

Pūrongo | Report 151

He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke

Review of Adult Decision- Making Capacity Law

**Executive summary and overview of
recommended decision-making
arrangements**



Executive summary

OVERVIEW

1. Te Aka Matua o te Ture | Law Commission has reviewed the Protection of Personal and Property Rights Act 1988 (PPPR Act). This is the key piece of legislation that deals with adult decision-making capacity in Aotearoa New Zealand.
2. We published a Preliminary Issues Paper for consultation at the end of 2022 and a Second Issues Paper for consultation in 2024.
3. This is our Final Report. It contains 175 recommendations to the Government for how the current law should be reformed.
4. We recommend that the PPPR Act be repealed and replaced with a new Act. Key recommendations for a new Act include:
 - (a) recognising formal supporters as a new role in legislation to assist people to make decisions themselves;
 - (b) retaining the ability of people to appoint attorneys to make decisions for them under enduring powers of attorney;
 - (c) retaining the power of te Kōti Whānau | Family Court to appoint representatives to make decisions on behalf of people who do not have decision-making capacity for those decisions;

- (d) requiring attorneys and court-appointed representatives, when making decisions on behalf of a person, to comply with decision-making rules that are centred on the person's rights, wishes and values;
 - (e) requiring attorneys and court-appointed representatives to ensure support is provided to represented people so that they can participate in the decision-making process; and
 - (f) providing for a single public agency to provide a range of oversight and related functions in relation to court-appointed representative, enduring power of attorney and formal support arrangements.
5. This executive summary provides a high-level overview of the chapters of the Report. Each chapter contains a full discussion of the issues with the current law, feedback we received during consultation and explanation of our recommendations. Immediately following this executive summary, we provide an overview of the decision-making arrangements we recommend.
6. In Chapter 1, we set out some introductory matters, explain our process in more detail and outline the topics that are addressed in each chapter. A list of all recommendations is set out at the end of this Report.

PART 1: FOUNDATIONAL MATTERS

7. In Part 1 of our Report, we introduce the current law and address foundational matters that have informed our recommendations.

The PPPR Act and the case for a new Act (Chapter 2)

8. We recommend that a new Act replace the PPPR Act.
9. The PPPR Act does not adequately reflect the importance of decision-making support. Its approach to decision making on behalf of a person does not always provide for the full and equal enjoyment of their rights. Many of its provisions are confusing and inconsistent.
10. To address these issues, foundational change is needed. The PPPR Act does not reflect contemporary understandings of disability and Aotearoa New Zealand's ratification of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention). In our view, the extent of the required reform means the PPPR Act should be repealed and replaced with a new Act.

Human rights (Chapter 3)

11. In Chapter 3, we give an overview of the relevant human rights that have informed our review.
12. Article 12 of the Disability Convention is particularly important. It requires, among other things, that disabled people enjoy legal capacity on an equal basis with others in all aspects of life and are provided with support to do so. Other rights that are often at the fore for people with affected decision making include the right to an

adequate standard of living, the right to the highest attainable standard of health, the right to refuse medical treatment, the right to be free from arbitrary detention and the right to be free from exploitation and abuse.

13. Underlying these human rights are the values of equality, dignity and autonomy. Very broadly, these values emphasise that all people have worth and are entitled to exercise their rights on an equal basis. Equality, dignity and autonomy underpin the particularly relevant concept of the “dignity of risk” — the idea that dignity requires people to have the ability to exercise choice, including to make risky choices.

Te ao Māori in this review (Chapter 4)

14. Tikanga and the Crown’s relevant obligations under te Tiriti o Waitangi | Treaty of Waitangi are directly relevant to this review. The Treaty has been understood to place obligations on the Crown to positively promote equity between Māori and non-Māori. However, Māori experience disability and health conditions that can affect decision-making ability more often than the general population.
15. To help ensure the higher rates of affected decision making among Māori do not create further inequities, the recommendations we make in Parts 2 to 7 of our Report aim to give more space for approaches to supporting, and making decisions on behalf of, people with affected decision making in line with tikanga.

PART 2: BUILDING BLOCKS OF A NEW ACT

16. In Part 2, we address key concepts and considerations that are relevant to all measures in a new Act that relate to decision making.

Overarching purposes and values of a new Act (Chapter 5)

17. The PPPR Act has no purpose provision, which may have contributed to uncertainty about its policy objectives. A new Act should include a purpose provision that states two policy aims — namely:

(a) to protect and promote the equality, dignity and autonomy of people with affected decision making; and

(b) to give effect to Aotearoa New Zealand’s human rights obligations.

18. Further, a new Act should require people exercising powers under the Act to consider tikanga where it is relevant in the circumstances. A general provision of this nature is preferable to a new Act referring to specific tikanga. A general provision would enable tikanga to be considered on its own terms and minimise the risk of distorting it. To assist people who do not have a working knowledge of tikanga, the provision should contain an inclusive list of situations where tikanga will be relevant and accordingly needs to be considered.

The importance of providing decision-making support (Chapter 6)

19. For people with affected decision making, support can be particularly important. For example, they might need help with obtaining information in an accessible format or to identify and weigh various options for a decision. Decision-making support is relevant both to assist someone make a decision themselves and to assist them participate in the making of a decision on their behalf.
20. The Disability Convention requires states to take appropriate measures to provide access by disabled people to support in exercising their legal capacity. However, the current law neglects the importance of providing decision-making support.
21. Reform is needed to make decision-making support more accessible and effective. In Chapter 6, we point to recommendations throughout our Report that aim to foster decision-making support. We recommend that “decision-making support” is defined in a new Act to mean assisting a person to do various things related to making decisions, such as to access and understand information relevant to a decision, identify and assess options for the decision, participate in decision making and communicate their decision. This recommended definition applies to all our subsequent recommendations concerning decision-making support.

Decision making on behalf of a person (Chapter 7)

22. There is considerable debate about whether decisions should ever be made on behalf of people with affected

decision making. The issue is most keenly contested in relation to arrangements put in place by courts. The United Nations Committee on the Rights of Persons with Disabilities considers states must wholly replace regimes that provide for decision making on behalf of a person with regimes for supported decision making. This view is controversial.

23. In our view, relevant human rights obligations do not prohibit decision making on behalf of people with affected decision making in all situations, including by courts and court-appointed representatives. To the contrary, these arrangements are sometimes necessary to protect and promote the equality, dignity and autonomy of people with affected decision making.
24. Although supported decision making is vital to enabling people with affected decision making to exercise their legal capacity, it cannot meet the needs of all people in all situations. We recommend that a new Act provide for decision making by courts and court-appointed representatives in such situations.

The concept of decision-making capacity (Chapter 8)

25. The PPPR Act uses various tests to assess whether a person is functionally able to make an autonomous decision for themselves. These tests are often described as tests of decision-making capacity, although this phrase is not used in the PPPR Act. That a person lacks relevant decision-making capacity is a necessary but not always sufficient condition before a person's legal agency can be restricted (for example, by appointing a

representative to make decisions on the person's behalf).

26. A new Act should retain the concept of decision-making capacity. There is no alternative concept that we consider better identifies when a decision might need to be made on behalf of a person with affected decision making.

Assessing decision-making capacity (Chapter 9)

27. Although the concept of decision-making capacity should be retained, much can be done to improve how it is assessed.

A single test for decision-making capacity

28. We recommend that a new Act provide one simple and clear legal test for decision-making capacity. Under that test, a person would be considered not to have decision-making capacity for a particular decision if they are unable to:
- (a) understand the information relevant to the decision; or
 - (b) retain that information long enough to make the decision; or
 - (c) use and weigh that information; or
 - (d) communicate the decision.
29. Our recommended test would require that a person's decision-making capacity be assessed in the light of the decision-making support available to them. This would help to ensure the assessment reflects the person's lived reality.

30. The test would be relevant in a number of ways under a new Act. For example, it would be relevant to:
- (a) the appointment of formal supporters and the creation of enduring powers of attorney;
 - (b) determining when formal supporters may not, and in some cases must not, act;
 - (c) determining when the Family Court may appoint a representative to make decisions on behalf of a person; and
 - (d) determining when the Family Court, a court-appointed representative or an attorney under an enduring power of attorney may make a decision on behalf of a person.

Three types of assessment

31. Varying degrees of formality are needed when assessing decision-making capacity in different contexts. To account for this, a new Act should provide for three types of decision-making capacity assessments:
- (a) Formal decision-making capacity assessments by professionals.
 - (b) Decision-making capacity determinations by the Family Court.
 - (c) Other (informal) decision-making assessments such as an assessment by a representative in order to decide whether a represented person has decision-making capacity to make a particular decision themselves.

32. Although the circumstances of each type of assessment would vary, all three types should apply the same test for decision-making capacity.
33. We also recommend other rules for assessing decision-making capacity that would apply to all three types of assessment, including to retain the presumption of decision-making capacity and to recognise that decision-making capacity can fluctuate.

Accompanying recommendations to improve formal assessments

34. We make accompanying recommendations to promote the accessibility of formal decision-making capacity assessments by professionals and to improve the knowledge and ability of people who undertake them. For example, we recommend that a code of practice be developed that sets out the circumstances and manner in which professionals should conduct formal decision-making capacity assessments.

PART 3: FORMAL SUPPORT

35. In Part 3, we recommend introducing a new role of formal supporter and set out the features of a formal support regime that should be provided for in a new Act.

The case for a formal support regime (Chapter 10)

36. Those who support people with affected decision making sometimes face challenges when trying to access relevant information held by third parties such as banks or care facilities on behalf of the supported person.

37. To address this issue, we recommend that a new Act provide for the appointment of formal supporters. Formal support regimes exist in a several other jurisdictions. A formal supporter is a decision-making supporter who has specific powers, and is subject to specific duties, set out in legislation. Typically, those powers and duties extend beyond those the supporter would have if they were simply providing informal decision-making support.
38. Establishing a formal support regime would help to meet Aotearoa New Zealand's obligation under the Disability Convention to take appropriate measures to provide access by disabled people to the support they may require in exercising their legal capacity.

Elements of a formal support regime (Chapter 11)

39. Under a new Act, a formal supporter's role should be to provide decision-making support to a person for the decisions or classes of decision specified in their appointment. A formal supporter should *not* be able to make or communicate any decision on behalf of the supported person. This is important to clearly distinguish a formal supporter from a representative and to minimise the risk of supported people being harmed by formal supporters misusing their powers.
40. A formal supporter should have the power (subject to the terms of their appointment) to access information to which the supported person is entitled and that the formal supporter needs to fulfil their support role.

41. A formal supporter should be able to be appointed by either the person who wants support or (with that person's consent) the Family Court. Where a person is appointing a formal supporter themselves, the appointment should be made and executed broadly in the same way as an enduring power of attorney.
42. We recommend that formal supporters have a range of duties, including to act in good faith and with reasonable skill, diligence and care, and to disclose conflicts of interest to the supported person and not act in relation to matters on which they have a conflict without the person's consent. We also recommend that they be required to cease acting if the supported person no longer has the decision-making capacity that would be required to appoint the formal supporter.

PART 4: FOUNDATIONS OF REPRESENTATIVE ARRANGEMENTS

43. In Part 4, we address the foundations of all representative arrangements — both court-appointed representative arrangements (which are put in place by the Family Court) and enduring powers of attorney (which are put in place by the represented person). Parts 5 and 6 address matters that are specific to these two types of arrangements respectively.

Decision-making rules (Chapter 12)

44. The Disability Convention requires measures relating to the exercise of legal capacity by a disabled person to respect their “rights, will and preferences”. As noted, it

also stresses the importance of decision-making support.

45. To meet the requirements of the Disability Convention, a new Act should set out the rules that must be followed by representatives (whether they are appointed by the Family Court or are attorneys acting under enduring powers of attorney) when making decisions on behalf of a represented person. We recommend that a new Act require all representatives to use reasonable efforts to comply with the following three decision-making rules:
- (a) Decisions should be centred on the represented person's wishes and values and respect their rights.
 - (b) The represented person should receive decision-making support for decisions and have the opportunity to participate in decision making.
 - (c) Decisions should be based on relevant information.
46. Each of our three recommended decision-making rules spells out what a representative is required to do to achieve these matters. The rules are explained in more detail in the overview of recommended decision-making arrangements immediately following this Executive Summary.

General duties of representatives (Chapter 13)

47. There is a significant power imbalance between represented people and representatives. To help address that imbalance, representatives should have clear duties that set standards of behaviour for representatives. Those duties should be set out in a new Act.

48. In addition to a duty to use reasonable efforts to comply with the decision-making rules, representatives should have duties to:
- (a) act honestly, in good faith and with reasonable care, diligence and skill;
 - (b) use reasonable efforts to be informed about the represented person's situation and consider whether decisions are needed to respect their rights, wishes and values;
 - (c) appropriately manage conflicts of interest;
 - (d) appropriately manage confidential information;
 - (e) use reasonable efforts to ensure the represented person receives decision-making support to understand the representative's role and develop decision-making capacity; and
 - (f) use reasonable efforts to keep the represented person informed and communicate with them in the way they are able to understand best.

PART 5: COURT-ORDERED DECISIONS AND REPRESENTATIVE ARRANGEMENTS

49. In Part 5, we address the two types of court orders by which we recommend the Family Court be able to provide for decisions to be made on behalf of a person:
- (a) Court-ordered decisions, where the Family Court itself makes a decision for the person.
 - (b) Court-ordered representative arrangements, where the Family Court appoints someone to make decisions for a person.

Making court-ordered decisions and appointing representatives (Chapter 14)

50. A new Act should set out a single test that determines when the Family Court has the power to make a court-ordered decision or impose a representative arrangement.
51. The test should require the Family Court to be satisfied that the person lacks decision-making capacity for the relevant decision(s) and that there is a need for the court-ordered decision to be made or the representative arrangement to be imposed. To ensure orders are proportionate and justified, a new Act should specify the situations where an order is needed. Broadly, this should only be where the order will promote the person's wishes and values or where there is a material risk of significant harm occurring to the person if the order is not made. An order should not be considered needed if a less restrictive intervention can reasonably meet the need for the order.
52. Sometimes, court orders need to be made urgently. A new Act should provide for urgent orders to be made if the Family Court is satisfied that the relevant person lacks decision-making capacity and an urgent order is necessary in the circumstances. Some procedural requirements should be able to be dispensed with in relation to applications for urgent orders if the Family Court considers this is necessary to respond to an immediate and serious risk of harm.

Court-ordered decisions (Chapter 15)

53. Under the PPPR Act, the Family Court can make court-ordered decisions only about specified matters relating to a person's welfare. We recommend that a new Act broaden that power so that the Family Court has power to make court-ordered decisions about any welfare or property matter.
54. Where the Family Court makes a court-ordered decision, it should be required to be satisfied that the decision complies with the first of our recommended decision-making rules for representatives — in summary, that the decision is centred on the person's wishes and values and respects their rights.
55. We also address various ancillary and procedural matters, including the continuing need for the Family Court to be empowered to make ancillary orders to give effect to a court-ordered decision.

Court-appointed representatives: eligibility (Chapter 16)

56. The Family Court should only appoint a representative to make decisions on behalf of a person if the Court is satisfied that the potential representative is suitable for the role. A potential representative's suitability will depend on multiple factors, including their ability to carry out the role and the wishes and values of the intended represented person.
57. A new Act should contain a list of matters that, if they occur, make a person ineligible to be a representative. These matters are significant indicators that a person is unsuitable or cannot perform the role. They include

being subject to an active restraining order or serving a sentence of imprisonment.

58. A new Act should also contain a list of matters that, if they occur, must be brought to the attention of the Family Court. These are matters that may, but also may not, indicate that the person is unsuitable for the role. They should be considered by the Court but should not automatically require a representative to stop acting. The matters include certain convictions and, for property representatives, bankruptcy.
59. Only someone aged 18 or over should be eligible to be appointed as a representative. This would bring the minimum age for court-appointed representatives in line with that for broadly analogous roles such as being a trustee or a director of a company.

Court-appointed representatives: nature and scope of the role (Chapter 17)

Separate roles should continue

60. Court-appointed welfare representatives and court-appointed property representatives should continue to be two separate roles, as they are under the PPPR Act.

Multiple representatives

61. Where the Family Court appoints multiple representatives, those representatives should be clear about how they are to work together, particularly where they share responsibility for decisions. The Family Court should be required to specify the decisions those representatives can make and whether they must act

together or can act alone. A representative should generally be liable for all decisions for which they have responsibility, except where another representative has made a decision without their agreement or consent.

62. A new Act should include rules for consultation between multiple representatives, and the Family Court should have the power to impose additional obligations.

Representatives' powers

63. The powers of court-appointed representatives need to be sufficient to enable representatives to perform their role but should not be so wide as to confuse the nature of the role or enable representatives to overstep it. For property representatives, this balance is best achieved by requiring the Family Court to specify the powers the representative has with respect to the relevant property. For welfare representatives, by contrast, it is more difficult to predict what powers might be needed. Welfare representatives should therefore have all the powers necessary to make and implement decisions within their remit, except to the extent they are limited by the Family Court in any particular case.
64. There are some welfare decisions that have such significant implications for a represented person that only the Family Court should be able to make them. The existing list of prohibited decisions in the PPPR Act should be retained, and four decisions should be added: consenting to procedures performed for the purpose of sterilisation or abortion; consenting to participate in a

surrogacy arrangement; and prohibiting contact between the represented person and any other person.

65. The existing limit of \$120,000 for certain property-related decisions should be removed. It creates a number of problems that outweigh any safeguarding benefits the limit has.

Participation in medical research

66. Where a person lacks decision-making capacity to consent to participating in medical research, the current law provides no workable basis upon which they may do so. There are good reasons for such a workable basis to exist.
67. We recommend that the Government progress the 2019 recommendations of the Health and Disability Commissioner, which would enable such participation in some situations and provide for safeguards. If those recommendations are not progressed, a new Act should provide for a similar framework.

Conflicts of interest

68. Representatives should be accountable for decisions involving a conflict of interest. However, an outright prohibition on such decisions would be unworkable. The Family Court should have power under a new Act to impose specific restrictions or obligations in relation to decisions in which a representative has a conflict of interest.

Remuneration for welfare representatives

69. Welfare representatives should continue to be prohibited from receiving remuneration for the role. Remuneration would negatively impact the nature of the role, which requires representatives to act otherwise than in their own personal interests. However, a new Act should empower the Family Court to allow remuneration for consequential services provided as a result of a welfare representative's decisions where the Court is satisfied that any conflict of interest can be properly managed. This may be important where, for example, the representative might be the best person to provide relevant professional services.

Reserve representatives and notification requirements

70. A new Act should enable the Family Court to specify reserve representatives to act in the event an appointed representative stops acting or is unable to act. This would allow representatives and represented people to plan for potential disruptions.

71. Representatives and reserve representatives should be required to notify the Family Court when they begin or stop acting, if they can reasonably be expected to do so.

Court-appointed representatives: safeguards (Chapter 18)

72. Record-keeping and reporting requirements for representatives and periodic reviews by the Family Court are key safeguarding mechanisms for represented

people. These mechanisms must balance the objectives of safeguarding and workability.

73. Property representatives should continue to be required to submit financial reports annually. However, the Family Court should have a new power to increase the frequency of reporting if it considers this appropriate to safeguard the represented person. Welfare representatives should continue not to have automatic record-keeping and reporting obligations but the Family Court should be empowered to set such obligations.
74. For periodic reviews of arrangements, the Family Court should continue to be required to specify a date by which a representative must apply for a review. The date should generally not be later than three years after the order comes into effect or three years after the previous court review (as is currently required). However, an exception should be introduced for subsequent reviews that allows the Family Court to set a date up to five years after the last review if it considers this appropriate, taking into account a range of relevant factors.

PART 6: SELF-INSTIGATED ARRANGEMENTS

75. In Part 6, we address two decision-making arrangements that are put in place by the relevant person themselves: enduring powers of attorney and advance directives.

Enduring powers of attorney (Chapter 19)

76. An enduring power of attorney is an advance planning tool that involves one person (the donor) giving 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 for those decisions.

77. Much of the existing legal framework for enduring powers of attorney under the PPPR Act should continue. However, we make recommendations to improve various aspects of the current regime.

Multiple attorneys

78. A new Act should enable multiple attorneys to be appointed under an enduring power of attorney, regardless of whether it relates to welfare or to property. This is currently only possible for property matters.

Improving accessibility

79. We make recommendations to improve the accessibility of enduring powers of attorney. The prescribed forms for creating enduring powers of attorney should be reviewed, the categories of eligible people to witness enduring powers of attorney should be able to be expanded by regulations, and enduring powers of attorney should be able to be witnessed remotely by audio-visual link in accordance with a process set out in secondary legislation.

Safeguards

80. We also make recommendations to ensure there are sufficient safeguards to protect donors. Most importantly, attorneys acting under enduring powers of attorney should be bound by our recommended decision-making rules (see Chapter 12). We also

recommend some amendment of the rules concerning when attorneys may commence acting, that donors have greater ability to require donors to keep records and that donors be able to require property attorneys to file financial records for review.

Aligning the rules for court-appointed representatives and attorneys

81. We make several recommendations to align the eligibility requirements for attorneys with our recommended requirements for court-appointed representatives. The age of eligibility should be 18 for both roles, and neither welfare attorneys nor court-appointed representatives should be ineligible for the respective role because of bankruptcy.
82. In addition, welfare attorneys should be prohibited from making those decisions that court-appointed welfare representatives are prohibited from making.

A register for enduring powers of attorney (Chapter 20)

83. When a person has lost decision-making capacity for a decision, various people including healthcare professionals are sometimes unable to ascertain whether an enduring power of attorney exists or, if so, where it is located. This can create a number of issues, including that the donor's wishes and values as set out in their enduring power of attorney are not followed. To help address this issue, we recommend that a national register for the voluntary registration of certain information relating to enduring powers of attorney be established.

84. Where a donor elects to register their enduring power of attorney, certain minimum information should be required to be recorded — namely, the donor’s identifying details, whether the enduring power of attorney relates to property or to welfare and the location of the original enduring power of attorney. Donors should have the option of registering additional information such as the attorney’s contact information and details about the arrangement. Access to the register should be restricted to people who have a legitimate need for the information.

Advance directives and other statements of wishes (Chapter 21)

85. An advance directive is a statement recording a person’s decisions in relation to potential future medical treatment in case they lose decision-making capacity to make those decisions later on. Whether an advance directive is valid and applicable to a particular situation is determined by the common law. The key balancing exercise is between respecting people’s autonomous decision making about their future and preventing people from being locked into earlier decisions that no longer represent their views.

86. For advance directives to operate effectively alongside decision making by representatives and the Family Court, the relationship between the two types of decision making needs to be clear. In our view, a decision that is covered by a valid and applicable advance directive is appropriately conceptualised as already having been made by the relevant person and to bind

the health practitioner who makes the relevant treatment decision. On that basis, we recommend that such decisions be outside the scope of decision making by representatives and the Family Court under a new Act.

87. The PPPR Act does not provide for statements of wishes beyond advance directives. We do not recommend a new Act do so. Under our recommended decision-making rules (see Chapter 12), representatives would need to consider any statement of wishes as one potential source among many for informing their understanding of the represented person's wishes and values. Elevating certain statements of wishes above others would risk creating an overly complex and potentially arbitrary hierarchy of sources for identifying a person's wishes and values.

PART 7: RELATED AND PROCEDURAL MATTERS

88. In Part 7, we address matters related to the decision-making arrangements addressed in previous parts of the Report, as well as some procedural matters.

Liability and immunity for representatives and formal supporters (Chapter 22)

89. Representatives and formal supporters should generally have immunity from civil liability for actions taken in their role except to the extent they acted in bad faith or without reasonable care, diligence and skill. This would help avoid people not wishing to take up these potentially intensive roles while still allowing represented

and supported people to bring legal claims for improper behaviour.

90. To deter formal supporters and representatives from abusing their role, the immunity should not apply in relation to benefits that they receive in their role except where a benefit results from them carrying out their role in accordance with their duties, a supported person has consented to the benefit or the benefit is permitted by an enduring power of attorney or constitutes permitted remuneration.
91. To protect third parties and represented people, representatives should be personally liable for any contract or agreement they enter into, or any liability they incur, if they fail to disclose that they are acting as a representative.

Use of force and deprivation of liberty (Chapter 23)

92. In some cases, a person may resist a decision made by the Family Court or a representative. For example, a person may not want to move to a secure care facility, even though they cannot live safely at home. Similar issues arise where a third party resists the implementation of a decision. For example, the spouse of a represented person may try to prevent them from moving to a residential care facility despite the move reflecting the person's wishes and values.
93. In some of these situations, as a last resort, the use of force may be required if a decision is to be implemented. We discuss under what circumstances that might be appropriate and, if so, how it should be authorised. We

also consider situations where a person is deprived of liberty, for example, if they reside at a secure care facility.

94. We conclude that the current law does not provide a sufficiently clear basis for the use of force to give effect to decisions made on behalf of people who lack decision-making capacity or for deprivations of their liberty. Nor does the law provide for sufficient safeguards to protect people's rights in these cases. The extent to which police may assist to give effect to decisions under the PPPR Act is also unclear.
95. Law reform is needed. However, because use of force and deprivation of liberty are particularly sensitive topics, comprehensive recommendations of reform in these areas require extensive consultation. We recommend that the Government further consult on these issues before developing policy. The implementation of the recommendations that we make elsewhere in this Report is not contingent on this further work.

Practical improvements and oversight (Chapter 24)

96. Effective oversight and support of representative and formal support arrangements will help ensure that these arrangements achieve their purpose. Current oversight and support functions are inadequate in some areas and fragmented across several public agencies.
97. We recommend that a new Act provide for several oversight and support functions to be undertaken by an appropriate public agency, including operating a complaints mechanism, developing information and

guidance and developing a website. The Government should also consider providing for additional functions such as active monitoring and supervision of representative and formal support arrangements, and training for representatives and formal supporters.

98. We also recommend the Government consolidate oversight and support functions into a single agency. Overseas jurisdictions we have investigated have a single agency such as an Office of the Public Guardian that provides oversight and support functions. Aotearoa New Zealand is an outlier for not having such an agency.
99. The limited availability of welfare representatives is a significant issue. A publicly-funded welfare representative system could address this shortage. However, the effectiveness of such a system would depend on how well it is resourced. We are not in a position to form a view about whether providing for an effective public welfare representative system is fiscally feasible and so do not make any recommendations about public welfare representatives. However, we outline matters that will need to be addressed if the Government decides to implement a public welfare representative system, such as the threshold for appointing a public welfare representative.

Improving court processes (Chapter 25)

100. Court processes would remain necessary under a new Act for a range of matters. The Disability Convention requires effective and equal access to justice for disabled people. However, we have heard about issues

with some of the Family Court's processes under the PPPR Act. They include people having difficulties in finding legal representation, the lack of active participation of people with affected decision making in hearings and other accessibility issues.

101. In the light of these issues, we discuss whether the Family Court or a new specialised court or tribunal should exercise jurisdiction over a new Act. We conclude that the Family Court should continue to have jurisdiction. The main issues with the current law and practice can be addressed without establishing a new decision-making body. Maintaining the Family Court's jurisdiction also ensures that its institutional knowledge and experience are preserved.

102. We make some recommendations to improve the accessibility of some of the Family Court's processes under a new Act. These recommendations concern the reimbursement rate for lawyers for subject persons, accessibility of application forms and the threshold for excusing people from a hearing. We also recommend that the Family Court have an express power to refer parties, with their consent, to alternative dispute resolution.

Overview of recommended decision-making arrangements

We recommend that a new Act provide for a range of decision-making arrangements under which a person can be appointed to play a role in decision making by or on behalf of someone with affected decision making. In this section, we provide a high-level overview of those recommended arrangements.

What is affected decision making?

We use the term “affected decision making” for all situations in which a person’s functional ability to make decisions is impaired in some way. This may be as a result of a traumatic brain injury, a learning disability, mental distress, dementia made wareware or some other cause. It may be temporary or permanent. A person’s decision making may be affected for only some decisions, or for all decisions.

“Affected decision making” and “decision-making capacity” (see next page) are different concepts. Someone with affected decision making may lack decision-making capacity for some decisions or they may have decision-making capacity for all decisions.

DECISION-MAKING SUPPORT

Everyone makes some decisions with support from other people. A person may seek advice from family or whānau, friends or experts. Sometimes they may need someone to help them obtain or understand relevant information. Sometimes they may need someone to help them understand the consequences of a decision. Decision-making support can be particularly important for people with affected decision making.

What is decision-making support?

A new Act should specify that providing decision-making support to a person means assisting the person to do one or more of the following things:

- Obtain and understand relevant information.
- Identify and assess options for a decision.
- Participate in decision making, communicate relevant information and express their wishes for a decision.
- Communicate and give effect to a decision.
- Obtain and use assistive equipment or technology.
- Have adequate time and a suitable environment to make a decision.

A new Act should recognise the importance of decision-making support in a range of ways. For example:

- assessments of a person's decision-making capacity should take into account the decision-making support available to them; and
- when a representative is making a decision on behalf of a person, they should ensure the person has decision-making support to participate in the decision and express their wishes for it.

Formal supporters

Most decision-making support provided to a person to help them make their own decisions is informal — the person providing it does not need any special role or powers to provide assistance. Sometimes, however, third parties are reluctant to provide a supporter with the supported person's confidential information. This can limit the effectiveness of the support they can provide.

To address this, we recommend that a new Act provide for a new type of arrangement — that of a formal supporter. The role of a formal supporter should be to provide decision-making support to the supported person to help them to make their own decisions. Unlike an informal supporter, a formal supporter should be entitled to access the supported person's relevant confidential information.

A new Act should enable a formal supporter to be appointed by the supported person or by the Family Court if the supported person agrees.

DECISIONS MADE ON BEHALF OF A PERSON

Sometimes a person may not have decision-making capacity for all decisions even with decision-making support. They may need someone else to make those decisions for them. We recommend that a new Act provide for several different decision-making arrangements under which this might occur — enduring powers of attorney, court-appointed representative arrangements and court-ordered decisions.

What is decision-making capacity?

The law uses the concept of decision-making capacity to identify when a person might need someone to make a decision for them. A new Act should specify that a person should be considered not to have decision-making capacity for a decision only if, with the decision-making support available to them, they are unable to:

- understand the information relevant to the decision; or
- retain that information as necessary to make the decision; or
- use or weigh that information; or
- communicate the decision.

Enduring powers of attorney

A person (the donor) should be able to create an enduring power of attorney (EPOA) appointing a person (the attorney) to make decisions in relation to the donor's:

- care and welfare (a welfare EPOA); or
- property (a property EPOA).

A new Act should set out how a donor — provided they have the relevant decision-making capacity — can create an EPOA. This process should involve the donor specifying the classes of decisions to which the EPOA relates. A new Act should also address when the attorney's power to make decisions takes effect.

A donor should be able to specify in a property EPOA that the attorney can make decisions as soon as the EPOA is created. For property EPOAs that do not do this, and for all welfare EPOAs, the attorney should not be able to make decisions until a formal decision-making capacity assessment conducted by a qualified professional, or the Family Court, has determined that the donor lacks decision-making capacity for one or more decisions within the scope of the EPOA.

In addition, if the decision concerns a significant matter, the attorney should not be able to make the decision unless a formal decision-making capacity assessment conducted by a qualified professional, or the Family Court, has determined that the donor lacks relevant decision-making capacity.

“Significant matter” should be defined to mean:

- a matter the donor specifies in the EPOA as a significant matter; and
- for welfare EPOAs, any other matter that has (or is likely to have) a significant effect on the health, wellbeing, or enjoyment of life of the donor (such as a permanent change of residence, entering residential care or undergoing a major medical procedure).

Court-appointed representatives

The Family Court should have power to appoint a representative to make decisions on behalf of a person in relation to their welfare or property.

The Family Court should only appoint a representative to make decisions on behalf of a person if it is satisfied that:

- the person does not have decision-making capacity for the decisions; and
- there is a need for the appointment.

For these purposes, a need should be considered to exist only if:

- the appointment will promote the person’s wishes and values for decisions they want to make, or are required to make, because:
 - it will ensure the decisions are made and give effect to the person’s “wishes and values” (see next page); or
 - to be legally effective, the decisions must be made by someone with decision-making capacity; or

- there will otherwise be a “material risk of significant harm” to the person (see next page).

However, a representative should not be appointed if a less restrictive intervention could reasonably meet the need. For example, the Family Court might consider that the person will have decision-making capacity if they have adequate decision-making support and (with the person’s consent) appoint a formal supporter instead of a representative.

Court-ordered decisions

As an alternative to appointing a representative, the Family Court itself should be able to make a decision on behalf of a person if:

- the person does not have decision-making capacity for the decision; and
- there is a “need” (as explained above) for the decision to be made.

DECISION-MAKING RULES

A new Act should specify how decisions on behalf of a person should be made by attorneys, court-appointed representatives and the Family Court. We recommend three key decision-making rules, summarised below. Attorneys and court-appointed representatives should be required to use reasonable efforts to follow all three rules. The Family Court should be required to follow only the first rule, although we envisage it would take account of the other two.

Rule 1: Decisions should be centred on the person's wishes and values

A decision made on behalf of a person should reflect the person's wishes and values.

If insufficient information is known about the person's wishes and values to make a decision, the decision should reflect what is known about their wishes and values and otherwise protect and promote their wellbeing in the least restrictive manner.

A decision should not be made if it is criminal, cannot realistically be given effect, or would result in a material risk of significant harm to the person. Instead, the decision should reflect the person's wishes and values to the extent possible and otherwise protect and promote their wellbeing in the least restrictive manner.

Wishes and values

A new Act should provide that:

- a person's "wishes" are the choices, desires, views or other indications they express in relation to a decision;
- a person's "values" are their reasonably stable values, beliefs, goals, likes and dislikes relevant to a decision.

If a person's wishes are inconsistent with their values, they should be balanced in the light of the importance of the values to the person.

Material risk of significant harm

People have the right to take risks, whether or not they have decision-making capacity. This is called the “dignity of risk”.

However, the concept of dignity of risk does not extend to very significant risks that a person does not have decision-making capacity to understand.

A new Act should distinguish between circumstances and decisions that give rise to a material risk of significant harm (which should be avoided) and lesser risks (which are consistent with a person’s dignity of risk).

Rule 2: Decision-making support and participation

An attorney or court-appointed representative should not make a decision for which the represented person has decision-making capacity, unless the person wants them to. Where the represented person makes the decision, the attorney or court-appointed representative should ensure the person receives the decision-making support they want to receive.

When an attorney or court-appointed representative is making a decision on behalf of a person, they should consult with the person and enable them to participate in the decision and express their wishes for it (unless the person does not want to). They should also ensure the person receives the decision-making support they want to receive.

Rule 3: Decisions should be based on relevant information

An attorney or court-appointed representative should ensure they have all material information to make a decision. This includes relevant prior decisions or statements by the represented person and the relevant circumstances of those decisions or statements.

The attorney or court-appointed representative should seek any such information they do not already have from people the represented person wants them to seek it from. They should also seek it from any other relevant source. However, if the represented person does not want them to seek it from a particular source, the attorney or representative should only do so if needed to avoid a material risk of significant harm to the person.

GENERAL DUTIES

In addition to requiring attorneys and court-appointed representatives to make reasonable efforts to comply with the decision-making rules, a new Act should also require them to act in accordance with some general duties, including to:

- act honestly and in good faith;
- exercise reasonable care, diligence and skill;
- use reasonable efforts to be informed about the represented person's situation and consider whether decisions are needed to respect their rights, wishes and values;

- identify and respond appropriately to conflicts of interest, including by:
 - ensuring that the decision-making rules are always the sole considerations in making decisions; and
 - complying with any specific requirements ordered by the Family Court or set out in the enduring power of attorney (as the case may be);
- use reasonable efforts to keep confidential any confidential information and not use it for any other purpose unless authorised by the enduring power of attorney or the Family Court;
- use reasonable efforts to ensure the represented person receives the decision-making support they want to receive to assist them to:
 - understand the role of the attorney or representative; and
 - develop decision-making capacity; and
- use reasonable efforts to communicate with the represented person in the way the person will best understand and keep them informed about decisions made on their behalf.

Formal supporters should have similar general duties, modified to reflect the fact that formal supporters would not be empowered to make decisions on behalf of the supported person.

CONFLICTS OF INTEREST

People with affected decision making can be particularly vulnerable to abuse by people supporting their decision making or making decisions on their behalf. We recommend a range of protections against such abuse, including the following:

- If a formal supporter has a conflict of interest, they should be required to disclose it to the supported person and not act unless the supported person consents and the formal supporter reasonably believes the supported person understands that consent.
- The Family Court should consider potential conflicts of interest when considering a person's suitability as a representative and the scope of decisions they should be able to make. It should also be able to specify requirements with which a representative must comply when they have a conflict of interest. In addition to any specified requirements, representatives should be required to ensure the decision-making rules are always the sole considerations in making decisions.
- If an attorney, court-appointed representative or formal supporter, or an associated person, receives a benefit as a result of their position, a court may require the attorney, representative or supporter to account for that benefit to the represented or supported person.
- A public agency should operate a complaints mechanism to respond to complaints about how a representative or formal supporter has performed their role.



Level 9, Solnet House, 70 The Terrace, Wellington 6011

PO Box 2590, Wellington 6140

Telephone: 0800 832 526

Email: com@lawcom.govt.nz
