in Aotearoa New Zealand legislation" (2022) 18 Policy Quarterly 52.

<sup>24</sup> Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 3(d).

<sup>25</sup> Kia Piki Ake Welfare Expert Advisory Group *Whakamana Tāngata: Restoring Dignity to Social Security in New Zealand* (February 2019) at 5. See also the report's first recommendation at 19.

to associate mana with individual dignity is problematic when mana is more fully understood from a tikanga perspective.

### ***Mana is associated with making decisions and taking action***

5.26 It is clear that some aspects of mana resonate in the context of our PPPR Act review. For example, mana is associated with making decisions and taking action. This aspect may be particularly significant in the context of a new Act that will continue to have a decision-making and enabling focus.

5.27 For example, Professor Te Ahukaramū Charles Royal says that, in addition to “being and identity”, mana has to do with “authority and empowering action”. He considers that action-taking is how “the existence of mana has to be felt in the world”.<sup>26</sup>

5.28 This way of seeing mana is consistent with what we heard from submitters. However, the position is more difficult because:

- (a) Others doubt whether mana (and certainly mana alone) is the right tikanga principle or value to refer to in this context.
- (b) Associating mana simply with the dignity and the actions and will of individuals is problematic.

### ***Mana may not be the right tikanga value or principle***

5.29 In spite of the seeming relevance of mana, not everyone agrees that it is the most suitable way within tikanga to address a person’s dignity, importance and sanctity. Mihiata Pirini and Associate Professor Anna High, in particular, point out concerns about conflating mana with individual dignity,<sup>27</sup> which our own research expands on and confirms. Other tikanga scholars have similar views. For example:

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<sup>26</sup> Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 202–203.

<sup>27</sup> Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623; Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52.

- (a) Tā Hirini Moko Mead identifies a “bundle of [tikanga] attributes that defines the importance and sanctity of the person” that include but are not limited to mana.<sup>28</sup> Mead positions mana within a wider weave of “several spiritual attributes” that also include personal tapu, mauri, wairua and hau. Mead considers that all these “relate to the importance of life, and to the relation of ira tangata [the human element] to the cosmos and to the world of the Gods”.<sup>29</sup>
- (b) Professor Khylee Quince and Jayden Houghton propose that the notion of ‘intrinsic tapu’ may relate more closely than mana to a person’s self-worth, dignity and essential humanity. Tapu is also explained as being inseparable from mana, as we earlier noted.<sup>30</sup>

### **Associating mana with individual dignity is problematic**

- 5.30 In addition to questions of whether mana is the right tikanga principle to single out from its matrix of other interconnected values and principles, Pirini and High have pointed out the “contingent and socially dependent” quality of mana.<sup>31</sup> As they explain, mana is closely connected with the principle of whanaungatanga.<sup>32</sup>
- 5.31 In this respect, mana significantly differs from dignity as the latter is defined in state and international law. In the modern Western legal tradition, dignity is largely linked with individual autonomy and rights. The recurring association of

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<sup>28</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 66; and see Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 646.

<sup>29</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 66; and see Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 646.

<sup>30</sup> Khylee Quince and Jayden Houghton *A to Z of New Zealand Law Privacy* (online ed, Thomson Reuters) at [46.2.2.3]. See also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 43; and Law Commission *He Poutama* (NZLC SP24, 2023) at [3.98].

<sup>31</sup> Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52 at 56.

<sup>32</sup> Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 626; and Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52 at 56.

mana with dignity creates a risk of overlooking or obscuring the important ways that mana and dignity differ from one another. Tensions can arise between whanaungatanga and “Western liberal ideals of autonomy”.<sup>33</sup>

- 5.32 A number of sources explain that mana is a comparatively “more woven, less individualistic” concept<sup>34</sup> and mirrors the underlying woven or collective premise that grounds Māori society.<sup>35</sup> For example, Williams J writing in the Supreme Court decision relating to Peter Ellis explains that, while mana involves dignity and authority, it exists because of relationships:<sup>36</sup>

Mr Ellis has mana ... that is, his own standing, dignity and authority. Death does not extinguish that mana because ... mana is not an individualistic phenomenon. It exists because of relationships with others in accordance with the principles of whanaungatanga and whakapapa. Such mana-sustaining relationships do not end at death, even if they are changed by it.

...

Mana occupies the same space as common law principles of individual dignity and integrity, but it is a more woven, less individualistic concept; and, because of this, its posthumous influence is stronger than that of the common law conception of individual reputation.

- 5.33 Professor Huia Tomlins-Jahnke makes the same points. She says that conversations about mana are nearly always about human “prestige, power and authority”, upholding the dignity and wellbeing of a person or persons and the development of human potential. However:<sup>37</sup>

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<sup>33</sup> Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52 at 56–57. For the authors’ more nuanced analysis that canvasses different understandings of dignity, see Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 629–631 and Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52 at 53. See too Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 2–6.

<sup>34</sup> *Ellis v R* [2022] NZSC 114, 1 NZLR 239 at [254].

<sup>35</sup> Mason Durie “Marae and Implications for a Modern Māori Psychology” (1999) 108 JPS 351 at 358.

<sup>36</sup> *Ellis v R* [2022] NZSC 114, 1 NZLR 239 at [251]–[254] per Williams J.

<sup>37</sup> Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tangata: Politics of Empowerment* (Huia, Wellington, 2011) at 1.

The concept itself is deeply embedded in a dynamic system of kinship relationships and ancestral precedence that is mediated and guided by the value the community places on mana.

- 5.34 Similar explanations can be found in the evidence of Ngāti Pahauwera and other tribes given to Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal<sup>38</sup> and writing by Tā Mason Durie<sup>39</sup> and Ngahihi o Te Ra Bidois.<sup>40</sup>

### **Mana involves obligations**

- 5.35 In addition, mana involves, perhaps primarily, fulfilling one's obligations.
- 5.36 Mana is contingent on the right process and larger laws than the will of one person. For example, as Tai Ahu says, according to pūrākau (Māori legendary narratives) there was a process of fierce debate with his siblings before the atua (god) Tāne took steps to separate the primordial parents Ranginui and Papatūānuku.<sup>41</sup> Even where unanimous agreement cannot be reached, “wānanga, discussion and input from the collective” are needed.<sup>42</sup>

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<sup>38</sup> Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 155, from Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992) at 18–19, citing evidence of Ngāti Pahauwera and other tribes “Mana and Rangatiratanga over the River”. See also John Patterson “Mana: Yin and Yang” (2000) 50 *Philosophy East and West* 229 at 230; and extracts from J Prytz Johansen *The Māori and His Religion: In its Non-ritualistic Aspects* at 90–93, cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 157, describing mana as a “fellowship”: “[t]he secret of mana is that communal life, the ‘fellowship’, permeates all the people to their innermost hearts; we may say that they live mana”.

<sup>39</sup> Mason Durie “Marae and Implications for a Modern Māori Psychology” (1999) 108 *JPS* 351 at 358.

<sup>40</sup> Ngahihi o Te Ra Bidois as cited in Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors” (Appendix 2, NZLC SP24, 2023) at 4.173, citing Statement of Evidence of Ngahihi o Te Ra Bidois (19 November 2007) at [5.2].

<sup>41</sup> Tai Ahu to Law Commission “Memorandum to Māori Liaison Committee — Adult decision making capacity and Māori issues” Appendix 2 — Māori Issues Working Paper Working Draft (11 November 2022) at [10].

<sup>42</sup> Tai Ahu to Law Commission “Memorandum to Māori Liaison Committee — Adult decision making capacity and Māori issues” Appendix 2 — Māori Issues Working Paper Working Draft (11 November 2022) at [3]–[4] and [125]. For another clear illustration, see te Kooti Whenua Māori | Māori Land Court decision of *Julian v McGarvey* 309 Waiāriki MB 207 per Judge Warren, particularly at [69]–[71].



- 5.37 It involves reciprocal obligations and responsibilities. These include practising tikanga. As Tāmāti Kruger explains, personal mana always has a source (such as gods, ancestors, people or land). It involves tikanga and meeting responsibilities towards that source — in other words, to the kinship group.<sup>43</sup>
- 5.38 Consequently, mana can rise or fall at different times.<sup>44</sup> This is another and essential respect in which mana may differ from a claim as a matter of universal individual right that non-Māori law requires be protected.

***Mana may be differently expressed today but has the same underlying themes***

- 5.39 There are other views on the developing meaning of mana today. As Royal says, in the modern Māori community “there is not a uniform and consistent expression of the traditional worldview ... Nor could there be, given the tremendous change.”<sup>45</sup> Royal argues that mana can be interpreted in more widely accessible and less spiritual ways than it used to be.<sup>46</sup> For Māori today, there may be many pathways to restoring or reconnecting with mana that will not always follow the traditional forms:<sup>47</sup>

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<sup>43</sup> Vivian Tāmāti Kruger cited in Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarataru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors” (Appendix 2, NZLC SP24, 2023) at 4.158, from Statement of evidence of Vivian Tāmāti Kruger (2 June 2020) at [42]–[43].

<sup>44</sup> Khylee Quince and Jayden Houghton *A to Z of New Zealand Law Privacy* (online ed, Thomson Reuters) at [46.2.2.3].

<sup>45</sup> Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 197.

<sup>46</sup> Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 202–203.

<sup>47</sup> Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 198.

... for some Māori, it may not involve a high degree of involvement in Māori communities, a fostering of ‘Māori’ identity, and connection with their iwi background. Some Māori might be (and are) healed and uplifted by people of goodwill and love who are not Māori. For other Māori, understanding and connecting with their Māori identity, history, and background is a profoundly important (perhaps even essential) part of their pathway toward healing and an experience of mana.

- 5.40 Dr Nick Roskruge similarly notes how the pressures of today’s world make expressing mana in its original ways more challenging: “[w]e are often isolated and independent beyond our needs, and constantly in a hurry”.<sup>48</sup> He observes that mana is therefore more likely today to be established “predominantly on personal attributes”, including “roles in [people’s] work and personal life, reflected in their status within their circle of friends and colleagues, and devoid of much of the depth on which in traditional society it was based”.<sup>49</sup>
- 5.41 However, writers who have considered the changing nature of mana have also reinforced ways in which the underlying values at the heart of mana have not changed:
- (a) Royal, for example, notes that the “tenet that one is not the source of mana is still upheld”.<sup>50</sup> He points out the importance of connection, explaining that mana involves how others see us and “demands a balancing of one’s personal aspirations and goals with provision of a space for other voices to be heard in one’s life practice”.<sup>51</sup>

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<sup>48</sup> Nick Roskruge “Horticulture: A Personal Perspective” in Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tangata: Politics of Empowerment* (Huia, Wellington, 2011) 243 at 255.

<sup>49</sup> Nick Roskruge “Horticulture: A Personal Perspective” in Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tangata: Politics of Empowerment* (Huia, Wellington, 2011) 243 at 255.

<sup>50</sup> Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 202.

<sup>51</sup> Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 205.

(b) Royal and Dr Nathan Matthews both emphasise that although, in modern Māori communities, belonging is no longer concerned exclusively with a kinship grouping defined by whakapapa, the underlying idea remains true that mana lies in “the strength of familial and societal links” and is connected with one’s role in community life.<sup>52</sup>

### ***Tikanga (including mana) is better addressed by another approach***

5.42 In our view, this consideration of mana indicates some of the complexity and challenges involved in referring to mana that overall make it undesirable to do so in a new Act. More generally, it illustrates the difficulties arising from attempting to include and define in a new Act any specific tikanga. We think there is a need to find another approach.

### **A general tikanga provision**

5.43 In this section, we consider the role of a general tikanga provision. In our view, enabling Māori who wish to live in accordance with tikanga to do so might be better achieved by a general provision concerning tikanga rather than provisions that identify specific tikanga values and principles.

5.44 A new Act could, for example, require each person with a role under that Act (including courts, decision-makers and decision-making supporters) to take into account tikanga to the extent that it is relevant in the circumstances. There are also other ways that a statutory test could be formulated. Instead of “take into account”, a provision might use wording such as “consider”, “have regard to” or “apply”.

5.45 In each case, the aim would be to ensure that tikanga is enabled to apply on its own terms, rather than on terms that are statutorily pre-determined and, accordingly, potentially artificial and distortionary.

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<sup>52</sup> Nathan Matthews “Religion: Māori Catholicism” in Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tangata: Politics of Empowerment* (Huia, Wellington, 2011) 151 at 169; Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillippa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 203–205.

- 5.46 Providing for tikanga in this manner could, in a range of ways, assist Māori who wish to live in accordance with tikanga:
- (a) It could enable and encourage a properly rounded view of those tikanga values and principles that are relevant in a particular circumstance without the risks of distortion involved in singling out individual concepts.
  - (b) For any given value or principle such as mana, it could allow consideration of the wider matrix of values and principles that form part of its context.
  - (c) Over time, it could work in conjunction with guidance developed under a new Act to enable all relevant parties to have a broader, deeper understanding of relevant values and principles and how their relevance might vary according to circumstance.
- 5.47 While the PPPR Act contains no provision such as this, two other statutes of relevance to people with affected decision-making (concerning compulsory mental health treatment and compulsory treatment for substance addiction) contain some relevant requirements that are consistent with greater tikanga recognition. These statutes require people (including courts) exercising powers under them to do so with:<sup>53</sup>
- (i) proper recognition of the importance and significance to the [person] of the [person's] ties with his or her family, whānau, hapū, iwi, and family group;
  - (ii) proper recognition of the contribution those ties make to the [person's] well-being; and
  - (iii) proper respect for the [person's] cultural and ethnic identity, language, and religious or ethical beliefs.
- 5.48 While these provisions are to some extent consistent with options that we are considering, we think there are also significant differences. For example, making decisions about mental health and substance addiction treatment in ways that are properly respectful of the person's individual characteristics is likely to lack the same impact as ensuring that a wide range of decisions in the person's life can reflect their wish to live in accordance with tikanga. Identifying matters that are of fundamental significance in tikanga (such as whānau, hapū

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<sup>53</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 5(2); Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 12(e).

and iwi) is not the same as enabling tikanga to be considered in a new Act whenever and however it is relevant.

- 5.49 Consequently, in our view, a new Act might better enable Māori who wish to live in accordance with tikanga to do so by the inclusion of a general provision that allows tikanga in the context of that Act to develop organically and in a nuanced and tika way.

**QUESTION 2:**

Do you agree that a new Act should include a general provision relating to tikanga requiring (for example) people with relevant roles under the Act to take into account tikanga to the extent that it is relevant in the circumstances? Why or why not?

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## **PART 2:**

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# **KEY FEATURES OF A NEW ACT**

## CHAPTER 6

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# The purpose of a new Act

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## INTRODUCTION

- 6.1 In this chapter, we discuss the proposed purpose of a new Act. A clear legislative purpose is important to set the direction of the legislation, guide interpretation of its provisions and signal a shift in policy approach.<sup>1</sup> We:
- (a) Discuss the need to review the current purpose of the Protection of Personal and Property Rights Act 1988 (PPPR Act) and clarify its focus.
  - (b) Propose that the purpose of a new Act must be closely informed by human rights, including concepts of rights, will and preferences and dignity, as we introduce in Chapter 3.

## THE NEED FOR A CLEAR PURPOSE

- 6.2 In this section, we consider the lack of clarity in the current purpose of the PPPR Act. The Act does not have a purpose provision. Instead:
- (a) The long title of the PPPR Act explains that it is “[a]n Act for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs”.

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<sup>1</sup> Legislation Design and Advisory Committee “Designing purpose provisions and statements of principle” (30 June 2022) <[www.ldac.org.nz](http://www.ldac.org.nz)>.

(b) Sections 8 and 28 of the PPPR Act state two primary objectives that the court must follow when exercising its jurisdiction under the Act.<sup>2</sup> These are to make the least restrictive intervention possible in the life of the person and to enable or encourage the person to exercise and develop their capacity to the greatest extent possible.

6.3 The PPPR Act when enacted was intended to move away from an overly protective model of legislation that “in the past ... had allowed too great a degree of paternalism” in the management of disabled people’s affairs.<sup>3</sup> Consistent with this, the objectives above are about promoting and supporting the autonomy and decision-making of the person as much as possible. This intention can also be seen in other provisions, such as the requirement that every person is presumed to have decision-making capacity until the contrary is shown<sup>4</sup> and a statutory list of matters that may not be taken as determinative on their own of a lack of decision-making capacity.<sup>5</sup>

### Judicial interpretation of the purpose of the PPPR Act

6.4 In the absence of a clear purpose clause, the purpose of the PPPR Act has been considered by the courts. Most cases agree that the purpose of the PPPR Act is protective. This has resulted in courts reading in welfare and best interests as a secondary objective of the PPPR Act.

6.5 Promoting the best interests of the person with affected decision-making is the paramount consideration for welfare guardians, property managers and attorneys acting under enduring powers of attorney.<sup>6</sup> In considering whether to appoint a person as a welfare guardian, the court must consider, among other things, whether they are likely to act in the best interests of the person.<sup>7</sup>

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<sup>2</sup> Protection of Personal and Property Rights Act 1988, ss 8(a) and (b) (relating to personal rights) and 28(a) and (b) (relating to property).

<sup>3</sup> (9 December 1986) 476 NZPD 5976–5977; (2 December 1987) 485 NZPD 1451–1452; (3 March 1988) 486 NZPD 2520.

<sup>4</sup> Protection of Personal and Property Rights Act 1988, ss 5, 24 and 93B.

<sup>5</sup> Protection of Personal and Property Rights Act 1988, s 93B.

<sup>6</sup> Protection of Personal and Property Rights Act 1988, ss 18(3), 36(1), 97A(2) and 98A(2).

<sup>7</sup> Protection of Personal and Property Rights Act 1988, s 12(5)(b).



However, best interests is not one of the primary objectives in sections 8 and 28.

6.6 Examples of cases in which courts consider the purpose of the Act include *Re A (Personal Protection)*. In that case, orders were sought to appoint a welfare guardian and specify that A should live at a psychopaedic institution.<sup>8</sup> The case went to te Kōti Matua | High Court on appeal to determine whether te Kōti Whānau | Family Court was entitled to look at the welfare and best interests of the person who is the subject of the application.

6.7 The High Court said that the PPPR Act is “all about the welfare and best interests of [people with affected decision-making]”.<sup>9</sup> It said that, under the Act, it is clear that the Family Court has primary objectives of making the least restrictive intervention and enabling and encouraging the person to exercise and develop their capacities. The Court explained:

If that is not seen as being in the welfare and best interests of the person who is the subject of the application before the Court, we do not know what is. ... It is quite apparent that the Act is concerned with the welfare and best interests of the persons in respect of whom applications are brought to the Family Court.

6.8 Subsequent to *Re A*, the High Court in another case described the Family Court’s role as “the bulwark of the protection of individuals in respect of whom applications are made”.<sup>10</sup>

6.9 The High Court again looked at the role of best interests in *KR v MR*.<sup>11</sup> There, orders were sought to terminate KR’s pregnancy. The Court preferred to focus on the statutory criteria, which in this case were the objectives in section 8 of the Act. It said that “the statute presumes that the welfare of a person who is subject to Part I is best served if intervention is directed to these objectives”.<sup>12</sup> From the person’s point of view, these objectives are “a surer guide to the

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<sup>8</sup> *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC).

<sup>9</sup> *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC) at 365.

<sup>10</sup> *Re H and H [protection of personal & property rights]* (1999) 18 FRNZ 297 (FC) at 302.

<sup>11</sup> *KR v MR* [2004] 2 NZLR 847 (HC).

<sup>12</sup> *KR v MR* [2004] 2 NZLR 847 (HC) at [62].

exercise of the decision-maker’s discretion than is a general appeal to the welfare principle”.<sup>13</sup>

- 6.10 The Family Court in *NA v LO* considered the same issue.<sup>14</sup> The Court said it must be guided by the primary objectives of the Act. The Court also accepted that it is a secondary objective of the Act to determine the welfare of the person at issue.<sup>15</sup> The Court agreed that, in the absence of a clear framework for determining Ms LO’s welfare and best interests, it should be guided by the “best interests” test in section 4 of the Mental Capacity Act 2005 (UK).<sup>16</sup>
- 6.11 We have found fewer cases describing the PPPR Act as focused on autonomy or rights. In *T-E v B [Contact]*, the High Court described the intention of the Act as “to encourage, facilitate and support the subject person”.<sup>17</sup> In *CMS v Public Trust*, the High Court described the objective of the Act as being not only to protect but also to promote the person’s autonomy, according to them the right to be heard whenever any decision is made.<sup>18</sup>

### Uncertainty about policy objectives

- 6.12 We do not think that the PPPR Act is sufficiently clear about the policy objectives it seeks to achieve.
- 6.13 As commentators have said, reading in welfare and best interests as a secondary objective means that there is some uncertainty about the role that ‘best interests’ has, what it means or how exactly it is to be assessed.<sup>19</sup>
- 6.14 It is also unclear how this relates to a focus on rights protection. A focus on protection of rights can give quite a different approach from protecting a

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<sup>13</sup> *KR v MR* [2004] 2 NZLR 847 (HC) at [63].

<sup>14</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253.

<sup>15</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [47].

<sup>16</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [49].

<sup>17</sup> *T-E v B [Contact]* [2009] NZFLR 844 (HC) at [18].

<sup>18</sup> *CMS v Public Trust* [2008] NZFLR 640 (HC) at [21].

<sup>19</sup> Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (Report for the New Zealand Law Foundation, Dunedin, July 2016) at [5.6].

person's welfare, particularly where welfare is conceived of in terms of the person's best interests.

- 6.15 Cases where the PPPR Act may need to be used can often involve extremely difficult decisions and the balancing of different rights.<sup>20</sup> It is unsatisfactory that the PPPR Act does not give a sufficiently clear signal as to the purpose of the Act to help guide the balancing of these rights. Without a clear purpose to guide the interpretation of the procedural provisions, there is a risk of inconsistent outcomes.

## CONTENT OF A NEW PURPOSE PROVISION

- 6.16 In our view, the purposes of law in this area would benefit from reconsideration, and a new Act should clearly articulate its purposes so that its underpinning policy objectives are clear. In this section, we consider what ideas or values could underpin a new Act.
- 6.17 Since the PPPR Act was introduced, article 12 of the UN Convention on the Rights of Persons with Disabilities (Disability Convention) and General Comment 1 have highlighted the importance of avoiding unduly paternalistic responses to affected decision-making. A single wide purpose focused on a person's "welfare and best interests" is unlikely to be consistent with this.
- 6.18 This does not mean that protection from harm should be entirely removed as a policy objective from future law. Protection from harm is the fundamental basis on which the original *parens patriae* doctrine and the ongoing evolution of the law in this area is based (see further Chapter 2). A view that current law is overly paternalistic does not mean that protection from harm should be ruled out as a consideration. To the contrary, we discuss in Chapters 9 and 10 ways in which the Act could continue to play a role in protecting people from significant harm even when that may be inconsistent with their wishes.

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<sup>20</sup> See *Re S* FC Auckland FAM-2008-004-2320, 29 August 2008. Hospital staff applied for an interim order authorising medical treatment for S for toxoplasmosis, which was urgent and life threatening. S had resisted treatment. S had expressed an intention to resist the application but was unable to attend the court hearing due to its urgency. The Court found that S partly lacked capacity to understand the nature or foresee the consequences of his decision-making in respect of receiving treatment for toxoplasmosis. The Court granted the order. In doing so the Court weighed the natural justice rights of S to be heard and offer alternative medical evidence against his rights to health and life, which were at imminent risk.

- 6.19 This is consistent with the requirement in article 12(4) of the Disability Convention that measures relating to the exercise of legal capacity must provide for safeguards to prevent abuse. Submissions on our Preliminary Issues Paper continued to suggest that protection is an important function of the Act. More generally, it is also consistent with ensuring that a new Act properly supports human dignity.
- 6.20 However, we do not consider that protection from significant harm should be the sole purpose of a new Act. As we discuss in Chapter 2, a key reason for replacing the PPPR Act is the need to recognise and give effect to the significant policy shift represented by the Disability Convention. This shift requires law to be grounded not in a medical model of disability (under which the role of the law is to protect disabled people by ensuring that decisions are made in their best interests) but instead in a social model of disability that properly recognises disabled people’s dignity and autonomy as holders of rights on an equal basis with all other people.
- 6.21 We therefore consider that the purposes of a new Act should also include the protection of human rights. This is consistent with article 1 of the Disability Convention, which records the Convention’s purpose as being 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”.<sup>21</sup>
- 6.22 Expressly stating a purpose of a new Act in this way would ensure that the purpose of protection from significant harm is properly framed. It would acknowledge that:
- (a) Protection from significant harm is a necessary aspect of protecting a person’s dignity and autonomy as a holder of rights on an equal basis with all other people.
  - (b) Restrictions on a person’s decision-making autonomy can be justified on the basis of protection from significant harm only to the extent required to protect their dignity and human rights.

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<sup>21</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 1.

**QUESTION 3:**

Do you agree that the purposes of a new Act should include both upholding people's human rights and safeguarding them from significant harm? Why or why not?

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## CHAPTER 7

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# Decision-making capacity

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### INTRODUCTION

- 7.1 This chapter considers the concept of decision-making capacity, including why we think it should continue to play a role in a new Act. We are focusing first on the concept because of its importance and the significant debate that has occurred about it. Understanding decision-making capacity and why we think it is needed in a new Act is necessary before turning to matters that are considered in later chapters, particularly the consideration of court-ordered arrangements in Chapter 9 and enduring powers of attorney (EPOAs) in Chapter 13.
- 7.2 Decision-making capacity is a complex and contested concept. It has been understood differently at different times and places. Different terms such as ‘capacity’, ‘competence’, ‘legal capacity’ and ‘mental capacity’ are used interchangeably and are also used to mean different things.
- 7.3 Whether the concept of decision-making capacity should be used in law is the subject of extensive debate. Given the different understandings of decision-making capacity, the meaning of this debate is not always clear.
- 7.4 This chapter does not provide an exhaustive review of the debate and the issues that have been raised in it. Instead, we:
- (a) Provide an overview of decision-making capacity. We explain what we mean by decision-making capacity and summarise how the Protection of Personal and Property Rights Act 1988 (PPPR Act) uses the concept.

- (b) Explain why we consider that a new Act should continue to use decision-making capacity (as noted above).
- (c) Discuss improvements that we think should be made to how decision-making capacity is defined and how it is assessed.

## OVERVIEW OF DECISION-MAKING CAPACITY

### The meaning of decision-making capacity

- 7.5 As we discuss in Chapter 5, state law in Aotearoa New Zealand is founded on and shaped by considerations of personal autonomy.<sup>1</sup> Individuals have rights and are subject to obligations. How those rights are exercised and obligations performed is generally a matter for individual decision (to the extent that the law permits).
- 7.6 We think that valuing individual autonomy in this way can be seen to encompass two related aspects — the individual’s own view of the life they wish to lead and the individual’s own view on how best to pursue that life.<sup>2</sup>
- 7.7 Implicitly linking these two aspects, we think, is the ability of people to reason from the outcomes they want to the decisions that they make to achieve them. Respect for a person’s choices about the life they wish to lead requires respect for the decisions they make because those decisions are the product of “reason-sensitive decision-making abilities in light of [the person’s own] sense of what matters”.<sup>3</sup>
- 7.8 However, the law also recognises some circumstances in which a person’s decisions should not be treated as reflecting their autonomous pursuit of desired outcomes. In general, the law’s response is to treat those decisions differently. For example, a person is not generally bound to a contract entered

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<sup>1</sup> Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1 at 5–6.

<sup>2</sup> There are many criticisms of the law’s assumption that those acting within it are rational and autonomous. There are criticisms from feminist, cultural and critical disability scholars: see for example Beverley A Clough “New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law” (2018) 26 *Med L Rev* 246 at 250 and 262–265.

<sup>3</sup> Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 391.

into under duress or oppressive or unconscionable conduct. The law may relieve a person of liability for actions taken when they are under the influence of alcohol or other drugs.<sup>4</sup>

- 7.9 The concept of decision-making capacity can be understood as seeking to identify circumstances in which a person's decisions are not connected in reason-sensitive ways to the outcomes they want because of their affected decision-making. A different legal response may therefore be required. For example, a contract entered into by a person without decision-making capacity may not be binding on them. If a person does not have capacity to make decisions about their care and welfare such as their health and accommodation, a welfare guardian may be appointed to make those decisions for them.<sup>5</sup>
- 7.10 Decision-making capacity also protects individual autonomy. If a person has decision-making capacity, they are subject to the usual legal consequences (good or bad) of their decisions.<sup>6</sup>
- 7.11 Decision-making capacity is connected to *legal* capacity, in particular, legal *agency*. As we explain in Chapter 2, legal capacity is the legal entitlement of a person to hold rights (legal standing) and to act on and exercise those rights (legal agency). Decision-making capacity has been, and in many cases still is, a basis for restricting a person's legal agency.<sup>7</sup> However, as we discuss below, the ways in which the law makes use of decision-making capacity varies. An absence of decision-making capacity does not necessarily mean a person's legal agency will be restricted.

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<sup>4</sup> See for example *Kurth v McGavin* [2007] 3 NZLR 614 (HC) at [88] where the Court notes that if a party is drunk when they entered into a contract it may be a defence to an action on the contract.

<sup>5</sup> Protection of Personal and Property Rights Act 1988, s 12(1)–(2).

<sup>6</sup> Of course, other legal responses may still apply. For example, there could be a different legal outcome if the decision results from duress.

<sup>7</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [14].



## Policy questions about decision-making capacity

### *The legal test for decision-making capacity*

- 7.12 Decision-making capacity is a legal concept. It exists because the law has a role for it. Although its presence or absence depends on particular factors, it is the law that defines what those factors are. The legal test for establishing whether a person has or does not have decision-making capacity therefore involves policy questions. The test is informed by prevailing societal values and because of this has changed over time.
- 7.13 Historically, decision-making capacity was often largely determined by reference to a person’s status such as the diagnosis of an impairment.<sup>8</sup> This approach effectively assumed that, if a person had certain characteristics or a particular disability, they did not have decision-making capacity.<sup>9</sup> This ‘status’ approach and its embedded assumptions about disability discriminated against disabled people. It is no longer used in New Zealand.<sup>10</sup>
- 7.14 Instead, a ‘functional’ approach to assessing decision-making capacity is now preferred. This approach assesses decision-making capacity in terms of particular cognitive functions.<sup>11</sup> Broadly, it asks whether the person

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<sup>8</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15]. This approach was used in New Zealand in the Aged and Infirm Persons Act 1912, where the Kōti Matua | High Court had the power to appoint a manager for a person’s property where the Court was satisfied that the person was “unable, wholly or partially to manage his affairs”, “by reason of age, disease, illness, or physical or mental infirmity”: Aged and Infirm Persons Protection Act 1912, s 4.

<sup>9</sup> Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC IP44, 2013) at [99].

<sup>10</sup> Historical guardianship laws in New Zealand contained elements of a status approach. The High Court had the power to appoint a manager to handle a person’s property where “by reason of age, disease, illness, or physical or mental infirmity” (status element) the person was “unable, wholly or partially to manage his affairs”: Aged and Infirm Persons Protection Act 1912, s 4.

<sup>11</sup> The functional approach looks to cognitive *functions*, rather than cognitive *processes*. It is agnostic as to the specific mental operations that underly a person’s decision-making. Rather, it considers whether those operations — whatever they may be — result in the required functions such as understanding and communication.

understands the general nature and likely consequences of what they are deciding and whether they can communicate the decision they have made.<sup>12</sup>

- 7.15 The functional approach allows decision-making capacity to be determined in relation to specific decisions or classes of decision.<sup>13</sup> This means people can be assessed to have decision-making capacity for some decisions, but not for others.

### ***The legal response to absence of decision-making capacity***

- 7.16 How the law responds when a person is assessed not to have decision-making capacity is also a question of policy. It, too, has therefore changed over time.
- 7.17 Under historical adult guardianship legislation, an absence of decision-making capacity was significantly determined on the basis of a person's status (such as so-called 'mental infirmity'). It was largely sufficient to trigger the appointment of a guardian and consequent denial of a person's legal agency.<sup>14</sup> This denial would generally be extensive: a person would lose legal agency for a very wide range of decisions. Disabled people have been disproportionately affected by such guardianship regimes.
- 7.18 In New Zealand today, an assessment that a person does not possess decision-making capacity for a decision (or class of decisions) does not automatically result in extensive denial of the person's legal agency. Instead, how the law responds depends on the particular circumstances. For example:
- (a) If a person does not have decision-making capacity to enter into a contract, the law may intervene to invalidate the contract if the other contracting party knew or ought to have known that the person did not have decision-making capacity.<sup>15</sup> This reflects the balance to be struck

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<sup>12</sup> *A Local Authority v JB* [2021] UKSC 52, [2022] 3 All ER 697 at [61].

<sup>13</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at [4.7].

<sup>14</sup> For example, under s 4 of the Aged and Infirm Persons Protection Act 1912, the High Court had the power to appoint a manager to handle a person's property where "by reason of age, disease, illness, or physical or mental infirmity" the person was "unable, wholly or partially to manage his affairs".

<sup>15</sup> *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 163 and 174; and *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, [2020] 2 NZLR 446 at [18] and [63]–[69].

between the freedom to contract, the need to promote certainty and the need to protect vulnerable people from harm.<sup>16</sup>

- (b) Absence of decision-making capacity is part of the test for compulsory treatment under the Substance Addiction (Compulsory Assessment and Treatment) Act 2017. A person can only be the subject of compulsory treatment if they have a severe substance addiction, they do not have decision-making capacity, compulsory treatment is necessary and appropriate treatment is available. This reflects the balance to be struck between protecting people from the harm resulting from addiction and the highly intrusive nature of compulsory treatment.<sup>17</sup>
- (c) Generally speaking, health care may only be provided to a person if they have given informed consent, which requires them to have decision-making capacity for the decision. However, if a person is assessed not to have decision-making capacity, treatment may still be provided if it is in the best interests of the person, reasonable steps have been taken to determine the person's views and the healthcare provider either believes the treatment is consistent with the person's wishes or has taken into account the views of other suitable people.<sup>18</sup> This recognises that, while treatment should not be provided without a person's consent, there will be circumstances where it is simply not possible for a person to give informed consent and yet necessary and appropriate for them to receive medical treatment.

### The significance of decision-making capacity for disabled people

7.19 For disabled people, decision-making capacity is particularly significant. Understandings of disability have changed over time, and this has affected how decision-making capacity is understood and used. Disabled people have historically been, and sometimes continue to be, affected by paternalism and assumptions about their abilities. This has meant the legal test for decision-

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<sup>16</sup> *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 163 and 174; *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, [2020] 2 NZLR 446 at [57]–[60].

<sup>17</sup> See (15 March 2016) 712 NZPD 9700-9702.

<sup>18</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, right 7(4).

making capacity has historically been based on incorrect assumptions about disability. The concept has also been used to unduly restrict disabled people's legal agency.<sup>19</sup> These issues have resulted in challenges to the law's use of decision-making capacity, which we discuss throughout this chapter.

### Decision-making capacity in the PPPR Act

- 7.20 The concept of decision-making capacity is used widely in New Zealand law. In this review, we are focusing on its use in a new Act to replace the PPPR Act. We therefore outline how the concept is currently used in that Act.
- 7.21 Decision-making capacity is fundamental to the operation of the PPPR Act. It is determined using a functional approach. What happens if a person is assessed not to have decision-making capacity depends on the context.
- 7.22 For all court-ordered arrangements, an absence of decision-making capacity is a necessary but not sufficient reason for making an order. In particular:
- (a) **Court-ordered decisions and the appointment of a property manager:**  
An absence of decision-making capacity triggers the court's jurisdiction to make a court-ordered decision or appoint a property manager.<sup>20</sup> However, in deciding whether to make an order, the court must be guided by its primary objectives of making the least restrictive intervention possible and enabling or encouraging the person with affected decision-making to develop their decision-making capacity.<sup>21</sup>
  - (b) **Welfare guardians:** An absence of decision-making capacity triggers the court's jurisdiction to appoint a welfare guardian, and the court must be guided by the two primary objectives.<sup>22</sup> In addition, the court must also be satisfied the person "wholly lacks" decision-making capacity in relation to any particular aspect or aspects of their personal care and welfare and the

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<sup>19</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

<sup>20</sup> Protection of Personal and Property Rights Act 1988, ss 6 and 25.

<sup>21</sup> Protection of Personal and Property Rights Act 1988, ss 8 and 28.

<sup>22</sup> Protection of Personal and Property Rights Act 1988, ss 6 and 12.

appointment is “the only satisfactory way to ensure that appropriate decisions are made” in relation to the decisions at issue.<sup>23</sup>

- 7.23 That an absence of decision-making capacity is not alone sufficient to justify a court order reflects the intrusive nature of court orders under the PPPR Act. Conversely, an absence of decision-making capacity is enough to activate an attorney’s decision-making role under an EPOA. This reflects both the autonomy exercised by the donor in setting up an EPOA and the need for EPOAs to be easily workable.

## THE USE OF DECISION-MAKING CAPACITY IN A NEW ACT

- 7.24 In this section, we explain why we have reached the view that decision-making capacity should be included in a new Act. We explain:
- (a) Some of the criticisms of decision-making capacity.
  - (b) Why we think that the concept needs to be retained.

### Criticisms of the concept

- 7.25 As noted earlier, what role (if any) the concept of decision-making capacity should play in the law is the subject of extensive debate. In this section, we outline some of the challenges to the concept itself. Other issues such as improving the decision-making capacity assessment are discussed later in this chapter.
- 7.26 Broadly speaking, criticisms of decision-making capacity fall into three camps. First, decision-making capacity, when used to restrict legal agency, is said to result in unjustified discrimination.<sup>24</sup> Importantly, the UN Committee on the Rights of Persons with Disabilities argues that using the functional approach to

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<sup>23</sup> Protection of Personal and Property Rights Act 1988, s 12(2).

<sup>24</sup> Commentators who argue that decision-making capacity results in unjustified discrimination include: United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15]; Piers Gooding and Eilionóir Flynn “Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?” (2015) 4 *Laws* 245 at 256; Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 66–67.

restrict legal agency is flawed because “it is discriminatorily applied to people with disabilities”.<sup>25</sup>

- 7.27 Second, decision-making capacity is criticised for its individualistic approach to disability and decision-making, valuing independence and focusing on the individual in isolation. This can be compared to relational or collective approaches that focus on the individual in the context of their social reality, taking into account their relationships, supports and values.<sup>26</sup>
- 7.28 This may be a particular issue for Māori and people from other cultures whose ethos is more collective. An individualist approach to disability “does not recognise the importance of ancestral connectivity and community collectively” nor the centrality of whānau.<sup>27</sup> An ao Māori perspective on disability “sees disability as a collective endeavour of both the individual and the whānau as a whole”.<sup>28</sup> It may also be inconsistent with te ao Māori to focus only on a person’s cognitive functioning. Concepts of hinengaro (mind) and hauora (wellbeing) in te ao Māori suggest that an individual’s capacity should be assessed within their wider social and cultural context.<sup>29</sup> Dr Hinemoa Elder has said that decision-making capacity “for Māori is not best understood as residing in the individual alone, rather as contained within a collective”.<sup>30</sup>
- 7.29 Third, decision-making capacity is criticised for not adequately reflecting how people actually make decisions in various ways:

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<sup>25</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15].

<sup>26</sup> See discussion in Beverley A Clough “New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law” (2018) 26 *Med L Rev* 246 at 258–260.

<sup>27</sup> Huhana Hickey and Denise Wilson “Whānau Hauā: Reframing disability from an Indigenous perspective” (2017) 6 *MAI Journal* 82 at 84.

<sup>28</sup> Huhana Hickey and Denise Wilson “Whānau Hauā: Reframing disability from an Indigenous perspective” (2017) 6 *MAI Journal* 82 at 87.

<sup>29</sup> See further Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper* (NZLC IP49, 2022) at [5.34]–[5.43].

<sup>30</sup> Hinemoa Elder “Te Puna a Hinengaro: He Tirohanga ki a Āheinga The Wellspring of Mind: Reflections on Capacity from a Māori Perspective” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 29 at 44.

- (a) The functional approach is focused on a person’s cognition.<sup>31</sup> However, it is clear that people often make decisions on an emotional or intuitive basis, rather than a (purely) rational or cognitive basis.<sup>32</sup>
- (b) Decision-making capacity is also usually assessed in a decision-specific manner.<sup>33</sup> However, decisions are often “ongoing, interwoven with other decisions, and the decisions of others”.<sup>34</sup>
- (c) The concept is binary — a person either has or does not have decision-making capacity. In reality, the ability to make a particular decision varies from person to person and from decision to decision and is often dependent on environmental and social factors.<sup>35</sup>

### Retaining the concept

- 7.30 Despite the criticisms of the concept of decision-making capacity, we think a new Act should continue to make use of it. For reasons we discuss in later chapters, we think that a new Act will need to provide for arrangements under which one person makes a decision for a person with affected decision-making, whether appointed by a court or the person themselves.<sup>36</sup> This means a new Act will need a concept to identify when a person’s decision-making is so affected that a representative arrangement might be needed and when it is not.<sup>37</sup> In our view, decision-making capacity is the preferable concept.
- 7.31 First, we are not aware of any viable alternative concepts. Comparable jurisdictions have not developed alternative concepts, instead recommending

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<sup>31</sup> Eilionóir Flynn and Anna Arstein-Kerslake “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10 *International Journal of Law in Context* 81 at 82.

<sup>32</sup> Amita Dhanda “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future” (2007) 34 *Syracuse Journal of International Law and Commerce* 429 at 459.

<sup>33</sup> Beverley A Clough “New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law” (2018) 26 *Med L Rev* 246 at 259.

<sup>34</sup> Beverley A Clough “New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law” (2018) 26 *Med L Rev* 246 at 260.

<sup>35</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [13].

<sup>36</sup> See Chapter 9 (court-ordered arrangements) and Chapter 13 (enduring powers of attorney).

<sup>37</sup> Similar functions of decision-making capacity are proposed in Alex Ruck Keene and others “Mental Capacity — Why Look for a Paradigm Shift?” (2023) 31 *Med L Rev* 340 at 350–352.

that decision-making capacity should be retained in new legislation.<sup>38</sup> While some academics have considered alternatives, they have not been fully developed or operationalised.<sup>39</sup>

- 7.32 This may not be surprising. As we discuss above, we think that the law's conception of individual autonomy is closely tied to a view of individual decisions as the product of "reason-sensitive" decision-making abilities.<sup>40</sup> Disentangling these deeply embedded ideas in a way that retains the coherence and consistency of the law does not appear at all straightforward.
- 7.33 Second and relatedly, there are hundreds of statutory references to decision-making capacity, and several common law rules relating to it. Use of a different concept in a new Act to replace the PPPR Act would result in a mismatch between that Act and the rest of the law. This mismatch may mean that our proposed decision-making arrangements do not always work as intended. As we discuss in Chapter 9, we think that appointment of a representative will sometimes be required because another area of law requires that the decision-maker have legal capacity. For example, if a person without decision-making capacity needs to sell a house, a bank and any prospective buyer will likely want to be sure any decision to sell the house is made by a person with decision-making capacity to ensure the contract cannot be undone.
- 7.34 Third, there are benefits to using a concept with which people are familiar. People such as judges, lawyers and medical professionals already have significant experience with the concept of decision-making capacity. Introducing an entirely new concept would render that existing knowledge and experience irrelevant. Embedding it would likely require extensive changes to practice. In likelihood, a period would follow of inconsistency, uncertainty and,

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<sup>38</sup> See for example Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [5.12]; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws — Final Report* (ALRC R124, 2014) at [2.50]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendations 6.1–6.3; Assisted Decision-Making Capacity Act 2015 (Ireland), s 3(1); Mental Capacity Act 2005 (UK), s 2.

<sup>39</sup> Piers Gooding and Eilionóir Flynn "Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?" (2015) 4 *Laws* 245 at 258.

<sup>40</sup> Matthew Burch "Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis" (2017) 34 *Journal of Applied Philosophy* 389 at 391.



potentially, unforeseen consequences. In our view, a new concept would need to be a necessary part of a material improvement in the law to justify these risks and costs.

- 7.35 Fourth, for the reasons we explain in Chapter 3, we accept that restrictions on a person's legal agency raise important human rights issues. They must be carefully assessed to ensure they are consistent with article 12 of the UN Convention on the Rights of Persons with Disabilities (Disability Convention) as well as the right to be free from unjustified discrimination that underlies article 12 (and is protected independently elsewhere in human rights law).
- 7.36 Restrictions on legal capacity do not, however, flow automatically from the concept of decision-making capacity itself. They flow from the legal consequences that attach to an assessment of impaired decision-making capacity. As we explain above, decision-making capacity is used in different ways in the law. Its absence does not automatically mean a person's legal agency is restricted. The legal response depends on the law and circumstances at issue.
- 7.37 We think much can be done to improve how the concept of decision-making capacity is used in the law. Whether decision-making capacity results in unjustified discrimination must, however, depend on two broad issues.
- 7.38 The first is the legal standards and processes that apply to assessments of whether a person has decision-making capacity. Later in this chapter, we consider options for improving those standards and processes.
- 7.39 The second is the precise legal consequences that flow from an assessment that a person lacks decision-making capacity. In later chapters, we identify those precise legal consequences and explore what reforms might be desirable to ensure any limits on the right to freedom from discrimination are justified.

## THE NEED FOR REFORM

- 7.40 In this section, following a discussion of the current law and key issues, we consider two changes that in our view are needed. They are:
- (a) Reform of the test for decision-making capacity in a new Act.
  - (b) Improving decision-making capacity assessments.

## Current law

7.41 Assessments of decision-making under the PPPR Act start from a presumption of competence.<sup>41</sup> The Act is also clear that a person's wish to make a decision "that a person exercising ordinary prudence" would not make is not sufficient by itself to find that the person does not have decision-making capacity.<sup>42</sup> However, the way in which the Act employs the concept of decision-making capacity raises a number of issues.

## The key issues

### *Multiple terms and tests in the PPPR Act*

7.42 As the table below illustrates, the Act contains a number of different terms for decision-making capacity and utilises several different tests. One commentator argues that the use of multiple terms and tests "produces unnecessary complexity".<sup>43</sup> Submitters also told us that it is undesirable to have different tests. When discussing any of these different formulations in this Issues Paper, we use the single term 'decision-making capacity' except where the specific wording of the PPPR Act is relevant.

CONTEXT	THE TERM AND THE TEST	WHO MAKES THE DETERMINATION OR ASSESSMENT
Jurisdiction to make an order about a person's personal care and welfare	The court must be satisfied that the person "lacks, wholly or partly, the <i>capacity</i> to understand the nature and foresee the consequences" or "wholly lacks the capacity to communicate decisions" about their personal care and welfare. <sup>44</sup>	The court makes the determination, typically on the basis of medical evidence.

<sup>41</sup> Protection of Personal and Property Rights Act 1988, ss 5 and 24.

<sup>42</sup> Protection of Personal and Property Rights Act 1988, ss 6(3) and 25(3).

<sup>43</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at [4.32].

<sup>44</sup> Protection of Personal and Property Rights Act 1988, s 6(1).

CONTEXT	THE TERM AND THE TEST	WHO MAKES THE DETERMINATION OR ASSESSMENT
Part of the test for appointing a welfare guardian	As part of the test for appointing a welfare guardian, the court must be satisfied that the person “wholly lacks the <i>capacity</i> to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person”. <sup>45</sup>	The court makes the determination, typically on the basis of medical evidence.
Jurisdiction to appoint a property manager	The court must be satisfied that the person “lacks wholly or partly the <i>competence</i> to manage” their affairs in relation to their property. <sup>46</sup>	The court makes the determination, typically on the basis of medical evidence.
Validity requirement of an EPOA	The donor must have decision-making capacity to make a valid EPOA. <sup>47</sup>  The witness must certify that (among other things) they had no reason to suspect that the donor was or may have been <i>mentally incapable</i> at the time they signed the instrument. <sup>48</sup>	To the extent there is an assessment, the witness must certify they had no reason to suspect the person did not have decision-making capacity.

<sup>45</sup> Protection of Personal and Property Rights Act 1988, s 12(2)(a).

<sup>46</sup> Protection of Personal and Property Rights Act 1988, s 25(1).

<sup>47</sup> *Re Tony* (1990) 5 NZFLR 609 (FC) at 622–623, applying *Re K (Enduring Powers of Attorney)* [1988] 2 WLR 781. See also *NJF v MIF* FC Rotorua FAM-2008-063-759, 20 December 2010 at [22].

<sup>48</sup> Protection of Personal and Property Rights Act 1988, s 94A(7).

CONTEXT	THE TERM AND THE TEST	WHO MAKES THE DETERMINATION OR ASSESSMENT
<p>Activating an EPOA in relation to personal care and welfare</p>	<p>A person is mentally incapable if the person:<sup>49</sup></p> <p>(a) <i>“lacks the capacity—</i></p> <p>(i) to make a decision about a matter relating to his or her personal care and welfare; or</p> <p>(ii) to understand the nature of decisions about matters relating to his or her personal care and welfare; or</p> <p>(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</p> <p>(b) <i>lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare”</i> (emphasis added).</p>	<p>For a significant matter in relation to a person’s personal care and welfare, a medical practitioner or court must make the determination that the person is “mentally incapable”.<sup>50</sup></p> <p>For all other personal care and welfare matters, the attorney must assess a person’s decision-making capacity. The attorney must believe on reasonable grounds that the donor is “mentally incapable”.<sup>51</sup></p>

<sup>49</sup> Protection of Personal and Property Rights Act 1988, s 94(2).

<sup>50</sup> Protection of Personal and Property Rights Act 1988, s 98(3)(a).

<sup>51</sup> Protection of Personal and Property Rights Act 1988, s 98(3)(b).

CONTEXT	THE TERM AND THE TEST	WHO MAKES THE DETERMINATION OR ASSESSMENT
Activating an EPOA in relation to property	A person is mentally incapable if they are “not wholly <i>competent</i> to manage [their] own affairs in relation to [their] property”. <sup>52</sup>	A medical practitioner or court must make the determination that the person is “mentally incapable”. <sup>53</sup>

### ***Decision-making fluctuates and is decision-specific***

7.43 The ways that a person’s decision-making is affected and the extent to which it is affected may vary. A person’s decision-making may be more affected at some times than others or more affected for some decisions than others. People’s decision-making may be less affected at a later date. A person’s decision-making might be affected temporarily or on an enduring basis. It might be relatively stable, fluctuate or be deteriorating. In turn, this means that when and for what decisions a person has decision-making capacity may vary. However, this may not always be reflected in practice. We heard that health professionals sometimes make a blanket decision about the person’s capacity rather than taking an approach that is decision-specific.

### ***A functional approach may overlook social and cultural contexts***

7.44 The functional approach to assessing decision-making capacity focuses on the presence or absence of specific cognitive functions. It does not directly take into account other matters that are relevant to decision-making, such as the person’s social and cultural context, relationships, supports and values.

7.45 As we state above, this may be a particular issue for Māori and people from a number of other cultures. Māori culture, for example, takes a more holistic view of the mind, emphasising relationships and collective responsibilities in

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<sup>52</sup> Protection of Personal and Property Rights Act 1988, s 94(1).

<sup>53</sup> Protection of Personal and Property Rights Act 1988, s 97(5).

making decisions. A focus on individual cognition may not easily account for these types of social and cultural considerations.

- 7.46 Some submitters made similar points. We heard there is a need for socially and culturally responsive approaches to assessing decision-making capacity and that, currently, the assessment process does not recognise language or social and cultural differences. There are difficulties when assessments occur in English and it is not the primary language of the person being assessed. Submitters told us decision-making capacity does not take into account te ao Māori or a Māori world view that acknowledges that a person's decision-making abilities can be directly connected to and affected by the strength and contributions of external factors, including iwi and hapū relationships and support.

### ***Circumstances of the assessment***

- 7.47 The circumstances in which an assessment takes place can have a material impact on the outcome. For example, a person may perform very differently without their regular supporter present. They may need more time than others to process information or information in an Easy Read format. Assessing a person in an unfamiliar environment or place where they have had previous negative interactions may mean they are more likely to be assessed not to have decision-making capacity. Some people may be more likely at some times of the day than others to be assessed as having decision-making capacity.
- 7.48 However, we heard that assessments tend to occur in a clinical setting outside the person's usual environment and supports. Several submitters commented on the importance of communication assistance for capacity assessments and providing decision-making support.
- 7.49 The circumstances of the assessment are particularly important in the context of disabilities. If a person is assessed without access to their usual support, disabled people may be more likely to be assessed not to have decision-

making capacity. The Disability Convention requires support and other reasonable accommodations to be provided.<sup>54</sup>

### ***Risk that assessors will be influenced by their own beliefs and values***

- 7.50 There is a risk that bias, stereotyping and assumptions will affect the outcome of a decision-making capacity assessment.<sup>55</sup> This might particularly be the case if the person being assessed comes from a different social or cultural background to the assessor. Submitters told us that assessments of decision-making capacity can be influenced by the assessor's own beliefs and values, and there is a lack of recognition of actual or perceived bias in the current assessment process.
- 7.51 In focusing on specific cognitive functions (such as understanding information, retaining and using or weighing information, and communicating the decision), the functional approach can be seen as a way to minimise the potential for assessor bias to influence assessments of decision-making capacity. A functional assessment nonetheless requires an exercise of judgement by the assessor as to whether what they have observed is sufficient to demonstrate each of the specified functions. The need for an exercise of judgement means there remains the potential for the assessor's own values and/or biases, stereotypes and assumptions to influence the assessment.
- 7.52 Anecdotally, we heard that people have experienced assumptions being made about their decision-making based only on their diagnosis or status, such as dementia made wareware. We were also told that health professionals can make incorrect assumptions about communication difficulties or other health conditions affecting decision-making capacity when they do not do so.

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<sup>54</sup> United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 5(3) and 12(3).

<sup>55</sup> See Natalie F Banner "Unreasonable reasons: normative judgements in the assessment of mental capacity" (2012) 18 *Journal of Evaluation in Clinical Practice* 1038; Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at 101–102; Alex Ruck Keene and others "Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection" (2019) 62 *International Journal of Law and Psychiatry* 56 at 69.

## **Practical issues**

- 7.53 Submitters told us about several operational issues they consider currently arise in functional assessments. These include:
- (a) Health professionals do not always have sufficient expertise in undertaking capacity assessments or have confidence in their ability to complete decision-making capacity assessments.
  - (b) Health professionals do not always have sufficient expertise in matters such as communication support, contemporary understandings of disability and disability rights.
  - (c) There is variation in approaches taken to assessing decision-making capacity, and the quality of the assessment can vary widely.
  - (d) There are several potential barriers to accessing assessments, including long waitlists, the cost of an assessment and a lack of assessors in rural locations.
  - (e) There are difficulties with the assessment process, such as having insufficient time to undertake the assessments or the assessor not having a long-term relationship with the person being assessed.

### **QUESTION 4:**

Are there any other issues with decision-making capacity assessments that we should consider?

## **Reforming the test for decision-making capacity**

### ***Statutory presumption that a person has decision-making capacity***

- 7.54 We consider the statutory presumption that a person has decision-making capacity should be retained. A statutory presumption is important because it aims to reduce the risk of an assessor assuming or wrongly determining that a person does not have decision-making capacity.<sup>56</sup>

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<sup>56</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [6.21].



**QUESTION 5:**

Do you agree that the presumption of decision-making capacity should be maintained? Why or why not?

***A single test for decision-making capacity***

- 7.55 In our view, there should be a single functional test for decision-making capacity. A single test should reduce confusion and cost and facilitate greater consistency in practice.
- 7.56 We suggest that, under a new Act, a person should be considered to have decision-making capacity if they are able to do four things:
- (a) Understand the information relevant to the decision and the effect of the decision.
  - (b) Retain that information as necessary to make the decision.
  - (c) Use or weigh that information as part of the process of making the decision.
  - (d) Communicate the decision (whether by talking, using sign language or any other means).
- 7.57 These four elements reflect current understandings of decision-making capacity. The same or substantially the same elements have been used in recent legislation in New Zealand.<sup>57</sup> They are also consistent with understandings of decision-making capacity reflected in law reform reviews and legislation in several comparable jurisdictions.<sup>58</sup>
- 7.58 Like the PPPR Act, a new Act will need to apply in many different circumstances while remaining properly rigorous, consistent and certain. We consider these four factors, expressed with this level of generality, strike the

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<sup>57</sup> Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 9 and End of Life Choice Act 2019, s 6.

<sup>58</sup> See for example Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [5.12]; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws — Final Report* (ALRC R124, 2014) at [2.50]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendations 6.1–6.3; Assisted Decision-Making Capacity Act 2015 (Ireland), s 3(1); Mental Capacity Act 2005 (UK), s 2.

right balance. In requiring assessment of four discrete functions they facilitate consistency and objectivity. In not being more granular, they facilitate adaptability to different circumstances and, importantly, enable ongoing development of expertise, guidance and training to take account of future developments in the understanding of decision-making and of increasing experience with use of the test.

- 7.59 We acknowledge that there are other forms of vulnerability that can have adverse consequences for people's decision-making without necessarily meaning the person does not have decision-making capacity in terms of the test we suggest. For example, for a range of reasons some people may have a compulsion to act in ways that they understand will cause them harm that they wish to avoid. However, this review only concerns decision-making capacity. While there may be benefits to general safeguarding legislation, its consideration is outside the scope of this review.<sup>59</sup>

**QUESTION 6:**

Do you agree that a new Act should provide a single test for decision-making capacity? Do you agree with the four factors we have identified?

***Matters that are insufficient to find that a person does not have decision-making capacity***

- 7.60 As we note above, under the PPPR Act, the fact that a person wants to make a risky or imprudent decision cannot, by itself, lead the court to determine a person does not have decision-making capacity.<sup>60</sup> We consider this should be retained. It assists in reducing the potential for assessments influenced by bias, assumptions or stereotypes. It also helps give effect to the dignity of risk, which (as we explain in Chapter 3) is the concept that dignity requires people

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<sup>59</sup> Several submitters supported the introduction of general safeguarding legislation for vulnerable adults. Some jurisdictions do have legislation to safeguard vulnerable adults such as the Safeguarding Vulnerable Groups Act 2006 (UK). This is in addition to the Mental Capacity Act 2005 (UK), which is their equivalent of the Protection of Personal and Property Rights Act 1988.

<sup>60</sup> Protection of Personal and Property Rights Act 1988, ss 6(3), 25(3) and 93B.

to have the ability to exercise choice, including risky choices.<sup>61</sup> Proper respect for the dignity of risk is a necessary part of ensuring people can make decisions consistently with their rights, will and preferences.

7.61 A new Act could also specify other factors that, by themselves, are insufficient to find that the person does not have decision-making capacity. Examples of such factors could include:<sup>62</sup>

- (a) The person's age.
- (b) The person's appearance.
- (c) Any aspect of the person's behaviour or manner.
- (d) Whether the person is disabled.
- (e) The person's methods of communication.
- (f) The person's cultural and linguistic circumstances.
- (g) The person's history of alcohol or drug abuse.
- (h) That the person does not have decision-making capacity for another matter or has previously not had decision-making capacity.

7.62 Specifying such factors may assist with consistency in the test's use and application. It could also serve an educative function in drawing people's attention to what is not sufficient.<sup>63</sup> Given we have heard concerns about unconscious bias in the test, it may be useful to expressly direct people's minds to factors that cannot, by themselves, lead to a finding that the person does not have decision-making capacity.

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<sup>61</sup> Piers Gooding "Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law" (2013) 20 *Psychiatry, Psychology and Law* 431 at 436, as cited by Jeanne Snelling and Alison Douglass "Legal Capacity and Supported Decision-making" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163, at 168.

<sup>62</sup> See for example, *Mental Capacity Act 2005*, s 2(3) and the New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 6.3(3).

<sup>63</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [6.38].

**QUESTION 7:**

What considerations should be insufficient, by themselves, to lead to a finding that a person does not have decision-making capacity? Should a new Act specify these factors?

**Improving the circumstances of the capacity assessment*****Support and reasonable accommodations for decision-making capacity assessments***

- 7.63 We think it is important for a person with affected decision-making to be able to access decision-making support for the purposes of a decision-making capacity assessment.
- 7.64 We are interested in hearing what sorts of support or reasonable accommodations would be helpful. For example, an assessment could take place with a support person or with modified language or visual aids. The assessment could take place in the person's home or at a time of day when the person is most likely to have decision-making capacity.
- 7.65 We are also interested in hearing whether the supports available to a person being assessed should be limited to those to which they generally have access.

***Culturally responsive approaches to assessing capacity***

- 7.66 We are interested in hearing views on how to respond to the cultural concerns we identified above.
- 7.67 One option is to think about what the person with affected decision-making needs, and how to enable a capacity assessment to be carried out in a way that better reflects their cultural and social context. For example, it might be important to ensure the decision-making capacity test takes place in a culturally appropriate environment, or that appropriate people are present during all or part of the assessment.
- 7.68 For example, Te Waka Oranga is a framework that allows whānau and clinicians to work together in the context of recovery from traumatic brain injury. Te Waka Oranga is both cultural and clinical, and navigation of the

process is shared by kaumātua and a clinical leader. Alongside this process is Te Waka Kuaka, which is a cultural needs assessment tool. Te Waka Kuaka can be used to learn the cultural needs of the whānau and how they would like to express their sense of connection to the person with affected decision-making.<sup>64</sup>

- 7.69 Recent work has also resulted in the development of MANA (Māori Assessment of Neuropsychological Abilities), an assessment tool for dementia mate wareware. The test includes the usual cognitive and functional assessments, but also includes “a wairua component”.<sup>65</sup> It asks the affected person about “their self-identity, how they perceive themselves, their relationships with mokopuna, whether they’re able to manaaki people like they used to, and the places that are important to them”.<sup>66</sup>
- 7.70 One option is to focus on how to prevent cultural bias affecting the assessment. This could be addressed through matters such as the development of practice guides and training. We discuss training below.

### **Training and related guidance**

- 7.71 Another way to mitigate many of the issues we identified with the assessment would be to ensure there is adequate training and guidance for professionals, especially about unconscious bias. There is already some guidance in New Zealand. For example, legal and medical practitioners have developed a guide for doctors and lawyers on how to assess decision-making capacity.<sup>67</sup> This includes a “toolkit” for assessing decision-making capacity.<sup>68</sup>

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<sup>64</sup> Hinemoa Elder “Te Waka Kuaka and Te Waka Oranga. Working with Whānau to Improve Outcomes” (2017) 38 *Australian and New Zealand Journal of Family Therapy* 27 at 36.

<sup>65</sup> Siena Yates “Makarena Dudley: Bringing te ao Māori to dementia” (24 March 2003) E-Tangata <e-tangata.co.nz>.

<sup>66</sup> Siena Yates “Makarena Dudley: Bringing te ao Māori to dementia” (24 March 2003) E-Tangata <e-tangata.co.nz>.

<sup>67</sup> Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University Press, Wellington, 2019).

<sup>68</sup> Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University Press, Wellington, 2019) at 453.

7.72 There are different ways this training or guidance could be provided. For example, training could be provided to people who assess decision-making capacity on unconscious bias and how it might influence their assessment. Standard interview methods and tools could be developed to assist with the quality of the assessments. Another option would be to develop a code of practice, with guidance for assessing decision-making capacity.<sup>69</sup> We discuss what training and related guidance might look like further in Chapter 16.

**QUESTION 8:**

How can the circumstances of a capacity assessment be improved?

**Who assesses decision-making capacity?**

7.73 As we discuss above, under the PPPR Act, who carries out a decision-making capacity determination depends on the situation. In particular:

- (a) **Te Kōti Whānau | Family Court** makes decision-making capacity determinations for personal orders, or for the application of a welfare guardian or property manager.<sup>70</sup> We understand the court often makes this decision on the basis of medical evidence.
- (b) **A health practitioner** can assess and determine decision-making capacity when an attorney acting under an EPOA intends to act in respect of a significant matter concerning a person's personal care or welfare or act in relation to their property. A health practitioner must determine that the person does not have decision-making capacity.<sup>71</sup>

7.74 We think the Family Court should continue to determine decision-making capacity for court-ordered arrangements. However, we are interested in whether assessments currently carried out by health practitioners might be carried out by other people. Some submitters told us that more than one

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<sup>69</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, 2016) at [4.65].

<sup>70</sup> Protection of Personal and Property Rights Act 1988, ss 12(2) and 25(1)–(2).

<sup>71</sup> Protection of Personal and Property Rights Act 1988, ss 97(5) and 98(3). The Family Court can also determine that a person does not have decision-making capacity for the purposes of activating an EPOA in relation to property or a significant matter in relation to a person's personal care or welfare.

professional should be involved in the process. Others thought that other people such as social workers should also be able to undertake a decision-making capacity assessment.

- 7.75 Enabling more people to undertake capacity assessments may mitigate some of the practical issues identified by submitters such as long waitlists. In some overseas jurisdictions, decision-making capacity assessments can be carried out by people other than health practitioners. For example, in many provinces in Canada, assessments may be carried out by medical practitioners or psychologists and also by other people (registered nurses, occupational therapists and social workers) who have completed a relevant course.<sup>72</sup>

**QUESTION 9:**

Who should be able to carry out a decision-making capacity assessment?

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<sup>72</sup> See for example Adult Guardianship and Trusteeship Regulation, Alta Reg 219/2009 (Alberta), reg 7; Capacity Assessment, O Reg 460/05 (Ontario), reg 2.

## CHAPTER 8

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# Decision-making support

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## INTRODUCTION

- 8.1 The focus of this chapter is on decision-making support. Everyone makes some decisions with support from other people. Sometimes, they seek advice from family and whānau, friends or experts. Sometimes, they need someone to explain something or talk things over with. For people with affected decision-making, support can be a particularly important part of making decisions.
- 8.2 The importance of decision-making support is recognised in the UN Convention on the Rights of Persons with Disabilities (Disability Convention), which requires that Aotearoa New Zealand take appropriate measures to provide disabled people with the support and reasonable accommodations they might require in making decisions.
- 8.3 As we note in Chapter 3, these obligations extend beyond the scope of this review. A range of initiatives and reforms will be required to ensure that disabled people have the support and reasonable accommodations they might require in making decisions, including matters such as increased availability of support-related services and development of processes and systems that are fully accessible. Considering all possible initiatives and reforms is beyond the scope of this review, which is focused on a new Act to replace the Protection of Personal and Property Rights Act 1988 (PPPR Act).
- 8.4 In this chapter, we:
- (a) Describe decision-making support, including how it can work in practice and why it is important.
  - (b) Describe current law and practice regarding decision-making support.



- (c) Describe the key issues we heard about decision-making support.
- (d) Consider some ways in which a new Act might incorporate decision-making support.

## DECISION-MAKING SUPPORT AND WHY IT IS IMPORTANT

### What is decision-making support?

- 8.5 The term ‘decision-making support’ refers to any support or accommodations a person may need to make a decision or express their views about a decision. It is a very broad term that can cover both informal and formal support arrangements of varying types and intensity.<sup>1</sup>
- 8.6 The types of decision-making support that people need for decisions will vary as people’s decision-making abilities naturally differ.<sup>2</sup> For example, some people might need information in an accessible format. Others might need adequate time or access to a quiet and calm place in which to make a decision.
- 8.7 In addition, how easy or difficult it is to make a decision will vary depending on the nature of the decision and other environmental and social factors.<sup>3</sup> Decisions a person finds large and complex such as moving home or consenting to medical treatment may require more support than decisions they find smaller and simpler.
- 8.8 Decision-making support occurs in a wide variety of settings, including within family and whānau environments, and in banks, medical practices, care facilities and supported living situations. Determining what decision-making support will work best for a person will require considering matters such as their needs, wishes, and social and cultural context.

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<sup>1</sup> United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

<sup>2</sup> United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [13].

<sup>3</sup> United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [13].

- 8.9 Sometimes, people have a trusted person to support them to make decisions. This person is often referred to as a ‘decision-making supporter’. A decision-making supporter might be involved in the person’s decision-making in various ways such as:<sup>4</sup>
- (a) Assisting the person to identify the decision that needs to be made.  
Sometimes, one decision may need to be made. Sometimes, there may be more than one decision. Sometimes, a decision may be able to be broken up into several smaller decisions.
  - (b) Identifying and accessing any relevant information or assisting the supported person to do this. Depending on the decision, this might include information about the person’s medical history or finances.
  - (c) Assisting the person to understand the information about the decision. For example, someone might help the person with online searches or to work through a document.
  - (d) Assisting the person to understand the consequences of the decision. For example, it may be helpful to discuss options and outcomes with the person and help them explore what is most important to them.
  - (e) Assisting the person to communicate a decision or communicating the decision for them. This might include writing the decision down, discussing the next steps and working out whether anyone else needs to be involved.
- 8.10 A decision-making supporter arrangement is different to a representative arrangement. Representative arrangements involve a representative such as a welfare guardian or property manager making decisions *for* the person with affected decision-making. Decision-making supporters support the person with affected decision-making to make the decision for themselves.
- 8.11 Some people told us they prefer the term ‘assistant’ to ‘decision-making supporter’ because it better reflects the role of working alongside a person to make sure they have what they need to participate in decision-making. Some people see this as a less paternalistic term than ‘supporter’. We are also aware that some people may prefer reo Māori terms or terms from other

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<sup>4</sup> Te Manatū Whakahiato Ora | Ministry of Social Development “Supported decision-making” <msd.govt.nz>.

languages. In this Issues Paper, for convenience, we use the term ‘decision-making supporter’.

### Why is decision-making support important?

- 8.12 Decision-making support can empower people with affected decision-making to make decisions about their own lives on an equal basis with others.<sup>5</sup> The Disability Convention requires countries to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.<sup>6</sup> It provides that disabled people must be provided with reasonable accommodations when exercising legal capacity.<sup>7</sup> These obligations reflect the movement towards finding ways in which support can enable people to exercise legal capacity.<sup>8</sup>
- 8.13 In recent years, there have been calls for decision-making support to be adopted in law and practice. Many states and law reform bodies have reviewed their laws relating to adult decision-making capacity. Some have

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<sup>5</sup> See Jeanne Snelling and Alison Douglass “Legal Capacity and Supported Decision-making” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 166–167; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws* (ALRC DP81, 2014) at [2.70]; Victorian Law Reform Commission *Guardianship: Consultation Paper — Part 3* (VLRC CP10, 2011) at [7.3]; and Auckland Disability Law *Let’s talk about Supported Decision Making*.

<sup>6</sup> United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 10 (opened for signature 30 March 2007, entered into force 26 September 2008), art 12(3). See also our discussion in Chapter 3.

<sup>7</sup> Article 12 is an equality and non-discrimination right. Under the Disability Convention, a failure to provide reasonable accommodations is a type of discrimination on the grounds of disability: Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2. It also provides a right to reasonable accommodations in art 5(3).

<sup>8</sup> Ron McCallum *Research Report: The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia’s Level of Compliance* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020) at 47, citing Gerard Quinn and Anna Arstein-Kerslake “Restoring the ‘Human’ in ‘Human Rights’ — Personhood and Doctrinal Innovation in the UN Disability Convention” in Conor Gearty and Costas Douzinas (eds) *Cambridge Companion to Human Rights Law* (Cambridge University Press, 2010) at 47.

adopted or recommended frameworks that create formal supported decision-making arrangements.<sup>9</sup>

- 8.14 This shift towards decision-making support is also reflected in New Zealand's Disability Strategy, which guides the work of government agencies on disability issues from 2016 to 2026.<sup>10</sup> The strategy's vision is that New Zealand will be a non-disabling society where "disabled people have an equal opportunity to achieve their goals and aspirations".<sup>11</sup> As part of this, the strategy recognises that people who need support to make or communicate decisions should receive it "in an appropriate way at the right time" and that those decisions should be recognised and respected.<sup>12</sup>
- 8.15 Submitters also told us that decision-making support is beneficial. Some of the benefits we heard include:
- (a) It provides people with opportunities to participate in decision-making and improves their ability to communicate.<sup>13</sup>
  - (b) In the health context, it improves the quality of the decision reached and reflects best practice (in terms of patient-centred care).<sup>14</sup>
  - (c) In the mental health services context, it can enhance individual well being and self-esteem.

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<sup>9</sup> See Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012); Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ARLC R124, 2014); Law Commission of Ontario *Capacity of Adults with Mental Disabilities and the Federal RDSP: Discussion Paper Summary* (Law Commission of Ontario, 2013); Law Commission of Ontario *Legal Capacity, Decision-Making and Guardianship: Discussion Paper* (Law Commission of Ontario, 2014); Powers of Attorney Act 2014 (Vic); Guardianship and Administration Act 2019 (Vic).

<sup>10</sup> Te Tari Mō Ngā Take Hauātanga | Office for Disability Issues *New Zealand Disability Strategy 2016–2026* (Ministry of Social Development, November 2016).

<sup>11</sup> Office for Disability Issues *New Zealand Disability Strategy 2016–2026* (Ministry of Social Development, November 2016) at 6.

<sup>12</sup> Office for Disability Issues *New Zealand Disability Strategy 2016–2026* (Ministry of Social Development, November 2016) at 30.

<sup>13</sup> J Rosen, speech pathologist "Communication: the Keystone of Supported Decision-making" (Capacity Australia conference, Sydney, 13 November 2015).

<sup>14</sup> Adrian E Bauman, H John Fardy and Peter G Harris "Getting it right: why bother with patient-centred care?" (2003) 179 MJA 253.

- (d) It can mean that, even if a person is not able to make decisions about some matters, they are able to make decisions about other matters.
- (e) Over time, it can mean that people develop more skills to make decisions for themselves, so that their need for support can gradually reduce.

## DECISION-MAKING SUPPORT IN LAW AND PRACTICE

### Decision-making support in law

8.16 The law in New Zealand recognises decision-making support in a range of ways. For example:

- (a) Under the Code of Health and Disability Services Consumers' Rights, every health consumer has the right to have one or more supporters of their choice present, except where safety may be compromised or another consumer's rights may be unreasonably infringed.<sup>15</sup>
- (b) The Victims' Rights Act 2002 provides that information about matters such as remedies, services, and procedures may be given to the victim's support person if the victim cannot receive it, cannot understand it or has nominated the support person to receive it.<sup>16</sup>
- (c) The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2023 provides for care recipients to appoint a support person for various functions, including to help them express their wishes or needs.<sup>17</sup>
- (d) Under the Retirement Villages Act 2003 Code of Residents' Rights, all residents may involve a support person or a person to represent them in dealings with the operator or other residents.<sup>18</sup>
- (e) The New Zealand Bankers Association has published "Guidelines to help banks meet the needs of older and disabled customers". These are guidelines rather than express legal obligations. They say that banks will work with older and disabled customers and communities to identify and

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<sup>15</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, right 8.

<sup>16</sup> Victims' Rights Act 2002, s 14.

<sup>17</sup> Intellectual Disability (Compulsory Care and Rehabilitation) Act 2023, ss 5, 21, 39 and 121.

<sup>18</sup> Retirement Villages Act 2003, sch 4 Code of Residents' Rights right 6.

address communication and language needs. Banks will also welcome interpreters and support people if this is what customers want or need.<sup>19</sup>

- 8.17 However, there is no consistent approach to recognition of supporters or decision-making support. In some contexts such as health, the law simply provides the person with the right to have a supporter ‘present’. In other contexts such as the Intellectual Disability (Compulsory Care and Rehabilitation) Act, the law recognises the supporter’s role in providing decision-making support.
- 8.18 Significantly, there is no express recognition of support or supporters in the PPPR Act. To a limited extent, the PPPR Act anticipates that welfare guardians and property managers might provide decision-making support in practice. For example, it provides that they must consult with the person affected “so far as practicable”.<sup>20</sup> The Act also requires welfare guardians and property managers to encourage the person to exercise their capacity and to communicate their decisions.<sup>21</sup> However, these provisions do not require support to be provided, facilitated, encouraged or recognised.<sup>22</sup>
- 8.19 While the PPPR Act does not expressly refer to support, in *TUV v Attorney-General*, te Kōti Mana Nui | Supreme Court considered the importance of support when interpreting section 108B of the Act. Section 108B requires te Kōti Whānau | Family Court to approve a settlement of claims for money or damages in situations where one of the parties does not have decision-making capacity.<sup>23</sup>

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<sup>19</sup> New Zealand Bankers Association *Guidelines to help banks meet the needs of older and disabled customers* (April 2019) at 4.

<sup>20</sup> Protection of Personal and Property Rights Act 1988, ss 18(4)(c) and 43(1)(a). For enduring powers of attorney, see s 99A. The Act also provides for the appointment of a lawyer to represent the person in respect of whom any application is made: s 65.

<sup>21</sup> Protection of Personal and Property Rights Act 1988, ss 18(3) and 36(1). For enduring powers of attorney, see s 98A(2).

<sup>22</sup> The Accessibility for New Zealanders Bill would, if enacted, establish an Accessibility Committee to identify accessibility barriers and work towards preventing and removing them. It is unclear whether this Bill will be progressed. Accessibility for New Zealanders Bill 2022 (153-2), cl 3(2).

<sup>23</sup> *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78.

8.20 The Supreme Court found that section 108B should be interpreted to require supported decision-making where appropriate.<sup>24</sup> The minority judgment further commented that the Act needed to be interpreted “as having a rights-enhancing purpose” that “include[d] supporting the incapacitated person so they have equal access to the benefit of the exercise of their legal rights”.<sup>25</sup> Consequently, when considering a settlement under section 108B, the court should apply a social model of disability and use “supported decision-making techniques ... to enable the specified person to participate to the fullest extent possible in the decision”.<sup>26</sup>

### Decision-making support in practice

8.21 Submitters told us that family and whānau are often involved in providing decision-making support. Community Law noted that “many people with affected decision-making have a network of friends or family who informally assist with that person’s decision-making”. This can “include assisting the person with communication, identifying decisions that need to be made, and helping the person access relevant information to understand the consequences of the decision”. For some people, decision-making support will be guided by tikanga.

8.22 There are many organisations and professionals providing decision-making support and guidance about decision-making support. For example:

- (a) IHC has published guidance for supporters of people with intellectual disabilities.<sup>27</sup>
- (b) Ngā Tangata Tuatahi | People First NZ provides a range of services encouraging people with a learning disability to speak up about what matters in their lives.<sup>28</sup> These include meeting assistants who can attend

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<sup>24</sup> *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [70] and n 53 (majority), referring to [101] (minority).

<sup>25</sup> *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [101].

<sup>26</sup> *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [101].

<sup>27</sup> IHC Advocacy *Supporting Decision-Making: A Guide for Supporters of People with an Intellectual Disability* (online ed).

<sup>28</sup> Ngā Tangata Tuatahi | People First NZ “What we do” <[www.peoplefirst.org.nz](http://www.peoplefirst.org.nz)>.

meetings alongside people with a learning disability and support them to participate, Easy Read resources on a range of matters and a free information and advice service.

- (c) Te Toihau Hauora, Hauātanga | Health and Disability Commissioner has introduced a Health Passport to hospitals.<sup>29</sup> The Health Passport is a booklet that people can take when they use health and disability services. It contains information about how to communicate with the person, things that are important to them and any other information, such as important people in their life.
- (d) Te Kahu Haumarū | The Personal Advocacy and Safeguarding Adults Trust offers a range of support services for adults at risk.<sup>30</sup>
- (e) Te Manatū Whakahiato Ora | Ministry of Social Development provides extensive information and guidance on supported decision-making.<sup>31</sup>

## THE KEY ISSUES WE HEARD

8.23 Consistent with the emphasis in the Disability Convention on decision-making support, submitters were generally positive about the benefits of support and the desirability of exploring ways in which it might be made more available, better recognised and more effective. In this section, we describe some key issues we heard about decision-making support.

### The interaction between support and representative arrangements under the PPPR Act

8.24 We heard that, even though there is scope for supported decision-making under the PPPR Act, the focus on representative arrangements and making decisions based on a person's best interests has hampered the use of decision-making support. We also heard that third parties such as agencies

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<sup>29</sup> Manatū Hauora | Ministry of Health "Health Passport" <[www.health.govt.nz](http://www.health.govt.nz)>.

<sup>30</sup> Te Kahu Haumarū | The Personal Advocacy and Safeguarding Adults Trust "The Personal Advocacy and Safeguarding Adults Trust: Advocating, Safeguarding Adults, Encouraging Independence" <[www.pasat.net.nz](http://www.pasat.net.nz)>.

<sup>31</sup> Ministry of Social Development "Supported decision-making" <[msd.govt.nz](http://msd.govt.nz)>.



sometimes ignore informal supporters and instead prefer to deal with welfare guardians or property managers.

- 8.25 On the other hand, we heard that there is often a continuum of involvement in decisions. For example, both Public Trust and Alzheimers New Zealand said that, in many cases, people may need both supported decision-making and decision-making by a representative. Different decision-making approaches might be required at different times and in relation to different decisions. Many submitters told us that it is important for support arrangements and representative arrangements to work together.

### **Gaps in availability of support and resources**

- 8.26 We have heard that there are gaps in the availability of decision-making support. Some people may have no family, whānau or friends available to act as a decision-making supporter. Decision-making support such as accessible information, adequate time or access to a quiet and calm place in which to make a decision is also not always available.
- 8.27 We also heard about situations where supporters may become unwilling or unable to act. For example, a person who has relied on their parents for decision-making support will lose that support when their parents die or otherwise become unable to provide support. This leaves the person with affected decision-making needing to set up a new support system at a vulnerable time. Submitters suggested that there should be a framework to fill these kinds of gaps.
- 8.28 Other submitters noted that there can be gaps in skills and experience that have implications for support. For some people, only those close to them may be able to understand what they want when they express their needs. In the absence of this close connection, those involved in providing decision-making support will need to be experienced in how to do so.
- 8.29 We also heard that decision-making supporters do not always have enough training or support themselves. Submitters told us that acting in a support role can be challenging, and there is often little opportunity for respite. Many submitters supported the availability of additional training, education, support and guidance for supporters. The New Zealand Disability Support Network noted that, for service providers providing decision-making support, staff need

to be given the training, resources and funding to understand the rights and needs of disabled people and how to provide decision-making support.

### Third-party recognition of supporters

- 8.30 The interface between a person's needs and the ethical and legal obligations of the people they deal with can be complex. We heard that decision-making supporters can face two related challenges when engaging with third parties:
- (a) Third parties may not acknowledge or understand the support arrangement. This can lead to inconsistent recognition of the supporter role.
  - (b) Third parties may be reluctant to provide supporters with information they require to provide good support due to privacy or confidentiality concerns.
- 8.31 We heard that service providers may not always understand that people with affected decision-making can be involved in decisions (or make their own decisions) with help from a supporter to make or communicate the decision. For example, one submitter told us they had difficulties having their role as a supporter recognised in a residential care setting.
- 8.32 However, we also heard that, in some circumstances, supported decision-making can be practically difficult. For example, the Australasian College for Emergency Medicine noted that supported decision-making can be particularly challenging in an emergency department because the patient may have impaired consciousness, be in pain or distress, or require immediate intervention.
- 8.33 We heard that some supporters have difficulties in accessing information. For example, we heard that sometimes health professionals can be reluctant to communicate with supporters. One submitter told us they struggled to access health information because the medical professionals would not talk to the supporter until the person was assessed not to have decision-making capacity. Conversely, another submitter noted that, if the person does not have decision-making capacity, this raises questions as to whether they can consent to information being shared with the supporter.

8.34 As noted above, these types of situations raise difficult issues for third parties who are seeking to ensure that a person is able to receive the support they require while also ensuring that their confidentiality and privacy rights are properly respected.

### **Insufficient ways to manage conflict and risk**

8.35 Several submitters told us there are insufficient ways to manage conflict and risk. We were told of situations where decision-making support can result in risk for the person with affected decision-making and also for the supporter. For example:

- (a) We were told about situations where supporters use their position to misuse the person's funds or influence the person to make decisions.
- (b) We heard that decision-making support can sometimes be difficult where family and whānau dynamics are complex or where family and whānau members disagree about the decision that needs to be made.
- (c) We heard that even well-intentioned supporters may influence the person with affected decision-making, which makes it difficult for the supported person to express their views.
- (d) We heard about situations where paid carers act in a supporter role but without appropriate training regarding the role.

### **HOW MIGHT A NEW ACT INCORPORATE DECISION-MAKING SUPPORT?**

8.36 In this section, we consider ways a new Act might incorporate decision-making support. We consider:

- (a) How the key features of a new Act might properly acknowledge the significance of support.
- (b) Whether a new Act should provide for formal supporter arrangements.
- (c) Whether a new Act should provide for co-decision-making arrangements.

### **Decision-making support in a new Act**

8.37 In our view, recognition of decision-making support is required throughout a new Act. We discuss a number of ways in which this might be achieved in other chapters. In summary, we consider that:

- (a) People should be able to access decision-making support for the purposes of a decision-making capacity assessment (Chapter 7).
  - (b) When considering whether to appoint a representative, the court should consider whether less restrictive measures such as decision-making support are available (Chapter 10).
  - (c) The role of court-appointed representatives and attorneys should properly acknowledge the significance of decision-making support (Chapters 10 and 13).
- 8.38 We acknowledge the possibility that, if a new Act provides for representative arrangements, some people might not adequately acknowledge the benefits of decision-making support, preferring instead to focus on representative decision-making. However, we think that incorporating decision-making support throughout a new Act, including in representative arrangements, will encourage people to consider decision-making support and counteract any tendencies to rely on representation when support arrangements would be sufficient.

## A formal supporter arrangement

### *What is a formal supporter arrangement?*

- 8.39 Some jurisdictions, such as Victoria and Ireland, have introduced legislation that provides for a formal supporter arrangement.<sup>32</sup> This is a decision-making arrangement under which a person with affected decision-making appoints someone to act as their supporter. In some jurisdictions, a court or tribunal can also appoint a supporter.
- 8.40 Formal supporters generally have access to the personal information required to make a decision. They also owe obligations or duties to the supported person. These can include treating the supported person with dignity and respect, discussing relevant information with the supported person in a way

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<sup>32</sup> Guardianship and Administration Act 2019 (Vic), pt 4; Powers of Attorney Act 2014 (Vic), pt 7. See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), ch 7; and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), pt 3.

they understand, acting honestly, diligently and in good faith, and respecting the supported person's privacy and confidentiality.

### **Advantages and disadvantages of formal supporter arrangements**

- 8.41 A formal supporter arrangement might have three primary benefits:
- (a) It may provide more certainty when dealing with third parties by clarifying the extent to which a supporter is entitled to be involved in a person's decision-making and to access their relevant information.<sup>33</sup>
  - (b) It could enable safeguards to be included in the support arrangement, including to prevent the supporter inappropriately using or disclosing the supported person's confidential information. For example, the law could impose specific duties on formal supporters.
  - (c) Without a formal supporter arrangement, the only options available to a court would be to appoint a representative, make a court-ordered decision or do nothing. Allowing a court to authorise or consider the availability of a formal supporter arrangement might help ensure that more restrictive interventions only occur as a last resort.<sup>34</sup>
- 8.42 However, there is also a risk that providing for formal supporter arrangements will undermine informal support that is working well. Third parties may be more likely to disregard informal supporters on the basis that they are not formal supporters.
- 8.43 We are also not sure how frequently a formal supporter arrangement would be used. People might be reluctant to act in a formal supporter role.<sup>35</sup> As we discuss below, formal supporters in overseas jurisdictions typically owe statutory duties to the supporter. Some supporters may find these duties onerous or off-putting, especially if there are consequences for breaching them. An unwillingness of people to be formal supporters would be particularly

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<sup>33</sup> See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.5]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2 Decision-making models* (NSWLRC, 2016) at [5.12].

<sup>34</sup> See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLC R145, 2018) at [7.18].

<sup>35</sup> See New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2 Decision-making models* (NSWLRC, 2016) at [5.13].

problematic if third parties also became more reluctant to deal with informal supporters.

### **Designing a formal supporter arrangement**

- 8.44 For a new Act to provide for formal supporter arrangements, it would be necessary to decide on the features of these arrangements. In this section, we discuss two key features that would need to be addressed. These are:
- (a) Entering into and ending the arrangement.
  - (b) The duties of the supporter (in particular concerning the supported person's confidential information).

### **Entering into and ending the arrangement**

- 8.45 Formal supporter arrangements are generally entered into by agreement between the supported person and the supporter.<sup>36</sup> This raises the question of whether the supported person should be required to have decision-making capacity to create a supporter arrangement.
- 8.46 Some overseas jurisdictions require that a person have decision-making capacity to enter into a support agreement.<sup>37</sup> There are obvious risks in enabling a person to provide someone else with access to their confidential information if they are not able to adequately understand the consequences of doing so.
- 8.47 The UN Committee on the Rights of Persons with Disabilities says that the provision of support “should not hinge on mental capacity assessments”.<sup>38</sup> However, requiring a person to have decision-making capacity to appoint a formal supporter would not deny *informal* support to people without decision-making capacity.

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<sup>36</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(1); Powers of Attorney Act 2014 (Vic), ss (5)(b), 86 and 99 and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) recommendations 7.1 and 73(1).

<sup>37</sup> Powers of Attorney Act 2014 (Vic), s 1(b); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(1). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 7.1.

<sup>38</sup> United Nations Committee on the Rights of Persons with Disabilities *General comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [29(i)].

- 8.48 In addition, a new Act might enable the court to appoint a formal supporter, as is the case in Victoria.<sup>39</sup> If self-appointment of a formal supporter required the person to have decision-making capacity, this option would enable a person who does not have decision-making capacity to nonetheless have a formal supporter appointed. This may also provide the court with an alternative to more intrusive orders such as appointment of a court-appointed representative.<sup>40</sup> We think the court would need to be satisfied that appointment of the supporter is consistent with the supported person's wishes.
- 8.49 As a formal supporter would generally be appointed by or consistently with the wishes of the person with affected decision-making, we consider that the supported person should be able to end the arrangement at any time. We also consider the court would need the ability to end a support agreement in certain circumstances, such as where the agreement resulted from duress or coercion or the supporter abused their position.

### Supporter duties and obligations

- 8.50 Overseas jurisdictions tend to impose statutory duties on formal supporters. These often recognise that the relationship is one of "special trust and confidence" that involves a degree of vulnerability on the part of the supported person.

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<sup>39</sup> Medical Treatment Planning and Decisions Act 2016 (Vic), s 87. See also the Guardianship and Administration Act 2019 (Vic), which provides for supportive guardianship and supportive administration appointments. Between 1 March 2020, when the Guardianship and Administration Act 2019 (Vic) commenced, and November 2022, the Victorian Civil and Administrative Tribunal (VCAT) had received 229 applications for supportive guardianship and made 71 appointments of supportive guardians. In this time, VCAT had received 189 applications for supportive administration and made 99 appointments of supportive administrators: Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability *Report 6: Enabling autonomy and access* (September 2023) at 155.

<sup>40</sup> We discuss in Chapter 10 a possible requirement in a new Act for the court to consider the availability of suitable less intrusive alternatives before appointing a representative.

- 8.51 Some examples of duties imposed or recommended include that the representative must:
- (a) Treat the supported person and important people in their life with dignity and respect.<sup>41</sup>
  - (b) Act honestly, diligently and in good faith.<sup>42</sup>
  - (c) Identify actual or potential conflicts of interest and, if there is a conflict of interest, ensure that the interests of the supported person remain their primary consideration.<sup>43</sup>
  - (d) Respect the supported person's privacy and confidentiality by only collecting, using and disclosing that person's personal information to the extent relevant and necessary.<sup>44</sup>
  - (e) Not coerce, intimidate or unduly influence the supported person.<sup>45</sup>
- 8.52 These sorts of duties and obligations could help ensure that supporters understand their role and that the arrangement works as intended. They can also be seen as responding to the potential for a formal supporter to abuse their role.

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<sup>41</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 7.13(1)(e).

<sup>42</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 12(1); Guardianship and Administration Act 2019 (Vic), s 94(b); Powers of Attorney Act 2014 (Vic), s 90(1)(a). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 7.13(1)(b).

<sup>43</sup> Guardianship and Administration Act 2019 (Vic), s 94(d) and (e); Powers of Attorney Act 2014 (Vic), s 90(1)(d); New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 7.13(1)(d). The Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 12(2) similarly provides the supporter cannot act for their own benefit or for the benefit of anyone other than the supported person.

<sup>44</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 11; Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at recommendation 47(e); New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 7.13(1)(g).

<sup>45</sup> Guardianship and Administration Act 2019 (Vic), s 94(h); Powers of Attorney Act 2014 (Vic), s 85(3)(b); New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at recommendation 7.13(1)(b).



- 8.53 In particular, a formal supporter's access to the supported person's private and confidential information would suggest a need for obligations that address the risk of them inappropriately using or disclosing that information. While that risk also exists with informal support, the fact that someone is a formal supporter may give an appearance of legitimacy to their actions. It may mean third parties are more likely to accept those actions at face value and not recognise or address indications of impropriety.

**QUESTION 10:**

Do you think a new Act should include a formal supporter arrangement?  
Why or why not?

**QUESTION 11:**

What do you think should be the key features of a formal supporter arrangement?

## **A co-decision-making arrangement**

### ***What is a co-decision-making arrangement?***

- 8.54 Some jurisdictions such as Ireland and Alberta have a 'co-decision-making' arrangement.<sup>46</sup> Under a co-decision-making arrangement, a person with affected decision-making has a co-decision-maker. Decisions are made jointly by the person with affected decision-making and the co-decision-maker. Decisions made solely by the person with affected decision-making alone are not legally valid.
- 8.55 Co-decision-making arrangements require the co-decision-maker and the person with affected decision-making to work together to reach agreement on decisions covered by the arrangement. However, the co-decision-maker is

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<sup>46</sup> Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), div 2 and Assisted Decision-Making (Capacity) Act 2015 (Ireland), pt 4.

usually required to accept the decision of the person with affected decision-making unless it might result in harm to that person.<sup>47</sup>

- 8.56 The role of co-decision-maker appears to be primarily one of supporting the person with affected decision-making by helping them access information relevant to the decision and discussing relevant information with them.<sup>48</sup> Co-decision-making is usually used in situations where a person's decision-making is impaired to the extent that they do not have decision-making capacity to make certain decisions on their own but can make those decisions with appropriate support.<sup>49</sup>

### ***Co-decision-making arrangements should not be included in a new Act***

- 8.57 We think that co-decision-making arrangements should not be included in a new Act.
- 8.58 The primary reason is that we do not consider that co-decision-makers are materially different to the role we propose for court-appointed representatives in a new Act. As we discuss in Chapter 10, the decision-making role of a representative must respect the person's rights, will and preferences and acknowledge the significance of decision-making support. Broadly speaking, we suggest this means a representative must give effect to a person's will and preferences except where it is not possible or appropriate to do so. One of the main reasons a representative might need to depart from the represented person's will and preferences is to avoid harm to the represented person. This sounds very similar to a co-decision-making arrangement where the co-decision-maker essentially supports the person to make a decision unless it results in harm to the person.
- 8.59 We recognise that some people may consider that a co-decision-making arrangement better respects their dignity and autonomy because decisions are jointly made. However, we do not think this is enough to justify the introduction

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<sup>47</sup> The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3 (Saskatchewan), ss 17(2) and 42(2); Adult Guardianship and Trusteeship Act SA 2008, c A-4.2 (Alberta), s 18(4)–(5); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 19(5).

<sup>48</sup> Adult Guardianship and Trusteeship Act SA 2008, c A-4.2 (Alberta), s 18(2); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 19(1).

<sup>49</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [9.3].

of co-decision-making arrangements. If both co-decision-makers and court-appointed representatives exist in a new Act, the similarity is such that it might result in both roles being misunderstood.

8.60 There are also other disadvantages to co-decision-making arrangements. These include:

- (a) It may reduce the number of cases where supported decision-making is used despite it being the most suitable option.<sup>50</sup>
- (b) The partnership may be unequal, with co-decision-makers effectively making decisions for the person with affected decision-making.<sup>51</sup>
- (c) The concept of co-decision-making may be difficult for people to understand, which could lead to problems in its application.<sup>52</sup>
- (d) The requirement that the co-decision-maker and person with affected decision-making reach agreement may lead to increased stress on the person with affected decision-making.<sup>53</sup>

**QUESTION 12:**

Do you agree that a new Act should not provide for co-decision-making arrangements? Why or why not?

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<sup>50</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2 Decision-making models* (NSWLRC, 2016) at [5.24]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.82]–[7.83].

<sup>51</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2 Decision-making models* (NSWLRC, 2016) at [5.25]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.82]–[7.83].

<sup>52</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2 Decision-making models* (NSWLRC, 2016) at [5.26]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.82]–[7.83].

<sup>53</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.82]–[7.83].

## CHAPTER 9

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# Court-ordered arrangements

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## INTRODUCTION

- 9.1 The next four chapters focus on court-ordered arrangements. These are decision-making arrangements that are ordered by the court under which another person or the court makes one or more decisions for the person with affected decision-making.
- 9.2 Broadly speaking, there are two types of court-ordered arrangements: court-ordered decisions and court-appointed representatives. A court-ordered decision is a decision made by the court for a person with affected decision-making, for example, that the person live in an aged care facility or receive medical treatment. Court-appointed representatives are people appointed by the court to make decisions for a person whose decision-making is affected.
- 9.3 Whether the law should provide for these types of arrangements and what they might involve are controversial topics. There is disagreement about whether court-ordered arrangements are permitted under article 12 of the UN Convention on the Rights of Persons with Disabilities (Disability Convention). In our view, such arrangements are permitted if properly designed. In particular, they must respect the rights, will and preferences of the person with affected decision-making rather than focusing on their best interests.
- 9.4 In this chapter, we:
- (a) Provide an overview of court-ordered arrangements under the Protection of Personal and Property Rights Act 1988 (PPPR Act).

- (b) Summarise the different views on whether court-ordered arrangements should be included in a new Act.
  - (c) Explain why we think properly designed court-ordered arrangements are consistent with Aotearoa New Zealand’s human rights obligations.
  - (d) Seek feedback on our view that court-ordered arrangements should be included in a new Act.
- 9.5 At the outset, it is important to note that different terms are used to describe arrangements under which one person makes a decision for another person. In this paper, we use the terms ‘court-ordered arrangements’ and ‘representative decision-making’. Another term frequently used is ‘substituted decision-making’. However, this term can mean different things to different people. We therefore only use it when discussing the debate about whether court-ordered arrangements are permitted under article 12 of the Disability Convention.

## **COURT-ORDERED ARRANGEMENTS UNDER THE PPPR ACT**

- 9.6 The PPPR Act contains provisions for both types of court-ordered arrangements: court-ordered decisions and court-appointed representatives.
- 9.7 Te Kōti Whānau | Family Court may make a range of decisions about a person’s personal care and welfare such as that a person live in a particular place or receive medical treatment. These are court-ordered decisions.<sup>1</sup>
- 9.8 The Family Court may appoint a person to make decisions for the person with affected decision-making. A welfare guardian may be appointed to make decisions about a person’s personal care and welfare. A property manager may be appointed to make decisions about another person’s property. Both welfare guardians and property managers are court-appointed representatives.
- 9.9 All these court-ordered arrangements have the following features in common:
- (a) Someone other than the person with affected decision-making makes the decision. For court-ordered decisions, this is a judge.

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<sup>1</sup> Note that the court must also approve a settlement of claims for money or damages in situations where one of the parties does not have decision-making capacity: see s 108B of the Protection of Personal and Property Rights Act 1988.

- (b) The arrangement may only be imposed if the person with affected decision-making is assessed not to have decision-making capacity.<sup>2</sup>
- (c) An absence of decision-making capacity alone is not enough to justify the order. The court must be guided by the Act's primary objectives of least restrictive intervention and encouraging the person to develop their own capacity.<sup>3</sup> The test for welfare guardians also has additional requirements, which we discuss in Chapter 10.
- (d) The best interests of the person with affected decision-making are important to the arrangement. They are relevant to whether the arrangement should be imposed.<sup>4</sup> They are also fundamental to the decision-making role of the court or court-appointed representative. For a welfare guardian, promoting and protecting the welfare and best interests of the person is the paramount consideration.<sup>5</sup> For a property manager, the paramount consideration is to use the property to promote and protect the best interests of the person.<sup>6</sup>
- (e) Most cases agree that the arrangements have a protective purpose. For example, in *Re A (Personal Protection)*, a full bench of te Kōti Matua | High Court said that "[it] is quite apparent that the Act is concerned with the welfare and best interests of the persons in respect of whom applications are brought to the Family Court".<sup>7</sup> The legislation is "clearly of a remedial nature" and "the Family Court is the bulwark of the protection of the individuals in respect of whom applications are made".<sup>8</sup>

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<sup>2</sup> Protection of Personal and Property Rights Act 1988, s 6(1). The person must also be domiciled or ordinarily resident in New Zealand or the property at issue must be in New Zealand: s 25.

<sup>3</sup> Protection of Personal and Property Rights Act 1988, s 8.

<sup>4</sup> *KR v MR* [2004] 2 NZLR 847 (HC) at [63]–[64]; *NA v LO* [2021] NZFC 7685 at [47].

<sup>5</sup> Protection of Personal and Property Rights Act 1988, s 18(3).

<sup>6</sup> Protection of Personal and Property Rights Act 1988, s 36(1).

<sup>7</sup> *Re A (Personal Protection)* [1996] 2 NZLR 354 (HC) at 366.

<sup>8</sup> *Re A (Personal Protection)* [1996] 2 NZLR 354 (HC) at 366. See also *Re RMS* (1993) 10 FRNZ 387 (FC) and *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945 at [45]. Compare, however, *T-E v B* where the Court found the intention of the Act "is to encourage, facilitate and support the subject person": *T-E v B [Contact]* [2009] NZFLR 844 (HC) at [18].

## DIFFERENT VIEWS ON WHETHER A NEW ACT SHOULD INCLUDE COURT-ORDERED ARRANGEMENTS

9.10 There is considerable debate on whether court-ordered arrangements should be included in a new Act. Much of this debate concerns whether court-ordered arrangements are permitted under article 12 of the Disability Convention.

### Debate on whether court-ordered arrangements are consistent with article 12

9.11 Article 12 itself does not expressly prohibit arrangements where one person makes a decision for another person. Commentators express very different views on whether article 12 should be interpreted as having that effect.

9.12 Much of this debate addresses the legitimacy or otherwise of ‘substituted decision-making’. This term does not appear in article 12 and, as we discuss later in this chapter, contributes to confusion because it is taken to mean different things by different people.

9.13 In General Comment 1, the UN Committee on the Rights of Persons with Disabilities (Disability Committee) said that supported decision-making should replace all forms of substituted decision-making.<sup>9</sup> It defined substituted decision-making as an arrangement where:<sup>10</sup>

- (a) Legal capacity is removed from the person (even for just one decision).
- (b) A substitute decision-maker is appointed.
- (c) The substituted decision-maker acts in the objective best interests of the person concerned.<sup>11</sup>

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<sup>9</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

<sup>10</sup> The definition originally (and in the version found online) says “and” not “or”. However, in 2018 the Committee issued a correction to this definition. It changed “and” to “or” so that the presence of any one of these factors is enough to categorise an arrangement as a substituted decision: United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* — *Corrigendum* UN Doc CRPD/C/GC/1/Corr.1 (26 January 2018).

<sup>11</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [27].

- 9.14 It also explains that a supported decision-making regime “comprises various support options which give primacy to a person’s will and preferences and respect for human rights norms”.<sup>12</sup> This includes intensive forms of support provided they are based on an interpretation of a person’s will and preferences, not their best interests.<sup>13</sup>
- 9.15 The Disability Committee has noted New Zealand’s lack of progress “in abolishing the guardianship system and substituted decision-making regime”.<sup>14</sup> It has specifically asked New Zealand to “implement a nationally consistent supported decision-making framework that respects the autonomy, [and] will and preferences” of disabled people.<sup>15</sup>
- 9.16 The Disability Committee’s view has been controversial and generated significant debate.<sup>16</sup> Many states do not agree with the Disability Committee’s view that substituted decision-making is prohibited and have made interpretive declarations to this effect. For example, Australia has declared its understanding of article 12 to be that it allows for “fully supported or substituted decision-making arrangements”. Substituted decision-making arrangements “provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to

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<sup>12</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [29].

<sup>13</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [29(b)].

<sup>14</sup> United Nations Committee on Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* (26 September 2022) CRPD/C/NZL/CO/2-3 at [21].

<sup>15</sup> United Nations Committee on Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* (26 September 2022) CRPD/C/NZL/CO/2-3 at [21].

<sup>16</sup> See for example Eilionóir Flynn and Anna Arstein-Kerslake “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10 *International Journal of Law in Context* 81; Piers Gooding “Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns” (2015) 15 *Human Rights Law Review* 45; John Dawson “A realistic approach to assessing mental health laws’ compliance with the UNCRPD” (2015) 40 *International Journal of Law and Psychiatry* 70; Alex Ruck Keene and others “Mental capacity — why look for a paradigm shift?” (2023) 31 *Med L Rev* 340.



safeguards”.<sup>17</sup> Similar declarations have been made by Canada, Estonia, Ireland, Uzbekistan, the Netherlands and Norway.<sup>18</sup>

### Submitters also held a variety of views

- 9.17 Some submitters discussed whether court-ordered arrangements should be included in a new Act. Of these, most supported a shift towards supported decision-making. However, there were different views on whether it is ever appropriate for one person to make a decision on behalf of another.
- 9.18 Several submitters thought there was still a need for court-ordered arrangements. Reasons given included:
- (a) There is a small but important group in society who will never be able to communicate past a very basic level. They need protection and someone looking out for their interests. Some examples given included a person in a coma, those who suffer from advanced dementia and someone who is experiencing the consequences of a severe stroke.
  - (b) Some submitters told us of their experiences of people making consistently adverse decisions and the impacts of these decisions. We heard there is a point where some people need someone to step in.
  - (c) Some people with certain conditions such as dementia and fluctuating capacity may require different levels of support at different times, including the need for someone to sometimes make decisions for them.
  - (d) Third parties need a process to ensure that, when a person does not have decision-making capacity, decisions can still be made and the decisions will be legally binding.
  - (e) Sometimes, a person may have complex financial and property arrangements. In such cases, a clear legal process is required so that the business, the farm or other enterprise can continue to function.

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<sup>17</sup> Australian Government “Declaration on the Convention on the Rights of Persons with Disabilities” (17 July 2008) United Nations Treaty Collection <[treaties.un.org](http://treaties.un.org)>.

<sup>18</sup> United Nations “Status of Treaties Chapter IV(15) — Declaration on the Convention on the Rights of Persons with Disabilities” United Nations Treaty Collection <[treaties.un.org](http://treaties.un.org)>.

(f) Court-ordered arrangements are needed to avoid a gap in the law in situations where a person is unable to be supported to make a decision themselves.

9.19 However, other submitters suggested that people should only ever be supported to make decisions. Reasons included:

(a) Substituted decision-making must be abolished to comply with New Zealand's obligations under the Disability Convention. This is the case even where a person's views are difficult to obtain.

(b) All people are capable of expressing their will and preferences if they have good-quality support to do so.

(c) People with high care, support or communication needs still have the right to supported decision-making even if only people close to them can understand what they want when they express their needs and must interpret or translate for them.

(d) Even when an individual with a disability requires total or 100 per cent support, the supporter should enable the individual to exercise their legal capacity to the greatest extent possible according to the wishes of the individual.

### **‘Substituted decision-making’ and ‘supported decision-making’ mean different things**

9.20 A confounding factor in the debate is the use of the terms ‘substituted decision-making’ and ‘supported decision-making’ to mean different and sometimes overlapping things. In particular, commentators differ over whether an arrangement under which someone makes a decision for another person based on what that person wants falls within supported decision-making or substituted decision-making.

9.21 Sometimes, supported decision-making is taken to identify an arrangement under which someone helps another person to make a decision, but the decision is made by the person whose decision-making is affected. Substituted decision-making is then taken to identify any arrangement under which someone makes a decision on behalf of another person — whether the decision is made based on the person's best interests or on what they want.

- 9.22 However, in other cases, an arrangement under which someone makes a decision for a person based on the person's will and preferences (or a best interpretation of their will and preferences) is regarded as reflecting a supported decision-making model. This contrasts with a substituted decision-making model, under which someone makes a decision for a person based on the person's best interests.
- 9.23 In our view, the second interpretation is closer to that adopted by the Disability Committee. The Disability Committee says substituted decision-making should be abolished, but still anticipates that sometimes a person might need to make decisions for another person based on a best interpretation of their will and preferences.<sup>19</sup>
- 9.24 The different uses of supported decision-making and substituted decision-making have proved unhelpful and confusing. In our view, given the absence of the term 'substituted decision-making' in article 12 itself, it is preferable to avoid all use of the term and to focus instead on the language of the article.

## REQUIREMENTS IMPOSED BY HUMAN RIGHTS OBLIGATIONS

- 9.25 In this section, we set out the factors that must be considered when designing court-ordered arrangements that are consistent with New Zealand's human rights obligations, including article 12.
- 9.26 As mentioned above, article 12 does not explicitly prohibit all arrangements where one person makes a decision for another person. In our view, neither does it do so implicitly. To the contrary, we think some of the safeguards provided in article 12 clearly anticipate court-ordered arrangements. In particular, article 12(4) requires that measures relating to the exercise of legal

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<sup>19</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [21]. The Disability Committee has also recommended that Australia adopt the Australian Law Reform Committee (ALRC) recommendations for a national supported decision-making framework: Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Australia* UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) at [24(b)]. The ALRC recommendations for a supported decision-making framework include representative decision-making: Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws — Final Report* (ALRC R124, 2014) at recommendation 4–6.

capacity be “proportional and tailored to the person’s circumstances, apply for the shortest time possible and ... [be] subject to regular review by a competent, independent and impartial authority or judicial body”.<sup>20</sup> They must also “be proportional to the degree to which such measures affect the person’s rights and interests”.<sup>21</sup> These references only make sense if court intervention is anticipated in some circumstances.

9.27 As we earlier noted, our conclusion that article 12 does not prohibit all arrangements where one person makes a decision for another person is consistent with the view many states have reached.

9.28 This does not mean that all court-ordered arrangements are permitted by international human rights law. To be permitted, they must first meet the criteria found in article 12 itself. These are:

- (a) The arrangement must respect the rights, will and preferences of the person with affected decision-making.<sup>22</sup> Importantly, we consider this means decisions should not be made based on a person’s objective best interests.
- (b) The arrangement must properly reflect the significance of support for decision-making.<sup>23</sup> We consider that there are two primary places where this is relevant. First, when a court is determining whether a court-ordered arrangement is required, the person with affected decision-making should have access to support during any assessments and be given the opportunity (with support) to express their will and preferences. Second, the decision-making role of the representative should also contain a supportive element to enable the person to express their own views.

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<sup>20</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>21</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>22</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>23</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(3).

- (c) The arrangement must be free of conflicts of interest and undue influence.<sup>24</sup>
  - (d) The arrangement must apply for the shortest time possible.<sup>25</sup>
  - (e) The arrangement must be subject to regular review by the Family Court.<sup>26</sup>
- 9.29 Court-ordered arrangements also need to be consistent with other human rights obligations found in domestic and international law. As we discuss in Chapter 3, representative decision-making arrangements may well engage the right to freedom from discrimination and may engage many other rights depending on the nature of the specific decision.
- 9.30 For that reason, it is critical to ensure that the intrusion on individual autonomy occasioned by representative arrangements is justified in human rights terms. Most human rights are capable of some limitation, and there can be good reasons to limit rights.<sup>27</sup> As we explain in Chapter 3, there is no one approach to determining whether a limit on a right is justified. However, some questions include whether:<sup>28</sup>
- (a) The reason for limiting the right is sufficiently important to justify restricting rights or freedoms.
  - (b) The measure is sufficiently well designed to ensure both that it actually achieves its aim and that it impairs the right or freedom no more than is needed.
  - (c) The gain to society justifies the extent of the intrusion on the right.

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<sup>24</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>25</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>26</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>27</sup> See discussion in Chapter 3.

<sup>28</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103. The courts do not always apply these tests in such a formal and formulaic way. See *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [100], in which members of the Supreme Court preferred a “simpler proportionality analysis”.

- 9.31 These questions overlap with a number of the specific criteria set out in article 12.
- 9.32 In our view, a court-ordered arrangement can be designed in a way that meets all these requirements. In the next section, we focus in particular on the first justification inquiry: whether and in what circumstances there is a sufficiently strong reason to justify overriding individual freedom through court-ordered arrangements. In the next three chapters, we discuss in more detail how such arrangements can be suitably tailored to ensure they intrude no more than is necessary on the rights of people with affected decision-making.

### WHEN ARE COURT-ORDERED ARRANGEMENTS NEEDED?

- 9.33 Article 12 does not say when court-ordered arrangements might be necessary. However, as we note above, for court-ordered arrangements to be consistent with human rights obligations (including the requirement to respect the person's rights, will and preferences), the reason for the arrangement must be sufficiently important to justify any restrictions on the represented person's wishes.
- 9.34 In our view, there are some circumstances where a person with affected decision-making may need another person to make decisions for them. We have identified four possible circumstances:
- (a) There is a need to make a decision (or class of decisions) but the person needs a representative to interpret their will and preferences. This might be because the represented person needs significant decision-making support and only people close to them can interpret their will and preferences.
  - (b) There is a need to make a decision (or class of decisions) but what can be understood of the person's will and preferences does not provide a sufficient basis on which to decide.
  - (c) There is a need to make a decision (or class of decisions) and there will be legal uncertainty if the decision is made by a person without decision-making capacity. This could be because the law specific to a decision requires it to be made by a person with decision-making capacity (or

enables it to be subsequently invalidated if made by a person without decision-making capacity).

(d) To prevent significant harm to the person.

- 9.35 The first circumstance is anticipated by the Disability Committee. General Comment 1 anticipates there will be situations in which a person might need to make a decision for a person with affected decision-making based on a best interpretation of their will and preferences.<sup>29</sup>
- 9.36 The second circumstance might be considered an aspect of the first. However, for the purposes of seeking views, we think it helpful to separately identify it in this Issues Paper.
- 9.37 The third circumstance, legal certainty, arises because of the role that decision-making capacity has in other laws. For example, a person with advanced dementia may wish to move to an aged care facility but not have decision-making capacity to consent to that move. The aged care facility will require legal certainty that the decision to move to the facility is lawful.
- 9.38 The fourth circumstance (court-ordered arrangements to prevent significant harm) is more controversial. People's ability to take risks must be respected. Disabled people have historically faced, and still face, paternalistic restrictions on their freedom to take risks that others do not. Many submitters stressed to us the importance of everyone being able to make decisions about their own lives, including to take risks and make mistakes. As we discuss in Chapter 3, this is seen as a fundamental part of what it means to be human.<sup>30</sup>
- 9.39 However, as we also discuss in Chapter 3, the dignity of risk does not equate dignity with all risk. There will be many cases in which respecting a person's dignity and autonomy means respecting their wish to take a risk. However, it should not be assumed that this will always be true. A person with affected decision-making may wish to make a decision exposing them to significant harm that, even with support, they do not understand. If the law lacked the

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<sup>29</sup> United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* — *Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [21].

<sup>30</sup> See also discussion in Law Commission of Ontario *Legal Capacity, Decision-making and Guardianship: Final Report* (March 2017) at 41–42.

means to avoid this, however great the risk and the harm, real questions would arise about whether the law is adequately respectful of the person's dignity and their rights.

- 9.40 Acknowledging this does not answer the difficult question of what types of risk and harm might justify intervention. Determining where the line falls between overly paternalistic interventions that undermine the person's dignity and autonomy and legitimate safeguards that protect them is far from simple. It requires honestly confronting the question of "what kinds of negative outcomes we as a society are willing to tolerate".<sup>31</sup> The answer to that question is not straightforward. There is space for legitimate disagreement.
- 9.41 We suggest that these considerations are relevant:
- (a) When consideration is being given to whether or not harm-based intervention is appropriate, the risk of overly paternalistic intervention is likely greater than the risk of insufficient safeguarding. We think the law should be designed with this risk in mind and guard against it by ensuring that the harm threshold is an appropriately high one. For example, a new Act might provide that a risk of harm to the person is only grounds for a court-ordered arrangement when it is a risk of *significant* harm. It might specify an even higher threshold such as requiring that there be a *material* risk of significant harm to the person. On the other hand, that might be higher than is needed in light of the requirement for the decisions that are made to respect the person's rights, will and preferences, as we discuss in Chapter 10.
  - (b) We do not presently think that a new Act should specify what types of harm to the person may be relevant. The harm that a person may suffer could be physical, financial or emotional. It may be a consequence of undue influence or abuse or it may not. We think that each type of harm could potentially undermine the person's dignity and autonomy and their enjoyment of their rights.
  - (c) Whether or not a given risk of harm to the person is sufficiently significant to warrant intervention will depend on the person because people differ in

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<sup>31</sup> Law Commission of Ontario *Legal Capacity, Decision-making and Guardianship: Final Report* (March 2017) at 41.



their risk tolerances and what will best respect their dignity and autonomy. Properly taking account of the person's will and preferences in relation to the relevant risk of harm will therefore be important even while not determinative.

- 9.42 We are interested in your thoughts on when a representative arrangement is required and when it is not required. We are particularly interested in what sorts of risks and harms might justify a court-ordered arrangement.

**QUESTION 13:**

Do you agree that court-ordered arrangements should be included in a new Act? Why or why not?

**QUESTION 14:**

In what circumstances might a court-ordered arrangement be needed?

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## CHAPTER 10

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# Court-appointed representatives: key features

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### INTRODUCTION

- 10.1 Court-appointed representatives are the focus of this chapter and the next. These are decision-making arrangements under which the court appoints a person (the court-appointed representative or representative) to make a decision or decisions for another person.
- 10.2 In this chapter, we discuss the key issues that arise in relation to court-appointed representatives. These are:
- (a) The nature of the representative's decision-making role.
  - (b) When a representative should make decisions.
  - (c) The test for appointing a representative.
  - (d) The scope of a court-appointed representative arrangement.
  - (e) How to ensure that court-appointed representative arrangements are in place no longer than they need to be and are subject to regular review.
- 10.3 In both this chapter and the next, we often refer to 'court-appointed representatives' without identifying whether the arrangement relates to care or financial decisions. This is because many aspects of court-appointed representative arrangements are the same regardless of whether the decision is a financial or welfare decision. Where the subject matter of the decision does matter, we identify it.

## COURT-APPOINTED REPRESENTATIVES' ROLE

### Current law

- 10.4 Under the Protection of Personal and Property Rights Act 1988 (PPPR Act), the court may appoint a welfare guardian (to make decisions about a person's care and welfare) or a property manager (to make decisions involving their property). Welfare guardians and property managers are two types of court-appointed representatives.
- 10.5 In both cases, the decision-making role of these representatives is focused on the best interests of the person with affected decision-making. For a welfare guardian, promoting and protecting the welfare and best interests of the person is the paramount consideration.<sup>1</sup> For a property manager, the paramount consideration is to use the property to promote and protect the best interests of the person.<sup>2</sup>
- 10.6 Alongside this overarching consideration, both welfare guardians and property managers must encourage the represented person to develop and exercise their own capacity.<sup>3</sup> As well, both of these representatives must consult with a range of people, including the person for who they act.<sup>4</sup> Welfare guardians must also help the represented person to integrate into the community to the greatest extent possible.<sup>5</sup>

### The key issue

- 10.7 In our view, the key issue with the current decision-making framework is that decisions are reached based on what is in a person's best interests. Requiring court-appointed representatives to act in the represented person's best interests is not consistent with the UN Convention on the Rights of Persons with Disabilities (Disability Convention). As explained in Chapters 3 and 9, the

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<sup>1</sup> Protection of Personal and Property Rights Act 1988, s 18(3).

<sup>2</sup> Protection of Personal and Property Rights Act 1988, s 36(1).

<sup>3</sup> Protection of Personal and Property Rights Act 1988, ss 18(3) and (4)(a)–(b) and 36.

<sup>4</sup> Protection of Personal and Property Rights Act 1988, ss 18(4)(c) and 43.

<sup>5</sup> Protection of Personal and Property Rights Act 1988, s 18(4)(b).

Disability Convention requires the focus to be on the person's rights, will and preferences.

- 10.8 A 'best interests' framework reflects the underlying assumption inherent in the medical model of disability that people with impairments are in need of intervention. This contrasts with an approach grounded in a person's rights, will and preferences. A rights, will and preferences approach recognises that, while a person may not be able to make a particular decision independently, the decision should still be made in a way that properly recognises that they are a person who can both hold and exercise rights. The shift from best interests to rights, will and preferences acknowledges the dignity, autonomy and rights of people who cannot make a decision independently.<sup>6</sup>
- 10.9 We acknowledge that there are arguments that best interests can be reinterpreted to focus less on the person's objective interests and incorporate consideration of their will and preferences. For example, in the United Kingdom, the views of the person affected are an important part of determining a person's best interests.<sup>7</sup> Some commentators argue that such an interpretation of best interests is consistent with the Disability Convention.<sup>8</sup> However, we think it preferable to depart from 'best interests' terminology altogether to tangibly underscore a shift from paternalistic understandings of decision-making to a decision-making framework grounded in the Disability Convention's 'rights, will and preferences' requirement.
- 10.10 The use of best interests under the PPPR Act was raised in submissions. Some submitters supported a decision-making framework that shifts away from best interests to one that incorporates the will and preferences of the represented person.

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<sup>6</sup> Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [3.55].

<sup>7</sup> See the Mental Capacity Act 2005 (UK), s 4(6) and *Aintree University Hospitals NHS Foundation Trust v Fames* [2013] UKSC 67 at [45].

<sup>8</sup> See for example Alison Douglass *Mental Capacity Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at [5.48] and Paul Skowron "Giving substance to 'the best interpretation of will and preferences'" (2019) 62 *International Journal of Law and Psychiatry* 125.

- 10.11 We also heard that there was confusion about what best interests means. It is not defined in legislation, which means it is open to interpretation. We heard there is variety in how welfare guardians and property managers approach their roles. For example, some people understand their decision-making role to involve supporting the represented person to express their will and preferences to the extent possible. However, we have also heard that some representatives do not empower the person with affected decision-making or help them to improve their skills to make decisions. We have been told of property managers taking complete control of money and assets even though the person would be able to manage or develop skills to manage some of their finances themselves if they had support. We have also heard of representatives overriding what a person wants or needs.
- 10.12 Designing a decision-making role that respects a person's rights, will and preferences is difficult and raises many issues, which we discuss below.

### **Reforming the decision-making role**

- 10.13 In this section, we discuss what might be involved in a decision-making role that is centred on a person's rights, will and preferences. We discuss two aspects of the decision-making role. These are:
- (a) The decision-making framework that should guide decisions of the representative.
  - (b) The process the representative should follow when making decisions.
- 10.14 By decision-making framework, we mean the basis on which decisions are to be reached — in other words, the criteria with which a decision must comply and the factors that should be considered. 'Best interests' is an example of a decision-making framework. We need to identify what should replace it to ensure compliance with article 12.
- 10.15 By decision-making process, we mean the steps a representative should take when making a decision.
- 10.16 Both the framework and the process are important to meeting the need for decisions to respect a person's rights, will and preferences. The framework must align with that need. However, it may not prove effective in practice without clear guidance on the process a representative must follow to identify

a person's rights, will and preferences, such as talking to the represented person and ensuring the represented person has adequate support.

### **The decision-making framework**

- 10.17 In Chapter 3, we explained four considerations that in our view are relevant to the phrase 'rights, will and preferences':
- (a) Proper acknowledgement of the person's dignity and autonomy and recognition of their individual agency in their decision-making are required.
  - (b) Authentic consideration of the whole person is required, including both their immediate wishes and their deeper values and aspirations.
  - (c) There may be times when a person's rights sit in tension with their will or preferences.
  - (d) When such tension arises, rights, will and preferences must each nevertheless be accorded proper weight and significance.
- 10.18 With those considerations in mind, we turn now to consider what might be required of the decision-making framework to ensure proper respect for the person's rights, will and preferences.

### **Making decisions based on a person's will and preferences**

- 10.19 We start with the question of what it means to identify a person's will and preferences.
- 10.20 Recent law reform proposals in Australia have distinguished between a person's will and preferences and a 'best interpretation' of their will and preferences. On this approach, when making decisions, the representative should first try to identify a person's will and preferences. If the representative cannot determine the person's will and preferences, they should act based on what the will and preferences are likely to be. This is determined by considering the available information and consulting the represented person's relatives, close friends and carers.<sup>9</sup>

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<sup>9</sup> Guardianship and Administration Act 2019 (Vic), s 9; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)–(2); New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 5.4; Australian Law Reform

- 10.21 There is also some literature exploring the difference between a person's will and their preferences. This literature argues that a person's will is their deeply held, reasonably stable and coherent personal beliefs, values and commitments. This is contrasted with a person's preferences, which are characterised as more immediate inclinations or desires.<sup>10</sup> According to this approach, the distinction between will and preferences can provide a basis for making decisions. The representative should make decisions based on a person's deeply held views and values, whether or not their immediate preferences are contradictory or not able to be discerned.<sup>11</sup>
- 10.22 In our view, both these approaches may be too formalistic.
- 10.23 We agree that the phrase will and preferences requires account to be taken both of a person's immediate wishes (their preferences) and their deeper values (their will). However, we do not think the decision-making framework should always privilege a person's will over their preferences. As we discuss in Chapter 3, both a person's will and their preferences must be respected even when the two appear to be in tension. From time to time, everyone makes decisions that appear inconsistent with their deeper values and aspirations or that balance those values and aspirations in different ways at different times. In our view, a person's deeper values and their immediate desires are both sources of information the representative must consider when determining a person's will and preferences. How they are weighed will likely depend on the nature of the decision and other sources of information available.
- 10.24 In addition, in practice it may not always be easy to distinguish between a person's will and their preferences. Neither may there always be a clear distinction between situations where a person's will and preferences are identifiable and those in which they need to be interpreted.

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Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC 124, 2014), recommendation 4-8.

<sup>10</sup> George Szukler "'Capacity', 'best interests', 'will and preferences' and the UN Convention on the Rights of Persons with Disabilities" (2019) 18 *World Psychiatry* 34 at 38.

<sup>11</sup> George Szukler "'Capacity', 'best interests', 'will and preferences' and the UN Convention on the Rights of Persons with Disabilities" (2019) 18 *World Psychiatry* 34 at 39.

- 10.25 We suggest that a person's will and preferences are better considered together as part of an in-the-round assessment that takes proper account both of longer-term deeper values and aspirations and more immediate wishes and desires and seeks to resolve any apparent tension between them in a way that is properly respectful of both.
- 10.26 We think this should require the representative to consider a number of factors:
- (a) What the person says or indicates about the particular decision at the time it needs to be made.
  - (b) Any advance directives or other written statements that are relevant to the particular decision.<sup>12</sup>
  - (c) The person's will and preferences more generally having regard to what is known about their previous actions and decisions, culture, values, aspirations, beliefs, appetite for risk and all other relevant factors. This could include considering the relative importance of each factor in the context of the particular decision and how the decision affects others such as family members. For example, if a person has always been close to their family and whānau, the feelings, wishes and interests of family members may be important considerations.
- 10.27 What this involves in any particular case will depend on the circumstances. Sometimes, what the person indicates about a particular decision will align with what is known about their will and preferences more generally. Sometimes, this may not so obviously be the case, and information such as the person's previous relevant statements and their values, aspirations and beliefs will assume greater significance.
- 10.28 We acknowledge that this may appear vague, difficult and potentially uncertain. That, we think, is a consequence of the need to respect a person's will and preferences even when they may not be easy to identify or they appear to be in tension. It is for this reason that the decision-making process is vital to enable the representative to reliably identify the person's will and

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<sup>12</sup> We discuss advance directives and other statements of wishes further in Chapter 15.



preferences and determine how both can be properly respected. We discuss the decision-making process later in this section.

### When is it not enough to reach a decision solely based on a person's will and preferences?

- 10.29 As we discuss in Chapter 9, there may be circumstances in which a person's will and preferences do not provide enough information or an acceptable basis on which to make a decision. Because of this, another person may need to be appointed to make decisions for them. We now turn to consider circumstances in which that other person might need to make a particular decision that does not accord with the person's will and preferences. To put this another way, in what circumstances might respecting the person's *rights*, will and preferences mean that their will and preferences alone should not always determine the decision?
- 10.30 One type of circumstance frequently considered in overseas law reform proposals is when a person's will and preferences in relation to a decision are not able to be adequately identified or are not alone sufficient to determine the decision that should be made. As we discuss in Chapter 9, this is one of the circumstances in which a representative may be required. For example, a difficult decision may be needed concerning medical treatment for a person with high and complex needs. The person's relevant views such as how they like to be treated by their carers must be respected. However, that information alone is unlikely to be a sufficient basis on which a decision can be made about the specifics of the treatment.
- 10.31 Another circumstance in which it may not be appropriate to make a decision based solely on a person's will and preferences is when doing so would give rise to a risk of harm to the person. For example, the Australian and New South Wales Law Reform Commissions recommended that a representative could depart from a person's will and preferences "where necessary to prevent harm" or to avoid an "unacceptable risk of harm", respectively.<sup>13</sup>

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<sup>13</sup> Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC 124, 2014), recommendation 3-3; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 5.4.

- 10.32 As we discuss in Chapter 9 in relation to the appointment of a decision-maker, considerable care is required to ensure that considerations of possible harm to the person do not result in their will and preferences being inadequately respected. Proper respect for a person's dignity and autonomy requires proper respect for their right to take risks and make imprudent decisions — even those that might strike others as unreasonable or unconventional.<sup>14</sup> The question, we think, is whether the person's dignity and autonomy would be better respected by risking the harm (consistently with their will and preferences) or by not doing so (and thereby departing from their will and preferences).
- 10.33 It is not easy to identify how the law might best distinguish between these different circumstances. As with a harm-based appointment of a representative (discussed in Chapter 9), we think that the risk of overly paternalistic departure from a person's will and preferences is likely greater than the risk of insufficient consideration being given to the risk of harm and that law should be designed with this in mind. For example, a new Act might provide that a risk of harm to the person is only grounds for departing from their will and preferences when it is a risk of *significant* harm or perhaps even a *material* risk of significant harm.
- 10.34 Importantly, harm cannot simply mean that some particular rights will not be exercised, or their potential benefits not maximised. The rights engaged in different decisions will vary. They may be specific rights under the law such as rights under a contract or to particular property. They may be human rights such as the inherent right to life, the right to physical and mental integrity, the right to the highest attainable standard of health or the right to an adequate standard of living.<sup>15</sup> In all cases, they need to be viewed through the prism of dignity and autonomy, the essence of which is individual determination of whether and how particular rights are exercised.
- 10.35 There may also be other situations in which a person's will and preferences alone are not a sufficient basis on which to make a decision. For example, a

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<sup>14</sup> Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [3.84]–[3.91].

<sup>15</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 10, 17, 25 and 28.

person may have a very clear will and preference (such as where they wish to live) that it is not possible to implement (perhaps for financial reasons).<sup>16</sup>

### How should a representative make decisions when a person's will and preferences are not sufficient?

- 10.36 We are considering how representatives should make decisions in those situations where a person's will and preferences do not provide enough information or an acceptable basis to make a decision.
- 10.37 One option is that the representative should act in a way that best promotes and upholds the represented person's human rights. This was the approach recommended by the Australian Law Reform Commission, which said a person's human rights should guide decisions where it is not possible to determine the will and preferences of the person.<sup>17</sup> A similar approach was recommended by the Scottish Law Mental Health Law Review.<sup>18</sup>
- 10.38 Such an approach obviously aligns with the requirement under article 12 to respect the person's rights, will and preferences. However, there is a difference between having regard to a person's human rights when supplementing their will and preferences and having regard to their human rights when *departing from* them. As we discuss in Chapter 3, a person's rights, will and preferences must each be accorded proper weight and significance. This suggests, we think, that a departure from a person's will and preferences should be no greater than is required to ensure that their dignity, autonomy and equality are upheld and protected to the maximum extent possible.
- 10.39 In addition, a new Act will require an approach that is practically workable. We doubt that a statutory decision-making framework that required representatives to consider the represented person's human rights would be workable. Human

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<sup>16</sup> The Scottish Mental Health Law Review also thought it might be necessary to act not solely based on a person's will and preferences where it is necessary for the person's well being, or to give effect to a person's earlier will and preference: Scottish Mental Health Law Review *Final Report* (September 2022) at 245.

<sup>17</sup> Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [3.53].

<sup>18</sup> Scottish Mental Health Law Review *Final Report* (September 2022) at 229.

rights are complex and not understood by everyone. Many people acting as representatives are family members without a legal background. At a minimum, significant guidance and training would be required. For example, the Australian Law Reform Commission recommended that guidelines, training, codes of practice and other explanatory material be developed.<sup>19</sup> Even then, however, there may be a significant risk of uncertainty and inconsistency as it cannot be assumed that all representatives will be in a position to adequately consider and understand that guidance. In our view, it would be preferable for a new Act to state how decisions should be made in a way that can more readily be applied by non-experts.

- 10.40 For example, a new Act might require that decisions reflect the person's will and preferences to the maximum extent possible without giving rise to significant harm (or a material risk of significant harm) to the person.
- 10.41 Alternatively, the decision-making framework generally might be described in plain language with a list of factors for the representative to consider. The Victorian and New South Wales Law Reform Commissions took this approach in recommending that decisions should be made based on a person's personal and social wellbeing.<sup>20</sup> Such an approach might specify relevant factors such as:<sup>21</sup>
- (a) The represented person's will and preferences. (This factor might itself be accompanied by a plain-language explanation of what it means.)
  - (b) The extent (if any) to which a decision reflecting solely the person's will and preferences would give rise to significant harm to the person (or a material risk of significant harm to the person).

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<sup>19</sup> Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [3.78].

<sup>20</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [5.27]; Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [6.94] and [17.100]–[17.103]; Guardianship and Administration Act 2019 (Vic), s 9(1)(c).

<sup>21</sup> Many of these factors are based on the Mental Capacity Act 2005 (UK); Guardianship and Administration Act 2019 (Vic), s 9; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)–(2); New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) recommendation 5.4; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), recommendation 4-8.

- (c) The views of family and whānau.
- (d) Social and cultural matters.
- (e) Whether the decision is the least restrictive option.

**QUESTION 15:**

Do you agree that a person's will and preferences should be considered together as part of an in-the-round assessment?

**QUESTION 16:**

How do you think a person's rights should be taken into account?

**QUESTION 17:**

When might it not be appropriate or sufficient for a representative to make a decision based only on a person's will and preferences?

**QUESTION 18:**

How should a representative make decisions when it is not appropriate or sufficient to make a decision based only on a person's will and preferences? What factors should the representative consider?

### ***Decision-making process***

10.42 As noted above, a robust decision-making process is important to giving effect to the decision-making framework. In particular, it is important to identifying a person's will and preferences. In this section, we consider:

- (a) How the role of court-appointed representatives can properly reflect the significance of decision-making support.
- (b) What consultation obligations the court-appointed representative should have.

### ***The significance of decision-making support***

10.43 Consistent with the Disability Convention's emphasis on support for decision-making, we think the role of the representative should reflect the significance of support. Some submitters told us that the role of court-appointed representatives should be strengthened by making clear that they have a supportive function.

- 10.44 As we discuss below, we think the representative should not make a decision unless they believe the represented person does not have decision-making capacity for it. Support is likely to be important when the representative is considering whether the represented person has decision-making capacity. It will also be important when the represented person is expressing their views about a decision.
- 10.45 We are interested in hearing views on how the representative role should include support. Some possible options include:
- (a) The representative providing the represented person with or ensuring the represented person has access to practicable and appropriate support.<sup>22</sup>
  - (b) Permitting and encouraging the represented person to participate in the decision as fully as possible.<sup>23</sup>
  - (c) Ensuring that the representative explains their role to the represented person to the extent possible in a way the represented person is likely to understand.<sup>24</sup>

### Consultation obligations

- 10.46 Under the PPPR Act, welfare guardians and property managers must consult with the represented person and anyone else who is competent to advise them on the represented person's welfare or property.<sup>25</sup> Consultation obligations are a useful way of ensuring that court-appointed representatives hear from the person affected and other relevant people. They are also often likely to be an essential part of ensuring that the representative understands the represented person's will and preferences and therefore how to exercise their decision-making role. Several submitters told us that representatives should be required to consult. We heard that:
- (a) There should be a duty to consult or communicate with the person with affected decision-making.

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<sup>22</sup> Guardianship and Administration Act 2019 (Vic), s 8(a). This requirement is framed as a principle that the representative must have regard to.

<sup>23</sup> Mental Capacity Act 2005 (UK), s 4(4).

<sup>24</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 43(4).

<sup>25</sup> Protection of Personal and Property Rights Act 1988, ss 18(4) and 43.

- (b) The representative should consult with the represented person's family and whānau, friends, medical professionals or other relevant people.
- (c) There should be a requirement for regular meetings between the representative and the person with affected decision-making, their whānau and people who support them.
- (d) In the case of a Māori person with affected decision-making, particular respect must be paid to the mana of that person's whānau, to honour the importance of whakapapa and the kinship obligations of whanaungatanga.<sup>26</sup>

10.47 We are interested in hearing views on who court-appointed representatives should consult with and how. We expect that consultation obligations will need to be limited to those that are reasonable in the circumstances, particularly in relation to consultation with people other than the represented person. For example, there may be people who the represented person does not want involved or informed about some (or all) decisions. It may not be practicable to consult everyone in the time available. It may be that the representative already knows enough about the views of others.

**QUESTION 19:**

How should the representative role provide for decision-making support?

**QUESTION 20:**

Who should the representative consult with and how?

**QUESTION 21:**

Are there any other steps a representative should be required to take when making a decision?

## WHEN SHOULD THE REPRESENTATIVE MAKE DECISIONS?

10.48 Sometimes, the scope of a court-appointed representative's decision-making role could cover decisions for which the represented person has decision-making capacity. As we discuss in Chapter 9, a person's ability to make

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<sup>26</sup> We discuss mana, whakapapa and whanaungatanga in Chapter 5.

decisions can fluctuate or change over time. In addition, while we think the scope of an arrangement should be limited to the decisions (or classes of decisions) for which a person does not have decision-making capacity (discussed below), it will be difficult to do this with complete accuracy.

- 10.49 The PPPR Act does not address this issue directly. However, it does require welfare guardians to support the exercise of the represented person's capacity and encourage them to act on their own behalf.<sup>27</sup> This suggests that a representative should not make a decision when the represented person has decision-making capacity. We heard that some representatives carefully consider whether the person can make a decision themselves and support them to make decisions where possible. However, we also understand that this does not always occur and that decisions are sometimes made without the input or knowledge of the represented person.
- 10.50 We heard that arrangements should be able to accommodate decision-making capacity that fluctuates or changes over time. One way to achieve this would be to tailor the scope of an arrangement so that it only covers decisions where the represented person does not have decision-making capacity. As we discuss below, we think this is a good idea, but there are likely practical limits to it, including difficulty in tailoring the scope of a representative arrangement with complete precision. There may be an inescapable risk of some decisions for which the person has decision-making capacity falling within the scope of an arrangement. There will also always be cases where people's decision-making capacity fluctuates.
- 10.51 Consequently, we think it will also be necessary to clarify that a representative only has authority to make decisions for which the represented person does not have decision-making capacity. For example, for each decision the representative could be required to:
- (a) Consider whether the represented person has decision-making capacity for the decision (having received all available support).
  - (b) Not make the decision if they believe (acting reasonably) that the represented person has decision-making capacity for it.

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<sup>27</sup> Protection of Personal and Property Rights Act, ss 18(3) and 36.



- 10.52 A similar approach exists in New Brunswick, where the law says a representative “shall not make a decision on behalf of a represented person if the representative is of the opinion that the represented person has the capacity to make the decision”.<sup>28</sup> In England and Wales, a representative is similarly unable to make a decision if they know or have reasonable grounds that the represented person has decision-making capacity.<sup>29</sup>
- 10.53 If such an approach was adopted, various consequential issues would need to be considered. Two examples are as follows:
- (a) The decision that needs to be made may be one that third parties want to be sure is made by someone with decision-making capacity. The representative may consider that they cannot act because the affected person has decision-making capacity. However, a third party to the decision (such as the other party to an intended contract) might be reluctant to proceed. They may be concerned about the risk of the representative later being found to have been wrong and the decision (such as entry into the contract) being challenged. A new Act would need to address this risk.
  - (b) A new Act would also need to contain adequate safeguards against representatives improperly deciding (or asserting) that a person has decision-making capacity. This may be especially important if the represented person wants to make a decision that will benefit the representative or someone who is associated with the representative.

**QUESTION 22:**

Do you agree that the representative should not be able to make a decision unless they consider the represented person does not have decision-making capacity?

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<sup>28</sup> Supported Decision-Making and Representation Act, SNB 2022 c 60 (New Brunswick), s 41(3).

<sup>29</sup> Mental Capacity Act 2005 (UK), s 20(1).

## THE TEST FOR APPOINTING A REPRESENTATIVE

### Current law

- 10.54 When considering whether to appoint a welfare guardian or a property manager, te Kōti Whānau | Family Court must first determine whether it has jurisdiction to make the order. Jurisdiction is established if the person is assessed wholly or partly to lack decision-making capacity to make decisions about their personal care and welfare or to manage their own affairs in relation to their property.<sup>30</sup>
- 10.55 If jurisdiction is established, the court may make an order. In exercising its discretion, the court must be guided by the Act's primary objectives of ensuring the least restrictive intervention and encouraging the person to develop their own capacity.<sup>31</sup>
- 10.56 The PPPR Act does not expressly require that cultural considerations are taken into account, but it can do so. One example is *S v S*, where the court accepted that the Family Court could consider tikanga.<sup>32</sup> In doing so, it considered the effect of dementia mate wareware from an ao Māori perspective.<sup>33</sup>
- 10.57 For property managers, this is all the court is required to consider. However, the test for appointing welfare guardians has additional elements. The court must also be satisfied that the person “wholly lacks” decision-making capacity in relation to any particular aspect or aspects of the personal care and welfare of that person, and that the appointment of the welfare guardian is “the only satisfactory way to ensure that appropriate decisions are made” in relation to the decisions at issue.<sup>34</sup>

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<sup>30</sup> Protection of Personal and Property Rights Act 1988, s 6(1). The person must also be domiciled or ordinarily resident in Aotearoa New Zealand or the property at issue must be in Aotearoa New Zealand: s 25.

<sup>31</sup> Protection of Personal and Property Rights Act 1988, s 8.

<sup>32</sup> *S v S* [2021] NZFC 5911 at [19].

<sup>33</sup> *S v S* [2021] NZFC 5911 at [26]–[27].

<sup>34</sup> Protection of Personal and Property Rights Act 1988, s 12(2).

10.58 The courts also sometimes consider whether the appointment of a welfare guardian would be in the person's best interests. This consideration is not in the PPPR Act and has been developed by the courts.<sup>35</sup>

## Key issues

### *The use of decision-making capacity*

10.59 The concept of decision-making capacity as a basis for the test raises a number of significant issues. These are discussed in Chapter 7.

### *Different tests for appointing welfare guardians and property managers*

10.60 Currently, the test for a welfare guardian is more restrictive than the test for appointing a property manager. While financial and welfare decisions are of a different nature, it is not clear why the test for appointing a welfare guardian is different. In both situations, the intervention can be intrusive. Financial decisions can also have a significant impact on a person, and "some people experience a loss of control over these decisions as a deep infringement upon their autonomy and dignity".<sup>36</sup>

### *Issues relating to rights, will and preferences*

10.61 The current tests for appointment of welfare guardians and property managers raise a number of issues relating to the requirement to respect the person's rights, will and preferences.

10.62 First, as we discuss above, the role of a welfare guardian and property manager is focused on a person's best interests. The courts may also consider whether the appointment of a welfare guardian is in a person's best interests.<sup>37</sup> However, as discussed above, the concept of best interests involves paternalism and has been criticised. In our view, a test based on a person's

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<sup>35</sup> Alison Douglass "Best Interests — A Standard for Decision-making" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 63 at 71. See for example *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 at 365–366 (HC); and *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [15].

<sup>36</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.93].

<sup>37</sup> See for example *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [15].

best interests is unlikely to be consistent with a reformed decision-making role that properly respects the represented person's rights, will and preferences.

- 10.63 Second, we have heard concerns that the person who is the subject of the order is not always sufficiently centred in the application for appointment of a welfare guardian or property manager. While a person with affected decision-making must be represented by a lawyer at the court hearing, there is no requirement for the court to hear directly from the person with affected decision-making nor any express requirement that the court consider the person's views.<sup>38</sup> We consider how to increase the participation of the person who is the subject of the application in Chapter 17.
- 10.64 Third, it is not clear that the test for appointing a welfare guardian is operating as stringently as intended. The test was "intended to be rigorous" because restricting the autonomy of people "is a serious step".<sup>39</sup> However, we have heard that this is not always happening in practice and that insufficient consideration is sometimes given to the nature of the intervention and whether other alternatives are available.

## Reforming the test

### *The test should be the same for financial and welfare decisions*

- 10.65 We think that the test for appointing a representative should be the same whether the decisions at issue are personal or financial. Both types of representatives may involve incursions on a person's autonomy.

### *Developing a new test*

- 10.66 Broadly speaking, we suggest that the test contain three elements:
- (a) The court should be satisfied that the person with affected decision-making does not have decision-making capacity for the decision or decisions at issue.

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<sup>38</sup> Protection of Personal and Property Rights Act 1988, s 65. There is a requirement to consider the subject person's views when considering the suitability of the welfare guardian or property manager: ss 12(7) and 31(7).

<sup>39</sup> Department of Justice *Protection of Personal and Property Rights Bill: Report of the Department of Justice* (JL/87/308, 22 May 1987) at 10.

- (b) The court should be satisfied that the circumstances of the person give rise to a need for the appointment of a representative.
- (c) The court should be satisfied that less intrusive measures (such as support arrangements) are either not available or not suitable.

10.67 We discuss each of these elements below.

### Decision-making capacity

10.68 As we discuss in Chapter 7, we consider that the concept of decision-making capacity should continue to play a role under a new Act. In this context, we think it should remain part of the test for appointing a representative.

10.69 However, we also consider that an absence of relevant decision-making capacity should be only one element of the test. Given court-appointed representative arrangements can be intrusive, we do not consider that an absence of decision-making capacity alone is enough to justify the arrangement. The circumstances of the person must also justify the arrangement, and the court should be satisfied that less intrusive measures are either unavailable or unsuitable.

### A need for the arrangement

10.70 In Chapter 9, we discuss the types of circumstance that might require someone to be appointed to make a decision (or class of decisions) for a person. These circumstances would need to be properly reflected in the test for appointing a representative set out in a new Act. That test should be sufficiently general to cover the wide variety of specific situations in which the need for a court-appointed representative may arise but exclude those situations in which it does not. It must also be workable in practice, including being clear and readily understandable.

10.71 There are challenges in framing a test to satisfy these requirements. Ways in which it has been described overseas include that an order is for a person's "personal and social wellbeing" or that an order is "needed".<sup>40</sup> However, these

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<sup>40</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [5.27] and recommendation 9.3; Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [6.94] and [17.100]–[17.103]; Guardianship and Administration Act 2019 (Vic), s 9(1)(c).

may be too general, at least without additional provisions expanding on them. As Chapter 9 discusses, we are considering whether a more detailed articulation of the circumstances that may constitute a need would be preferable.

10.72 Two factors that may be relevant in this context are:

- (a) The extent to which considerations can include future needs. For example, at the time that an application to appoint a representative is made to the court, the person concerned may not be at risk of making a significantly harmful decision or need a person with decision-making capacity to enter into any contract. However, it may be foreseeable that such a need will arise. Requiring an application to wait until the need has become urgent may mean that needs go unmet. However, neither should representatives be appointed prematurely.
- (b) The nature of the representative's decision-making role. As discussed above, we think that the decision-making framework and process should ensure that the represented person's rights, will and preferences are respected, including by giving the representative the power to make decisions only for which the person does not have decision-making capacity. The appointment of a representative should therefore restrict the person's autonomy to a lesser extent than might be the case under a 'best interests' decision-making model.

10.73 We are also interested to hear views on what matters a court should consider when determining whether there is a need for a representative arrangement. These matters might include:<sup>41</sup>

- (a) The will and preferences of the person with affected decision-making. What this involves will likely depend on the circumstances. A person may have clear views about the appointment of a representative such as disagreeing with the appointment. Another person might not be able to express a clear view so that the court may need to consider their past wishes and values. A person may wish to be supported to give their views.

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<sup>41</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.3; Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012), recommendations 174–177; Guardianship and Administration Act 2019 (Vic), ss 30(2) and 31.

We discuss ways people can be supported to be involved in court processes in Chapter 17.

- (b) The views of whānau and family members. The view of whānau and family members may be relevant both to determining the will and preferences of the person and to identifying whether an order is needed.
- (c) Any risks of harm. As we discuss in Chapter 9, we think that these should be considered in light of the will and preferences of the represented person.
- (d) Any other factors that are relevant to the situation at issue.

### Less intrusive or restrictive measures are either not available or not suitable

10.74 Measures relating to the exercise of legal capacity must be proportional.<sup>42</sup> In addition to a lack of decision-making capacity and a need for an arrangement, we consider that the court should be satisfied that there are no less intrusive or less restrictive measures available to address that need. For example, it may be possible that the need for an order could be managed through adequate support. It could also be that a one-off court-ordered decision rather than the appointment of a representative is sufficient to address the need.

#### QUESTION 23:

Do you agree the test for a representative should be the same for both welfare and property decisions? Why or why not?

#### QUESTION 24:

Do you agree the court should be satisfied that the person does not have decision-making capacity for the decision or decisions at issue before appointing a representative? Why or why not?

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<sup>42</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4). As well, as we discuss in Chapter 3, because court-appointed representative arrangements will frequently engage other human rights it is important they are justified. Ensuring that other measures are not available is relevant to the justification inquiry.

**QUESTION 25:**

Do you agree that the court should be satisfied that the person's circumstances give rise to a need for a representative to be appointed? If so, what factors are relevant to this assessment?

**QUESTION 26:**

Do you agree the court should be satisfied that less intrusive or restrictive measures are either not available or not suitable before appointing a representative? Why or why not?

**SCOPE OF THE ARRANGEMENT**

10.75 In this section, we discuss two issues relating to the scope of a representative arrangement. We discuss:

- (a) How a new Act can ensure the scope of a representative arrangement is justified and yet remains workable.
- (b) Whether there are any types of decisions that should never be included in an order.

**Ensuring the scope of the arrangement is workable and justified*****Current law***

10.76 The PPPR Act does not expressly connect the test for appointing a representative with the decision or decisions included within the scope of the arrangement. Under the PPPR Act, a welfare guardian may be appointed “in relation to such aspect or aspects of the personal care and welfare of that person as the court specifies in the order”.<sup>43</sup> For property managers, they may be appointed as the manager “of the property, or any specified part of the property” of the person with affected decision-making.<sup>44</sup>

10.77 In some cases, the court has considered the scope of the arrangement in light of the statutory test for appointing a welfare guardian or property manager. In

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<sup>43</sup> Protection of Personal and Property Rights Act 1988, s 12(1).

<sup>44</sup> Protection of Personal and Property Rights Act 1988, s 31(1).



*Re H*, the Court found that the extent of a welfare guardian arrangement should be guided by the primary objectives of least restrictive intervention and encouraging the person to develop capacity.<sup>45</sup> In *Flavell v Campbell*, the Court said that property orders should be tailored to minimise interference with the subject person's rights. It should only apply to those areas where intervention is essential.<sup>46</sup>

10.78 However, we understand that wide orders are frequently made, particularly for welfare guardians.<sup>47</sup> For example, in *BJR v VMR*, the scope of the arrangement was considered on appeal. The person at the centre of the case, "Alice", had high and complex needs and resided at a care facility.<sup>48</sup> The Family Court appointed a welfare guardian for all care and welfare decisions.<sup>49</sup> The parties agreed that use of the guardianship powers would be rare given most healthcare decisions could be reached through a collaborative process.<sup>50</sup>

10.79 On appeal, it was argued that the order "was not the least restrictive approach available".<sup>51</sup> For it to be justified, "the order should have been tailored to limited circumstances and situations".<sup>52</sup> *Te Kōti Matua | High Court* was initially attracted to the idea of restricting the order to aspects of Alice's care and welfare. However, in the process of developing restrictions, the Court reached the view that it was unworkable because "[r]estrictions initially designed to deal with emergency medical situations were then expanded to include urgent care situations".<sup>53</sup>

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<sup>45</sup> *Re H* [1993] NZFLR 225 at 232.

<sup>46</sup> *Flavell v Campbell* [2019] NZHC 799, [2019] NZLFR 18 at [66].

<sup>47</sup> See for example *E v E* HC Wellington CIV-2009-485-2335, 20 November 2009 at [7] and [10]; *JW v CW* [2020] NZFC 6683, [2020] NZFLR 940.

<sup>48</sup> *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945.

<sup>49</sup> *VMR v BJR* [2013] NZFC 9104, as cited in *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945 at [2].

<sup>50</sup> *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945 at [40].

<sup>51</sup> *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945 at [36].

<sup>52</sup> *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945 at [36].

<sup>53</sup> *BJR v VMR* [2014] NZHC 1548, [2014] NZFLR 945 at [46].

### **Reforming the scope of the order**

- 10.80 Broadly speaking, we think that the scope of a representative's decision-making role should be expressly connected to the reason for their appointment. This is another way of ensuring that decisions are only made for the represented person when required. Some submitters also thought representative orders should be more specific, rather than conferring wide decision-making functions on welfare guardians or property managers.
- 10.81 However, we understand that there may be practical concerns with tailoring arrangements. We have heard that wide orders can be needed because it is difficult to anticipate in advance what decisions will need to be made. A wide order therefore reduces the need for future applications to the court. While the powers might not frequently be used, they will be available in case they are needed. In the case of *MJR v VMR*, the wide order was granted in part because there had already been multiple applications to the Family Court. As we discuss in Chapter 17, we heard that there are barriers to accessing the court, including delays and costs.
- 10.82 Consequently, we expect that a balance will need to be struck between ensuring the scope of the order is no wider than required and addressing practical concerns about the need to allow sufficient scope. Where possible, we think it would be preferable for the scope of the arrangement to identify the particular decision or decisions at issue. However, this may not always be practicable. The arrangement may need to apply to a class of decisions such as health decisions. A requirement that the representative not make decisions for which the represented person has decision-making capacity may be particularly significant in these cases.

#### **QUESTION 27:**

Do you agree that the scope of a representative's decision-making role should be expressly connected to the reason for their appointment? Why or why not?

## Should any types of decision require express court approval or be excluded?

### *Decisions about a person's care and welfare*

10.83 The PPPR Act prohibits welfare guardians from making the following decisions:<sup>54</sup>

- (a) Entering or ending a marriage or civil union.
- (b) Adopting a child.
- (c) Refusing consent to a standard medical treatment intended to save the person's life or prevent serious damage to the person's health.
- (d) Consenting to electro-convulsive treatment.
- (e) Consenting to 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.
- (f) Consenting to take 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 the person's health.
- (g) Requesting assisted dying.

10.84 Case law also requires certain health decisions such as pregnancy terminations and sterilisations to only be made by a welfare guardian if that power is expressly conferred by the Family Court.<sup>55</sup> As explained in *Re H*, for invasive and irreversible procedures, “most careful thought would need to be given to whether it could be right to vest in a welfare guardian unrestricted power to consent” to such treatments.<sup>56</sup>

10.85 We are interested in hearing views on whether there are any other personal decisions that a representative should be prohibited from making or whether any of the current prohibitions should be removed. Some other restrictions on personal decisions exist in overseas jurisdictions, including:<sup>57</sup>

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<sup>54</sup> Protection of Personal and Property Rights Act 1988, s 18(1).

<sup>55</sup> *Re H* [1993] NZFLC 225.

<sup>56</sup> *Re H* [1993] NZFLC 225 at 233.

<sup>57</sup> Guardianship and Administration Act 2019 (Vic), s 39; Mental Capacity Act 2005 (UK), s 27; Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 44(1) and 138.

- (a) Entering or ending a sexual relationship.
- (b) Making a decision about the care or wellbeing of a child.
- (c) Entering a surrogacy arrangement.
- (d) Making or discharging a parenting order.
- (e) Stopping a person from having contact with the represented person.

10.86 We are also interested in views on whether any decisions should be directly authorised by the Family Court. For example, we have heard that a representative should only be able to consent to detention in residential care if they are specifically empowered to do so.

10.87 We are also aware that the legal basis for conducting research with adults who may not have the decision-making capacity to consent to the research is limited and unclear in Aotearoa New Zealand.<sup>58</sup> It may be that, in appropriate circumstances, the court should be able to authorise a representative to consent to the represented person's involvement in specific research.<sup>59</sup>

### **Decisions about property**

10.88 Under the PPPR Act, property managers are not expressly prohibited from making any decisions. However, there are certain decisions that a property manager may only make if authorised by the court. These include:<sup>60</sup>

- (a) Gifts of over \$5,000 a year.<sup>61</sup>
- (b) The purchase of a home (or other property-related transaction) of more than \$120,000.<sup>62</sup>

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<sup>58</sup> See Alison Douglass *Mental Capacity Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at ch 6.

<sup>59</sup> For discussion of the types of matters a court would need to consider to ensure the research is ethical and there are sufficient safeguards, see Alison Douglass *Mental Capacity Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at ch 6.

<sup>60</sup> Protection of Personal and Property Rights Act 1988, sch 1 cl 1. In addition, if the court has directed that a person subject to a property order cannot make a will with leave of the court, the court may authorise the manager acting for that person to execute the will in such terms as the court directs: Protection of Personal and Property Rights Act 1988, s 55(1).

<sup>61</sup> Protection of Personal and Property Rights Act 1988, sch 1 cl 1(b)(ii).

<sup>62</sup> Protection of Personal and Property Rights Act 1988, sch 1 cl 1(b)(iii) and sch 1 cl 3.

(c) Entering into a lease for a term of more than 10 years.<sup>63</sup>

10.89 We are interested in hearing whether reform is required. For example, while the threshold of \$120,000 for property transactions can be increased, it never has been.<sup>64</sup>

10.90 A further question is whether the need for the court to authorise some decisions is useful for managing conflicts of interest. In Chapter 11, we explain our view that representatives should be permitted to act in situations of conflict of interest provided the conflicts are properly managed. However, other safeguards could be required. One option might be for certain decisions such as those where a representative materially benefits from a decision to require express approval. Another option would be to prohibit certain conflicted decisions entirely. For example, in Victoria, a representative may not enter into a property transaction that gives rise to a conflict.<sup>65</sup>

**QUESTION 28:**

In addition to the current prohibitions, are there any other personal decisions that a representative should be prohibited from making? Should any of the current prohibitions be removed?

**QUESTION 29:**

Are there any personal decisions that should be expressly authorised by the court? If so, what are they?

**QUESTION 30:**

Is any reform required to the property decisions that must be expressly authorised by the court? If so, what?

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<sup>63</sup> Protection of Personal and Property Rights Act 1988, sch 1 cl 1(r).

<sup>64</sup> Protection of Personal and Property Rights Act 1988, sch 1 cl 3.

<sup>65</sup> Guardianship and Administration Act 2019 (Vic), s 57.

## ENSURING THAT ARRANGEMENTS ARE IN PLACE NO LONGER THAN NECESSARY AND SUBJECT TO REVIEW

10.91 In this section, we discuss ways to ensure that representative decision-making arrangements are in place no longer than necessary and are subject to regular review. We discuss:

- (a) The ability of the court to impose representative arrangements for a limited period.
- (b) Reviews of arrangements.
- (c) Rights of appeals.

### Setting arrangements for limited periods

10.92 Under the PPPR Act, the court can set an expiry date for an order appointing a welfare guardian or property manager.<sup>66</sup>

10.93 In some cases, the court has used this power to limit the period of a representative arrangement. In *Re CLD*, the Court ordered that accommodations be provided to CLD and appointed Public Trust as the property manager to pay rent and utility costs. The order was set for 18 months. The Court was “optimistic, as are the health professionals, that it may not be necessary for orders to continue indefinitely and this should be worked towards”.<sup>67</sup>

10.94 In our view, this feature should be retained. It is another tool enabling the court to ensure that the role of court-appointed representatives is confined to the extent that is necessary. It is also consistent with the requirement of the Disability Convention that such arrangements apply for “the shortest time possible”.<sup>68</sup> One option could be to require the court to consider whether it is appropriate to appoint the representative for a limited period.

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<sup>66</sup> Protection of Personal and Property Rights Act 1988, s 17(1)(a).

<sup>67</sup> *Re CLD* FC North Shore FAM-2002-004-1729, 15 September 2010 at [97].

<sup>68</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

## Reviews of arrangements

### *Current law*

- 10.95 Under the PPPR Act, welfare guardians and property managers are subject to periodic review. The court must specify a date not later than three years by which the welfare guardian or property manager is required to apply to the court for review of an order.<sup>69</sup> In addition, several people, including the property manager, welfare guardian and represented person, can apply at any time for review of a welfare guardian or property order.<sup>70</sup>
- 10.96 During a review, the court has discretion about what to review but must review the decision-making capacity of the person.<sup>71</sup> The court shall also be guided by the Act's primary objectives.<sup>72</sup> It appears there was some intention that the periodic reviews specified in the court's order would be *de novo*.<sup>73</sup> In other words, the review would consider the need for a representative afresh. We have heard that sometimes periodic reviews are heard without holding a court hearing. Instead, the court considers written submissions from the parties.
- 10.97 Following a review, the court may:<sup>74</sup>
- (a) Vary or decline the order.
  - (b) Discharge or decline to discharge the order.
  - (c) Extend the order for a further period.
  - (d) Make any order that it could have made in the original application, whether in addition to or instead of the order under review.
- 10.98 Decisions of the welfare guardian and property manager can also be challenged. The person with affected decision-making or any other person with leave of the court may apply at any time to review a particular decision. If in all

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<sup>69</sup> Protection of Personal and Property Rights Act 1988, ss 12(8) and 31(8).

<sup>70</sup> Protection of Personal and Property Rights Act 1988, ss 86(1) and 87(2).

<sup>71</sup> Protection of Personal and Property Rights Act 1988, ss 86(2) and 87(3).

<sup>72</sup> Protection of Personal and Property Rights Act 1988, ss 86(4) and 87(5).

<sup>73</sup> Protection of Personal and Property Rights Bill 1986 (90-1) (explanatory note) at vi.

<sup>74</sup> Protection of Personal and Property Rights Act 1988, ss 86(5) and 87(6).

the circumstances it is reasonable to do so, the court may review the decision and make such order as it thinks fit.<sup>75</sup>

### Reforming periodic review

- 10.99 We consider that there should continue to be periodic review of court-appointed representative arrangements. However, there may be ways of improving the periodic review function.
- 10.100 There are several reasons for periodic reviews. They help ensure that orders are not in place for longer than they should be. A person's decision-making capacity or circumstances may change such that a representative order is no longer needed or needs to be amended. Regular review can help prevent and address abuse and exploitation.<sup>76</sup> It is also a way of ensuring that the representative remains suitable to carry out the role. Some submitters told us the periodic review function is an important safeguard. Periodic reviews are also required under the Disability Convention.<sup>77</sup>
- 10.101 On the other hand, we also heard that periodic reviews can be draining and costly on participants. Procedural delays can leave the person with affected decision-making vulnerable until a new order is made. We have heard there is stress and emotion in having to repeatedly "prove" or "justify" your situation. In *Re SMK*, the Court noted "there is an intrusive element in terms of persistent reviews".<sup>78</sup> It can place an additional strain on the court and health systems.

### Time period before first review

- 10.102 As noted above, under the PPPR Act any periodic review must be scheduled within three years. We are considering whether the time before the first review should be shorter. Some jurisdictions require the first review to take place one

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<sup>75</sup> Protection of Personal and Property Rights Act 1988, s 89(1).

<sup>76</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.83].

<sup>77</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>78</sup> *Re SMK* [2012] NZFC 5175 at [4].



year after the representative's appointment.<sup>79</sup> We have heard that a person's decision-making capacity can change when a representative arrangement is first put in place, as the person may be in a more stable living arrangement with access to greater support. One option would be to require the first review of a court-appointed representative arrangement to occur within one year.<sup>80</sup>

### Time period between subsequent reviews

10.103 We are also considering whether the time period should change for subsequent reviews. We understand that sometimes the court sets the period between reviews at five years although three years is the period stipulated in the PPPR Act.

10.104 Some submitters told us that court-appointed representative arrangements should be reviewed yearly while others said they should occur every three years. Several submitters thought the maximum period between reviews should be longer than three years if the person's decision-making is permanently affected and very unlikely to change.

10.105 We are interested in hearing views on what the standard time between reviews should be and whether there should be an extension power. We expect that any extension power would need to be carefully tailored, as it would not be appropriate in all cases. An extension would also need to be weighed against the risk that, if the time between reviews is too long, orders may remain in place longer than they should.<sup>81</sup>

### What should the court consider in a periodic review

10.106 We think there may be a need for more guidance on what the court must consider when carrying out a periodic review. As noted above, the court has discretion about what to review but must review the decision-making capacity of the person.<sup>82</sup> The court shall also be guided by the Act's primary

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<sup>79</sup> See for example Guardianship and Administration Act 2019 (Vic), s 159; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 26(1).

<sup>80</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.8.

<sup>81</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.85].

<sup>82</sup> Protection of Personal and Property Rights Act 1988, ss 86(2) and 87(3).

objectives.<sup>83</sup> We heard there is variation in how periodic reviews are determined. Some submitters told us they were uncertain about what the court will consider in the periodic review.

10.107 Regarding what the court should consider, it may be appropriate (for example) for the court to consider whether there remains a need for the arrangement and whether a less intrusive option might now be available. It may also be useful for the court to be required to consider whether the representative is still suitable to act in the role and whether any conflicts of interest are being properly managed. As we discuss in Chapter 11, we think a representative should still be able to be appointed where there are conflicts of interest. However, the court should be satisfied that the conflicts of interest are being properly managed.

10.108 We heard also that:

- (a) At every review of a welfare guardianship, there should be a rebuttable presumption that it will be dissolved.
- (b) There should be a reassessment of the person's circumstances. Any changes in circumstances should be considered.
- (c) The subject person should always be involved and should have an opportunity to have their say unless there is a clear reason why not.
- (d) Updating evidence such as medical certificates should not be required if there is no realistic prospect of a change in the person's decision-making capacity.

**QUESTION 31:**

How frequently should periodic reviews be held?

**QUESTION 32:**

What should the court consider when carrying out a periodic review?

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<sup>83</sup> Protection of Personal and Property Rights Act 1988, ss 86(4) and 87(5).

### **Applications for review at other times**

10.109 We consider that reviews are a key accountability mechanism and that it should continue to be possible to apply for review at any point. It is important that there is a mechanism for terminating or amending an order if circumstances change or the representative is acting improperly.

10.110 We are interested to hear views on whether any circumstances should require the representative to apply for a review. For example, it may be appropriate to require a representative to apply for review if the circumstances that gave rise to the arrangement have materially changed.

10.111 We discuss issues relating to court accessibility in Chapter 17.

### **Rights of appeal**

10.112 Under the PPPR Act, a party to the proceeding or the person with affected decision-making may appeal a representative order to the High Court.<sup>84</sup> In our view, an appeal right should be retained alongside the review function. It is important that parties are able to challenge the original (or any revised) order. We have not heard of concerns about rights of appeal. However, we are interested to hear any views on what might be improved.

#### **QUESTION 33:**

Is there anything else you would like to tell us about the duration of arrangements, reviews of arrangements or rights of appeal?

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<sup>84</sup> Protection of Personal and Property Rights Act 1988, s 83.

## CHAPTER 11

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# Court-appointed representatives: other aspects

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### INTRODUCTION

11.1 In this chapter, we consider some other matters relating to court-appointed representatives. We discuss:

- (a) When a person might have more than one representative and how multiple representatives should act together.
- (b) The test for determining the suitability of a representative.
- (c) Other requirements about who can act as a representative, such as whether anyone should be prohibited from acting as a representative, the minimum age requirement to be a representative and when corporations can act as a representative.
- (d) The powers a representative may need in order to exercise their decision-making role.
- (e) The duties a representative should owe to the represented person.
- (f) The record-keeping and reporting requirements of a representative.
- (g) What should happen if a representative acts improperly.
- (h) Issues relating to the availability of a representative, such as what should happen if a person needs a representative and there is no one available and what should happen if the representative can no longer act during the arrangement.
- (i) Reimbursement and remuneration of a representative.

## MORE THAN ONE COURT-APPOINTED REPRESENTATIVE

### When might a person have more than one representative?

- 11.2 Under the Protection of Personal and Property Rights Act 1988 (PPPR Act), a person might have more than one court-appointed representative for two reasons:
- (a) First, welfare and property decisions are different representative arrangements. Care and welfare decisions are made by welfare guardians. Decisions about property are made by property managers. While the same person can act as both a welfare guardian and property manager, different people can also hold these roles.
  - (b) Second, because the PPPR Act permits more than one representative to be appointed in a role, a person can have more than one welfare guardian or more than one property manager.<sup>1</sup> Where more than one property manager is appointed by te Kōti Whānau | Family Court, their responsibility shall be jointly held unless the court orders otherwise.<sup>2</sup> The PPPR Act does not specify whether multiple welfare guardians are responsible for the same or different decisions.<sup>3</sup>

### *Reforming the law on multiple representatives*

- 11.3 There are two distinct questions to address in the context of multiple representatives. These are:
- (a) Whether welfare and property decisions should continue to be different types of representative arrangement.
  - (b) Regardless of whether welfare and property decisions are two types of arrangement, whether a new Act should allow for more than one

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<sup>1</sup> Protection of Personal and Property Rights Act 1988, ss 12(6) and 31(1). Welfare guardians can only be appointed if it is in the best interests of the person. There is not a similar restriction on multiple property managers.

<sup>2</sup> Protection of Personal and Property Rights Act 1988, s 31(2).

<sup>3</sup> In the cases we have read, welfare guardians were appointed for the same decisions: see *Re A* (1993) 10 FRNZ 537 (FC); *Re LM* (1992) 9 FRNZ 555 (FC); *AK v RJT* FC North Shore FAM-2009-090-2264, 29 August 2011; *Re RVR* FC Christchurch FAM-2007-054-472, 7 October 2010.

representative to be appointed for the same class of decisions and/or different classes of decisions.

### Should welfare and property decisions be two types of arrangement?

- 11.4 The New South Wales Law Reform Commission recommended a single representative arrangement, the scope of which is set by the court and can include financial and welfare decisions.<sup>4</sup> Other jurisdictions also have single representative arrangements.<sup>5</sup>
- 11.5 One reason to shift to a single type of arrangement is that it might simplify the process of establishing the arrangement, especially where one person is going to act in both roles. Currently, welfare guardians and property managers are appointed under separate orders.<sup>6</sup> If there was only one type of arrangement, the court could make one order appointing a proposed representative to make both financial and welfare decisions.<sup>7</sup> In addition, decisions relating to care and welfare will often have financial implications such as a need to spend more of the person's money to obtain additional care. Requiring there to be two different types of arrangement may add unnecessary complexity to this decision-making, especially when the roles are held by the same person.
- 11.6 On the other hand, the substance of financial and property decisions may be sufficiently different from care and welfare decisions that they merit different arrangement types. In *Grosser v Grosser*, te Kōti Matua | High Court said it made "sense to have a division between the roles" as "it enables separate people to fulfil each role, particularly where each role may require a different skill set".<sup>8</sup> The Victorian Law Reform Commission reached a similar view and

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<sup>4</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC 145, 2018), recommendation 9.1.

<sup>5</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 38(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(2)(b).

<sup>6</sup> The test for each is both different. However, as we discuss in Chapter 7, we think the test for determining whether a representative should be appointed should be the same for both welfare and property decisions.

<sup>7</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC 145, 2018) at [9.29]–[9.31].

<sup>8</sup> *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [57].

recommended the division between welfare and property representatives be maintained.<sup>9</sup>

- 11.7 We suggest that it would be preferable to have one type of decision-making arrangement. We think concerns about property and welfare decisions being different can be managed. As we discuss below, we think the court should be able to appoint more than one representative with different areas of responsibility. This would enable different people to be responsible for different areas according to their suitability. The different skills required for specific decision types could be managed through representatives' suitability requirements.

### Should a new Act allow more than one representative to be appointed?

- 11.8 In our view, the court should have the ability to appoint more than one representative both for the same classes of decision and for different classes of decision.
- 11.9 Several submitters supported the possibility of multiple representatives. Some submitters said that the role of representative can be onerous and multiple representatives would allow people to share the load. In *AK v RJT*, the Court thought it was appropriate to appoint Mr T's wife and daughter as welfare guardians so they could work in tandem and support each other.<sup>10</sup>
- 11.10 We also heard that multiple representatives might lead to better decisions. One submitter said it might provide greater checks and balances on the decision-making role. Another submitter said it would allow the appointment of representatives who bring different values and perspectives. This could be particularly important for older people because it would mean they could appoint someone from their peer group as well as a younger person.
- 11.11 The ability to appoint multiple representatives for the same decisions might be particularly important for people whose cultures expect a wider group of people to be involved in decision-making. Decision-making arrangements among Māori, for example, may involve the whānau. However, having a single representative does not necessarily mean the process by which a decision is

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<sup>9</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [5.45]–[5.47].

<sup>10</sup> *AK v RJT* FC North Shore FAM-2009-090-2264, 29 August 2011 at [4].

reached is not collective. We heard that having one person speak for the whole whānau would not be unusual.

- 11.12 As we discuss above, the ability to appoint multiple representatives for different decisions will be particularly important if there is only one type of decision-making arrangement.
- 11.13 If the court can appoint more than one representative, we are interested in whether there should be any restrictions on when this should occur. Multiple representatives (whether for the same or different decisions) may add complexity and make it harder to reach decisions, particularly if the representatives disagree. There may also be some decisions that, at least for some people, are better made by one representative. In *Grosser v Grosser*, the Court explained “that the type of decisions that welfare guardians may make are best left to individuals who have, or can develop, a personal relationship with the subject person”.<sup>11</sup> It referred to Parliamentary debate where (introducing the Bill for its second reading) the then Minister of Justice the Rt Hon Geoffrey Palmer said, “that kind of relationship is best developed on a one to one basis”.<sup>12</sup>
- 11.14 One way to manage these issues would be for the court to consider whether the appointment of multiple representatives (whether for the same or different classes of decisions) is appropriate having regard to the purpose and nature of the decision-making role. An additional option may be for the court to be required to consider during the suitability assessment whether the proposed representatives will be able to work together. There could also be a limit on the number of representatives a court can appoint.
- 11.15 If multiple representatives can be appointed, it will be important for a new Act to be clear on their liability for decisions.<sup>13</sup> We think that liability should follow the representative’s decision-making power. In other words, if the representatives are responsible for the same decisions, they should both be

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<sup>11</sup> *Grosser v Grosser* [2015] 3 NZLR 716, [2015] NZHC 974 at [33].

<sup>12</sup> *Grosser v Grosser* [2015] 3 NZLR 716, [2015] NZHC 974 at [33], citing (18 February 1988) 486 NZPD 2120–2121.

<sup>13</sup> We discuss the ability to bring civil claims against representatives later in this chapter.



liable. When representatives are responsible for different decisions, they should only be liable for their respective decisions.

### How multiple representatives might work together

- 11.16 If more than one representative is appointed, it is important that there be a clear process for how they work together and how disagreements are resolved. This is particularly so if they are responsible for the same decisions. However, given the potential for different decisions to interrelate, it is also important when the representatives are responsible for different decisions. We heard that welfare and financial decisions are not always easy to divide. For example, a decision about moving a person to a residential care facility involves both financial and welfare considerations. The decision about where to live is a welfare decision but payment to the facility will be required.
- 11.17 The PPPR Act only imposes consultation obligations on representatives when there are multiple representatives. If there is a welfare guardian and a property manager, they must consult with each other on a regular basis.<sup>14</sup> If two welfare guardians are appointed, they must regularly consult with each other.<sup>15</sup> There is no express consultation requirement for two property managers (although, as noted above, responsibility is usually held jointly). Welfare guardians and property managers may also apply to the court for directions regarding the exercise of their powers, which could presumably resolve any difference in views.<sup>16</sup>
- 11.18 We are considering whether there should be more extensive obligations on multiple representatives when working together. Some other jurisdictions provide either statutory obligations on multiple representatives or require a court to specify certain details when making an order for multiple representatives. For example, in Victoria, there are statutory requirements for multiple representatives working together. These include a duty to consult the other representative where responsibilities overlap, mandatory dispute resolution processes and an order of priority between different representatives

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<sup>14</sup> Protection of Personal and Property Rights Act 1988, ss 18(5) and 43(6).

<sup>15</sup> Protection of Personal and Property Rights Act 1988, s 12(6A).

<sup>16</sup> Protection of Personal and Property Rights Act 1988, ss 18(6) and 38(2).

where decisions conflict.<sup>17</sup> By contrast, in New Brunswick, the court is required when making an order for multiple representatives to specify the details of the order, including the representatives' responsibilities and powers for different matters and dispute resolution procedures.<sup>18</sup>

- 11.19 One benefit of this type of statutory obligation for representatives is that it will be clear and certain for everyone involved. The rules will be the same and universally understood. There should be less scope for disagreement or misunderstanding. Third parties will also know how multiple representatives will act with each other.
- 11.20 On the other hand, if all relevant obligations of multiple representatives are contained in statute there will be no ability to adapt the requirements to the particular circumstances. We anticipate there will be a wide range of joint relationships and ways of working together. If it is up to the court to determine the representatives' relevant obligations, it will be able to tailor them to the circumstances. The court will also have had the benefit of hearing evidence about the representatives' suitability and how they might work together.
- 11.21 We are interested to hear views on how representatives should work together and whether relevant obligations should be provided in the representative order, in a new Act or both.

**QUESTION 34:**

Do you think that welfare and property representatives should be separate roles? Why or why not?

**QUESTION 35:**

Do you think a court should be able to appoint more than one representative? If so, should this be for different decisions and/or the same decisions?

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<sup>17</sup> Guardianship and Administration Act 2019 (Vic), s 177(2)–(4).

<sup>18</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 38(3).

**QUESTION 36:**

If there are two or more representatives, how should they work together? Do you think a new Act should contain statutory obligations for multiple representatives or allow the court to decide what the obligations are?

**THE TEST FOR ASSESSING SUITABILITY****Current law**

11.22 Under the PPPR Act, there are several factors relevant to the court's assessment of a person's suitability to act as a welfare guardian or property manager:

- (a) The court must consider the wishes of the person with affected decision-making to the extent possible.<sup>19</sup>
- (b) The court must be satisfied the proposed welfare guardian or property manager can carry out their duties in a satisfactory manner, having regard to the needs of the person with affected decision-making and the relationship between them and the proposed appointee.<sup>20</sup>
- (c) The court must be satisfied that the proposed appointee will act in the best interests of the person with affected decision-making.<sup>21</sup>
- (d) If considering a proposed welfare guardian, the court must be satisfied there is unlikely to be a conflict of interest.<sup>22</sup> For property managers, the court must take into account any likely conflict of interest.<sup>23</sup>

11.23 These factors are not exhaustive. For example, the Family Court has also considered cultural considerations.<sup>24</sup> In *Re [S]*, Mr S was acting as the welfare guardian and property manager for his wife who had dementia. Their son applied for review of the orders on the basis he was more suitable. The court

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<sup>19</sup> Protection of Personal and Property Rights Act 1988, ss 12(7) and 31(7).

<sup>20</sup> Protection of Personal and Property Rights Act 1988, ss 12(5)(a) and 31(5)(a).

<sup>21</sup> Protection of Personal and Property Rights Act 1988, ss 12(5)(b) and 31(5)(b).

<sup>22</sup> Protection of Personal and Property Rights Act 1988, s 12(5)(c).

<sup>23</sup> Protection of Personal and Property Rights Act 1988, s 31(6).

<sup>24</sup> *Re [S]* [2021] NZFC 5911 at [25].

found cultural considerations were relevant to suitability because Mr S “[had] not been attending to [Mrs S’s] spiritual and psychological wellbeing in terms of her sense of connectedness with her tamariki and mokopuna”.<sup>25</sup> Conversely, the son had made “a concerted effort to embrace te ao Māori and tikanga” and believed it was important his mother be connected to her children.<sup>26</sup>

### Reforming the suitability requirements

11.24 Suitability requirements are important. Given the nature of the role, the court should be satisfied that a proposed representative is suitable.

11.25 In this section we consider:

- (a) Whether the suitability requirements in the PPPR Act continue to be appropriate.
- (b) Whether any factors should be determinative of suitability or whether they should all be part of an in-the-round suitability assessment.

### Factors relevant to suitability

11.26 We have not heard and do not consider that any of the suitability requirements in the PPPR Act and case law are inappropriate. We therefore suggest that the court should consider the following factors when assessing a representative’s suitability:

- (a) The ability of the representative to carry out the role.
- (b) The will and preferences of the represented person.
- (c) Any conflicts of interest.
- (d) Social and cultural considerations.

11.27 We discuss these factors and some issues we have identified below.

11.28 We do not consider that these factors should be exhaustive and the court should continue to be able to consider any other matter it considers relevant.

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<sup>25</sup> *Re [S]* [2021] NZFC 5911 at [43].

<sup>26</sup> *Re [S]* [2021] NZFC 5911 at [50].

## Ability to carry out the role

- 11.29 We heard that it is important for representatives to have the necessary skills to carry out the role. We are interested in what this means and how it should be assessed.
- 11.30 Under the PPPR Act, the court must be satisfied that a proposed representative will carry out their duties and act in the best interests of the person with affected decision-making. As discussed in Chapter 8, we consider that the decision-making role of a representative should be reformed to better respect the rights, will and preferences of the represented person. This has implications for the ability of the representative to carry out the role. In particular, focusing the decision-making role on the person's rights, will and preferences increases the importance of the representative having or being able to develop a good relationship with the represented person.<sup>27</sup> It will also be important for the representative to establish they have the time and ability to identify the person's will and preferences.<sup>28</sup>
- 11.31 We are considering whether there should be additional requirements for financial decisions. For example, in Victoria, the proposed representative must have sufficient expertise to make financial decisions.<sup>29</sup> In Ireland, the court must have regard to several factors such as the size, nature and complexity of the relevant person's financial affairs and any professional expertise, qualification or experience required to manage the relevant person's financial affairs.<sup>30</sup>

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<sup>27</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(5)(c)–(d); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 37(2)(a); Guardianship and Administration Act 2019 (Vic), s 32(3)(c)–(d). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.6(2)(b).

<sup>28</sup> Guardianship and Administration Act 2019 (Vic), s 32(3)(d).

<sup>29</sup> Guardianship and Administration Act 2019 (Vic), s 32(2)(d).

<sup>30</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(6).

## The will and preferences of the represented person

- 11.32 In our view, the will and preferences of the person with affected decision-making are relevant to the representative's suitability.
- 11.33 This may require consideration of different matters. Sometimes, a person may express a view on whether they want the proposed representative to act in that role. At other times, it may be necessary to consider whether the person has a good relationship with the proposed representative. It could also be necessary to consider what is important to the person. For example, in *Re [S]*, te ao Māori was important to the person with affected decision-making, and that played a pivotal role in determining who was suitable to act as the welfare guardian.<sup>31</sup>

## Conflicts of interest

- 11.34 Consideration of conflicts of interest is required under the UN Convention on the Rights of Persons with Disabilities (Disability Convention), which specifies legal arrangements be "free of conflict of interest and undue influence".<sup>32</sup> Submitters also told us the court should consider conflicts of interest.
- 11.35 We consider the requirements concerning conflicts of interest should be the same for all types of decision whether personal or property-related. Under the PPPR Act they are different. As we explain above, for welfare guardians, the court must be satisfied there is unlikely to be a conflict of interest.<sup>33</sup> For property managers, the court must take into account any likely conflict of interest.<sup>34</sup>
- 11.36 We also do not think there should be a blanket prohibition on appointing a representative who has a conflict of interest. Given so many representatives will be family or whānau members, we consider that this prohibition could

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<sup>31</sup> *Re [S]* [2021] NZFC 5911 at [50].

<sup>32</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

<sup>33</sup> Protection of Personal and Property Rights Act 1988, s 12(5)(c).

<sup>34</sup> Protection of Personal and Property Rights Act 1988, s 31(6).

unnecessarily prevent people from acting in the role. A prohibition would also be inconsistent with whānau obligations under tikanga.

- 11.37 To the extent the Disability Convention says legal arrangements must be free from conflicts of interest, we think this is best viewed as requiring that such arrangements be unaffected by conflicts of interest. This would mean, when considering conflicts of interest during a suitability assessment, the court would need to be satisfied any conflicts can be appropriately managed. For example, as we discuss later in this chapter, it might be that the court can ensure the conflict is managed by imposing additional reporting obligations, including in relation to steps taken to manage conflicts of interest.

### Social and cultural considerations

- 11.38 We think social and cultural considerations are relevant to suitability in two ways.
- 11.39 First, the court should consider social and cultural considerations to ensure the proposed representative will be able to engage with the person's social and cultural context. People's social and cultural context will affect how they make decisions and the types of decisions they want to make. If the representative is not able to act in a culturally informed and responsive way, they may not be suitable for the role.
- 11.40 Second, it might be appropriate for the court to acknowledge or allow for the representative to be selected in a culturally appropriate way. This may be particularly important to Māori. We heard that formalising a relationship is not consistent from an ao Māori perspective. While appointing a representative may be necessary from a legal perspective, from a Māori perspective the relationship is valid simply by virtue of its existence. There may also be situations where whānau have selected a proposed representative in accordance with tikanga.

### *Should any of these factors be determinative?*

- 11.41 Many factors may contribute to deciding on a person's suitability to act as a representative. There may be some factors that are so important that they are determinative of whether a person can properly hold the role. We are interested in views on whether any of these factors should be individually determinative or whether they should be part of an overall suitability

assessment that takes all relevant factors into account.<sup>35</sup> Under the PPPR Act, a welfare guardian or property manager's ability to carry out the role and the conflict requirements are independent requirements. If either requirement is not met, the person cannot be appointed. A similar approach is taken in Victoria.<sup>36</sup> However, some other jurisdictions consider the factors as part of an in-the-round suitability assessment.<sup>37</sup>

- 11.42 One benefit to an overall suitability assessment is that it allows a more nuanced approach to the factors. For example, a person may have a conflict of interest but this may be outweighed by the fact they have a good and long-standing relationship with the person. On the other hand, it is difficult to imagine a situation where a person does not have the ability to carry out the representative role but is found to be nonetheless suitable.

**QUESTION 37:**

What should the court consider when determining whether a representative is suitable?

**QUESTION 38:**

Should any factors be determinative? If so, what are they?

## OTHER REQUIREMENTS ABOUT WHO CAN ACT AS A REPRESENTATIVE

- 11.43 In this section, we discuss other requirements about who can act as a representative. These are:

- (a) Whether any people should be prohibited from acting as a representative.
- (b) The minimum age required to act as a representative.

- 11.44 We do not discuss the requirement that a representative must consent to the appointment as we consider this requirement should be maintained.

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<sup>35</sup> Compare Guardianship and Administration Act 2019 (Vic), s 32(1) and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(5).

<sup>36</sup> Guardianship and Administration Act 2018 (Vic), ss 32(1)(b)–(c) and 32(2)(b)–(d).

<sup>37</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(5). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.6(2).



## Prohibitions and restrictions on who can act as a representative

11.45 The PPPR Act contains the following outright prohibitions on who can act as a welfare guardian or property manager:

- (a) A person cannot act as a property manager if they are in charge of a hospital or aged care facility and the person with affected decision-making is a patient or resident of that hospital or aged care facility.<sup>38</sup>
- (b) A corporation cannot act as a property manager unless they are a trustee corporation such as the Māori Trustee or Public Trust.<sup>39</sup>
- (c) A corporation cannot act as a welfare guardian.<sup>40</sup>

11.46 We are interested in whether a new Act should contain any further prohibitions on who can act as a representative. For example, in Ireland, the people who cannot act as a representative include:

- (a) A person convicted of an offence or subject to a restraining or protection order in relation to the person with affected decision-making.<sup>41</sup>
- (b) For property decisions, a person convicted of an offence involving fraud or dishonesty or a disqualified director.<sup>42</sup>

11.47 We are also interested in whether corporations should be prohibited from acting as a representative, especially for financial decisions.<sup>43</sup> For example, the current restriction may prevent iwi, hapū or kaupapa Māori organisations from acting as property representatives when this might be most appropriate for the person concerned.

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<sup>38</sup> Protection of Personal and Property Rights Act 1988, s 31(4).

<sup>39</sup> Protection of Personal and Property Rights Act 1988, s 31(3).

<sup>40</sup> Protection of Personal and Property Rights Act 1988, s 12(4).

<sup>41</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 39(1)(a)–(b).

<sup>42</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 39(1)(c) and (e).

<sup>43</sup> Some jurisdictions allow corporations to act in a financial role. Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 40(2). Guardianship and Administration Act 2019 (Vic), s 32(2).

- 11.48 One benefit of outright prohibitions is that they are administratively easier. The court does not need to determine the suitability of such people as the Act has already deemed them unsuitable.
- 11.49 On the other hand, outright prohibitions are a blunt approach. The New South Wales Law Reform Commission considered that automatic exclusions were too restrictive.<sup>44</sup> It was concerned that such exclusions might prevent people from being appointed who have a trusting and close relationship with the person with affected decision-making. It thought it was sufficient that these sorts of issues be considered under the suitability assessment.<sup>45</sup>
- 11.50 We are therefore interested to hear views on whether, instead of prohibitions, a new Act might instead specify that particular matters must be drawn to the court's attention prior to appointment so that it can consider whether or not it is disqualifying. A new Act might then also require that, if any of those matters occur following a person's appointment as a representative, the appointment is automatically ended unless and until the court considers the matter and decides to reappoint them.
- 11.51 The PPPR Act already contains this type of provision in addition to the outright prohibitions noted above. It provides that both welfare guardians and property managers stop holding office if they are adjudicated bankrupt, are made a special patient or committed patient under the Mental Health Act 1969, require a welfare guardian or property manager, or are otherwise incapable of acting.<sup>46</sup> We are interested in whether a new Act should specify any further circumstances in which representatives should cease acting (or that should be drawn to the court's attention if the appointment has not yet occurred).

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<sup>44</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC 145, 2018) at [9.66]–[9.67]. A similar view was reached in Australian Law Reform Commission *Elder Abuse — A National Legal Response* (ALRC R131, 2017) at [5.68]–[5.70].

<sup>45</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC 145, 2018) at [9.67].

<sup>46</sup> Protection of Personal and Property Rights Act 1988, ss 22(b) and 52(b).

**QUESTION 39:**

Should there be any prohibitions on who can act as a representative? If so, who should be prohibited from acting as a representative?

**QUESTION 40:**

Should there be other matters that do not result in prohibitions on acting but must be drawn to the court's attention (and that mean a representative may not continue acting until the court has considered it)?

**Age of the representative**

11.52 In Aotearoa New Zealand, a welfare guardian or a property manager must be over the age of 20.<sup>47</sup> We are interested in views on whether this is still the appropriate age limit.

11.53 Different minimum ages exist or have been contemplated overseas. In England and Wales, Ireland and Victoria, a representative must be 18 or older.<sup>48</sup> In New Brunswick, they must be 19 or older.<sup>49</sup> The New South Wales Law Reform Commission recommended that, in certain circumstances, a representative could be appointed at 16. It cited research that suggested one in 10 Australian carers is under the age of 25 and that service providers and professionals frequently do not acknowledge young carers.<sup>50</sup> This led the Commission to recommend that a representative could be between 16 and 18 years old provided the proposed functions are consistent with the 16-year-old's decision-making abilities.<sup>51</sup>

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<sup>47</sup> Protection of Personal and Property Rights Act 1988, ss 12(4) and 31(3).

<sup>48</sup> Guardianship and Administration Act 2019 (Vic), s 32(1); Mental Capacity Act 2005 (UK), s 19(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(2)(b).

<sup>49</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 40(1)(a).

<sup>50</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.53].

<sup>51</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.54] and recommendation 9.5.

- 11.54 It is important that the person carrying out the representative role has sufficient understanding and maturity to make decisions for another person. However, we consider that the age limit should be lowered to 18 years of age. In New Zealand, there are very few age restrictions of 20 years and many of these may be out of date.<sup>52</sup> For example, a person must currently be over 20 to adopt a child. However, Te Tāhū o te Ture | Ministry of Justice in its consultation on adoption law proposed the age restriction should be lowered to 18.<sup>53</sup>
- 11.55 We think it would rarely be appropriate for people younger than 18 to act as a court-appointed representative. People younger than 18 do not have the same legal rights and powers as adults. For example, most contracts are unenforceable against parties under the age of 18 unless the court orders they are fair and reasonable.<sup>54</sup> It would be anomalous to give a representative legal authority for someone else that they would not have for themselves. An appointed representative also assumes responsibilities and liabilities as part of the role. It may be unfair to impose these on a person who is under 18.

**QUESTION 41:**

Do you agree the age limit for representatives should be lowered to 18? Why or why not?

**QUESTION 42:**

Should the court ever be able to appoint a person younger than 18 as a representative? Why or why not?

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<sup>52</sup> Some examples of age restrictions of 20 years include: if you are adopted, you can apply to find the names of your birth parents (Adult Adoption Information Act 1985, ss 2 and 4); you can adopt a child (Adoption Act 1955, s 4(1)); you can gamble in a casino (Gambling Act 2003, s 303); you can have small amounts of alcohol in your system when you drive (Land Transport Act 1998, s 11).

<sup>53</sup> Te Tāhū o te Ture | Ministry of Justice *A new adoption system for Aotearoa New Zealand: Discussion Document* (June 2022) at 19.

<sup>54</sup> Contract and Commercial Law Act 2017, ss 86–89.

## POWERS OF A REPRESENTATIVE

- 11.56 Under the PPPR Act, a welfare guardian has such powers “as may be reasonably required to enable the welfare guardian to make and implement decisions ... in respect of each aspect specified in the order”.<sup>55</sup> A property manager has “all such rights and powers as the court may confer on the manager in the property order”.<sup>56</sup> Property managers are also entitled to the possession and management of the property that is the subject of the order.<sup>57</sup>
- 11.57 We are interested in whether any issues are encountered with the powers of welfare guardians or property managers and whether it would be beneficial to include some express powers in a new Act. For example, the relevant statute in New Brunswick specifies that representatives may also obtain from any person any information that is relevant.<sup>58</sup>

### QUESTION 43:

Are there any issues with the current powers of welfare guardians or property managers that a new Act should address?

## DUTIES OF THE REPRESENTATIVE

### Current law

- 11.58 The exact scope and nature of the duties of welfare guardians and property managers is unclear. Under the PPPR Act, the first and paramount consideration of, respectively, a welfare guardian or property manager is “the promotion and protection of the welfare and best interests of the person” and

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<sup>55</sup> Protection of Personal and Property Rights Act 1988, s 18(2).

<sup>56</sup> Protection of Personal and Property Rights Act 1988, s 38(1).

<sup>57</sup> Protection of Personal and Property Rights Act 1988, s 35. The Registrar General of Land is also authorised to accept dealings from the property manager, even though they are not claiming to be entitled to the estate or interest in land: s 38(3).

<sup>58</sup> Supported Decision-Making and Representation Act, SNB 2022 c 60 (New Brunswick), s 41(2). Similar powers exist under the Guardianship and Administration Act 2019 (Vic), such as to sign and do anything that is necessary to give effect to a power or duty vested the representative (ss 38(1)(b) and 46(f)) and the power to undertake legal proceedings (if specified in the order): s 38(1)(c).

“to use the property in the promotion and protection of the best interests of the person”.<sup>59</sup>

11.59 Property managers also owe fiduciary duties to the person with affected decision-making.<sup>60</sup> It is likely that welfare guardians also owe fiduciary duties. The essence of a fiduciary relationship is one of trust and confidence where one person is entitled to rely on the other.<sup>61</sup> Welfare guardians and property managers can make decisions for the represented person. They can affect the represented person’s legal interests, such as by entering into a contract. They can also undertake important and personal decisions such as consenting to health care or directing that a person live in an aged care facility.

11.60 Some common fiduciary duties include:<sup>62</sup>

- (a) Avoiding unauthorised personal profit or benefit from the relationship.
- (b) Avoiding conflict between personal interest and duty to the beneficiary.
- (c) Avoiding divided loyalties.
- (d) Reporting to the beneficiary when a breach of fiduciary duty has been committed by the fiduciary.

### Reforming the duties of the representative

11.61 Representatives should have duties to the represented person to ensure that they carry out their decision-making role appropriately. There is a significant power imbalance between the representative and the represented person. It is important the law recognises this imbalance and imposes appropriate duties.

11.62 We are interested in views on the duties a representative should have to the represented person. For example, duties may require the representative to:

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<sup>59</sup> Protection of Personal and Property Rights Act 1988, ss 18(3) and 36(1).

<sup>60</sup> See Bill Atkin “Managing Assets and Money” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 319, at 328; *Flavell v Campbell* [2019] NZHC 799, [2019] NZFLR 18 at [69]; *P v P* FC Christchurch FAM-2003-009-4084, 7 August 2008 at [16].

<sup>61</sup> *Chirside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [80].

<sup>62</sup> Andrew Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [26.17.2.2(1)].

- (a) Act honestly, diligently and in good faith.<sup>63</sup>
- (b) Not coerce, intimidate or unduly influence the person.<sup>64</sup>
- (c) Exercise reasonable skill and care.<sup>65</sup>
- (d) Not use the position for profit or benefit.<sup>66</sup>
- (e) Identify and respond to situations where there is a conflict, ensure the person's interests (or rights, will and preferences) are always the paramount consideration and seek external advice when necessary.<sup>67</sup>
- (f) Keep the representative's property apart and separate from their own unless otherwise authorised.<sup>68</sup>
- (g) Not use or disclose the represented person's confidential information except as required for the role unless authorised by law.<sup>69</sup>

11.63 We are also interested in views on whether these duties should be set out in a new Act. One reason to list the duties in an Act is that some fiduciary duties, if strictly applied, may be too onerous. As we discuss earlier in this chapter, a strict prohibition on conflicts of interest may be unworkable. A new Act could clarify what a duty to avoid or minimise and appropriately manage a conflict of interest might involve.<sup>70</sup> We have also heard that representatives are unsure about how to act in the role. If the duties are listed together in an Act, this would enable greater clarity and accessibility.

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<sup>63</sup> Guardianship and Administration Act 2019 (Vic), ss 41(1)(e) and 55(e); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 43(1).

<sup>64</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.13.

<sup>65</sup> Guardianship and Administration Act 2019 (Vic), ss 41(1)(f) and 55(f).

<sup>66</sup> Guardianship and Administration Act 2019 (Vic), ss 41(1)(g) and 55(g); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 43(2).

<sup>67</sup> See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.13.

<sup>68</sup> Guardianship and Administration Act 2019 (Vic), s 60.

<sup>69</sup> See Guardianship and Administration Act 2019 (Vic), s 41(1)(i); New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.13.

<sup>70</sup> Compare for example Companies Act 1993, ss 107(3) and 139–144, relating to conflicts of interest affecting directors of companies.

**QUESTION 44:**

What duties should a representative have? For example, should the representative be required to:

- a. Act honestly, diligently and in good faith.
- b. Exercise reasonable skill and care.
- c. Manage and appropriately respond to any conflicts of interest.

**QUESTION 45:**

Do you think these duties should be set out in statute?

## RECORD-KEEPING AND REPORTING REQUIREMENTS

### Current law

11.64 The PPPR Act requires property managers to file financial statements with the Family Court.<sup>71</sup> These must be provided within three months of the initial appointment and then annually.<sup>72</sup> The statements are then forwarded to Public Trust to be examined.<sup>73</sup>

11.65 If a property manager fails to file a statement, the registrar must draw the matter to the attention of a judge, who can direct the manager to provide the report.<sup>74</sup> The manager is also liable to pay a fine not exceeding \$1,000.<sup>75</sup>

### Reforming reporting requirements

11.66 In our view, a new Act should continue to include some reporting requirements. As explained in *NA v JB*, the reporting requirements “are there for good reasons”.<sup>76</sup> They provide oversight to ensure people are not taken

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<sup>71</sup> Protection of Personal and Property Rights Act 1988, s 45(2).

<sup>72</sup> Protection of Personal and Property Rights Act 1988, s 45(2).

<sup>73</sup> Protection of Personal and Property Rights Act 1988, s 46.

<sup>74</sup> Protection of Personal and Property Rights Act 1988, s 48(1).

<sup>75</sup> Protection of Personal and Property Rights Act 1988, s 45(4).

<sup>76</sup> *NA v JB* [2022] NZFC 1666 at [16].



advantage of.<sup>77</sup> Several submitters supported the general need for record-keeping and reporting requirements.

11.67 However, we are interested in views on whether the reporting requirements should be reformed. In this section, we discuss:

- (a) When financial reporting should be required.
- (b) Whether reporting should be required for non-financial matters.
- (c) Reporting requirements for decisions involving conflicts of interest.
- (d) Other issues raised by submitters.

### ***When financial reporting should be required***

11.68 We have heard that the current reporting requirements can be onerous and resource intensive, especially when the amount is not very significant. We are thinking about ways to mitigate this.

11.69 Some options we are considering are:

- (a) Increasing the threshold for when financial reporting is required. Currently, a property manager, and therefore financial reporting, is required if the property being administered is over \$5,000 or the person's income is over \$20,000. Some submitters have suggested this threshold is too low. The threshold was last adjusted in 2007.<sup>78</sup>
- (b) Providing the court a discretion to decide whether financial reporting is required (including, perhaps, in relation to specific assets or asset classes).<sup>79</sup>
- (c) Allowing the court to reduce the frequency of financial reporting.<sup>80</sup>

11.70 These options, while easing the reporting requirement, would also reduce the extent of safeguards against financial abuse. This may be appropriate if other

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<sup>77</sup> *NA v JB* [2022] NZFC 1666 at [16].

<sup>78</sup> Protection of Personal and Property Rights Order 2007, cl 3.

<sup>79</sup> New South Wales Law Reform Commission Review of the Guardianship Act 1987 (NSWLRC R145, 2018), recommendation 9.19(1).

<sup>80</sup> New South Wales Law Reform Commission Review of the Guardianship Act 1987 (NSWLRC R145, 2018), recommendation 9.19(2).

safeguards are sufficient such as periodic review of representative orders.<sup>81</sup>

We are interested in views on where the balance between safeguarding and workability should lie.

### ***Reporting requirements for non-financial decisions***

11.71 Under the PPPR Act, reporting requirements are limited to the decisions of property managers. Several submitters supported reporting requirements being in place for welfare guardians as well as property managers. One submitter did not support welfare guardians having to record their decisions.

11.72 We are interested in views on whether there are any non-financial decisions for which reporting requirements might be appropriate. In Ireland, for example, reporting requirements apply to any restraints of the represented person.<sup>82</sup>

### ***Reporting requirements in decisions where there is a conflict of interest***

11.73 We are thinking about whether there should be additional reporting requirements in relation to decisions involving conflicts of interest. As we discuss earlier in this chapter, we think a representative should generally still be able to act when they have a conflict of interest provided it is appropriately managed.

11.74 We are interested in hearing views on whether, in such cases, the court should be able to order additional reporting requirements. For example, the court could require the representative to record the steps they took to manage the conflict of interest.

### ***Other issues***

11.75 Submitters raised two other issues:

(a) Who should receive or review the reports.

(b) Whether the sanctions for non-compliance with reporting requirements are sufficient.

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<sup>81</sup> See New South Wales Law Reform Commission Review of the Guardianship Act 1987 (NSWLRC R145, 2018) at [9.119].

<sup>82</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 46(4).

- 11.76 As we explain above, financial records are filed in the Family Court. They are then forwarded to Public Trust for review. Some submitters suggested that we consider where financial reports must be filed and who should review them. The Law Association (previously the Auckland District Law Society) said a copy of the financial report should be provided to the subject person, the court (or another appropriate body) and to family and whānau members. Another submitter suggested that it may not always be necessary for Public Trust to review the report and that sometimes it could be reviewed by court staff.
- 11.77 We are interested to hear views on these issues. There may be safeguarding benefits to financial reports being provided to family and whānau members specified by the court and/or to people specified by the represented person in a statement of wishes (which we discuss in Chapter 15). While we are not sure that it would be appropriate for court staff to review financial statements, there may be inefficiencies in reports being filed in the Family Court and then reviewed by Public Trust. It may be easier if the reports are filed in and reviewed by the same body. This body could perhaps be a new oversight body if one were to be established, as we discuss in Chapter 16.
- 11.78 Te Kāhui Ture o Aotearoa | New Zealand Law Society told us that property managers are failing to provide annual statements with increased frequency and suggested stronger sanctions for non-filing of reports in order to improve compliance. We agree that non-compliance with statutory obligations is problematic. However, several submitters told us that the current requirements are too onerous and unworkable. It may therefore be that the real issue lies in the reporting requirements themselves. If so, increasing the sanctions to increase compliance may not be the most appropriate response.

**QUESTION 46:**

When should financial reports be required?

**QUESTION 47:**

Are there any non-financial decisions which should be subject to record keeping and reporting requirements? If so, what?

**QUESTION 48:**

In decisions where the representative has a conflict of interest, should they be subject to record-keeping and reporting requirements on how the conflict was managed?

**WHAT SHOULD HAPPEN IF THE REPRESENTATIVE ACTS IMPROPERLY?**

- 11.79 In this section, we discuss what should happen if the representative acts improperly. This could include where a representative does not act consistently with the requirements of their decision-making role, acts outside of their powers or breaches their duties. We think there should be a range of available options, as the consequences should depend on the circumstances and severity of the behaviour. The law needs to be able to respond appropriately both to those situations involving an honest and minor mistake and to those involving deliberate and harmful failure to comply with obligations.
- 11.80 Under the PPPR Act, there are broadly four mechanisms for responding to improper conduct. These are:
- (a) Alternative dispute resolution such as mediation.
  - (b) Removal of the representative from their role by the Family Court.
  - (c) In some circumstances, the making of a civil claim against the representative.
  - (d) In some cases, the representative might be criminally liable.
- 11.81 We discuss each mechanism below.
- 11.82 Alongside these mechanisms, it will also be important that a representative has access to adequate information and guidance about their role. Sometimes, a representative will fail to comply with their legal obligations because they did not know or understand what they were supposed to be doing. We discuss ways to improve access to information and guidance in Chapter 16.

**Alternative dispute resolution**

- 11.83 There will be situations where it may be appropriate to use processes outside of court to respond to a situation where a representative acts improperly. This may be particularly useful where the representative's misconduct was not

deliberate or malicious. Representative relationships are often long lasting and it is essential that there are pathways to constructively manage situations where things go wrong. We discuss the use of processes outside of court further in Chapter 17.

### Removal from role by the Family Court

- 11.84 In Chapter 10, we suggest that representative arrangements should continue to be the subject of reviews, both periodic and following specific application. In these reviews, the court would have the power to substitute a new representative or end the order, which would have the effect of removing the representative from their role.<sup>83</sup>
- 11.85 We think this will often be the most appropriate mechanism for managing situations where a representative is acting improperly. As we discuss below, we think there are good arguments for a new Act to retain the current statutory immunity of representatives under which civil claims can only be brought against them if it can be shown that they acted in bad faith or without reasonable care. This means the primary mechanism for responding to situations where a representative has acted improperly will be their removal from the role.

### Civil claim and alternatives

- 11.86 Under the PPPR Act, representatives have some immunity from civil suits. A civil claim cannot be brought against either a welfare guardian or a property manager in respect of the powers conferred by the Act unless it is shown that they “acted in bad faith or without reasonable care”.<sup>84</sup>
- 11.87 Broadly speaking, we think a statutory immunity from civil suits should be maintained. Without it, the risk of facing a legal claim might deter people from agreeing to become a representative. We think this is undesirable for a voluntary and largely unpaid role, which we have heard can be onerous.

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<sup>83</sup> See Chapter 10.

<sup>84</sup> Protection of Personal and Property Rights Act 1988, ss 20(1) and 49(1).

11.88 However, we are interested in hearing views on what the immunity should be in order to strike the right balance between disincentivising improper behaviour by representatives and discouraging people from being representatives at all. In particular, we are interested in whether it should continue to be possible to bring a civil claim against a representative for acting without reasonable care. Alternative approaches might include allowing claims only for bad faith, wilful non-compliance and recklessness, only for bad faith and wilful non-compliance, or only for bad faith.

### Criminal law

11.89 Under the PPPR Act, if a property manager files a false statement, they commit an offence punishable to up to three years' imprisonment. They also commit an offence liable to a fine of not more than \$1,000 if they fail to file a report.<sup>85</sup> There are also offences under the Crimes Act 1961 that could respond to misconduct such as protections for vulnerable adults against ill-treatment or neglect as well as offences relating to theft or dishonesty.<sup>86</sup>

11.90 In this review, we are not examining offences in the Crimes Act. However, we are interested in whether the offence provisions in the PPPR Act should be reformed. We are cautious about whether introducing new offences would be the best or even a helpful way of seeking to prevent representatives abusing their position. In Australia, the New South Wales Law Reform Commission did not recommend new offence provisions.<sup>87</sup> It concluded that offences in the New South Wales Crimes Act such as fraud and failure to provide someone with the necessities of life adequately covered acts of abuse, exploitation and neglect.<sup>88</sup> It warned that the creation of new offences could duplicate offences

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<sup>85</sup> Protection of Personal and Property Rights Act 1988, s 45(3).

<sup>86</sup> For example, perjury, false statements and fabricating evidence (Crimes Act 1961, ss 108–113); duty to provide necessities and protect from injury (s 151); sexual exploitation of person with significant impairment (s 138); ill-treatment or neglect of child or vulnerable adult (s 195); failure to protect child or vulnerable adult (s 195A); theft by person in special relationship (s 220); dishonestly taking or using document (s 228); false accounting (s 260).

<sup>87</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.142].

<sup>88</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.145]–[9.146].

and create uncertainty.<sup>89</sup> In New Zealand, guidelines published by the Legislation Design and Advisory Committee note that offences are just one possible mechanism for achieving compliance with legislation and that “[c]ompelling reasons must exist to justify applying the criminal law to conduct”.<sup>90</sup>

11.91 In addition, while offences can encourage people to comply with duties, they are only an effective deterrent to the extent that people committing offences perceive there to be a risk that they will be identified. The Law Commission of Ontario observed that the relationship dynamics underlying some forms of abuse together with the effects of shame and fear of retaliation may make victims reluctant to disclose harm or to see family members face criminal penalties.<sup>91</sup>

**QUESTION 49:**

What options should be available if a representative does not act properly or no longer meets suitability requirements?

**QUESTION 50:**

When should it be possible to bring a civil claim against a representative?

## **WHAT HAPPENS IF A REPRESENTATIVE IS NOT AVAILABLE OR CAN NO LONGER ACT?**

11.92 In this section, we discuss what should happen if a court considers that a person needs a representative but one is not available. We discuss two issues:

(a) Who might act as the representative when no representative is available.

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<sup>89</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [9.147].

<sup>90</sup> Legislation and Design Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 121–122.

<sup>91</sup> Law Commission of Ontario *Legal Capacity, Decision-Making and Guardianship: Discussion Paper* (Toronto, May 2014) at 207.

- (b) What should happen if a representative stops acting during the course of the appointment.

### Current situation and law

- 11.93 Under the PPPR Act, trustee corporations such as Public Trust can act as a property manager.<sup>92</sup> This means that, if no other preferred person is available, a trustee corporation can act instead. There is no equivalent body for welfare guardians. However, there are Welfare Guardian Trusts in some parts of New Zealand. These organisations recruit and train volunteers to act as welfare guardians when no one else is available.
- 11.94 We expect that, in situations where welfare guardians or property managers are required to stop holding office such as in cases of bankruptcy, the order will end.<sup>93</sup> However, the PPPR Act does not expressly specify what should happen if a welfare guardian or property manager is unable to act during the arrangement. Neither does it specify what happens if a representative wants to resign.
- 11.95 Several submitters told us about situations where a person needed a welfare guardian but no suitable person was available. Sometimes, this meant decisions were made by another person without clear authority. We were told about family and whānau members or paid support staff being treated as though they had decision-making authority for the person even though no order was in place. We also heard about organisations having to make decisions with no authority, support or funding and sometimes in conflict with family and whānau members.
- 11.96 As we discuss above, these situations can sometimes be resolved through organisations such as Welfare Guardian Trusts and trustee corporations. However, as we note in more detail in Chapter 16, these are at best incomplete solutions.

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<sup>92</sup> Protection of Personal and Property Rights Act 1988, s 31(3).

<sup>93</sup> Protection of Personal and Property Rights Act 1988, ss 22(b) and 52(b).



## Who acts as a representative when one is not available?

### *Ways to increase the availability and accessibility of possible representatives*

11.97 In Chapter 16, we discuss possible ways of increasing the availability and accessibility of people and organisations that can act as court-appointed representatives or attorneys under an enduring power of attorney. We do not repeat that discussion here.

### *Court appointment of volunteer representatives only as a last resort*

11.98 We are interested in views on whether, for care and welfare decisions, volunteer or independent representatives should only be appointed as a last resort. We have heard that welfare guardian roles are frequently held by people close to the person with affected decision-making. Where decision-making is required to respect the person's rights, will and preferences, it might be even more desirable for the representative to be someone who is already close to the person if such a person is available and otherwise suitable.

11.99 Some jurisdictions specify that volunteer representatives can only be appointed if no one else is available. For example, in Ireland, such representatives can only be appointed if "there is no suitable person" available.<sup>94</sup> Similarly, in Victoria, the Tribunal may appoint the Public Advocate only if "satisfied no other person fulfils the requirements".<sup>95</sup>

#### **QUESTION 51:**

When courts appoint a representative for care and welfare decisions, should volunteer or independent representatives be appointed only as a last resort?

## What happens if a representative stops acting during the course of the appointment?

11.100 We are interested in hearing views on what should occur if a representative stops acting or wants to stop acting during their appointment when the person represented has an ongoing need for representation.

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<sup>94</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(7).

<sup>95</sup> Guardianship and Administration Act 2019 (Vic), s 33(1).

11.101 One option might be to allow for the appointment of reserve representatives who can act if the primary representative dies, resigns or loses decision-making capacity.<sup>96</sup> However, there will not always be an appropriate person to act as a reserve representative. An option for managing these situations might be for a court review of the arrangement to be required whenever a representative stops or wants to stop acting.<sup>97</sup> However, pending court review, another representative would need to act. The New South Wales Law Reform Commission recommended that, in such cases, the Public Representative or NSW Trustee act in the interim.<sup>98</sup>

**QUESTION 52:**

What should happen if a representative stops acting?

## REIMBURSEMENT AND REMUNERATION

11.102 Under the PPPR Act, expenses properly or reasonably incurred by a welfare guardian or property manager are payable out of the property of the represented person.<sup>99</sup> For welfare guardians, a court may also order that expenses incurred be met by the Crown.<sup>100</sup> Only property managers receive remuneration and only if directed by the court.<sup>101</sup>

11.103 We think representatives should continue to be able to be reimbursed for costs incurred in the role. However, we are interested in hearing views on whether reform is needed to the rules on remuneration for representatives, especially those acting in a care and welfare role.

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<sup>96</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.11.

<sup>97</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.21.

<sup>98</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 9.22(2).

<sup>99</sup> Protection of Personal and Property Rights Act 1988, ss 21(1) and 50(1).

<sup>100</sup> Protection of Personal and Property Rights Act 1988, s 21(2).

<sup>101</sup> Protection of Personal and Property Rights Act 1988, s 50(2).

- 11.104 Some submitters told us that representatives should be paid, especially those acting because there was no suitable representative available. One submitter explained the role of a welfare guardian is a significant commitment and it is unfair for people to take on this role without compensation. However, another submitter said the law needs to think carefully about who gets paid and how much. People should only be able to receive payment if it is in the interest of the represented person.
- 11.105 A range of approaches are taken in other jurisdictions. In Victoria, as here, only financial representatives receive remuneration if directed by the court.<sup>102</sup> However, in Ireland and New Brunswick remuneration is not limited to financial decisions. In New Brunswick, any representative is entitled to remuneration provided it is authorised by the court.<sup>103</sup> In Ireland, remuneration is permitted if authorised by the court and if the representative's functions are connected to their trade or profession or there are other exceptional circumstances.<sup>104</sup>
- 11.106 We consider that representatives acting in relation to a person's property should continue to receive remuneration from the represented person with the court's approval. Court approval is important to the management of risks of conflicts of interest and financial abuse. We did not hear any concerns expressed with how this aspect of the PPPR Act currently operates.
- 11.107 However, we are not sure that the same applies in relation to representatives acting in a care and welfare role. The potential for abuse and conflict of interest may be greater, and the ability for it to be adequately monitored less, than in relation to property matters. We are interested in views on this issue.

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<sup>102</sup> Guardianship and Administration Act 2019 (Vic), s 175(1).

<sup>103</sup> Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 47(1).

<sup>104</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 42(2).

**QUESTION 53:**

Should representatives acting in relation to welfare matters be entitled to remuneration from the represented person?

**QUESTION 54:**

Is there anything else you would like to tell us about court-appointed representatives?

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## CHAPTER 12

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# Court-ordered decisions

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## INTRODUCTION

- 12.1 Under the Protection of Personal and Property Rights Act 1988 (PPPR Act), the court can make orders that are tailored to particular, often one-off, decisions. The PPPR Act calls these ‘personal orders’ but we will use the term ‘court-ordered decisions’.
- 12.2 In this chapter, we consider some options for reform of court-ordered decisions. Many of the issues are similar to those raised in the chapters on court-appointed representatives, such as ensuring the scope and duration of the order are no more than necessary and the basis upon which decisions should be made.<sup>1</sup> Consequently, in this chapter, we focus only on issues that have not been already covered. We discuss:
- (a) The interaction between court-appointed representatives and court-ordered decisions.
  - (b) Whether court-ordered decisions should include financial decisions.

## OVERVIEW OF THE CURRENT LAW

- 12.3 Under the PPPR Act, te Kōti Whānau | Family Court can make a range of decisions about a person’s personal care and welfare such as that the person live in a particular place or receive medical treatment.<sup>2</sup>

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<sup>1</sup> See Chapters 10 and 11.

<sup>2</sup> Protection of Personal and Property Rights Act 1988, s 10.

- 12.4 The court must first determine whether it has jurisdiction to hear the application. Jurisdiction is established if the person is assessed wholly or partly to lack decision-making capacity to make decisions about their personal care and welfare or to manage their own affairs in relation to their property.<sup>3</sup>
- 12.5 Once jurisdiction is established, the court “may” make an order. The court’s decision must be guided by the Act’s primary objectives of making the least restrictive intervention and encouraging the person to develop their own capacity.<sup>4</sup>
- 12.6 Sometimes, the courts also consider whether a court-ordered decision would be in the person’s best interests.<sup>5</sup> This consideration has been read into the statute by the courts. For example, in *NA v LO*, an order was sought for termination of LO’s pregnancy.<sup>6</sup> The Court said that it must be guided by the primary objectives of the Act. However, it accepted it could consider, as a secondary objective, the welfare of the person at issue.<sup>7</sup> The Court agreed that, in the absence of a clear framework for determining a person’s welfare and best interests, it should be guided by the best interests test in section 4 of the Mental Capacity Act 2005 (UK).<sup>8</sup> Under this test, the court is directed to consider various factors when deciding whether to make an order such as the views of the person with affected decision-making and any relevant circumstances.<sup>9</sup>

## THE INTERACTION BETWEEN COURT-APPOINTED REPRESENTATIVES AND COURT-ORDERED DECISIONS

- 12.7 There is no statutory preference in the PPPR Act for court-appointed representatives or court-ordered decisions. However, as we discuss in

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<sup>3</sup> Protection of Personal and Property Rights Act 1988, ss 6(1) and 25. The person must also be domiciled or ordinarily resident in New Zealand or the property at issue must be in New Zealand.

<sup>4</sup> Protection of Personal and Property Rights Act 1988, s 8.

<sup>5</sup> *X v Y* (2004) 23 FRNZ 475 (HC); *NA v LO* [2021] NZFC 7685 at [47].

<sup>6</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253.

<sup>7</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [47].

<sup>8</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [48]–[49].

<sup>9</sup> This test is used to guide all decision-makers under the Mental Capacity Act 2005 (UK).

Chapter 10, the test for appointing a welfare guardian includes requirements additional to those applying for court-ordered decisions and the appointment of property guardians. We are interested in whether a new Act should contain a statutory preference for court-ordered decisions or representative arrangements and, if so, which it should prefer.

- 12.8 Other countries have different approaches. In England and Wales and Ireland, the overarching tests for making a court-ordered decision and for appointing a representative are the same. However, the Mental Capacity Act 2005 (UK) gives priority to court-ordered decisions, stating that “a decision by the court is preferred” to the appointment of a representative.<sup>10</sup> By contrast, in Ireland, the Assisted Decision-Making (Capacity) Act 2015 provides the court may only make the decision itself when “satisfied the matter is urgent or it is otherwise expedient”.<sup>11</sup>
- 12.9 One reason to give statutory priority to court-ordered decisions is to help ensure that any intervention is as limited as possible.<sup>12</sup> If court-ordered decisions are preferred, the appointment of a court-appointed representative may be more likely to be limited to those situations where it is not practicable or appropriate for the court to make a single decision. One example where this may be the case is where “somebody needs to make future or ongoing decisions for a person” whose affected decision-making is such that they will likely continue to lack decision-making capacity in the future.<sup>13</sup>
- 12.10 On the other hand, this argument might have less force if the representative arrangement is tailored to the decisions at issue. Further, there may also be arguments in favour of preferring representative arrangements. It may be better for the decision to be made by someone who knows the person, particularly given the significance of the person’s will and preferences to decision-making. The court will only be able to make a decision based on the

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<sup>10</sup> Mental Capacity Act 2005 (UK), s 16.

<sup>11</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(2).

<sup>12</sup> Department for Constitutional Affairs *Mental Capacity Act 2005: Code of Practice* (The Stationery Office, 23 April 2007) at [8.26].

<sup>13</sup> Department for Constitutional Affairs *Mental Capacity Act 2005: Code of Practice* (The Stationery Office, 23 April 2007) at [8.31].

evidence before it, while a representative who knows the person with affected decision-making will have a much greater range of information on which to base the decision.

- 12.11 We are interested in hearing views on whether a new Act should state whether a court-ordered decision or the appointment of a representative should be preferred, or whether there should be no statutory preference on the basis that it will depend on the circumstances.

**QUESTION 55:**

Are there any circumstances where you think a court order would be more appropriate than a court-appointed representative?

**QUESTION 56:**

Should the law provide that either (a) a court-ordered decision or (b) a court-appointed representative is generally preferred? If so, which type do you think should be preferred?

### WHAT TYPES OF DECISIONS SHOULD THE COURT BE ABLE TO MAKE?

- 12.12 Under the PPPR Act, court-ordered decisions relate to a person's personal care and welfare.
- 12.13 The PPPR Act does not expressly provide that the court may make property decisions. However, there are cases in which the court has made a decision about property. In *CCS Disability Action (Wellington) Branch Inc v JCEE*, the Court vested a tenancy in both the person with affected decision-making and his partner.<sup>14</sup> In *Loli v MWY*, the Court authorised Public Trust to make the necessary financial arrangements to ensure the person with affected decision-making could reside in residential care and be provided with appropriate medical advice, care and treatment.<sup>15</sup> Both these orders were made under the

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<sup>14</sup> *CCS Disability Action (Wellington) Branch Inc v JCE* [2011] NZFLR 696 (FC) at [36].

<sup>15</sup> *Loli v MWY* FC Auckland FAM-2009-004-1877, 14 January 2011.



Court's power to make an order that the person be "provided with living arrangements".<sup>16</sup>

- 12.14 We are interested in views on whether it would be useful for a new Act to expressly allow the court to make one-off financial decisions. The legislation in Ireland and England and Wales expressly permits the court to make decisions about both personal and property matters.<sup>17</sup>

**QUESTION 57:**

Should the court be able to make decisions about both personal and property matters? Why or why not?

**QUESTION 58:**

Are there any other issues with court-ordered decisions we should know about?

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<sup>16</sup> Protection of Personal and Property Rights Act 1988, s 10(1)(e).

<sup>17</sup> Mental Capacity Act 2005 (UK), ss 16(2)(a), 17 and 18; Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 37 and 38(2)(a).

## CHAPTER 13

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# Enduring powers of attorney

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## INTRODUCTION

- 13.1 In the next two chapters, we discuss enduring powers of attorney (EPOAs). An EPOA is an arrangement under which one person (the donor) gives another person (the attorney) the power to make decisions for them, usually at some point in the future when the donor no longer has decision-making capacity.
- 13.2 EPOAs are provided for under the Protection of Personal and Property Rights Act 1988 (PPPR Act). In our view, they should be retained in a new Act. Submitters told us EPOAs are a useful arrangement. No submissions suggested that EPOAs be discontinued.
- 13.3 These chapters focus on the aspects of EPOAs that might differ from court-appointed representatives. EPOAs are similar to court-appointed representatives. In both arrangements, one person makes decisions for another person assessed not to have decision-making capacity. We expect that many features of the arrangements will be similar.
- 13.4 In this chapter, we consider:
- (a) How EPOAs are created.
  - (b) How to tailor the scope of an EPOA.
  - (c) When an attorney can make decisions for the donor under an EPOA.
  - (d) The decision-making role of the attorney.
  - (e) Safeguards for once an EPOA is in place.

- 13.5 In Chapter 14, we consider whether a new Act should introduce a registration system for EPOAs or a process for notifying specified people that an EPOA has been created or that the attorney has begun making decisions. Many submitters told us we should consider the introduction of an EPOA register or notification requirements.
- 13.6 Some matters relevant to EPOAs are also addressed in other chapters. Many people told us there is not enough information about EPOAs. We discuss ways to improve access to information and guidance in Chapter 16. In the same chapter, we also consider whether an agency should be responsible for responding to and investigating complaints about EPOAs.

## CONTEXT

### EPOAs under the PPPR Act

- 13.7 EPOAs can cover decisions about personal welfare, property matters or both.<sup>1</sup>
- 13.8 There are strict requirements for creating an EPOA. An EPOA must be created on a prescribed form. It must be signed by the donor and the attorney.<sup>2</sup> The donor's signature must be witnessed by a person who is generally a lawyer and independent of the attorney.<sup>3</sup> The attorney's signature must be witnessed by a person other than the donor or the donor's witness.<sup>4</sup>
- 13.9 The donor's witness must also certify that they:<sup>5</sup>
- (a) Believe the donor understands the nature of the EPOA, including its potential risks and consequences.
  - (b) Believe the donor is not acting under pressure or duress.
  - (c) Have no reason to suspect the donor does not have decision-making capacity to sign the EPOA.

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<sup>1</sup> Protection of Personal and Property Rights Act 1988, ss 97, 98 and 99.

<sup>2</sup> Protection of Personal and Property Rights Act 1988, s 94A(3).

<sup>3</sup> Protection of Personal and Property Rights Act 1988, s 94A(4) and (7)(c).

<sup>4</sup> Protection of Personal and Property Rights Act 1988, s 94(5).

<sup>5</sup> Protection of Personal and Property Rights Act 1988, s 94(7).

- 13.10 An attorney can typically make decisions under an EPOA only when the donor does not have decision-making capacity.<sup>6</sup> A doctor is often responsible for determining whether the donor has decision-making capacity.<sup>7</sup>
- 13.11 Similar to court-appointed representatives, the decision-making role of an attorney is focused on the best interests of the donor and includes obligations to help the donor develop and exercise their decision-making capacity.<sup>8</sup> The attorney also has a duty to consult the donor, any other attorneys and any people specified in the EPOA.<sup>9</sup>

### Overarching issue — balancing the dual objectives of EPOAs

- 13.12 The law relating to EPOAs has two key objectives — usability and safeguarding.<sup>10</sup>
- 13.13 EPOAs are designed to enable people to easily delegate decision-making powers to another person. They are intended to be “a user-friendly mechanism for arranging ... future affairs” that can be tailored to suit individual circumstances.<sup>11</sup> In doing so, EPOAs can support autonomy by allowing people to say what should happen when they are not able to make decisions for themselves. In that sense, they reflect a person’s rights, will and preferences.
- 13.14 EPOAs are also designed to ensure vulnerable people are sufficiently protected. For the most part, EPOAs come into effect when a person is assessed not to have decision-making capacity.<sup>12</sup> This means that the donor cannot revoke the EPOA and may be unable to effectively supervise the

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<sup>6</sup> Protection of Personal and Property Rights Act 1988, ss 97(4)(b) and 98(3).

<sup>7</sup> Protection of Personal and Property Rights Act 1988, s 98(3)(a).

<sup>8</sup> Protection of Personal and Property Rights Act 1988, ss 97A and 98A.

<sup>9</sup> Protection of Personal and Property Rights Act 1988, s 99A.

<sup>10</sup> *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [42].

<sup>11</sup> *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [40], citing (18 February 1988) 486 NZPD 2120.

<sup>12</sup> However, a donor may authorise their property EPOA to have effect immediately: Protection of Personal and Property Rights Act 1988, s 97(4).

actions of their attorney.<sup>13</sup> It is therefore important the arrangement is designed with sufficient safeguards to protect against misuse.<sup>14</sup>

- 13.15 How best to balance usability and safeguarding is a difficult issue.<sup>15</sup> If EPOAs are too easy to create and use, there is a risk they will be misused. However, if the safeguards are too stringent, people will not create and use EPOAs.<sup>16</sup> If people do not create EPOAs, more people will need to use court-appointed representatives.<sup>17</sup>

### ***The balance between usability and safeguarding has been reviewed before***

- 13.16 How to balance usability and safeguarding has already been reviewed twice. In 2001, Te Aka Matua o te Ture | Law Commission looked at the misuse of EPOAs.<sup>18</sup> At that stage, the law contained fewer safeguards and it was easier to create an EPOA.<sup>19</sup>
- 13.17 The Commission considered that there were insufficient safeguards to protect the interests of donors.<sup>20</sup> Several safeguards were introduced in response to the Commission's report.<sup>21</sup> For example, it became more complicated to create an EPOA as the donor's witness now had to explain the nature of the EPOA to the donor and certify certain matters such as believing on reasonable grounds that the donor understands the nature of the EPOA.<sup>22</sup> There was also increased involvement of medical professionals in decisions about the donor's

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<sup>13</sup> *Read v Almond* [2015] NZHC 2797 at [267].

<sup>14</sup> (7 December 2006) 636 NZPD 7036; Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.49].

<sup>15</sup> *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [42].

<sup>16</sup> Western Canada Law Reform Agencies *Enduring Powers of Attorney: Areas for Reform* (March 2008) at [39].

<sup>17</sup> (18 February 1988) 486 NZPD 2120.

<sup>18</sup> Te Aka Matua o te Ture | Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001).

<sup>19</sup> The law only required that the document be in a prescribed form and signed by both the donor and the attorney and for both signatures to be witnessed: Protection of Personal and Property Rights Act 1988 (as originally enacted), s 95(1).

<sup>20</sup> Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [7].

<sup>21</sup> Protection of Personal and Property Rights Amendment Act 2007.

<sup>22</sup> Protection of Personal and Property Rights Act 1988, s 94A(7).

decision-making capacity, and property attorneys became required to keep financial records.<sup>23</sup>

- 13.18 In 2014, the Minister for Senior Citizens reviewed the effectiveness of these additional safeguards (2014 review).<sup>24</sup> The 2014 review found the amendments had been generally effective in protecting people but that changes were needed to achieve the right balance between protecting people and making EPOAs accessible.<sup>25</sup> Too many people were not making EPOAs due to the cost and complexity of doing so and Public Trust had seen a one-third reduction in the number of EPOAs it set up annually.<sup>26</sup>
- 13.19 The 2014 review noted that many submitters felt that the 2007 amendments had gone too far in some areas, creating barriers for some people to make EPOAs.<sup>27</sup> Among other things, it recommended the forms and process needed to be simpler and easier to follow and the witnessing requirements needed to be adjusted. In response, the law was amended. Changes included enabling the donor's witness to meet their explanation obligations by following a template contained in the EPOA form and updating the forms to be in plain language.<sup>28</sup>

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<sup>23</sup> Protection of Personal and Property Rights Act 1988, ss 97(5), 98(3)(a) and 99C.

<sup>24</sup> Protection of Personal and Property Rights Act 1988, s 108AAB.

<sup>25</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 2–3 (obtained under Official Information Act 1982 request to the Office of Seniors, Ministry of Social Development).

<sup>26</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Ministry of Social Development, June 2014) at 11 (obtained under Official Information Act 1982 request to the Office of Seniors, Ministry of Social Development).

<sup>27</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Ministry of Social Development, June 2014) at 3 (obtained under Official Information Act 1982 request to the Office of Seniors, Ministry of Social Development).

<sup>28</sup> Statutes Amendment Act 2016, pt 23 and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Amendment Regulations 2017.

### ***The balance between usability and safeguarding is still an issue***

- 13.20 We heard that the balance between usability and safeguarding is still an issue. Many people told us the process to create an EPOA is difficult and expensive. We heard the forms are too long and complex. Some people told us the role of the witness is too complicated or queried whether the witness needed to be a lawyer. Others supported the use of a lawyer when making an EPOA as a necessary safeguard.
- 13.21 We also heard that there is not enough oversight of the attorney's role. Some people told us about situations where the attorney acted improperly or abused their role. For example, we heard about situations where attorneys controlled the donor, stopped people from visiting the donor or stole money from the donor. We heard there needs to be an accessible way to respond to these sorts of concerns.
- 13.22 We consider the balance between usability and safeguarding throughout this chapter. We do so by considering the different features of the arrangement separately — both to ensure clarity and to enable comparison with other jurisdictions. However, it needs to be borne in mind that the balance ultimately struck between usability and safeguarding in any jurisdiction is a result of all the features together. Caution is therefore required in comparing the approach of different jurisdictions to specific features.
- 13.23 When developing recommendations, we will be considering how usability and safeguarding should be balanced across the entire arrangement. For example, if there are fewer safeguards when making an EPOA, there may be a greater need for ongoing safeguards once the EPOA is in place.

## MAKING AN EPOA

### Current law

- 13.24 To create a valid EPOA, the donor must have decision-making capacity and not be subject to undue influence.<sup>29</sup> If an EPOA was created in such circumstances, te Kōti Whānau | Family Court can invalidate the EPOA.<sup>30</sup>
- 13.25 An EPOA must also be created using a prescribed form. It must be signed by both the donor and the attorney.<sup>31</sup> A lawyer, an officer or employee of a trustee corporation or a legal executive must witness the donor's signature.<sup>32</sup> This person must be independent of the proposed attorney.<sup>33</sup> The attorney's signature must be witnessed by someone who is not the donor or the donor's witness.<sup>34</sup>

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<sup>29</sup> In this context, decision-making capacity means the donor must understand the nature and extent of the power they are conferring, but they do not need to be fully capable of managing the matters over which authority is conferred: *Re Tony* (1990) 5 NZFLR 609 (FC) at 622–623, applying *Re K (Enduring Powers of Attorney)* [1988] 2 WLR 781. See also *NJF v MIF* FC Rotorua FAM-2008-063-759, 20 December 2010 at [22].

<sup>30</sup> *Re Tony* (1990) 5 NZFLR 609 (FC) at 624; *NJF v MIF* FC Rotorua FAM-2008-063-759, 20 December 2010 at [41]; *W v Public Trust* [2010] NZFLR 277 (HC) at [46].

<sup>31</sup> Protection of Personal and Property Rights Act 1988, ss 94(4) and 94A(3); and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, reg 4 and sch forms 1 and 3. If the prescribed form is not used, the EPOA can still take effect but only if the process followed is substantially the same as required by the Act and regulations.

<sup>32</sup> Protection of Personal and Property Rights Act 1988, ss 94A(4) and 94A(6); and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 1 and 3. A failure by the witness to take appropriate steps to satisfy themselves that the donor has capacity to create an EPOA can lead to the validity of the EPOA being challenged, a claim in negligence or disciplinary action against the witness: Iris Reuecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 145.

<sup>33</sup> Protection of Personal and Property Rights Act 1988, s 94A(4). There are exceptions for when two people appoint each other as attorney: s 94(4A).

<sup>34</sup> Protection of Personal and Property Rights Act 1988, s 94A(5).



13.26 The donor's witness must also:

- (a) Explain to the donor the effects and implications of the EPOA.<sup>35</sup> They must advise the donor of the options to tailor the EPOA such as specifying the scope of the attorney's powers and whether the donor wants to appoint someone to monitor the attorney's actions.<sup>36</sup>
- (b) Certify that they believe the donor understands the nature of the EPOA, including its potential risks and consequences.
- (c) Certify that they believe the donor is not acting under undue pressure or duress.
- (d) Certify that they have no reason to suspect the donor does not have decision-making capacity to sign the EPOA.<sup>37</sup>

13.27 There is no requirement that a medical professional certify the person has decision-making capacity to create an EPOA. However, there will be times when it is prudent to do so. If there is uncertainty, the witness may require a medical certificate to certify there is no reason to suspect the person does not have decision-making capacity.<sup>38</sup> A medical certificate would also make it less likely the validity of the EPOA could later be challenged on the basis the person did not have decision-making capacity.<sup>39</sup>

## The key issues

### *The forms for creating an EPOA may be too long and complex*

13.28 Several submitters told us that the EPOA forms need amending. We heard they are unwieldy, take too long to complete and are difficult to understand.

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<sup>35</sup> Protection of Personal and Property Rights Act 1988, s 94A(6); Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008.

<sup>36</sup> Protection of Personal and Property Rights Act 1988, s 94A(6); and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch form 5(F).

<sup>37</sup> Protection of Personal and Property Rights Act 1988, s 94A(7). Note the wording used is "mentally incapable".

<sup>38</sup> See *NJF v MIF FC Rotorua* FAM-2008-063-759, 20 December 2010 at [40].

<sup>39</sup> See for example *NJF v MIF FC Rotorua* FAM-2008-063-759, 20 December 2010 at [22]. The Family Court has jurisdiction under the common law to declare that an EPOA is invalid if it was made when the person did not have decision-making capacity.

We heard the forms' complexity adds to the cost of making an EPOA, because it takes a long time to complete the forms and for matters to be explained. In turn, this means some people do not create an EPOA. This view, however, was not shared by Te Kāhui Ture o Aotearoa New Zealand Law Society. The Auckland District Law Society (now the Law Association) Family Law Committee was also divided on whether the forms were too long.

### ***The process to create an EPOA may be too complicated and expensive***

13.29 We heard that, for many people, the process of making an EPOA is too complicated and expensive. Submitters told us about several issues with the process, including:

- (a) EPOAs can be too expensive to create. Most donors use a lawyer as their witness to an EPOA and this can be expensive. Other witnessing options such as using Public Trust also come at a cost.<sup>40</sup> Legal aid is not available for drafting or seeking advice on an EPOA.<sup>41</sup> Although some Community Law Centres prepare EPOAs, they do not have the resourcing capacity to meet demand for these services.
- (b) The requirement that the donor and the attorney have separate witnesses can increase the time and cost involved in making an EPOA. It is also not always easily achievable for the donor's witness to be independent to the attorney, especially in small towns.
- (c) The witnessing requirements for the donor's witness, including the certification role, are too onerous. One submitter told us they did not think the witnessing requirements were particularly effective as they thought abuse of EPOAs generally occurs when the EPOA comes into effect or when the donor is making decisions for the donor. However, another

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<sup>40</sup> Public Trust "Will Pricing" <[www.publictrust.co.nz](http://www.publictrust.co.nz)>; Public Trust "Enduring power of attorney (EPA)" <[www.publictrust.co.nz](http://www.publictrust.co.nz)>.

<sup>41</sup> Legal Services Act 2011, s 7; Andrew Finnie "Using and working with the PPPR Act — the challenges" in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (New Zealand Human Rights Commission, Auckland, 2018) 21 at 22.

submitter told us about a situation where a donor was coerced into making an EPOA.

### ***Inequitable access or uptake of EPOAs***

13.30 Some submitters told us there is inequitable access to and uptake of EPOAs.

For example:

- (a) We heard the cost of creating an EPOA excludes people on lower incomes who cannot afford the legal fees to create an EPOA.
- (b) We heard that Māori have lower rates of uptake of EPOAs than Pākehā.<sup>42</sup> One submitter suggested this may be due to the cost and lack of culturally responsive sources of information about EPOAs.
- (c) We heard that people with affected decision-making may be excluded from creating EPOAs because the forms are not provided in accessible formats and decision-making support may be required but not available.

### ***Reform to process for creating an EPOA***

13.31 In this section, we discuss four possible areas for reform. These are:

- (a) The prescribed forms.
- (b) The witnessing requirements of the EPOA, including whether the donor and attorney need independent witnesses.
- (c) The additional safeguards currently carried out by the donor's witness such as the certification requirements.
- (d) Making the process for creating EPOAs more accessible and culturally responsive.

### ***The prescribed forms***

13.32 The EPOA forms were updated in 2017 to be in plain English. Despite this, we heard many people still find the forms difficult. We are interested in hearing ways to make the documents easier to understand and to use.

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<sup>42</sup> See also So-Jung Park and Heather Astell "Prevalence of enduring power of attorney and barriers towards it in community geriatric population in Counties Manukau Health" (2017) 7130 NZ Med J 35 at 39–40.

- 13.33 Several submitters thought the forms should be shortened. We heard that the volume of material in the prescribed form is daunting to most people. Some submitters suggested the forms could be shortened by removing the explanatory information and including it in a separate document. Others suggested the forms would be easier to use if donors could remove irrelevant sections from the form.
- 13.34 We are also interested in whether it would be easier to fill out an EPOA form online. Currently, the EPOA forms can be downloaded from Te Tāhū o te Ture | Ministry of Justice website as MS Word documents, which can be completed in MS Word or by hand. However, in the United Kingdom, the prescribed form can be filled out in an online form, including an option with step-by-step guidance for completing the form.<sup>43</sup>
- 13.35 Another option we are considering is whether the prescribed forms for property and personal EPOAs could be combined. At the moment, the prescribed forms for property and for personal matters are separate.<sup>44</sup> This separation means there is duplication in the matters covered. This seems unnecessary, particularly in those cases where a single attorney is appointed for both property and personal matters. On the other hand, separate forms may help ensure any factors specific to personal or property matters are more thoroughly considered.<sup>45</sup>

### ***Donor's and attorney's signatures should continue to be witnessed***

- 13.36 We consider the signatures of the donor and the attorney should continue to be witnessed. The process of witnessing has a protective function. It confirms that the document has been signed by the donor and serves as an extra check

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<sup>43</sup> The form must still be printed and signed at the end: Office of the Public Guardian “Lasting power of attorney forms” GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>44</sup> Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch. The PPPR Act provides for powers to be granted in respect of both property and personal welfare matters in one document: Protection of Personal and Property Rights Act 1988, ss 93A(1)(c) and 99.

<sup>45</sup> For example, currently the donor can appoint a monitor for a property EPOA but not for personal EPOAs: Protection of Personal and Property Rights Act 1988, s 94A(6)(c)(ii).

against forgery, fraud and duress.<sup>46</sup> Witnessing also marks the significance of an EPOA and can discourage donors from carelessly entering into one.<sup>47</sup>

13.37 However, we are interested in two possible areas of reform:

- (a) Whether the signatures of the donor and attorney should require different witnesses.
- (b) Who should be able to act as a witness.

### Should the signatures of the donor and attorney require different witnesses?

13.38 Under the PPPR Act, the signatures of the donor and the attorney are witnessed by different people. We heard the signatures should be able to be witnessed by the same person if they are a lawyer. Other comparable jurisdictions also generally use the same witness (or witnesses) for both signatures.<sup>48</sup>

13.39 If the same witness can be used for both signatures, it may be necessary to consider whether the number of witnesses should increase. Currently, there are two witnesses to the EPOA, even if they are witnessing different signatures. More than one witness, whether for the same or different signatures, may be more likely to notice any unusual behaviour.

13.40 In England and Wales, only one witness is required.<sup>49</sup> The New South Wales Law Reform Commission also recommended one witness on the basis that two witnesses may be unduly onerous and deter people from appointing an attorney.<sup>50</sup> However, other jurisdictions such as Victoria and Ireland require

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<sup>46</sup> Henry Brandts-Giesen and Indiana Shewen “Executing and witnessing important documents” (20 August 2020) New Zealand Law Society | Te Kāhui Ture o Aotearoa <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

<sup>47</sup> England and Wales Law Commission *Electronic Execution of Documents* (Law Com 386, 2019) at [5.16].

<sup>48</sup> The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), rr 9(3)(b) and 9(6)(b); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(c)–(d); Powers of Attorney Act 2014 (Vic), s 33(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(4).

<sup>49</sup> The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), rr 9(3)(b) and 9(6)(b).

<sup>50</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [8.45].

two witnesses.<sup>51</sup> The Australian Law Reform Commission recommended EPOAs have two witnesses on the basis there would be increased opportunity to notice any behaviours suggesting duress or coercion. They also suggested that this would provide reassurance for family members who may be concerned about the legitimacy of the document.<sup>52</sup>

### Who should be able to act as a witness?

- 13.41 As we note above, currently the donor's witness must be independent of the attorney and must be a lawyer, an officer or employee of a trustee corporation or a legal executive.<sup>53</sup> The attorney's witness can be anyone except the donor or the donor's witness.
- 13.42 We are interested in hearing views on whether any reform is required. Some submitters queried whether the witness needed to be a lawyer or related professional. One submitter suggested the witness could be a Justice of the Peace. The New Zealand Law Society supported the use of a lawyer when making an EPOA, viewing it as an essential safeguard.
- 13.43 Overseas, there is variation in whether the witness needs to be a specified professional. There is no such requirement in Ireland. In New Brunswick, it depends on the nature of the EPOA. For financial matters, the witness must be lawyer.<sup>54</sup> For personal matters, two witnesses are required but they can be anyone over 18 provided they are independent.<sup>55</sup> In Victoria, one of the two

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<sup>51</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(d); Powers of Attorney Act 2014 (Vic), s 33(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(4).

<sup>52</sup> Australian Law Reform Commission *Elder Abuse — A National Legal Response — Final Report* (ALRC R131, 2017) at [5.34].

<sup>53</sup> Protection of Personal and Property Rights Act 1988, ss 94A(4) and 94A(6); and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch form 5. A failure by the witness to take appropriate steps to satisfy themselves that the donor has capacity to create an EPOA can lead to the validity of the EPOA being challenged, a claim in negligence or disciplinary action against the witness: Iris Reuecamp "Enduring Powers of Attorney, Welfare Guardians and Property Managers" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 145.

<sup>54</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(c).

<sup>55</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(d).

witnesses must be someone authorised to witness affidavits or a medical practitioner.<sup>56</sup>

- 13.44 In our view, whether the witness needs to be a specified professional largely depends on whether the witness is required to undertake other functions. For example, in Ireland, the witness is not required to be a specified professional. However, the witness only witnesses the signatures to the EPOA.<sup>57</sup> Other safeguards such as certifying that a person understands the EPOA or has decision-making capacity are carried out by a lawyer and medical professional respectively.<sup>58</sup> In Victoria, the witness is required to be a specified professional and is responsible for other safeguards such as certifying that they believe the donor has decision-making capacity and is not subject to undue influence.<sup>59</sup>
- 13.45 We also heard about issues with the requirement that the donor's witness be independent of the attorney, especially when two people are appointing each other as attorney. When two people are appointing each other as attorney, the PPPR Act modifies the independence requirement so that the donors' witnesses can be from the same firm or the same person provided there is a negligible risk of conflict.<sup>60</sup> We heard that the terms of this exception are difficult to understand and causing difficulties in practice.
- 13.46 We think the witness (or at least one witness, if there are two) should be independent, and we are interested in whether a new Act should clarify what this means. Other jurisdictions are often more specific in defining how the witness must be independent. For example:
- (a) In Victoria, both witnesses must have no family connection to either party. Witnesses also cannot be a care worker or accommodation provider for the donor. An attorney's employee may be a witness only if they are acting

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<sup>56</sup> Powers of Attorney Act 2014 (Vic), s 35(1)(b).

<sup>57</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(4)(b).

<sup>58</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(1)(b)–(d).

<sup>59</sup> Powers of Attorney Act 2014 (Vic), s 36.

<sup>60</sup> Protection of Personal and Property Rights Act 1988, s 94A(4A).

in the ordinary course of their employment but they must record this in the EPOA.<sup>61</sup>

- (b) In Ireland, the witnesses cannot be an employee or agent of the attorney and at least one witness must not be an immediate family member of either party.<sup>62</sup>
- (c) In New Brunswick, if the EPOA is for personal care, the witnesses cannot be the attorney's spouse, partner or child.<sup>63</sup> (Property EPOAs are witnessed by a lawyer, and the relevant Act does not require them to be independent.)

### **Additional safeguards**

13.47 Looking at the PPPR Act and comparable jurisdictions, three additional safeguards are often included in the requirements to create an EPOA. These relate to ensuring that:

- (a) The donor understands the nature of the EPOA.
- (b) The EPOA is not made under duress or undue influence.
- (c) The donor has decision-making capacity to make an EPOA.

13.48 Under the PPPR Act, these safeguards are all addressed by the witnessing requirements. The donor's witness must explain certain matters to the donor and must certify certain matters.

13.49 As we explain below, it may be that some of the safeguards can be carried out another way or are not required. This could address the views of the many submitters who told us the process for making an EPOA is too complex and expensive. However, substantial reform to these safeguards should be approached with caution. EPOAs have significant implications for the donor, and they are not able to revoke the EPOA if they lose decision-making capacity. While we heard the requirements for making an EPOA were too difficult, submitters also told us about situations where EPOAs were abused. Making it easier to create an EPOA might increase the potential for abuse.

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<sup>61</sup> Powers of Attorney Act 2014 (Vic), s 35(2)–(3).

<sup>62</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(4)(a).

<sup>63</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(d).



New Zealand Law Society did not consider that there should be changes to the certification requirements for creating an EPOA.

### Understanding the nature of an EPOA

13.50 Under the PPPR Act, the witness must both explain the nature of the PPPR Act to the donor and certify they believe the donor understands the EPOA.

13.51 Different approaches are taken to the ‘understanding’ requirement overseas. For example:

(a) In Victoria and New Brunswick, there is no express requirement that anyone explain to the donor the effect and nature of an EPOA.

(b) In Ireland, a legal practitioner (separate to the witness) must interview the donor and be satisfied they understand the implications of creating the power.<sup>64</sup>

(c) In the United Kingdom, the donor must read (and confirm they have read) the prescribed explanatory information. A certificate provider, who can be either a person who has known the donor well for at least two years or a person chosen for their professional skills such as a general practitioner or lawyer, must certify that the donor understands the purpose of the EPOA and scope of the authority conferred.<sup>65</sup>

13.52 We are interested in hearing views on whether the requirements to create an EPOA should include a safeguard aimed at ensuring the donor understands the nature of an EPOA and, if so, what that safeguard should involve.

13.53 There may be ways the law can more cheaply and easily ensure people understand the nature and risks of an EPOA. For example, the law could simply require the donor read the prescribed explanatory information and confirm they have done so. There may also be technological solutions that could be developed to enable a person to demonstrate their understanding.

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<sup>64</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(1)(b).

<sup>65</sup> The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), reg 8; Mental Capacity Act 2005 (UK), sch 1 pt 1 cl 2(1)(e)(i).

- 13.54 On the other hand, it is also not uncommon for the law to require that people receive advice when they are vulnerable or giving up a particularly significant right. For example, intending residents of retirement villages must receive independent legal advice before signing an occupation right agreement.<sup>66</sup> Under the Property (Relationships) Act 1976, a relationship property agreement (an agreement to contract out of the standard relationship property rules) is void unless each party received independent legal advice before signing the agreement.<sup>67</sup>

### Decision-making capacity to make an EPOA

- 13.55 Under the PPPR Act, the witness must also certify that there is no reason to believe the donor did not have decision-making capacity to make the EPOA.
- 13.56 As with the other safeguards, different approaches are taken overseas:
- (a) In Victoria, the witness must certify whether the donor appeared to have decision-making capacity.<sup>68</sup>
  - (b) In Ireland, a medical practitioner must certify they are satisfied the person had decision-making capacity.<sup>69</sup>
  - (c) In New Brunswick, a lawyer must certify that the donor had capacity to make a property EPOA.<sup>70</sup> No assessment of the person's decision-making capacity occurs for personal EPOAs.
  - (d) In the United Kingdom, there is no assessment of the person's decision-making capacity.
- 13.57 As we note above, we are cautious about unnecessarily adding additional professionals into the safeguarding process. Requiring a medical professional in all cases is likely to make EPOAs more expensive and complex to create. We are interested in hearing views on whether, if this safeguard is retained, it could be carried out by the witness.

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<sup>66</sup> Retirement Villages Act 2003, s 27(3).

<sup>67</sup> Property (Relationships) Act 1976, s 21F.

<sup>68</sup> Powers of Attorney Act 2014 (Vic), s 36(1)(a)(ii).

<sup>69</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(1)(c).

<sup>70</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(c)(ii)(D).

13.58 More significantly, we are interested in hearing views on whether anyone should be required to certify that there is no reason to believe the person lacked decision-making capacity. This is because:

- (a) It is not clear how effective this requirement is. Lawyers do not necessarily know the donor well and therefore will not always be best placed to judge whether the person appeared to have decision-making capacity. An EPOA can also always be invalidated later on the basis the person lacked decision-making capacity. Consequently, a person making an EPOA who understands that there might be future questions about their decision-making capacity might still choose to get medical evidence to that effect.
- (b) Moreover, if a new Act retains a requirement for confirmation that the donor understands the EPOA, also requiring confirmation of their decision-making capacity may be unnecessary given the centrality of ‘understanding’ in the functional test for decision-making capacity.<sup>71</sup> Alternatively, if it is to be included, a separate requirement for a confirmation that the donor understood the EPOA may not be necessary.

### Undue pressure

13.59 Under the PPPR Act, the donor’s witness must certify that they believe the donor is not acting under “undue pressure or duress”.<sup>72</sup>

13.60 As with the ‘understanding’ requirement, different approaches are taken overseas. For example, the requirement does not exist in New Brunswick. In Victoria, the witness must certify that the witness appeared to sign the document freely and voluntarily.<sup>73</sup> In Ireland, a legal practitioner (who also explains the nature of the EPOA to the donor) is required to certify there is no reason to believe the EPOA was created due to fraud, coercion or undue pressure.<sup>74</sup> In the United Kingdom, the certificate provider must certify that, in their opinion, there was no fraud or undue pressure.<sup>75</sup>

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<sup>71</sup> See discussion in Chapter 7.

<sup>72</sup> Protection of Personal and Property Rights Act 1988, s 94A(7)(ab)(iii).

<sup>73</sup> Powers of Attorney Act 2014 (Vic), s 36(1)(a)(i).

<sup>74</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(1)(b)(iii).

<sup>75</sup> Mental Capacity Act 2005 (UK), sch 1 part 1 cl 2(1)(e)(ii).

- 13.61 We are interested in hearing views on whether anyone should certify that they believe the EPOA did not result from undue pressure. We are also interested in whether this person should also certify there is no reason to believe there was fraud.
- 13.62 Such a requirement will not catch all types of undue pressure. For example, coercive behaviour over a sustained period may not be visible to the witness.<sup>76</sup> However, the requirement would protect against conduct that is obvious. On the other hand, the law already has other ways to respond to undue influence and fraud. If an EPOA is created under undue influence or fraud, the EPOA can subsequently be invalidated on those grounds.
- 13.63 If this requirement is included, there are benefits to it being carried out by the witness. As we discuss above, we think the signatures of the attorney and donor should continue to be witnessed. We are cautious about adding additional professionals into the safeguarding process unnecessarily as it is likely to create additional complexity and increase the cost of making an EPOA. However, we are interested in hearing views on whether specific professionals might be more likely to detect undue pressure to an extent that would justify the additional complexity and cost.

### ***Should a donor be able to create an EPOA remotely?***

- 13.64 We are considering whether it should be possible to create an EPOA by audio-visual link. In response to the COVID-19 pandemic, orders were made enabling EPOAs to be signed and witnessed (including the witness's certification role) using audio-visual links.<sup>77</sup> These orders have since ended.<sup>78</sup>
- 13.65 We think consideration should be given to this being a permanent option for creating EPOAs. Public Trust suggested digital creation as a quicker, more efficient way to create EPOAs, noting this could increase the accessibility and uptake of EPOAs. However, allowing EPOAs to be created by audio-visual link

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<sup>76</sup> England and Wales Law Commission *Electronic Execution of Documents* (Law Com 386, 2019) at [5.18].

<sup>77</sup> The Epidemic Preparedness (Protection of Personal and Property Rights Act 1988 — Enduring Powers of Attorney) Immediate Modification Order 2020 came into effect on 24 April 2020 and applied to EPOAs made from that date until the end of the Epidemic Notice.

<sup>78</sup> The Epidemic Preparedness (COVID-19) Notice 2020 (Epidemic Notice) expired on 20 October 2022.

may reduce the effectiveness of any additional safeguarding requirements. For example, it may be even more difficult to reach a view on whether the person has decision-making capacity or is acting under duress remotely.

- 13.66 We are, however, conscious that technology continues to develop, and we are interested in hearing views on the extent to which the law could enable such developments to improve EPOA usability without sacrificing safeguarding. A new Act could provide for regulations to set out the process for the creation of EPOAs remotely. This would allow for more regular updates to the process as technology develops.

### ***Making the process for creating EPOAs more accessible and culturally responsive***

- 13.67 We are interested in hearing views on how to make the process for creating EPOAs more accessible and culturally responsive. We also discuss ways to make information about EPOAs more accessible and culturally appropriate in Chapter 16.

- 13.68 Some people will need access to decision-making support when making an EPOA. They might need access to information in accessible formats or extra time. One submitter told us about their experience supporting someone to create an EPOA in their work as a social worker. This support included developing accessible Easy Read material on EPOAs, going through the material with the person on several occasions and then supporting them to make the EPOA with a lawyer.

- 13.69 Others may need information or the prescribed forms to be in other languages or explained in more culturally responsive ways. For example, one submitter suggested that Māori need a place they can go to speak to other Māori about how to create decision-making arrangements such as EPOAs.

#### **QUESTION 59:**

How could EPOA forms be updated to improve their usability?

#### **QUESTION 60:**

Do you agree EPOAs should continue to be witnessed? If so, who should be able to act as a witness?

**QUESTION 61:**

Other than witnessing requirements, what safeguards should accompany the creation of EPOAs? For example:

- a. Should someone be required to explain the nature of the EPOA to the donor?
- b. Should someone be required to certify that they believe the donor understands the EPOA?
- c. Should someone be required to certify that they believe the donor is not acting under undue pressure?
- d. Should someone be required to certify that they believe the donor has decision-making capacity?

**QUESTION 62:**

Should EPOAs be able to be created remotely by audio-visual link or using other technology?

**QUESTION 63:**

How can the process for making EPOAs be more accessible and culturally responsive?

**TAILORING THE SCOPE OF AN EPOA**

13.70 Under the PPPR Act, a donor can tailor the scope of an EPOA. They can:

- (a) Specify what decisions are the subject of the EPOA.<sup>79</sup> The donor can confer wide powers such as all personal and welfare matters or specify that only certain decisions are the subject of the EPOA.
- (b) State any restrictions or conditions on the attorney's ability to make decisions.<sup>80</sup>

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<sup>79</sup> Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

<sup>80</sup> Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

- 13.71 We understand that very wide powers are usually conferred and that EPOAs are not often tailored to individual circumstances.<sup>81</sup> This may be because, in many cases, the donor makes an EPOA to take effect in future circumstances they cannot accurately predict. However, it is also possible that people do not fully understand their options for tailoring an EPOA or that they avoid this option due to the perceived cost or difficulty involved.
- 13.72 We are not aware of there being issues with tailoring the scope of an EPOA, beyond the general difficulties in making an EPOA that we discuss above. However, we are interested in hearing views on what might be improved.

**QUESTION 64:**

Are there any issues with tailoring the scope of an EPOA?

## **WHEN MAY ATTORNEYS MAKE DECISIONS UNDER AN EPOA?**

### **Current law**

- 13.73 Under the PPPR Act, when a property attorney and personal attorney may make decisions is different:
- (a) For property EPOAs, the EPOA can “take effect” immediately or once a donor is assessed not to have decision-making capacity (depending on which option the donor has specified).<sup>82</sup> If the latter, a relevant health practitioner must certify or the court must determine that the donor does not have decision-making capacity.<sup>83</sup>
  - (b) For personal EPOAs, an attorney “must not act” unless they believe on reasonable grounds that the donor lacks decision-making capacity for a particular decision.<sup>84</sup> For decisions that are likely to have a significant effect on the donor’s health, well-being or enjoyment of life, a relevant

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<sup>81</sup> Iris Reuecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 142.

<sup>82</sup> Protection of Personal and Property Rights Act 1988, s 97(4).

<sup>83</sup> Protection of Personal and Property Rights Act 1988, s 97(5).

<sup>84</sup> Protection of Personal and Property Rights Act 1988, s 98(3)(b).

health practitioner must certify or the court must determine that the donor does not have decision-making capacity.<sup>85</sup>

## **The key issues**

### ***The use of decision-making capacity assessments***

13.74 Many of the issues we heard relate to the decision-making capacity assessment. These issues and proposals for reform are discussed in Chapter 7.

### ***Lack of clarity about when attorneys are entitled to act***

13.75 Submitters told us that how and when an EPOA comes into effect is unclear. Some submitters said attorneys do not always understand or know when they are able to make decisions for the donor. We also heard there is confusion among service providers and professionals as to when attorneys may act and the process for doing so. This confusion may be exacerbated by the difference between when an attorney may act under a property EPOA and under a welfare EPOA.

### ***It is not clear what happens in cases where the donor's decision-making capacity fluctuates or when the donor has capacity to make some decisions but not others***

13.76 We consider that more clarity is needed about the scope of the attorney's decision-making role in cases of fluctuating decision-making capacity or when the donor has capacity to make some decisions but not others.

13.77 As we discuss in Chapter 7, a person's decision-making abilities can vary depending on the nature of the decision. For example, a person might have decision-making capacity to make decisions about where they live but not have decision-making capacity to make decisions about complex health treatment. A person's decision-making abilities can also fluctuate or change over time.

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<sup>85</sup> Protection of Personal and Property Rights Act 1988, ss 98(3)(a) and (6).



- 13.78 As we note above, for personal EPOAs, the attorney must not act unless the person is assessed as lacking decision-making capacity either by the attorney or, if the decision concerns a “significant matter”, by a relevant health practitioner or the court. Decision-making capacity is determined in relation to the personal matter being decided and at the time the decision is being made.<sup>86</sup>
- 13.79 While this recognises the decision-specific and fluctuating nature of decision-making capacity, as noted above, we are unsure of the extent to which attorneys are acting this way in practice. We heard that attorneys, health professionals and health services often interpret an EPOA to mean that, once it has come into effect, the attorney is responsible for all decisions even though the donor is still capable of making some decisions themselves.
- 13.80 Property EPOAs do not recognise fluctuating capacity or the decision-specific nature of capacity in the same way, as the whole EPOA takes effect when a person is assessed not to have decision-making capacity. This means that all financial decisions can be made by the attorney regardless of whether the donor has decision-making capacity to make some of them.

## Reform

### *Overseas jurisdictions*

- 13.81 In overseas jurisdictions, there is variation in how and when an attorney’s power to make a decision or decisions comes into effect.
- 13.82 EPOAs are often separated into EPOAs for property and EPOAs for personal care and welfare.<sup>87</sup> Property EPOAs can usually confer authority on the attorney to either act immediately or to act when the donor does not have decision-making capacity for a particular decision.<sup>88</sup> Personal care and welfare

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<sup>86</sup> Protection of Personal and Property Rights Act 1988, s 98(3A).

<sup>87</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 7(1).

<sup>88</sup> Mental Capacity Act 2005 (UK), s 9(1). Compare to the approach for personal matters in s 11(7). Decision-making capacity is decision-specific: s 2.

EPOAs usually confer authority on the attorney to act only when the donor does not have decision-making capacity for a particular decision.<sup>89</sup>

- 13.83 However, there are exceptions. In Victoria, an EPOA can authorise the attorney to act immediately for both personal or property matters.<sup>90</sup> In Ireland, the attorney only has authority to act, whether for property or personal care and welfare decisions, if the donor does not have decision-making capacity.<sup>91</sup> In some jurisdictions, there is an ability to specify a time or circumstance in which the EPOA comes into effect.<sup>92</sup>
- 13.84 If the attorney does not have authority to act until the donor lacks decision-making capacity for a particular decision, there are different approaches to how this is determined:
- (a) Sometimes, the attorney only needs to have a reasonable belief that the donor lacks decision-making capacity before they can act, and there is no requirement for a medical certificate. The United Kingdom code of practice states that, for complicated decisions or decisions where there is uncertainty, a “reasonable belief” that a person does not have decision-making capacity may require a medical or professional assessment.<sup>93</sup> In Victoria, third parties dealing with the attorney can ask for evidence such as a medical certificate to establish that the donor does not have decision-making capacity.<sup>94</sup>
  - (b) In New Brunswick, an assessment must be undertaken by a specified professional such as a medical practitioner or capacity assessor to determine that the donor does not have decision-making capacity.<sup>95</sup> The

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<sup>89</sup> Mental Capacity Act 2005 (UK), ss 9(1) and 11(7). Decision-making capacity is decision-specific: s 2; Enduring Powers of Attorney Act SNB 2019 c 30, s 9(1).

<sup>90</sup> Powers of Attorney Act 2014 (Vic), s 39(1).

<sup>91</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 59(4).

<sup>92</sup> Powers of Attorney Act 2014 (Vic), s 39(1); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 8(2).

<sup>93</sup> Department for Constitutional Affairs *Mental Capacity Act 2005: Code of Practice* (The Stationery Office, 23 April 2007) at [4.44]–[4.45].

<sup>94</sup> Powers of Attorney Act 2014 (Vic), s 39(4).

<sup>95</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 1 (definition of “assessor”) and ss 8(3)(b) and 9(2)(b).

donor can specify in the EPOA a person who is to determine whether the donor has decision-making capacity. If this person is unable or unwilling to make the determination, a capacity assessor must determine that the donor lacks decision-making capacity.<sup>96</sup>

- (c) In Ireland, an attorney must register an EPOA before they can begin acting under it and the application for registration must be accompanied by an assessment by a healthcare provider that the donor lacks decision-making capacity.<sup>97</sup>

13.85 There are also different approaches to what happens once an EPOA comes into effect:

- (a) Sometimes, the EPOA only comes into effect for the particular decision and the attorney only has authority for that decision. Decision-making capacity must then be assessed for each subsequent decision.<sup>98</sup>
- (b) Sometimes, the EPOA has general effect and the attorney has authority to make any decisions, subject to any restrictions in the EPOA or in the legislation.<sup>99</sup>

### ***Reforming when an attorney can make decisions under an EPOA***

13.86 In this section, we discuss three possible areas for reform. These are:

- (a) When the EPOA should come into effect so that the attorney may use their decision-making powers under the EPOA, at least for some decisions.
- (b) Whether, once the EPOA has come into effect, the attorney's decision-making powers should be activated on a case-by-case basis for each decision or all at once. By activated, we mean that the attorney has the power to make that particular decision.
- (c) When decision-making capacity assessments should be carried out by a professional.

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<sup>96</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), ss 8(3)(a) and 9(2)(a).

<sup>97</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 59(4), 68(1) and 68(7)(b).

<sup>98</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 9(1).

<sup>99</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 59(5).

### When the EPOA should come into effect

- 13.87 As we discuss in Chapter 7, we consider that decision-making capacity should be retained in a new Act. In our view, an attorney should be empowered to make decisions for which the donor lacks decision-making capacity.
- 13.88 We think it is appropriate that a lack of decision-making capacity alone can trigger the EPOA coming into effect. This is because the donor enters the EPOA arrangement by choice. We do not think it is necessary to specify additional requirements such as that a decision is needed.<sup>100</sup> A number of submitters thought the threshold for the EPOA coming into effect should continue to be based on decision-making capacity.
- 13.89 However, we are interested in hearing any contrary views. For example, should the EPOA only come into effect where the donor is assessed as lacking decision-making capacity and the attorney is satisfied that there is a need to use their decision-making powers and that less restrictive measures are not available?
- 13.90 We are also interested in hearing views on whether a donor should have the right to specify in their EPOA that the EPOA comes into effect when the donor still has decision-making capacity. Under the PPPR Act, the donor can authorise a property EPOA to take effect while the donor still has decision-making capacity so that the attorney can begin acting immediately. We understand that this is a useful option for people who do not want to make decisions regarding their property, whether or not they have decision-making capacity for any particular decision.
- 13.91 Although a donor can use an ordinary power of attorney to confer power on an attorney to act in circumstances when the donor still has decision-making capacity, an ordinary power of attorney ceases to have effect when the donor loses decision-making capacity.<sup>101</sup> This means people who want to appoint an attorney to also act if they lose decision-making capacity in the future would need to create both an ordinary power of attorney and an EPOA. People may

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<sup>100</sup> Conversely, we do consider these sorts of additional considerations are needed to justify the appointment of a court-appointed representative. See our discussion in Chapter 10.

<sup>101</sup> D Kalderimis *Laws of New Zealand Powers: Powers of Attorney* (online ed) at [162].

find it more convenient and cheaper to do this in one document (the EPOA) rather than two.

- 13.92 Some submitters suggested that we consider whether the donor should also be able to specify that a personal EPOA takes effect immediately regardless of whether the donor has decision-making capacity. As we note above, both personal and property attorneys may act immediately in Victoria. They may also act at any other time, circumstance or occasion specified in the EPOA.<sup>102</sup>
- 13.93 However, personal decisions are different to property decisions because of their personal nature. It is not clear how often, if ever, a person would want someone else to make decisions about their medical treatment or where they live while they retain decision-making capacity. Some areas of law such as medical treatment also require the person themselves to consent to the decision.<sup>103</sup> In addition, unless a new Act specifies that the attorney's decision is binding, there will be uncertainty as to who has the authority to make the decision, especially when the donor disagrees with the attorney.

### Once an EPOA comes into effect, should an attorney's decision-making powers be activated for all decisions?

- 13.94 We are interested in hearing views on whether, once the EPOA comes into effect, the attorney should be able to act on any matter (as is the case for property attorneys under the PPPR Act) or whether those powers should be activated on a case-by-case basis (as is the case for personal attorneys under the PPPR Act).
- 13.95 In the jurisdictions we discuss above, it is more common for an attorney's powers to activate on a case-by-case basis. This is also consistent with our view that decision-making capacity is decision and context-specific and that it may fluctuate. It is also consistent with our view in Chapter 10 that court-appointed representatives should not make decisions for which the represented person has decision-making capacity. However, given the

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<sup>102</sup> Powers of Attorney Act 2014 (Vic), s 39(1).

<sup>103</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, right 7(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" (emphasis added).

voluntary nature of EPOAs, the same approach may not be required for EPOAs. Even if a lack of decision-making capacity for a decision is required to bring the EPOA into effect, it may be appropriate for donors to be entitled to specify that the attorney may act for all decisions once the EPOA takes effect.

13.96 It may be administratively easier if an attorney's powers to act under an EPOA are activated for all purposes once the EPOA takes effect, because then only one decision-making capacity assessment would be needed. This may be especially the case if a medical professional is required to assess the donor's decision-making capacity for a decision before the attorney can make it. However, there may be other ways to manage this administrative burden. As we discuss below, we do not consider medical professionals should always be required to complete the decision-making capacity assessment. For most decisions, it may be sufficient for the attorney to reasonably believe that the donor does not have decision-making capacity to make the particular decision (as we discuss in Chapter 10 in relation to court-appointed representatives). It may only be for more significant decisions that an assessment of decision-making capacity by a medical professional is required.

13.97 In addition, if the attorney's powers are activated for all decisions once the donor is assessed as lacking decision-making capacity, the consequences of the EPOA will be much more significant. The attorney would have the ability to make decisions that the donor has decision-making capacity to make themselves. This may require additional safeguards. For example, in Ireland, the safeguards for creating an EPOA are more stringent than in other jurisdictions. A donor must have two witnesses, receive legal advice on the EPOA and undertake a decision-making capacity assessment by a medical professional. They must also confirm they intend the EPOA to come into force when they are assessed as lacking decision-making capacity in relation to one or more of the decisions subject to the EPOA.<sup>104</sup>

### When should a professional determine whether a person has decision-making capacity?

13.98 Under the PPPR Act, an attorney must not act in respect of significant personal decisions and must not act in relation to the donor's property (unless

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<sup>104</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(1)(a)(ii).

the EPOA has empowered the property attorney to act immediately) unless a medical professional has determined the donor lacks decision-making capacity. This safeguard was introduced following the Commission's 2001 review.<sup>105</sup> At the time, many third parties such as hospitals were already requiring a medical certificate as a matter of practice. Submitters also overwhelmingly supported the introduction of the medical certificate.<sup>106</sup>

13.99 In Chapter 7, we discuss whether a new Act should allow other professionals such as registered nurses, social workers or other professionals with appropriate training to undertake decision-making capacity assessments. In this section, we discuss when professional assessments of this kind should be required. While professional assessments are an additional safeguard, they also increase the time and cost involved and can be distressing for the person being assessed.

13.100 Some options we are considering include:

- (a) The assessment is undertaken by the attorney in most cases, with a professional assessment in cases where the donor disagrees with the attorney.
- (b) The assessment is undertaken by the attorney in most cases, with a professional assessment when the attorney uses an EPOA for the first time.
- (c) The assessment is undertaken by the attorney in most cases, with a professional assessment when the decision is "significant". The law could define what amounts to a significant decision. It could also allow donors to identify, in the EPOA, additional decisions that the donor views as significant.
- (d) The donor can identify a person in the EPOA, such as a family member, who can determine whether they have decision-making capacity. For

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<sup>105</sup> The Law Commission recommended medical certification that the donor lacks decision-making capacity as a general requirement for all decisions. However, the legislative change only introduced a medical certification requirement for significant decisions: See Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [30] and Protection of Personal and Property Rights Amendment Act 2007, s 11(1).

<sup>106</sup> Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [30].

example, in New Brunswick, the donor can specify who can conduct decision-making capacity assessments in the EPOA.<sup>107</sup>

**QUESTION 65:**

Do you agree that loss of decision-making capacity is a sufficient trigger for an EPOA to come into effect so that the attorney may exercise decision-making powers under an EPOA? Should donors be entitled to specify a different trigger?

**QUESTION 66:**

Once an EPOA comes into effect, should an attorney be able to act on any matter or should the attorney's powers be activated on a case-by-case basis? Why?

**QUESTION 67:**

When should a professional be required to determine whether the person does not have decision-making capacity?

## MAKING DECISIONS AS AN ATTORNEY

### Current law

13.101 Under the PPPR Act, the decision-making role of an attorney is focused on the best interests of the person with affected decision-making. For a personal attorney, the promotion and protection of the welfare and best interests of the donor is the paramount aim. For a property attorney, the paramount consideration is to manage the property so as to promote and protect the donor's best interests.<sup>108</sup>

13.102 Alongside this overarching consideration, the attorney must seek to encourage the donor to develop and exercise their capacity to understand and communicate decisions (personal) and competence in managing affairs

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<sup>107</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), ss 8(3) and 9(2).

<sup>108</sup> Protection of Personal and Property Rights Act 1988, s 97A. Where there are different attorneys for personal care and property, the property attorney must also give the personal care and welfare attorney the financial support they need to perform their duties: Protection of Personal and Property Rights Act 1988, s 99(2).



(property).<sup>109</sup> Personal attorneys must also consider the financial implications of the decisions they make.<sup>110</sup>

13.103 Attorneys are also subject to consultation obligations. In exercising their powers, an attorney must “as far as practicable” consult the donor, any person specified in the EPOA to be consulted and any other attorney appointed under the EPOA or another EPOA.<sup>111</sup> A personal attorney must also “have regard to” any advance directive the donor has made unless this is contrary to provisions of the Act.<sup>112</sup>

### Reforming the decision-making role

13.104 For the reasons discussed below, we think that the decision-making role of an attorney should be the same as a court-appointed representative.

13.105 We discuss reform to the court-appointed representative’s decision-making role in Chapter 10. In that chapter, we explain our view that the decision-making role should respect a person’s rights, will and preferences. We also explain that there are two aspects of the decision-making role:

- (a) The decision-making framework that should guide decisions of the representative.
- (b) The process that the representative should follow when making decisions.

13.106 We then seek views on several issues. We ask how a representative should identify a person’s will and preferences. We also ask when it might not be appropriate to make decisions based solely on a person’s will and preferences and, in such cases, how decisions should be made. We also ask questions about the decision-making process. In particular, we discuss the representative’s obligations concerning decision-making support and consultation.

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<sup>109</sup> Protection of Personal and Property Rights Act 1988, ss 98A(2) and 97A(2).

<sup>110</sup> Protection of Personal and Property Rights Act 1988, s 98A.

<sup>111</sup> Protection of Personal and Property Rights Act 1988, s 99A(1).

<sup>112</sup> Protection of Personal and Property Rights Act 1988, ss 99A(2), 98(4) and 18.

13.107 In this section, we:

- (a) Explain why we think the decision-making framework for attorneys should be the same as for court-appointed representatives.
- (b) Discuss whether the decision-making process for attorneys should be the same as for court-appointed representatives.
- (c) Discuss ways to ensure the donor's will and preferences are captured when making an EPOA.

***Should a new Act specify the same decision-making framework for attorneys as for court-appointed representatives?***

13.108 As discussed in Chapter 10, by 'decision-making framework' we mean the basis on which decisions are to be reached — in other words, the criterion or criteria with which a decision must comply and the factors that should be considered. 'Best interests' is a decision-making framework.

13.109 Generally speaking, we consider the decision-making framework set out in a new Act for attorneys should be the same as that for court-appointed representatives. Both will make decisions for a person who has been assessed not to have decision-making capacity. Under the PPPR Act, the decision-making role of an attorney is also broadly the same as that of welfare guardian or property manager.<sup>113</sup>

13.110 In reaching this view, we considered whether a new Act should permit the donor to select a different decision-making framework. While court-appointed representatives need a fixed decision-making framework, this may not be the case for attorneys as the donor consents to the arrangement. When the representative is appointed by the donor, there is (at least in principle) no reason why a donor cannot choose the decision-making framework. If, for example, a person says they want decisions made in their best interests, they

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<sup>113</sup> In 2001, the Law Commission recommended changes to the attorney's role to align it with the the social objectives of welfare guardians and property managers. The Commission recommended that attorneys should also be under an obligation to encourage the donor to exercise competence and consult with the donor and other relevant people: Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [35].

are consenting to decisions being made on that basis. On its face, this appears consistent with their rights, will and preferences.

13.111 We suggest that this approach is unnecessary. We expect that any wishes expressed by the donor, for example in a statement of wishes as we discuss in Chapter 15, will be highly relevant to determining the donor's will and preferences about the decision-making framework.

13.112 We also do not consider this approach is workable in practice. There are downsides to allowing donors to set different decision-making frameworks. We heard that attorneys do not always understand their role. Allowing multiple frameworks would likely increase confusion and make it difficult to provide guidance to attorneys.

13.113 This does not mean the attorney should be entitled to ignore the donor's views on how decisions should be made. To the contrary, they should respect the donor's rights, will and preferences. We suggest that the simplest way to ensure this happens is for attorneys and court-appointed representatives to have the same decision-making framework and for donors to specify in advance what their wishes are in relation to specific decisions or classes of decisions (which we discuss further below).

***Should a new Act specify the same decision-making process for attorneys as for court-appointed representatives?***

13.114 As discussed in Chapter 10, by 'decision-making process', we mean the steps a court-appointed representative should take when making a decision in order to be sure that it satisfies the requirements of the decision-making framework.

13.115 We are interested in hearing views on whether the decision-making process for attorneys under an EPOA should be the same as for court-appointed representatives. As with the decision-making framework, there are benefits to them being similar as it will be clearer what the attorney's obligations are.

13.116 However, under the PPPR Act, the donor can already specify changes to the decision-making process. For example, they can adjust the attorney's consultation obligations by specifying who the attorney must consult. We are interested in whether this should continue and how it would work with the requirement that the attorney respect the donor's rights, will and preferences.

For example, what should happen if the donor has specified that a certain person is to be consulted if they later fall out with that person?

### **Recording a person's will and preferences**

13.117 Given the importance of a person's will and preferences, we think that, when a donor is making an EPOA, it would be helpful for them to record their wishes concerning, for example, how they would like decisions to be made. We heard that donors do not always discuss their wishes with their attorney. We also heard that, when a person is creating an EPOA, this is an opportunity for the donor to do so.

13.118 In Chapter 15, we discuss whether it would be useful for a new Act to provide for a statement of wishes. This is a document in which a person could record their values, lifestyle preferences and other matters that are important to them and that they would wish to be taken into account by supporters and representatives. We are interested in whether the process of making an EPOA could be improved to enable a donor to easily record a statement of wishes or in some other way set out matters relating to their wishes at the same time. For example, the explanatory material or EPOA forms could include a prompt to consider creating a statement of wishes. Alternatively, the EPOA form could include space to record the donor's wishes. Queensland's EPOA documents have an optional section in which the donor can record their views, wishes and preferences that they want the attorney to know when making decisions for them.<sup>114</sup>

#### **QUESTION 68:**

Do you agree that the decision-making framework for attorneys should be the same as that for court-appointed representatives? Why or why not?

#### **QUESTION 69:**

Should the donor be able to specify the attorney's consultation obligations? Why or why not?

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<sup>114</sup> Queensland Government *Enduring Power of Attorney — Short Form* (Powers of Attorney Act 1998 Form 2, Version 4, 30 November 2020) at 3.

**QUESTION 70:**

How could a person's wishes best be captured when creating an EPOA?

**SAFEGUARDS ONCE AN EPOA IS IN PLACE**

13.119 In this section, we consider whether reform is needed to the main safeguards that exist under the PPPR Act once an EPOA is in place. These relate to:

- (a) Monitoring of the attorney.
- (b) The attorney's record-keeping obligations.
- (c) The role of the Family Court.

**Appointment of a monitor or similar person**

13.120 Under the PPPR Act, a donor may appoint a person to observe or monitor the attorney's actions.

- (a) For property EPOAs, the donor may specify that the attorney's decisions about the donor's property are monitored.<sup>115</sup> The Act does not specify what the role of the monitor is or what powers they have.
- (b) For both property and personal EPOAs, the donor may specify one or more people who are entitled to information about how the attorney is carrying out their role.<sup>116</sup> The attorney must "promptly comply" with any requests for information.<sup>117</sup>

13.121 It is not clear whether there is any practical difference between the ability to appoint a monitor and the ability to appoint a person who is entitled to information. The prescribed form to create a property EPOA does not contain a section on monitors. Instead, the property and personal forms both contain a section on appointing a person "to keep an eye" on the attorney's actions.<sup>118</sup>

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<sup>115</sup> Protection of Personal and Property Rights Act 1988, ss 94A(6)(c) and 99B.

<sup>116</sup> The power is conferred under the general ability to authorise powers subject to any conditions or restrictions: Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

<sup>117</sup> Protection of Personal and Property Rights Act 1988, s 99B.

<sup>118</sup> Protection of Personal and Property Rights Act 1988, s 94A(6)(c)(ii); Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch form 1 pt J (property) and form 3 pt G (personal).

The forms provide an option to name someone to whom an attorney must give information about how they are carrying out their role.<sup>119</sup> If the donor selects this option, they must identify who is to receive the information and what information the attorney is to provide.

13.122 It is also not clear how often these mechanisms are used or how effective they are in safeguarding the donor from abuse. We are interested in hearing views on whether this option is useful and, if so, how it could be improved. For example, the law could provide more information on what a monitor could do. In New Brunswick, a monitor has powers to visit the donor and to request records from the attorney.<sup>120</sup> The monitor is also required to advise the donor and any other attorneys if the monitor suspects the attorney is not acting in accordance with the legislation.<sup>121</sup>

**QUESTION 71:**

Should donors be able to appoint a monitor? Why or why not? If so, what powers should the monitor have?

**Record-keeping and reporting**

13.123 Under the PPPR Act, a property attorney must keep records of financial transactions undertaken while the donor does not have decision-making capacity. Failure to do this is an offence, and the attorney can be fined up to \$1,000 on conviction.<sup>122</sup>

13.124 The attorney does not have to file these records anywhere. However, as we note above, if the donor has specified that a person receive financial records, the attorney must provide the information if requested to do so.<sup>123</sup>

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<sup>119</sup> Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch form 1 pt J (property) and form 3 pt G (personal).

<sup>120</sup> Enduring Powers of Attorney Act SNB 2019 c 30, s 16.

<sup>121</sup> Enduring Powers of Attorney Act SNB 2019 c 30, s 16(3).

<sup>122</sup> Protection of Personal and Property Rights Act 1988, s 99C.

<sup>123</sup> Protection of Personal and Property Rights Act 1988, s 99B(a).

13.125 A personal attorney has no statutory obligation to keep records. However, a donor can specify record-keeping obligations as a condition of the attorney's appointment.<sup>124</sup>

13.126 In our view, financial attorneys should be required to keep financial records. Several submitters thought this was an important safeguard. However, we are interested in hearing views on whether the record-keeping requirements should be reformed. In this section, we discuss whether:

- (a) A third party should review or audit the financial records.
- (b) Record-keeping (and possibly reporting) should be required for non-financial matters.

### ***Should financial reporting be required?***

13.127 Several submitters thought attorneys should be required to report financial records to the court or another appropriate body. We also heard that there could be a requirement to report to family members.

13.128 The PPPR Act already provides that the donor can specify a person to receive the financial records. It is not clear that making this mandatory would strike the right balance between usability and safeguarding.

13.129 However, not everyone will have someone who could review financial records even if they wanted someone to do so. It may be that, in those cases, another body should be responsible for reviewing the records. For example, in Saskatchewan, there is a right for any "interested person" to ask the registrar to direct the attorney to provide information (referred to as accounting) about how they are managing the donor's affairs. The registrar can then investigate to ensure the accuracy of that information.<sup>125</sup> Careful thought would be needed, however, to be confident that the effectiveness of such an option would not be outweighed by the cost of its implementation and the potential for

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<sup>124</sup> Protection of Personal and Property Rights Act 1988, ss 99A and 99B; Iris Reuecamp "Enduring Powers of Attorney, Welfare Guardians and Property Managers" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 149.

<sup>125</sup> Powers of Attorney Act SS 2002 P-20.3, s 18.

the increased administrative obligations to disincentivise people from acting as attorneys.

### **Record-keeping and reporting requirements for non-financial decisions**

- 13.130 We are also interested in views on whether record-keeping obligations should be extended to some personal matters, particularly if they have significant personal or financial implications. We heard from some submitters that attorneys should have to record some types of personal decisions and how they were reached. This might involve recording the options considered, reasons for a decision and how they took the person's will and preferences into account. In New Brunswick, for example, personal attorneys are required to keep a list of "all decisions made by the attorney in relation to the grantor's health care, accommodation and support services, including the date of the decision and the reason for the decision".<sup>126</sup>
- 13.131 Again, however, this could prove onerous, time-consuming and expensive and may disincentivise people from being attorneys. We are interested in hearing views on where the balance should lie.

#### **QUESTION 72:**

Should financial attorneys be subject to a reporting requirement for financial records? Why or why not?

#### **QUESTION 73:**

Should attorneys keep records of some types of personal decisions? If so, which matters should they be required to keep records for and what should be recorded?

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<sup>126</sup> General Regulation, NB Reg 2020-43 (New Brunswick), reg 4(3).



## The role of the Family Court

13.132 The Family Court has oversight of EPOAs. The court can decide whether an EPOA is valid.<sup>127</sup> The court can also review an attorney's decisions and revoke their appointment.<sup>128</sup>

13.133 The court has wide powers to determine questions regarding an EPOA. For example, it can:<sup>129</sup>

- (a) Determine whether an EPOA is valid.
- (b) Give directions about the property or personal affairs of the donor.
- (c) Require the attorney to provide accounts, information or documents.
- (d) Modify the EPOA.
- (e) Determine the suitability of the attorney.
- (f) Review an attorney's decision.
- (g) Revoke an attorney's appointment.

13.134 Many submitters told us about difficulties challenging actions under an EPOA due to the complexity and cost of court proceedings. These barriers can be exacerbated if the donor is isolated, frightened of the attorney or dependent on the attorney for care and support. If actions under an EPOA are challenged, the delay in having the matter resolved can be particularly difficult for the donor, the attorney and those close to them and can adversely affect the relationships of all those involved.

13.135 These concerns appear to be borne out by the number of applications made to the Family Court, which are low. Between 2013 and 2022, applications for

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<sup>127</sup> Protection of Personal and Property Rights Act 1988, s 102(1)(a).

<sup>128</sup> Protection of Personal and Property Rights Act 1988, ss 102 and 103.

<sup>129</sup> Ramon Pethig *Laws of New Zealand* (20) Mental Health: Enduring Powers of Attorney at [178], citing Protection of Personal and Property Rights Act 1988, ss 102 and 105.

review of the decision of an attorney numbered fewer than 30 per year.<sup>130</sup> The highest number of applications was 26 in 2021. The lowest was 10 in 2017.<sup>131</sup>

13.136 We discuss ways to improve court processes in Chapter 17. However, it may also be that the Family Court will not always be best placed to provide oversight or respond to complaints about attorneys acting improperly. Establishing an easy, low-cost and timely complaints function under a new Act may help resolve complaints at an early stage. We discuss the introduction of a complaints function in Chapter 16.

### IS THERE ANYTHING ELSE YOU WANT TO TELL US?

13.137 In this chapter, we have only focused on those areas of EPOAs that may be particularly different to court-appointed representatives. We have not addressed other features of the EPOA arrangement, such as attorney remuneration, revocation of an EPOA and the attorney's duties.

13.138 Please let us know if there is anything additional you think we should take into account in relation to EPOAs.

#### QUESTION 74:

Is there anything else you would like to tell us about enduring powers of attorney?

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<sup>130</sup> Ministry of Justice Analytics and Insights "PPPR Act breakdown by application types" (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).

<sup>131</sup> Ministry of Justice Analytics and Insights "PPPR Act breakdown by application types" (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).

## CHAPTER 14

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# An EPOA register and notification requirements

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### INTRODUCTION

- 14.1 Under the Protection of Personal and Property Rights Act 1988 (PPPR Act), there is no process for registering enduring powers of attorney (EPOAs) or notifying anyone that an EPOA has been created or that the attorney has begun making decisions for the donor. Many submitters told us we should consider the introduction of an EPOA register.
- 14.2 In this chapter, we consider the issues that the introduction of a register or notification requirements might resolve. We then consider whether a new Act should introduce a registration system or notification requirements.

### THE KEY ISSUES

#### Difficulty of knowing whether there is an EPOA in place

- 14.3 We heard it can be difficult to find out whether a person has made an EPOA and to locate records of EPOAs when they are needed.
- 14.4 Submitters told us that people can forget whether they have made an EPOA or where they have stored it.<sup>1</sup> We heard that EPOAs are often not required until a

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<sup>1</sup> See also Andrew Finnie “Using and working with the PPPR Act — the challenges” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (New Zealand Human Rights Commission, Auckland, 2018) 21 at 23.

person experiences a sudden cognitive event affecting their memory, understanding or communication. In this scenario, the person may be unable to communicate the existence or location of the EPOA. Unless family and whānau members are already aware of the existence of the EPOA and its location, the EPOA will not be able to be used in precisely the circumstance it was intended for.

- 14.5 We also heard that EPOAs can be easily lost or misplaced. EPOAs might be held by the donor, the attorney, as part of the person's medical records or by the donor's lawyer. In many cases, whether an EPOA is easily locatable depends on the filing practices of the donor or the attorney. People also sometimes change lawyer or medical practice, leaving their records behind.
- 14.6 Even when an EPOA can be located, there can be no way to tell if it has been superseded. There is a risk of people presenting an old EPOA that has been cancelled or updated. We heard that sometimes donors create a new EPOA without revoking previous EPOAs because they do not remember their existence.
- 14.7 These issues have flow-on effects. For example, we heard that:
- (a) Sometimes, professionals, organisations and service providers may have to rely on the family's word for who the attorney is.
  - (b) Sometimes, a property manager or welfare guardian is unnecessarily appointed.
  - (c) Uncertainties about the existence or validity of an EPOA can lead to disputes between family members and, in some cases, court proceedings.<sup>2</sup>
  - (d) Organisations can be reluctant to rely on an EPOA.<sup>3</sup>

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<sup>2</sup> See also Andrew Finnie "Using and working with the PPPR Act — the challenges" in Mark Fisher and Janet Anderson-Bidois (ed) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (New Zealand Human Rights Commission, Auckland, 2018) 21 at 23.

<sup>3</sup> See also Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.204].

## Limited oversight of attorneys acting under an EPOA

- 14.8 Some submitters thought that there is currently not enough oversight of the attorney's role. We heard about situations where the attorney acted improperly or abused their role. For example, submitters told us about situations where attorneys controlled the donor, stopped people from visiting the donor or stole money from the donor.
- 14.9 The current safeguarding mechanisms such as oversight by te Kōti Whānau | Family Court may not be sufficient to manage these concerns. As we discuss in Chapter 17, people with affected decision-making may find it difficult to challenge the conduct of an attorney due to dependence, lack of resources or accessibility issues. It may therefore be important for family members and other interested people to be able to easily find out information about an EPOA.

## Lack of knowledge about the uptake and use of EPOAs

- 14.10 In the absence of a central record, there is limited information available about the use of EPOAs. We do not know how many there are, how many of them are being used and how many have been cancelled, amended or replaced. This makes reliable assessment of the effectiveness of EPOAs difficult.

## AN EPOA REGISTER

### EPOA registers in other jurisdictions

- 14.11 EPOA registers have been set up in other jurisdictions including England and Wales, Northern Ireland, Ireland, Scotland, Queensland and Tasmania.<sup>4</sup> The

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<sup>4</sup> Mental Capacity Act 2005 (UK), sch 1 pt 2; Mental Capacity Act 2016 (Northern Ireland) 2016, s 126; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 45; Adults with Incapacity Act 2000 (Scotland), s 6; Powers of Attorney Act 1998 (Qld), ss 25 and 60; Guardianship and Administration Act 1995 (Tas), s 89. In Australia generally, Attorneys-General from each Australian jurisdiction have decided to prioritise the development of a National Register of Enduring Powers of Attorney relating to financial matters (the National Register), with further discussions to come. Consultation on the paper closed on 30 June 2021 and the scheme remains under consideration: see Australian Government: Attorney-General's Department *National Register of Enduring Power of Attorney: Public Consultation Paper* (April 2021).

register is usually administered by an agency such as an Office of the Public Guardian.<sup>5</sup>

- 14.12 Registration requirements are often accompanied by requirements that specified people are notified of the registration.<sup>6</sup> Many jurisdictions also have a process where certain people can object to the registration of the EPOA.<sup>7</sup>
- 14.13 In most cases, people are permitted to check the register to determine whether a valid instrument exists. However, approaches to accessing information in the register differ between jurisdictions. In Tasmania, copies of EPOAs are held on a register maintained by the Land Titles Office and are public records.<sup>8</sup> In Scotland, the register is maintained by the Office of the Public Guardian and, for a fee, anyone can ask for it to be searched during normal office hours.<sup>9</sup>
- 14.14 To look more closely at one example, in England and Wales, the Office of the Public Guardian is the body responsible for running the registration system. Some key features of the registration system are:<sup>10</sup>
- (a) A lasting power of attorney (the equivalent of an EPOA) must be registered before it can be used.<sup>11</sup> Registration can take place any time after the lasting power of attorney is made. Either the donor or their attorney can apply for registration.<sup>12</sup>

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<sup>5</sup> Registers are administered by the Office of the Public Guardian in England and Wales, Scotland, Alberta and (when the new legislation is fully implemented) Northern Ireland: Mental Capacity Act 2005 (UK), s 58(1)(a)–(b); Adults with Incapacity (Scotland) Act 2000, s 6(2)(b); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 106(4); and Mental Capacity Act (Northern Ireland) 2016, s 126(1)(a)–(b).

<sup>6</sup> Mental Capacity Act 2005 (UK); Assisted Decision-Making (Capacity) Act 2015 (Ireland).

<sup>7</sup> Mental Capacity Act 2005 (UK), sch 1 cls 13 and 14; Mental Capacity Act (Northern Ireland) 2016, sch 4 cls 13 and 14; Assisted Decision-Making Act 2015 (Ireland), s 71.

<sup>8</sup> Powers of Attorney Act 2000 (Tas), ss 3–5; and Land Titles Act 1980 (Tas), s 36.

<sup>9</sup> Adults with Incapacity (Scotland) Act 2000, s 6(2)(b).

<sup>10</sup> Note that some of these features will change when the Powers of Attorney Act 2023 is fully implemented.

<sup>11</sup> Mental Capacity Act 2005 (UK), s 9(2)(b); and Office of the Public Guardian "Form - LP13 Register your lasting power of attorney: a guide (web version)" (18 May 2023) GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>12</sup> Mental Capacity Act 2005 (UK), sch 1 cl 4(2); Office of the Public Guardian "Make, register or end a lasting power of attorney" GOV.UK <[www.gov.uk](http://www.gov.uk)>.

- (b) A lasting power of attorney is registered by sending the signed and witnessed document to the Office of the Public Guardian.<sup>13</sup>
- (c) There is a fee of £82 to register a lasting power of attorney.<sup>14</sup> Applicants can seek a reduction or exemption from fees.<sup>15</sup>
- (d) The donor can specify in their lasting power of attorney that certain people should be notified when the lasting power of attorney is being registered.<sup>16</sup> If notification requirements are included, the donor must inform the identified people when the donor applies to register the lasting power of attorney.<sup>17</sup> Those notified then have five weeks to raise any concerns about the lasting power of attorney.<sup>18</sup>
- (e) Anyone can apply for the Office for the Public Guardian to search the register for information about a lasting power of attorney. This can include whether the person has a registered lasting power of attorney, when it was registered, the name of the donor, the name of the attorney and the scope of the attorney's powers.<sup>19</sup> This is a free service.<sup>20</sup> Certain people, such as staff from local authorities, social care and the National Health Service can also request information under urgency.<sup>21</sup>

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<sup>13</sup> Mental Capacity Act 2005 (UK), sch 1 cl 4(3)(a).

<sup>14</sup> Mental Capacity Act 2005 (UK), sch 1 cl 4(3)(b); and Office of the Public Guardian "Applying for a reduced fee for your power of attorney" (24 June 2013) GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>15</sup> Office of the Public Guardian "Make, register or end a lasting power of attorney" GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>16</sup> Mental Capacity Act 2005 (UK), sch 1 cl 2(1)(c).

<sup>17</sup> Mental Capacity Act 2005 (UK), sch 1 cl 6.

<sup>18</sup> Mental Capacity Act 2005 (UK), sch 1 cl 13(1)(b) and The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), reg 14(2).

<sup>19</sup> Office of the Public Guardian "Find out if someone has an attorney, deputy or guardian acting for them" GOV.UK <[www.gov.uk](http://www.gov.uk)>; The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), regs 31–32; and Office of the Public Guardian *Find out if someone has a registered attorney or deputy* (OPG100, 2022).

<sup>20</sup> Office of the Public Guardian "Find out if someone has an attorney, deputy or guardian acting for them" GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>21</sup> Office of the Public Guardian Communications Staff "Rapid register searches — our new service for public sector organisations making urgent decisions" (30 March 2021) GOV.UK <[www.publicguardian.blog.gov.uk](http://www.publicguardian.blog.gov.uk)>.

- (f) If the donor or attorney consents, third parties can directly view a summary of a lasting power of attorney to check whether it is valid and who the attorneys are.<sup>22</sup> Access to this information is online and requires an access code.<sup>23</sup>

### Should a new Act provide for a register?

- 14.15 Whether an EPOA register should be introduced in Aotearoa New Zealand has been considered before. In 2001, Te Aka Matua o te Ture | Law Commission considered whether a registration system would discourage abuse of EPOAs. There was some support for a register on the basis it would both discourage abuse and resolve the practical difficulty of locating EPOAs. However, the Commission recommended against the establishment of a register, indicating that it was not convinced that “the benefits of registration would outweigh the resultant expense and loss of privacy”.<sup>24</sup>
- 14.16 The matter was considered again by the Minister for Senior Citizens in 2014. Many submitters supported the idea of a register on the basis that professionals cannot be sure whether EPOAs are in place and sometimes multiple people identify themselves as the attorney.<sup>25</sup> However, the Minister also recommended against the introduction of a register on the basis that it would increase costs and therefore deter people from creating EPOAs.<sup>26</sup> Instead, the Minister recommended education, encouraging the fuller use of existing information systems by healthcare professionals, and encouraging

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<sup>22</sup> Office of the Public Guardian “View a lasting power of attorney” GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>23</sup> Office of the Public Guardian “View a lasting power of attorney” GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>24</sup> Te Aka Matua o te Ture | Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [40].

<sup>25</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 16.

<sup>26</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Ministry of Social Development, June 2014) at 16.



people to tell service providers such as banks about their EPOAs and advance directives.<sup>27</sup>

14.17 While the introduction of a register has been considered and rejected before, it is timely to consider the issue again. A register continues to be mentioned by commentators, stakeholders and submitters as a way to improve access to information about EPOAs. In other jurisdictions, registration of EPOAs is a common response to the sorts of issues discussed above.<sup>28</sup>

14.18 As we discuss below, there are advantages and disadvantages to an EPOA register. Whether the advantages outweigh the disadvantages is finely balanced. While many jurisdictions have introduced a registration system, the disadvantages have led other jurisdictions such as New South Wales to reject the option of establishing a register.<sup>29</sup>

### **Key advantages and disadvantages of a register**

#### **Advantages**

14.19 A key advantage of registration is that EPOAs are more likely to be located when they are needed. Submitters noted a register would assist in determining whether an EPOA is in place and who the attorney is. We heard this would be particularly useful when urgent decisions are required.

14.20 The requirement of the UN Convention on the Rights of Persons with Disabilities for decision-making arrangements to respect a person's rights, will and preferences also underscores the need to have systems in place to locate EPOAs. EPOAs are a way that people can ensure their views and autonomy

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<sup>27</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Ministry of Social Development, June 2014) at 16.

<sup>28</sup> Mental Capacity Act 2005 (UK), sch 1 pt 2; Mental Capacity Act 2016 (Northern Ireland), s 126; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 45; Adults with Incapacity Act 2000 (Scotland), s 6; Powers of Attorney Act 1998 (Qld), ss 25 and 60; and Guardianship and Administration Act 1995 (Tas), s 89.

<sup>29</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), recommendation 14.9. See also Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.259].

are respected. Conversely, if EPOAs cannot be accessed when they are needed, people's pre-recorded wishes can be undermined.<sup>30</sup>

- 14.21 Another advantage is that a register may assist with greater monitoring and oversight of EPOAs.<sup>31</sup> In other jurisdictions, registration requirements have been introduced to enable effective supervision of decision-makers and to prevent abuse.<sup>32</sup>
- 14.22 Submitters thought a register would assist in the oversight of EPOAs. We heard that registration would increase the supervision of attorneys because it will be easier for people to identify who the attorney is and the scope of their powers.<sup>33</sup> This may be particularly important when third parties such as financial institutions and health providers need to verify the attorney's authority.<sup>34</sup> Registration may also help prevent people using forged or revoked EPOAs.<sup>35</sup>
- 14.23 Finally, a register could provide for anonymous data collection that contributes to research on EPOAs, informs practice and also informs the development of the law. This is particularly relevant given the current gap in data and information about the use of EPOAs.

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<sup>30</sup> Australian Capital Territory Law Reform Advisory Council *Guardianship Report* (ACT LRAC 4, 2016) at [7.5.1].

<sup>31</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.49].

<sup>32</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at xiv and [1.103]; (8 February 2005) 669 GBPD HL 757.

<sup>33</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at [8.11].

<sup>34</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.49].

<sup>35</sup> Australian Government: Attorney-General's Department *National Register of Enduring Power of Attorney: Public Consultation Paper* (April 2021) at [3.1] and [2.3]; and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.49].

## Disadvantages

- 14.24 One of the main disadvantages of registration may be the resource implications.<sup>36</sup> For a register to work, an agency would need to be responsible for setting up and maintaining it. For example, in England and Wales, the Office of the Public Guardian is responsible for maintaining the register and managing requests to search the register.<sup>37</sup> Registration may add to the “formality, complexity and expense” of setting up an EPOA.<sup>38</sup>
- 14.25 Although resourcing would be required, we do not think it should be assumed that it would be significant. While manual registration and processing may require significant resourcing on an ongoing basis, the same may not apply to a system utilising electronic registration and automated processes.
- 14.26 Another disadvantage is that a registration scheme likely needs to be mandatory in order for it to realise all the advantages discussed above.<sup>39</sup> If a register is not mandatory, people would not be able to rely on it to locate EPOAs.<sup>40</sup> However, the costs and complexity associated with a mandatory scheme along with privacy concerns may discourage people from creating an EPOA.<sup>41</sup> Some submitters were concerned about the introduction of these additional costs.
- 14.27 It is also not clear to what extent registration will detect fraud or abuse.<sup>42</sup> Registration itself will not necessarily prevent a person from being coerced into

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<sup>36</sup> Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.258].

<sup>37</sup> Office of the Public Guardian “Make, register or end a lasting power of attorney” GOV.UK <[www.gov.uk](http://www.gov.uk)>; Office of the Public Guardian “Find out if someone has an attorney, deputy or guardian acting for them” GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>38</sup> Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.258].

<sup>39</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.50].

<sup>40</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.54].

<sup>41</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.51].

<sup>42</sup> Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.257].

making an EPOA, nor is there any guarantee third parties will use it to check an attorney has authority to act.<sup>43</sup> There is also a risk that registration will give too much legitimacy to an attorney's actions, leading third parties to accept an attorney's actions at face value even when there are concerns of misuse.<sup>44</sup>

## Design of a register

### *Key design questions for an EPOA register*

14.28 If a registration system is included in a new Act, several design questions would need to be considered. Many of these matters require a balance between ensuring a register is as effective as possible while also addressing potential risks and drawbacks.

### *Who should be responsible for maintaining a register?*

14.29 If a new oversight body is established (as discussed in Chapter 16), one of its functions might be to establish and maintain a register of EPOAs. Assuming that its functions may also include providing guidance and template forms, people would be able to locate everything they require to make an EPOA in one place.

14.30 Another option is for an existing organisation to be funded to take on this role. For example, Public Trust suggested in its submission that it may be well placed to maintain a national register of EPOAs as an organisation that already has significant involvement in this area.

14.31 An additional option may be for iwi or hapū organisations to hold this information. This may be more appropriate from a tikanga perspective although it could also limit some of the benefits of a single national register.

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<sup>43</sup> New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.56].

<sup>44</sup> Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.257].

## Costs for registration

14.32 In all the jurisdictions we looked at, registration of an EPOA requires payment of a fee.<sup>45</sup> This is usually between \$100 and \$300. For example, in Tasmania it costs AU\$161.09 to register an enduring power of attorney, while in Queensland the cost is AU\$224.32.<sup>46</sup>

14.33 A registration fee can help cover the costs of administering a register. However, increasing the cost of setting up an EPOA may mean some people do not make one. We heard that the cost of setting up an EPOA is currently a barrier to creating EPOAs. Some submitters also told us the additional costs associated with a register could further discourage people from setting up an EPOA.

## Whether registration would be voluntary or mandatory

14.34 In most jurisdictions with a registration system, it is mandatory to register an EPOA.<sup>47</sup> For example, in England and Wales, a lasting power of attorney is only valid if it is registered.<sup>48</sup> In Tasmania, decisions of the attorney have no legal effect unless the EPOA is registered.<sup>49</sup> However, not all registration systems are mandatory. In Queensland, registration is generally voluntary.<sup>50</sup>

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<sup>45</sup> Office of the Public Guardian “Make, register or end a lasting power of attorney” GOV.UK <[www.gov.uk](http://www.gov.uk)>; Land Titles Office “Land Titles Office Fees” <[nre.tas.gov.au](http://nre.tas.gov.au)>; Queensland: Titles Queensland “Fee calculator” <[www.titles.qld.com.au](http://www.titles.qld.com.au)>; Office of the Public Guardian (Scotland) “Power of Attorney — Fees” <[www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk)>; Assisted Decision-Making (Capacity) Act 2015 (Fees) Regulations 2023 (Ireland), sch 1; Northern Ireland Department of Justice “Court Fees from 1 November 2023” <[www.justice-ni.gov.uk](http://www.justice-ni.gov.uk)> (see Court of Judicature Fees Schedule at [44]).

<sup>46</sup> Tasmania: Land Titles Office “Land Titles Office Fees” <[nre.tas.gov.au](http://nre.tas.gov.au)>; Queensland: Titles Queensland “Fee calculator” <[www.titlesqld.com.au](http://www.titlesqld.com.au)>.

<sup>47</sup> Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.259]; Guardianship and Administration Act 1995 (Tas), s 89(1)(c); Adults with Incapacity (Scotland) Act 2000, s 19(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 59(4)(b); The Enduring Powers of Attorney (Northern Ireland) Order 1987, s 3(1)(b); and Mental Capacity Act 2005 (UK), sch 4 para 4(2).

<sup>48</sup> Mental Capacity Act 2005 (UK), s 9(2)(b).

<sup>49</sup> Powers of Attorney Act 2000 (Tas), s 16.

<sup>50</sup> Powers of Attorney Act 1998 (Qld), s 25(1).

However, if an attorney makes a decision about land, it will only have legal effect if the EPOA has been registered.<sup>51</sup>

- 14.35 As explained above, voluntary registration would provide an incomplete record. Some submitters thought an EPOA should only be valid once it is registered and there could be additional safeguards or guidance for attorneys as part of the registration process. However, mandatory registration is likely to increase the costs and administrative requirements for everyone. We heard this may discourage some people from setting up an EPOA. We also heard that, given the importance of EPOAs, their validity should not depend on registration.
- 14.36 It may be possible to design a middle ground where registration is not mandatory but there are consequences for non-registration. For example, a new Act could provide that, where there are multiple EPOA documents, the registered EPOA should take priority.<sup>52</sup>

### What information should be contained on the register and what could be accessed?

14.37 Submitters told us that a register should include:

- (a) Details of the EPOA document, including the date it was created and the specified witness.
- (b) Details of the attorney, including contact details.
- (c) The type of EPOA (property or personal care and welfare).
- (d) Whether or not the EPOA has been activated.
- (e) The review status of the EPOA.
- (f) Any details of cancellation of the EPOA.

14.38 However, what information is contained on a register must be considered alongside who should have access to that information and when. This is because information to be contained on the register will depend on what the privacy concerns are and how privacy concerns are managed. For example, if the information on the register is extensive and includes matters such as the

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<sup>51</sup> Land Title Act 1994 (Qld), s 132.

<sup>52</sup> This is a similar concept to the priority of registered security interests under the Personal Property Securities Act 1999, ss 41 and 66.

donor and attorney's addresses, strict requirements may be needed about who can access that information and when (even if access is more freely available to other information on the register). However, if a register contains minimal private information such as just the fact a person has an EPOA and the name of the attorney, less stringent access rules may be required.

- 14.39 Determining where the balance lies between an effective register of EPOAs (and access to it) and privacy concerns is not a simple matter. If insufficient information is registered or able to be accessed easily, the benefits of a register may not be realised. In such cases, the safeguarding function of registration may be minimal and EPOAs may still be difficult to locate. However, many people may be reluctant for their personal information to be too widely available or even to register this information at all.

### Notification requirements

- 14.40 Later in this chapter, we discuss whether a new Act should include notification requirements. Notification requirements often sit alongside registration systems. For example, in England and Wales a lasting power of attorney must state whether any individuals should be notified when the lasting power of attorney is being registered.<sup>53</sup>

### Should other decision-making arrangements be registered?

- 14.41 In other jurisdictions with EPOA registers, it is common for other decision-making arrangements to also be registered. For example:
- (a) In England and Wales, the Office of the Public Guardian keeps a register of lasting powers of attorney, powers of attorney and court appointed deputies (a type of court-appointed representative).<sup>54</sup>
  - (b) In Ireland, when the relevant changes are implemented, the Decision Support Service will keep a register of co-decision-making agreements, decision-making representation orders and enduring powers of attorney.<sup>55</sup>

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<sup>53</sup> Mental Capacity Act 2005 (UK), sch 1 cl 2(1)(c). EPOAs created before 2007 are subject to different notification requirements under the Enduring Powers of Attorney Act 1985: see Mental Capacity Act 2005 (UK), sch 5 cl 11(1).

<sup>54</sup> Mental Capacity Act 2005 (UK), s 58(1).

<sup>55</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 25, 45, 72 and 94.

- 14.42 Some submitters supported the registration of advance directives or court-appointed representatives. In addition, in Chapter 15 we discuss whether a new Act should provide for a ‘statement of wishes’. This is a document that records matters such as the person’s values, their lifestyle preferences and other matters that are particularly important to them. If a new Act provided for statements of wishes, it may be beneficial for a person’s advance directives and statement of wishes to both be accessible alongside their EPOA. This would help ensure their wishes are easily known. However, the type of privacy concerns discussed in relation to EPOAs would also arise here, possibly even more acutely given the content that statements of wishes could contain.

### Other practical and administrative matters

- 14.43 There are also various practical and administrative matters that would need to be addressed such as:
- (a) How an EPOA is registered.
  - (b) Whether anyone can object to registration and, if so, on what basis. In considering who may be able to object to registration, there would need to be consideration of wider interests that may be engaged by tikanga or because of a person’s social or cultural background.
  - (c) Whether registered information can be updated and, if so, how.
  - (d) How disputes about registered information are resolved.
  - (e) How to manage transitional issues relating to existing documents.
- 14.44 In our view, these issues are less central to the design of a register than the matters discussed in earlier sections of this chapter. However, we are still interested in hearing views on them.

#### QUESTION 75:

Do you think there should be a register of EPOAs? Why or why not?



**QUESTION 76:**

How do you think a register should operate? In particular:

- a. Should registration be mandatory or voluntary?
- b. What information should be included in the register?
- c. Who should be able to access information on the register?
- d. Should other instruments such as advance directives be included in a register? If so, which instruments should be included? Who should be able to access them?

**NOTIFICATION REQUIREMENTS****Notification requirements in other jurisdictions**

- 14.45 There are EPOA notification requirements in jurisdictions such as Ireland, England and Wales, and New Brunswick.<sup>56</sup>
- 14.46 Jurisdictions differ on whether notification is mandatory or only required if chosen by the donor. For example, in Ireland, notification requirements are mandatory.<sup>57</sup> In New Brunswick and England and Wales, notification is only required if chosen by the donor and the donor must specify who should receive notice.<sup>58</sup>
- 14.47 There are also different approaches to when notification is required. Options for when notification is required include:
- (a) When the EPOA is created.<sup>59</sup>
  - (b) When the donor or attorney intends to register the EPOA.<sup>60</sup>

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<sup>56</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 68; Mental Capacity Act 2005 (UK), sch 1 cl 6; and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13.

<sup>57</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 59(4) and 68.

<sup>58</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13; and Mental Capacity Act 2005 (UK), sch 1 cl 2(1)(c).

<sup>59</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 61.

<sup>60</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland); s 68; Mental Capacity Act 2005 (UK), sch 1 cls 4(2) and 6.

(c) When the attorney begins to make decisions for the donor.<sup>61</sup>

14.48 People who are to be given notice can include the donor's spouse or civil partner, any of the donor's co-habitants or adult children, any other people involved in the decision-making of the donor and any people specified in the EPOA.<sup>62</sup>

14.49 Jurisdictions also differ on who must give notice. It could be the responsibility of the donor,<sup>63</sup> the attorney<sup>64</sup> or a public body such as an Office of the Public Guardian.<sup>65</sup>

### Should notification requirements be included in a new Act?

14.50 If a new Act includes notification requirements, more people will be aware of the existence of EPOAs, making it more likely that EPOAs are located when needed. However, as only certain people receive notification, it is likely there will continue to be times when an EPOA cannot be found or it is unclear whether an EPOA exists. This may especially be the case in emergency situations where there will be a need to make urgent decisions but no guarantee the people present will have received notification.

14.51 Notification might also make it easier to oversee and monitor EPOAs. The Queensland Law Reform Commission considered that notification requirements could provide some level of scrutiny of attorneys and reduce potential misuse of EPOAs.<sup>66</sup> There was also some support for this among submitters. We heard that a donor's immediate family and whānau should be alerted when there are changes to an EPOA or an EPOA is activated. Another submitter thought that wider family members should be involved in creating an EPOA to increase oversight.

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<sup>61</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13.

<sup>62</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 68.

<sup>63</sup> Mental Capacity Act 2005 (UK), sch 1 cls 4(2) and 6.

<sup>64</sup> Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13; Mental Capacity Act 2005 (UK), sch 1 cls 4(2) and 6.

<sup>65</sup> Powers of Attorney Act 2023 (UK), sch cl 4.

<sup>66</sup> Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.270].

14.52 However, there are also downsides to notification, especially mandatory notification. For example, the Queensland Law Reform Commission considered that a mandatory notification requirement would “increase the level of complexity of the scheme for enduring powers of attorney, which may make enduring powers less attractive as an advance planning tool”.<sup>67</sup> As we indicate in Chapter 13, many submitters expressed concern that the requirements for creating an EPOA are already too complicated.

### ***Design of a notification requirement***

14.53 If a notification requirement were to be included in a new Act, several design questions would need to be considered.

14.54 A key consideration is the events that should trigger notification. As we discuss above, there are various options. These include when the EPOA is created, when it is registered and when the attorney wants to act for the first time.

14.55 A second consideration is whether notification should be voluntary or mandatory. There may be situations where the donor may not want certain family and whānau members to know about the EPOA. In these cases, mandatory notification may sit uncomfortably alongside an increased focus on people’s rights, will and preferences. In addition, as we note above, mandatory notification may increase the costs of creating and using EPOAs. However, if notification is not mandatory, the benefits of a notification requirement will be less significant.

14.56 A third consideration is who should give notice and how to ensure that they do it. There may be different views on these questions, including from a tikanga perspective. In the United Kingdom, one of the reasons the Office of the Public Guardian will shortly become responsible for all notice requirements is to ensure that notification requirements are met.<sup>68</sup>

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<sup>67</sup> Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws* (QLRC R67, 2010) vol 3 at [16.281].

<sup>68</sup> Powers of Attorney Act 2023 (UK), sch cl 4; Powers of Attorney Bill (UK, HL Bill 121) (explanatory notes) at [46]–[48].

14.57 Other issues that would need to be considered include:

- (a) Who should receive notice, having regard in particular to tikanga and to social and cultural expectations more generally.
- (b) Whether there should be a prescribed timeframe for giving notice such as a specified number of days.
- (c) How notice should be given, for example, whether it must be in writing.
- (d) What should happen if a person is unable to give notice.
- (e) Whether there should be any consequences for failing to fulfil the notice requirements.

**QUESTION 77:**

Do you think a new Act should include notification requirements for EPOAs? Why or why not?

**QUESTION 78:**

What should the features of a notification requirement be? In particular:

- a. What events should trigger notice?
- b. Should notice be voluntary or mandatory?
- c. Who should give notice?
- d. Who should receive notice?

**QUESTION 79:**

Is there anything else you would like to tell us about a register or notification?

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## CHAPTER 15

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# Documenting wishes about the future

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### INTRODUCTION

15.1 In this chapter, we consider how advance directives and other statements of a person's wishes about the future interact with decision-making arrangements.

We discuss:

- (a) The law on advance directives, some of the issues we have heard and why we will not be considering reform of advance directives generally in this Protection of Personal and Property Rights Act 1988 (PPPR Act)-focused review. We are only focusing on decision-making arrangements.
- (b) Whether a new Act could clarify how advance directives are considered in decision-making arrangements.
- (c) Whether, in addition to advance directives, a new Act could recognise and provide for people to make a non-binding statement of wishes.

### DEFINING OUR TERMS

15.2 Advance directives are instructions given by a person to medical treatment decision-makers about future medical decisions. They are one way people can communicate their choices about medical procedures or treatment that may be needed in the future at a time when they are not able to give their informed consent. Advance directives relate to some issues we are addressing in this Issues Paper because the PPPR Act contains provisions about advance directives.

- 15.3 In this chapter, we are also considering other kinds of statements that need not only be about medical care. Later in the chapter, when we talk about these kinds of statements, we call them a statement of wishes.
- 15.4 The advance care plan template, which is now quite widely used by clinicians in Aotearoa New Zealand, is one example of what we mean by a statement of wishes. An advance care plan may include an advance directive.<sup>1</sup> However, the plan can also give other information about what is important to the person, and this may assist in giving context to the advance directive (if one has been made). For example, it:
- ... asks about what worries the person, what quality of life means to them and how they want to be cared for generally which can then be used to guide care choices.
- 15.5 In a decision-making framework that focuses on a person's rights, will and preferences, we think that both advance directives and statements of wishes could be important ways for a person to tell others in advance about their will and preferences. Whether both of these ways of documenting a person's wishes should be provided for in a new Act is one of the important questions we ask in this chapter.

## ADVANCE DIRECTIVES

### The law on advance directives

#### *Limited legislative provision for advance directives and little New Zealand case law*

- 15.6 In New Zealand, the law about how to make an advance directive and when medical professionals must follow them is not set out in an Act. The Code of Health and Disability Services Consumers' Rights (the Code) provides for advance directives.<sup>2</sup> The Code says:

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<sup>1</sup> See Health Quality and Safety Commission "My Advance Care Plan & Guide" <[www.hqsc.govt.nz](http://www.hqsc.govt.nz)>.

<sup>2</sup> Schedule to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

- (a) Health consumers and disability services consumers have a right to use an advance directive.<sup>3</sup>
  - (b) An advance directive is “a directive by which a consumer makes a choice about a possible future health care procedure” that is “intended to be effective only when they are not competent”.<sup>4</sup>
  - (c) An advance directive can include a decision to receive healthcare or to refuse consent.<sup>5</sup>
  - (d) An advance directive can be written or oral.<sup>6</sup>
  - (e) Advance directives may be used by a health consumer or disability services consumer “in accordance with the common law”.<sup>7</sup>
- 15.7 The right to use an advance directive is an extension of the principle that autonomous decisions by a person about their healthcare should be respected.<sup>8</sup> Because the Code includes refusal of treatment in advance directives, it also reflects the right to refuse consent to treatment in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). The NZ Bill of Rights says that “[e]veryone has the right to refuse to undergo any medical treatment”.<sup>9</sup>
- 15.8 We heard that health professionals take advance directives very seriously. If they have been validly made and satisfy other tests, they will be considered legally binding by clinicians.

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<sup>3</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch cl 2 right 7(5).

<sup>4</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch cl 4.

<sup>5</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch cl 4.

<sup>6</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch cl 4.

<sup>7</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch cl 2 right 7(5).

<sup>8</sup> Iris Reuecamp “Advance Decision-Making about Personal Care and Welfare” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at [14.1].

<sup>9</sup> New Zealand Bill of Rights Act 1990, s 11.

15.9 However, the Code does not address everything. For example, it does not cover how to make a valid advance directive, how to establish whether an advance directive applies to a specific decision or the criteria that guide medical professionals in deciding whether they must follow an advance directive. For guidance on these issues, there is a need to refer to the common law (in other words, to judicial decisions). However, little case law has developed in New Zealand.<sup>10</sup> This means that cases from countries like the United Kingdom are the only real source of guidance on these issues.<sup>11</sup>

### **Considering advance directives under a decision-making arrangement**

15.10 The PPPR Act provides for how advance directives are to be considered when there is a decision-making arrangement in place involving enduring powers of attorney (EPOAs). There is no equivalent provision for a welfare guardian.

### **An attorney acting in relation to a donor's personal care and welfare**

15.11 Section 99A of the PPPR Act provides that an attorney acting under an EPOA in relation to a donor's personal care and welfare has a duty to consult with the donor.<sup>12</sup> Advance directives are referred to as part of this duty.<sup>13</sup> However:

- (a) An attorney is not required to follow (or even have regard to) an advance directive given by the donor. They “may” do so.<sup>14</sup>
- (b) An attorney is denied the power to act if the advance directive would require them to act in ways prohibited by the Act.<sup>15</sup> They are restrained by the PPPR Act both from consenting to certain procedures, or refusing consent to standard medical treatment or procedures that are intended to save the life or prevent serious damage to the health of the person.<sup>16</sup>

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<sup>10</sup> See generally *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433, [2014] 3 NZLR 404; *Gordon v Attorney-General* [2023] NZHC 2332, [2023] NZFLR 190.

<sup>11</sup> Hui Yun Chan “Advance Directives Refusing Treatment: A Proposal for New Zealand” (2016) 27 NZULR 38 at 42.

<sup>12</sup> Protection of Personal and Property Rights Act 1988, s 99A.

<sup>13</sup> Protection of Personal and Property Rights Act 1988, s 99A(2) and (3).

<sup>14</sup> Protection of Personal and Property Rights Act 1988, s 99A(2) and (3).

<sup>15</sup> Protection of Personal and Property Rights Act 1988, ss 99A(2), 98(4) and 18(1).

<sup>16</sup> Protection of Personal and Property Rights Act 1988, s 18(1).



15.12 If an attorney follows an advance directive, the PPPR Act says they are not liable for anything done or omitted unless they have acted in bad faith or without reasonable care.<sup>17</sup>

### A welfare guardian

15.13 The PPPR Act has no provision for welfare guardians comparable to section 99A of the Act. In other words, there is no provision expressly empowering a welfare guardian to have regard to and follow an advance directive and protecting them from liability if they do so.

15.14 It is therefore unclear whether:

- (a) A welfare guardian is not intended to have the same powers as an attorney to give effect to an advance directive.
- (b) A welfare guardian may not have an equivalent duty in relation to considering advance directives (although they remain free to exercise their own discretion to do so).
- (c) They may be exposed to liability in doing so.

### Issues with advance directives

15.15 The prevalence of advance directives in New Zealand is unknown. According to commentators, “[a]necdotal evidence suggests there is a lack of knowledge or interest in their use”.<sup>18</sup>

15.16 However, submissions we received show that there are concerns about the law and clinical practices relating to advance directives. For example:

- (a) There is uncertainty about the requirements for making a valid advance directive arising from the gap in statutory direction about how an advance directive should be set up and the absence of cases in New Zealand.

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<sup>17</sup> Protection of Personal and Property Rights Act 1988, s 99A(3).

<sup>18</sup> Iris Reuecamp “Advance Decision-Making About Personal Care and Welfare” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at [14.8].

- (b) Reference to “the common law” in the Code leaves open how the position and practice in New Zealand is affected as the position in England and other commonwealth jurisdictions evolves.<sup>19</sup>
- (c) A recurring theme in submissions was uncertainty around the weight that health professionals give to advance directives. Commentary suggests that health professionals may sometimes be reluctant to give effect to a person’s advance directive.<sup>20</sup> A particularly cautious approach is likely to be taken to advance directives when the person’s life might be at stake.<sup>21</sup> Several submitters were concerned that advance directives are often ignored or overridden because of the lack of clarity about their use. Some submitters provided real-life examples of this happening, which suggested there could be variation in how advance directives are viewed and whether they are followed.
- (d) As a result, some submitters thought that the status of advance directives and the circumstances in which they can be overridden need to be clarified or strengthened in the law. However, not all submitters agreed. Others said that, while advance directives are taken very seriously and have binding legal status, they need to be “clinically interpretable & not confusing”. They require confidence that the person had capacity at the time of signing, the person was informed and they were not coerced. We heard that because “the questions clients are considering within an advance directive are medical, not legal”, advance directives or advance care plans drafted by lawyers often do not work well. Advance directives that are set up without consulting a medical professional do not always consider the healthcare context or needs of a medical decision-maker.

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<sup>19</sup> Hui Yun Chan “Advance Directives Refusing Treatment: A Proposal for New Zealand” (2016) 27 NZULR 38 at 42.

<sup>20</sup> Lindy Willmott “Advance Directives and the Promotion of Autonomy: a comparative Australian statutory analysis” (2010) 17 J Law Med 556 at 13.

<sup>21</sup> Sam McMullan “Advance Directive” (2010) 6 NZFLJ 359 at 360 and n 29 refers to the guidelines of two district health boards and also to a qualitative study with health professionals in Scotland where the professionals came up with divergent conclusions as to the “right thing to do” when presented with an advance directive that applied to a hypothetical scenario: Trevor Thompson, Rosaline Barbour, Lisa Schwartz “Adherence to advance directives in critical care decision making: vignette study” (2003) 327 BMJ 1 at 1.

Clinicians may lack confidence that the person making the directive has met the requirements for its validity and understood its clinical consequences. All of these factors may affect decisions that are made by health professionals about whether it is proper to follow an advance directive.

- (e) We also heard about obstacles to locating, storing and accessing advance directives. For example, several submitters said that there needs to be an easily accessible national database for storing and accessing advance directives and advance care plans made in any format. Health professionals must be able to go to one uniform place in the digital records to read the person's wishes if the person is no longer competent and they must be trained to do so. We heard that issues can arise from limitations in the software capabilities of different health districts.

### **Issues cannot be considered properly in this review**

15.17 We agree that there may be reasons to reassess the usability and fitness for purpose of the present legal framework that provides for advance directives.

15.18 However, when advance directives are not followed, the reasons are often complex and may not always be to do with issues in the legal framework.

15.19 Advance directives require close engagement with healthcare practice and law. In particular, they raise issues for clinicians about informed consent that are significant when decisions can have the consequence of life or death. It is clear from submissions that to properly consider the issues with advance directives would require wider and deeper engagement with the law on healthcare, health care systems, the healthcare context and medico-legal ethical issues than we can undertake in our present PPPR Act-focused project. We are also aware that Manatū Hauora | Ministry of Health and Te Toihau Hauora, Hauātanga | Health and Disability Commissioner are both conducting reviews that include advance directives.<sup>22</sup>

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<sup>22</sup> Te Toihau Hauora, Hauātanga | Health and Disability Commissioner "Review of the Act and Code 2024" <[www.hdc.org.nz](http://www.hdc.org.nz)>.

- 15.20 For these reasons, we are not generally considering reform of advance directives or when an advance directive should be binding on health professionals in this Issues Paper.
- 15.21 However, in developing our proposals for a new Act, we will need to review how court-appointed representatives (representatives) and attorneys acting under an EPOA (attorneys) consider advance directives in their decision-making. These provisions are part of the PPPR Act.

## **ADVANCE DIRECTIVES AND DECISION-MAKING ARRANGEMENTS**

- 15.22 In this section, we look at how advance directives are relevant to and considered by representatives and attorneys in a decision-making arrangement. We discuss:
- (a) Ways in which the current law is unclear.
  - (b) Safeguarding aspects in the current provisions.
  - (c) Changes that could be made to the statutory provisions that guide how advance directives are considered by representatives and attorneys.

### **Uncertainty about how advance directives are considered**

- 15.23 The current law is unclear about how an advance directive will be considered by representatives and attorneys. For example:
- (a) An attorney can choose whether to follow an advance directive depending on what they think best promotes the donor's welfare and best interests.
  - (b) The PPPR Act does not say what weight is to be given to the donor's views. It is left to the attorney to decide whether and how they will take the donor's views into account.
  - (c) We heard that risks of conflict can arise where healthcare professionals are bound by the Code to make care choices for the person in accordance with their wishes but there are no laws requiring an attorney to make decisions in line with how the person would wish to be treated.<sup>23</sup>

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<sup>23</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch cl 2 right 7.

(d) The Act gives no guidance on how a welfare guardian should engage with an advance directive. This is another source of uncertainty.

15.24 Submitters on our Preliminary Issues Paper drew attention to the unclear relationship of advance directives with decision-making arrangements. The Health and Disability Commissioner suggested that any changes to the law should support greater clarity. A few submitters considered that an attorney should be required to follow an advance directive.

### **Safeguarding aspects in the current law**

15.25 We think that the current law has some important safeguards. These include the provisions preventing an attorney from refusing consent to standard medical interventions intended to save the person's life or to prevent serious damage to their health.<sup>24</sup>

15.26 Sometimes, allowing a representative or attorney discretion about whether to follow an advance directive could also be a safeguard, such as when there is reason to believe that the donor's wishes may have changed since the advance directive was made.

15.27 This means that clarifying the law by simply requiring a person's representative or attorney to follow an advance directive (as some submitters suggested) may not be appropriate. Sometimes, providing for discretion rather than requiring a directive to be followed may be the approach that is most consistent with the rights, will and preferences approach we discuss in other chapters.

15.28 This could be one reason why the PPPR Act was not amended to address this issue following a review of EPOAs by the Minister for Senior Citizens in 2014. Following amendments to the PPPR Act in 2007, the Minister was required to consider whether further changes to EPOAs were needed.<sup>25</sup> The Minister prepared a report in 2014.<sup>26</sup> The report criticised the fact that an attorney is

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<sup>24</sup> Protection of Personal and Property Rights Act 1988, s 18(1).

<sup>25</sup> Protection of Personal and Property Rights Act 1988, s 108AAB.

<sup>26</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014).

entitled to act contrary to the donor's advance directive and recommended that the Act and forms be amended to correct this issue.<sup>27</sup> However, to date, no substantive amendments have been made to this aspect of the Act.

### How representatives and attorneys should consider advance directives

- 15.29 We agree there is a need to improve the present framework for considering advance directives.
- 15.30 As we discuss in Chapter 3, we think that a new Act must shift focus towards the rights, will and preferences of a person, rather than their best interests or welfare. We think that the way in which representatives and attorneys use advance directives should be clarified as part of giving effect to this objective. Advance directives are likely to shed light on the person's will and preferences. Not requiring any regard to be had to them would be inconsistent with the extent to which they are likely to support this objective. Giving weight to these statements can facilitate a person's continuing autonomy and dignity by ensuring that their views are at the centre of any decision that a representative or attorney makes.
- 15.31 Some of the difficulties that presently arise in giving effect to advance directives are because the law requires representatives and attorneys to focus on a person's welfare or best interests. The legislative changes we are thinking about may reduce some of the friction that exists under the present law between the person's wishes as set out in an advance directive and the powers and responsibilities of these decision-makers.
- 15.32 There are other ways in which a new Act might improve clarity and recognise the importance of advance directives and other statements. In the rest of this section, we consider:
- (a) Who may act on an advance directive? Is there a justification for the distinction drawn in the PPPR Act between an attorney and a welfare guardian?

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<sup>27</sup> Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Ministry of Social Development, June 2014) at 3 and 14–15.

- (b) Do court-appointed representatives and attorneys require any different safeguards?
- (c) The weight given to an advance directive by representatives and attorneys.
- (d) Whether a new Act might set out circumstances in which it may be appropriate not to follow a valid advance directive.

### ***Who may act on an advance directive?***

15.33 In Chapter 2, we discuss some of the situations in which a court may appoint a representative. The PPPR Act presently draws a distinction between attorneys acting under an EPOA and welfare guardians appointed by the court. However, it does not follow in our view that there would never be an advance directive in place when the court appoints a welfare guardian.

15.34 We consider that, if an advance directive is otherwise considered valid, there is unlikely to be a justification for distinguishing between an attorney who is acting under an EPOA and a welfare guardian or other court-appointed representative. A new Act should allow for advance directives to be followed by both representatives and attorneys.

#### **QUESTION 80:**

Do you think both court-appointed representatives and attorneys should be able to act on an advance directive? Why or why not?

### ***Should representatives and attorneys have different statutory requirements?***

15.35 For the same reasons, we do not consider that the requirements on representatives and attorneys should differ when they are considering advance directives. The regard that court-appointed representatives should have to advance directives should be the same as the regard that should be given to them by an attorney who is acting under an EPOA. The person's will and preferences expressed in an advance directive should be central to decision-making in both types of cases.

- 15.36 In our preliminary view, these matters and any further safeguards that are set in place (such as preventing a representative or attorney from acting on an advance directive in some circumstances) therefore should be the same for both representatives and attorneys.

**QUESTION 81:**

Do you agree that statutory requirements for representatives and attorneys should be the same? Why or why not?

***Giving effect to an advance directive***

- 15.37 As we state earlier, our preliminary view is that it may not always be appropriate for a person's attorney or representative to be required to follow an advance directive.
- 15.38 However, we are thinking about how the provisions that say how attorneys and representatives are to consider and act on advance directives can be clarified and aligned with the purposes of a new Act. This includes:
- (a) The weight that attorneys and representatives must give to an advance directive compared to the present test that they "may have regard" to a directive.
  - (b) Whether a new Act can give more guidance by specifying when it may be appropriate not to follow an advance directive.

**Weight**

- 15.39 The PPPR Act provides that an attorney "may have regard to" an advance directive. As we state above, the advance directive gives effect to the person's rights and sets out their wishes about future decisions. In our view, the requirement to properly respect a person's rights, will and preferences may mean that advance directives should be given greater weight.
- 15.40 A submission we received from Public Trust gave some examples of different possible approaches:
- ... for example, should they be followed in most situations unless there are exceptional reasons for not doing so, are they the paramount consideration but to be weighed against other matters, or are they only to be given equal consideration with other matters.



- 15.41 These suggestions give useful examples or options of the kinds of test a new Act might contain.
- 15.42 In a new Act guided by rights, will and preferences, an advance directive will clearly be relevant. We think that, at a minimum, attorneys and representatives must therefore be required to have regard to it. However, there is a range of options affecting how much weight is given to the directive. For example:
- (a) At one end of the spectrum, there could be an obligation to regard an advance directive as binding.
  - (b) At the other and least restrictive end, there could simply be a requirement to take the advance directive into account, as one relevant but not determinative factor in understanding the person's will and preferences. This approach could allow the attorney or representative to decide what weight should be given to the directive, taking into account all other factors. Factors could include things such as the age of the advance directive, the extent to which it is clearly applicable to the decision that needs to be made, how consistent it is with what is otherwise known about the person's wishes, and any evidence about the extent to which the person fully appreciated its implications.
- 15.43 Allowing representatives and attorneys a lot of discretion could acknowledge that factors may vary so greatly between different situations that it is dangerous for the law to be too specific. On the other hand, perhaps advance directives have such significance that they should be accorded additional weight (while still leaving room for the possibility of factors that indicate they should not be followed).
- 15.44 Therefore, examples of possible intermediate options may include:
- (a) Requiring "particular" or "significant" regard to be had to the advance directive.
  - (b) Requiring that the advance directive must be followed unless there are reasonable grounds (or, as another option, compelling reasons) to decide not to do so.
  - (c) Providing that the advance directive should only be departed from in exceptional circumstances (such as an overwhelming preponderance of other evidence that it no longer reflects the person's wishes).

- 15.45 In determining which option is best, the overriding consideration should be to ensure the person's rights, will and preferences are respected.
- 15.46 In our preliminary view, this is likely to mean that, in some circumstances, departure from the advance directive might be required. The Act should be clear about when and to what extent. We suggest below some possible situations.

### Deciding not to follow an advance directive

- 15.47 We are interested in hearing any circumstances in which people think advance directives need not be followed. Perhaps, this may be rare. However, a new Act could give more guidance to representatives and attorneys such as by setting out a list of circumstances in which departing from a directive may be appropriate. For example, perhaps departing from a directive could be appropriate in some or all of the following situations:
- (a) The advance directive may not reflect the person's will and preferences. Their will and preferences could have changed, particularly if the advance directive is old.
  - (b) The advance directive may have rested on facts or assumptions that were not accurate or have ceased to be accurate (such as a refusal of chemotherapy because of a concern about side effects that are now unlikely given advances in treatment).
  - (c) The application of an advance directive in the particular circumstances under consideration may not be clear due to ambiguity or uncertainty as to exactly what the person meant.
- 15.48 As a minimum, if there is reason to believe that a person's will and preferences differ from those set out in an advance directive, we think that this could be a reason for the advance directive not to be followed — or even to provide that it *must* not be followed in such cases.
- 15.49 We are aware that issues can sometimes arise because PPPR Act obligations on those considering advance directives differ to those of health professionals. An attorney (who is not required by law to follow an advance directive) may disagree with healthcare professionals who have obligations under Right 7 of the Code to make care choices for the person in accordance with their wishes. In likelihood, this will be to refuse consent for certain kinds of treatment in

certain circumstances. At times, an attorney (perhaps from family, whānau or someone else close to the person) could be struggling to agree.

- 15.50 Given the changes that we have discussed, we think this is likely to arise in future in a smaller subset of cases as a result of clarifying the obligation of attorneys and representatives to focus on the person's will and preferences. In addition, if attorneys and representatives are required to give an advance directive more weight, it could support them in making these difficult decisions.
- 15.51 We acknowledge that it will not resolve all situations. For example, those close to the person may believe that they did not want a procedure and have declined consent for it using an advance directive. If the clinician finds the advance directive insufficient to act on in the circumstances, this will be upsetting and may result in outcomes at odds with a person's wishes as understood by those who know the person best. We note again that our present review considers only the obligations that should apply to representatives and attorneys, leaving other matters (including when an advance directive should be binding on health professionals and when it should not) for other reviews.

**QUESTION 82:**

Do you agree that there could be times when a representative or attorney should not follow an advance directive? If so, when do you think not following a directive would be appropriate?

**QUESTION 83:**

Should a new Act give more guidance on when representatives and attorneys may choose not to follow or must follow an advance directive, such as by setting out examples?

**QUESTION 84:**

Should we be considering any other issues about how advance directives are considered under a decision-making arrangement?

## PROVIDING FOR A STATEMENT OF WISHES IN A NEW ACT

15.52 In this section, we discuss whether, in addition to advance directives (which communicate a person's medical treatment decisions), a new Act could provide for people to say what is important to them more generally in the form of a non-binding statement of wishes. At present, while there is some legislative recognition of advance directives in the PPPR Act, there is not for other kinds of statements. In a revised statutory framework that focuses on rights, will and preferences, such statements might have particular importance. We are considering:

- (a) The benefits of a statement of wishes (which may include how they could work together with advance directives).
- (b) Whether statutory recognition of a statement of wishes is needed.
- (c) The scope of a statement of wishes.
- (d) Requirements for making a statement of wishes.
- (e) The weight given to a statement of wishes by attorneys and representatives.

### Benefits of a statement of wishes

15.53 In a rights, will and preferences-focused framework, there could be benefits in making a statement of wishes. They include:

- (a) A statement of wishes allows what is most important to the person to be summarised in one place.
- (b) A statement of wishes can be very important for medical treatment decision-makers. However, it may not need to be medically focused. For instance, providing information about what is important to the person or identifying who they would like to be consulted about decisions could assist other representatives such as a property manager. It may record things that are important to the person but could easily be overlooked such as whether they would like music to be played in their room (and, if so, what sort). It may say what the person wants to happen if they die to help families, whānau or others who were close to the person make decisions at a difficult time.

- (c) A statement of wishes can work together with advance directives. By giving a more rounded picture of what is important to the person and why, a statement of wishes could provide context that helps medical treatment decision-makers to understand and interpret an advance directive. If an advance directive has not been made or does not apply to the medical event that is happening for the person due to its specificity, a statement of wishes may be helpful. For example, the law could provide that, even if a decision in an advance directive is not effective in a particular case, a statement of wishes may still allow decisions to be made informed by the person's will and preferences. If a medical treatment decision-maker is considering not following an advance directive, the law could say that they must be satisfied this is consistent with what is important to the person conveyed in their statement of wishes.
- (d) By clearly setting out what is important to the person, a statement of wishes may help to reduce tension and conflict among family and whānau or supporters when decisions are made.<sup>28</sup> We heard that clear information from the affected person can lessen the burden of decision-making by a supporter, attorney or representative.
- (e) Making legislative provision for these kinds of statements would be consistent with some other jurisdictions. For example, the Victorian Law Reform Commission recommended that statements of wishes (referred to in Victoria as 'values directives') be adopted in legislation. These recommendations have been implemented in Victoria in the Medical Treatment Planning and Decisions Act 2016.<sup>29</sup> The Law Society of Scotland has made a similar recommendation.<sup>30</sup>

### Whether statutory recognition is needed

15.54 Statements of wishes do not need to be specifically addressed in legislation. They can be created without any provision in the law. In New Zealand, the template for advance care plans is an example of a statement of wishes being

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<sup>28</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [11.67].

<sup>29</sup> Medical Treatment Planning and Decisions Act 2016 (Vic), s 6.

<sup>30</sup> Law Society of Scotland *Advance choices, and medical decision-making in intensive care situations* (19 May 2022).

developed and becoming regularly used in practice without any need for statutory support.

- 15.55 We think it would be undesirable if creating legal requirements for a statement of wishes led to the process of people documenting their wishes becoming unnecessarily formalised. Legal recognition must not discourage people from discussing and recording their views and wishes in a way that suits them.
- 15.56 However, one reason to provide for the option in a new Act is that it may make people more aware that documenting their wishes is important. It may also encourage them to use standard forms that are easier to design systems around and easy for others to understand and use. It could allow guidance to be developed and links to decision-making arrangements such as EPOAs to be made clear. It may also reinforce the importance of statements of wishes to attorneys and representatives and thereby underscore the need to respect the person's rights, will and preferences.
- 15.57 Overall, we think that recognising statements of wishes in the law may increase confidence that people's views will be considered in future decisions. In turn, this could make it more likely that people will take the time to document their wishes.
- 15.58 It could also support greater safeguards. For example, the law could require attorneys and representatives to record reasons for departing from a statement of wishes when they make a decision that is inconsistent with the person's stated wishes.<sup>31</sup>
- 15.59 Recognising statements of wishes in a new Act could be done in different ways. One option is for the law to recognise or provide for these kinds of statements simply by empowering or requiring attorneys and representatives to consider them. Another way is to include provisions and forms to formalise the process of making a statement of wishes.

**QUESTION 85:**

Would it be helpful if a new Act provided for people to make a statement of wishes or referred to these kinds of statements? Why or why not?

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<sup>31</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [11.72].

## The scope of a statement of wishes

15.60 We do not think a statement of wishes would need to be limited to healthcare matters. As an example, the advance care plans presently being developed and used in New Zealand are being used mainly in a healthcare context. However, they may include general information about what is important to the person that could be useful in other situations. A statement like this could help people say what is important to them in a way that may, potentially, inform any decision-making arrangement.

15.61 This is not the approach followed in all jurisdictions. For instance, the values directive now provided for in Victoria is explicitly to inform medical treatment decision-makers (who may include the person's attorney or representative). In Victoria, a values directive:

- (a) Is a statement *in an advance care directive* of a person's preferences and values.
- (b) Is the basis on which the person would like any medical treatment decisions to be made on behalf of the person.
- (c) Includes, but is not limited to, a statement of medical treatment outcomes that the person regards as acceptable.

15.62 However, we can see benefit in statements of wishes not being so restricted. They could cover a wide range of matters, including personal care and welfare, and financial and property matters. For example, a statement of wishes might set out:

- (a) Values that have guided the person's life and that they wish to continue to guide decision-making.
- (b) Lifestyle preferences such as who the person wishes to have contact with.<sup>32</sup>
- (c) Factors that are of particular importance to the person, including cultural requirements or spiritual beliefs.

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<sup>32</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [11.68].

- (d) Preferences for how decisions should be made such as ensuring the views and needs of family and whānau are taken into account or following a tikanga-consistent process.
- (e) Matters of particular importance about how the person's property is dealt with — for example, a wish that their money is not invested in particular industries.
- (f) The charities that the person wishes to continue giving to and how much they would like to give.

### **Making a statement of wishes**

- 15.63 A new Act could offer a standardised process and form for making a statement of wishes. This could help make it easier for people to think about and communicate what is important to them.
- 15.64 However, people may also wish to do things their own way, and we consider that they should be able to do so. Leaving people with a lot of flexibility may also mean people find it easier to make statements of wishes and are therefore more likely to do so.
- 15.65 We are weighing the importance of considerations such as flexibility and not imposing unnecessary costs on people against what kind of safeguards are needed for making a statement of wishes. In many cases, the statement will be assumed to reflect the person's wishes unless there is evidence suggesting otherwise. Even if it is only a guide, it may have considerable influence on future decisions — perhaps including medical decisions. This raises the question of how to be sure that:
- (a) People understand how their statement of wishes will be used.
  - (b) The statement was freely made by them and reflects their own views.
- 15.66 Things we are thinking about include:
- (a) What formalities are needed to give attorneys, representatives and others confidence that the statement is made by the person and expresses their own wishes.
  - (b) How to balance relative informality against sufficient safeguards.
  - (c) Whether the law should allow for advance directives and a statement of wishes to be made in a single document.



- 15.67 Recommended practice when making an advance directive is to work through possible options and what they mean with the help of a medical professional. To be stored in the health records system, an advance directive may require sign-off by a medical professional.
- 15.68 A values directive in Victoria (which is part of an advance directive) is similarly made in a medical context. There are witnessing and certification requirements for these directives. The directive must be signed in the presence of two witnesses of whom one must be a medical practitioner. The witnesses must certify on the document that it appeared to be free and voluntary.<sup>33</sup>
- 15.69 If a person did not understand how their statement of wishes could be used or was coerced into making it, it cannot be said to reliably reflect their will and preferences. Safeguards might be appropriate to ensure that the person has decision-making capacity when they complete the statement and that the statement does reflect their wishes.
- 15.70 On the other hand, if a statement of wishes is intended to provide information and guidance rather than to record a binding decision, arguably it could be appropriate for them to be made more informally than an advance directive:
- (a) They may not need to be drafted with the same level of precision (and possibly professional assistance) as an advance directive.
  - (b) There could be very little limitation in the type of information that a person could put into a statement of wishes. This should provide flexibility for people to include anything they think is relevant or important to them.
- 15.71 An offence could provide another form of possible safeguard. In Victoria, for example, it is an offence to induce a person to make an advance care directive. It could be an offence to induce the making of a statement of wishes or to fraudulently misrepresent that a statement of wishes was made by the person if they did not make it.<sup>34</sup>
- 15.72 We are interested in hearing views on what safeguards might be set in place without requiring too great a level of formality. We are also considering whether some of those safeguards might not be mandatory but simply treated

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<sup>33</sup> Medical Treatment and Planning Act 2016 (Vic), s 17.

<sup>34</sup> Medical Treatment and Planning Act 2016 (Vic), s 14.

as relevant factors to be taken into account in determining how much weight to give to a statement of wishes in determining a person's will and preferences.

- 15.73 There may be both advantages and disadvantages of having one document for both advance directives and statements of wishes. The advance care plans presently being made in New Zealand allow for this, and some submitters on our Preliminary Issues Paper considered it a useful approach.
- 15.74 If both ways of documenting a person's wishes about the future (an advance directive and a statement of wishes) were to be provided for in one standard form document, one approach could be that there is no requirement to have completed all parts of the document, and different parts may have different formalities.

**QUESTION 86:**

What safeguards (if any) do you think are needed in making a statement of wishes? Why?

### **Giving effect to a statement of wishes**

- 15.75 In practice, a representative or attorney may look to a variety of sources to determine a person's will and preferences. It would need to be clear that a statement of wishes is only one of the ways to understand the person's will and preferences that is available to attorneys and representatives.
- 15.76 As we outlined for advance directives, we are thinking about whether there could be situations in which it would be acceptable or appropriate not to follow a statement of wishes. We are interested in hearing views on this and examples of such situations. For example:
- (a) The person's circumstances (such as family or other life circumstances) might have changed so that there is reason to believe that the statement no longer reflects their current wishes.
  - (b) There could be some situations where it is not practicable for attorneys and representatives to follow all of a person's wishes.

**QUESTION 87:**

Should a statement of wishes always be followed? If not, in what situations might it be acceptable or appropriate not to do so?

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## **PART 3:**

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# **SYSTEMIC IMPROVEMENTS**

## CHAPTER 16

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# Practical improvements and oversight

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### INTRODUCTION

- 16.1 In this chapter, we explore practical ways to ensure the decision-making arrangements in a new Act work effectively. We consider:
- (a) What information, guidance and training might be needed.
  - (b) Ways to increase the availability of people to act as attorneys and representatives.
  - (c) Ways to improve oversight of decision-making arrangements, including through complaints and investigation processes and the option of establishing an oversight body.
  - (d) Ways to include tikanga-focused and Treaty-consistent oversight.

### INFORMATION, GUIDANCE AND TRAINING

- 16.2 Many submitters told us there is a need for increased information, guidance and training across many areas and laws dealing with affected decision-making.
- 16.3 In this section, we focus on the three main areas where we think information, guidance and training would be important to making a new Act work well. These are:
- (a) Information about decision-making arrangements and how they work.
  - (b) Information and guidance for representatives and attorneys with roles under a new Act.

- (c) Guidance and training for legal and health professionals undertaking decision-making capacity assessments.

16.4 We also discuss the option of introducing a code of practice.

## Information about decision-making arrangements

### Issues

- 16.5 A lot of publicly accessible information already exists about the Protection of Personal and Property Rights Act 1988 (PPPR Act). This includes information about the different decision-making arrangements that are available and court processes. For example, Te Tāhū o te Ture | Ministry of Justice, Te Tari Kaumātua | Office for Seniors and Public Trust all provide information on how to set up enduring powers of attorney (EPOAs), along with the prescribed forms.<sup>1</sup> The Ministry of Justice provides information on applying for court orders, including applications for welfare guardians, property managers and personal orders.<sup>2</sup> Community and volunteer organisations also provide information and guidance on the PPPR Act.<sup>3</sup>
- 16.6 However, we heard that many people are still unaware of the decision-making arrangements under the PPPR Act or struggle to find information when they need it. We also heard that awareness of decision-making arrangements under the PPPR Act is generally uneven. Some people may face additional barriers to accessing information about decision-making arrangements, including disabled people, tāngata whaikaha Māori, people from minority cultural backgrounds and older people.
- 16.7 Even when people can access information about decision-making arrangements, we heard the information can be difficult to understand. This

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<sup>1</sup> Te Tāhū o te Ture | Ministry of Justice “The court & enduring power of attorney (EPA)” <[www.justice.govt.nz](http://www.justice.govt.nz)>; Te Tari Kaumātua | Office for Seniors “Promoting enduring power of attorney (EPA)” <[officeforseniors.govt.nz](http://officeforseniors.govt.nz)>; and Public Trust “Enduring Power of Attorney (EPA)” <[www.publictrust.co.nz](http://www.publictrust.co.nz)>.

<sup>2</sup> Ministry of Justice “Powers to Make Decisions for Others” <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>3</sup> Community Law “Individual Rights & Freedoms” <[communitylaw.org.nz](http://communitylaw.org.nz)>; and Welfare Guardians Trusts NZ “Information” <[www.welfareguardians.nz](http://www.welfareguardians.nz)>.

may be particularly the case for EPOAs, where a number of submitters told us the current forms are long and complex.<sup>4</sup>

### **Options for improving information about decision-making arrangements**

16.8 We are interested in ways to improve the availability and accessibility of information about decision-making arrangements available under a new Act.<sup>5</sup> Initiatives might include:

- (a) **Introducing publicly funded community education.** We heard that community education in this area is important, especially to encourage people to make future plans.<sup>6</sup> Comparable education programmes exist overseas. For example, in South Australia, the Office of the Public Advocate’s Information Service runs community group information sessions on a range of subjects related to affected decision-making. This includes a session on “planning ahead”, which covers matters relating to advanced care planning and EPOAs.<sup>7</sup>
- (b) **Producing accessible explanations of the decision-making arrangements and related processes.** These explanations could be written concisely and in plain language.<sup>8</sup> They could also be available in accessible formats including Braille, Easy Read, large print, and a range of languages including te reo Māori and New Zealand Sign Language. Comparable explanations are available in some other jurisdictions. For

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<sup>4</sup> See also Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 2–3 (obtained under Official Information Act 1982 request to the Office of Seniors, Ministry of Social Development), which discusses some of the issues with information about EPOAs.

<sup>5</sup> The Accessibility for New Zealanders Bill would, if enacted, establish an Accessibility Committee to identify accessibility barriers and work towards preventing and removing them: Accessibility for New Zealanders Bill 2022 (153-2), cl 3(2). It is unclear whether this Bill will be progressed.

<sup>6</sup> See also Te Tāhū Hauora | Health Quality & Safety Commission “What is advance care planning” tō tātou reo: advance care planning <[www.myacp.org.nz](http://www.myacp.org.nz)>.

<sup>7</sup> Government of South Australia: Office of the Public Advocate “Information sessions” <[www.opa.sa.gov.au](http://www.opa.sa.gov.au)>.

<sup>8</sup> Note the Plain Language Act 2022, which aims to improve the accessibility of certain documents that are prepared by public service agencies and Crown agents for the public.

example, in South Australia, the Office of the Public Advocate produces fact sheets on decision-making arrangements and related processes that are available in accessible Easy Read format and in several Aboriginal languages.<sup>9</sup>

(c) **A one-off public information campaign.** This could be timed to coincide with implementation of a new Act.

16.9 It would be necessary to determine who should be responsible for providing this information. Later in this chapter, we discuss whether there should be a new oversight body that could have this responsibility. Another option is the Ministry or agency responsible for the new Act. Alternatively, iwi, hapū, other Māori organisations and community organisations who would have existing relationships with their communities could be given funding for this purpose.

**QUESTION 88:**

Do you think the availability and accessibility of information about decision-making arrangements should be improved? If so, how?

## Information and guidance about how to act as a representative or an attorney

### Issues

16.10 We heard that there needs to be better information and guidance for representatives and attorneys. For example, submitters told us that:

- (a) There is confusion about how welfare guardians, property managers and attorneys should make decisions.
- (b) Attorneys, welfare guardians and property managers do not always know how to engage in supported decision-making. This includes a lack of understanding of the importance of communication and the need for adequate understanding of the person and what support they need.
- (c) Sometimes, people acting in representative roles need advice on a particular issue but there is nowhere they can go.

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<sup>9</sup> Government of South Australia: Office of the Public Advocate “Fact sheets” <[www.opa.sa.gov.au](http://www.opa.sa.gov.au)>.



- (d) People acting in representative roles need more guidance on other aspects of the role, such as financial record-keeping.

16.11 In addition, if a new Act is introduced, people will require information and guidance on how the decision-making roles differ from those under the PPPR Act.

### ***Options for improving the information and guidance that is available***

16.12 We are interested in ways to improve the information and guidance that is available to representatives and attorneys. Some options include:

- (a) Standard written guidance for representatives and attorneys on what their roles involve. This could include, in particular, guidance on how to identify a person's will and preferences and the process to follow when making decisions.
- (b) Template documents. For example, we heard that a template for financial records would be helpful so that people know the level of detail that is needed.
- (c) A code of practice for representatives and attorneys (we discuss this further below).
- (d) Training for representatives and attorneys on how to perform their role. Initial training when a person is appointed is likely to be particularly important but ongoing training could also be made available. In some other jurisdictions, mandatory training has been recommended for court-appointed representatives. In Victoria, the Law Reform Commission recommended that, when appointing a representative, the tribunal could make the order "subject to the condition that the appointed person undertakes a designated training program".<sup>10</sup>
- (e) A service that provides advice or support to representatives and attorneys, such as a helpline or information service. For example, in South Australia the Office of the Public Advocate provides support and advice through an

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<sup>10</sup> Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at recommendation 293.

Information Service.<sup>11</sup> The Information Service provides one-on-one information and advice on a range of relevant issues and can be contacted via phone, email, letter or in person at the Public Advocate's office.<sup>12</sup>

- 16.13 It would be necessary to determine who is responsible for providing this information and guidance. Possible options include those discussed above in relation to the development of information about decision-making arrangements.

**QUESTION 89:**

Do you think the information and guidance available for people acting as representatives or attorneys should be improved? If so, how?

## Guidance and training for professionals assessing decision-making capacity

### Issues

- 16.14 There is already some guidance on decision-making capacity assessments in Aotearoa New Zealand. For example, legal and medical practitioners have developed a guide for doctors and lawyers on how to assess decision-making capacity.<sup>13</sup> This includes a “toolkit” for assessing decision-making capacity.<sup>14</sup> However, we heard that more information, guidance and training is needed for health and legal professionals who are undertaking decision-making capacity assessments. As we discuss in Chapter 7, submitters told us that:
- (a) Health professionals do not always have sufficient expertise in undertaking decision-making capacity assessments or have confidence in their ability to complete decision-making capacity assessments.

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<sup>11</sup> Government of South Australia: Office of the Public Advocate “About the Information Service” <[www.opa.sa.gov.au](http://www.opa.sa.gov.au)>.

<sup>12</sup> Government of South Australia: Office of the Public Advocate “About the Information Service” <[www.opa.sa.gov.au](http://www.opa.sa.gov.au)>.

<sup>13</sup> Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Lawyers and Doctors* (Victoria University of Wellington Press, 2020).

<sup>14</sup> Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Lawyers and Doctors* (Victoria University of Wellington Press, 2020) at 453.

- (b) Health professionals do not always have sufficient expertise in matters such as communication support, contemporary understandings of disability, and disability rights.
- (c) There is variation in approaches taken to assessing decision-making capacity and the quality of the assessment can vary.

### ***Options for providing more guidance and training for professionals***

16.15 As we discuss in Chapter 7, we think there should be more guidance and training for legal and health professionals conducting decision-making capacity assessments. Some options include:

- (a) Information on standard interview methods and tools to assist with the quality of the assessments.
- (b) A code of practice containing guidance for assessing decision-making capacity (we discuss this further below).<sup>15</sup>
- (c) Official guidance on how to conduct a decision-making capacity assessment. For example, in Ontario, the Capacity Assessments Office produces “Guidelines for Conducting Assessments of Capacity”.<sup>16</sup>
- (d) Training for professionals who conduct decision-making capacity assessments. This could include training on unconscious bias and how it might influence the assessment. For example, in England the National Health Service developed a series of e-learning sessions on the Mental Capacity Act for health professionals.<sup>17</sup> The series includes a session on assessing decision-making capacity. In Ontario, the Capacity Assessments Office provides the training and continued education required for someone to undertake decision-making capacity assessments.<sup>18</sup>

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<sup>15</sup> Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, Dunedin, 2016) at [4.65].

<sup>16</sup> Capacity Assessments Office: Ontario Ministry of the Attorney General *Guidelines for Conducting Assessments of Capacity* (May 2005).

<sup>17</sup> NHS England “About Mental Capacity Act programme” <[www.e-lfh.org.uk](http://www.e-lfh.org.uk)>.

<sup>18</sup> Ontario Office of the Public Guardian and Trustee *The Capacity Assessment Office: Questions and Answers* (2020) at [2].

- 16.16 Again, it would be necessary to determine who is responsible for providing this guidance and training. Possible options include those discussed above in relation to the development of information about decision-making arrangements.

**QUESTION 90:**

Do you think the training and guidance for professionals who conduct decision-making capacity assessments should be improved? If so, how?

### Introducing a code of practice

- 16.17 Several submitters told us we should consider the development of a code of practice for those acting under decision-making arrangements and undertaking decision-making capacity assessments.
- 16.18 Codes of practice can be a useful way of providing guidance and developing best practice. Alison Douglass, a barrister specialising in health and disability law, suggests that a code of practice should be developed in New Zealand.<sup>19</sup> Codes of practice also exist in some other jurisdictions. For example, the Mental Capacity Act in the United Kingdom requires an accompanying code of practice to be developed to provide practical guidance to a range of people involved with adult decision-making capacity arrangements.<sup>20</sup>
- 16.19 Developing a code of practice is more technical and complicated than some of the other options for increasing guidance. It would require consideration of several other matters, including:
- (a) Who should be responsible for drafting and updating a code of practice? Who should be consulted as part of the development of a code of practice?
  - (b) Who should the code of practice apply to? Some of the categories of people the code of practice might apply to include health professionals,

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<sup>19</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at xiv and [7.28]–[7.29].

<sup>20</sup> Mental Capacity Act 2005 (UK), s 42.

legal professionals, social workers, paid carers, supporters, attorneys and representatives.

- (c) What legal status should the code of practice have? Should it provide guidance on best practice for people involved or should it be binding on them in some way? In the United Kingdom, the code of practice is viewed as guidance but there are some categories of people who are legally required to have regard to it.<sup>21</sup>
- (d) What should be included in a code of practice? Some of the areas a code of practice could cover include decision-making capacity assessments, the representative's or attorney's decision-making role, supported decision-making, and guidance for lawyers working under a new Act.

16.20 As we discuss above, there are many ways to increase information and guidance. A code may not be needed if the availability and accessibility of information is improved in other ways.<sup>22</sup>

**QUESTION 91:**

Do you think a new Act should have an accompanying code of practice? If so, how do you think the code of practice should be developed and operate?

## **AVAILABILITY OF PEOPLE TO ACT AS REPRESENTATIVES AND ATTORNEYS**

- 16.21 Sometimes, there may not be someone available to act as a person's representative or attorney. We are considering ways in which more people could be available.
- 16.22 Under the PPPR Act, trustee corporations such as Public Trust can act as a property manager.<sup>23</sup> There is no equivalent body for welfare guardians. However, there are Welfare Guardian Trusts in some parts of New Zealand.

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<sup>21</sup> Mental Capacity Act 2005 (UK), s 42(4).

<sup>22</sup> England and Wales Law Commission *Adult Social Care* (Law Com 326, 2011) at [3.23]–[3.25]. The report notes that a code may not be needed to achieve the main goal of information that is consolidated, uniform and available in a single location.

<sup>23</sup> Protection of Personal and Property Rights Act 1988, s 31(3).

These organisations recruit and train volunteers to act as welfare guardians when no one else is available.<sup>24</sup>

- 16.23 A trustee corporation can also be appointed as a property attorney under an EPOA.<sup>25</sup> However, a trustee corporation cannot be appointed as an attorney for personal care and welfare under an EPOA.<sup>26</sup> Professionals such as lawyers or accountants can also be named in an EPOA as an attorney.<sup>27</sup> However, there are no organisations equivalent to Welfare Guardian Trusts established to provide people to act as property attorneys.

### Issues with the current availability of people who can act

- 16.24 Several submitters told us that there are people without anyone available, willing and suitable to act as a representative or an attorney. Consequences of this can include delay in the person's access to appropriate care and decisions being made by organisations or family and whānau members without the necessary authority.
- 16.25 The availability of organisations such as Welfare Guardian Trusts and trustee corporations appears to be an incomplete solution. We heard that:
- (a) There is a lack of volunteer representatives and the organisations are unfunded.
  - (b) The organisations have rules concerning when they will provide a welfare guardian. For example, we heard some organisations will not provide a volunteer welfare guardian in cases where there is family or whānau conflict.
  - (c) The role is time-consuming and volunteers are not usually paid for their time.
  - (d) Trustee corporations can be reluctant to provide property managers if their costs cannot be covered. Te Whatu Ora | Health New Zealand noted that trustee corporations may only agree to taking on a property manager role if

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<sup>24</sup> Welfare Guardians "Welfare Guardians Trusts NZ" <welfareguardians.nz>.

<sup>25</sup> Protection of Personal and Property Rights Act 1988, s 94A(6)(c).

<sup>26</sup> Protection of Personal and Property Rights Act 1988, s 98(2).

<sup>27</sup> Protection of Personal and Property Rights Act 1988, s 94A(8)(b).

the person's assets are sufficient to ensure that the trustee corporation will be able to recover its costs.

- (e) There are limited options for people who do not have someone suitable to appoint as their attorney. Some people have not arranged an EPOA, particularly for personal care and welfare, because they do not have anyone they can appoint as their attorney.

### Options for increasing the availability of people who can act

16.26 In some jurisdictions, a public body is responsible for providing representatives or attorneys when needed. For example, in Victoria, the Public Advocate can be appointed as an attorney or guardian for personal matters.<sup>28</sup> In New South Wales, if no one else is available, the Public Guardian can be appointed as a representative for personal matters and the New South Wales Trustee and Guardian can be appointed as a representative for financial matters.<sup>29</sup> In Ireland, the Decision Support Service maintains a panel of suitable people who are available to be appointed as a representative if no one else is available.<sup>30</sup>

16.27 Several submitters also suggested ways to increase the availability of representatives and attorneys. These included:

- (a) Government organisations could provide representatives and attorneys, possibly through partnerships with volunteer organisations.
- (b) There could be state-funded representatives and attorneys as an option of last resort for people who do not have someone to support or represent them.
- (c) A service could be established within a new or existing Ministry or agency to provide representatives and attorneys when needed.

16.28 We also heard it would be helpful if organisations such as residential care facilities were provided with guidance on their obligations when a person does

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<sup>28</sup> Powers of Attorney Act 2014 (Vic), s 28(3); Guardianship and Administration Act 2019 (Vic), s 33(1).

<sup>29</sup> Guardianship Act 1987 (NSW), s 25M(1)(b).

<sup>30</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 101(a); and Seirbhís Tacaíochta Cinnteoireachta: Decision Support Service “Decision Support Service Panels” <decisionsupportservice.ie>.

not have a representative or attorney but needs one and the process they need to follow.

- 16.29 If an oversight body were established (discussed later in this chapter), its functions could include providing representatives and attorneys for people who do not have someone else available. Alternatively, existing organisations could be funded to provide this service. Iwi, hapū, other Māori organisations and community organisations may be well placed to provide this type of service, given their existing relationships in their communities.
- 16.30 Another option is to extend the role of kaitiaki (trustees) of kaitiaki trusts. Currently, if a person “lacks the competence to manage [their] own affairs in relation to [their] property”, te Kooti Whenua Māori | Māori Land Court can create a kaitiaki trust.<sup>31</sup> A kaitiaki trust can protect any interests in Māori freehold land or general land, any shares in Māori incorporations or any personal property.<sup>32</sup> It may be appropriate to extend the role that kaitiaki trusts have so they can manage all the property of a person with affected decision-making.
- 16.31 Whichever options are employed, care will be required not to undermine volunteer work that is already working well.

**QUESTION 92:**

How do you think the law should increase the availability of people who can act as representatives and attorneys?

## COMPLAINTS AND INVESTIGATIONS

- 16.32 In this section, we consider how a new Act could provide for complaints to be made and investigated. We discuss:
- (a) The current mechanisms for complaints.
  - (b) Issues with the current mechanisms.
  - (c) Comparative approaches to complaints.

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<sup>31</sup> Te Ture Whenua Maori Act 1993 | Maori Land Act 1993, ss 210 and 217.

<sup>32</sup> Te Ture Whenua Maori Act 1993 | Maori Land Act 1993, s 217(1).



- (d) Options for dealing with complaints.

### Current mechanisms for complaints

- 16.33 Presently, te Kōti Whānau | Family Court has a key oversight role in decision-making arrangements. It is the main forum for people who have complaints or disputes about decision-making arrangements.
- 16.34 As we discuss in Chapter 10, welfare guardian and property manager orders are subject to regular review.<sup>33</sup> This must be no later than three years from the date of the initial order. In addition, several people, including the property manager, welfare guardian and represented person, can apply at any time for review of a welfare guardian or property management order.<sup>34</sup> Decisions of a welfare guardian or property manager can also be reviewed at any time.
- 16.35 As we discuss in Chapter 13, the Family Court has wide jurisdiction over EPOAs. This includes determining the validity of an EPOA and reviewing any decision made by an attorney under an EPOA.<sup>35</sup>
- 16.36 There are also other domestic or international bodies that may be involved in complaints or concerns relating to the use of decision-making arrangements under the PPPR Act. These include:
- (a) Te Kāhui Tika Tangata | Human Rights Commission, which offers a free and confidential dispute resolution service for complaints about unlawful discrimination and other prohibited behaviours under the Human Rights Act 1993.<sup>36</sup>
  - (b) Te Toihau Hauora, Hauātanga | Health and Disability Commissioner, who can investigate complaints made about “treatment received from health and disability service providers”.<sup>37</sup>

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<sup>33</sup> Protection of Personal and Property Rights Act 1988, ss 12(8) and 31(8).

<sup>34</sup> Protection of Personal and Property Rights Act 1988, ss 86 and 89(1).

<sup>35</sup> Protection of Personal and Property Rights Act 1988, s 103.

<sup>36</sup> Te Kāhui Tika Tangata | Human Rights Commission “Making a complaint” <[tikatangata.org.nz](http://tikatangata.org.nz)>.

<sup>37</sup> Kaitiaki Mana Tangata | Ombudsman New Zealand “Health & Disability Commissioner (HDC)” <[www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)>.

- (c) The Aged Care Commissioner, who can investigate complaints made about older people’s health and disability services.<sup>38</sup>
- (d) The Ombudsman, who can investigate complaints about the actions and decisions of government agencies.<sup>39</sup>
- (e) Te Ara Ahunga Ora | Retirement Commission, which supports dispute resolution processes for registered retirement villages.<sup>40</sup>
- (f) Ngā Pirihamana o Aotearoa | New Zealand Police, which can receive complaints in relation to actions that might amount to criminal conduct.<sup>41</sup>
- (g) The UN Committee on the Rights of Persons with Disabilities, which has jurisdiction to hear complaints from individuals and groups under the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities.<sup>42</sup>

## Issues with current complaints mechanisms

### *Complaints through the court are inaccessible*

16.37 We have heard that people find the Family Court to be an inaccessible forum for the resolution of complaints or disputes.

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<sup>38</sup> Te Toihau Hauora, Hauātanga | Health and Disability Commissioner “Aged Care Commissioner” <[www.hdc.org.nz](http://www.hdc.org.nz)>.

<sup>39</sup> Ombudsman New Zealand “How the Ombudsman works” <[www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz)>.

<sup>40</sup> Retirement Villages Act 2003, pt 4; Retirement Villages (Disputes Panel) Regulations 2006; and Te Ara Ahunga Ora | Retirement Commission “Ngā amuamu me ngā tohenga: Complaints and disputes” <[retirement.govt.nz](http://retirement.govt.nz)>. See also Te Tūāpapa Kura Kāinga | Ministry of Housing and Urban Development *Review of the Retirement Villages Act 2003: Options for change* (August 2023) at 53, which proposes “replacing the current complaints and dispute resolution scheme with a new sector-specific scheme” provided by either an appointed dispute resolution provider or a commissioner.

<sup>41</sup> Examples include failures to provide necessities and protect from injury under s 151 of the Crimes Act 1961, ill-treatment or neglect of a vulnerable adult under s 195 of the Crimes Act 1961, theft by a person in a special relationship under s 220 of the Crimes Act 1961 and dishonest use of a document under s 228 of the Crimes Act 1961.

<sup>42</sup> Te Tari Mō Ngā Take Hauātanga | Office for Disability Issues “Optional Protocol” <[www.odi.govt.nz](http://www.odi.govt.nz)>. The Disability Committee has made decisions in 67 matters under the Optional Protocol, none of which concern complaints from New Zealand: see United Nations Human Rights: Office of the High Commissioner “Welcome to the OHCHR Juris Database” <[juris.ohchr.org](http://juris.ohchr.org)>.

- 16.38 Submitters told us that court processes are inaccessible. We heard that they are long, costly and expensive. One submitter told us that professionals involved in supporting a person with affected decision-making such as social workers, are not inclined or able to pursue court action on behalf of a client because of the time, complexity and cost involved. Court processes are also unlikely to be used until the issues have reached a level that justifies the time and cost involved. At this point, the potential impact on the person with affected decision-making and the relationship they have with their representative or attorney is likely to be significant.
- 16.39 We also heard that court processes can be particularly inaccessible for people with affected decision-making. They may find it difficult to challenge the conduct of a representative or an attorney due to dependence, lack of resources or accessibility issues. The Australia and New Zealand Society for Geriatric Medicine New Zealand Division noted it can be difficult for a person with affected decision-making to access the court if they are restricted from acting on their own behalf.
- 16.40 These concerns may explain the low number of applications filed in the Family Court. Between 2013 and 2022, there were fewer than 30 applications per year for review of the decision of a court-appointed welfare guardian or property manager.<sup>43</sup> The annual number of applications ranged from 13 to 26.<sup>44</sup> In the same period, similarly low numbers of applications were made to review the decision of an attorney. The annual number of applications ranged from 10 to 26.<sup>45</sup>

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<sup>43</sup> Ministry of Justice Analytics and Insights “PPPR Act breakdown by application types” (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).

<sup>44</sup> Ministry of Justice Analytics and Insights “PPPR Act breakdown by application types” (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).

<sup>45</sup> Ministry of Justice Analytics and Insights “PPPR Act breakdown by application types” (31 July 2023) SEC-5933 (obtained under Official Information Act 1982 request to the Courts and Justice Services Policy Group, Ministry of Justice).

### **Difficulties with the options for raising complaints outside of court**

- 16.41 Outside of court, we heard that agencies or family and whānau members who have concerns about decision-making arrangements lack options to raise those concerns and need an easier way to challenge decisions.
- 16.42 While there are several agencies who are involved in complaints that might relate to decision-making arrangements, they generally do not have complete jurisdiction over the actions of an attorney, welfare guardian or property manager. For example, we heard that many complaints will not be serious enough for Police to investigate.
- 16.43 Even where there may be an existing mechanism available for dealing with a complaint, we have heard that the current pathways for raising complaints are unclear.
- 16.44 The fact that there are multiple organisations who might have some role appears to be contributing to this lack of clarity. Disability Connect submitted that there needs to be one agency that is responsible for complaints. They noted several difficulties with the number of agencies potentially involved and the challenges those agencies face, including long delays, lack of suitable resourcing and not having appropriate powers. The Royal Commission of Inquiry into Abuse in Care has also noted the lack of clear processes for making complaints of abuse.<sup>46</sup>

### **Comparative approaches to complaints**

- 16.45 In other jurisdictions, a single body such as a Public Guardian often carries out complaint and investigation functions for decision-making arrangements, meaning that complaints are less reliant on court intervention. There are some common features in how the complaints mechanisms operate.
- 16.46 First, the responsible body can receive complaints or concerns related to decision-making arrangements.<sup>47</sup> Some complaints bodies can also investigate

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<sup>46</sup> Abuse in Care Royal Commission of Inquiry *Tāwharautia: Pūrongo o te Wā* (Interim Report, Volume One, December 2020) at 15. See also Dr Michael Roguski *The Hidden Abuse of Disabled People Residing in the Community: An Explanatory Study* (Kaitiaki: Research and Evaluation, June 2013) at [5.6].

<sup>47</sup> Office of the Public Guardian “Report a concern about an attorney, deputy or guardian” GOV.UK <[www.gov.uk](http://www.gov.uk)>; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 47(1).

on their own motion.<sup>48</sup> The grounds on which a person may make a complaint or report a concern include:

- (a) A concern that a person acting under a decision-making arrangement is acting outside the scope of the arrangement, not fulfilling their legal duties or not suitable for the role.<sup>49</sup>
- (b) A concern that the decision-making arrangements for a person with affected decision-making are inappropriate or inadequate or that the person with affected decision-making is being abused or neglected by the person acting under the arrangement.<sup>50</sup>

16.47 After receiving a complaint that is within its jurisdiction, the complaints body may investigate.<sup>51</sup> The investigation may involve:

- (a) Requesting evidence and explanations from the person who is acting under a decision-making arrangement and is the subject of the complaint or concern.<sup>52</sup>
- (b) Requiring people to produce records such as medical or social service records and reviewing these records.<sup>53</sup>
- (c) Arranging for an independent person to visit the person with affected decision-making or the person who is acting under the decision-making arrangement and is the subject of the complaint or concern.<sup>54</sup>

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<sup>48</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 47(4).

<sup>49</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 47(1); Power of Attorney Act RSBC 1996 c 370 (British Columbia), s 34(2)(c); and Public Guardian and Trustee of British Columbia “Assessment and Investigation Services” <[www.trustee.bc.ca](http://www.trustee.bc.ca)>.

<sup>50</sup> Public Guardian Act 2014 (Qld), ch 3 pts 3–4; Office of the Public Guardian “Investigating abuse of adults” <[www.publicguardian.qld.gov.au](http://www.publicguardian.qld.gov.au)>; Power of Attorney Act RSBC 1996 c 370 (British Columbia), s 34(2); Public Guardian and Trustee of British Columbia “Assessment and Investigation Services” <[www.trustee.bc.ca](http://www.trustee.bc.ca)>.

<sup>51</sup> Office of the Public Guardian *Raise a concern about an attorney, deputy or guardian* (OPG130); Power of Attorney Act RSBC 1996 c 370, s 34(2); and Public Guardian and Trustee Act SY 2003 c 21, sch 3.

<sup>52</sup> Office of the Public Guardian “How we deal with safeguarding concerns” (11 July 2019) GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>53</sup> Office of the Public Guardian “How we deal with safeguarding concerns” (11 July 2019) GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>54</sup> Mental Capacity Act 2005 (UK), s 58(1)(d).

16.48 If a complaint is well founded, the complaints body may be able to ask the person acting under the decision-making arrangement to take action to address the concerns.<sup>55</sup> In some cases, it may apply to the court for appropriate orders such as an order for supervision or removal of the person appointed under the decision-making arrangement and the making of alternative decision-making arrangements.<sup>56</sup>

### **Options for dealing with complaints**

16.49 In this section, we discuss how a new Act might provide for an accessible complaints function.

16.50 We discuss other ways to deal with complaints through improving the accessibility of the court and the provision of other dispute resolution options in Chapter 17.

### ***Introducing a complaints function under the new Act***

16.51 We think an identified agency should be responsible for responding to complaints about decision-making arrangements. Effective, accessible complaints processes are important. They can help to resolve issues at an early stage and address issues that might not otherwise be raised. They can be less adversarial than court processes and therefore more likely to preserve close, trusting and often familial relationships. As we explain above, a dedicated complaints and investigation function is common in other jurisdictions.

16.52 That agency might be a new oversight body (as we discuss later in this chapter). Alternatively, it might be an existing agency. In either case, it would need appropriate powers to take on a complaints and investigation function and, we think, to apply to court for orders as required. It would also require adequate resourcing to ensure that complaints can be addressed promptly and thoroughly.

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<sup>55</sup> Mental Capacity Act 2005 (UK), s 58(1)(g)–(h).

<sup>56</sup> Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 47; Power of Attorney Act RSBC 1996 c 370 (British Columbia), s 34(2); Public Guardian and Trustee Act SY 2003 c 21 (Yukon), ss 15–17; Mental Capacity Act 2005 (UK), s 58(1)(g)–(h); and Office of the Public Guardian “Possible investigation outcomes” <[www.publicguardian.qld.gov.au](http://www.publicguardian.qld.gov.au)>.

16.53 Additional matters that would need to be addressed include:

- (a) The powers that the complaints body would need to carry out this function. For example, should the body have investigative or search powers?
- (b) The interaction between the roles of the designated complaints body and existing complaints bodies.
- (c) How complaints are received. For example, who can make a complaint? Should the complaints body be able to investigate on its own motion without receiving a complaint? Answers to such questions would need to take proper account of the vulnerability of some people with affected decision-making, and the difficulty they may have in challenging the conduct of an attorney or representative themselves (given dependence, lack of resources and accessibility barriers).

**QUESTION 93:**

What do you think about a complaints function? For example:

- a. Should there be a way of making complaints about a representative or an attorney?
- b. Who should be responsible for the complaints function?
- c. How should a complaints function operate? For example, who should be able to make complaints? What actions should people be able to complain about? What powers should the responsible agency have?

## **ESTABLISHING AN OVERSIGHT BODY**

16.54 If a new complaints body were established, its functions would not need to be limited to complaints and investigations. In this section, we consider whether a new body should be established to provide both oversight and guidance. Many submitters supported the establishment of such a body, including to improve accountability and safeguards.

### **What might an oversight body look like?**

16.55 Oversight bodies exist in other jurisdictions. For example, in England and Wales, the Mental Capacity Act 2005 established a new office, the Office of the Public Guardian. The functions of the Public Guardian include establishing

and maintaining a register of lasting powers of attorney, supervising court-appointed deputies and undertaking investigations into concerns about an attorney or court-appointed deputy or guardian.<sup>57</sup> The Office of the Public Guardian also publishes forms, information and guidance on these matters.<sup>58</sup> Recent priorities for the Office of the Public Guardian include promoting lasting powers of attorney “to all parts of society” and continuing to make lasting powers of attorney easier to use across the finance, legal and health sectors.<sup>59</sup>

16.56 Some other functions that an oversight body might undertake include:

- (a) Providing tikanga-focused and Treaty-consistent oversight (discussed later in this chapter).
- (b) Providing free or low-cost services for establishing decision-making arrangements like EPOAs and support arrangements and making advance statements.
- (c) Receiving and reviewing financial reports from court-appointed representatives, as discussed in Chapter 11.
- (d) Establishing and maintaining a register of EPOAs, as discussed in Chapter 14.
- (e) Acting as a representative or attorney for people who do not have someone available to act in these roles.
- (f) Providing access to a panel of supporters, representatives and lawyers with relevant expertise.
- (g) Providing guidance on implementing decision-making arrangements, including through information, education and training.
- (h) Providing access to other dispute resolution options, as we discuss in Chapter 17.

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<sup>57</sup> Mental Capacity Act 2005 (UK), ss 57–60; and Office of the Public Guardian “About us” GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>58</sup> Office of the Public Guardian “Office of the Public Guardian” GOV.UK <[www.gov.uk](http://www.gov.uk)>.

<sup>59</sup> Office of the Public Guardian “Corporate report — Office of the Public Guardian business plan: 2021 to 2022” (web version) GOV.UK <[www.gov.uk](http://www.gov.uk)>.



## Is a new body needed?

- 16.57 A new public body should only be created if no existing body “possesses the appropriate governance arrangements or is capable of properly performing the necessary functions”.<sup>60</sup>
- 16.58 Various bodies already have roles in this context. For example, the Ministry of Justice, the Office for Seniors and Public Trust all provide information and forms for setting up EPOAs.<sup>61</sup> Both Public Trust and lawyers can help with formalities for setting up EPOAs on payment of fees, and there are other bodies such as Community Law Centres that assist as well. There are also bodies such as the Health and Disability Commissioner that can respond to complaints although none with a specific role under the PPPR Act.
- 16.59 Continuing the current approach of having multiple bodies undertaking various functions might best enable existing capabilities and expertise to be built on. However, there can be difficulties with providing an existing body with new functions, including the following:<sup>62</sup>
- (a) New functions can conflict with existing strategic priorities or purposes and may not align with the body’s primary focus.
  - (b) An existing body might not have adequate resourcing to undertake the additional functions.
  - (c) An existing body might not have adequate skills for the new function and may be slow to acquire them sufficiently given existing priorities and focus.
  - (d) Acquiring new functions might adversely affect the body’s ability to perform its existing role.

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<sup>60</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at 104. See also the further questions and considerations for those proposing to establish a new government-funded body at 104–109. These include whether or why it is needed (could an existing body, modified if needed, take on the function?) and what type of body by reference to a list of types.

<sup>61</sup> Ministry of Justice “Powers to Make Decisions for Others” <[www.justice.govt.nz](http://www.justice.govt.nz)>; Office for Seniors “Promoting enduring powers of attorney (EPA)” <[officeforseniors.govt.nz](http://officeforseniors.govt.nz)>; and Public Trust “Enduring Power of Attorney (EPA)” <[www.publictrust.co.nz](http://www.publictrust.co.nz)>.

<sup>62</sup> See discussion in *Te Aka Matua o te Ture | Law Commission He Poutama* (NZLC SP24, 2023) at 266–273.

- 16.60 Establishing a new single oversight body might deliver benefits not otherwise easily obtainable. It would likely facilitate a more co-ordinated approach to all the agency's functions than could realistically be achieved if functions are spread among multiple bodies.<sup>63</sup> It may also be easier for people to navigate decision-making arrangements if all relevant functions sit within one body. As we noted above, submitters told us it is confusing and difficult when multiple agencies are responsible for related functions.
- 16.61 Having one dedicated body might also make it easier to provide for additional functions in the future. For example, a body might initially be funded to update existing forms and guidance in a co-ordinated way and to assist with setting up decision-making arrangements. Over time, it could implement other functions such as a phone line enquiry service or a panel of representatives and attorneys for people who do not have someone available to perform these roles.
- 16.62 An oversight body would require public funding. The overlap of its functions with those of existing bodies such as Public Trust, the Health and Disability Commissioner, the Office of the Ombudsman, and the Retirement Commissioner would need to be carefully considered. However, if all the functions sit with one body, funding those functions would be more straightforward and a range of efficiencies could be expected.

**QUESTION 94:**

Do you think there should be a specific oversight body for adult decision-making arrangements? If so, what oversight functions would be most useful?

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<sup>63</sup> See also Dr Michael Roguski *The Hidden Abuse of Disabled People Residing in the Community: An Explanatory Study* (Kaitiaki: Research and Evaluation, June 2013) at [6.3].

## TIKANGA-FOCUSED AND TREATY-CONSISTENT OVERSIGHT

16.63 As discussed in Chapters 4 and 5, we are considering how a new Act could better meet the Crown's obligations under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) and recognise and provide for tikanga.

16.64 In this section, we consider options for providing tikanga-focused and Treaty-consistent oversight for the purposes of a new Act.

16.65 We discuss three options:

- (a) If a new oversight body is established, requiring a minimum number of its members to be Māori.
- (b) Establishment of a new permanent body or steering committee comprising only Māori.
- (c) Establishment of a tikanga and Treaty-focused implementation group for an initial period only.

16.66 For reasons we discuss below, we suggest that the first of these options is preferable.

### Minimum Māori membership of an oversight body

16.67 If a new oversight body were established, its functions could include ensuring proper recognition of and provision for tikanga and proper regard for the Treaty in the operation of the new Act.

16.68 Examples of what this could involve include:

- (a) Providing research, education and guidance on tikanga, mātauranga Māori and te ao Māori, including on how tikanga may operate in the context of adult decision-making to inform the development of practice over time.
- (b) Providing guidance and oversight on the development and implementation of the decision-making framework in a new Act.
- (c) Developing guidance to assist whānau to choose and use the different arrangements offered in a new Act.
- (d) Researching and developing effective tools for whānau, hapū, iwi and other hāpori Māori (Māori communities) to provide support for people with affected decision-making.

(e) Educating legal and health professionals on conducting decision-making capacity assessments in a way that respects tikanga.

16.69 To support this, we think membership of the new oversight body would require a minimum number of Māori members with relevant knowledge of tikanga. We do not think *expertise* in tikanga should be required of those members. The new body could have the ability to seek specialist advice on tikanga when needed.

16.70 Addressing relevant Treaty considerations would, we think, be an important matter to include in a new oversight body's functions. However, we do not consider that this should require its Māori members to have specific Treaty expertise. The Treaty is now widely considered throughout the government and in a range of other sectors such as health and law. Relevant knowledge is not restricted to Māori.

16.71 Te Aka Matua o te Ture | Law Commission has previously considered the establishment in new legislation of an oversight committee requiring a minimum number of members to be Māori. In its report on the use of DNA in criminal investigations, the Commission recommended a new oversight committee comprising between six and eight members with at least three Māori members.<sup>64</sup> It said a single oversight committee with a strong Māori membership would "support a partnership approach to oversight and avoid issues inherent in a dual-committee structure".<sup>65</sup> We think similar considerations may apply here.

### A separate body or steering committee

16.72 Another option is the establishment of a new permanent body or steering committee whose members comprise only Māori to provide guidance and oversight both in the development of a new Act and in its implementation. A Māori oversight or steering committee could be responsible for providing direction on the respect and recognition of tikanga, mātauranga Māori and te

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<sup>64</sup> Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [5.87] and [5.90].

<sup>65</sup> Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [5.92].

ao Māori in areas similar to those identified above. This option need not be contingent on the establishment of an oversight body. A new committee could support the work of a Ministry responsible for administering a new Act.

16.73 In its report on the use of DNA in criminal investigations, the Commission also considered establishing a separate Māori advisory committee to operate alongside an oversight committee. While acknowledging that a separate committee could “ensure a wide range of different Māori views are represented”, the Commission ultimately did not prefer this option. It noted that a dual-committee approach risks an overlapping of functions, confusion of roles and gaps in oversight and could result in tension between the two bodies. It was also concerned that a separate body that was advisory in nature would lack the mana to give effect to the Treaty. We think similar issues could arise in this context and accordingly do not favour this option if a new oversight body were to be established in the manner we outline above.

16.74 If a separate Māori advisory committee were to be established, careful consideration would need to be given to its design to ensure it had appropriate representation and authority from a tikanga perspective.

### **An implementation group for an initial period**

16.75 A third option might be the establishment of an interim group to provide initial tikanga-focused guidance on the implementation of a new Act. Relevant functions could then be taken over by another body after that initial implementation period.

16.76 This option would allow for an initial dedicated focus on developing tikanga guidance. Over time, as familiarity built with a new Act, the resource demands could be expected to lessen and more easily become part of the regular work of a new oversight body established as outlined above. However, we think the risks identified above in having a permanent Māori advisory committee may well also arise with an interim committee.

**QUESTION 95:**

Do you have views on the options we have identified for providing tikanga and Treaty-focused guidance and oversight? Are there other options we should consider?

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## CHAPTER 17

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# Improving court processes

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## INTRODUCTION

- 17.1 Court processes will remain necessary under a new Act. We consider te Kōti Whānau | Family Court should be able to make decisions and appoint representatives.<sup>1</sup> We also consider that the Court should continue to have jurisdiction over enduring powers of attorney (EPOAs).<sup>2</sup>
- 17.2 These court processes need to be accessible to the people who might use them. This ensures adequate access to justice — that is, the ability of people to have their legal rights determined and upheld through a process that is fair, efficient and transparent.<sup>3</sup> Effective access to justice is vital for upholding rule of law values.<sup>4</sup>
- 17.3 The requirement for court processes to be accessible also arises from obligations in the UN Convention on the Rights of Persons with Disabilities (Disability Convention). In particular, the Disability Convention requires that any measures that relate to the exercise of legal capacity such as decision-

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<sup>1</sup> Chapter 9.

<sup>2</sup> Chapter 13.

<sup>3</sup> Te Aka Matua o Te Ture | Law Commission *Class actions and litigation funding* (NZLC IP45, 2020) at [5.4].

<sup>4</sup> See Jeremy Waldron “The Concept and the Rule of Law” (2008) 43(1) Ga L Rev 1 at 59.

making arrangements must have “appropriate and effective safeguards”.<sup>5</sup> It also requires that disabled people have effective access to justice “on an equal basis with others”.<sup>6</sup>

- 17.4 Submitters told us about issues with the Family Court’s processes. For example, we heard that people find the Family Court difficult to access and not always socially and culturally responsive. We also heard that the person with affected decision-making is not always able to participate effectively in the court process.
- 17.5 Many of these issues are consistent with accessibility issues throughout the court system generally. Much work is already under way to improve the accessibility of courts.<sup>7</sup> We do not consider ways to address general accessibility concerns in this chapter.
- 17.6 Rather, we focus on how to improve the accessibility of court processes under a new Act. We begin by summarising the concerns raised by submitters. We then consider:
- (a) Ways to increase the participation of the person with affected decision-making in court processes.
  - (b) Ways to support people who are making an application to court.
  - (c) Ways to make court processes more socially and culturally responsive.

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<sup>5</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 12(2) and 12(4).

<sup>6</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 13(1). Note, also the obligation under art 12(3) to ensure that disabled persons have access to the support they may require in exercising their legal capacity.

<sup>7</sup> See for example Te Komiti Mō Ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022); Te Kāhui Ture o Aotearoa *Access to Justice: Stocktake of initiatives* (Research report, December 2020); Te Tāhū o te Ture | Ministry of Justice “Te Ao Mārama — Enhancing Justice for All” (14 December 2023) <[www.justice.govt.nz](http://www.justice.govt.nz)>. An area of focus for the judiciary over the next five years is that information on court websites is available in te reo Māori, New Zealand Sign Language and accessible formats, so far as practicable, as well as other improvements in availability of information about court processes: Te Tumu Whakawā o Aotearoa | Chief Justice of New Zealand *Digital Strategy for Courts and Tribunals* (Te Tari Toko i te Tumu Whakawā | Office of the Chief Justice, March 2023) at 26.



- (d) Whether a new specialist court or tribunal should be established to deal with applications under a new Act.
- (e) Whether a new Act should expressly provide for other dispute resolution options such as mediation.

## AN OVERVIEW OF CURRENT ISSUES WITH COURT ACCESSIBILITY

17.7 Many submitters told us that court processes are difficult to access. For example, we heard:

- (a) Court processes can be difficult to understand and navigate effectively.
- (b) Court processes are often slow. This can lead to harmful consequences such as further damage to relationships or delays in access to services or treatment.
- (c) The cost of court processes is a significant barrier, especially as the decision-making arrangements at issue affect individuals, whānau and families who may not have the resources to engage lawyers for lengthy court processes.<sup>8</sup>
- (d) People with affected decision-making are not always able to meaningfully participate in the court process.
- (e) It is difficult for people to make an application to the court.
- (f) Court processes are not accessible or inclusive for all cultures.<sup>9</sup>

17.8 We heard that these concerns are often more acute for older people and those who need communication assistance, decision-making support or other accommodations.

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<sup>8</sup> See also Andrew Finnie “Using and working with the PPPR Act — the challenges” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, 2018) 21 at 22. There are currently no required fees for filing a Protection of Personal and Property Rights Act 1988 application in the Family Court and fees for court proceedings under the Act can be waived in cases of hardship: Ministry of Justice “Family Court fees and funding” <[www.justice.govt.nz](http://www.justice.govt.nz)>; Protection of Personal and Property Rights Act 1988, s 110.

<sup>9</sup> See also Kantar *Public Access to Justice Research 2021* (New Zealand Law Society, October 2021) at 17; Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki!* (Second Report, December 2019) at 13.

- 17.9 The concerns are made more acute by the absence of other effective complaint and dispute resolution mechanisms.<sup>10</sup> In practice, there can sometimes be no way to adequately resolve concerns about arrangements like EPOAs, welfare guardians and property managers.

## **PARTICIPATION IN COURT PROCESSES BY THE PERSON WITH AFFECTED DECISION-MAKING**

- 17.10 In this section, we consider whether reform is needed to ensure the person with affected decision-making:

- (a) Has appropriate representation.
- (b) Is present at the hearing in appropriate cases.
- (c) Can provide their views to the court.
- (d) Has appropriate support to participate in the court process.

### **Representation in court processes**

- 17.11 When an application is made under the Protection of Personal and Property Rights Act 1988 (PPPR Act), the court must appoint a lawyer to represent the person in respect of which an application is made unless the person already has a lawyer or will retain one.<sup>11</sup> We heard that the role of the court-appointed lawyer in PPPR Act cases is vital.

- 17.12 The court-appointed lawyer must explain the application to the person and give effect to the person's wishes in respect of the application.<sup>12</sup> They must also consider whether the reason an order is sought can be resolved in other ways.<sup>13</sup> The Family Court has issued guidelines for court-appointed lawyers.<sup>14</sup>

- 17.13 We heard some concerns about legal representation of people with affected decision-making. These included:

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<sup>10</sup> See discussion in Chapter 16.

<sup>11</sup> Protection of Personal and Property Rights Act 1988, s 65(1).

<sup>12</sup> Protection of Personal and Property Rights Act 1988, s 65(2)(a).

<sup>13</sup> Protection of Personal and Property Rights Act 1988, s 65(2)(b).

<sup>14</sup> Peter F Boshier *Guidelines for Counsel for Subject Person Appointed under the Protection of Personal And Property Rights Act 1988* (Te Tāhū o te Ture | Ministry of Justice, 24 March 2011).

- (a) The appointment of the court-appointed lawyer ends once a PPPR Act order is in place. This means the person with affected decision-making has to find their own lawyer if they have any subsequent issues with their representative that they want the court to address. Finding lawyers to act in this area can be challenging. There is a limited number of lawyers with relevant expertise and an even more limited number who are legal aid lawyers. This may be because cases can be lengthy and there is no additional legal aid funding for accessibility needs.<sup>15</sup> We also heard that some lawyers can be reluctant to act for people with affected decision-making because of a concern that they may not receive reliable instructions.
- (b) There is a lack of training on the role of the court-appointed lawyer and limited guidance on how to work with people who may have affected decision-making.<sup>16</sup> More training and guidance and better training and guidance are required.

17.14 Options for improving representation of people with affected decision-making in court processes might include the following:

- (a) Increasing the guidance and training available to legal professionals in this area. For example, in the United Kingdom, the Law Society has developed guidance for legal professionals on how to work with clients who may have affected decision-making.<sup>17</sup> Increased training and guidance might help lawyers feel more confident working with and communicating with people who have affected decision-making. It might better equip them to obtain the views of the person with affected decision-making and communicate them to the court.

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<sup>15</sup> However, note that the Family Court entitles legal aid lawyers to a one-off payment of around \$150 for accessibility needs.

<sup>16</sup> The National Strategy for Civil Justice recognises the need for legal professionals to have more education to improve knowledge and awareness of the impacts of those experiencing disability: Wayfinding for Civil Justice Working Group *Wayfinding for Civil Justice: National Strategy* (Minister of Justice, December 2023) at 10.

<sup>17</sup> The Law Society (England and Wales) “Topics and resources: Private client: Mental capacity” <[www.lawsociety.org.uk](http://www.lawsociety.org.uk)>.

- (b) Maintaining a publicly available panel of lawyers with relevant expertise in this area so that it is easier for people with affected decision-making to find a suitable lawyer. If an oversight body were established, as we discuss in Chapter 16, it might carry out that role.
- (c) Reviewing legal aid funding, either to increase the number of people who can access a lawyer through legal aid or giving lawyers more time and support to work with people who have accessibility needs. Giving lawyers more time and support may reduce any reluctance to act for people with affected decision-making.

**QUESTION 96:**

How could the representation of people with affected decision-making in court processes be improved?

**Ensuring the person with affected decision-making is generally present at the hearing**

- 17.15 The PPPR Act requires that the person in respect of which an application is made is present throughout the hearing unless they are excused or excluded from attendance.<sup>18</sup> The person can be excused if they “wholly lack” the capacity to understand the nature and purpose of the proceedings or if attending is likely to cause them serious mental, emotional or physical harm.<sup>19</sup>
- 17.16 We understand that this presumption of attendance is not widely reflected in practice and that the court typically hears applications in the absence of the person with affected decision-making.<sup>20</sup>
- 17.17 It is important that the person with affected decision-making is generally present at the hearing. In *Dawson v Keesing*, the Court considered that the

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<sup>18</sup> Protection of Personal and Property Rights Act 1988, s 74(1).

<sup>19</sup> Protection of Personal and Property Rights Act 1988, s 74(2).

<sup>20</sup> Iris Reuecamp *Protection of Personal and Property Rights Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2023) at 153; Greg Kelly and Kimberly Lawrence “Participation in Litigation” in *A to Z of New Zealand Law Mental Health — Capacity* (online ed, Thomson Reuters) at [41.C.24.4.5].

subject person's presence at the making of orders was an important part of ensuring natural justice.<sup>21</sup>

17.18 We have considered ways to make it easier for the person with affected decision-making to be present at the hearing.

17.19 One option might be to more frequently hold hearings in locations that suit the person with affected decision-making, such as their place of residence or a place in which they feel comfortable. We understand that some PPPR Act applications are already held in different locations. For example, in *Re RMS*, the hearing was held at the aged care facility where the person was living.<sup>22</sup> In other courts such as Ngā Kōti Rangatahi | Rangatahi Courts and Pasifika Courts, hearings can be held on a marae or at a Pasifika venue.<sup>23</sup> It may be that the use of alternative locations should be expressly encouraged. For example, in Ontario, the Consent and Capacity Board “will convene wherever it is needed [and] can be set up to go to the applicant rather than the reverse”.<sup>24</sup>

17.20 Another option might be to require the court to consider whether the person's attendance can be facilitated through alternative means such as audio-visual link. In some cases, meeting by telephone or online may be more suitable for the person. Under the Family Court Rules, the court can already hold telephone and video conferences and make use of equipment and technology “to ensure proceedings are dealt with speedily”.<sup>25</sup> These could be expressly extended to facilitate attendance at hearings by people with affected decision-making.

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<sup>21</sup> *Dawson v Keesing* (2004) 23 FRNZ 952 (HC) at [22].

<sup>22</sup> *Re RMS* (1993) 10 FRNZ 387 (FC).

<sup>23</sup> Ministry of Justice “About Youth Court — Rangatahi Courts & Pasifika Courts” Te Kōti Taiohi o Aotearoa | Youth Court of New Zealand <[www.youthcourt.govt.nz](http://www.youthcourt.govt.nz)>.

<sup>24</sup> British Columbia Law Institute and Canadian Centre for Elder Law *Study Paper on Health Care Consent and Capacity Assessment Tribunals* (BCLI SP12 and CCEL SP10, 2021) at 101.

<sup>25</sup> Family Court Rules 2002, r 181.

**QUESTION 97:**

What would make it easier for the person with affected decision-making to be present at the hearing?

**Ensuring the person's views are sought and communicated to the court**

- 17.21 Under the PPPR Act, if the person with affected decision-making is present in court and “appears capable of addressing the court”, the court must give them the opportunity to do so.<sup>26</sup> Guidelines for court-appointed lawyers require that “where the [person with affected decision-making] is able to express a clear view, that view should be put before the Court”.<sup>27</sup>
- 17.22 In practice, it is not clear how often the person's views are communicated to the court. Practice may be inconsistent. For example:
- (a) In *NA v LO*, the judge met directly with the person to obtain their views.<sup>28</sup>
  - (b) In *JH v LN*, there is no indication on the face of the decision that the person's views were sought on their medical treatment.<sup>29</sup>
  - (c) In *JW v CW*, the Court did not place weight on the person's evidence because they lacked decision-making capacity.<sup>30</sup>
- 17.23 A 2016 analysis indicated that, in litigation that proceeded to a hearing, the person with affected decision-making was expressly excused from attending the hearing in only 15 out of 94 cases.<sup>31</sup> However, they only actively participated in 24 of the remaining 79 cases.<sup>32</sup> It is unclear what occurred in

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<sup>26</sup> Protection of Personal and Property Rights Act 1988, s 75. See for example *B v B* FC Dunedin FAM-2007-012-28, 13 March 2007 at [6].

<sup>27</sup> Peter F Boshier *Guidelines for Counsel for Subject Person Appointed under the Protection of Personal And Property Rights Act 1988* (Ministry of Justice, 24 March 2011) at [3.7].

<sup>28</sup> *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [8].

<sup>29</sup> *JH v LN* [2022] NZFC 771, [2022] NZFLR 305.

<sup>30</sup> *JW v CW* [2020] NZFC 6683, [2020] NZFLR 940 at [48].

<sup>31</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at [19].

<sup>32</sup> Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at [19].

the remainder of cases, including whether or not the person was present or took part in the hearing at all and, if not, why not.<sup>33</sup>

- 17.24 Whether or not the person with affected decision-making is present at the hearing, we think their views should be sought and presented to the court and the court must be satisfied that steps have been taken to ensure that this is the case. Having an opportunity to present their views can be very significant for the person and hearing those views is important for the judge.<sup>34</sup> It can help ensure that the person remains centred in decisions concerning them and can provide an important safeguard against paternalism.<sup>35</sup>
- 17.25 We have considered ways to help ensure the person's views are sought and communicated to the court. One option is to express more strongly the obligation of court-appointed lawyers to obtain the views of the person and put them before the court. For example, guidelines could state that, "where the [person with affected decision-making] is able to express a clear view, that view *must* be put before the Court". Alternatively, a requirement to put the person's views before the court could be included in a new Act.

**QUESTION 98:**

What might better ensure that the views of the person with affected decision-making are sought and communicated to the court?

### **Ensuring that the person has appropriate support to participate in the court process**

- 17.26 There are various ways that people with affected decision-making can currently be supported to participate in the court process. They include:

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<sup>33</sup> Greg Kelly and Kimberly Lawrence *A to Z of New Zealand Law Mental Health — Capacity* (online ed, Thomson Reuters) at [41.C.24.4.5]; Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at [19].

<sup>34</sup> See for example *B v B* FC Dunedin FAM-2007-012-28, 13 March 2007 at [6].

<sup>35</sup> As discussed in the context of the United Kingdom in Amel Alghrani, Paula Case and John Fanning "Editorial: The Mental Capacity Act 2005 — Ten Years On" (2016) 24(3) *Med L Rev* 311 at 313.

- (a) The person can have a support person with them in court if the judge permits. The judge must permit this unless they consider there is good reason why the support person should not be present.<sup>36</sup>
- (b) Family Court staff, including Kaiārahi o te Kooti a Whānau | Family Court Navigators (Kaiārahi) are available to provide people with information, guidance and support in Family Court processes. Kaiārahi can help with understanding processes and outcomes of Family Court hearings, accessing out-of-court services and support in the community, and connecting whānau or families with other community agencies and services.<sup>37</sup>
- (c) The person may access an interpreter. The information sheet that must accompany a PPPR Act application allows the applicant to specify whether an interpreter is required for the proceedings.<sup>38</sup> This is additional to the general rights to speak te reo Māori and use New Zealand Sign Language in legal proceedings.<sup>39</sup>
- (d) The person may access communication assistance if it is needed to enable them to give evidence.<sup>40</sup>

17.27 We have heard that more could be done to support people with affected decision-making to participate in the court process. For example, we heard there is limited availability and use of communication assistance for PPPR Act applications. While communication assistance is available in criminal cases, it is less readily available for civil cases, including those under the PPPR Act. Whānau, family and other carers are not always aware that formal communication assistance is an option.

17.28 We also heard that Family Court staff, including Kaiārahi, are trained primarily in the main areas of the Court's work such as childcare arrangements and relationship property. Because the PPPR Act jurisdiction is a minor part of the

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<sup>36</sup> Protection of Personal and Property Rights Act 1988, ss 79(1)(i) and 79(2).

<sup>37</sup> Ministry of Justice "Kaiārahi o te Kooti-a-Whānau" (21 February 2024) <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>38</sup> Family Court Rules 2002, sch 9 form PPPR 14.

<sup>39</sup> Te Ture mō Te Reo Māori 2016 | Māori Language Act 2016, s 7; New Zealand Sign Language Act 2006, s 7.

<sup>40</sup> Evidence Act 2006, s 80(3).



Court's work, court staff may not always be well positioned to assist with PPPR Act matters.

- 17.29 Some possible options for better supporting persons with affected decision-making in the court process include:
- (a) Expanding the role of Kaiārahi so that they can provide further assistance, including guiding the person through the court process.
  - (b) Increasing access to communication assistance and other communication supports to ensure that appropriate adjustments are made to court processes to enable the person with affected decision-making to participate.
  - (c) Allowing the person with affected decision-making to have access to their decision-making supporters and any other decision-making support they usually receive.
  - (d) Considering alternative ways of giving evidence. For example, in *S v Attorney-General*, a specialist interviewer with experience in conducting interviews with people with affected decision-making asked the interview questions. The interviews were conducted where the individuals resided to minimise stress.<sup>41</sup>

**QUESTION 99:**

What might better support a person with affected decision-making to participate in the court process?

## **SUPPORT FOR PEOPLE MAKING AN APPLICATION TO THE COURT**

- 17.30 Under the PPPR Act, several people (including the person with affected decision-making, a relative, a social worker or a medical practitioner) can make an application to the court.<sup>42</sup> A number of submitters told us it can be difficult to make an application. For example, we heard:

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<sup>41</sup> See *S v Attorney-General* [2017] NZHC 2629 at [28].

<sup>42</sup> See for example Protection of Personal and Property Rights Act 1988, s 7.

- (a) It can be difficult to complete the application forms and navigate the court process.
- (b) It can be expensive. We heard that, although people can make a PPPR Act application to the court themselves, the reality is that most people need the assistance of a lawyer, the cost of which can be significant for some people.
- (c) Finding lawyers to act in this area can be challenging. As discussed above, there is a limited number of lawyers with relevant expertise and an even more limited number who are legal aid lawyers.
- (d) If a person does not have legal support to make an application, they may need to rely on support from community or government organisations such as hospital staff. However, volunteer and government organisations do not have sufficient resources to support everyone making an application.
- (e) PPPR Act jurisdiction is only a minor part of the Family Court's work and court staff are not always well-placed to assist with PPPR Act matters.

17.31 There is already some support available to people making an application to court. For example, Te Tāhū o te Ture | Ministry of Justice provides guidance and forms for making PPPR Act applications.<sup>43</sup> As discussed above, Family Court staff, including Kaiārahi, are also available to provide people with information, guidance and support in Family Court processes. In addition, legal aid for the application is available for people who are under a certain income threshold and meet other criteria.<sup>44</sup>

17.32 Options for making it easier for people to make an application to the court include:

- (a) Improving the guidance available on court processes, as discussed in Chapter 16. This could include community education on the court process, accessible explanations of the court process, and somewhere people could go for advice on making an application to the court.

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<sup>43</sup> Ministry of Justice "Powers to make decisions for others" (18 October 2021) <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>44</sup> Legal Services Regulations 2011, ss 5 and 6; Ministry of Justice *Your guide to legal aid: Information about applying for legal aid* (MOJ0083JAN14).

- (b) Increasing the availability of lawyers practising in this area and increasing the guidance and training available to them, as discussed above.
- (c) Expanding the role of Kaiārahi, as discussed above. For example, Kaiārahi could provide people with initial guidance on making an application to the court and guide people through the court process.

**QUESTION 100:**

How could people be better supported to make an application to court?

**SOCIALLY AND CULTURALLY RESPONSIVE COURT PROCESSES**

- 17.33 Court processes need to be responsive to different cultural backgrounds. The need for this would be even more important under a new Act requiring greater account to be taken of a person’s will and preferences.<sup>45</sup>
- 17.34 Submitters told us that current court processes are not accessible or inclusive for all cultures.<sup>46</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group also heard that people “find court processes confusing and alienating, with a culture and language that is intimidating and does not reflect a modern Aotearoa New Zealand”.<sup>47</sup>

**Current social and cultural responsiveness of the court**

- 17.35 Cultural considerations and tikanga can be considered in PPPR Act cases.<sup>48</sup> Te Kōti Matua | High Court has confirmed a right under the Act to express one’s “cultural heritage”.<sup>49</sup> However, it is unclear to what extent court processes currently enable tikanga and cultural considerations to “speak in

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<sup>45</sup> In addition to the discussion of te Tiriti o Waitangi | Treaty of Waitangi in Chapter 4, see Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 12(2), 12(4) and art 13.

<sup>46</sup> See also Kantar *Public Access to Justice Research 2021* (New Zealand Law Society, October 2021) at 17; Safe and Effective Justice Advisory Group *Turuki! Turuki!* (Second Report, December 2019) at 13.

<sup>47</sup> Safe and Effective Justice Advisory Group *Turuki! Turuki!* (Second Report, December 2019) at 61.

<sup>48</sup> See for example *Re [S]* [2021] NZFC 5911. (We have anonymised the name of the defendant for the purpose of this Issues Paper and so refer to the person the case concerned as “S”.)

<sup>49</sup> *T-E v B [Contact]* [2009] NZFLR 844 at [18].

[their] own context”.<sup>50</sup> There are no express rules requiring the conduct of court hearings in ways which are culturally responsive to the person concerned and their families and whānau, or which might make it easier for the courts to do so.

17.36 In other contexts, there are examples of initiatives intended to make court processes more responsive to an individual’s cultural background:

- (a) Te Ao Mārama is a te Kōti-ā-Rohe | District Court initiative designed to reflect the needs of a multi-cultural Aotearoa New Zealand.<sup>51</sup> It aims to create a justice system where all people can seek justice and meaningfully participate in court, regardless of their means or ability, ethnicity, culture or language.<sup>52</sup>
- (b) Te Whare Whakapiki Wairua | Alcohol and Other Drug Treatment Court has established a Pou Oranga (Māori cultural advisor) role. This role involves advising on how to engage with Māori participants and ensuring that kaupapa Māori principles are included in the Court process and treatment plan.<sup>53</sup>
- (c) Rangatahi Courts are held on marae and follow Māori cultural processes. Pasifika Courts are held in Pasifika churches or community centres and follow Pasifika cultural processes. These courts are designed to help Māori and Pasifika young people to engage in the youth justice process and to better involve Māori and Pasifika families and communities in the youth justice process.<sup>54</sup>

17.37 There are also international examples. In Nunavut, Canada, the Mental Health Act 2021 established Inuit cultural advisors. The Act’s purpose is to “improve the mental wellness of Nunavummiut and address Inuit-specific needs related to mental wellness” and it aimed to better reflect and accommodate Inuit

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<sup>50</sup> *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 at [4].

<sup>51</sup> Heemi Taumaunu “Transformative Te Ao Mārama model announced for District Court” (press release, 11 November 2020).

<sup>52</sup> Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand *Annual Report 2022* at 4.

<sup>53</sup> Ministry of Justice “Alcohol and Other Drug Treatment Court” <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>54</sup> Te Kōti Taiohi o Aotearoa | Youth Court of New Zealand “About Youth Court — Rangatahi Courts & Pasifika Courts” Ministry of Justice <[www.youthcourt.govt.nz](http://www.youthcourt.govt.nz)>.

approaches to healing.<sup>55</sup> Cultural advisors meet with individuals and their *tikkuaqtaujuq* (selected representative) either in person or remotely, and give evidence and advise the Mental Health Review Board on relevant Inuit societal values and perspectives.<sup>56</sup>

### Options for ensuring court processes are socially and culturally responsive

17.38 These local and international examples suggest ways in which court processes under a new Act could be more responsive to an individual's culture and background and better equipped, in particular, to recognise *tikanga*.

Options might include:

- (a) The availability of cultural advisors to assist participants in court processes under a new Act, possibly by extension of (or based on) the *Kaiārahi* role. A key part of the cultural advisor role could be forming connections with communities and out-of-court services. Another could be to ensure court processes are more responsive to the perspectives and practices of Māori and of other cultures.
- (b) Procedures that accommodate the application of *tikanga* and other cultural considerations in court hearings. This could include expressly providing for options to hold court hearings at venues appropriate to the parties, changes to standing rules to recognise that a wider range of people might have an interest in the court hearing in cultures with more collective values, and the power to hear from *kaumātua*, *whānau* and family, and other community leaders in a less formal way than calling them as witnesses.

17.39 In addition, *te Kooti Whenua Māori* | Māori Land Court might conceivably play a role in determining some matters under a new Act. The Commission has previously recommended expanding (or giving consideration to expanding) the jurisdiction of the Māori Land Court in relation to all communal Māori assets

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<sup>55</sup> Mental Health Act SNu 2021 c 19 (Nunavut), s 1; Mélanie Ritchot "Nunavut MLAs adopt new Mental Health Act" *Nunatsiaq News* (online ed, Iqaluit, 9 June 2021).

<sup>56</sup> Mental Health Act SNu 2021 c 19 (Nunavut), s 67(5).

and certain succession matters.<sup>57</sup> It has also suggested that expanding the role of the Court to enable it to address issues of tikanga more broadly should be considered.<sup>58</sup> As the Court already has tools, procedures and experience enabling it to operate in a culturally responsive way for Māori and it regularly deals with matters involving questions of tikanga, providing it with jurisdiction to hear certain matters under a new Act may be appropriate.<sup>59</sup>

**QUESTION 101:**

What changes do you think would make court processes more socially and culturally responsive?

## ESTABLISHING A SPECIALIST COURT OR TRIBUNAL

17.40 In this section, we consider the option of establishing a specialist court or tribunal to deal with matters under a new Act. We heard significant support for a specialist court or tribunal.

17.41 However, as we explain below, our preliminary view is that the perceived benefits of a specialist forum may be more easily achieved by changes that improve the accessibility of the Family Court.

### Changing Family Court processes to achieve benefits of a specialist forum

17.42 We heard that establishing a specialist court or tribunal could have a number of benefits such as:

- (a) The ability to appoint members with a range of relevant expertise.
- (b) Simpler forms and requirements to make an application.

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<sup>57</sup> Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (R85, 2004) at R118; Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at [11.49]–[11.58].

<sup>58</sup> Law Commission *He Poutama* (NZLC SP24, 2023) at [8.139].

<sup>59</sup> For example, the Court is required to conduct proceedings in such a way as will best avoid unnecessary formality and may also apply such rules of marae kawa as the judge thinks appropriate and make rulings on the use of te reo Māori during a hearing. Judges are also appointed having regard to their knowledge and experience of te reo Māori, tikanga Māori and the Treaty of Waitangi. See Te Ture Whenua Maori Act 1993 | Maori Land Act 1993, ss 66 and 7(2A).

- (c) A less adversarial approach.
- (d) Prompt resolution of issues.
- (e) The ability to work more flexibly.

- 17.43 For reasons we explain below, we think that each of these benefits (or perceived benefits) might be achievable in the Family Court by changes to its processes.
- 17.44 The power to appoint specialist members is desirable. An ability to include a member with relevant expertise or experience may help to make court processes more comfortable for participants and evolve thinking and practice more swiftly. Some tribunals in other jurisdictions can appoint community or lay members with knowledge or experience of disability.<sup>60</sup> Such a power could be given to the Family Court, modelled upon similar powers that are established for other New Zealand courts. For example, the Māori Land Court can appoint additional members who have knowledge and experience of tikanga Māori or whakapapa.<sup>61</sup> The High Court has a similar but more limited power that applies to matters where expert evidence is required. It can appoint an independent “court expert” to assist the Court with matters that require specialist expertise.<sup>62</sup>
- 17.45 The requirements to make an application could be adapted. To make an application, very simple forms could be used, and non-standard applications could be allowed if they contain sufficient information. Having simpler forms and requirements to initiate an application could be achieved in the Family Court by changes to the required forms and procedures in the Family Court Rules.<sup>63</sup>
- 17.46 Tribunals can be less adversarial than courts. For example, proceedings in the Immigration and Protection Tribunal can be inquisitorial, adversarial or both.<sup>64</sup>

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<sup>60</sup> For example, the Guardianship and Administration Stream of the Tasmanian Civil and Administrative Tribunal: Tasmanian Civil and Administrative Tribunal Act 2020 (Tas), s 44(2)(b); and the Prescribed Psychiatric Treatment Panel in South Australia: Mental Health Act 2009 (SA), s 41A(3).

<sup>61</sup> Te Ture Whenua Maori Act 1993 | Maori Land Act 1993, s 32A.

<sup>62</sup> High Court Rules 2016, r 9.36. The District Court has the same power: District Court Rules 2014, r 9.27.

<sup>63</sup> Family Court Act 1980, s 10(1).

<sup>64</sup> Immigration Act 2009, s 218.

However, the Family Court was originally established to resolve disputes in a less adversarial manner<sup>65</sup> and its court hearings are said to be “inquisitorial in nature”.<sup>66</sup> It may be that changes in rules and practice could enable a less adversarial approach in Family Court hearings under a new Act.

- 17.47 Dedicated resourcing and less formality may help a specialist forum to meet goals of efficiency and prompt resolution of issues. However, this is not inevitably the case. The Human Rights Review Tribunal has experienced significant delays.<sup>67</sup> In the United Kingdom, the Court of Protection has been criticised for being “expensive, slow and inefficient”.<sup>68</sup> An alternative might be to improve efficiencies in Family Court processes, which are already required to be conducted in a way that avoids unnecessary formality.<sup>69</sup>
- 17.48 Tribunals may be able to work flexibly, which can allow them to resolve conflicts and hold people accountable in ways appropriate to individual circumstances.<sup>70</sup> The availability of other dispute resolution options (discussed below) is relevant here and could help resolve conflicts earlier and in more flexible ways. In Chapter 16, we also discuss the possible introduction of a complaints and investigation function.
- 17.49 There may also be reasons that it is more appropriate for the Family Court to continue considering matters under a new Act. One is the subject matter of the applications. Applications to appoint a representative can result in significant intrusions in the lives of individuals, such as orders concerning complicated

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<sup>65</sup> Berry Zondag “Procedural Innovation in the New Zealand Family Courts: The Parenting Hearings Programme” (PhD Thesis, University of Auckland, 2009) at 49–50.

<sup>66</sup> Sylvia Bell *Protection of Personal and Property Rights Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2017) at 31, as cited in *Flavell v Campbell* [2019] NZHC 799, [2019] NZFLR 18 at [72].

<sup>67</sup> Jeremy Wilkinson “Two-year Human Rights Tribunal backlog causing stress for complainants” *The New Zealand Herald* (online ed, Auckland, 27 September 2022).

<sup>68</sup> Janet Weston “Managing mental incapacity in the 20th century: A history of the Court of Protection of England & Wales” (2020) 68 *International Journal of Law and Psychiatry* 101524 at 1.

<sup>69</sup> Family Court Act 1980, s 10(1). The National Strategy for Access to Civil Justice also suggests that measures should be taken, including in the courts, to enhance the goal of “just, speedy and inexpensive” determination of disputes: Wayfinding for Civil Justice Working Group *Wayfinding for Civil Justice: National Strategy* (Minister of Justice, December 2023) at 12.

<sup>70</sup> Law Commission *Tribunal Reform* (NZLC SP20, 2008) at [7.39]–[7.40].



medical decisions, complex financial affairs, where a person is to live and who is to make decisions on their behalf.<sup>71</sup>

17.50 While some jurisdictions such as the United Kingdom have a specialist court or tribunal with jurisdiction over cases involving adults with affected decision-making, this approach is not universal.<sup>72</sup> Many other jurisdictions use generalist courts.<sup>73</sup>

17.51 Finally, there is a range of practicalities to consider. One is the risk that significant Family Court expertise might be lost, at least in part, if a new court or tribunal was established. A second is the time and expense required to establish the infrastructure (including personnel, IT and physical locations) that a new court or tribunal would require. Avoiding the risk of delay and loss of expertise and instead increasing the Family Court's resources may be preferable.

17.52 Taking all this into account, our preliminary view is that a new Act should not provide for a specialist tribunal. Instead, we think it preferable to invest in the Family Court.

**QUESTION 102:**

Do you agree that improvements should be sought through changes to current court processes, or do you favour the establishment of a specialist court or tribunal? Why?

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<sup>71</sup> See England and Wales Law Commission *Mental Incapacity* (Law Com 231, 1995) at [10.5].

<sup>72</sup> Alex Ruck Keene and others "Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection" (2019) 62 *International Journal of Law and Psychiatry* 56 at 59.

<sup>73</sup> Alex Ruck Keene and others "Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection" (2019) 62 *International Journal of Law and Psychiatry* 56 at 59. See for example British Columbia, Canada: Mental Health Act RSBC 1996 c 288, Patients Property Act RSBC 1996 c 349, Adult Guardianship Act RSBC 1996 c 6; Nova Scotia, Canada: Adult Capacity and Decision-making Act SNS 2017 c 4, ss 3(h) and 5; and Ireland: Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 4.

## OTHER DISPUTE RESOLUTION OPTIONS

- 17.53 In this section, we discuss whether a new Act should provide for dispute resolution options that could assist people to resolve disputes out of court.
- 17.54 In our view, it would be desirable for disputes under a new Act to be able to be resolved in a way that, to the extent possible, is non-adversarial and can preserve important relationships. Mediation is a common example of this type of dispute resolution but other processes, including processes in accordance with tikanga, might also be used.
- 17.55 In our Preliminary Issues Paper, we mentioned the possibility of a dispute resolution service that could help resolve situations where there are challenges, disagreements or breakdowns in relationships. Some submitters supported the availability of this type of service. The New Zealand Disability Support Network noted the need for out-of-court processes that are easily accessible to resolve conflicts. One submitter commented that a less formal setting would enable prompt resolution of disputed cases.

### Current use of other dispute resolution processes

- 17.56 We are aware of mediations occurring in some cases under the PPPR Act.<sup>74</sup> The Act itself provides for pre-hearing conferences to identify the problem for which an order is sought and reach agreement on a solution if possible.<sup>75</sup> These were included in the PPPR Act to provide an informal way for the parties to work out the issues and resolve them by agreement.<sup>76</sup> Settlement conferences are also available under the Family Court Rules.<sup>77</sup>
- 17.57 In addition, Family Court guidance for court-appointed lawyers recommends that, if there is conflict within a family, the lawyer should consider whether a family meeting, mediation or settlement conference is appropriate.<sup>78</sup> However,

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<sup>74</sup> *BJR v VMR* [2014] NZHC 1548 at [7]; *Rothera v Rothera* [2018] NZHC 375 at [16]–[17].

<sup>75</sup> Protection of Personal and Property Rights Act 1988, ss 66 and 67.

<sup>76</sup> (2 December 1987) 485 NZPD 1451.

<sup>77</sup> Family Court Rules 2002, r 178.

<sup>78</sup> Peter F Boshier *Guidelines for Counsel for Subject Person Appointed under the Protection of Personal And Property Rights Act 1988* (Ministry of Justice, 24 March 2011) at [4.3].

mediation is not specifically addressed in the Family Court Rules that apply to cases under the PPPR Act.

### **The benefits of other dispute resolution processes**

- 17.58 In practice, we have heard that many PPPR Act matters can be resolved through agreement. Dispute resolution processes such as mediation can assist with this by:
- (a) Providing a less formal forum for the parties to find a way to move forward.
  - (b) Facilitating a prompt resolution of issues by allowing the parties to discuss options that might not be readily available through contested court processes.
  - (c) Allowing relationships between participants to be preserved and supported.
  - (d) Providing flexibility in location and process, which may support more socially and culturally responsive dispute resolution options.
- 17.59 The preservation of relationships is particularly significant. A good relationship is essential to the success of decision-making arrangements. Prompt resolution of disputes will assist these relationships to be maintained.
- 17.60 We also think that providing for other dispute resolution options in a new Act is important in light of the Crown's obligations under te Tiriti o Waitangi | Treaty of Waitangi, as discussed in Chapter 4. For example, iwi, hapū or Māori organisations could be funded to provide tikanga-based dispute resolution or the Māori Land Court's dispute resolution service could be available under a new Act.

### **Design of other dispute resolution processes**

- 17.61 If a new Act provides for other dispute resolution processes, thought will need to be given to how to safeguard the person at the centre of the arrangement. Enabling other dispute resolution processes would not mean excluding the jurisdiction of the Family Court. Disputes would need to be able to be referred to court if a satisfactory resolution could not be reached. For example, in a Family Court mediation process under the Oranga Tamariki Act 1989, if a

mediation process does not result in agreement, the mediation becomes a judicial conference and court orders can be made.<sup>79</sup>

- 17.62 There will also be situations where other dispute resolution processes are not appropriate and a matter should go straight to court. For example, in a Family Court mediation process under the Care of Children Act 2004 parties can be excused from attending mediation if the application is filed urgently (without notice), there is evidence that at least one of the parties is not able to participate effectively or there is evidence that one of the parties in the case has been violent towards another party or their child.<sup>80</sup>
- 17.63 Similarly, other dispute resolution processes will likely not be appropriate when the dispute involves allegations of abuse of power.<sup>81</sup> Even where there is no allegation of abuse, there may be cases where dispute resolution is not appropriate due to power imbalances between the parties. The circumstances in which dispute resolution is not appropriate will need to be carefully considered.
- 17.64 There are also various matters that would need to be considered in designing a dispute resolution process.<sup>82</sup> These include:
- (a) How could dispute resolution be initiated and who could initiate dispute resolution? For example, could it be initiated separately from a court application?
  - (b) Who could preside over dispute resolution (such as a judge, a mediator, a kaumātua or another person) and what would their role be?
  - (c) Whether it would be provided as a free service.
  - (d) How and by which body it would be administered.

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<sup>79</sup> Family Court Rules 2002, rr 292 and 292A.

<sup>80</sup> Care of Children Act 2004, s 46E(4).

<sup>81</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at [29.1].

<sup>82</sup> See Hīkina Whakatutuki | Ministry of Business, Innovation and Employment “Deciding what form of dispute resolution process is needed” <[www.mbie.govt.nz](http://www.mbie.govt.nz)>; Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) <[www.ldac.org.nz](http://www.ldac.org.nz)> at [29.2]–[29.3].

- (e) How to ensure that it is available promptly and in locations that are easy to access and appropriate for the parties.
- (f) Other procedural matters, including whether lawyers could be present, how the location of the dispute resolution is determined, confidentiality of information shared in the process and enforceability of dispute resolution outcomes.

**QUESTION 103:**

Do you think a new Act should provide for other dispute resolution options?  
If so, what are they?

**QUESTION 104:**

In what situations do you think other dispute resolution options may not be appropriate?

**QUESTION 105:**

What would make other dispute resolution options work well?

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