

He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke
Review of Adult Decision-Making Capacity Law

Overview of Final Report

1. The Law Commission has published its final report for **He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law**.
2. The report reviews the Protection of Personal and Property Rights Act 1988 (**PPPR Act**). The PPPR Act governs the law for enduring powers of attorney, welfare guardians and property managers.
3. This is an overview of key features of the report.
4. The full report is available on our website at these links: <https://tinyurl.com/NZLC-R151> or <https://www.lawcom.govt.nz/our-work/review-of-adult-decision-making-capacity-law/tab/report>.

Key Issues with Current Law

5. There are three key issues with the current law.

The PPPR Act does not reflect the importance of decision-making support

6. Decision-making support is fundamental to enabling people with affected decision making to make their own decisions. This is emphasised by the United Nations Convention on the Rights of Persons with Disabilities (**Disability Convention**). The Disability Convention came into force for Aotearoa New Zealand in 2008.
7. The PPPR Act does not state that decision-making support must be provided. This means that a decision can be made for a person when they could, with support, make it themselves.

The “best interests” approach is no longer appropriate

8. The PPPR Act requires decisions to be made in a person’s “best interests”. This approach can be paternalistic.
9. The Disability Convention requires respect for a person’s “will and preferences”. This includes both the **wishes** that a person expresses and their enduring **values** (including goals, likes and dislikes).
10. The PPPR Act does not make clear that a person’s wishes and values must be respected, or say how to ensure they are respected.

The PPPR Act is complex and inconsistent

11. The PPPR Act is difficult to navigate. It does not have a clearly stated policy objective. Rules for similar things are worded differently without any obvious reason. For example, decision-making capacity is defined differently in different places.
12. This makes it harder for people to access and understand the law.

New Legislation is Needed

13. New legislation is needed to improve decision-making support and decision-making arrangements for adults with affected decision making.
14. The Law Commission makes 175 recommendations for a new Act and related matters. Our recommendations are designed to protect and promote people’s equality, dignity and autonomy.

Snapshot of Recommended Arrangements

15. A new Act should continue to provide for enduring powers of attorney, court-appointed representatives and court-ordered decisions. However, these arrangements should be significantly reformed.
16. In addition, a new role should be created called a formal supporter.
17. A new Act should have these key features:
 - The Act should have clear statutory purposes.
 - Decision-making support should be embedded throughout the Act.

- Where a decision needs to be made on behalf of a person, the decision should be centred on the person’s wishes and values and respect their rights.
- There should be a single test for when the Family Court can make a court-ordered decision or order a representative arrangement.
- There should be a single test for decision-making capacity.
- People exercising powers under the Act should consider tikanga where it is relevant.

18. We explain these features below.

Overarching Purposes and Values

19. A new Act should state its policy objectives. These should be:

- 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
- to give effect to Aotearoa New Zealand’s international human rights obligations, including under the Disability Convention.

20. All people exercising powers under the Act should be required to consider tikanga where it is relevant. The Act should set out some situations where tikanga will be relevant. This will help people who do not have knowledge of tikanga to understand when it needs to be considered.

Decision-Making Support

21. Decision-making support should be embedded in a new Act. It should be relevant both when a person is making a decision for themselves and when a decision is being made on their behalf:

- There should be a new role of “formal supporter” to assist a person to make their own decisions.
- A person’s decision-making capacity should be assessed in the light of the decision-making support that is expected to be available to them when they are making relevant decisions.

- Where a decision needs to be made for a person, they should receive decision-making support to participate in it and express their wishes for it.
- The Family Court should consider a person's access to decision-making support when deciding whether there is a need for it to make a decision, or to appoint a representative to make decisions, for the person.

Definition of decision-making support

22. Decision-making support should be defined in a new Act. The should include **assisting** a person to:

- get relevant information
- identify and assess options for a decision
- participate in decision making
- obtain and use assistive equipment or technology
- communicate and give effect to a decision.

23. Decision-making support should **not** include making or communicating a decision for a person.

Formal supporters

24. The role of a formal supporter should be to provide decision-making support to a person for classes of decision specified in their appointment. Formal supporters should have a power to access the supported person's information relevant to those decisions (but not decisions that their appointment does not relate to).

25. A person should be able to appoint a formal supporter for themselves. Broadly the same process for appointing an enduring power of attorney should apply. The Family Court should also be able to appoint a formal supporter for a person, with the supported person's consent.

26. A formal supporter should be required to resign if 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.

Decision Making on Behalf of a Person

27. Sometimes a person may not have decision-making capacity for a decision, even with decision-making support. In this situation, it can be necessary for a decision to be made on behalf of the person.
28. A person should continue to be able to appoint an enduring power of attorney to make decisions for them if they lose decision-making capacity in the future. In addition, the Family Court should continue to be able to make a decision for a person who lacks decision-making capacity for it. or appoint a representative to do so.

Decision-making rules

29. 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 decision-making rules.
30. 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 but may want to take account of the other two.
31. **Decision-Making Rule 1** is that decisions should be centred on a person's wishes and values and respect their rights:
 - A decision made on behalf of a person should generally give effect to their wishes and values. A person's "wishes" are the choices, desires or views 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 and values relevant to a decision are inconsistent, they should be balanced in the light of the importance of the values to the person.
 - If insufficient information is known about the person's wishes and values, the decision should reflect what is known about their wishes and values. Beyond that, the decision should 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. Beyond that, the decision should protect and promote their wellbeing in the least restrictive manner.

32. **Decision-Making Rule 2** is that the represented person should be entitled to receive decision-making support for decisions and have the opportunity to participate in them:
- An attorney or court-appointed representative should not make a decision that the represented person has decision-making capacity to make, unless the person wants them to. Where the represented person makes the decision, the 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. They should also enable the person to participate in the decision and express their wishes for it, unless the person does not want to. In addition, the representative should ensure the person receives the decision-making support they want to receive.
33. **Decision-Making Rule 3** is that 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.
 - The attorney or court-appointed representative should seek any relevant 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 representative should only do so if needed to avoid a material risk of significant harm to the person.

Single test for orders by Family Court

34. A new Act should set out a single test for when the Family Court has the power to make a court-ordered decision or appoint a representative.
35. The test should require the Family Court to be satisfied that:
- the person lacks decision-making capacity for the relevant decision or decisions; and
 - there is a need for the court-ordered decision or representative.
36. A new Act should state there is only a need for a court order which makes a decision or appoints a representative if:

- the order will promote the person's wishes and values; or
- there is a material risk of significant harm occurring to the person if the order is not made.

37. A court order should not be made if a less restrictive intervention can reasonably meet the need.

Improving workability and safeguards

38. We also recommend a range of changes to the rules governing enduring powers of attorney and court-appointed representatives to improve workability and strengthen safeguards for represented people.

General Duties

39. A new Act should set out duties of attorneys, court-appointed representatives and formal supporters.

40. For attorneys and court-appointed representatives, in addition to using reasonable efforts to comply with the decision-making rules, their duties should include 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
- use reasonable efforts to keep confidential any confidential information and not use it for any other purpose, unless authorised
- 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
- 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.

41. 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.
42. Generally, attorneys, court-appointed representatives and formal supporters should have immunity from liability for breach of their duties unless they acted in bad faith or without reasonable care, diligence and skill. However, this immunity should not apply to any liability they might have to pay to the represented or supported person any unauthorised benefit they have received in the role.

Decision-Making Capacity

43. A new Act should continue to use the concept of decision-making capacity. However, how decision-making capacity is defined and assessed should be improved.

Single test for decision-making capacity

44. Wherever decision-making capacity is relevant in a new Act, it should be the same test.
45. A person should be considered not to have decision-making capacity for a decision if 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 as part of the process of making the decision; or
 - communicate the decision (by any means).
46. Whether a person has decision-making capacity for a decision should be assessed in the light of the decision-making support expected to be available to them when making the decision.
47. Assessments of decision-making capacity should also recognise that:
 - a person can have decision-making capacity for some matters and not others
 - decision-making capacity can fluctuate over time.

Different types of assessment

48. The level of formality needed for a decision-making capacity assessment varies. We recommend that there be three different types:
 - Formal assessments by a qualified professional.
 - Determinations by the Family Court.
 - Informal assessments — for example by an attorney, court-appointed representative or formal supporter.
49. A code of practice should be developed that sets out how formal assessments should be conducted.

Practical Improvements and Oversight

50. A single public agency should be responsible for providing oversight and support functions in relation to a new Act. These functions should include a complaints mechanism, general information and guidance, and support and advice.
51. The public agency should also be responsible for maintaining a voluntary register of enduring powers of attorney. This would help address uncertainty, when a person loses decision-making capacity, about whether an enduring power of attorney exists and where it is located.
52. The Family Court should continue its oversight role of decision-making arrangements.

Areas for Further Review

53. We recommend further review of two areas of law.
54. First, the Government should review the common law on advance directives. This law is currently unclear. The review should consider whether the law on advance directives should be put in legislation and, if so, how.
55. Second, the Government should review the law relating to the use of force against people who lack decision-making capacity and the deprivation of their liberty. The current law is unclear and does not provide for sufficient safeguards to protect people's rights.
56. Passing of a new Act need not await the outcome of these reviews.