

**Pūrongo | Report 151**

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

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

**List of recommendations**



# List of recommendations

## CHAPTER 2: THE PPPR ACT AND THE CASE FOR A NEW ACT

**R1**

The Protection of Personal and Property Rights Act 1988 should be repealed and replaced with a new Act.

## CHAPTER 5: OVERARCHING PURPOSES AND VALUES OF A NEW ACT

**R2**

A new Act should include a purpose clause that indicates that the Act is intended:

- a. to protect and promote the equality, dignity and autonomy of people who require decision-making support or do not have decision-making capacity for some decisions; and
- b. to give effect to Aotearoa New Zealand's international human rights obligations, including under the United Nations Convention on the Rights of Persons with Disabilities.

**R3**

A new Act should require people exercising powers under it to consider tikanga where it is relevant in the circumstances.

**R4**

A new Act should provide that circumstances in which tikanga may be relevant include where:

- a. the relevant person's wishes and values indicate tikanga is important to them;
- b. the relevant person has whakapapa Māori; or
- c. other evidence indicates tikanga is relevant.

## CHAPTER 6: THE IMPORTANCE OF PROVIDING DECISION-MAKING SUPPORT

**R5**

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:

- a. Access, obtain, collect and understand the information relevant to the decision (including, where relevant, the views of people whose views are important to the person).
- b. Identify options for the decision and assess them, including:
  - i. their reasonably foreseeable consequences (including, where relevant, for the people and things the person cares about); and
  - ii. the likelihood of those consequences occurring.
- c. Participate in decision making.
- d. Communicate and give effect to their decision.
- e. Express their wishes in relation to a decision.
- f. Communicate information relevant to a decision.
- g. Obtain and use relevant assistive equipment or technology.
- h. Have adequate time, in a suitable environment, to do the things listed in (a)–(g).

## CHAPTER 7: DECISION MAKING ON BEHALF OF A PERSON

**R6**

A new Act should continue to provide for decisions to be made on behalf of people with affected decision making, including by courts and court-appointed representatives.

## CHAPTER 8: THE CONCEPT OF DECISION-MAKING CAPACITY

**R7**

A new Act should use the concept of decision-making capacity.

**CHAPTER 9: ASSESSING DECISION-MAKING CAPACITY****R8**

A new Act should provide for a single test for decision-making capacity.

**R9**

A person should be considered not to have decision-making capacity with respect to a decision or class of decisions only if, with the decision-making support that is expected to be available to them when they make the decision or class of decisions, they are unable to:

- a. understand the information relevant to the decision and the effect of the decision(s); or
- b. retain that information as necessary to make the decision(s); or
- c. use or weigh that information as part of the process of making the decision(s); or
- d. communicate the decision(s) — whether by talking, using sign language or any other means.

**R10**

Subject to R11 and R12, the presumption of decision-making capacity should be retained in a new Act.

**R11**

Where:

- a. a court-appointed representative is assessing whether a person has decision-making capacity to make a decision; or
- b. an attorney under an enduring power of attorney (other than an enduring power of attorney relating to property under which an attorney is entitled to act when the donor has decision-making capacity) is assessing whether they can make a decision,

the presumption of decision-making capacity should not apply. However, the representative should nevertheless be required to consider and form a view on whether the person has decision-making capacity for the decision.

**R12**

Where a formal supporter is assessing whether they should resign (in accordance with R50) because the supported person has ceased to have and is unlikely to regain decision-making capacity to make the appointment, the presumption of decision-making capacity should not apply.

**R13**

A new Act should provide that, when assessing whether a person has decision-making capacity, regard must be had to the following:

- a. A person may have decision-making capacity in relation to some decisions or classes of decisions and not others.
- b. If a person does not have decision-making capacity in relation to a decision or class of decisions, it may be temporary.

**R14**

A new Act should provide that, subject to R15, when assessing decision-making capacity for an individual decision, the fact that a person only possesses decision-making capacity long enough to make and communicate the decision (however brief that period) does not prevent them from having decision-making capacity for it.

**R15**

A new Act should provide that, when assessing decision-making capacity for the purposes of:

- a. creating or continuing a court-ordered representative arrangement;
  - b. determining whether an attorney can make a decision or class of decisions under an enduring power of attorney;
  - c. appointing a formal supporter; or
  - d. assessing whether a formal supporter arrangement should be terminated,
- the assessor may disregard brief or intermittent indications of decision-making capacity.

**R16**

A new Act should specify that lack of decision-making capacity cannot be established by reference to matters not referred to in the test for determining whether a person lacks decision-making capacity (in R9). For example, lack of decision-making capacity should not be able to be established on the basis of:

- a. decision(s) a person has made or intends to make being, in the opinion of others, unwise or risky;
- b. any medical diagnosis that has been made with respect to a person;
- c. a person's disability;
- d. a person's age;
- e. a person's appearance;
- f. a person's method(s) of communication, including their ability to communicate verbally; or
- g. a person's behaviour or manner.

**R17**

The term "formal decision-making capacity assessment" should be defined in a new Act to mean:

- a. a decision-making capacity assessment that is required before an attorney can make the first decision, and certain subsequent decisions, under an enduring power of attorney, as addressed in R139 and R140; or
- b. a decision-making capacity assessment that te Kōti Whānau | Family Court has directed to be filed in evidence, as addressed in R61.

**R18**

The definition of "formal decision-making capacity assessment" should specify that it does not include a determination by te Kōti Whānau | Family Court of whether a person has decision-making capacity.

**R19**

A new Act should provide that:

- a. a person in respect of whom a formal decision-making capacity assessment is sought or conducted is entitled to refuse to undergo or continue with an assessment;
- b. an assessor may not undertake a formal decision-making capacity assessment without the person present unless:
  - i. the person refuses to undergo or continue with the decision-making capacity assessment or cannot reasonably participate in the assessment; and
  - ii. the assessor is satisfied that the assessment can be completed reliably using the information available; and
- c. where an assessor is not able to undertake a formal decision-making capacity assessment in accordance with R19(b), te Kōti Whānau | Family Court should be able to make a determination about the person's decision-making capacity on the basis of the evidence before it.

**R20**

A new Act should provide that formal decision-making capacity assessments can only be carried out by:

- a. a relevant health practitioner (as currently described in paragraph (a) of the definition of "relevant health practitioner" in section 94(4) of the Protection of Personal and Property Rights Act 1988); or
- b. a member of another class of people prescribed by secondary legislation.

**R21**

The Government should:

- a. work with relevant professional bodies to encourage and enable a wider range of professions to develop expertise in decision-making capacity assessments;
- b. develop a system to authorise members of relevant professions who do not currently undertake formal decision-making capacity assessments to conduct formal decision-making capacity assessments; and
- c. if needed to give effect to R21(a) and (b), enact secondary legislation to provide for that approach (in accordance with R20(b)).

**R22**

A new Act should provide for a code of practice to be developed by a relevant government agency that sets out the circumstances and manner in which formal decision-making capacity assessments should be conducted.

**R23**

The Government should work with relevant professional bodies and relevant disabled people's organisations to develop:

- a. a code of practice (as described in R22); and
- b. accompanying guidance and training.

**R24**

A new Act should require a person who has conducted a formal decision-making capacity assessment (an “assessor”) to prepare a report that records, at a minimum:

- a. the circumstances of the assessment, including any support the person had for the purposes of the assessment and any people the assessor has consulted;
- b. the process the assessor followed for the assessment;
- c. the assessor’s findings with respect to each of the four limbs of the test for decision-making capacity; and
- d. if a person needs decision-making support to have decision-making capacity for a decision or class of decision, the nature of the support required.

## CHAPTER 10: THE CASE FOR A FORMAL SUPPORT REGIME

**R25**

A new Act should provide for the appointment of formal supporters.

## CHAPTER 11: ELEMENTS OF A FORMAL SUPPORT REGIME

**R26**

A new Act should specify that a formal supporter’s role is to provide decision-making support to a person for the decisions or classes of decision specified in their appointment.

**R27**

A new Act should specify that, subject to the terms of their appointment, a formal supporter is entitled to access information to which the supported person is entitled and that the formal supporter reasonably considers they need in order to provide the decision-making support specified in the appointment.

**R28**

A new Act should specify that a formal supporter is not entitled to access any information that the supported person would not be entitled to disclose to the formal supporter if the supported person held it.

**R29**

A new Act should specify that appointment as a formal supporter does not authorise the formal supporter to:

- a. make any decision on behalf of the supported person;
- b. communicate or give effect to a decision on behalf of the supported person;  
or
- c. take any action that they know, or ought to know, is inconsistent with the supported person’s wishes.

- R30** A formal supporter should not have the power to delegate any of their powers.
- R31** A new Act should enable formal supporters to be appointed by either the person who needs support or te Kōti Whānau | Family Court.
- R32** A new Act should provide that people are ineligible to be appointed as a formal supporter if they:
- are under the age of 18;
  - have a representative appointed by te Kōti Whānau | Family Court acting on their behalf;
  - have an attorney under an enduring power of attorney acting on their behalf;
  - are subject to compulsory treatment or are a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
  - are a body corporate, other than a trustee corporation.
- R33** A new Act should specify that a trustee corporation can be appointed as a formal supporter only in relation to property matters.
- R34** Where a person seeks to appoint a formal supporter themselves, a new Act should specify the following requirements for appointment:
- The appointment should be made in a prescribed form developed for this purpose.
  - The person and the formal supporter should sign the appointment.
  - The person's and the formal supporter's signatures should be witnessed. The witnessing requirements should be the same as those for creating an enduring power of attorney under a new Act.
- R35** A new Act should provide that, despite a failure to comply with any of the appointment requirements:
- Any action taken by the formal supporter under the appointment is valid if:
    - the formal supporter does not know of the failure and acts in good faith; or
    - the failure is not material.
  - A third party dealing with the formal supporter may treat any action of the supporter under the appointment as valid if:
    - the third party does not know of the failure and acts in good faith; or
    - the failure is not material.

**R36**

A new Act should permit the remote execution of formal support arrangements. Secondary legislation should prescribe a process for executing formal support arrangements by audio-visual link that is consistent with the equivalent process for executing enduring powers of attorney.

**R37**

Under a new Act, te Kōti Whānau | Family Court should have the power to appoint a formal supporter if satisfied that:

- a. the person who requires decision-making support wishes the appointment to be made and those wishes do not result from undue pressure or fraud;
- b. the person (with decision-making support if required) understands the nature and foreseeable risks and consequences of the appointment; and
- c. the potential formal supporter is a suitable person to act in the role, having regard to:
  - i. the nature of the relationship between the person and the potential supporter;
  - ii. the potential supporter's likely ability to exercise their powers and perform their duties under the appointment;
  - iii. the likelihood the potential supporter will act in accordance with their duties as a formal supporter; and
  - iv. such other matters as the Family Court thinks fit.

**R38**

Under a new Act, te Kōti Whānau | Family Court should have the power to require the appointment of a formal supporter to be reviewed at such times and on such bases as it considers appropriate.

**R39**

A new Act should provide that two or more people may be appointed as formal supporters, including for the same decisions or classes of decision. In such cases, the liability of individual formal supporters for their actions should be determined in the same way as the liability of individual representatives is determined.

**R40**

The appointment of a formal supporter (whether made by the supported person or te Kōti Whānau | Family Court) should specify:

- a. the decisions (or classes of decision) to which the appointment relates;
- b. the type or types of decision-making support to which the appointment is limited (if any);
- c. any restrictions on the formal supporter's power to access, or their use of, personal or confidential information of the supported person to which the supported person is entitled;
- d. any consent that the supported person wishes to give at the time of appointment to the formal supporter using or disclosing confidential information or acting despite a conflict of interest;

- e. any entitlement of the formal supporter to remuneration or reimbursement of expenses that has been agreed between the supported person and the formal supporter at the time of appointment; and
- f. if the appointment is not to take effect immediately, the date or event on which it will do so; and
- g. any other conditions that the Family Court considers appropriate.

**R41**

The appointment of a formal supporter should take effect:

- a. on a date, or on the occurrence of an event, specified in the appointment; or
- b. if no such date or event is specified, immediately.

**R42**

A new Act should provide that any changes to a formal support arrangement must meet the same requirements as an appointment. A court-ordered appointment should only be able to be changed by te Kōti Whānau | Family Court.

**R43**

Subject to R45 to R47, formal supporters should be required to:

- a. use reasonable efforts to provide decision-making support to the supported person for decisions within the scope of their appointment and otherwise act in accordance with the terms of their appointment;
- b. act honestly and in good faith;
- c. exercise reasonable care, diligence and skill — that is:
  - i. exercise the care, diligence and skill that a reasonable person would exercise in the same circumstances; or
  - ii. if appointed in a professional capacity, exercise the care, diligence and skill reasonably expected of a person of that profession in the same circumstances;
- d. use reasonable efforts to be informed about the supported person's circumstances as relevant to the formal supporter's role, including through liaising with:
  - i. any other formal supporters for the person in relation to any matters relevant to decisions within the scope of their appointment; and
  - ii. any court-appointed representative or attorney entitled to act for the person under an enduring power of attorney in relation to any matters relevant to decisions they are appointed to make,
 except to the extent the supported person requests otherwise;
- e. identify and disclose to the person any conflict of interest in relation to any decision or class of decisions within the scope of their appointment and only access the person's private or confidential information or provide decision-making support with respect to such decision(s) to the extent that the supported person has consented to them doing so;
- f. keep confidential any confidential or personal information acquired in the course of their role and not use or disclose it for any other purpose, except to the extent the supported person has otherwise consented; and

- g. comply with any record-keeping requirements specified in secondary legislation.

**R44**

A new Act should provide for secondary legislation to be enacted specifying record-keeping requirements with which formal supporters should comply.

**R45**

A formal supporter should not be able to rely on any consent given for the purposes of R43(e) and (f) unless they reasonably consider that the supported person:

- a. had decision-making capacity for that consent when it was given; and
- b. continues (or with available decision-making support would continue) to do so at the time of the formal supporter's action.

**R46**

A formal supporter should be prohibited from:

- a. assisting the supported person to communicate or give effect to a decision, or taking any other action in reliance on their consent, if the formal supporter knows or ought to know that the decision or consent results from undue pressure or fraud; or
- b. assisting the supported person to communicate or give effect to a decision, or taking any other action in reliance on their consent, if the formal supporter knows or ought to know that:
  - i. the decision will give rise to a material risk of significant harm to the supported person; and
  - ii. the supported person (with decision-making support) does not have decision-making capacity for the decision or consent.

**R47**

A formal supporter should be entitled to refuse to assist a supported person to communicate or give effect to a decision, or take any other action in reliance on their consent, if the formal supporter considers that:

- a. the supported person (with decision-making support) does not have decision-making capacity for the decision or consent; or
- b. the decision or action will give rise to a material risk of significant harm to the supported person; or
- c. supporting the person to communicate or give effect to the decision or taking the action might result in liability for the formal supporter, despite R160.

**R48**

A new Act should clarify that the involvement of a formal supporter does not, by itself, mean the supported person's decision or action lacks legal effect or that it is binding on the formal supporter instead of the supported person. However, a formal supporter or a third party should not be able to claim that a decision or action is that of the supported person if they knew (or ought to have known) at the time of the decision or action that:

- a. the formal supporter breached their duties; and

- b. the supported person would likely have decided or acted materially differently had the formal supporter not breached their duties.

**R49**

Under a new Act, a formal support arrangement should terminate if:

- a. the supported person revokes the arrangement by written notice to the formal supporter;
- b. te Kōti Whānau | Family Court terminates the arrangement;
- c. the formal supporter resigns by written notice to the person;
- d. the formal supporter becomes ineligible to act;
- e. the supported person or the formal supporter dies;
- f. a subsequent appointment of a formal supporter is made in relation to any decision or class of decision to which the appointment relates; or
- g. an attorney appointed under an enduring power of attorney becomes entitled to act, or a court-ordered representative is appointed for the person, in relation to any decision or class of decisions to which the arrangement relates.

**R50**

A new Act should provide that a formal supporter must resign if they know, or ought to know, that the supported person (with decision-making support) no longer has the decision-making capacity to appoint a formal supporter and is unlikely to regain it. Where there is a reasonable basis to suspect the supported person has ceased to have and is unlikely to regain decision-making capacity to make the appointment, the formal supporter should be required to consider and form a view on that matter.

**R51**

A new Act should provide that, if an appointment terminates, a formal supporter must cease acting as a formal supporter as soon as they know of the termination, except to take reasonable steps to ensure the supported person understands the termination.

**R52**

Actions taken by a formal supporter in accordance with an appointment after it has terminated should remain valid if the formal supporter did not know, and could not reasonably be expected to have known, of its termination.

**R53**

A new Act should provide that te Kōti Whānau | Family Court may terminate the arrangement if it is satisfied that the formal supporter is failing, or has failed, to comply with any of their duties or proposes not to comply with any of those duties.

## CHAPTER 12: DECISION-MAKING RULES

### R54

A new Act should require representatives to use reasonable efforts to make decisions in accordance with three decision-making rules:

- a. Decision-Making Rule 1: Representative decisions should be centred on the person's wishes and values and respect their rights (see R55).
- b. Decision-Making Rule 2: The person should receive decision-making support for decisions and have the opportunity to participate in them (see R56).
- c. Decision-Making Rule 3: Representative decisions should be based on relevant information (see R57).

### R55

A new Act should provide, as Decision-Making Rule 1, that representative decisions should be centred on the represented person's wishes and values and respect their rights, as follows:

- a. A decision made by a representative should give effect to the represented person's wishes and values, except where Decision-Making Rule 1(e) or (f) applies.
- b. The representative should determine a represented person's wishes and values in relation to a decision as follows:
  - i. The represented person's wishes are the choices, desires, views or other indications that they express in relation to the decision.
  - ii. The represented person's values are their reasonably stable values, beliefs, goals, likes and dislikes that are relevant to the decision.
- c. If the represented person's wishes are inconsistent with their values, the representative should make a decision that appropriately balances those wishes and values in the light of the importance of the values to the represented person.
- d. If the representative does not have sufficient information to make a decision that gives effect to the represented person's wishes and values in accordance with Decision-Making Rule 1(a)–(c), they should make the decision that:
  - i. gives effect to what they understand of the person's wishes and values in accordance with Decision-Making Rule 1(a)–(c); and
  - ii. will otherwise best protect and promote the person's wellbeing in the least restrictive manner.
- e. The representative should not make a decision that:
  - i. is criminal;
  - ii. cannot realistically be given effect; or
  - iii. will result in a material risk of significant harm to the represented person.
- f. The representative may decline to make a decision that will expose the represented person or the representative to civil liability.

- g. Where Decision-Making Rule 1(e) or (f) apply and the representative will be making a decision that departs from the represented person's wishes and values to some extent, the representative should make the decision that:
  - i. gives effect to what they understand of the person's wishes and values in accordance with Decision-Making Rule 1(a)–(c), to the extent possible; and
  - ii. will otherwise best protect and promote the person's wellbeing in the least restrictive manner.
- h. The representative should not decline to make a decision merely because they disagree with it or consider it unorthodox or unwise.

**R56**

A new Act should provide, as Decision-Making Rule 2, that the represented person should be entitled to receive decision-making support for decisions and have the opportunity to participate in them, as follows:

- a. The representative should consult with the represented person about a decision and enable them to participate in it, and express their wishes for it, to the extent the represented person is able unless it is clear the represented person does not wish to be consulted or to participate.
- b. The representative should ensure the represented person receives the decision-making support they wish to receive to assist them to participate in a decision, and express their wishes for it, to the extent they are able. This should include decision-making support to enable them to express their wishes in whatever way they wish, whether verbally, in writing, by gesture, by sign language or in any other way.
- c. The representative should not make a decision for which the represented person has decision-making capacity unless the represented person wants the representative to make the decision. Where the represented person is making a decision, the representative should ensure the represented person receives the decision-making support they wish to receive to assist them to make the decision.

**R57**

A new Act should provide, as Decision-Making Rule 3, that representative decisions should be based on relevant information, as follows:

- a. The representative should ensure they have all material information necessary to make a decision in accordance with Decision-Making Rule 1. This includes relevant statements or decisions the represented person previously made and the relevant circumstances of those statements and decisions.
- b. The representative should seek any such information that they do not already have from any person or other source identified by the represented person.
- c. The representative should also seek such information from any other relevant person or source (such as the represented person's carers, healthcare professionals or financial advisers), except where the represented person does not want them to. In that case, the representative should only seek the information if they believe it may be required to avoid a material risk of significant harm to the represented person.

**CHAPTER 13: GENERAL DUTIES OF REPRESENTATIVES****R58**

A new Act should specify that all representatives must:

- a. comply with the decision-making rules in accordance with R54;
- b. act honestly and in good faith;
- c. exercise reasonable care, diligence and skill — that is:
  - i. exercise the care, diligence and skill that a reasonable person would exercise in the same circumstances; or
  - ii. if appointed as a representative in a professional capacity, exercise the reasonable care, diligence and skill of that profession;
- d. use reasonable efforts to be informed about the represented person's circumstances as relevant to the representative's role and:
  - i. if they believe the person's wishes and values are not being respected, consider whether decisions are required to help ensure they are respected and make decisions where appropriate; and
  - ii. if they believe the person is at material risk of significant harm, consider whether decisions are required to eliminate or mitigate that risk and make decisions where appropriate;
- e. identify and respond appropriately to any conflicts of interest, including by:
  - i. ensuring the decision-making rules are always the sole considerations in making decisions;
  - ii. complying with record-keeping and reporting requirements in R115 to R118 and R149 to R151; and
  - iii. complying with any conditions specified by the donor in an enduring power of attorney or specified by te Kōti Whānau | Family Court in an order of appointment;
- f. use reasonable efforts to keep confidential any confidential or personal information acquired in the course of their role and to not use or disclose it for any other purpose unless authorised by:
  - i. an enduring power of attorney; or
  - ii. subject to any enduring power of attorney, the Family Court;
- g. use reasonable efforts to ensure that the represented person receives the decision-making support they want to receive to assist them to:
  - i. understand the role of the representative; and
  - ii. have and develop decision-making capacity generally;
- h. use reasonable efforts to communicate with the represented person in the way they will be able to understand best; and
- i. use reasonable efforts to keep the represented person informed about decisions made, information obtained and steps taken by the representative.

## CHAPTER 14: MAKING COURT-ORDERED DECISIONS AND APPOINTING REPRESENTATIVES

**R59**

A new Act should provide for the following court-ordered decisions and representative arrangements:

- a. Court-ordered decisions.
- b. Court-appointed welfare representatives.
- c. Court-appointed property representatives.
- d. Property administrators.

**R60**

Te Kōti Whānau | Family Court should have the power to make a court-ordered decision or impose a representative arrangement under a new Act if it is satisfied:

- a. the person in respect of whom an application for a court-ordered decision or representative arrangement is being made lacks decision-making capacity for the relevant decision or class of decisions; and
- b. there is a need for the court-ordered decision to be made or the representative arrangement to be imposed.

**R61**

For the purposes of determining whether a person has decision-making capacity for a decision or class of decisions, te Kōti Whānau | Family Court should have the power to direct a formal decision-making capacity assessment to be completed and the report filed in evidence.

**R62**

For the purposes of R60(b), a court-ordered decision or representative arrangement should be considered needed for a person only if:

- a. it will promote the person's wishes and values because they want to make one or more decisions, or will be required to do so, and:
  - i. the court-ordered decision or representative arrangement is needed to ensure that the decision or decisions are made and give effect to the person's wishes and values; or
  - ii. to be legally effective, the decision or decisions must be made by someone with decision-making capacity; or
- b. there is a material risk of significant harm occurring to the person in respect of whom the application has been made if a court-ordered decision is not made or a representative arrangement is not imposed; or
- c. one or more of the circumstances referred to in (a) and (b) is likely to arise during the period of the proposed representative arrangement or in which the proposed court-ordered decision will have effect.

**R63** A court-ordered decision or representative arrangement (including the type and scope of the order) should not be considered needed if a less restrictive intervention can reasonably meet the need for the court-ordered decision or representative arrangement. This should include where the person in respect of whom an application has been made is provided with decision-making support to make their own decisions.

**R64** When deciding whether there is a need for a court-ordered decision or representative arrangement, te Kōti Whānau | Family Court must consider the person's wishes and values to the extent they can be ascertained.

**R65** Where an application has been made for a court-ordered decision or representative arrangement, te Kōti Whānau | Family Court should have the power to impose an order (being either a court-ordered decision, a representative arrangement or an order to appoint a formal supporter) that is different from the order sought if:

- a. te Kōti Whānau | Family Court is satisfied that no interested party would oppose the order; or
- b. the order is for a court-ordered decision or representative arrangement that is less restrictive than that being sought or to appoint a formal supporter.

**R66** When making an order for a representative arrangement, te Kōti Whānau | Family Court should specify the matters to which the arrangement relates.

**R67** On an application for an urgent order, a court-ordered decision or a representative arrangement, te Kōti Whānau | Family Court should be able to make an urgent order if it is satisfied that:

- a. the relevant person lacks decision-making capacity; and
- b. an urgent order is necessary in the circumstances.

**R68** Subject to R70, before te Kōti Whānau | Family Court makes an urgent order, notice should be given to all parties and to the relevant person.

**R69** Subject to R70, all parties and the relevant person should be entitled to be heard before an urgent order is made.

**R70** Te Kōti Whānau | Family Court should be able to dispense with the requirements for notice and the entitlement of a person to be heard if it considers it necessary to do so to respond to a serious and immediate risk of harm to the relevant person.

**R71**

Before making an urgent order, te Kōti Whānau | Family Court should be required to be satisfied that the person in respect of whom the application was made has had a lawyer made available to them.

**R72**

The maximum period for which an urgent order can be in force should be six months from the date it is made. However, if te Kōti Whānau | Family Court dispenses with the requirements for notice or the entitlement of any person to be heard, the maximum period should be three months.

**R73**

After an urgent order ends, te Kōti Whānau | Family Court should have the power to:

- a. make only one further urgent order; or
- b. make a final order; or
- c. dismiss an application for a court-ordered decision or representative arrangement (if relevant).

## CHAPTER 15: COURT-ORDERED DECISIONS

**R74**

A new Act should provide te Kōti Whānau | Family Court with a general power to make court-ordered decisions about welfare and property matters. To avoid doubt, a new Act should:

- a. specify that, subject to R74(c) the Family Court may make all decisions a representative can be empowered to make and all decisions a welfare representative is prohibited from making under R97 and R98; and
- b. include a non-exhaustive list of decisions the Family Court may make, including:
  - i. an order that any parent of the person make suitable arrangements for the personal care of the person after the parent's death;
  - ii. an order that the arrangements made by any parent of the person for the personal care of the person after the parent's death be observed or be varied in any particular way specified in the order;
  - iii. an order that the person shall enter, attend at or leave an institution specified in the order, not being a hospital or psychiatric security institution under the Mental Health (Compulsory Assessment and Treatment) Act 1992;
  - iv. an order that the person be provided with specified living arrangements;
  - v. an order that the person be provided with specified medical advice or treatment;
  - vi. an order that the person be provided with specified educational, rehabilitative, therapeutic or other services;

- vii. an order that the person shall not leave Aotearoa New Zealand without the permission of the Family Court or shall leave Aotearoa New Zealand only on specified conditions; and
  - viii. an order appointing a person as next friend or litigation guardian for the person for the purposes of any proceedings in te Kōti-ā-Rohe | District Court or the Family Court; and
- c. specify that the Family Court's power to make decisions under a new Act does not extend to requesting on behalf of the person the option of receiving assisted dying under the End of Life Choice Act 2019.

**R75**

Where te Kōti Whānau | Family Court makes a court-ordered decision, it should be required to be satisfied that the decision complies with Decision-Making Rule 1, as addressed in R55.

**R76**

A new Act should continue to provide te Kōti Whānau | Family Court with a power to make ancillary orders to give effect to court-ordered decisions.

**R77**

A new Act should continue to provide te Kōti Whānau | Family Court with a power to require a review of a court-ordered decision by a defined date.

**R78**

A new Act should continue to provide that no person (other than the person in respect of whom the application is made) shall be bound by a court-ordered decision unless that person is a party to the proceedings in which the order is made.

## CHAPTER 16: COURT-APPOINTED REPRESENTATIVES: ELIGIBILITY

**R79**

Te Kōti Whānau | Family Court should only appoint a representative if it is satisfied they are a suitable person to act as a representative for the proposed represented person.

**R80**

In determining whether a potential representative is suitable, te Kōti Whānau | Family Court should consider:

- a. the ability of the potential representative to carry out the role, including:
  - i. their ability to meet the particular needs of the represented person;
  - ii. their ability to make decisions in accordance with our recommended decision-making rules; and
  - iii. their relationship to the represented person (including whether the relationship will be beneficial or detrimental to the representative's ability to carry out the role);

- b. the wishes and values of the represented person or proposed represented person;
- c. any conflicts of interest the potential representative may have and whether these can be appropriately managed;
- d. any social or cultural considerations that are relevant; and
- e. any other matter that the Family Court considers relevant in the circumstances.

**R81**

A new Act should prohibit a person or body corporate from being appointed, or continuing to act, as a court-appointed representative in the following circumstances:

*New prohibitions*

- a. A person should be prohibited from being appointed, or continuing to act, as a representative if they are subject to an active restraining order or protection order in respect of the relevant person.
- b. A person should be prohibited from being appointed, or continuing to act, as a representative if they are serving a sentence of imprisonment.
- c. A person should be prohibited from being appointed, or continuing to act, as a representative if they lack decision-making capacity for any decisions or class of decisions for which they are acting or seeking to act as a representative, except where the loss of decision-making capacity is short term and not expected to occur again.

*Modified prohibitions*

- d. A person in charge of an aged care facility or other institution where the relevant person is a resident should be prohibited from being appointed, or continuing to act, as the person's representative.
- e. A person who is a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 should be prohibited from being appointed, or continuing to act, as a representative.

*Existing prohibitions*

- f. A body corporate should be prohibited from being appointed as a welfare representative.
- g. A body corporate should be prohibited from being appointed as a property representative unless it is a trustee corporation.

**R82**

If any of the circumstances specified in R81 occurs after a representative's appointment, the representative should immediately cease acting and be required to notify te Kōti Whānau | Family Court and the represented person if they can reasonably be expected to do so.

**R83**

A new Act should specify a list of matters that a potential representative must bring to the attention of te Kōti Whānau | Family Court if they are seeking to be a representative. If appointed to the role, the representative should be required to apply for a review (if they can reasonably be expected to do so) if one of the specified matters occurs during their appointment. The specified matters should be:

- a. a conviction for an offence by the representative or proposed representative that is in relation to or affects the relevant person;
- b. a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 in respect of the representative or proposed representative; or
- c. for a property representative, bankruptcy, conviction of an offence involving fraud or dishonesty, or any matter or circumstance that means the person is not qualified to be appointed as a director of a company under section 151 of the Companies Act 1993.

**R84**

A new Act should specify that a potential representative must bring any evidence of prior convictions for which they have completed a prison sentence to the attention of te Kōti Whānau | Family Court when they are applying to be appointed as a representative.

**R85**

A new Act should specify that, if a person seeking appointment as a representative was the subject of any prior restraining or protection orders against the relevant person that are no longer active, they must bring evidence of such orders to the attention of te Kōti Whānau | Family Court when they are applying to be appointed as a representative.

**R86**

A new Act should specify that only people aged 18 or over can be appointed as a representative.

## CHAPTER 17: COURT-APPOINTED REPRESENTATIVES: NATURE AND SCOPE OF THE ROLE

### R87

A new Act should provide that, when making an order for multiple representatives in the same role or an order that would mean a represented person has multiple representatives in the same role, te Kōti Whānau | Family Court must specify:

- a. the decisions or classes of decisions that each representative is authorised to make; and
- b. where multiple representatives are authorised to make the same decisions or classes of decisions:
  - i. whether they must make decisions together (that is, they must all agree with the decision) or each can make decisions alone; and
  - ii. if the general rule for liability among multiple representatives who are authorised to make the same decision(s) in R88 is not to apply, how liability is to be held.

### R88

A new Act should provide that, subject to R87(b)(ii) and R160, where multiple representatives are authorised to make the same decisions or classes of decisions, the following should apply:

- a. Those representatives should generally be jointly and severally liable for decisions made.
- b. However, a representative (Representative A) should not be liable for the decision of another representative (Representative B) if Representative B made the decision without the agreement or consent of Representative A.

### R89

A new Act should provide that, subject to R160, where multiple representatives are authorised to make different decisions or classes of decisions, they should be liable for their own decisions only.

### R90

A new Act should provide for the following consultation obligations for multiple representatives:

- a. Where multiple representatives are authorised to make the same decisions or classes of decisions, each of these representatives should be required to consult all other such representatives before making a decision. This obligation should apply regardless of whether the representatives are jointly and severally liable for the decision or te Kōti Whānau | Family Court has provided for different liability rules.
- b. Where representatives are authorised to make different decisions or classes of decisions, each representative should be required to consult with any other representative before making any decision that they know or ought to know has implications for any decision the other representative may be required to make.

**R91**

A representative should be exempt from these consultation obligations if:

- a. it would be impractical to consult in the circumstances; or
- b. the representative reasonably believes in good faith that a representative with whom they would otherwise have an obligation to consult would agree with their intended decision.

**R92**

Te Kōti Whānau | Family Court should have the power to impose any decision-making obligations on multiple representatives that it considers appropriate in the circumstances, including specifying:

- a. any dispute resolution process that representatives must use in the event of a disagreement;
- b. any order of priority between representatives where they disagree about a decision;
- c. whether there are any decisions on which representatives must be unanimous; and
- d. whether there are any matters for which representatives must apply to the Family Court for directions in the event of a disagreement.

**R93**

With respect to court-appointed welfare representatives, a new Act should:

- a. provide for these representatives to have the powers they may reasonably need to make and implement decisions for the represented person in respect of each matter specified by te Kōti Whānau | Family Court in the order; but
- b. enable the Family Court to exclude any powers it thinks fit.

**R94**

With respect to court-appointed property representatives, a new Act should:

- a. require te Kōti Whānau | Family Court to determine which powers a property representative is to have with respect to property specified in the order appointing them; and
- b. include a non-exhaustive list of possible powers of property representatives based on the list currently in Schedule 1 of the Protection of Personal and Property Rights Act 1988 but expressed in modernised language.

**R95**

The application forms for court-ordered property representatives should:

- a. require an applicant to list any powers sought with respect to the relevant person's property; and
- b. refer applicants to the non-exhaustive list of possible powers.

**R96**

A new Act should specify that court-appointed representatives have the power to access all information that:

- a. the represented person is entitled to access; and
- b. is relevant to the representative's role.

**R97**

A new Act should contain a list of decisions that a welfare representative is prohibited from making. Subject to R99 and R100, the list should contain all the decisions currently listed in section 18(1) of the Protection of Personal and Property Rights Act 1988 Act, using modernised language.

**R98**

The following decisions should be added to the list of decisions a welfare representative is prohibited from making:

- a. Consenting to any procedure performed for the purpose of sterilising the represented person.
- b. Consenting to any procedure performed for the purpose of abortion.
- c. Consenting to participate in any surrogacy arrangement.
- d. Prohibiting contact between the represented person and any other person.

**R99**

The Government should progress the Health and Disability Commissioner's 2019 recommendations regarding participation in research by people who cannot give informed consent.

**R100**

If the current framework provided by right 7(4) of the Code of Health and Disability Services Consumers' Rights remains, a new Act should:

- a. enable te Kōti Whānau | Family Court or a representative to consent to participation in research by a potential participant who cannot give their informed consent; and
- b. provide for safeguards to protect participants that:
  - i. require approval of the research by a properly constituted ethics committee;
  - ii. prioritise the participant's rights, wishes and values;
  - iii. set appropriate parameters for the level of invasiveness of research that is permitted; and
  - iv. ensure that participation by people who cannot give informed consent is necessary to adequately carry out the research.

**R101**

The specified sum set in Schedules 1 and 2 of the Protection of Personal and Property Rights Act 1988 at which a property manager (including Public Trust acting as a manager) requires the consent of te Kōti Whānau | Family Court to exercise a particular power should not continue in a new Act.

**R102**

A new Act should retain the rules regarding the wills and will making of people subject to property orders in sections 54 and 55 of the Protection of Personal and Property Rights Act 1988.

**R103**

A new Act should provide that, in exercising these powers, te Kōti Whānau | Family Court should aim to give effect to the person's wishes and values.

- R104** A new Act should provide that, when making or reviewing an order for a welfare or property representative, te Kōti Whānau | Family Court has the power to impose any restrictions or obligations on representatives it sees fit for decisions where there is an actual or potential conflict of interest.
- R105** A new Act should provide that court-appointed welfare representatives should generally be prohibited from receiving (directly or indirectly) remuneration for consequential services provided as a result of any decision made by them or the represented person.
- R106** A new Act should provide an exception to allow te Kōti Whānau | Family Court to authorise such remuneration if it is satisfied the welfare representative would remain suitable under the proposed suitability requirements in R80. In particular, the Family Court should be satisfied the welfare representative will be able to manage any conflicts of interest arising from the authorisation of remuneration for such consequential services.
- R107** A new Act should provide that, when making an order for a representative or on a separate application, te Kōti Whānau | Family Court has the power to appoint a reserve representative to act during any period for which the appointed representative stops acting or becomes unable to act.
- R108** Before appointing a reserve representative, te Kōti Whānau | Family Court should be required to be satisfied the potential reserve representative is suitable to act as a representative in accordance with our recommendations at R80.
- R109** A person appointed as a reserve representative should have a duty to stay reasonably informed of the circumstances of the represented person for the duration of the order.
- R110** If an appointed representative stops acting during their appointment, they should be required (if they are reasonably able) to notify te Kōti Whānau | Family Court, the reserve representative (if applicable) and any parties to the original application that they have stopped acting.
- R111** A reserve representative should begin acting when they become aware or ought to be aware that the appointed representative has stopped acting or is unable to act.
- R112** If a reserve representative begins acting, they should be required to notify te Kōti Whānau | Family Court and the appointed representative that they have started acting.

**R113** In the event of a disagreement about whether a reserve representative should begin acting, the appointed representative should continue to act until te Kōti Whānau | Family Court has heard and determined the matter.

**R114** A reserve representative who is acting should be bound by the same terms of the order that appointed the previous representative (for example, with respect to their scope of appointment and powers), except to the extent that te Kōti Whānau | Family Court specifies otherwise.

## CHAPTER 18: COURT-APPOINTED REPRESENTATIVES: SAFEGUARDS

**R115** A new Act should provide that property representatives are required to submit financial reports to the relevant body annually.

**R116** Te Kōti Whānau | Family Court should be able to set additional reporting requirements for property representatives (including for specific matters or to increase the frequency of reporting) where it considers them appropriate to safeguard the represented person. However, the Family Court should not be able to extend the period of financial reporting beyond one year.

**R117** A property representative should be required to submit a final financial report no later than 30 days after their appointment ends.

**R118** A new Act should empower te Kōti Whānau | Family Court to set record-keeping and reporting obligations for welfare representatives where it considers such obligations are appropriate to safeguard the represented person for a decision or class of decisions.

**R119** A new Act should continue to contain penalties for non-compliance with record-keeping and reporting obligations and knowingly false reporting by all representatives.

**R120** A new Act should provide that, when setting the date by which a welfare or property representative must apply for the first review of the representative arrangement, te Kōti Whānau | Family Court should specify a date that is no longer than three years from the date the order comes into effect.

**R121**

When setting the date by which a welfare or property representative must apply for subsequent reviews of the representative arrangement, te Kōti Whānau | Family Court should generally be required to specify a date that is no longer than three years from the last review. However, the Family Court should be able to specify a date up to five years from the last review if satisfied it is appropriate to do so, taking into account:

- a. the extent and likelihood of changes to the represented person's relevant decision-making capacity;
- b. the likelihood that the need for the arrangement will continue beyond three years;
- c. the stability of the arrangement; and
- d. any other matters that it considers relevant in the circumstances.

**R122**

A new Act should provide that, in a periodic review, te Kōti Whānau | Family Court should consider:

- a. the represented person's relevant decision-making capacity (unless the application for review only seeks to appoint a new representative);
- b. whether there is still a need for the arrangement;
- c. the wishes and values of the represented person;
- d. whether the arrangement is achieving its purpose;
- e. the ongoing suitability of the representative or representatives, including whether they are properly making decisions in accordance with the decision-making rules; and
- f. any other matter the Family Court considers relevant.

**R123**

The current powers of te Kōti Whānau | Family Court following a review in sections 86(5) and 87(6) of the Protection of Personal and Property Rights Act 1988 should be continued in a new Act.

## CHAPTER 19: ENDURING POWERS OF ATTORNEY

**R124**

A new Act should continue to provide for enduring powers of attorney.

**R125**

There should continue to be separate prescribed forms for enduring powers of attorney for welfare and for property.

**R126**

The forms should include:

- a. the certificate a witness to the donor's signature is required to complete; and
- b. notes to explain:
  - i. the different aspects of the enduring power of attorney forms; and
  - ii. the effects and implications of the enduring power of attorney.

**R127**

Te Tāhū o te Ture | Ministry of Justice should review the prescribed forms to improve accessibility.

**R128**

A donor should not be able to specify in their enduring power of attorney that their decision-making capacity must be assessed by a health practitioner with a specific scope of practice.

**R129**

A new Act should preserve the other options available under the current law for tailoring an enduring power of attorney.

**R130**

A new Act should enable a donor to appoint more than one attorney, for the same decisions or different decisions, under both:

- a. an enduring power of attorney in relation to welfare; and
- b. an enduring power of attorney in relation to property.

**R131**

A new Act should provide that, when a donor appoints multiple attorneys in the same role, the donor must specify:

- a. the decisions or classes of decisions that each attorney is authorised to make; and
- b. where multiple attorneys are authorised to make the same decisions or classes of decisions, whether they must make decisions together (that is, they must all agree with the decision) or can each make decisions alone.

**R132**

A new Act should provide that, subject to R160, where multiple attorneys are authorised to make the same decisions or classes of decisions, the following should apply:

- a. Those attorneys should generally be jointly and severally liable for decisions made.
- b. However, an attorney (Attorney A) should not be liable for the decision of another attorney (Attorney B) if Attorney B made the decision without the agreement or consent of Attorney A.

**R133** A new Act should provide that, subject to R160, where multiple attorneys are authorised to make different decisions or classes of decisions, they should be liable for their own decisions only.

**R134** A new Act should continue to require the signatures of the donor and attorney to be witnessed.

**R135** A new Act should retain the current witnessing requirements in section 94A of the Protection of Personal and Property Rights Act 1988, with the following amendments:

- a. The explanation and certification requirements for a witness to a donor's signature should be amended to require the witness to certify that they have no reason to suspect the donor is acting under undue pressure or influence.
- b. The list of eligible witnesses to the donor's signature should be expanded to include people authorised by secondary legislation to witness such signatures.
- c. A witness should no longer be required to be independent of the donor and attorney if the witness is satisfied that performing their responsibilities for both parties will not constitute more than a negligible risk of a conflict of interest.

**R136** A new Act should permit the remote execution of enduring powers of attorney by audio-visual link. Secondary legislation should prescribe a process that must be followed when an enduring power of attorney is signed and witnessed by audio-visual link.

**R137** A new Act should provide that a person under 18 years of age is ineligible to be appointed as an attorney under an enduring power of attorney.

**R138** A new Act should not restrict a person who is bankrupt from being appointed as an attorney under an enduring power of attorney in relation to welfare or from continuing to act in that role if they become bankrupt.

**R139** An attorney under an enduring power of attorney in relation to welfare should not be able to make any decision on behalf of the donor before a formal decision-making capacity assessment or te Kōti Whānau | Family Court has determined that the donor does not have decision-making capacity for one or more decisions to which the enduring power of attorney relates.

**R140** An attorney under an enduring power of attorney in relation to welfare should only be able to make a decision on behalf of the donor in respect of a “significant matter” if:

- a. a formal decision-making capacity assessment or te Kōti Whānau | Family Court has determined that the donor does not have decision-making capacity for that decision at the time it is, or is proposed to be, made; or
- b. a formal decision-making capacity assessment or the Family Court has determined that the donor does not have decision-making capacity for a class of decisions that includes that decision, and a relevant health practitioner (as currently defined in the Protection of Personal and Property Rights Act 1988) has certified that, due to an ongoing health condition, the donor is likely not to have decision-making capacity for that class of decisions:
  - i. at any time in the future; or
  - ii. before a specified date that falls after the date of the decision.

**R141** For the purposes of R140, a “significant matter” should be defined in a new Act as:

- a. a matter that has, or is likely to have, a significant effect on the health, wellbeing or enjoyment of life of the donor (for example, a permanent change in the donor’s residence, entering residential care or undergoing a major medical procedure); and
- b. any other matter the donor specifies as a “significant matter” in the enduring power of attorney.

**R142** A new Act should continue to provide that an enduring power of attorney for property may specify that it is to take effect immediately.

**R143** Unless an enduring power of attorney in relation to property specifies that it is to take effect immediately, an attorney should not be able to make any decision on behalf of the donor before a formal decision-making capacity assessment or te Kōti Whānau | Family Court has determined that the donor does not have decision-making capacity for one or more decisions to which the enduring power of attorney relates.

- R144** A new Act should provide that an attorney under an enduring power of attorney in relation to property may only conclude that a donor does not have decision-making capacity for a decision in respect of a “significant matter” if:
- a. a formal decision-making capacity assessment or te Kōti Whānau | Family Court has determined that the donor does not have decision-making capacity for that decision at the time it is, or is proposed to be, made; or
  - b. a formal decision-making capacity assessment or the Family Court has determined that the donor does not have decision-making capacity for a class of decisions that includes that decision and a relevant health practitioner (as currently defined in the Protection of Personal and Property Rights Act 1988) has certified that, due to an ongoing health condition, the donor is likely not to have decision-making capacity for that class of decisions:
    - i. at any time in the future; or
    - ii. before a specified date that falls after the date of the decision.
- R145** For the purposes of R144, a “significant matter” should be defined in a new Act as any matter the donor specifies as a “significant matter” in the enduring power of attorney.
- R146** A new Act should continue to provide that an attorney under an enduring power of attorney in relation to welfare is prohibited from making any decisions that a court-appointed welfare representative is prohibited from making.
- R147** A new Act should continue to enable donors to specify one or more people who are entitled to be provided with information relating to the exercise of an attorney’s powers.
- R148** A new Act should not make separate provision for a donor of an enduring power of attorney in relation to property to specify that an attorney’s dealings with the donor’s property are to be monitored.
- R149** A new Act should continue to require attorneys under enduring powers of attorney in relation to property to keep records of financial transactions.
- R150** A new Act should enable a donor of an enduring power of attorney in relation to property to specify in their enduring power of attorney that the attorney(s) are to provide their financial records to the public agency that has the function of keeping and examining property representatives’ records on an annual basis for that agency to examine.
- R151** A new Act should enable a donor of an enduring power of attorney in relation to welfare to require the attorney(s) to keep records of a specified class or classes of decisions.

**CHAPTER 20: A REGISTER FOR ENDURING POWERS OF ATTORNEY**

**R152** A new Act should provide for the establishment of a register of information about enduring powers of attorney to be administered by a government entity.

**R153** It should be voluntary to register information about an enduring power of attorney. A donor should be able to deregister previously registered information. Not registering or deregistering an enduring power of attorney should not affect its validity.

**R154** A register should enable registration of:

- a. minimum information for all enduring powers of attorney of:
  - i. the donor's identifying details;
  - ii. whether the enduring power of attorney relates to property or to welfare; and
  - iii. the location of the original enduring power of attorney; and
- b. optional additional information for any registered enduring power of attorney of:
  - i. the attorney's name and contact details;
  - ii. details of how the donor has tailored the arrangements made under the enduring power of attorney;
  - iii. the location of any certified copies of the enduring power of attorney; and
  - iv. a copy of the enduring power of attorney.

**R155** Only the relevant donor or (if asked to do so by the donor) the donor's agent, witness or attorney should be able to register information about an enduring power of attorney.

**R156** Access to registered information about enduring powers of attorney should be restricted.

**R157** Secondary legislation should prescribe the classes of people who may access registered information and the circumstances in which each class may access it. People within the prescribed classes should only be able to access registered information they need.

## CHAPTER 21: ADVANCE DIRECTIVES AND OTHER STATEMENTS OF WISHES

- R158** A new Act should provide that a person's medical treatment decisions expressed in a valid and applicable advance directive are outside the scope of decision making of:
- te Kōti Whānau | Family Court;
  - court-appointed representatives; and
  - attorneys acting under an enduring power of attorney.

- R159** The Government should review the common law on advance directives in Aotearoa New Zealand with a view to establishing whether the law on advance directives should be codified and, if so, how.

## CHAPTER 22: LIABILITY AND IMMUNITY FOR REPRESENTATIVES AND FORMAL SUPPORTERS

- R160** Subject to R162 and R164, a new Act should provide that representatives and formal supporters who reasonably believe they are acting within the scope of their appointment have immunity from civil liability (including in equity) for any action or omission in their role, except to the extent that they acted in bad faith or without reasonable care, diligence and skill.

- R161** For the purposes of R160, a new Act should define reasonable care, diligence and skill to mean:
- the care, diligence and skill that a reasonable person would exercise in the same circumstances; or
  - if a representative or formal supporter is appointed in a professional capacity, the reasonable care, diligence and skill of that profession.

- R162** The immunity in R160 should not extend to any liability of the representative or formal supporter to account to the represented or supported person for any benefit obtained by them (or by an associated person) in connection with their position, except to the extent that:
- the benefit results from the performance of their obligations in accordance with their duties; or
  - the supported person has consented to the benefit in accordance with R43(e) or R43(f) and R45; or
  - the benefit is expressly permitted by an enduring power of attorney, or is not prohibited by an enduring power of attorney and has been expressly permitted by te Kōti Whānau | Family Court; or
  - the benefit constitutes permitted reimbursement of expenses.

**R163**

A new Act should not continue to provide a separate immunity for property managers and attorneys that applies when following the advice of any person with whom they have an obligation to consult or when following directions from te Kōti Whānau | Family Court.

**R164**

A new Act should provide that a representative may be personally liable in respect of any contract or arrangement entered into with, or liability incurred to, any person if the representative does not disclose that they are acting in their capacity as a representative before entering into the contract or arrangement or incurring the liability.

## CHAPTER 23: USE OF FORCE AND DEPRIVATION OF LIBERTY

**R165**

The Government should review the law relating to the use of force against, and the deprivation of liberty of, people who lack decision-making capacity.

## CHAPTER 24: PRACTICAL IMPROVEMENTS AND OVERSIGHT

**R166**

A new Act should provide for the following functions to be undertaken by an appropriate agency or agencies:

- a. Operating a complaints mechanism to respond to complaints about representatives' or formal supporters' performance of their roles.
- b. Developing information and guidance about representative arrangements and formal support arrangements.
- c. Providing support and advice for representatives, formal supporters, represented people and their family or whānau.
- d. Receiving, keeping and examining records provided by representatives.
- e. Developing and maintaining a website.
- f. Maintaining a register of enduring powers of attorney in the form recommended in Chapter 20.

- R167** In order to ensure that oversight and support of representative and formal support arrangements is as effective as possible, the Government should consider whether a new Act should provide for the following additional functions to be undertaken by an appropriate agency:
- a. Active monitoring and supervision of representative and formal support arrangements.
  - b. Providing training for representatives and formal supporters.
  - c. Offering a dispute resolution service for representatives, represented people, formal supporters, supported people and their family or whānau to resolve disputes related to a representative or formal support arrangement.

- R168** A new Act should provide the relevant agency or agencies with all the powers required to carry out its or their functions. In particular, a new Act should provide for:
- a. all necessary powers to operate an effective complaints mechanism, including:
    - i. powers to compel the provision of relevant information for the purpose of investigating a complaint; and
    - ii. powers to initiate proceedings in te Kōti Whānau | Family Court; and
  - b. all necessary powers to compel the provision of records to be examined.

- R169** The Government should consolidate oversight and support functions for representative and formal support arrangements into a single agency.

## CHAPTER 25: IMPROVING COURT PROCESSES

- R170** Te Kōti Whānau | Family Court should continue to exercise first instance jurisdiction under a new Act.

- R171** Te Tāhū o te Ture | Ministry of Justice should initiate a review of the reimbursement rate for lawyers for subject persons with Te Kāhui Ture o Aotearoa | New Zealand Law Society.

- R172** In connection with the introduction of a new Act, te Komiti mō ngā Tikanga Kooti | Rules Committee should consider ways in which the new forms in Schedule 9 of the Family Court Rules 2002 could be made more accessible for people with affected decision making.

**R173**

Te Kōti Whānau | Family Court should be able to excuse a person in respect of whom an application is made from attending a hearing if it is satisfied that:

- a. the person is, with the support available to them, unable to express their wishes and values in relation to matters that may arise in the course of the court hearing; or
- b. attendance or continued attendance is likely to cause the person mental, emotional or physical harm.

**R174**

At any time before an application under a new Act is finally determined, a Judge or Associate of te Kōti Whānau | Family Court should have the power to refer parties to alternative dispute resolution with their consent.

**R175**

A Judge or Associate of te Kōti Whānau | Family Court should refer parties to alternative dispute resolution only if the Judge or Associate considers that:

- a. there is a reasonable prospect that alternative dispute resolution will assist the parties to resolve the matters in dispute; and
  - b. there is no significant power imbalance between the parties or a material risk of significant harm to a person or any other reason that would make alternative dispute resolution inappropriate.
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