

Pūrongo | Report 151

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

Review of Adult Decision- Making Capacity Law



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

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

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

The Commissioners are:

Mark Hickford — Tumu Whakarae | President

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The title of this Report was developed for Te Aka Matua o te Ture | Law Commission by the translation team at Aatea Solutions Limited and was finalised in conjunction with the Commission's Māori Liaison Committee.

Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka.

A catalogue record for this title is available from the National Library of New Zealand.

ISBN 978-1-0670173-7-8 (Print)

ISBN 978-1-0670173-6-1 (Online)

ISSN 0113-2334 (Print)

ISSN 1177-6196 (Online)

This title may be cited as NZLC R151. This title is available on the internet at the website of Te Aka Matua o te Ture | Law Commission: www.lawcom.govt.nz

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29 January 2026

Tēnā koe Minister

NZLC R151 — He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'Mark Hickford', with a long horizontal stroke extending to the right.

Mark Hickford

Tumu Whakarae | President



Foreword

In Aotearoa New Zealand, adults are generally free to decide for themselves how they wish to live. However, if a person is found to lack decision-making capacity, that freedom might be significantly curtailed. Instead of making their own decisions in the ways they want, someone else might be appointed, under the Protection of Personal and Property Rights Act 1988 (PPPR Act), to make those decisions for the person in their “best interests”.

As its name suggests, the PPPR Act was intended to protect the rights of those subject to it in ways that earlier laws had failed to do. Despite those advances, that protection has often been experienced as restriction, powerlessness and absence of voice. Instead of being supported to have agency in their own lives, many have found that their views have largely been ignored. Reform is needed.

Twenty years after the PPPR Act was passed, Aotearoa New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities. The Convention stresses the importance of decision-making support and of ensuring that measures relating to a person’s decision making respect their “rights, will and preferences”. The PPPR Act is almost completely silent on these key requirements. Much of this Report concerns how they should be given substance so that the agency of vulnerable people is supported rather than diminished.

We recommend that the PPPR Act be replaced by a new Act that properly recognises the role that decision-making support can play in maximising a person’s agency. For example, we recommend the introduction of a new role of formal supporter, someone a person can appoint to assist them make their own decisions. We also recommend that, where a decision needs to be made on a person’s behalf, it be squarely centred on their wishes and values, except in the rare event it would expose them to a material risk of significant harm. The unifying theme of these, and all our other, recommendations is the protection and promotion of people’s equality, dignity and autonomy.

I acknowledge with gratitude the numerous people, groups and organisations who have provided feedback and advice during this review. In particular, I acknowledge those whose views have reflected their lived experience, and for whom equality, dignity and autonomy are not abstract concepts but very real concerns. Their feedback has greatly enriched our understanding of what is required to better ensure that all adults in Aotearoa New Zealand enjoy the freedom to live in the way they want to live.



Mark Hickford

Tumu Whakarae | President

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of the individuals and organisations that have helped us in this review.

We acknowledge the generous contributions and expertise of our Lived Experience, Whānau and Carers Expert Advisory Group:

Jeanette Brunton, Gina Giordani, Matthew Innes, Cindy Johns, Kate Johns, Wiremu Kohere, Lisa Martin, Sir Robert Martin, Fiona Parrant and Gaylene Te Rauna.

We also acknowledge the generous contributions and expertise of our Professional Expert Advisory Group:

Professor John Dawson, Alison Douglass, Dr Hinemoa Elder, Andrew Finnie, Dr Mark Fisher, Associate Professor Dr Ben Gray, Dr Huhana Hickey, Iris Reuvecamp and Dr Jeanne Snelling.

We are grateful for the support and guidance of the Commission's Māori Liaison Committee.

We thank the many people who, throughout the course of this review, found time to meet with us to share their views and experience. Likewise, we acknowledge the valuable contribution of all who submitted during the consultation periods. The input we received has been central to the development of our recommendations for reform. We also express our considerable gratitude to Alex Ruck Keene KC (Hon) for his assistance over the course of this review and to Amokura Kawharu, who was President of the Commission during nearly the entire period of this review.

Nō reira, ka rere ā mātou mihi ki a koutou, kua whai wā ki te āwhina i a mātou. Nā koutou te rourou, nā mātou te rourou, ka ora ai te iwi. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

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

The Commissioner responsible for this project is Geof Shirtcliffe. The legal and policy advisers involved in the preparation of this Report are Tessa Bromwich, Tāneora Fraser, Thomas Bucz, Jesse Watts and Zoe Lewis. The law clerks who have worked on this Report are Jack McNeill, Christie Wallace, Kaea Hudson and Sean McElwain-Wilson.

We acknowledge the passing in April 2024 of Sir Robert Martin, a tireless champion for the human rights of disabled people. Kua hinga te tōtara i te wao nui a Tāne.

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Glossary

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

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

Term	Description
advance directive	A statement given by a person about possible future medical decisions. Advance directives are one way people can communicate their choices about medical procedures or treatment that may be needed in the future at a time when they are not able to give their informed consent.
affected decision making	We use the term “affected decision making” to describe all situations where an adult’s functional ability to make decisions is impaired, regardless of the level of that impairment or the extent of their ability to continue (with support) to make decisions for themselves. A person with affected decision making may or may not have decision-making capacity for a decision (see definition of decision-making capacity).
attorney	The person appointed by the donor under an enduring power of attorney to make decisions for the donor, generally at some point in the future when the donor lacks decision-making capacity (see definition of enduring power of attorney).
“best interests” approach	When a person is subject to a representative decision-making arrangement under the PPPR Act, the basis upon which decisions are made for them is guided by what the representative thinks is in the person’s best interests. This approach has been criticised by the UN Committee on the Rights of Persons with Disabilities as being inconsistent with the rights of disabled people.

conflict of interest	We use the term “conflict of interest” broadly, to refer to any circumstances in which a formal supporter or representative has or is likely to have an incentive not to act in accordance with their duties because of obligations they have to another person or because doing so might benefit them or an associated person.
court-appointed representative	A person appointed by the Family Court to make decisions for a person who has been determined not to have relevant decision-making capacity. For brevity, in some chapters we simply use “representative” (see definition of representative).
court-ordered decision	A decision made by the Family Court (rather than a representative) on behalf of a person who has been determined not to have relevant decision-making capacity. For example, a decision that the person live in a particular place or receive medical treatment. In this Report, we use this term to refer to a “personal order” that the Family Court is currently empowered to make under the PPPR Act (see definition of personal order). A “court-ordered decision” does not include an order appointing a representative.
decision-making capacity	<p>We use the term decision-making capacity to describe a person’s functional ability to make an autonomous decision for themselves and to communicate that decision. Under our recommendations:</p> <ul style="list-style-type: none"> (a) a lack of relevant decision-making capacity is a necessary, but not sufficient, condition for the Family Court to make a court-ordered decision for, or appoint a representative to make decisions for, a person; and (b) a representative may generally only make a decision for which the represented person lacks decision-making capacity.
decision-making rules	The rules that we recommend a representative must follow when making decisions on behalf of a represented person. See the rules in Chapter 12.
decision-making support	Decision-making support is a broad term that covers various forms of assistance with decision making. In Chapter 6, we recommend a definition of decision-making support that includes assisting a person to access and understand relevant information, identify options for a decision, participate in decision-making and communicate their decision. Decision-making support is relevant both where a person with affected decision making is making a decision themselves and where a representative is making a decision on their behalf.

donor	The person who appoints an attorney under an enduring power of attorney to make decisions for them at some point in the future (see definition of enduring power of attorney).
enduring power of attorney (EPOA)	An arrangement under which one person (the donor) grants another person (the attorney) the power to make personal care and welfare decisions for them or manage their property affairs. Enduring powers of attorney generally only take effect if the donor ceases to have relevant decision-making capacity.
legal capacity	The legal entitlement of a person to: (a) hold rights and owe legal duties (legal standing); and (b) act on and exercise those rights and be accountable for the performance of those duties (legal agency).
mental distress	A circumstance in which a person's mental health is negatively affected in a way that affects their thoughts, feelings or behaviour.
personal order	A type of order under the PPPR Act under which the Family Court makes a decision about a person's personal care and welfare — for example, that the person live in a particular place or receive medical treatment.
property attorney	An attorney appointed under an enduring power of attorney to make decisions on behalf of the donor about property matters.
property manager	A person appointed by the Family Court under the PPPR Act to make decisions about another person's property.
property representative	A term we use for a representative who has been appointed by the Family Court to make decisions on behalf of a person about property matters. In this Report, we recommend this term replace "property manager" in a new Act.
Protection of Personal and Property Rights Act 1988 (PPPR Act)	The key piece of legislation that deals with adult decision-making capacity. It provides several decision-making arrangements for people who do not have relevant decision-making capacity.
reasonable accommodation	Adjustments or modifications that are needed to ensure disabled people enjoy all human rights and fundamental freedoms on an equal basis with others. The modifications and adjustments must be necessary and appropriate and not impose a disproportionate or undue burden.

representative	A general term for a person who has been appointed by the Family Court or under an enduring power of attorney to make decisions for another person, usually for welfare or property matters. We specify which type of representative (such as a court-appointed welfare representative) where it is necessary to do so in this Report.
rights, will and preferences	Article 12 of the United Nations Convention on the Rights of Persons with Disabilities requires legal measures relating to the exercise of a person’s legal capacity to respect the “rights, will and preferences” of the person with affected decision making. What this means is the subject of significant debate, as we discuss in Chapter 12.
wishes	A term we use to describe the choices, desires, views or other indications that a person expresses in relation to a decision.
values	A term we use to describe a person’s reasonably stable values, beliefs, goals, likes and dislikes that are relevant to the decision.
formal supporter	In this Report, we recommend the establishment of a formal supporter role to assist a supported person to make their own decisions. In Chapter 11, we make detailed recommendations for the role, powers and duties of formal supporters, and how their appointment should commence and terminate.
welfare attorney	An attorney appointed under an enduring power of attorney to make decisions on behalf of the donor about welfare matters.
welfare guardian	A person appointed by the Family Court to make decisions about another person’s personal care and welfare.
welfare representative	A term we use for a representative who has been appointed by the Family Court to make decisions on behalf of the represented person about welfare matters. In this Report, we recommend this term replace “welfare guardian” in a new Act.

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.
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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.
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CHAPTER 1

Introduction

IN THIS CHAPTER, WE:

- set out the background to this review;
- explain the scope of the review and the process we have followed; and
- summarise the matters addressed in this Report.

INTRODUCTION

- 1.1 This is the final report in the review that Te Aka Matua o te Ture | Law Commission was asked to undertake of the law relating to adult decision-making capacity. The focus of our review is the Protection of Personal and Property Rights Act 1988 (PPPR Act).
- 1.2 Under that Act, decision-making arrangements can be put in place that involve decisions being made on behalf of a person. If the person lacks decision-making capacity for some decisions, te Kōti Whānau | Family Court might make those decisions instead or appoint a representative such as a welfare guardian to do so. Alternatively, the person themselves might have appointed someone else to make the decisions under an enduring power of attorney.
- 1.3 These decision-making arrangements have a considerable impact on the people subject to them. An arrangement might avoid harm by ensuring that decisions are made in a person's "best interests". However, that can leave the person feeling silenced, powerless and unable to lead the life they want to lead. It can also make them vulnerable to neglect or misuse of powers by a court-appointed representative or attorney.
- 1.4 In this Report, we make 175 recommendations to better protect and promote the equality, dignity and autonomy of adults with affected decision making. We use the term "affected decision making" to describe all situations where an adult's functional ability to make decisions is impaired, regardless of the level of that impairment or the extent of their ability to continue (with support) to make decisions for themselves. Decision making might be affected due to a range of factors such as a traumatic brain injury, dementia, mental illness, a learning disability or mental distress.
- 1.5 We recommend that the PPPR Act be repealed and replaced with a new Act. Key elements of a new Act that we recommend include:
 - (a) provisions that help facilitate decision-making support for people with affected decision making — both to enable them to make decisions themselves and to assist

- them to participate in decision making where it is necessary for a decision to be made on their behalf;
- (b) statutory recognition of formal supporters to assist people with affected decision making to make decisions themselves;
 - (c) provisions that retain the ability of people to appoint attorneys under enduring powers of attorney;
 - (d) provisions that retain the power of te Kōti Whānau | Family Court to appoint representatives or make court-ordered decisions for people who do not have the relevant decision-making capacity;
 - (e) decision-making rules that must be applied where an attorney under an enduring power of attorney, a court-appointed representative or the Family Court is making a decision on behalf of a person who lacks relevant decision-making capacity and that are centred on the person’s rights, wishes and values; and
 - (f) enhanced oversight functions consolidated in a single public agency.

IMPETUS FOR REFORM

- 1.6 In 2006, the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) was adopted. It reflects a significant change in understandings of disability. Under article 12, states agree to recognise that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Article 12 requires states to take appropriate measures to provide access by disabled people to the support they may require in exercising their legal capacity. It requires that all measures relating to the exercise of legal capacity by disabled people provide for appropriate and effective safeguards. Among other things, those safeguards must ensure the person’s “rights, will and preferences” are respected.
- 1.7 Article 12 has spurred calls for reform of adult decision-making laws in numerous jurisdictions, including Aotearoa New Zealand. In its reports on New Zealand, the United Nations committee established under the Disability Convention has expressed particular concern about the “adult guardianship” provisions in the PPPR Act under which the Family Court may appoint a representative to make decisions for a person who is assessed not to have decision-making capacity.¹
- 1.8 Article 12 is of direct and central relevance to the reform of the PPPR Act. It requires consideration of fundamental issues such as:
- (a) whether the concept of decision-making capacity may legitimately play any role in how the law treats decisions made by people with affected decision making;
 - (b) if the concept of decision-making capacity does have a legitimate role, how this should be defined and assessed;

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

- (c) what a person’s “rights, will and preferences” are and what is required for them to be respected; and
 - (d) what is required to take appropriate measures to provide access by a person to the support they require in exercising their legal capacity.
- 1.9 There are further reasons to review the PPPR Act. It is now over 30 years old. Societal understandings of disability have changed, just as society itself has changed. For example, whereas approximately 11 per cent of the population were aged over 65 in 1988 (when the PPPR Act was enacted), approximately 18 per cent of the population are now in that age bracket.² Tatauranga Aotearoa | Stats NZ projections indicate that this will rise to over 23 per cent by 2050.³ Relatedly, the incidence of dementia *mate wareware* in Aotearoa New Zealand has risen and is predicted to continue to rise.⁴
- 1.10 In addition, Cabinet processes now routinely require legislation to be assessed for consistency with the New Zealand Bill of Rights Act 1990, international law and *te Tiriti o Waitangi* | Treaty of Waitangi (Treaty). Guidelines published by the Legislation Design and Advisory Committee further recommend that *tikanga* be considered.⁵ New Zealand is a more multicultural society than it was 30 years ago, making it important to also consider the needs of people from different cultures.

OUR PROCESS

- 1.11 In July 2019, we were asked by the Minister responsible for the Law Commission to review the law relating to adults with impaired decision-making capacity.
- 1.12 Following receipt of the Minister’s letter of referral in July 2019, we commenced our review in late 2020. We conducted research and consulted with a range of stakeholder organisations and government agencies to understand the scope of the reference. We published our terms of reference in October 2021.⁶
- 1.13 Throughout our review, we have been mindful of Aotearoa New Zealand’s obligation under the Disability Convention to “closely consult with and actively involve persons with disabilities” in developing legislation and policies to implement the Convention.⁷

Preliminary Issues Paper

- 1.14 Following publication of our terms of reference, we conducted more detailed research and analysis and met with further stakeholder organisations and government agencies. We convened a *wānanga* with *pūkenga* (experts) and arranged additional interviews with experts to discuss approaches to affected decision making in *te ao Māori*.

² Tatauranga Aotearoa | Stats NZ “National population projections: 2022(base)–2073” (27 July 2022) <www.stats.govt.nz>; and Tatauranga Aotearoa | Stats NZ “One million people aged 65+ by 2028” (press release, 27 July 2022).

³ Tatauranga Aotearoa | Stats NZ “National population projections: 2022(base)–2073” (27 July 2022) <www.stats.govt.nz>.

⁴ See Etuini Ma’u and others *Dementia Economic Impact Report 2020* (Waipapa Taumata Rau | University of Auckland, September 2021) at 14–15 and 22.

⁵ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [3.4] and [5.3].

⁶ Our terms of reference can be found at <www.lawcom.govt.nz>.

⁷ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(3).

- 1.15 In November 2022, we published a Preliminary Issues Paper together with a short summary of it.⁸ We asked 20 high-level questions focused on people’s lived experience of the law relating to adult decision-making capacity. To promote accessibility, the summary was published in a range of alternate formats (Easy Read, New Zealand Sign Language, audio format and Braille format) and in English and te reo Māori. Submissions could be made by post, email or text and via an online survey form.
- 1.16 We received 207 submissions. These submissions were from individuals, lawyers, healthcare professionals, social workers, care providers, government agencies and commercial organisations. During the consultation period, we also held three focus group meetings involving a total of approximately 30 people with a range of relevant life experiences. We also gave two public webinars.

Second Issues Paper

- 1.17 We analysed the submissions and focus group feedback and conducted further research and analysis. It became apparent that it was not feasible to properly address all law relating to adult decision-making capacity in a single review. There are multiple legislative regimes relating to decision-making capacity. In addition to the PPPR Act, these include the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 and the Code of Health and Disability Services Consumers’ Rights. There is also a range of common law rules relating to decision-making capacity, for example concerning contractual capacity and testamentary capacity. Each regime and common law rule addresses decision-making capacity within a specific context and accordingly raises different practical and human rights considerations. All these regimes and rules need to be considered individually. It has not been practicable to address all these areas of law in this review.
- 1.18 We have therefore limited this Report and our recommendations to the PPPR Act and some associated issues. The PPPR Act is the main statute concerning decision-making capacity, with the most wide-ranging impact on the lives of those to whom it applies.
- 1.19 We published our Second Issues Paper in April 2024.⁹ We provided detailed analysis of specific issues with the PPPR Act and asked 105 questions. To promote accessibility, we published four “Key Topic summaries” on issues addressed in the Second Issues Paper that we understood to be of most concern to people with affected decision making. These summaries were published in English, te reo Māori and the same alternate formats as the Preliminary Issues Paper. Submissions could be made by post, by email or via an online survey form.
- 1.20 We received 134 submissions from a similar range of people and organisations to those that submitted on the Preliminary Issues Paper. During the consultation period, we also held seven focus groups involving approximately 60 people with a range of relevant life experiences.

⁸ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper* (NZLC IP49, 2022); and Te Aka Matua o te Ture | Law Commission *Summary of Preliminary Issues Paper* (2022).

⁹ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024).

- 1.21 When summarising feedback from submitters in this Report, we only name individual submitters when they have submitted in a professional capacity.

Advisory groups

- 1.22 Throughout this review we have been supported by two expert advisory groups. Our Lived Experience, Whānau and Carers Expert Advisory Group initially comprised 10 people with a variety of lived experiences of having, or caring for people who have, affected decision making. Our Professional Expert Advisory Group comprised nine practising and academic lawyers and health practitioners, each of whom has considerable relevant professional expertise.
- 1.23 We have also received input from the Commission's standing Māori Liaison Committee and liaised with a range of experts, government agencies and other stakeholders.

Overseas jurisdictions that we have investigated

- 1.24 The main overseas jurisdictions that we have investigated are the Australian states and territories, England and Wales, Scotland, Ireland, Northern Ireland and the Canadian provinces and territories. We have focused our research on these jurisdictions both for practical reasons (in particular, they all include resources in English) and because they have some legal heritage similar to that of Aotearoa New Zealand.

THIS REPORT

- 1.25 This is our Final Report in this review. It contains 175 recommendations for reform. These recommendations primarily relate to the content of a new Act that we recommend replace the PPPR Act.
- 1.26 At the end of the executive summary (which precedes this introduction),¹⁰ we provide an overview of the decision-making arrangements we recommend be provided for in a new Act. We suggest that readers look at this overview before the rest of the Report as it provides a roadmap for the detailed recommendations that follow.
- 1.27 Following this introductory chapter, this Report has seven parts.

Part 1

- 1.28 Part 1 outlines some introductory matters and addresses overarching issues:
- (a) In Chapter 2, we summarise the key features of the PPPR Act and explain our recommendation that it be replaced by a new Act that better responds to the needs of people with affected decision making.
 - (b) In Chapter 3, we give an overview of relevant human rights obligations, including the requirements of article 12 of the Disability Convention.
 - (c) In Chapter 4, we discuss te ao Māori in this review, including tikanga that are relevant to this review and the Crown's relevant obligations under the Treaty.

Part 2

- 1.29 Part 2 addresses building blocks of a new Act:

¹⁰ See pages 25 to 30.

- (a) In Chapter 5, we discuss the purposes that a new Act should have and how a new Act should ensure that tikanga is considered where relevant.
- (b) In Chapter 6, we address the ways in which a new Act should provide for decision-making support and how decision-making support should be defined.
- (c) In Chapter 7, we address whether a new Act should enable the Family Court and court-appointed representatives to make decisions on behalf of people with affected decision making in some situations.
- (d) In Chapter 8, we discuss whether a new Act should use the concept of decision-making capacity.
- (e) In Chapter 9, we address what the test for a lack of decision-making capacity should be and how decision-making capacity should be assessed.

Part 3

1.30 Part 3 concerns formal support:

- (a) In Chapter 10, we consider whether a new Act should provide for formal decision-making supporters and co-decision making.
- (b) In Chapter 11, we discuss the elements that a formal support regime should have.

Part 4

1.31 Part 4 addresses the foundations of representative arrangements:

- (a) In Chapter 12, we consider the rules that should apply to representatives (whether they are representatives appointed by the Family Court or attorneys acting under enduring powers of attorney) when they are making a decision for a person.
- (b) In Chapter 13, we discuss the general duties that representatives should have.

Part 5

1.32 Part 5 addresses court-ordered decisions and court-ordered representative arrangements:

- (a) In Chapter 14, we consider when the Family Court should have the power to make, or appoint a representative to make, decisions for which a person does not have decision-making capacity. We also address interim orders.
- (b) In Chapter 15, we consider court-ordered decisions, including the kinds of decision that the Family Court should be able to make for a person who does not have relevant decision-making capacity.
- (c) Chapters 16 to 18 concern court-appointed representatives. In Chapter 16, we discuss who should be able to act as a court-appointed representative. Chapter 17 addresses the nature and scope of the court-appointed representative role. In Chapter 18, we consider the safeguarding mechanisms that a new Act should provide in relation to court-appointed representatives.

Part 6

1.33 Part 6 concerns self-instigated arrangements:

- (a) In Chapter 19, we discuss enduring powers of attorney, including how they should be created and executed and when attorneys should be able to act under them.

- (b) In Chapter 20, we address whether a register should be established for enduring powers of attorney.
- (c) In Chapter 21, we discuss advance directives and statements of wishes that a person may make about future decisions.

Part 7

- 1.34 Part 7 concerns procedural and other matters related to decision-making arrangements generally:
- (a) In Chapter 22, we address the liability of representatives and formal supporters and whether they should have any immunity from liability for actions or omissions in their role.
 - (b) In Chapter 23, we consider the use of force to implement decisions made by the Family Court or representatives and related issues concerning deprivations of liberty. We also discuss the involvement of Ngā Pirihimana o Aotearoa | New Zealand Police in these matters.
 - (c) In Chapter 24, we discuss whether an oversight body for decision-making arrangements should be established and the functions such a body could have. We also consider how the availability of representatives could be improved.
 - (d) In Chapter 25, we consider a number of issues relating to court processes under a new Act.

MATTERS NOT ADDRESSED

- 1.35 Our recommendations relate mainly to the key features of a new Act. We do not consider all subsidiary or operational matters or questions of legislative design. In some areas, we have set out our recommendations in some detail to make our policy intent clear. However, we do not propose specific statutory wording. Te Tari Tohutohu Pāremata | Parliamentary Counsel Office will be able to advise on the most appropriate way to implement our recommendations for a new Act.
- 1.36 As we note above, this Report does not cover all law relating to adult decision-making capacity. However, reviewing the PPPR Act has required us to consider fundamental issues relevant to that other law. These issues include what is required for law that uses the concept of decision-making capacity to comply with New Zealand's human rights obligations, how decision-making capacity should be defined and assessed and the importance of decision-making support and safeguards for people with affected decision making. We expect our conclusions on issues like these will be relevant to future reform of other law relating to adult decision-making capacity.
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PART 1:

FOUNDATIONAL MATTERS



1. In this part, we introduce the current law and address foundational matters that have informed the recommendations we make in this review.
 2. In Chapter 2, we give an overview of the Protection of Personal and Property Rights Act 1988 (PPPR Act) and the key issues we have identified with it. We recommend that the PPPR Act be repealed and replaced with a new Act.
 3. In Chapter 3, we give an overview of human rights that are relevant to this review. This includes introducing the United Nations Convention on the Rights of Persons with Disabilities. A key provision of that Convention for the purposes of this review is article 12, which requires (among other things) that disabled people enjoy legal capacity on an equal basis with others in all aspects of life. We return to what article 12 requires with respect to particular issues as they arise throughout this Report.
 4. In Chapter 4, we consider tikanga and the Crown's relevant obligations under te Tiriti o Waitangi | Treaty of Waitangi. The Treaty has been understood to place obligations on the Crown to positively promote equity between Māori and non-Māori. The recommendations we make in Parts 2 to 7 of the 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.
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CHAPTER 2

The PPPR Act and the case for a new Act

IN THIS CHAPTER, WE CONSIDER:

- the context of the PPPR Act;
- the decision-making arrangements and general approach to decision making in the PPPR Act;
- who is using the PPPR Act;
- key issues with the PPPR Act; and
- whether the PPPR Act should be repealed and replaced with a new Act.

INTRODUCTION

- 2.1 The Protection of Personal and Property Rights Act 1988 (PPPR Act) is the key piece of legislation that deals with adult decision-making capacity in Aotearoa New Zealand and is the focus of this Report.
- 2.2 When it was enacted nearly four decades ago, the PPPR Act represented a significant advancement in legislative recognition of the rights of people with affected decision making. However, as we explain in this chapter, there are now significant issues with it. We consider a new Act is needed.

THE CONTEXT OF THE PPPR ACT

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

- 2.3 The laws relating to adult decision-making capacity in Aotearoa New Zealand are derived from the ancient legal doctrine of “*parens patriae*”, which can be translated as “parent of

the nation”.¹ The phrase “*parens patriae*” reveals a key idea underpinning the development of these laws — namely, the idea that some adults are unable to safely manage their own affairs and therefore require protection in the form of another adult acting as a “quasi-parent” on their behalf.²

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

Early legislation

- 2.6 As time went on, legislation progressively replaced the operation of the *parens patriae* doctrine. Laws were passed to regulate state intervention in the lives of certain groups of people who the state considered to need special care or protection. This included legislation in relation to children and young people, those experiencing mental distress and the “aged and infirm”.⁶
- 2.7 One of the early laws passed in Aotearoa New Zealand dealing directly with the capacity of adults to make decisions was the Aged and Infirm Persons Protection Act 1912. This gave te Kōti Matua | High Court the power to appoint a manager for a person’s property where the Court was satisfied that the person was “by reason of age, disease, illness, or physical or mental infirmity ... [u]nable, wholly or partially, to manage his affairs”.⁷ Protection orders could also be issued under the Act if a person was using alcohol or any drug “in excess”.⁸
- 2.8 The Aged and Infirm Persons Protection Act primarily dealt with how the property of a person would be managed if their decision-making capacity was in question. It did not address matters concerning the person’s welfare, including decisions about medical

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

² See *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [10].

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

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

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

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

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

⁸ Aged and Infirm Persons Protection Act 1912, s 5.

treatment. Where required, the *parens patriae* doctrine continued to be employed under the inherent jurisdiction of the High Court.

The disability rights movement and the introduction of the PPPR Act

- 2.9 The disability rights movement began to emerge in the 1970s and 1980s, inspired by other social movements.⁹ The PPPR Act was enacted in this social context. The emerging disability rights movement and its strong human rights focus was one of the main driving forces for the introduction of the PPPR Act.¹⁰
- 2.10 The PPPR Act was designed to respond to concerns that the law did not treat disabled people as having the same rights as everyone else. Its provisions were intended to move away from the paternalistic approach of previous law and emphasise the rights of the person.¹¹ Other legislation with a rights focus was passed at about the same time, including the New Zealand Bill of Rights Act 1990 and the Mental Health (Compulsory Assessment and Treatment) Act 1992.
- 2.11 Alongside these domestic changes, there were increasing calls in the international human rights arena for more focus on the rights of disabled people. This marked a shift to a rights-based approach, under which denying or restricting rights because of impairment was considered discriminatory. These calls culminated in the adoption of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) on 13 December 2006. Aotearoa New Zealand ratified the Disability Convention in 2008.¹²
- 2.12 The Disability Convention elaborates on how rights in existing core human rights treaties apply to disabled people and provides instruction for states on how to recognise those rights.¹³ Two key ideas in the Disability Convention provide relevant context to the PPPR Act and help to identify issues with it:
- (a) The Disability Convention requires respect for a disabled person’s “rights, will and preferences”.¹⁴ Respecting a person’s will and preferences requires a focus on the individual and what they want in the making of any decision, including both their immediate wishes and their deeper values and aspirations. We discuss rights, will and preferences further in Chapter 12.

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

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

¹¹ See Bill Atkin “An Overview of the Protection of Personal and Property Rights Act 1988” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 111 at 112. It also addressed the gap in the earlier law in relation to health and welfare matters. In addition, it replaced Part 7 of the Mental Health Act 1969, which provided that the property of anyone committed under that Act was placed under property management automatically.

¹² United Nations “Status of Treaties: Chapter IV Human Rights: 15. Convention on the Rights of Persons with Disabilities” United Nations Treaty Collection <www.treaties.un.org>.

¹³ These include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

¹⁴ Article 12(4) requires states to provide for appropriate and effective safeguards that ensure measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.

- (b) The Disability Convention also imposes obligations on states to take appropriate measures to ensure disabled people have access to the support they need to make decisions.¹⁵ We discuss support further in Chapter 6.

OVERVIEW OF THE PPPR ACT

2.13 The PPPR Act provides for one-off decisions and representative arrangements that can be used when a person is assessed to lack decision-making capacity for a decision or decisions. Broadly speaking, decision-making capacity is the concept used by the law in Aotearoa New Zealand to describe a person's functional ability to make an autonomous decision for themselves and to communicate that decision.¹⁶ Various phrases in the PPPR Act are used to capture this idea, such as when a person lacks "capacity" or "competence" to make or communicate decisions or to "manage his or her own affairs". Because these all refer to the same idea described above, and for brevity, we refer simply to the concept of decision-making capacity. We discuss decision-making capacity in more detail in Chapters 8 and 9.

Decision making on a person's behalf

- 2.14 There are four main ways in which decisions can be made on a person's behalf under the PPPR Act:
- (a) *Court-ordered decisions*: Te Kōti Whānau | Family Court may make a range of decisions about the person's personal care and welfare such as requiring the person to live in a particular place or receive medical treatment.¹⁷
 - (b) *Welfare guardians*: The Family Court may appoint a welfare guardian.¹⁸ A welfare guardian is someone who is authorised to make decisions for another person about their personal care and welfare.
 - (c) *Property managers*: The Family Court may appoint a property manager.¹⁹ A property manager is someone who is authorised to make decisions about another person's property.
 - (d) *Enduring powers of attorney (EPOAs)*: The PPPR Act provides a process for one person to grant another person an EPOA to make personal care and welfare decisions for them and/or manage their property at some time in the future.²⁰

¹⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(3).

¹⁶ See for example Brent Hyslop and Grant Gillett "Ethical, Relational and Cultural Elements of Capacity" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 20; and Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, 2016) at 10–12. The concept of decision-making capacity is the focus of Chapter 8.

¹⁷ Protection of Personal and Property Rights Act 1988, s 10(1)(e)–(f). Decisions made by the Family Court about a person's care and welfare are often referred to as "personal orders". However, this term is confusing because (as defined in the PPPR Act) it also includes other orders, including orders appointing welfare guardians. For clarity, we refer to decisions made by the Family Court as court-ordered decisions.

¹⁸ Protection of Personal and Property Rights Act 1988, s 12.

¹⁹ Protection of Personal and Property Rights Act 1988, s 31.

²⁰ Protection of Personal and Property Rights Act 1988, s 94A.

- 2.15 How these orders and arrangements are made or entered into varies. For decisions or arrangements put in place by the Family Court, a finding that a person does not have decision-making capacity does not automatically mean a court-ordered decision or representative arrangement will be imposed:
- (a) For court-ordered decisions and property manager appointments, the Court must consider whether an order should be made. The PPPR Act contains primary objectives of imposing the least restrictive intervention and encouraging the person to develop their own decision-making capacity.²¹
 - (b) For welfare guardian appointments, the Court must also be satisfied that the relevant person “wholly lacks” decision-making capacity for the relevant decisions and that the appointment of a welfare guardian is “the only satisfactory way to ensure that appropriate decisions are made” in relation to the decisions at issue.²² The primary objectives of the PPPR Act are also relevant here.
- 2.16 EPOAs are voluntary arrangements that are entered into before a person is assessed not to have decision-making capacity in anticipation that they may not have decision-making capacity in the future. One person (the donor) gives another person (the attorney) the power to make decisions for them when they lose decision-making capacity (or, for EPOAs in relation to property, at an earlier date if the donor chooses).²³

A “best interests” approach to decision making

- 2.17 Under the PPPR Act, how decisions are made for people is heavily guided by an assessment of their best interests. When making decisions for the person with affected decision making, the best interests of the person with affected decision making is the paramount consideration of welfare guardians, property managers and attorneys.²⁴ When making court-ordered decisions, the Family Court can also consider what is in the best interests of the person.²⁵ We discuss “best interests” decision making in more detail in Chapter 12.

WHO IS USING THE PPPR ACT

- 2.18 There are no comprehensive data on who uses or is subject to court-ordered decisions or representative arrangements under the PPPR Act. This is particularly true for EPOAs, which are privately made and held.
- 2.19 There are some relevant data available from Te Tāhū o te Ture | Ministry of Justice on PPPR Act applications and other data on rates of dementia aware wareware that are relevant. In 2024, there were 7,865 applications made under the PPPR Act.²⁶ While this

²¹ Protection of Personal and Property Rights Act 1988, ss 8 and 28.

²² Protection of Personal and Property Rights Act 1988, s 12(2).

²³ Protection of Personal and Property Rights Act 1988, ss 97(4)(b) and 98(3). Donors may choose to authorise a property EPOA to come into effect immediately while the donor still has decision-making capacity: s 97(4)(a).

²⁴ Protection of Personal and Property Rights Act, ss 18(3), 36(1), 97A(2) and 98A(2).

²⁵ *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC) at 365–366.

²⁶ Email from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding PPPR Act data (5 September 2025).

represents a small proportion of the population, the number of applications has more than doubled since 2013 when 3,370 applications were filed.²⁷

- 2.20 Anyone who is assessed not to have decision-making capacity could theoretically use or be subject to a court-ordered decision or representative arrangement. There are many possible reasons for a person to be assessed as lacking decision-making capacity, and therefore many people in Aotearoa New Zealand may need a representative arrangement over the course of their lifetime. For example, we are aware of cases where court-ordered decisions or arrangements have been sought for people with acquired brain injuries, severe alcohol abuse, brain tumours, dementia mate wareware and learning disabilities.²⁸
- 2.21 People with dementia mate wareware and other forms of cognitive decline may more commonly use EPOAs. This is because people set up EPOAs in advance in case they lose decision-making capacity in the future. Rates of dementia mate wareware are therefore particularly relevant to the use of EPOAs. A report from Waipapa Taumata Rau | University of Auckland indicates that, by 2050, rates of dementia mate wareware will more than double to reach approximately 3 per cent of the total population.²⁹ This is likely to result in a corresponding increase in the use of EPOAs. We have heard anecdotally through consultation that the number of EPOAs is likely far higher than the number of representative arrangements that have been made by the Family Court.

KEY ISSUES WITH THE PPPR ACT

- 2.22 We have identified three key issues with the PPPR Act that require significant reform to address. These issues are briefly summarised below. We discuss them in more detail in later chapters, along with other issues that we have identified.

The PPPR Act does not recognise the importance of support for people with affected decision making

- 2.23 Decision-making support can empower people with affected decision making to make decisions about their own lives on an equal basis with others.³⁰ It is a core concept in the Disability Convention and is recognised as essential for disabled people to enjoy equal recognition before the law.³¹

²⁷ Email from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding PPPR Act data (31 July 2023).

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

²⁹ Etuini Ma'u and others *Dementia Economic Impact Report 2020* (Waipapa Taumata Rau | University of Auckland, September 2021) at 14.

³⁰ See Jeanne Snelling and Alison Douglass “Legal Capacity and Supported Decision-making” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 166–167; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [2.70]; Victorian Law Reform Commission *Guardianship: Consultation Paper – Part 3* (VLRC CP10, 2011) at [7.4]; and “What is supported decision-making?” (17 April 2025) Whaimana | Support My Decisions <www.supportmydecisions.nz>.

³¹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(3). In Chapter 6, we propose a definition for decision-making support in a new Act.

- 2.24 There is virtually no express reference to support for people with affected decision making in the PPPR Act.³² While the PPPR Act anticipates that representatives (attorneys under an EPOA, welfare guardians and property managers) might provide support in some situations,³³ it does not require them to do so.
- 2.25 There is also no requirement in the Act for the Family Court to consider whether a person is receiving sufficient support before a court-ordered decision or representative arrangement may be imposed. This fails to recognise that people with affected decision making may not require a representative arrangement if they have adequate support.

The “best interests” approach is no longer appropriate

- 2.26 The “best interests” approach is no longer appropriate for two main reasons.
- 2.27 First, the best interests approach in the PPPR Act may not always provide for the full and equal enjoyment of human rights by people with affected decision making.³⁴ Critical to this enjoyment is that the law enables people with affected decision making to live their life how they want to live it, in the light of what matters to them. This idea is captured in the first principle of the Disability Convention — namely, “[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”.³⁵ It is also reflected in the requirement to respect disabled people’s rights, will and preferences.³⁶
- 2.28 The PPPR Act’s focus on the best interests of people with affected decision making is not compatible with these requirements.³⁷ The Family Court held in 2021 that a person’s views are relevant (and potentially significant) to determining their best interests.³⁸ However, there is limited case law on this point, and the relevant person’s views are not given prominence in the PPPR Act. This means that, while the “best interests” approach may sometimes result in the person’s will and preferences being respected, it may not always do so. It does not ensure that what the person wants will be central where a representative arrangement is imposed or where decisions are made by others on their behalf. For this reason, the PPPR Act does not guarantee to people with affected decision making the full and equal enjoyment of their human rights.³⁹

³² There is only one mention of support in the PPPR Act. Section 79(1)(i) provides for “support persons” to be present at hearings regarding the relevant person.

³³ For example, representatives must consult with the represented person so far as practicable. This is not an express requirement for support but it may involve some provision of support. See Protection of Personal and Property Rights Act 1988, ss 18(4)(c)(i), 43(1)(a) and 99A(1)(a).

³⁴ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 1. See also United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [8]–[9].

³⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3(a).

³⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

³⁷ The PPPR Act makes numerous references to the relevant person’s best interests in relation to the appointment of a representative and decision making by representatives. See Protection of Personal and Property Rights Act 1988, ss 12, 18(3), 30(1)(c), 31(5)(b), 36(1), 97A(2) and 98A(2).

³⁸ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [51].

³⁹ See our discussion on human rights in Chapter 3.

- 2.29 In addition, despite the Family Court identifying the importance of the person's views, the best interests approach remains associated with a paternalistic approach to decision making. This was emphasised to us during our public consultation and focus groups. This association is not conducive to decisions that promote the dignity, autonomy and equality of people with affected decision making.

The PPPR Act is confusing and inconsistent

- 2.30 The PPPR Act is difficult to follow for a number of reasons.⁴⁰ It was drafted over 30 years ago and does not meet modern drafting standards or use clear and plain language. The structure is not intuitive and the policy objectives and purpose of the legislation are not clearly defined.
- 2.31 The PPPR Act is also seemingly inconsistent in many places. For example, as we explain in later chapters, there are multiple, inconsistent legislative tests to determine whether a person has decision-making capacity or whether a representative arrangement should be imposed for care and welfare or property matters.⁴¹ There is no clear reason for these tests being different.
- 2.32 Legislation should be accessible for users — it should be easily found, easy to navigate and easy to understand.⁴² These standards are particularly important for people with affected decision making, who may face additional barriers to accessing and understanding legislation that affects them.

THE NEED FOR A NEW ACT

- 2.33 The PPPR Act requires reform in a number of significant ways. In our view, the extent of the required reform means the PPPR Act should be repealed and replaced with a new Act.
- 2.34 Foundational change is required. The PPPR Act was designed and built on ideas that are no longer appropriate in the light of contemporary understandings of disability and Aotearoa New Zealand's ratification of the Disability Convention. The Legislation Design and Advisory Committee guidelines state:⁴³
- If existing legislation is to be heavily amended (or it is already old or heavily amended), consideration should be given to replacing it instead ... If multiple amendments will cause the resulting law to be so complex it becomes difficult to understand, replacing the legislation should be preferred. Complexity can arise through grafting new policies onto existing frameworks so that the overall coherence of the legislation is lost.
- 2.35 Amending the PPPR Act to reflect up-to-date understandings of disability and comply with the Disability Convention would, we consider, involve “grafting new policies onto existing frameworks”.
- 2.36 There is a further, significant, reason to prefer a new Act over an amended PPPR Act. Many of the legal changes that we recommend in this Report would necessitate, and rely for their effectiveness on, changes in attitude and practice. In our view, replacing the

⁴⁰ See *New Zealand Disability Strategy 2026–2030* (Whaikaha | Ministry of Disabled People, December 2025) at 47.

⁴¹ See Chapters 9 and 14.

⁴² See Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 9.

⁴³ See Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [3.1].

PPPR Act with an entirely new Act would more tangibly signal the extent of legal change and thereby underscore the importance of changes in practice and attitudes.

- 2.37 Many submitters called for a more holistic and support-focused approach for people with affected decision making. A number of submitters said an attitudinal shift is needed to the ability of adults with affected decision making to make their own decisions and that greater understanding of the importance of decision-making support is required. Some felt that current assumptions about decision-making capacity lead to paternalistic decisions being made for people with affected decision making. We also heard that current practices are inconsistent. A new Act would best respond to these concerns.
- 2.38 For all these reasons, we consider an entirely new Act is to be preferred. We therefore refer throughout this Report to a new Act rather than to an amended PPPR Act.

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

CHAPTER 3

Human rights

IN THIS CHAPTER, WE CONSIDER:

- the values of equality, dignity and autonomy;
- the social model of disability;
- the Disability Convention, including article 12 (the right to equal recognition before the law); and
- how other human rights relate to this review.

INTRODUCTION

- 3.1 Good law complies with international and domestic human rights obligations.¹ Many such obligations are relevant to law about people with affected decision making.
- 3.2 Underlying these obligations 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.
- 3.3 The United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) contains the fullest elaboration of the rights of disabled people under international law. Article 12 of the Disability Convention is particularly relevant to this review. It requires states to recognise that disabled people enjoy legal capacity on an equal basis with others. We provide an overview of article 12 in this chapter.²
- 3.4 Article 12 does not operate in a vacuum. It exists alongside other human rights. As we explain in this chapter, examples of 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. Later in this chapter, we briefly discuss some ways in which the subject matter of this review engages these rights.

¹ Some rights found in international law conventions have direct counterparts in Aotearoa New Zealand's domestic law and others do not. Even where international obligations are not implemented domestically, the state is required under international law to comply with them.

² We address specific issues as they arise throughout this Report. In particular, see Chapters 6, 7 and 12.

EQUALITY, DIGNITY AND AUTONOMY

- 3.5 The fundamental values of equality, dignity and autonomy underlie human rights.³ In this section, we provide a high-level overview of what these intertwined values mean in the context of human rights law.
- 3.6 The rights to equality and non-discrimination are deeply embedded in international human rights law and thread through the Disability Convention. For example, article 1 states one of the Convention’s purposes is to promote, protect and ensure the “full and equal” enjoyment of all human rights.
- 3.7 There are many different views about what equality means and what it requires.⁴ In broad terms, the concept of equality underlying the Disability Convention is a substantive one. In other words, it recognises that sometimes people need to be treated differently to ensure they can participate in society on an equal basis.⁵
- 3.8 The idea of dignity also underpins human rights law. It is referred to in fundamental international human rights instruments. For example, the preamble to the Universal Declaration of Human Rights recognises that dignity is an inherent characteristic of all people.⁶ More recently, the Disability Convention refers to the “inherent dignity” of disabled people.⁷ Human rights cases in Aotearoa New Zealand have also emphasised the importance of dignity.⁸
- 3.9 At a high level, dignity signals the inherent worth of all people by virtue of their humanity.⁹ It means that “each person’s humanity *means something* and has *worth*”.¹⁰ Dignity is therefore necessarily linked to equality’s insistence that all people have the same or equal

³ For a discussion of these values in relation to mental capacity, see Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023), which considers mental capacity in the context of autonomy, dignity and equality.

⁴ For an overview of different conceptions of equality, see Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) 1; Sheilah L Martin “Equality Jurisprudence in Canada” (2019) 17 NZJPL 127 at 131; and John von Doussa “‘One Law For All’” (2005) 13 Wai L Rev 12 at 12.

⁵ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [10]; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3(c) and (e), stating the principles of full and effective participation and inclusion in society and equality of opportunity.

⁶ The Declaration also provides that “[a]ll human beings are born free and equal in dignity and rights”: *Universal Declaration of Human Rights* GA Res 217A (1948), art 1.

⁷ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3(a).

⁸ See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [338]; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [67], [73]–[74] and [105]; *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [177]–[182]; *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [196]–[203]; and *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1 at [48]–[57].

⁹ See Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 629; and *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [79].

¹⁰ James R May and Erin Daly “Why dignity rights matter” (2019) 2 EHRLR 129 at 129; and *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [86] (emphasis added).

- value.¹¹ Dignity is not respected when “a person is treated as less than human, in a way which violates [their] right to equality in dignity and rights”.¹²
- 3.10 Dignity and equality, in turn, are linked with autonomy. There are different conceptions of autonomy.¹³ A value underlying many of them is that people should be able to live their life how they want to live it, in the light of their own sense of what matters.¹⁴
- 3.11 The first principle of the Disability Convention is “[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”.¹⁵ Disabled people have historically been, and sometimes continue to be, denied the ability to live their life how they want to live it and to make their own decisions.¹⁶ If a disabled person’s autonomy is treated as of less importance than others’, they are not being treated as of equal value as a person and their dignity is not recognised.
- 3.12 Dignity, equality and autonomy underpin a concept of particular relevance to this review called the “dignity of risk”. This is the idea that dignity requires people to have the ability to exercise choice, including to make risky choices.¹⁷ Inherent in this view is that the ability to exercise choice is deeply tied to what it means to be human — and hence to a person’s dignity, autonomy and equality.¹⁸
- 3.13 On the other hand, the values of dignity, autonomy and equality also underpin the protective function of human rights law.¹⁹ Upholding them may sometimes require a person who is vulnerable to be protected from a risk of harm. Dignity of risk does not equate dignity with the ability to take any type of risk in any situation. Rather, it requires the law to distinguish between situations in which dignity, autonomy and equality require respect for a person’s decision to run a risk and situations in which they do not.

¹¹ James R May and Erin Daly “Why dignity rights matter” (2019) 2 EHRLR 129 at 129; and *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [86]. See also United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [4].

¹² *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [86].

¹³ For example, while traditional liberal conceptions of autonomy emphasise the value of independence, relational conceptions of autonomy emphasise social and interpersonal connections and dynamics. See John Christman “Autonomy in Moral and Political Philosophy” in *The Stanford Encyclopedia of Philosophy* (online ed, Plato, 2025) at [3.1] and [3.3]. See also Natalie Stoljar “Feminist Perspectives on Autonomy” in *The Stanford Encyclopedia of Philosophy* (online ed, Plato, 2024) at [3].

¹⁴ See John Christman “Autonomy in Moral and Political Philosophy” in *Stanford Encyclopedia of Philosophy* (online ed, Plato, 2025); and Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 391.

¹⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3(a).

¹⁶ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [7].

¹⁷ Piers Gooding “Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law” (2013) 20 *Psychiatry, Psychology and Law* 431 at 436, as cited in Jeanne Snelling and Alison Douglass “Legal Capacity and Supported Decision-making” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 168.

¹⁸ See Law Commission of Ontario *Legal Capacity, Decision-making and Guardianship: Final Report* (March 2017) at 42.

¹⁹ The value of autonomy is most often conceived to support leaving people to make their own choices. This is an important consideration in this review. However, as we explain in Chapter 7, we consider that conceiving autonomy as always favouring non-interference is unduly narrow. See Camilla Kong and Alex Ruck Keene *Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues* (Jessica Kingsley Publishers, London, 2018) at 30–36.

EVOLVING MODELS OF DISABILITY

- 3.14 Modern understandings of what is required to give effect to the human rights of disabled people have emerged alongside a broader evolution in thinking about the nature and causes of disability.
- 3.15 For a long time in Western society, disability was viewed through the lens of a “medical model”. The medical model views disability as an individual issue — an illness, condition or impairment that requires intervention, sometimes without the individual’s consent.²⁰
- 3.16 Different ways of thinking about disability have subsequently developed. The “social model” of disability was developed in the 1980s and has been particularly influential.²¹ At a high level, the social model describes disability in a way that does not focus on a person’s impairment. Instead, the focus is on identifying the physical and societal barriers that prevent people with impairments from being fully included in society.²² The social model posits that it is “the level of accommodations made by a society that determines the degree to which a person’s impairment becomes a disability”.²³
- 3.17 In the twenty-first century, academics and commentators have increasingly referred to the “human rights model” of disability. Whereas the social model of disability seeks to *explain* disability, the human rights model of disability has been put forward as a basis for disability *policy*.²⁴ It seeks to provide “moral principles or values as a foundation of disability policy”,²⁵ focusing on the inherent dignity of the human being.²⁶ The human rights model is often described as giving greater emphasis to impairment than the social model, asking “what human rights citizenship means” for people affected by impairments.²⁷ The human rights model is variously conceived as a development of, or complementary to, the social model.²⁸

²⁰ For an explanation of the medical model, see for example Alice Mander “The Stories That Cripple Us: The Consequences of the Medical Model of Disability in the Legal Sphere” (2022) 53 VUWLR 337 at 343–346.

²¹ Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 International Journal of Human Rights 348 at 349.

²² Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 International Journal of Human Rights 348 at 363–364.

²³ George Szmukler “‘Capacity’, ‘best interests’, ‘will and preferences’ and the UN Convention on the Rights of Persons with Disabilities” (2019) 18(1) World Psychiatry 34 at 35.

²⁴ Theresia Degener “A New Human Rights Model of Disability” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 41 at 43; Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 International Journal of Human Rights 348 at 364.

²⁵ Theresia Degener “A New Human Rights Model of Disability” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 41 at 43.

²⁶ Gerard Quinn and Theresia Degener “The Moral Authority for Change: Human Rights Values and the World Wide Process of Disability Reform” in Gerard Quinn and Theresia Degener (eds) *Human Rights and Disability: The Current Use and Future Potential of Human Rights Instruments in the Context of Disability* (United Nations, 2002) 13 at 13–14.

²⁷ Peter Bartlett “Beyond the liberal subject: challenges in interpreting the CRPD, and the CRPD’s challenges to human rights” (2025) 25(2) Human Rights Law Review 1 at 4.

²⁸ See Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 International Journal of Human Rights 348.

THE DISABILITY CONVENTION

- 3.18 The Disability Convention and its Optional Protocol (enabling individuals to complain if their rights have been violated) were adopted by the UN General Assembly in 2006.²⁹ The Convention entered into force for Aotearoa New Zealand in 2008 and the Optional Protocol in 2016.³⁰
- 3.19 The Disability Convention followed years of lobbying by the disability rights movement. Disabled people were actively involved in the negotiation of the Disability Convention at a level unprecedented in international lawmaking.³¹
- 3.20 The Disability Convention is often said not to recognise new rights. Rather, it is said to elaborate how rights in existing core human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights apply to disabled people.³² However, the Disability Convention includes “considerably more detailed instruction” for states than other human rights treaties.³³

Framing of disability

- 3.21 The social model of disability played a key role in the development of the Disability Convention and is reflected in the Convention’s framing of disability.³⁴ Proponents of the human rights model of disability also describe the Convention as reflecting, or providing a “tool to implement”, that model.³⁵
- 3.22 The preamble to the Convention states that disability is an “evolving concept”. Consistent with this view, the Convention does not define “disability”. However, the target group of “persons with disabilities” is described non-exhaustively in article 1 as including:

... those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

²⁹ Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (opened for signature 30 March 2007, entered into force 3 May 2008).

³⁰ The Disability Convention and Optional Protocol were formally adopted by the following General Assembly Resolution: *Resolution on the Convention of the Rights of Persons with Disabilities A/RES/61/106* (2006). Aotearoa New Zealand signed the Convention in 2007, ratified it in 2008 and acceded to the Optional Protocol in 2016: Te Tāhū o te Ture | Ministry of Justice “Convention on the Rights of Persons with Disabilities” (20 May 2025) <www.justice.govt.nz>.

³¹ See Theresia Degener and Andrew Begg “From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 1 at 11–15.

³² See for example Valentina Della Fina “Article 1 [Purpose]” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 89 at 93.

³³ Peter Bartlett “Beyond the liberal subject: challenges in interpreting the CRPD, and the CRPD’s challenges to human rights” (2025) 25(2) *Human Rights Law Review* 1 at 5–6.

³⁴ See Anna Lawson and Angharad E Beckett “The social and human rights models of disability: towards a complementarity thesis” (2021) 25 *International Journal of Human Rights* 348 at 351.

³⁵ See for example Theresia Degener “A New Human Rights Model of Disability” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 41 at 41.

Full and equal enjoyment of rights

- 3.23 The purpose of the Disability Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.³⁶ Equality and non-discrimination “are at the heart of” the Convention’s substantive articles, which provide for disabled people to enjoy specific rights “on an equal basis with others”.³⁷
- 3.24 Active steps are sometimes needed to enable disabled people to enjoy their rights fully and equally. Article 5(3) imposes a positive obligation on states to “take all appropriate steps to ensure that reasonable accommodation is provided”. Reasonable accommodation is defined to mean:³⁸
- ... necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms ...
- 3.25 The definition of “discrimination on the basis of disability” in article 2 specifies that it includes denial of reasonable accommodation.³⁹
- 3.26 In addition to the concept of reasonable accommodation, many of the rights in the Disability Convention articulate steps that states must take to ensure equality in the light of the societal barriers disabled people face. For example, article 21, which deals with freedom of expression, specifies that disabled people must be able to use sign language, Braille and other alternative communication measures when interacting with government officials.⁴⁰

General obligations of states

- 3.27 States that are parties to the Disability Convention have a general obligation to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”.⁴¹

³⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 1. See also the general principles in art 3, which include: respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; and accessibility.

³⁷ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [8].

³⁸ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2 definition of “Reasonable accommodation”.

³⁹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2 definition of “Discrimination on the basis of disability”. See also United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [19]. The Human Rights Act 1993 requires reasonable accommodation to be made for disabled people in various situations, for example, concerning employment: s 29.

⁴⁰ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 21(b).

⁴¹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(1).

Central to this review, this obligation includes ensuring that all laws, policies and practices comply with the Disability Convention.⁴²

- 3.28 When developing and implementing legislation and policies to give effect to the Disability Convention, states must closely consult and actively involve disabled people.⁴³ This obligation reflects the “nothing about us without us” principle that informed the development of the Convention.⁴⁴
- 3.29 With respect to *when* states are required to realise their obligations, the Disability Convention provides for a different approach to civil and political rights (on the one hand) and economic, social and cultural rights (on the other). Civil and political rights must be realised immediately. By contrast, a state can realise economic, social and cultural rights progressively by taking “measures to the maximum of its available resources”.⁴⁵ This distinction reflects that taken in other international treaties.⁴⁶ The distinction is complex in the context of the Disability Convention, which sometimes includes both categories of rights in a single article.⁴⁷

Monitoring the Disability Convention

- 3.30 The Disability Convention establishes a Committee on the Rights of Persons with Disabilities (Disability Committee). States are required to report periodically to the Disability Committee on the measures they have taken to give effect to their obligations under the Disability Convention.⁴⁸ The Committee reviews states’ progress towards compliance and makes suggestions and general recommendations.⁴⁹ Where states have acceded to the Optional Protocol, the Disability Committee can consider individual

⁴² Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(1)(a)–(b).

⁴³ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(3).

⁴⁴ See Theresia Degener and Andrew Begg “From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 1 at 19 and 38.

⁴⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(2).

⁴⁶ For example, the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) sets out the principle of “progressive realisation” in art 2.1. The International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) does not include such a principle.

⁴⁷ See Andrea Broderick “Article 4: General Obligations” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 106 at 131, n 149.

⁴⁸ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 34–35.

⁴⁹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 36. For example, the Disability Committee responded to Aotearoa New Zealand’s 2013 report that “immediate steps to revise the relevant laws and replace substituted decision-making with supported decision-making” needed to be taken to ensure compliance with art 12: United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of New Zealand* UN Doc CRPD/C/NZL/CO/1 (31 October 2014) at 2. We discuss this issue in detail in Chapter 7.

complaints of violations of the Disability Convention and conduct inquiries into grave or systemic violations.⁵⁰

- 3.31 The Disability Committee also issues guidance, including by providing general comments on the interpretation of treaty provisions. Statements by other UN human rights bodies can also be relevant to rights recognised in the Disability Convention. For example, the United Nations Human Rights Committee, which is established under the ICCPR, makes comments about rights recognised in the ICCPR. These may be relevant to how cognate rights in the Disability Convention are interpreted.⁵¹
- 3.32 The statements of UN committees (including the Disability Committee) are not direct sources of binding obligation in and of themselves.⁵² Rather, they are sources of interpretive authority (sometimes persuasive) that help us to understand the meaning and scope of relevant international law obligations.⁵³

ARTICLE 12 OF THE DISABILITY CONVENTION

- 3.33 Article 12 of the Disability Convention is particularly relevant to this review. It concerns disabled people's right to equal recognition before the law. It describes what states must do to ensure equality before the law for disabled people.⁵⁴
- 3.34 Given the significance of article 12 to this review, we set it out in full:
1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
 2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a

⁵⁰ Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 1 and 6. As noted above, Aotearoa New Zealand acceded to the Optional Protocol in 2016.

⁵¹ See Alex Ruck Keene and others "Mental capacity — why look for a paradigm shift?" (2023) 31 *Med L Rev* 340 at 348.

⁵² See Helen Keller and Geir Ulfstein "Introduction" in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) 1 at 4; and John Dawson "The CRPD and Mental Capacity Law" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 95 at 109.

⁵³ See Helen Keller and Leena Grover "General Comments of the Human Rights Committee and their legitimacy" in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) 116 at 117–118.

⁵⁴ See United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [1]. The right to equal recognition before the law is recognised in the Universal Declaration of Human Rights (art 6) and International Covenant on Civil and Political Rights (art 16) in the following terms: "Everyone shall have the right to recognition everywhere as a person before the law".

competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the persons' rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Overview of article 12

- 3.35 Article 12 has a particular focus on legal capacity. The Disability Committee has explained that legal capacity refers to a person's entitlement, as a matter of law, to:⁵⁵
- (a) hold rights and duties ("legal standing"); and
 - (b) exercise those rights and duties ("legal agency").
- 3.36 Legal capacity is necessary to exercise rights.⁵⁶ The denial of legal capacity to disabled people has led to rights being denied such as the right to vote, the right to found a family and the right to liberty.⁵⁷ Disabled people "remain the group whose legal capacity is most commonly denied in legal systems worldwide".⁵⁸
- 3.37 Article 12 is grounded in the concepts of equality, dignity and autonomy. As explained by the Disability Committee, "[f]reedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person".⁵⁹
- 3.38 The Disability Committee considers the principle of progressive realisation (which, as noted above, applies in respect of economic, social and cultural rights) does not apply to article 12. That is on the basis that the right to equality before the law is a civil and political right with roots in the ICCPR. The Committee has called on states to "immediately begin taking steps towards the realization of the rights provided for in article 12".⁶⁰

⁵⁵ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [13].

⁵⁶ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [47].

⁵⁷ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

⁵⁸ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

⁵⁹ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [33].

⁶⁰ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [30].

Ambiguity in article 12

- 3.39 There is significant debate about what article 12 requires. As leading scholars have observed, “[t]hroughout the history of article 12, and its associated literature, the theme of ambiguity recurs”.⁶¹ Particular (and interrelated) areas of contention include:
- (a) whether article 12 completely prohibits decision-making arrangements under which a person or court makes a decision on behalf of a disabled person;
 - (b) whether measures that restrict a disabled person’s exercise of legal capacity based on a lack of decision-making ability always amount to unjustified discrimination (in breach of article 12(2));
 - (c) the nature of states’ obligations (under article 12(3)) to provide disabled people access to support they may require in the exercise of their legal capacity; and
 - (d) what it means for measures relating to legal capacity to have appropriate safeguards (under article 12(4)).
- 3.40 These are key issues for our review. We address them primarily in Chapters 6, 7, 8 and 12. In short, we consider that article 12 does not prohibit in all circumstances decision-making arrangements under which a person or court makes a decision on behalf of a disabled person. However, it imposes important requirements in relation to these arrangements. A decision should only be made for a person where they cannot be supported to make the decision themselves. Where a decision is made for a person, it must respect the person’s “rights, will and preferences”. A person’s will and preferences include the wishes they express and their underlying values and beliefs.

MANY OTHER RIGHTS ARE RELEVANT TO THIS REVIEW

- 3.41 The right to equal recognition before the law is central to legal measures for people with affected decision making. However, it cannot be exercised in a vacuum. Other rights are necessary to exercise legal capacity. For example, a person cannot make a meaningful choice about a medical matter if they do not have access to adequate healthcare.⁶² Relevant rights arise in overlapping instruments, including the Disability Convention and core human rights treaties and in domestic law, including in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).
- 3.42 Measures relating to the exercise of legal capacity can engage civil, political, economic, social and cultural rights.⁶³ Some examples of decisions that can arise, and the rights that can be engaged, are as follows:
- (a) *Whether a person receives medical treatment*: Depending on the scenario involved, rights immediately engaged may include the right to the highest attainable standard

⁶¹ See Lucy Series and Anna Nilsson “Article 12 CRPD: Equal Recognition before the Law” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 341; and János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 27–48.

⁶² Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 79–81.

⁶³ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8].

of health, the right to life, the right to refuse medical treatment and the right not to be subject to torture or cruel or degrading treatment.⁶⁴

- (b) *Whether a person should sell their house:* The right of disabled people to own and dispose of property on an equal basis to others is specifically protected in the Disability Convention, reflecting the fact that, historically, this right has been restricted.⁶⁵ In some circumstances, other rights may be engaged such as the right to an adequate standard of living and the right to freedom from exploitation and abuse.⁶⁶
- (c) *Whether a person should live in residential care:* In some circumstances, placing and holding a person in residential care amounts to a detention for the purposes of the NZ Bill of Rights and international law, engaging the right to liberty, including the right to be free from arbitrary detention.⁶⁷ Even if there is no detention, decisions about where people live that are contrary to their wishes and values may engage other rights such as freedom of movement.⁶⁸ Where a person's current living arrangement raises safety issues, other rights might be relevant such as the right to the highest attainable standard of health, the right to an adequate standard of living and the right to freedom from exploitation and abuse.⁶⁹

3.43 In all the above scenarios, other rights can be engaged. For example, te Tiriti o Waitangi | Treaty of Waitangi (Treaty) and the right to self-determination (as recognised by the United Nations Declaration on the Rights of Indigenous Persons) are relevant where Māori want decisions to be made in accordance with tikanga. As Aotearoa New Zealand is a multicultural society, the rights of minorities to practise their culture and religion and use

⁶⁴ New Zealand Bill of Rights Act 1990, ss 8, 9 and 11; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 6–7; Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 10, 15 and 25; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 12.

⁶⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(5).

⁶⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 16, 25 and 28; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), arts 11–12.

⁶⁷ New Zealand Bill of Rights Act 1990, s 22; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 9.1; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 14.

⁶⁸ New Zealand Bill of Rights Act 1990, ss 16 and 18; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 12 and 21; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 18 and 19.

⁶⁹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 16 and 28; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 11.

their language can be engaged.⁷⁰ Where a decision involves accessing, using or disclosing a person's private information, privacy rights and interests must be considered.⁷¹

- 3.44 We discuss Treaty obligations in Chapter 4. Other rights are considered as relevant throughout the Report. However, it is not practicable to identify and comprehensively consider in this Report all human rights that can be engaged where people have affected decision making. Our recommendations are intended to provide a framework that reflects New Zealand's obligations under article 12, safeguards other rights that are clearly engaged and enables other relevant rights to be considered as they arise. In this way, our recommendations seek to protect and promote the equality, dignity and autonomy of people with affected decision making.
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⁷⁰ These rights are reflected in several international human rights instruments as well as in the NZ Bill of Rights: New Zealand Bill of Rights Act 1990, ss 13–15; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 18, 19 and 27; Universal Declaration of Human Rights GA Res 217A (1948), arts 19 and 27; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 15(1)(a); and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 30. See generally United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007). See also Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 2 right 1(3).

⁷¹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 22. See also Privacy Act 2020, s 22.

CHAPTER 4

Te ao Māori in this review

IN THIS CHAPTER, WE CONSIDER:

- the tikanga relevant to this review; and
- the Crown's relevant obligations under te Tiriti o Waitangi | Treaty of Waitangi.

INTRODUCTION

- 4.1 In te ao Māori, many tikanga are relevant to the issues we consider in this review. Tikanga provides collective responses that uphold the mana (authority) and mauri (life essence) of people with affected decision making and enhance their hauora (holistic wellbeing).¹
- 4.2 As we explain in this chapter, Māori experience disability and health conditions that can affect decision-making ability more often than the general population. Te Tiriti o Waitangi | Treaty of Waitangi (Treaty) has been understood to place obligations on the Crown to positively promote equity between Māori and non-Māori.
- 4.3 Although our review of the Protection of Personal and Property Rights Act 1988 (PPPR Act) cannot directly address this broader issue of inequity of health outcomes, our recommendations can help minimise any further disadvantages Māori may suffer as a result of it. To help ensure the higher rates of affected decision making among Māori do not create further inequities, a new Act should give more space for approaches to supporting, and acting for, a person with affected decision making in line with tikanga.
- 4.4 We do not make any recommendations in this chapter. Rather, we point to the various recommendations elsewhere in this Report that recognise tikanga and that are intended to help ensure decision-making arrangements under a new Act meet the needs of Māori.

¹ The definitions for mana, mauri and hauora we provide are only brief, in-text definitions to assist readers with comprehension. For a more comprehensive explanation of these terms, see Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at ch 3. See also Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauriki Research Institute, Victoria University Press, Wellington, 2013).

TIKANGA IN THIS REVIEW

What is tikanga?

- 4.5 Tikanga is the set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori.² Within te ao Māori, tikanga is a source of rights, obligations and authority that governs relationships.³
- 4.6 Tikanga may involve both:⁴
- (a) tikanga Māori, being values and principles that are broadly shared and accepted generally by Māori; and
 - (b) localised tikanga that are shaped by the unique knowledge, experiences and circumstances of individual Māori groups (such as iwi, hapū, marae or whānau).
- 4.7 Tikanga has been described as values-based and context-dependent.⁵ While tikanga is “suspicious of unbending rules”,⁶ it also functions as a coherent, integrated and comprehensive whole in which both principles and precedent are important.⁷

Why is tikanga relevant to law reform?

- 4.8 In Aotearoa New Zealand today, tikanga is significant to those engaging in law reform in the following ways:
- (a) Tikanga is the first law of Aotearoa New Zealand and has continuing significance as an independent source of rights, interests and obligations for Māori.
 - (b) Tikanga is part of New Zealand law. As underscored by te Kōti Mana Nui | Supreme Court, tikanga forms part of New Zealand law through the common law and statutes and regulations that incorporate it.⁸ It may also be a relevant consideration for public bodies where it is incorporated into their policies and processes.
 - (c) Tikanga is important to giving effect to rights and obligations under the Treaty.
 - (d) Tikanga is relevant under international instruments in relation to Māori as indigenous people. For example, rights of indigenous peoples affirmed by the United Nations Declaration on the Rights of Indigenous Peoples include the right to “practise and

² Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at 9.

³ See generally Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at ch 3.

⁴ See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.22] and Figure 1.

⁵ David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 9; and *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [74]. The majority noted: “[i]t is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context”.

⁶ *Doney v Adlam* [2023] NZHC 363 at [103].

⁷ See generally Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006); Caren Fox “Ko te mana te utu: narratives of sovereignty, law and tribal citizenship in the Pōtikirua ki Te Toka-a-Taiau district” (PhD Thesis, Te Whare Wānanga o Awanuiāraangi, 2023); and Hirini Moko Mead and Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [33], as cited in Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarataru, ko ngā tuinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors” (NZLC SP24, Appendix 2, 2023) at [2.37].

⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19]. See also *Smith v Fonterra* [2024] NZSC 5, [2024] 1 NZLR 134 at [182]–[189].

revitalize their cultural traditions and customs” and to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions” while also retaining the right to choose to participate fully in the life of the state.⁹

- 4.9 Guidelines published by the Cabinet Office and the Legislation Design and Advisory Committee also require those engaging in review and reform of the law to consider tikanga.¹⁰

Tikanga and the PPPR Act

- 4.10 The PPPR Act does not refer to tikanga. However, some case law recognises that it can be relevant to decisions under the Act.
- 4.11 In a case where te Kōti Whānau | Family Court was considering the appointment of a representative for a Māori person with dementia mate wareware, the Court said “cultural considerations and the implications for [the relevant person] need to be considered by the Court and given significant weight”.¹¹ As a result, the Court gave “significant weight to tikanga principles”.¹² Relatedly, te Kōti Matua | High Court has observed that a person’s “cultural heritage” can be relevant to decisions made under the PPPR Act.¹³
- 4.12 In another Family Court case, the Court said “tikanga can and where relevant should be considered when appropriate in making decisions under the Act”.¹⁴ In this case, tikanga was material to the Court’s decision to appoint a representative for a kaumātua (elder) with dementia mate wareware. In the context of a whānau dispute about where the kaumātua should live, the Court chose a mokopuna the Court was hopeful would reunite the whānau. The Court reasoned this would improve the kaumātua’s taha hinengaro (mental wellbeing), taha wairua (spiritual wellbeing) and taha whānau (family wellbeing), which were all connected to the health of the whānau.¹⁵

Many tikanga are relevant to this review

- 4.13 Our research and consultation have indicated that there is a number of tikanga that are relevant to decision making in te ao Māori and, therefore, to this review, including:¹⁶
- (a) whakapapa (referring to a person’s web of connections, often specifically genealogical connections);

⁹ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), arts 5 and 11(1).

¹⁰ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [74] and [76]; and Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [3.4] and [5.3].

¹¹ *Re [S]* [2021] NZFC 5911 at [25].

¹² *Re [S]* [2021] NZFC 5911 at [36].

¹³ *T-E v B [Contact]* [2009] NZFLR 844 (HC) at [18].

¹⁴ *IF v AN* [2025] NZFC 7862 at [45].

¹⁵ *IF v AN* [2025] NZFC 7862 at [77]–[81].

¹⁶ These were tikanga we also identified in our Second Issues Paper. They are taken from research and from consultation on our Preliminary Issues Paper, where we asked specifically about tikanga that were relevant. See Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [5.11]. Other values and principles were identified by submitters to our Preliminary Issues Paper, including: manaakitanga (the well-known term for caring for one another); whakapono (making decisions with the honest belief that they are in the person’s best interests); ngākau (a doorway to the wairua, good and bad feelings, and being able to connect); and whatumanawa (a place for deepest feelings and trauma and supporting the person through these traumas).

- (b) whanaungatanga (kinship, involving maintaining relationships, strengthening bonds and collective responsibilities);
 - (c) aroha (involving loving concern for a person and acting with their welfare in mind);
 - (d) mana (involving authority and responsibilities);
 - (e) tiaki (guardianship or stewardship);
 - (f) wairua (the spiritual essence of a person that can be damaged or disrupted);
 - (g) mauri-ora (the healthy life force of a person); and
 - (h) rongō (signifying a state of internal balance and peace).
- 4.14 Also relevant are Māori understandings of health and disability. Tā Mason Durie’s *Te Whare Tapa Whā* conceptualises hauora (holistic wellbeing) as comprising four taha (walls of a house). These are: taha hinengaro (relating to mental health); taha wairua (relating to spiritual health); taha whānau (relational health); and taha tinana (relating to physical health).¹⁷ Durie emphasises the importance of taha whānau and taha wairua to Māori understandings of wellbeing and health:¹⁸
- Emphasis on relationships reflects a Māori belief that personal understanding, knowledge, and awareness derive from outside the individual, not within ... answers are sought in the restitution of positive cultural links and relationships which will enhance internal understanding and confidence.
- 4.15 The emphasis on taha whānau and taha wairua are consistent with broadly accepted understandings of “the role that collectivism and interdependence of Māori play in health and well-being”.¹⁹ This approach extends to Māori conceptions of mental health. Rather than viewing mental health as an individual issue, mental health problems can be seen as indicators that the balance between emotions, social relationships, spirituality and the body have become distorted.²⁰
- 4.16 Similarly, Māori understandings of disability tend to be more holistic and emphasise relationships and collective responsibility to others. Huhana Hickey and Denise Wilson’s “Whānau Hauā” perspective conceptualises disability as a collective endeavour of tāngata whaikaha Māori (people with a disability) and their whānau, which is:²¹

¹⁷ Mason Durie “Is there a distinctive Māori psychology?” (paper presented to the National Māori Graduates of Psychology Symposium, Hamilton, 2002); and Mason Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 49.

¹⁸ Mason Durie “Is there a distinctive Māori psychology?” (paper presented to the National Māori Graduates of Psychology Symposium, Hamilton, 2002); and Mason Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 49.

¹⁹ Paula Thérèse King *Research Report on Māori with Lived Experience of Disability: Part 1* (Waitangi Tribunal, Wai 2575, #B22, 24 June 2019) at 17.

²⁰ See Mason Durie “Is there a distinctive Māori psychology?” (paper presented to the National Māori Graduates of Psychology Symposium, Hamilton, 2002); and Mason Durie *Ngā Kāhui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 48. See also Hinemoa Elder “Te Puna a Hinengaro: He Tirohanga ki a Āheinga | The Wellspring of the Mind: Reflections on Capacity from a Māori Perspective” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 29; and Keri Ratima and Mihi Ratima “Māori Experience of Disability and Disability Support Services” in Bridget Robson and Ricci Harris (eds) *Hauora: Māori Standards of Health IV: A study of the years 2000–2005* (Te Rōpū Rangahau Hauora a Eru Pōmare, University of Otago, Wellington, 2007) 189.

²¹ Huhana Hickey and Denise L Wilson “Whānau Hauā: Reframing disability from an indigenous perspective” (2017) 6 MAI Journal 82 at 87.

... driven by collective efforts and cultural obligations and responsibilities that whānau members have to each other and the whānau as a whole, while they strive to achieve balance within an environment of change and institutional barriers.

- 4.17 Hickey and Wilson argue that both the medical and social models of disability are inadequate to describe indigenous experiences of disability because of their focus on the individual.²² This reasoning carries through to notions of decision-making capacity.²³ Hinemoa Elder has said that “capacity for Māori is not best understood as residing in an individual alone, rather as contained within a collective”.²⁴
- 4.18 Practically, these understandings result in collective responses to affected decision making. For example, a study of Māori perspectives of dementia mate wareware concluded that an important aspect of te oranga wairua (spiritual wellbeing) is for kaumātua to continue to undertake cultural roles and live in te ao Māori. The experiences of study participants demonstrated that this could be supported by whānau embracing and accommodating changes in behaviour with an understanding of the importance of kaumātua remaining culturally and socially connected and maintaining some independence, rather than pathologising these changes.²⁵ Mana-enhancing relationships with whānau, informed by tikanga (aroha, manaakitanga, whakapapa and whanaungatanga), were also found to be essential.²⁶ Relatedly, Elder has observed that the impact on a person’s wairua from dementia mate wareware requires culturally informed assessment and interventions.²⁷

THE TREATY IN THIS REVIEW

The texts of the Treaty

- 4.19 Te Aka Matua o te Ture | Law Commission has examined the significance of the Treaty to the development of the law in Aotearoa New Zealand in several recent reports.²⁸ In this section, we briefly summarise the aspects of that analysis that are particularly relevant to law reform in the area of adult decision making.
- 4.20 The Treaty was signed in 1840 by representatives of the British Crown and rangatira representing many, but not all, hapū. There is a Māori text and an English text. The two

²² Huhana Hickey and Denise L Wilson “Whānau Hauā: Reframing disability from an indigenous perspective” (2017) 6 MAI Journal 82 at 85.

²³ We discuss the concept of decision-making capacity in Chapter 8.

²⁴ Hinemoa Elder “Te Puna a Hinengaro: He Tirohanga ki a Āheinga | The Wellspring of the Mind: Reflections on Capacity from a Māori Perspective” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 29 at 44.

²⁵ Margaret Dudley and others “Mate wareware: Understanding ‘dementia’ from a Māori perspective” (2009) 132 NZMJ 66 at 67 and 69.

²⁶ Margaret Dudley and others “Mate wareware: Understanding ‘dementia’ from a Māori perspective” (2009) 132 NZMJ 66 at 71.

²⁷ Margaret Dudley and others “Mate wareware: Understanding ‘dementia’ from a Māori perspective” (2009) 132 NZMJ 66 at 72.

²⁸ See for example Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [2.6]–[2.28]; Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at [2.54]–[2.67]; and Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at [3.8]–[3.24].

texts have differences between them. These differences have been the subject of significant ongoing debate, scholarship and judicial consideration. In summary:

- (a) Article 1 of the Māori text provides that rangatira grant the Crown kāwanatanga. The English text provides that the chiefs cede sovereignty to the Crown.
- (b) Article 2 of the Māori text provides that the Crown will protect the exercise of tino rangatiratanga over lands, villages and all treasures. In the English text, article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.²⁹
- (c) Article 3 of the Māori text provides that the Crown agrees to protect Māori and give Māori the same rights and duties of citizenship as the people of England.³⁰ A similar undertaking is conveyed in article 3 of the English text, in which the Crown imparted to Māori its protection as well as all the rights and privileges of British subjects. Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.³¹

4.21 The overwhelming majority of Māori signatories signed the reo Māori text, as did Lieutenant-Governor William Hobson on behalf of the Crown. It has long been acknowledged that signing would have followed debate and discussion in te reo Māori. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has said precedence or at least considerable weight should be given to the reo Māori text when there is a difference between it and the English text.³² This is both because of the circumstances of the Treaty’s signing and in the light of the contra proferentem rule under the law of treaties – namely, that ambiguous provisions must be construed against the party that drafted or proposed them.

The Treaty and its importance in policy making

4.22 The Treaty is an integral part of the constitutional framework of Aotearoa New Zealand.³³ It has been described as “of vital constitutional importance” and “part of the fabric of New Zealand society”.³⁴ For almost 40 years, consideration of the Treaty and an analysis of its implications have been required in policy making and have been a feature of Cabinet decisions. As recorded in guidance issued to public officials by the Cabinet Office:³⁵

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

²⁹ Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

³⁰ Ian Hugh Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

³¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

³² See for example Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2010) at 148; Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180; and Waitangi Tribunal *The Ngai Tahu Report 1991* (Wai 27, 1991) at 223.

³³ See Cabinet Office *Cabinet Manual 2023* at 155; and Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [2].

³⁴ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 28, citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

³⁵ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [7].

- 4.23 The importance of properly taking the Treaty into account in both the development of legislation and in the final product is emphasised in the Legislation Design and Advisory Committee guidelines for good legislation.³⁶ The United Nations Declaration on the Rights of Indigenous Peoples also reinforces the importance of complying with treaties entered into with indigenous peoples. It states:³⁷

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

The relevance of the Treaty to this review

- 4.24 The Treaty, article 3 in particular, is important to this review because Māori experience disability and ill health that may affect their decision making more often than the general population.³⁸
- 4.25 For example, Māori experience dementia mate wareware at higher and more rapidly increasing rates than non-Māori.³⁹ Māori are also disproportionately affected by other health conditions that can affect decision making (such as diabetes, cardiovascular disease, strokes and a history of traumatic brain injuries).⁴⁰
- 4.26 Commentators have also suggested that the prevalence of dementia mate wareware among Māori may exceed reported rates.⁴¹ Older Māori are less likely to engage with either primary care or mental health services and more likely to be cared for within the whānau where the progression of this condition may be less visible. Academics from Waipapa Taumata Rau | University of Auckland describe the consequences of these inequities as follows:⁴²

³⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at ch 5.

³⁷ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007), art 37(1). The Declaration was signed by the New Zealand Government in 2010. See Pita Sharples “Supporting UN Declaration restores NZ’s mana” (press release, 20 April 2010) Te Kāwanatanga o Aotearoa | New Zealand Government <www.beehive.govt.nz>.

³⁸ See generally Joanne Baxter and others “Prevalence of Mental Disorders Among Māori in Te Rau Hinengaro: The New Zealand Mental Health Survey” (2006) ANZJP 40(10) 914; Te Kani Kingi “Māori Mental Health: A Māori Response” in Huia Tomlins-Jahnke and Malcolm Mulholland (eds) *Mana Tāngata: Politics of Empowerment* (Huia, Wellington, 2011) 173; Etuini Ma’u and others *Dementia Economic Impact Report 2020* (Waipapa Taumata Rau | University of Auckland, September 2021); and Katherine Elizabeth Walesby and others “Prevalence and geographical variation of dementia in New Zealand from 2012 to 2015: Brief report utilising routinely collected data within the Integrated Data Infrastructure” (2020) 39 *Australasian Journal on Ageing* 297.

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

⁴⁰ Joanne Baxter “Māori Perspectives” in Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) 153 at 155. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 19–20 and 23–24.

⁴¹ Katherine Elizabeth Walesby and others “Prevalence and geographical variation of dementia in New Zealand from 2012 to 2015: Brief report utilising routinely collected data within the Integrated Data Infrastructure” (2020) 39 *Australasian Journal on Ageing* 297 at 301–302. Recording of dementia mate wareware may generally be lower in ethnic minorities. See Naaheed Mukadam, Claudia Cooper and Gill Livingston “A systematic review of ethnicity and pathways to care in dementia” (2011) 26 *International Journal of Geriatric Psychiatry* 12.

⁴² Etuini Ma’u and others *Dementia Economic Impact Report 2020* (Waipapa Taumata Rau | University of Auckland, September 2021) at 18.

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

- 4.27 The Waitangi Tribunal has developed the principle of equity based on article 3 of the Treaty. This principle guarantees Māori freedom from discrimination and obliges the Crown to positively promote equity and to protect the rights and interests of Māori as citizens.⁴³ In relation to health, the Tribunal has said that “[a] general equality of health outcomes for Maori as a whole is one of the expected benefits of the citizenship granted by the Treaty”.⁴⁴ The Tribunal has affirmed that there is an “inequity of health outcomes between Māori and non-Māori” on multiple occasions.⁴⁵
- 4.28 Our recommendations in this review would address the Crown’s obligations under article 3 in two ways.
- 4.29 First, our recommendations would mitigate the impact of Māori health inequalities when Māori engage with the law under a new Act. This review cannot address the general health inequities that Māori face. However, it can address what the legal implications are for Māori who are assessed to lack decision-making capacity. We explain below how the recommendations we make throughout this Report enable Māori responses to affected decision making under a new Act. These recommendations would help ensure that the health inequalities Māori face do not result in further inequities when Māori engage with a new Act.
- 4.30 Second, our recommendations would provide options for Māori and accommodate both te ao Māori and te ao Pākehā approaches to adult decision making. Article 3 (in combination with the protection of tino rangatiratanga under article 2) is also the foundation for the principle of options.⁴⁶ The principle of options is concerned with the choices open to Māori.⁴⁷ The Treaty envisages the protection of tribal authority, culture and customs and confers the same rights and privileges as British subjects on individual Māori. Māori are free to pursue either or both of these.⁴⁸ The principle of options means

⁴³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 33; Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 48 and 62; Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 201, 2004) at 27–28; Waitangi Tribunal *The Te Arawa Mandate Report* (Wai 1150, 2004) at 94; and Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims, Stage One Volume 2* (Wai 1200, 2008) at 428.

⁴⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 64.

⁴⁵ See for example Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 55; Waitangi Tribunal *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims Volume 2* (Wai 215, 2010) at 811; and Waitangi Tribunal *The Hauraki Report: Volume 3* (Wai 686, 2006) at 1182.

⁴⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 195; and Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁴⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

⁴⁸ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report 1992* (Wai 27, 1992) at 274.

the Crown must ensure that both options remain open to Māori.⁴⁹ In our view, this requires a new Act to enable Māori responses to affected decision making, which would promote uptake of decision-making arrangements by Māori. Similar arguments have been made in the context of welfare of children and healthcare.⁵⁰ We explain below how our recommendations would better provide Māori the option to pursue te ao Māori or te ao Pākeha approaches to affected decision making when they engage with a new Act.

Consultation

- 4.31 In our Second Issues Paper, we considered the relevance of article 3 of the Treaty to this review. We also considered how a new Act might make provision for the exercise of tino rangatiratanga in the context of arrangements relating to adult decision making.
- 4.32 We noted the importance of decision-making arrangements enabling Māori to live according to tikanga. We also noted the importance of decision-making arrangements enabling Māori collective involvement in decision-making that concerns Māori with affected decision making. We suggested that, by enabling more accessible and culturally relevant decision-making arrangements for Māori, a new Act could reduce the barriers experienced by Māori in accessing those arrangements and thereby promote greater equity of outcomes.
- 4.33 We asked submitters whether they agreed with our description of the ways in which the Treaty is relevant to this review.
- 4.34 Sixty-three submitters responded to this question. Most of them agreed with our description of how the Treaty is relevant to this review. Roughly half of the submitters that agreed with our description remarked that ensuring consistency with the Treaty and enabling Māori to live in accordance with tikanga are important considerations for a new Act. Some submitters specifically highlighted the importance of collective decision making.
- 4.35 Te Hunga Rōia Māori o Aotearoa | Māori Law Society (Te Hunga Rōia) noted that the group of Māori over the age of 65 has been growing significantly in past years. It also highlighted current inequalities between Māori and non-Māori in relation to health. Te Hunga Rōia proposed a provision that requires those who exercise powers under a new Act to have regard to, and be consistent with, the Treaty and its principles. We discuss this proposal in Chapter 5.
- 4.36 Some submitters partly agreed with our description. One of these submitters said a new Act should be guided by “equality of all persons”. Another submitter said the Treaty should not define the purpose of new legislation but apply “within the legislation”. Three submitters noted that there should be appropriate safeguards for collective decision making to ensure that it does not hamper any time-sensitive decisions such as urgent medical treatment and that the wellbeing of the person remains paramount where there are diverging views among the collective. Another submitter said there needs to be

⁴⁹ See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 24; and Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 44.

⁵⁰ See *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184–185; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 65.

respect and accommodation for those who would prefer to take “a more individual pathway”.

- 4.37 One submitter said “more detailed proposals” needed to be made and “more creative ways found” to reconcile respect for the individual’s rights, will and preferences with the Māori focus on collective decision making.
- 4.38 Four submitters disagreed with our description of the ways in which the Treaty is relevant to this review. Two of them did so on the basis that the Treaty should not be considered relevant in any way.

HOW OUR RECOMMENDATIONS RELATE TO TE AO MĀORI

- 4.39 We now turn to the recommendations we make in this Report that aim to enable Māori responses to matters of adult decision making under a new Act.

Decision makers should be required to consider tikanga where relevant

- 4.40 A new Act should engage with tikanga and should do so appropriately. We therefore recommend that people who exercise powers under a new Act be required to consider tikanga where it is relevant in the circumstances. This is to help recognise the importance from a tikanga perspective of continuing any whānau and hapū involvement in a person’s life and to sustain whanaungatanga connections and obligations.
- 4.41 We set out our recommendation on considering tikanga in Chapter 5 and explain our reasoning in more detail there. In short, our recommendation is designed to ensure that a provision mandating consideration of tikanga where relevant is sensitive to differences in tikanga across communities and to the varying degrees of importance that tikanga has to people according to their respective wishes and values. Furthermore, our recommended approach would enable tikanga to be considered from within a Māori world view and as a coherent and comprehensive system.

Assessments of decision-making capacity should consider whānau support

- 4.42 We recommend in Chapter 9 that an assessment of whether a person has decision-making capacity should be made on the basis of the support that is generally available to the person who is being assessed. In other words, if a person can make a decision with certain types of support and they can be expected to have this support when making a decision, the person should be considered to have decision-making capacity to make that decision.
- 4.43 Where a person receives support from their whānau or hapū when making decisions, that would factor into an assessment of that person’s decision-making capacity.

Tikanga considerations for appointing representatives or supporters

- 4.44 We recommend that a new Act expressly require that social and cultural considerations be taken into account when the Family Court appoints a representative for a person (Chapter 16). This could include taking whakapapa into account and considering whether the potential representative would be able to give effect to wishes and values of the represented person that require understanding of tikanga.
- 4.45 The Family Court should continue to be able to appoint more than one representative for a person (Chapter 17). We also recommend that a person (or the Family Court with the person’s consent) should be able to appoint more than one formal supporter (Chapter

11). It might be appropriate to appoint multiple representatives or formal supporters in the light of tikanga considerations, as it could help facilitate collective involvement of whānau or hapū in decision making.

4.46 Tikanga could also inform any decision-making obligations that the Court imposes on multiple representatives, including in relation to dispute resolution (see Chapter 17).

Decision-making rules should require tikanga consideration through wishes and values of the person

4.47 We recommend in Chapter 12 that a person's wishes and values should be at the centre of a representative's decision making. This would mean that, where a person wants a decision to be made in accordance with tikanga, including with the input of a collective, our recommended decision-making rules would require a decision maker to act accordingly.

Institutional reflections of tikanga

4.48 In Chapter 24, we discuss potential consolidation of oversight and support functions in a single agency. We explain that such an agency could benefit from having an advisory committee with sufficient knowledge of te ao Māori and tikanga Māori.

4.49 Lastly, Family Court Judges and Associates should have the power to refer parties, with their consent, to alternative dispute resolution out of court (Chapter 25). This could lead to increased use of tikanga-based processes to resolve disputes.

PART 2:

BUILDING BLOCKS OF A NEW ACT



1. In this part, we address key concepts and considerations that are relevant to all the measures relating to decision making that we recommend for a new Act.
 2. Chapter 5 concerns overarching purposes and values. We recommend that a new Act be directed to protecting and promoting the equality, dignity and autonomy of people with affected decision making and giving effect to Aotearoa New Zealand's human rights obligations. We also recommend that all people exercising powers under the Act be required to consider tikanga where it is relevant.
 3. Chapter 6 concerns decision-making support, a fundamental aspect of states' obligations under article 12 of the United Nations Convention on the Rights of Persons with Disabilities. As many of our recommendations in this Report involve decision-making support, we recommend that it be defined in a new Act.
 4. In Chapter 7, we explain that decision-making support, while fundamental, will not enable all people to make autonomous decisions for themselves in all situations. We recommend that a new Act continue to provide for decisions to be made on behalf of a person in such circumstances where needed to protect and promote their equality, dignity and autonomy. We also explain the need for appropriate and effective safeguards to prevent abuse of these arrangements.
 5. Chapters 8 and 9 concern decision-making capacity, by which we mean a person's functional ability to make an autonomous decision for themselves and to communicate that decision. In Chapter 8, we recommend the concept continue to be used in a new Act. Lack of decision-making capacity for a decision should be a necessary (but not sufficient) condition for the decision to be made on their behalf.
 6. In Chapter 9, we address how decision-making capacity should be defined and assessed in a new Act. We also make recommendations directed to improving the quality of decision-making capacity assessments.
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CHAPTER 5

Overarching purposes and values of a new Act

IN THIS CHAPTER, WE CONSIDER:

- the need for a purpose clause in a new Act and what it should cover;
- how a new Act should ensure that tikanga is considered where relevant; and
- whether a new Act should include general principles.

INTRODUCTION

- 5.1 A purpose clause can help ensure that an Act is understood and interpreted as intended.¹ As we explain in this chapter, the absence of a purpose clause in the Protection of Personal and Property Rights Act 1988 (PPPR Act) may have contributed to uncertainty about its policy objectives.
- 5.2 We consider that a new Act to replace the PPPR Act should include a purpose clause that provides for two overarching objectives. These should be protecting and promoting the equality, dignity and autonomy of people with affected decision making and giving effect to Aotearoa New Zealand's human rights obligations.
- 5.3 Further, a new Act should require decision makers exercising powers under it to consider tikanga when 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 a new Act distorting tikanga.
- 5.4 We do not recommend a new Act include general principles. Matters such as how people with affected decision making should be supported and how decisions should be made on their behalf (where needed) should be addressed in statutory rules rather than as principles.

¹ See Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 309–316.

BACKGROUND

Current law

- 5.5 The PPPR Act does not have a purpose provision or a statement of overarching values that underlie the Act. However, objectives and principles are stated in various provisions throughout the Act.²
- 5.6 The courts have mostly interpreted these objectives and principles to mean that the PPPR Act's purpose is to promote people's welfare or best interests. In some cases, the courts have emphasised the importance of autonomy and support.

Key provisions indicating the purpose of the PPPR Act

- 5.7 The long title of the PPPR Act states that it is “[a]n Act for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs”.
- 5.8 The Act states that, where te Kōti Whānau | Family Court exercises its jurisdiction with respect to a person who lacks decision-making capacity for a decision, the Court should have two primary objectives. These are:³
- (a) to make the least restrictive intervention possible in the life of the person; and
 - (b) to enable or encourage the person to exercise and develop their decision-making capacity to the greatest extent possible.
- 5.9 Several provisions in the Act contain guiding principles for representatives (welfare guardians, property managers or attorneys acting under enduring powers of attorney). The paramount consideration of a representative is to promote and protect the best interests of the person, while encouraging the person to develop and exercise the decision-making capacity they have to the greatest extent possible.⁴

Judicial consideration of the purpose of the PPPR Act

- 5.10 The courts have characterised the purpose of the PPPR Act in different ways.
- 5.11 A prominent theme in the case law is that the PPPR Act is focused on the welfare and best interests of people with affected decision making. As set out above, the PPPR Act describes the paramount consideration of representatives in this way but does not refer to people's welfare or best interests when describing the Family Court's primary objectives. Nevertheless, the courts have held on multiple occasions, with varying degrees of emphasis, that these concepts are important to the Family Court's role.
- 5.12 For example, in an early Family Court case, the Court held that the welfare and best interests of the relevant person must be the “first and paramount consideration” for the

² See Bill Atkin “Introduction” in *Family Law Service — Protection of Personal and Property Rights* (online ed, LexisNexis) at [7.801].

³ Protection of Personal and Property Rights Act 1988, ss 8 and 28.

⁴ Protection of Personal and Property Rights Act 1988, ss 18(3), 36(1), 97A(2) and 98A(2). The person's best interests are also relevant when the Family Court is considering the suitability of a potential representative: ss 12(5), 31(5)(b) and 32(3)(b).

Court when exercising its discretion in relation to a person’s personal rights.⁵ Te Kōti Matua | High Court later described the PPPR Act as “all about the welfare and best interests” of people with affected decision making.⁶ The High Court has also observed that the two primary objectives stated in the PPPR Act in relation to the Family Court’s jurisdiction (least restrictive intervention and encouraging development of decision-making capacity) give effect to the person’s welfare and best interests.⁷ In 2022, the Family Court described the welfare of the relevant person as a “secondary objective” of the PPPR Act.⁸

- 5.13 Increasingly, case law is giving greater emphasis to autonomy and support. In *TUV v Chief of the New Zealand Defence Force*, te Kōti Mana Nui | Supreme Court (in obiter) took an interpretive approach that emphasised the importance of supported decision making.⁹ In so doing, the Court drew on article 12 of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention).¹⁰ Winkelmann CJ and O’Regan J observed in their joint opinion that the part of the PPPR Act at issue “must be interpreted as having a rights-enhancing purpose”, which includes:¹¹

... supporting the incapacitated person so that they have equal access to the benefit of the exercise of their legal rights, and are able to participate as fully as they can, with support, in decision-making affecting their legal interests.

- 5.14 Other courts have made related observations. For example, the High Court has described the objective of the PPPR Act as being not only to protect the relevant person but also to promote their autonomy¹² and “to encourage, facilitate and support the subject person”.¹³ The Family Court has observed that the relevant person’s views should be afforded “great respect” and are an important guide in determining what is in the person’s welfare and best interests.¹⁴

Tikanga

- 5.15 As we explain in Chapter 4, the PPPR Act does not refer to tikanga. However, some case law recognises that it can be relevant to decisions under the Act. In 2025, the Family

⁵ *Re H* [1993] NZFLR 225 (FC) at 234. See also *Re H and H [protection of personal & property rights]* (1999) 18 FRNZ 297 (FC) at 301–302.

⁶ *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC) at 365. See also *Wood v McKellar* [2015] NZHC 1281 at [40].

⁷ *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC) at 365. See also *KR v MR* [2004] 2 NZLR 847 (HC) at [62], observing that “the statute presumes that the welfare of a person who is subject to Part I is best served if intervention is directed to [the two primary objectives stated in the PPPR Act]”. In that case, however, the Court preferred to focus on the statutory criteria.

⁸ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [47].

⁹ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78.

¹⁰ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [65]–[66] per Glazebrook, Ellen France and Arnold JJ and [96]–[99] per Winkelmann CJ and O’Regan J.

¹¹ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [101]. Winkelmann CJ and O’Regan J were dissenting, but not on this point.

¹² *CMS v Public Trust* [2008] NZFLR 640 (HC) at [21].

¹³ *T-E v B [Contact]* [2009] NZFLR 844 (HC) at [18].

¹⁴ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [51].

Court said “tikanga can and where relevant should be considered when appropriate in making decisions under the Act”.¹⁵

Overseas approaches

- 5.16 In some jurisdictions we have considered, relevant statutes include purpose or object statements.¹⁶ The provisions that we have identified in overseas statutes were all enacted after the Disability Convention entered into force. They reflect key themes of the Disability Convention, including support, dignity and autonomy.
- 5.17 Additionally, many overseas statutes include general principles that apply throughout the Act. Some statutes have separate provisions for general principles and principles that address more specifically the way any decisions for a person should be made.¹⁷ Other statutes address these matters in the same provision.¹⁸

ISSUES

Uncertainty about policy objectives

- 5.18 The PPPR Act is not sufficiently clear about the policy objectives it seeks to achieve. Key concepts such as “least restrictive intervention” and “best interests” are scattered throughout the Act, with different concepts sometimes applying to different decision makers. There is no purpose provision articulating the Act’s overarching purpose(s).
- 5.19 The courts have interpreted the Act in a way that gives significant weight to welfare and best interests in judicial decision making, despite the Act not expressly providing for this. However, the lack of legislative guidance about the concept of best interests means there is some uncertainty about what it means and how exactly it is to be assessed.¹⁹

Insufficient emphasis on core concepts of the Disability Convention

- 5.20 The PPPR Act was enacted 20 years before the Disability Convention came into force. Unsurprisingly, core concepts in the Disability Convention are not strongly reflected in the PPPR Act.²⁰ We highlight two main concerns.
- 5.21 First, the PPPR Act does not give priority to a person’s will and preferences. Instead, with respect to decision making by representatives, it refers to a person’s best interests. As we go on to discuss in Chapter 12, the requirement under article 12(4) of the Disability Convention that measures relating to the exercise of legal capacity respect a person’s “rights, will and preferences” is sometimes contrasted with a requirement to advance a person’s “best interests”. Respecting a person’s will and preferences requires a focus on what the person wants in the making of any decision whereas making a decision based

¹⁵ *IF v AN* [2025] NZFC 7862 at [45].

¹⁶ See Guardianship and Administration Act 2000 (Qld), ss 6–7; Guardianship and Administration Act 1995 (Tas), s 7; Guardianship and Administration Act 2019 (Vic), s 7; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 4; and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 2.

¹⁷ See for example Guardianship and Administration Act 2019 (Vic), ss 8–9.

¹⁸ See for example Guardianship and Administration Act 2000 (Qld), s 11B.

¹⁹ See Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at [5.6].

²⁰ As we explain in Chapter 3, Aotearoa New Zealand has an obligation under international law to ensure that legislation is consistent with the Convention.

on a person's best interests may mean denying them anything other than what someone else considers to be the "objectively best" decision.

- 5.22 Although the Family Court held in 2021 that a person's views and wishes are relevant to determining their best interests, case law does not give sufficient guidance about how they are to be taken into account.²¹ Even if it did, in our view attempting to give best interests a meaning that revolves around a person's will and preferences would create unnecessary confusion.²² It would be difficult to dissociate best interests from the paternalistic approach to decision making with which it remains associated.
- 5.23 Second, the PPPR Act is largely silent on the concept of decision-making support. As we explain in Chapter 6, article 12(3) of the Disability Convention requires states to provide disabled people with access to the decision-making support they require in exercising their legal capacity. The PPPR Act includes the concepts of enabling or encouraging people to exercise and develop their decision-making capacity to the greatest extent possible. However, it does not recognise that people with affected decision making may require support to make decisions or participate in decision making. (We address this issue further in Chapters 6 and 10.)

No express reference to tikanga

- 5.24 The PPPR Act does not mention tikanga, and there is no indication that tikanga was a consideration in the development of the legislation.
- 5.25 While the Family Court has made clear that tikanga can and should be considered where appropriate, this is not apparent on the face of the Act. This means that many representatives may not be aware of the potential relevance of tikanga.

A NEW ACT SHOULD STATE ITS OVERARCHING PURPOSES

- 5.26 In this section, we address the need for a purpose provision in a new Act and what it should cover.

Consultation

- 5.27 In our Second Issues Paper, we expressed the view that the purposes of a new Act should include:
- (a) upholding people's human rights; and
 - (b) safeguarding them from significant harm.
- 5.28 We asked submitters whether they agreed with this approach.
- 5.29 Seventy submitters gave feedback on the purpose of a new Act. Most of these submitters agreed that the purposes of a new Act should include both upholding people's human rights and safeguarding them from significant harm.
- 5.30 A few submitters shared their views on how the purposes we proposed should be prioritised:

²¹ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [51]. See further Chapter 11.

²² See Mary Donnelly "Best Interests in the Mental Capacity Act: Time to say Goodbye?" (2016) 24(3) *Med Law Rev* 318 at 331–332.

- (a) One submitter said that an abstract concept such as human rights should not override the right to be protected from actual and real harm.
 - (b) Conversely, the Donald Beasley Institute and Ngā Tāngata Tuatahi | People First NZ submitted that new legislation should prioritise human rights over protection.
 - (c) Te Kāhui Tika Tangata | Human Rights Commission noted that, while protection from harm is important, “all people have this right [to be protected from harm], and at the same time no one can be fully protected from harm”. In their view, “the purpose should be framed in terms of the rights to supported decision making and to be free from exploitation, violence and abuse”.
- 5.31 Approximately a third of submitters said that a new Act should include other purposes. The most common additional purposes suggested were that a new Act should:
- (a) reflect or meet Aotearoa New Zealand’s human rights obligations, including under the Disability Convention;
 - (b) respect people’s will and preferences; and
 - (c) support people in the exercise of their legal capacity.
- 5.32 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted that, in addition to a purpose provision, a new Act should include “a set of principles to sit alongside the Act’s purpose”. NZLS noted that the principles could address matters such as:
- (a) that the relevant person’s will and preferences should normally be followed;
 - (b) that any intervention should be the least restrictive;
 - (c) the relevance of tikanga and other cultural approaches; and
 - (d) procedural fairness.
- 5.33 Several other submitters also identified principles that they considered should be reflected in the legislation. For example, Te Tāhū Hauora | Health Quality and Safety Commission National Mortality Review Committee said the Family Court is currently required to impose the least restrictive intervention possible in the life of the relevant person. It said it is important that “everyone acting under this legislation understands this central principle, not just the courts”.

Recommendation

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.

- 5.34 Guidelines issued by the Legislation Design and Advisory Committee explain that purpose clauses can serve various functions. At a high level, these are:²³
- (a) communicating the basic purpose of the regime;
 - (b) signalling a change in the high-level policy approach;
 - (c) serving concrete administrative or legal functions (such as forming the basis of statutory criteria for the exercise of discretionary powers); and
 - (d) guiding the interpretation of the legislation.
- 5.35 The guidelines also explain there are a range of different types of purpose clauses. Some purpose clauses simply describe the legal means of the effect of legislation (descriptive purpose clauses). Other purpose clauses identify the policy aims of the law (policy purpose clauses). A third group “sit somewhere on the spectrum between descriptive purpose clauses and policy purpose clauses, or use elements of both”.²⁴
- 5.36 In our view, a new Act should include a purpose clause to signal the direction of the regime and to guide the interpretation of the legislation. The exact type of purpose clause used is a matter of drafting. However, we consider a purpose clause should articulate the policy aims of a new Act. Te Tari Tohutohu Pāremata | Parliamentary Counsel Office will be able to advise on whether a purpose clause should also include descriptive elements.
- 5.37 We recommend a purpose clause state two policy aims. While the wording of these aims is a matter of drafting, we recommend the clause cover that the Act is intended:
- (a) to protect and promote the equality, dignity and autonomy of people with affected decision making; and
 - (b) to give effect to New Zealand’s international human rights obligations, including under the Disability Convention.
- 5.38 The values of equality, dignity and autonomy are at the heart of all our recommendations for a new Act in this Report. Their centrality should be signalled in a purpose provision. Similarly, it is appropriate for a purpose provision to inform readers that complying with New Zealand’s international human rights obligations, including the Disability Convention, is a key driver for legislative reform.
- 5.39 Our recommended purposes differ slightly from the purposes we suggested in the Second Issues Paper (upholding people’s human rights and safeguarding them from significant harm). Feedback from submitters illustrated that the two purposes we had suggested might cause confusion. Whereas a few submitters considered they were in tension and would need to be balanced in some cases, others thought that one objective incorporated the other. In our view, the two policy aims we recommend in this chapter more clearly articulate what our recommendations in this Report are designed to achieve. We address how the concepts of equality, dignity and autonomy relate to each other when explaining our recommendations throughout this Report, in particular in the context of the decision-making rules we recommend in Chapter 12.

²³ Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines (2021 edition): Designing purpose provisions and statements of principle* (15 January 2025) <www.ldac.org.nz>.

²⁴ Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines (2021 edition): Designing purpose provisions and statements of principle* (15 January 2025) <www.ldac.org.nz>.

A NEW ACT SHOULD REQUIRE CONSIDERATION OF TIKANGA WHERE RELEVANT

5.40 In this section we explain how we consider a new Act should expressly refer to tikanga.

Consultation

5.41 In our Second Issues Paper, we reached the view that a new Act should not refer to specific tikanga values or principles. Instead, we suggested that a new Act should contain a general provision relating to tikanga. For example, we suggested a general provision might require people with relevant roles under a new Act to take into account tikanga to the extent that it is relevant in the circumstances.

5.42 We asked submitters whether they agreed. In addition to addressing that question, a number of submitters gave more general feedback on why a new Act should recognise tikanga.

Why a new Act should recognise tikanga

5.43 Twenty submitters gave reasons for a new Act to recognise tikanga.

5.44 The most common reason given, by about half of these submitters, was that recognising tikanga would facilitate a collective decision-making approach. Most submitters that gave this reason emphasised the importance of this approach for Māori. Others emphasised that recognising tikanga is important because of the highly relational nature of decision-making law generally.

5.45 Approximately a quarter of submitters that addressed this issue said it is important to recognise tikanga because it may be relevant either to a person's circumstances or to their wishes and values.

5.46 Some submitters that addressed this issue said recognising tikanga is important to meet the Crown's obligations under te Tiriti o Waitangi | Treaty of Waitangi (Treaty).

5.47 Other reasons submitters gave were that:

- (a) enabling Māori to live according to tikanga would recognise tino rangatiratanga;
- (b) tikanga is relevant to law reform due to the Supreme Court's decision in *Ellis v R*;²⁵
- (c) recognising tikanga would improve equity; and
- (d) tikanga reflects best-practice standards of care generally.

A general tikanga provision

5.48 Forty-eight submitters gave feedback on whether a new Act should have a general tikanga provision. The overwhelming majority supported this. A few did not.

5.49 The most common reason submitters gave was that a general tikanga provision is preferable due to variation in tikanga across groups. Approximately a third of submitters that supported a general tikanga provision made this point.

5.50 Approximately a quarter of submitters that supported a general tikanga provision said it would be more responsive to context than specifying which tikanga are relevant. A quarter also cautioned that guidance is needed to ensure tikanga is not misapplied.

²⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

- 5.51 Other reasons submitters gave for supporting a general tikanga provision were that it:
- (a) would allow tikanga to develop organically;
 - (b) would allow people to choose which values are important to them; and
 - (c) would raise awareness of tikanga.
- 5.52 One submitter thought having a general tikanga provision was unnecessary because there is a general responsibility to understand tikanga anyway.

Recommendation

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.

- 5.53 In our view, a new Act should engage with tikanga and should do so appropriately. As we explain in Chapter 4, tikanga functions as a coherent, integrated and comprehensive whole. Providing for tikanga to operate prescriptively within a statutory scheme risks distorting its normal application and also risks its potential application being overlooked. For a new Act to engage appropriately with tikanga, we consider the following objectives are important:
- (a) A new Act should recognise the importance from a tikanga perspective of continuing whānau and hapū involvement in the person's life and sustaining whanaungatanga connections and obligations.²⁶
 - (b) A new Act should recognise tikanga in a way that is sensitive to:
 - (i) variation in tikanga across communities; and
 - (ii) the difference in the importance of tikanga among individuals according to their wishes and values.
 - (c) A new Act should engage with tikanga in a way that enables tikanga to be considered from within a Māori world view and as a comprehensive system.²⁷

²⁶ Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.11]; and Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.37]. The Commission describes whanaungatanga as demanding the maintenance of relationships: at [3.38].

²⁷ Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [2.1] onwards.

- (d) Sufficient guidance needs to be available for decision makers under a new Act to help ensure tikanga is safeguarded from misinterpretation by the courts and others exercising powers under a new Act.²⁸
- (e) Sufficiently flexible processes need to be available to facilitate the resolution of disputes in accordance with tikanga.

A general provision is preferable

- 5.54 In our view, a general tikanga provision is the best way to give effect to the objectives for reform set out above.
- 5.55 Any number of tikanga (including those set out in Chapter 4) may be relevant in any given circumstance. In this context, briefly summarising specific principles or values in a new Act would risk distorting tikanga. It could fail to capture that tikanga values and principles are intertwined and exist in “an interconnected matrix”.²⁹ Specifying particular tikanga could also neglect the extent to which potentially relevant tikanga may vary according to the localised expressions of different Māori groups.
- 5.56 Accordingly, we do not consider that a new Act should specify which tikanga values and principles may be applicable. Rather, a new Act should enable tikanga to function on its own terms without seeking to specify what that might mean. For any given value or principle that may be relevant in a particular context such as mana, a general provision could encourage consideration of the wider matrix of values and principles that form part of its context.³⁰ Over time, it could work in conjunction with guidance developed under a new Act to enable parties to have a broader and deeper understanding of relevant values and principles and how their application might vary according to circumstance.
- 5.57 Guidance about potentially relevant tikanga will be needed to assist those applying the general provision. However, if a new Act were to attempt to provide such guidance, it would not be able to give the necessary depth of explanation without adding significant length. Further, there is a risk that legislative guidance would overly influence decision makers’ understanding of tikanga. There is already a lot of guidance available on the tikanga that may be applicable.³¹ For courts, this will include recourse to pūkenga tikanga (tikanga experts).³² Over time, guidance specific to a new Act could be developed.
- 5.58 We have considered whether mana should be referred to in a new Act as an exception to our conclusion that particular tikanga should not be specified. Mana is frequently

²⁸ The Commission has recently stated that, “Given that tikanga is integral to cultural identity, its use and application outside of its natural environment (including within state law) must be handled with care”: Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [8.106].

²⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239: see “Appendix: Statement of Tikanga” at [30]; Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.1]–[3.11].

³⁰ This helps to avoid a situation where tikanga is treated as a “grab bag” of values. See Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33.

³¹ See for example Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023), chs 3, 4 and 8. Education and resources concerning tikanga are also available to members of the judiciary via Te Kura Kaiwhakawā | Institute of Judicial Studies.

³² Both te Kōti-ā-Rohe | District Court and te Kōti Matua | High Court can request to appoint a tikanga expert as counsel assisting the court. See High Court Rules 2016, r 10.22; and District Court Rules 2014, r 10.27. The High Court can also appoint them as court experts. See High Court Rules 2016, r 9.36. Parties can also call tikanga experts as witnesses.

connected with dignity in case law, legislation and policy contexts.³³ Mana is also associated with making decisions and taking action.³⁴ Reflecting this, we received feedback in response to our Preliminary Issues Paper that mana could be an important guiding value in a new Act.³⁵

- 5.59 In our view, a new Act should not include an express reference to mana. While mana has some concepts that resonate in the context of our review, it is inherently a collective concept and involves reciprocal obligations to the collective.³⁶ Singling out mana would risk isolating tikanga values and principles from their natural context.
- 5.60 One related statute that does refer expressly to mana is the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (SACAT Act). The SACAT Act enables compulsory treatment for severe substance addiction. A purpose of the SACAT Act is to “protect and enhance [the person’s] mana and dignity and restore their capacity to make informed decisions about further treatment and substance use”.³⁷ While there are some similarities between the PPPR Act and the SACAT Act, the SACAT Act is aimed at addressing a fundamentally different issue to the PPPR Act. As we note above, mana is an inherently collective concept. Aiming to restore a person’s mana may be more appropriate as a purpose if the person has been removed from their community for compulsory treatment. For this reason, we do not consider the direct reference to mana in the SACAT Act greatly assists our approach to tikanga in this review.

Situations where tikanga may be relevant

- 5.61 Tikanga could be relevant under a new Act in a number of ways. In practice, however, people exercising powers under a new Act can only consider tikanga when they understand its relevance. The degree of familiarity with tikanga is likely to vary widely.
- 5.62 We therefore recommend that a new Act specify three general situations where tikanga may be relevant. These situations would put a person exercising powers under a new Act on notice that they should consider tikanga. The situations are where:

³³ See Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623; Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52; Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 3(d); and Kia Piki Ake Welfare Expert Advisory Group *Whakamana Tāngata: Restoring Dignity to Social Security in New Zealand* (February 2019) at 5. See also the Group’s first recommendation at 19.

³⁴ See Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn and others (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology — Invited Keynotes: Revisiting the Past to Reset the Future* (New Zealand Psychological Society, Wellington, 2012) 195 at 202–203; and Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 154.

³⁵ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [5.23].

³⁶ See Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 626; Mihiata Pirini and Anna High “Dignity and mana in Aotearoa New Zealand legislation” (2022) 18 Policy Quarterly 52; Mason Durie “Marae and Implications for a Modern Māori Psychology” (1999) 108 JPS 351 at 358; Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.73]; and “Statement of evidence of Vivian Tāmāti Kruger” (2 June 2020) at [42]–[43] as cited in Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarataru, ko ngā tuinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors” (NZLC SP24, Appendix 2, 2023) at [4.158].

³⁷ Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 3(d).

- (a) *The relevant person's wishes and values indicate tikanga is important to them:* Our recommended decision-making rules in Chapter 12 generally require decisions to give effect to the relevant person's wishes and values. Depending on the person's wishes and values, tikanga could be relevant in a number of ways. For example, a person's wishes and values may be for tikanga to be determinative or simply a relevant consideration for a particular decision.
- (b) *The relevant person has whakapapa Māori:*³⁸ This situation, in the wider context of our recommendations, is designed to recognise the importance of a person's whakapapa in tikanga.³⁹ In addition to the importance of whakapapa as a principle or value, having whakapapa Māori provides a person with certain rights or obligations in te ao Māori that it may be important for a decision maker to consider. Such is the importance of this that we consider a person's whakapapa should put a representative on notice in the same way their wishes and values should.
- (c) *Other evidence indicates tikanga is relevant:* There may be situations in which tikanga is clearly relevant that do not fall into the first two situations. For example, there may have been a rāhui (prohibition) put in place where a represented person had previously decided to conduct a recreational activity. Tikanga should clearly be relevant to the person's representative and decisions they make about whether the person should continue with the activity.

5.63 Specifying these three situations may be particularly useful for people who do not already have a working knowledge of tikanga. It may provide the first indication to them that tikanga will be important to consider — particularly if a represented person is unable to communicate this themselves. Ideally, guidance in the form of case law or information produced by a government agency would also develop over time to assist people to identify when tikanga may be relevant.

Tikanga as a mandatory consideration

5.64 A general provision on tikanga could be worded in a number of ways. For example, it could require decision makers to “take into account”, “have regard to”, “consider” or “apply” tikanga when it is relevant.⁴⁰ The wording used is important because it determines the level at which decision makers must engage with tikanga when it is relevant.

5.65 We do not recommend “apply” because that may not be appropriate in all circumstances. Rather, we recommend “consider” because, in our view, it requires genuine and meaningful engagement in and appropriate to the circumstances. Dictionary definitions of “consider” include “contemplate mentally”, “examine the merits of” or “take into

³⁸ Precedent in the common law for the requirement to consider tikanga when it forms part of a person's heritage can also be found in the Supreme Court decision of *Takamore v Clarke*. See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Tipping, McGrath and Blanchard JJ.

³⁹ See *He Hīnātore ki te Ao Māori: A glimpse into the Māori world – Māori Perspectives on Justice* (Te Tāhū o te Ture | Ministry of Justice, Wellington, March 2001) at 27; *Te Aka Matua o te Ture | Law Commission He Poutama* (NZLC SP24, 2023) at 52–53; Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 285–286; and Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 47.

⁴⁰ We gave these examples in our Second Issues Paper at [5.44].

account; show regard for”.⁴¹ Exactly what is required in order for a person to consider tikanga would depend on the context. Where a longstanding representative has familiarity with both the person’s wishes and values and a working knowledge of tikanga, we would expect the decision maker to consider tikanga in their role in a natural way. Our recommendation would also require a person who is not familiar with tikanga to consider tikanga in appropriate circumstances. In such cases, guidance for decision makers will be particularly important. In all circumstances, the extent of the engagement required will depend on the context.

- 5.66 Our recommendation for tikanga to be a mandatory consideration sits within our other recommendations for a new Act. In particular, under the decision-making rules we recommend in Chapter 12, a decision maker’s role would be to support the relevant person and make decisions that give effect to their wishes and values with very limited exceptions. The rules are designed to maximise the person’s equality, dignity and autonomy and to recognise their rights under the Disability Convention and domestic human rights law. Our recommended tikanga clause would sit within the context of a new Act as a whole and its focus on a person’s human rights.
- 5.67 Recognition of tikanga through a person’s wishes and values can also help ensure that a person’s equality, dignity and autonomy are upheld. People may not be able to lead autonomous and dignified lives on a basis of equality if the law does not uphold their cultural context and connections. This is most clearly relevant to a person’s wishes but is also relevant to a person’s reasonably stable values, beliefs and goals, which can be closely tied to the cultural assumptions that are important to them. It can also help ensure that the right to enjoyment of culture is upheld.⁴²
- 5.68 The requirement for people exercising powers under a new Act to consider tikanga when it is relevant should be a minimum requirement. Of course, tikanga could provide helpful tools or perspectives for decision makers beyond that requirement. For example, tikanga might assist a decision maker in their role through a tikanga-based dispute resolution process, or tikanga values or principles might help them to make a decision or provide support.

No Treaty clause required

- 5.69 We do not recommend a new Act include a provision that requires those who exercise powers under it to have regard to, or be consistent with, the Treaty and its principles, as was suggested by Te Hunga Rōia Māori o Aotearoa | Māori Law Society in its submission. We do not consider that a Treaty clause would add substantively to the effect of our recommendations throughout this Report in relation to Treaty consistency. For example, it would not add substantively to the tikanga clause we recommend in this chapter. The

⁴¹ Tony Deverson and Graeme Kennedy (eds) *New Zealand Oxford Dictionary: The Future of New Zealand English* (Oxford University Press, Melbourne, 2012) at 232 (definition of “consider”).

⁴² See New Zealand Bill of Rights Act 1990, s 20.

Supreme Court has affirmed that “[t]he courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question”.⁴³

GENERAL PRINCIPLES NOT DESIRABLE

- 5.70 The possibility of a principles section was raised in submissions. As we note above, many overseas jurisdictions we have investigated take this approach.
- 5.71 Guidelines issued by the Legislative Design and Advisory Committee explain that statements of principle can be used in a similar way to policy purpose clauses — that is, “to set out high-level statements of core policy aims or general underlying values that affect how the legislation should be interpreted and applied”.⁴⁴ However, the guidelines emphasise that principles should be used with care. In particular, they should not be used to “create stand-alone enforceable substantive rights or duties as they are usually too broad and unqualified to work well in this way”.⁴⁵
- 5.72 In addition to the purpose and tikanga clauses addressed above, we recommend in later chapters that a new Act include rules that apply:
- (a) when a representative is authorised to make a decision for a person (see Chapter 12);
 - (b) when the Family Court is considering whether to make a court-ordered decision or impose a representative arrangement (see Chapter 14); and
 - (c) when the Family Court is making a decision for a person (see Chapter 15).
- 5.73 These rules address matters that some submitters suggested be included in a principles section, for example, that the relevant person’s will and preferences should normally be followed and that any intervention should be the least restrictive. Given they are substantive in nature, we consider these matters are best provided for in a new Act as rules rather than as principles, in line with the Legislative Design and Advisory Committee’s guidance.
- 5.74 We do not consider any further general principles are necessary or desirable to support decision making in line with the policy of the recommended legislation.⁴⁶ Together, our recommended purpose clause, tikanga clause and decision-making rules address the matters most commonly raised by submitters as being suitable for inclusion in either a purpose clause or a principles section.

⁴³ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151]; *Hukina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 and 223; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46].

⁴⁴ Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines* (2021 edition) *Designing purpose provisions and statements of principle* (15 January 2025) <www.ldac.org.nz>.

⁴⁵ Legislation Design and Advisory Committee *Supplementary materials to the Legislation Guidelines* (2021 edition) *Designing purpose provisions and statements of principle* (15 January 2025) <www.ldac.org.nz>.

CHAPTER 6

The importance of providing decision-making support

IN THIS CHAPTER, WE CONSIDER:

- the need for a new Act to foster decision-making support to people with affected decision making; and
- how a new Act should define decision-making support.

INTRODUCTION

- 6.1 Everyone makes some decisions with support from other people. For example, we may seek advice from family, whānau, friends or experts, or we may ask someone to explain something to us or to be a sounding board for our own thoughts and ideas. 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 multiple options for a decision.
- 6.2 The Protection of Personal and Property Rights Act 1988 (PPPR Act) largely neglects the importance of providing decision-making support. In this chapter, we explain why we consider the provision of decision-making support to people with affected decision making is integral to the success of a new regime and set out how we think decision-making support should be defined in a new Act.
- 6.3 In later chapters, we make detailed recommendations about how a new Act should foster the provision and availability of decision-making support. For example, we recommend that a new Act should authorise the appointment of formal supporters (Chapters 10 and 11) and that a new Act should require representatives to support a person to make their own decision before making it on their behalf (Chapter 12).

BACKGROUND

Current law and practice

The PPPR Act and judicial commentary

- 6.4 There are no express references to decision-making support in the PPPR Act except that “support persons” may attend te Kōti Whānau | Family Court hearings if the Judge permits it.¹
- 6.5 To a limited extent, the PPPR Act anticipates that representatives might provide decision-making support in practice. For example, the PPPR Act requires representatives to consult with the represented person “so far as practicable”.² Further, welfare guardians and property managers are required to encourage the represented person to develop and exercise their decision-making capacity and to communicate their decisions.³ Attorneys acting under enduring powers of attorney (EPOAs) have similar obligations.⁴
- 6.6 In *TUV v Chief of New Zealand Defence Force*, te Kōti Mana Nui | Supreme Court interpreted a provision of the PPPR Act to require a supported decision-making model, drawing on article 12 of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention).⁵ The case concerned a settlement in an employment dispute. One issue before the Supreme Court was the meaning of section 108B of the PPPR Act, which requires a court to approve a settlement of a dispute involving a person who is “incapable of managing [their] affairs”. The Supreme Court observed that, when considering whether to approve a settlement, a court should require decision-making support to be provided where appropriate to enable the relevant person to participate to the fullest extent possible in the decision.⁶

Other New Zealand legislation

- 6.7 There is no consistent approach in other New Zealand legislation to recognising the role of supporters or facilitating decision-making support. Some provisions refer to support people but go no further than providing for their attendance at specific proceedings or events. In other contexts, legislation addresses in more detail how a support person may provide decision-making support. For example:⁷
- (a) under the Victims’ Rights Act 2002, information about matters such as remedies, services and procedures may be given to the victim’s support person if the victim

¹ Protection of Personal and Property Rights Act 1988, s 79(1)(i) and (2).

² Protection of Personal and Property Rights Act 1988, ss 18(4)(c), 43(1)(a) and 99A(1)(a).

³ Protection of Personal and Property Rights Act 1988, ss 18(3) and 36(1).

⁴ Protection of Personal and Property Rights Act 1988, ss 97A(2) and 98A(2).

⁵ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78.

⁶ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [70], n 53 per Glazebrook, France and Arnold JJ, agreeing with the minority’s observation at [101] per Winkelmann CJ and O’Regan J.

⁷ Under the Mental Health Bill 2024 (87-2), if enacted into law in its current form, people under compulsory care would be entitled to independent support persons. These support persons may (among other things) be able to help them make decisions and participate in the relevant processes under the new legislation, including to make complaints where necessary: cl 23(1).

cannot receive it, cannot understand it or has nominated the support person to receive it;⁸

- (b) under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, a care recipient may appoint a support person for various functions, including to help them express their wishes or needs;⁹ and
- (c) under the Retirement Villages Act 2003 Code of Residents' Rights, a resident may involve a support person in dealings with the operator or other residents.¹⁰

The New Zealand Disability Strategy and organisations that provide decision-making support

- 6.8 The New Zealand Disability Strategy, which guides the work of government agencies on disability issues from 2026 to 2030, recognises self-determination as one of the Strategy's key values, stating that "disabled people have the same rights as other people to make decisions about their own lives, including using supported decision-making".¹¹
- 6.9 The Strategy further states that the government will review health policies and practices with a view to "making sure tools for self-determination and supported decision-making are standard practice in healthcare" and that it will review "protections for disabled people in family law, including adoption, guardianship and personal property rights", considering supported decision-making among other aspects.¹²
- 6.10 There are many organisations and professionals that provide decision-making support and guidance about decision-making support. For example:
 - (a) IHC Advocacy has published guidance for supporters of people with intellectual disabilities.¹³
 - (b) Te Manatū Whakahiato Ora | Ministry of Social Development provides extensive information and guidance on supported decision making.¹⁴
 - (c) Ngā Tangata Tuatahi | People First NZ provides a range of services encouraging people with a learning disability to speak up about what matters in their lives.¹⁵ These include meeting assistants who can attend meetings alongside people with a learning disability and support them to participate, Easy Read resources on a range of matters and a free information and advice service.
 - (d) Te Toihau Hauora, Hauātanga | Health and Disability Commissioner has introduced a Health Passport, which is a booklet that people can take when they use health and disability services.¹⁶ A Health Passport contains information about how to communicate with the person and things that are important to them.

⁸ Victims' Rights Act 2002, s 14.

⁹ Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 5, 21, 39 and 121.

¹⁰ Retirement Villages Act 2003, sch 4 right 6.

¹¹ *New Zealand Disability Strategy 2026–2030* (Whaikaha | Ministry of Disabled People, December 2025) at 18.

¹² *New Zealand Disability Strategy 2026–2030* (Whaikaha | Ministry of Disabled People, December 2025) 37 and 49.

¹³ IHC Advocacy *Supporting Decision-Making: A Guide for Supporters of People with an Intellectual Disability* (online ed).

¹⁴ Te Manatū Whakahiato Ora | Ministry of Social Development "Supported decision-making" <www.msd.govt.nz>.

¹⁵ Ngā Tangata Tuatahi | People First NZ "What we do" <www.peoplefirst.org.nz>

¹⁶ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner "My Health Passport" <www.hdc.org.nz>.

- (e) Volition is “an accessible multi-media app that empowers disabled people to collaborate with their supporters and direct their own decisions, services and lives”.¹⁷
- (f) Whaikaha | Ministry of Disabled People launched a website in 2025 that shares information and resources about supported decision making.¹⁸

6.11 Initiatives like these contribute toward meeting Aotearoa New Zealand’s obligations under the Disability Convention, which we discuss in detail later in this chapter. More generally, they help promote the equality, dignity and autonomy of people with affected decision making by better enabling them to make and communicate decisions about how they want to live.

Overseas approaches

Support is facilitated in multiple ways

- 6.12 In the context of legislation about affected decision making, many jurisdictions we have investigated require representatives to support or encourage a person to make a decision themselves where possible. In some jurisdictions, legislation expressly provides that the representative may only make a decision for the person if support proves insufficient.¹⁹ For example, legislation in Northern Ireland contains a detailed provision on what support a representative must have given a person before being authorised to make a decision on their behalf.²⁰ Some jurisdictions also require representatives to ensure that the represented person can participate in the decision-making process, even if the representative ultimately makes the decision.²¹
- 6.13 Five of the jurisdictions we have considered provide for the appointment of formal supporters.²² Law reform bodies in two other jurisdictions have recommended formal support regimes, but these recommendations have not been implemented to date.²³
- 6.14 In the various statutes, formal supporters are appointed by the supported person or a court to help the supported person with decision making. Formal supporters usually have powers to obtain relevant information and have duties to assist the supported person with various tasks required for decision making. However, they are not authorised to

¹⁷ Volition “About Volition” <www.volition.org.nz>.

¹⁸ Whaikaha | Ministry of Disabled People “Whaimana: Support My Decisions” <www.supportmydecisions.nz>.

¹⁹ Guardianship and Administration Act 2000 (Qld), s 11B principle 10(2)(b); Mental Capacity Act 2005 (UK), s 1(3); and Mental Capacity Act (Northern Ireland) 2016, ss 1(4) and 5.

²⁰ Mental Capacity Act (Northern Ireland) 2016, ss 1(4) and 5.

²¹ Guardianship and Administration Act 1995 (Tas), s 8(1)(b); Powers of Attorney Act 2014 (Vic), s 21(1)(b); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 35(1)(d); Powers of Attorney Act RSBC 1996 c 370 (British Columbia), s 19(3)(c); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)(a); Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 39(3); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 43(1)(d). Compare Adults with Incapacity (Scotland) Act 2000, s 1(5), which does not mention support but requires decision makers to encourage the represented person to develop their own decision-making skills.

²² Guardianship and Administration Act 2019 (Vic), pt 4; Powers of Attorney Act 2014 (Vic), pt 7; Assisted Decision-Making (Capacity) Act 2015 (Ireland), pt 3; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), pt 2 div 1; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), pt 2; and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), pt 1.

²³ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at ch 4; and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at ch 7.

make decisions on the supported person’s behalf. We discuss the role of formal supporters in more detail in Chapters 10 and 11.

- 6.15 Two jurisdictions we have considered have legislation that refers to informal supporters – people who provide assistance to people with affected decision making but have not been appointed by the supported person or a court. In Queensland, informal supporters “must” follow certain statutory principles.²⁴ In Tasmania, informal supporters “are encouraged” to do so.²⁵ Under Queensland legislation, the relevant tribunal may ratify certain decisions made by informal supporters.²⁶

Definition of support

- 6.16 Only a few jurisdictions we have considered provide a stand-alone definition of support or assistance:
- (a) In Tasmania, “support” is defined to include “the use of information or formats tailored to the particular needs of the person making the decision”, “assistance to communicate” the supported person’s decision, “the giving of additional time” to the supported person and the use of assistive technology.²⁷
 - (b) In New Brunswick, “assistance” is defined as “any measure that helps a person have the capacity to make a decision, including explanations of relevant information and reasonably foreseeable consequences of the available options”.²⁸
 - (c) Legislation in Nova Scotia defines “support” to mean reasonably and practically available forms of support to assist the adult in making a decision, “including peer support, communication and interpretive assistance, individual planning, coordination and referral for services and administrative assistance”.²⁹
- 6.17 More commonly, overseas legislation defines support indirectly through the powers vested in formal supporters.³⁰ These powers often include assistance with accessing and disclosing information, communicating decisions and giving effect to decisions.

SUPPORT IN THE DISABILITY CONVENTION

- 6.18 Article 12(3) of the Disability Convention requires states to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Consistent with the social model of disability, this provision underlines that barriers can prevent disabled people from exercising their legal capacity. They may need support to exercise their legal capacity on an equal basis.

²⁴ Guardianship and Administration Act 2000 (Qld), s 11B(2).

²⁵ Guardianship and Administration Act 1995 (Tas), s 8(3).

²⁶ Guardianship and Administration Act 2000 (Qld), s 154.

²⁷ Guardianship and Administration Act 1995 (Tas), s 3 definition of “support”.

²⁸ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 2.

²⁹ Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 3(s).

³⁰ For example Guardianship and Administration Act 2019 (Vic), s 90(1); Powers of Attorney Act 2014 (Vic), ss 87–89; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(1); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(1).

- 6.19 The United Nations Committee on the Rights of Persons with Disabilities (Disability Committee) explains that support is a broad term, encompassing “informal and formal support arrangements of varying types and intensity”.³¹ Examples of support given by the Disability Committee include support people, communication assistance and measures relating to universal design and accessibility.³²
- 6.20 The concept of support overlaps with that of reasonable accommodation. Reasonable accommodation involves “modifications and adjustments” that are needed in a particular case for a disabled person to enjoy rights on an equal basis with others.³³ States are required to take all appropriate steps to ensure that reasonable accommodation is provided.³⁴ However, states are not required to provide modifications or adjustments that would impose a “disproportionate or undue burden”.³⁵

Concerns with the Disability Committee’s interpretation of article 12(3)

- 6.21 The Disability Committee considers that the concept of support is separate from that of reasonable accommodation and that states’ obligations are different with respect to each. On the Committee’s view, in contrast to a state’s qualified obligation with respect to reasonable accommodation, “[t]he State has an absolute obligation to provide access to support in the exercise of legal capacity”.³⁶ This would mean that states must take measures to provide access to support even where that would impose a disproportionate or undue burden.³⁷
- 6.22 This position is open to doubt. First, it rests on article 12(3) being a civil and political right, hence requiring immediate realisation.³⁸ Some commentators have suggested that article 12(3) is a socio-economic right, not a civil and political right, given that its implementation requires significant state resources.³⁹ In that case, states would have to take measures “to the maximum of [their] available resources” to progressively realise the right.⁴⁰

³¹ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

³² United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

³³ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2 definition of “Reasonable accommodation”.

³⁴ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 5(3).

³⁵ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2 definition of “Reasonable accommodation”.

³⁶ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [34].

³⁷ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [34].

³⁸ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [30].

³⁹ See Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 104–107, referring to a number of commentators including Theresia Degener “A New Human Rights Model of Disability” in Valentina Della Fina, Rachele Cera and Guiseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, Cham (Switzerland), 2017) 41 at 44. Theresia Degener was a member of the Disability Committee when *General Comment No 1* was made.

⁴⁰ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(2).

- 6.23 Second, even if article 12(3) is considered a civil and political right (as the Disability Committee believes), we do not think it would follow that states have an absolute obligation to provide access to support in the exercise of legal capacity. The obligation in article 12(3) is to take “appropriate measures”. As some commentators observed even before the Committee published *General Comment No 1*, this obligation:⁴¹
- ... should be interpreted within the context of the [Disability Convention] as a whole, including Article 5(3) which requires states to take only “appropriate steps” to ensure reasonable accommodation. Thus, individuals’ right to supports to exercise legal capacity does not impose an unlimited duty on the state.
- 6.24 It would be inconsistent for states’ obligations in relation to reasonable accommodation to be limited by the concept of disproportionate or undue burden but for states’ obligations in relation to support to be limitless. Such markedly different obligations would also necessitate states being able to distinguish between the two concepts. However, when a measure constitutes “reasonable accommodation” and when it constitutes “support” is not always clear.
- 6.25 The Disability Committee’s guidance points to some ways to distinguish between the respective duties to provide for reasonable accommodation and support. Reasonable accommodation requires the duty holder “to enter into dialogue with the individual with a disability”.⁴² By contrast, obligations relating to support can apply generally, in advance of any individual’s need.⁴³
- 6.26 However, the line between reactive duties (to provide reasonable accommodation) and proactive duties (to provide support) is very blurred.⁴⁴ The Disability Committee states that “[t]he type and intensity of support to be provided will vary significantly from one person to another”, which suggests that support sometimes has a reactive and individualised character.⁴⁵ In some cases, forms of support identified by the Committee (such as assistance with communication and measures relating to universal design and accessibility) will also provide reasonable accommodation for people.⁴⁶ Commentators have characterised support as a form of reasonable accommodation or have noted the overlap between the two concepts.⁴⁷

⁴¹ Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 112.

⁴² United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [24(b)].

⁴³ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17].

⁴⁴ Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 208.

⁴⁵ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [18].

⁴⁶ Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 208.

⁴⁷ Mary Keys “Article 12 [Equal Recognition Before the Law]” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, Cham (Switzerland), 2017) 263 at 266; Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 112; and Gerard Quinn and Abigail Rekas-Rosalbo “Civil Death: Rethinking the Foundations of Legal Personhood for Persons with a Disability” (2016) 56 *Irish Jurist* 286 at 315.

The role of article 12(3) in this review

- 6.27 In the light of the concerns and doubts outlined above, we think the exact nature and extent of states' obligations under article 12(3) is unclear. Regardless, on any interpretation, the Disability Convention requires states to ensure that legal measures relating to the exercise of legal capacity enable and facilitate support for disabled people to exercise legal capacity.⁴⁸ This is a core focus of this review, and we return to it throughout this Report.
- 6.28 Changes to the law alone cannot always ensure access to decision-making support and reasonable accommodation. A range of other initiatives and reforms are likely needed to complement law reform, such as increased availability of support-related services and improved accessibility to them. We consider that the Government is best placed to evaluate the resourcing implications of improving access to decision-making support through state funding and therefore make no recommendation in this regard. However, we emphasise that our recommendations throughout this Report are not intended as a comprehensive response to article 12(3).

ISSUES

No express provision for decision-making support in PPPR Act

- 6.29 Decision-making support can empower people with affected decision making to make decisions about their own lives on an equal basis with others.⁴⁹ As outlined above, the Disability Convention requires Aotearoa New Zealand to realise, at least progressively, measures to give people with affected decision making access to the support they need to exercise their legal capacity.
- 6.30 The PPPR Act does not contain provisions that are expressly directed to fostering the provision of support to people with affected decision making. This gives rise to a number of issues.

Representatives are not required to provide support

- 6.31 The PPPR Act does not expressly require a representative to provide decision-making support to the represented person. Rather, the PPPR Act provides for arrangements under which the Family Court or a representative (a welfare guardian, property manager or attorney acting under an enduring power of attorney) makes decisions for the person.⁵⁰ The PPPR Act requires representatives to consult with the represented person and to encourage them to exercise their decision-making capacity but does not mention decision-making support. This means that, although a representative may choose to provide the person with support to make decisions, they are not required to do so.

⁴⁸ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [70], n 53 per Glazebrook, France and Arnold JJ, agreeing with the minority's observation at [101] per Winkelmann CJ and O'Regan J.

⁴⁹ See Jeanne Snelling and Alison Douglass "Legal Capacity and Supported Decision-making" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 166–167; Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [2.70]; and Victorian Law Reform Commission *Guardianship: Consultation Paper – Part 3* (VLRC CP10, 2011) at [7.4].

⁵⁰ Protection of Personal and Property Rights Act 1988, pts 2, 4 and 9.

6.32 It can be anticipated that the Supreme Court's emphasis on supported decision making when interpreting section 108B of the PPPR Act will be influential in relation to the courts' interpretation of other provisions of the Act. However, developing case law does not provide the clarity and certainty of legislation, nor can it necessarily go far enough to fill the legislative gap. This means that represented people and people for whom court-ordered decisions are considered may not receive the support they need to participate in and express their wishes in relation to decisions.

Decisions may too readily be made on behalf of people

6.33 Providing decision-making support may enable people with affected decision making to have decision-making capacity for decisions that they otherwise would not have. However, the PPPR Act does not require a person's decision-making capacity to be determined (whether by the Family Court, health practitioners or representatives) in the light of the decision-making support available to them. In addition, when considering whether a court-ordered decision should be made or a representative arrangement imposed, the Family Court is not expressly directed to consider available decision-making support arrangements when identifying the least restrictive intervention possible or what would best enable the person to exercise and develop their decision-making capacity.

6.34 As a result of this legal framework, arrangements may be imposed on, or decisions made on behalf of, a person where the person would, with decision-making support, have relevant decision-making capacity. This is apparent from the feedback we have received from submitters.

6.35 In response to various questions in our Second Issues Paper, submitters highlighted the importance of including express provisions on decision-making support in a new Act. A common theme in submissions was that adequate decision-making support is a less intrusive intervention than representative arrangements and can be better suited to meeting people's nuanced needs. As a result, submitters said, a regime that provides for supported decision making is better equipped to uphold the human rights of people with affected decision making.

6.36 VisAble expressed concern about the lack of legislative priority or enforcement of supported decision making. The Chief Ombudsman was similarly disappointed by the general lack of urgency, resourcing and focus needed to ensure the development of supported decision-making capability in Aotearoa New Zealand.

Additional barriers to decision-making support

6.37 Beyond the terms of the PPPR Act, submitters identified other barriers that currently prevent people from receiving good decision-making support. These barriers included:

- (a) a lack of knowledge, skills or ability in relation to decision-making support, including as a result of a lack of accessible information and training;
- (b) insufficient numbers of people willing and able to act as supporters;
- (c) third parties such as financial institutions, healthcare providers and government agencies not recognising decisions communicated by informal supporters;
- (d) personal reluctance of people with affected decision making to seek support; and

- (e) a lack of readily available aids that facilitate decision-making support such as talking mats⁵¹ or digital applications.

A NEW ACT SHOULD FOSTER THE PROVISION OF DECISION-MAKING SUPPORT

- 6.38 The lack of clear legislative provision for decision-making support, in combination with additional barriers to support, makes it difficult for Aotearoa New Zealand to discharge its obligations under article 12(3) of the Disability Convention. In our view, reform is required to make decision-making support more accessible and effective.
- 6.39 We make multiple recommendations throughout this Report to foster the provision of decision-making support so as to minimise resort to more intrusive or rights-restrictive arrangements.
- 6.40 In Chapters 10 and 11, we recommend a new Act should enable the appointment of formal supporters with specific statutory powers and duties that go beyond those a person would have if they were simply providing informal decision-making support. A key aspect of the recommended formal supporter role is that they should have the power to access confidential or personal information in relation to the supported person if needed to provide support.
- 6.41 We also make several recommendations that are intended to limit the use of representative decision making in favour of decision-making support as much as possible:
- (a) In Chapter 9, we recommend that assessments of a person's decision-making capacity take into account the decision-making support that is generally available to them.
 - (b) In Chapter 12, we recommend that, before a representative makes a decision for a represented person, the representative be required to make reasonable efforts to ensure that the person cannot make the decision themselves with appropriate decision-making support. Where a person does not have decision-making capacity in relation to a decision, we recommend that the representative be required to ensure the represented person receives appropriate support so they can participate in the decision-making process and express their wishes in relation to it.
 - (c) In Chapter 14, we recommend that, when the Family Court is considering whether to appoint a representative to make decisions for a person, it be required to consider the extent to which the person has access to decision-making support.
- 6.42 Some of the barriers to decision-making support identified by submitters — for example, people's reluctance to provide or accept support — cannot be directly addressed by legislative reform. However, the improved legal certainty that our recommendations would provide might encourage potential providers and receivers of support to make use of support frameworks. This, in turn, might help increase the momentum towards a stronger support paradigm for adults with affected decision making.

⁵¹ “A Talking Mat is a visual communication framework which supports people with communication difficulties to express their feelings and views. Talking Mats can be carried out physically or in a digital space, for example a tablet, laptop or computer for which we have created one of the best apps for communication disability”: “What is a Talking Mat?” <www.talkingmats.com>.

RECOMMENDATION: DEFINING 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).

Need for an overarching definition

6.43 Given the importance of the concept of decision-making support throughout our recommendations, its meaning would need to be clear in a new Act.

6.44 As mentioned above, few jurisdictions we have considered provide a stand-alone definition of support or assistance in relevant legislation.⁵² More commonly, the term is indirectly defined through the powers that are vested in formal supporters.⁵³ However, our recommendations refer to decision-making support in relation to many elements of a new Act, not just a formal supporters regime. We therefore consider a new Act should define the term “decision-making support” and that this definition should apply throughout the Act.

Definition should encompass various forms of assistance

6.45 We consider the definition of decision-making support in a new Act should comprise the different forms of assistance a person may require.

⁵² But see Guardianship and Administration Act 1995 (Tas), s 3 definition of “support”; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 2; and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 3(s).

⁵³ For example Guardianship and Administration Act 2019 (Vic), s 90(1); Powers of Attorney Act 2014 (Vic), s 87–89; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(1); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(1).

- 6.46 Depending on a person's decision-making capacity, the decision-making support they need varies.⁵⁴ For example, some people might need information in an accessible format, while others might require assistance obtaining or understanding some information. The nature of the decision and other environmental and social factors can also affect the decision-making support required.⁵⁵ Complex decisions such as whether to live in a different place or whether to consent to medical treatment will usually require more support than simpler decisions.
- 6.47 The definition we recommend therefore lists eight different forms of assistance. In developing this definition, we have drawn on the features of decision-making support raised in submissions and commentary as well as the definitions included in overseas legislation.⁵⁶

Decision-making support should be limited to assistance

- 6.48 A new Act should be clear that decision-making support is confined to assistance. For example, under our definition, decision-making support includes helping a person to think about a decision (through identifying and analysing options) but does not extend to making the decision. Similarly, decision-making support includes assisting a person to communicate and give effect to a decision but does not include the supporter communicating or giving effect to a decision themselves.
- 6.49 The reason for this approach is to limit the potential for abuse by people providing decision-making support. We address this issue in Chapter 11, which discusses formal supporters.

Decision-making support is relevant to decisions made by the person and by others

- 6.50 Decision-making support is relevant where a person is making a decision themselves and where a decision is being made for them. The definition of decision-making support should therefore encompass the types of support required in both situations.
- 6.51 As we note above, support can enable a person to have decision-making capacity for a decision that they otherwise could not make themselves. Aspects of our recommended definition that may commonly be relevant in this context include assisting a person to gather information, assisting a person to identify and assess the available options and assisting a person to communicate or give effect to a decision.

⁵⁴ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [18].

⁵⁵ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [13].

⁵⁶ Definitions of support in overseas legislation are set out above. Some Australian law reform bodies have commented on the meaning of decision-making support. See for example New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.2]; and Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.2]. Defining decision-making support to include assisting a person to understand the views of others whose views are important to the supported person is modelled on a recommendation by the Australian Law Reform Commission: Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-5(e).

6.52 Support should also play an important role when a person does not have decision-making capacity to make a decision (even with support). Aspects of our recommended definition that may be relevant in this context include assisting a person to participate in a decision and assisting them to express their wishes in relation to a decision.⁵⁷

⁵⁷ Many overseas jurisdictions provide for similar principles. See Powers of Attorney Act 2014 (Vic), s 21(1)(b); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 35(1)(d); Powers of Attorney Act RSBC 1996 c 370 (British Columbia), s 19(3)(c); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)(a); Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 39(3); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 43(1)(d).

CHAPTER 7

Decision making on behalf of a person

IN THIS CHAPTER, WE CONSIDER:

- whether relevant human rights obligations ever permit decisions to be made on behalf of a person with affected decision making; and
- if so, whether a new Act should provide for decision making on behalf of a person with affected decision making.

INTRODUCTION

- 7.1 In Chapter 6, we discuss the importance of providing decision-making support to people with affected decision making. In many cases, provision of appropriate support should enable people with affected decision making to make their own decisions. In this chapter, we consider whether there are ever situations in which it is appropriate for decisions to be made on a person's behalf, including by courts or court-appointed representatives.
- 7.2 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 that are put in place by courts as opposed to self-instigated arrangements such as enduring powers of attorney (EPOAs).
- 7.3 The United Nations Committee on the Rights of Persons with Disabilities (Disability Committee) considers that decision making on behalf of disabled people is discriminatory, cannot be justified and is incompatible with article 12 of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention). The Disability Committee has called on states to wholly replace regimes that provide for decision making on behalf of a person with supported decision making. This view is controversial.
- 7.4 This is a key issue that we need to address with respect to a new Act. In this chapter, we explain why we consider that relevant human rights obligations sometimes permit decision making on behalf of people with affected decision making, including by courts and court-appointed representatives.
- 7.5 Further, we explain why we consider these arrangements are sometimes necessary to uphold the equality, dignity and autonomy of people with affected decision making.

Although supported decision making is fundamental to enabling people with affected decision making to exercise their legal capacity, it cannot meet the needs of all people in all situations. Accordingly, we recommend that a new Act provide for decision making on behalf of people with affected decision making, including by courts and court-appointed representatives, in some circumstances. In later chapters, we explain in more detail when it may be appropriate for te Kōti Whānau | Family Court to impose such arrangements.

BACKGROUND

Terminology

7.6 Commentators use varying terminology when discussing whether human rights obligations permit decision making on behalf of a person.

Substitute decision making

7.7 Arrangements that involve decisions being made on behalf of people with affected decision making are commonly referred to as “substitute decision making”. However, the meaning of this phrase is unclear.

7.8 The Disability Convention does not use the phrase “substitute decision making” but the Disability Committee has referred to the phrase when providing guidance about the Convention. The Disability Committee’s definition of “substitute decision-making regimes” has changed over time. In *General Comment No 1* (as published in 2014), the Committee defined such regimes as systems where:¹

- (i) legal capacity is removed from a person, even if this is in respect of a single decision;
- (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and
- (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

7.9 In this definition, the three elements of the definition are cumulative; they all need to be met for a decision-making arrangement to constitute substitute decision making.

7.10 In 2018, however, the Disability Committee issued a correction to *General Comment No 1* changing the “and” after the semicolon in paragraph (ii) to “or”.² This has significant implications and has led to some uncertainty. Under the amended definition, *any* arrangement where one person is legally responsible for making a decision for another constitutes substitute decision making. This includes decisions made based on the relevant person’s “will and preferences” — a phrase used in article 12(4) of the Disability Convention and that we explain later in this section. It also appears to include decisions made under self-instigated arrangements such as EPOAs, although the Committee’s reasoning does not otherwise address these arrangements.

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

² United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law — Corrigendum* UN Doc CRPD/C/GC/1/Corr.1 (26 January 2018).

Decision making on behalf of a person

7.11 Given the extent of the uncertainty concerning the meaning of “substitute decision making”, we do not use that phrase (unless context requires). Instead, we refer to “decision making on behalf of a person”. This concept encompasses all arrangements under which a decision is made for a person with affected decision making, including both arrangements that are put in place by a court and arrangements that are put in place by the person themselves.

Supported decision making

7.12 As we explain above, the Disability Committee considers that supported decision making should replace decision making on behalf of a person.

7.13 In the literature, the phrase “supported decision making” is used to mean different things. For some commentators, it refers to the process of providing support to a person with affected decision making to enable them to make their own decision.³ Others also include within the meaning of “supported decision making” arrangements under which a supporter makes or facilitates a decision based on the person’s will and preferences.⁴

7.14 We use the phrase “supported decision making” to mean arrangements where a person with affected decision making is provided decision-making support to make a decision themselves.⁵ This includes formal and informal arrangements. Under our approach, “supported decision making” and “decision making on behalf of a person” are mutually exclusive.

Will and preferences

7.15 Article 12(4) of the Disability Convention requires (among other things) that all measures relating to the exercise of legal capacity “respect the rights, will and preferences of the person”. We address the meaning of this phrase in Chapter 12. For the purposes of this chapter, however, it is necessary to explain briefly what we understand “will and preferences” to mean.

7.16 We consider the phrase “will and preferences” is properly interpreted to entail two distinct concepts:

- (a) A person’s “will” is their longer-term or more deeply held wants, values and aspirations.
- (b) A person’s “preferences” are their more immediate inclinations or desires.

³ See for example Law Commission of England and Wales *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017) at 167; and Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 14.

⁴ See for example Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [4.16]; and Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, 2010) at 91–94. We explain how these arrangements work in Chapter 8.

⁵ We address the meaning of “decision-making support” in Chapter 6. In short, we consider that, under a new Act, decision-making support should include assisting a person to access information, identify and assess options, communicate and give effect to a decision and express the person’s wishes in relation to a decision. Decision-making support is required in relation to both supported decision making and decision making on behalf of a person.

7.17 Accordingly, we consider that identifying a person's will and preferences (as a whole) can involve more than identifying the wishes that they express at a particular time. Sometimes, the wishes that a person expresses may reflect their preferences but not their will. Where that is the case, identifying a person's will and preferences may require that their more deeply held wants, values and aspirations are considered.⁶

Current law and overseas approaches

7.18 The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides for circumstances in which the Family Court or a representative can make a decision on behalf of a person. The four main ways in which decisions can be made on a person's behalf are court-ordered decisions, welfare guardians' decisions, property managers' decisions, and attorneys' decisions. We provide an overview of these forms of decision making in Chapter 2.

7.19 All overseas jurisdictions we have researched provide for decision making on behalf of people with affected decision making in some form, including decision making by courts or court-appointed representatives.⁷ This includes jurisdictions that have reformed their law following (or in connection with) ratification of the Disability Convention.⁸

THE RELEVANCE OF ARTICLE 12 OF THE DISABILITY CONVENTION

7.20 Article 12 of the Disability Convention, which addresses equal recognition before the law, does not expressly address whether decision making on behalf of people with affected decision making is ever permitted.⁹

7.21 During the drafting of article 12, states and disability organisations sharply contested whether the Disability Convention should ever permit decisions to be made for disabled people with affected decision making. At a high level, the debate centred on whether:¹⁰

⁶ In Chapter 12, we explain how a person's will and preferences should be identified, including where a person's will and preferences are in tension. We also explain how a person's rights should be taken into account in the rare situations where a person's will and preferences may be in tension with their rights.

⁷ For practical reasons, we have not been able to substantively research jurisdictions where English is not an official language. Commentators who interpret article 12 to prohibit court-ordered representative decision making sometimes refer to Peru as having the first regulation of legal capacity compliant with the Disability Convention. See for example Antonio Martinez-Pujalte "Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms" (2019) 8 *Laws* 1 at 17. However, Martinez-Pujalte also indicates that the Peruvian regulation provides for supporters to interpret the will of a supported person and that judicial support can be provided for people who cannot manifest their will: at 16.

⁸ For example Guardianship and Administration Act 2019 (Vic); Mental Capacity Act 2005 (UK); Assisted Decision-Making (Capacity) Act 2015 (Ireland); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia).

⁹ For an overview of debate about the meaning of article 12, see János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 28–38.

¹⁰ For an overview of the negotiations, see Lucy Series and Anna Nilsson "Article 12 CRPD: Equal Recognition before the Law" in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 342–348; Theresia Degener and Andrew Begg "From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations" in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, Cham (Switzerland),

- (a) decision making on behalf of people with affected decision making (in particular, by courts and court-appointed representatives) should be abolished and replaced with supported decision making; or
 - (b) decision making on behalf of people with affected decision making (including by courts and court-appointed representatives) should be permitted alongside supported decision making.
- 7.22 Article 12, as ultimately agreed, does not expressly resolve this debate. Commentators disagree on the intention behind this. Some emphasise that proposals to expressly permit decision making by courts and court-appointed representatives were rejected during drafting.¹¹ Others contend that the preparatory work of the Disability Convention provides substantial evidence that the states involved in drafting article 12 did not intend it to require the abolition of decision making by courts and court-appointed representatives.¹² A third group considers that all that can be taken from the preparatory work is that delegates agreed to disagree and the article is intentionally silent.¹³

The Disability Committee's view

- 7.23 The Disability Committee considers that article 12 requires “substitute decision-making regimes” to be abolished.¹⁴ As we address above, exactly what constitutes substitute decision making is unclear. However, the Committee’s most recent definition appears to encompass all decision making on behalf of people with affected decision making.
- 7.24 The Disability Committee considers that article 12 embodies the position that all people, regardless of disability or decision-making skills, inherently possess legal capacity¹⁵ — that is, all people inherently possess both legal standing (the entitlement to hold rights and duties) and legal agency (the entitlement to exercise and perform those rights and duties).¹⁶
- 7.25 On this view, the fact that a person is assessed as having impaired decision-making ability in relation to a decision is not a legitimate reason to deny their legal agency. Arrangements that restrict a person’s legal agency on this basis are incompatible with the obligation of states under article 12(2) to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. Instead, support must

2017) 1 at 23–24, 32 and 35–36; and Wayne Martin and others *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (Position Paper, 6 June 2016) at 11, n 13 and 58–62.

¹¹ For example *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/37/56 (12 December 2017) at [33].

¹² For example Wayne Martin and others *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (Position Paper, 6 June 2016) at 10, 11, n 13 and 58–62.

¹³ For example Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 64; and Lucy Series and Anna Nilsson “Article 12 CRPD: Equal Recognition before the Law” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 341.

¹⁴ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [7] and [9].

¹⁵ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [8], [14], [25] and [32].

¹⁶ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [13]–[14].

be provided to enable people with affected decision making to exercise their legal capacity.¹⁷

- 7.26 Relatedly, the Disability Committee considers that decision-making regimes under which a decision is made for a person following an assessment that they have impaired decision-making ability are discriminatory and cannot be justified. The Committee observes that, in these regimes, “a person’s disability and/or decision-making skills are taken as legitimate grounds for denying [a person’s] legal capacity and lowering his or her status as a person before the law”.¹⁸ The Committee considers that “[a]rticle 12 does not permit such discriminatory denial of legal capacity”.¹⁹
- 7.27 The Disability Committee’s position has sparked significant debate. Some commentators support it or advance similar views.²⁰ Other commentators disagree.²¹ Several states, including Aotearoa New Zealand, expressed concern about the Disability Committee’s approach.²²

Disability Committee has recommended reform

- 7.28 The Disability Committee has noted Aotearoa New Zealand’s lack of progress “in abolishing the guardianship system and substituted decision-making regime”.²³ It has recommended that New Zealand “implement a nationally consistent supported decision-making framework that respects the autonomy, will and preferences” of disabled people.²⁴

¹⁷ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15]–[16].

¹⁸ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15].

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

²⁰ For example Eilionóir Flynn and Anna Arstein-Kerslake “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10 *International Journal of Law in Context* 81; Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, 2010); Antonio Martinez-Pujalte “Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms” (2019) 8(1) *Laws* 1; and Tina Minkowitz “Legal Capacity: Fundamental to the Rights of Persons with Disabilities” (2007) 56(1) *IRR* 25.

²¹ For example Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023); John Dawson “A realistic approach to assessing mental health laws’ compliance with the UNCRPD” (2015) 40 *International Journal of Law and Psychiatry* 70; George Szmukler “‘Capacity’, ‘best interests’, ‘will and preferences’ and the UN Convention on the Rights of Persons with Disabilities” (2019) 18 *World Psychiatry* 34; and Alex Ruck Keene and others “Mental capacity — why look for a paradigm shift?” (2023) 31 *Med L Rev* 340.

²² For example *German Statement on the Draft General Comment on Article 12 CRPD* (20 February 2014) at 2; Te Tari Mō Ngā Take Hauātanga | Office for Disability Issues *New Zealand submission on draft general comment on Article 12: Equal recognition before the law* (11 March 2014) at 2; and *Draft General Comment No 1 on Article 12 of the Convention on the Rights of Persons with Disabilities — submission by the Norwegian Government* at 1–3.

²³ United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* (26 September 2022) CRPD/C/NZL/CO/2-3 at [21].

²⁴ United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* (26 September 2022) CRPD/C/NZL/CO/2-3 at [22].

7.29 The Disability Committee has made similar requests of many other states.²⁵

KEY HUMAN RIGHTS ISSUES

7.30 Two key human rights issues are relevant to whether a new Act should provide for decision making on behalf of people with affected decision making (including by courts and court-appointed representatives). These are:

- (a) whether restrictions of legal agency based on an assessment that the person has impaired decision-making ability invariably amount to unjustified discrimination (under either international or domestic law); and
- (b) whether article 12 of the Disability Convention otherwise prohibits such decision-making arrangements.

7.31 We consider these issues in turn.

Do measures that restrict legal agency based on impaired decision-making ability invariably constitute unjustified discrimination?

7.32 Article 12(2) of the Disability Convention requires states to recognise that disabled people enjoy legal capacity on an equal basis with others in all aspects of life. Leading scholars have observed that, “[a]t a minimum”, this obligation includes ensuring that legislation relating to the legal capacity of people with affected decision making does not result in unjustified discrimination.²⁶

7.33 Unjustified discrimination based on disability by state actors including the legislature is also prohibited under domestic law by section 19 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).²⁷

7.34 Whether legislation results in unjustified discrimination can usefully be analysed in two steps: whether the legislation is discriminatory and, if so, whether the discrimination is justified.

First step: whether the legislation is discriminatory

7.35 With respect to the first step, discrimination is said to occur under section 19 of the NZ Bill of Rights when:²⁸

- (a) a person is treated differently from others based on a prohibited ground of discrimination; and
- (b) that different treatment results in a material disadvantage to them, when viewed in context.

²⁵ For example United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third reports of Australia* (15 October 2019) CRPD/C/AUS/CO/2-3 at [23]–[24]; and United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of Denmark* (08 October 2024) CRPD/C/DNK/CO/2-3 at [40].

²⁶ For example Lucy Series and Anna Nilsson “Article 12 CRPD: Equal Recognition before the Law” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 354.

²⁷ New Zealand Bill of Rights Act 1990, ss 5 and 19, read with Human Rights Act 1993, s 21(1)(h).

²⁸ *Ministry of Health v Atkinson* [2012] NZCA 184 at [109]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729; and *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [130].

- 7.36 Disability is a prohibited ground of discrimination in New Zealand’s anti-discrimination law and is defined to include “psychiatric illness”, “intellectual or psychological disability or impairment” and “any other loss or abnormality of psychological, physiological, or anatomical structure or function”.²⁹
- 7.37 Under both the Disability Convention and New Zealand law, discrimination can be either direct or indirect.³⁰ Direct discrimination is when law, on its face, treats a group of people differently from others based on a prohibited ground, to their material disadvantage. Indirect discrimination is when law is neutral on its face but has a discriminatory effect. In other words, indirect discrimination occurs when a law does not single out a group of people based on a prohibited ground but nevertheless impacts them disproportionately to their material disadvantage.³¹
- 7.38 Applying this framework, it is clear that measures that restrict legal agency based on impaired decision-making ability treat people differently based on the prohibited ground of disability.³² Commentators often characterise this as indirect discrimination on the basis that the measures are disability-neutral on their face but disproportionately affect disabled people.³³ However, there may also be a case for the measures amounting to direct discrimination, either because they operate to identify whether a person has a disability (a cognitive impairment) or because there is a very close overlap between people to whom the measures apply and people who have a disability.
- 7.39 Notwithstanding that these measures clearly involve differential treatment based on the prohibited ground of disability, there is a strong argument that, where they are designed to protect people from serious harm or to give effect to their will and preferences, they do not necessarily result in material disadvantage, when viewed in context.³⁴ Indeed, as we address later in this chapter, we consider it is sometimes *necessary* for a decision to be made on behalf of a person with affected decision making to protect their equality, dignity and autonomy.

²⁹ Human Rights Act 1993, s 21(1)(h)(iii)–(v); and New Zealand Bill of Rights Act 1990, s 19(1).

³⁰ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 2; and *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [134]. See also United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [20]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.12.1].

³¹ See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.12.1]; and United Nations Committee on the Rights of Persons with Disabilities *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [20].

³² For an opposing view, see John Dawson “The CRPD and Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 95 at 105–106, arguing that decision-making capacity tests need not be viewed as discrimination “on the basis of disability”.

³³ See for example George Szmukler “‘Capacity’, ‘best interests’, ‘will and preferences’ and the UN Convention on the Rights of Persons with Disabilities” (2019) 18 *World Psychiatry* 34 at 37; Lucy Series and Anna Nilsson “Article 12 CRPD: Equal Recognition before the Law” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 356–357; and Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 392.

³⁴ See Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 392. See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [3.48].

7.40 On this basis, we consider that measures that restrict legal agency based on a lack of decision-making ability do not invariably amount to discrimination.

Second step: whether any discrimination is justified

7.41 Even if a measure that restricts legal agency does amount to discrimination, legislation that discriminates based on disability (whether directly or indirectly) is not necessarily incompatible with human rights law. Many rights, including the right to be free from discrimination, are capable of some limitation, and there can be good reasons to limit rights.

7.42 The Disability Convention does not use the language of “justified” or “unjustified” discrimination. However, we do not consider it prohibits all different treatment that results in material disadvantage.³⁵ Jurisprudence on article 26 of the International Covenant on Civil and Political Rights, concerning the right to equality before the law and freedom from discrimination, is clear that the right can be subject to reasonable limits.³⁶ Consistent with this approach, the requirement in article 12(4) of the Disability Convention that measures relating to the exercise of legal capacity are “proportional” suggests there may be some circumstances in which limitations on the right to enjoy legal capacity on an equal basis with others can be justified.

7.43 In Aotearoa New Zealand, the courts use various approaches to determine whether a limit on a right is demonstrably justified. Some questions that are commonly addressed include:³⁷

- (a) whether the reason for limiting the right is sufficiently important to justify restricting rights or freedoms;
- (b) whether the measure is sufficiently well designed to ensure both that it actually achieves its aim and that it impairs the right or freedom no more than is necessary; and
- (c) whether the gain to society justifies the extent of the intrusion on the right.

7.44 Similar questions are often asked by international treaty bodies.³⁸

7.45 In our view, measures that restrict legal agency based on impaired decision-making ability can have a sufficiently important purpose to justify restricting the right to be free from

³⁵ See Wayne Martin and others *Achieving CRPD compliance: Is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?* (Essex Autonomy Project, Position Paper, 22 September 2014); and Lucy Series and Anna Nilsson “Article 12 CRPD: Equal Recognition before the Law” in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, Oxford, 2018) 339 at 363, noting that there is support for a reading of article 2 of the Disability Convention that enables some discrimination to be justified; and that “[p]resumably securing other rights within the Convention would potentially be a legitimate aim for an intervention”.

³⁶ See United Nations Human Rights Committee *General Comment No 18: Non-discrimination* (Thirty-seventh session, 10 November 1989) at [12]–[13]. The United Nations Committee on the Rights of Persons with Disabilities’ description of discrimination in international human rights also refers to justification tests: *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [20].

³⁷ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

³⁸ With respect to the United Nations Human Rights Committee, see for example *General Comment No 18: Non-discrimination* (Thirty-seventh session, 10 November 1989) at [13]. With respect to the United Nations Committee on the Rights of Persons with Disabilities, see for example *Zsolt Bujdosó and others v Hungary* UN Doc CRPD/C/10/D/4/2011 (16 October 2013) at [9.6].

discrimination in some situations. As we explain later in this chapter, we conceive the purpose of such measures as protecting the equality, dignity and autonomy of people who do not have decision-making capacity.

- 7.46 Accordingly, if measures that restrict legal agency based on impaired decision-making ability amount to discrimination, we consider that it may be possible to justify such discrimination in some circumstances. Whether this is the case will depend on whether the measures are sufficiently well designed to achieve their purpose and impair rights no more than necessary.

Does article 12 prohibit such arrangements for any other reason?

- 7.47 As noted above, the Disability Committee has interpreted article 12 to embody the position that all people, regardless of disability or decision-making skills, inherently possess legal capacity (including legal agency). Some commentators have endorsed this interpretation.³⁹
- 7.48 In Chapter 6, we explain that article 12(3) recognises that disabled people may need support to exercise their legal capacity and requires states to take appropriate measures to provide access to it. In this way, article 12 underpins what has been described as a “paradigm shift” away from decision making on behalf of a person towards supported decision making.⁴⁰ As we explain below, however, we consider that article 12 does not prohibit decision making on behalf of a person (including by courts and court-appointed representatives) in all situations.⁴¹

Ordinary meaning of article 12

- 7.49 As a general rule, an international treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁴² We consider that the ordinary meaning of article 12 (understood in the light of the context, object and purpose of the Disability Convention) permits decision making on behalf of a person in some situations.
- 7.50 As we note above, article 12 does not explicitly prohibit decisions ever being made on behalf of a person. Nor does it do so implicitly, in our view. On the contrary, some of the safeguards provided in article 12 appear to anticipate such decision making. Article 12(4) requires that measures relating to the exercise of legal capacity be “proportional and

³⁹ See for example Tina Minkowitz “CRPD and Transformative Equality” (2017) 13 *International Journal of Law in Context* 77; and Anna Arstein-Kerslake and Eilíonóir Flynn “The right to legal agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities” (2017) 13 *International Journal of Law in Context* 22.

⁴⁰ See for example Gerard Quinn “Rethinking Personhood: New Directions in Legal Capacity Law & Policy Or How to Put the ‘Shift’ back into ‘Paradigm Shift’” (Lecture, University of British Columbia, Vancouver, 29 April 2011).

⁴¹ For support for this view, see for example Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023); John Dawson “A realistic approach to assessing mental health laws’ compliance with the UNCRPD” (2015) 40 *International Journal of Law and Psychiatry* 70; George Szmukler “‘Capacity’, ‘best interests’, ‘will and preferences’ and the UN Convention on the Rights of Persons with Disabilities” (2019) 18 *World Psychiatry* 34; and Alex Ruck Keene and others “Mental capacity — why look for a paradigm shift?” (2023) 31 *Med L Rev* 340. See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [2.96].

⁴² Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(1).

tailored to the person’s circumstances”, “apply for the shortest time possible”, be “subject to regular review by a competent, independent and impartial authority” and “be proportional to the degree to which such measures affect the person’s rights and interests”. These safeguards make most sense in relation to measures imposed on a person that limit or constrain their legal agency.⁴³ For example, if article 12 only contemplated supported decision making, it is unclear why support should be required to be provided for the “shortest time possible”.

- 7.51 The object and purpose of the Disability Convention as a whole supports the conclusion that decision making on behalf of a person is sometimes permitted. The Convention is not just about legal capacity. It addresses how a wide range of rights apply to disabled people. As we address later in this chapter and further in Chapter 12, removing the option for a decision ever to be made on behalf of a person would sometimes result in violations of other rights of disabled people that are recognised in the Disability Convention. For example, it could result in people being subjected to exploitation, violence and abuse, and not being provided an adequate standard of living. The text of the Disability Convention does not indicate that the enjoyment of legal agency on an equal basis with others should *always* be privileged above a person’s enjoyment of other rights.
- 7.52 Instruments made by parties to a treaty in connection with its conclusion form part of a treaty’s context and therefore are relevant to interpreting its ordinary meaning.⁴⁴ When ratifying the Disability Convention, seven states made declarations about the meaning of article 12 to the effect that it permits decision making on behalf of people with affected decision making in some situations. For example, Australia declared its understanding of article 12 to be that it allows for “fully supported or substituted decision-making arrangements”. Australia’s position is that substituted decision-making arrangements “provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards”.⁴⁵ Similar declarations were made by Canada, Estonia, Ireland, the Netherlands, Norway, Poland and Uzbekistan.⁴⁶ Conversely, no state made a declaration to the effect that it interprets article 12 to prohibit decision making on behalf of a person.

⁴³ See Wayne Martin and others *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (Position Paper, 6 June 2016) at 38–39; and Rosalind F Croucher “Seismic Shifts – reconfiguring ‘capacity’ in law and the challenges of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities” (2016) 22 *International Journal of Mental Health and Capacity Law* 7 at 13–15. As we address above with respect to the right to freedom from discrimination, proportionality is a common element of tests applied by courts and human rights bodies to identify whether a limitation on a right is justified.

⁴⁴ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(2)(b).

⁴⁵ *Convention on the Rights of Persons with Disabilities – Australia’s Declaration* (17 July 2008) <www.treaties.un.org>.

⁴⁶ *Convention on the Rights of Persons with Disabilities – Canada’s Declaration and Reservation* (11 March 2010); *Convention on the Rights of Persons with Disabilities – Estonia’s Declaration* (30 May 2012); *Convention on the Rights of Persons with Disabilities – Ireland’s Reservation* (20 March 2018); *Convention on the Rights of Persons with Disabilities – Declarations of the Netherlands* (14 June 2016); *Convention on the Rights of Persons with Disabilities – Norway’s Declarations* (3 June 2013); *Convention on the Rights of Persons with Disabilities – Poland’s Reservation* (30 March 2007); and *Convention on the Rights of Persons with Disabilities – Uzbekistan’s Declaration and Reservation* (28 June 2021). All are available on the United Nations Treaty Collection website: <www.treaties.un.org>.

7.53 The subsequent practice in applying a treaty is also relevant to interpreting its ordinary meaning.⁴⁷ Some states have enacted new laws for people with affected decision making after ratifying the Disability Convention.⁴⁸ As noted earlier, none of the jurisdictions that we have considered have entirely abolished decision making on behalf of a person (including decision making by courts or court-appointed representatives).

Supplementary means of interpretation

7.54 Where the meaning of an international treaty identified in the light of the general interpretative rule is ambiguous or manifestly absurd, supplementary means of interpretation such as the preparatory work and the circumstances of the treaty's conclusion may be considered.⁴⁹ For the reasons just addressed, we consider the ordinary meaning of article 12 is that decision making on behalf of a person (including by courts and court-ordered representatives) is sometimes permitted. However, given the disagreement on this issue, we go on to briefly consider supplementary means of interpretation.

7.55 In our view, the context in which the Disability Convention was formed is significant. Decision making on behalf of people with affected decision making (including by courts and court-appointed representatives) was widespread throughout the world. In this context, clearer words than those in article 12 would have been needed to require the complete abolition of these regimes.⁵⁰

Human rights permit these arrangements but safeguards are required

7.56 For the reasons addressed above, we consider that arrangements that involve decision making on behalf of a person in situations where the person is assessed to have impaired decision-making ability do not invariably amount to unjustified discrimination (under either international or domestic human rights law). Further, article 12 of the Disability Convention does not prohibit these arrangements for any other reason.

7.57 However, human rights obligations impose important requirements in relation to these measures. Article 12(4) of the Disability Convention requires states to ensure all measures that relate to the exercise of legal capacity provide for “appropriate and effective safeguards to prevent abuse in accordance with international human rights law”. The safeguards must ensure that these measures:

- (a) respect the rights, will and preferences of the person;
- (b) are proportional and tailored to the person's circumstances;
- (c) apply for the shortest time possible;

⁴⁷ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(b).

⁴⁸ For example Guardianship and Administration Act 2019 (Vic); Mental Capacity Act 2005 (UK); Assisted Decision-Making (Capacity) Act 2015 (Ireland); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia).

⁴⁹ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 32.

⁵⁰ See Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 65–66.

- (d) are subject to regular review by a competent, independent and impartial authority or judicial body; and
- (e) are proportional to the degree to which such measures affect the person's rights and interests.

7.58 These safeguards also provide important standards to consider when determining whether measures are sufficiently well designed so as not to amount to unjustified discrimination. We return to these safeguards throughout this Report.

SHOULD A NEW ACT PROVIDE FOR DECISIONS TO BE MADE ON BEHALF OF PEOPLE WITH AFFECTED DECISION MAKING?

7.59 Regardless of the position under human rights law, a new Act should only enable decision making on behalf of a person if it is sometimes necessary to protect or promote the dignity, equality and autonomy of people with affected decision making.

Consultation

- 7.60 In our Second Issues Paper, we asked whether court-ordered arrangements should be included in a new Act. We described court-ordered arrangements as “decision-making arrangements that are ordered by the court under which another person or the court makes one or more decisions for the person with affected decision-making”.⁵¹ This is the same concept that we describe in this Report as decision making on behalf of a person by a court or court-appointed representative.
- 7.61 Fifty-seven submitters gave feedback on whether court-ordered arrangements should be included in a new Act. The vast majority agreed they should be included (albeit often expressing caution about how they should be included). Only a small number of submitters disagreed.
- 7.62 Submitters that agreed with including court-ordered arrangements in a new Act gave several reasons. Most thought there would be a gap in the law if court-ordered arrangements were abolished. For example, one submitter said “I think it is unrealistic to pretend that there is never a need for court-ordered arrangements”. Public Trust said that, in its day-to-day work, it sees “a genuine need for such arrangements” and it considered “there will always be circumstances where this is appropriate and required”. Te Kāhui Ture o Aotearoa | New Zealand Law Society said that, if there were no mechanism for court orders in relevant circumstances, “a large lacuna [would] exist in the law, not unlike the one that existed before the current Act was enacted”. Some submitters gave personal accounts of situations where court intervention was necessary. We expand on these submissions when discussing situations in which a court-ordered decision or court-ordered representative arrangement might be necessary in Chapter 14.
- 7.63 A few submitters said some vulnerable people do not have family or whānau, access to other support or an EPOA in place and that court-ordered arrangements are necessary to help these people.
- 7.64 Some submitters said court-ordered arrangements are necessary to safeguard vulnerable people.

⁵¹ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [9.1].

- 7.65 Another reason given by some submitters was that sometimes a person with affected decision making will be at the centre of a complicated family or whānau situation and that judicial oversight can be necessary to resolve these situations. A few submitters said the certainty brought about by judicial intervention is a reason to include court-ordered arrangements in a new Act.
- 7.66 One submitter said court-ordered arrangements provide an opportunity for accountability of representatives that would otherwise not be possible.
- 7.67 Although the vast majority of submitters supported the inclusion of court-ordered arrangements in a new Act, most indicated arrangements should not be imposed without a sufficiently good justification and without appropriate safeguards. Some submitters recognised there may sometimes be a need for court-ordered arrangements but indicated concern for the agency of the represented person or said specialist guidance should be available to the court before imposing any arrangement.
- 7.68 Three submissions did not agree with including court-ordered arrangements in a new Act. Two of these submissions said they were too costly. The other submission, which was made jointly by the Donald Beasley Institute and Ngā Tāngata Tuatahi | People First NZ, said court-ordered arrangements “disproportionately impact disabled people’s legal capacity on an unequal basis” and that supported decision making should replace all substituted decision making, even where someone’s views are difficult to obtain. This submission was supported with examples of lived experience of abuse, exploitation and improper care by those subjected to court-ordered arrangements. The submission nevertheless said that, in situations where a person’s will and preferences can result in serious harm, court intervention is permissible as long as it is “non-discriminatory to disabled people and applied on an equal basis with non-disabled persons”.
- 7.69 Participants in the focus groups we held to hear from people with lived experience also overwhelmingly supported the inclusion of court-ordered arrangements in the Act. One participant said:
- I was glad my family made a decision to have me admitted to [a hospital], because I would’ve ended up in jail otherwise. They made the right decision by going against me. Those are the people that know me the best.
- 7.70 Another participant said:
- ... it depends — people may be able to understand some things but may not understand everything — it might work at the moment to not have a representative — but it might be good to have someone appointed as a backup. People still need backup because things can go wrong — anything can come up at any time ...
- 7.71 However, participants usually qualified their support by saying that it is critical to ensure arrangements are only imposed as a last resort and with the participation of the represented person, and that safeguards are in place to protect them.

Recommendation

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.

- 7.72 We agree with the vast majority of submitters that a new Act should provide for decisions to be made on behalf of people with affected decision making, including by courts and court-appointed representatives.
- 7.73 If supported decision making could protect and promote the dignity, equality and autonomy of people with affected decision making in all situations, decisions on their behalf would not be needed. In our view, however, supported decision making is not always sufficient for this purpose.

Decision-making support cannot enable all people with affected decision making to make autonomous decisions in all situations

- 7.74 State law in Aotearoa New Zealand is founded on, and shaped by, considerations of personal autonomy. In very broad terms, the law generally operates on the basis that people can make autonomous decisions, that they should be entitled to do so and that they should bear the risks accordingly.⁵² By an autonomous decision, we mean a decision that is made in a sufficiently “reason-sensitive” way — that is, where the decision maker has reasoned from the outcomes they want to the decision they make to achieve them.⁵³
- 7.75 The law also recognises that sometimes people cannot make an autonomous decision and that entitling them to make a decision or requiring them to bear the risks of doing so may not be appropriate.⁵⁴ Many laws specify standards that measure whether a person has sufficient ability to make a decision, enter an arrangement or perform or continue in a role.⁵⁵ We explore more fully what the standard(s) under a new Act should be in Chapters 8 and 9.
- 7.76 For present purposes, the critical point is that supported decision making is not sufficient to enable all people with affected decision making to make autonomous decisions in all situations. It is a hard reality that some people with affected decision making are not always able to make an autonomous decision, even with decision-making support. This is most clearly the case for a person who is entirely unresponsive, for example, because they are in a coma. However, it may also be true for others such as those with advanced

⁵² See John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 4–6.

⁵³ See Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 391. As we explain in Chapter 8, a person lacking decision-making capacity with respect to a decision is not the only way that a decision may not be autonomous. For example, a person might make a decision under undue influence. For clarity, when we refer to an “autonomous decision”, we are not referring to the proposed legal test for autonomous decision making recommended by the Scottish Mental Health Law Review. See Scottish Mental Health Law Review *Final Report* (September 2022), R8.5.

⁵⁴ For example, a person is not bound by a contract that they entered under undue influence. See Stephen Todd and Matthew Barber Burrows, *Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [12.4]. A person is also not responsible for a crime they commit without conscious volition. See “Offences and Defences” in *Adams on Criminal Law* (online ed, Thomson Reuters) at [CA23.39]; and *Cook v R* [2025] NZSC 44, [2025] 1 NZLR 75 at [42].

⁵⁵ For example, the law sets standards that address when a person can enter a marriage, make a will or give effective consent to medical treatment. See John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 13.

dementia made aware, a severe learning disability, a brain injury or those who are experiencing a psychotic episode.⁵⁶

7.77 To illustrate this, we first consider the situation where:

- (a) a person with affected decision making is not able (even with decision-making support) to reason from the outcomes they want to a decision that would achieve them; but
- (b) a third party can identify their will and preferences and make a decision that gives effect to them.

7.78 Where this occurs, the decision by the third party promotes the *value of autonomy* because it helps the person live their life how they want to live it. However, the fact that the decision reflects the person's will and preferences does not mean it is the person's *autonomous decision*. Rather, a decision has been made on their behalf, in accordance with the decision maker's understanding of the person's will and preferences.⁵⁷

7.79 Some other situations where decision-making support cannot enable a person with affected decision making to make an autonomous decision themselves include where:

- (a) it is not possible for a third party to identify a person's will and preferences relevant to a decision; or
- (b) a third party can identify a person's will and preferences but not with sufficient particularity to inform a decision. For example, what can be understood of the person's will and preferences is not sufficient to choose between different options.

7.80 In these situations, too, giving effect to what is understood of the person's will and preferences promotes the *value of autonomy*. However, the decision made is not the person's *autonomous decision*.

7.81 Even commentators who favour abolishing decision making on behalf of a person acknowledge that measures need to be put in place in situations where the will and preferences of a person with affected decision making are unclear. Commentators have identified various approaches. For example, the Disability Committee considers the person providing support to the person should identify the "best interpretation" of the person's will and preferences.⁵⁸ Other commentators describe the role of a supporter as

⁵⁶ See Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 70; Anne Plumb "UN Convention on the Rights of Persons with Disabilities: out of the frying pan into the fire? Mental health service users and survivors aligning with the disability movement" in Helen Spandler, Jill Anderson and Bob Sapey (eds) *Madness, distress and the politics of disablement* (Policy Press, Bristol, 2015) 183; and Brent Hyslop and Grant Gillett "Ethical, Relational and Cultural Elements of Capacity" in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 23.

⁵⁷ See Jeanne Snelling and Alison Douglass "Legal Capacity and Supported Decision-making" in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 171; and Matthew Burch "Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis" (2017) 34 *Journal of Applied Philosophy* 389 at 395. For clarity, we consider a decision given effect in accordance with an advance directive is an example of a decision that was made by the person who made the advance directive themselves. We address this issue in Chapter 21.

⁵⁸ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [21].

“facilitat[ing]” the decision of the relevant person or acting as their “cognitive prosthesis”.⁵⁹

- 7.82 Under these approaches, commentators attribute the decision to the person with affected decision making, not the supporter. In other words, the decision identified by the supporter is treated as the autonomous decision of the supported person.⁶⁰
- 7.83 For the reasons set out above, we consider that a decision that gives effect to what is understood of a person’s will and preferences promotes their autonomy. However, treating a decision made by a third party (such as a supporter) as the autonomous decision of the person with affected decision making is a fiction.

Decision making on behalf of a person can promote equality, dignity and autonomy

- 7.84 Where decision-making support is not sufficient to enable a person to make an autonomous decision, it can sometimes be necessary for a decision to be made on behalf of the person to protect and promote their equality, dignity and autonomy.

Equality and dignity

- 7.85 In some situations, decision-making support alone might not ensure a person’s equal enjoyment of their rights and might fail to uphold their dignity.⁶¹ This could be the case where a person with affected decision making who has received decision-making support wants — or appears to want — to make a decision that may cause them significant harm.
- 7.86 After talking through their options with their supporter, a person may want to make a risky decision that they do not understand. As we note above, during our consultation, some people shared with us their lived experience of situations where they, or someone they knew, did not understand the risks and potential harm of decisions they were making.⁶² On a true supported decision-making paradigm (where a supporter does not in practice make a decision on the person’s behalf), the only option to seek to prevent this

⁵⁹ For example Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, 2010) from 91.

⁶⁰ See Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 128; Sandra Fabijanić Gagro and Marissabell Škorić “The Convention on the Rights of Persons with Disabilities and the Legal Capacity of Persons with Psychosocial Disabilities — Contemporary Challenges” (2020) 41 *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 759 at 766–767; Eilionóir Flynn and Anna Arstein-Kerslake “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10 *International Journal of Law in Context* 81 at 95; and Piers Gooding “Navigating the Flashing Amber Lights of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns” (2015) 15 *Human Rights Law Review* 45 at 54.

⁶¹ See for example Melvyn Colin Freeman and others “Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities” (2015) 2 *Lancet Psychiatry* 844; and Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023).

⁶² See the examples noted in our consultation section above. See also Anne Plumb “UN Convention on the Rights of Persons with Disabilities: out of the frying pan into the fire? Mental health service users and survivors aligning with the disability movement” in Helen Spandler, Jill Anderson and Bob Sapey (eds) *Madness, distress and the politics of disablement* (Policy Press, Bristol, 2015) 183 at 190, noting that psychiatric participants in a study “perceived themselves, in retrospect, as being at risk”.

outcome would be to provide more decision-making support. However, the person might decline further support or it still might not enable them to understand the decision.⁶³

- 7.87 In rare situations, the will and preferences of a person with affected decision making may be to suffer significant harm or to pursue a course of action that will likely cause them to suffer significant harm. Again, the only option under a true supported decision-making paradigm would be for a supporter to seek to provide more decision-making support in the hope that it will lead to the person changing their mind. Failing that, the supporter would have no legal basis to prevent the supported person from inflicting significant harm on themselves, other than through compulsory mental health treatment regimes (which may be more restrictive than enabling a decision to be made on the person's behalf).
- 7.88 Another area of potential concern is where a supporter is unduly influencing or manipulating a person to make decisions that will cause the person significant harm. For example, a supporter might induce a person to enter an abusive relationship or to relinquish their property in circumstances that will leave the person in substandard living conditions.⁶⁴ In these situations, another person could seek to provide decision-making support to the person to help them understand that their supporter is mistreating them and encourage them to appoint a different supporter. However, the person might not understand the situation and retain trust in their supporter.⁶⁵ While a support regime might include a safeguarding function under which a court could remove a supporter, such a decision would in practice amount to a decision made on the person's behalf, for the reasons addressed above.
- 7.89 As we discuss in Chapter 3, the concept of the dignity of risk underlines the powerful reasons to respect disabled people's ability to take risks.⁶⁶ However, on occasion, the protective function of human rights requires such risks to be averted to enable disabled people to enjoy substantive equality and uphold their dignity. Where to draw the line between an overly paternalistic intervention and an appropriately protective intervention is a difficult issue, which we discuss in Chapter 12. For present purposes, the critical point is that significant harm to a person with affected decision making can sometimes only be averted by making a decision on their behalf.⁶⁷ Where a person has not appointed their own representative, arrangements that involve decision making by a court or court-appointed representative may therefore be required.

⁶³ In *Calderdale Metropolitan Borough Council v LS & Anor* [2025] EWCOP 10 (T3) (13 March 2025) at [94]–[96], the Court of Protection (England and Wales) held that a *compulsory* support plan could not properly be regarded as a form of “help” to enable the person to make a decision under the Mental Capacity Act 2005 (UK).

⁶⁴ As the United Nations Committee on the Rights of Persons with Disabilities has emphasised, disabled people can be disproportionately affected by violence, abuse and neglect: *General Comment No 6 (2018) on equality and non-discrimination* UN Doc CRPD/C/GC/6 (26 April 2018) at [56]. See also Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 209–210.

⁶⁵ See Julia Duffy *Mental Capacity, Dignity and the Power of International Human Rights* (Cambridge University Press, Cambridge, 2023) at 229; Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 397; and Anita Smith “Are Guardianship Laws and Practices Consistent with Human Rights Instruments?” in A Kimberley Dayton (ed) *Comparative Perspectives on Adult Guardianship* (Carolina Academic Press, Durham (North Carolina), 2014) 247 at 257.

⁶⁶ See Jeanne Snelling and Alison Douglass “Legal Capacity and Supported Decision-making” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 163 at 168.

⁶⁷ See Melvyn Colin Freeman and others “Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities” (2015) 2 *Lancet Psychiatry* 844.

Autonomy

- 7.90 Unlike supported decision making, decision making on behalf of a person involves removal of a person's legal agency. Nonetheless, in our view, decision making on behalf of a person can sometimes be more conducive to protecting their autonomy by better enabling them to live their life how they want to live it, in the light of their own sense of what matters. In other words, decision making on behalf of a person can sometimes better respect a person's will and preferences than supported decision making.⁶⁸
- 7.91 This can be the case where a person's preferences (their expressed wishes in the moment) are at odds with their will (their reasonably enduring values). As we discuss in Chapter 12, in this situation, the person's will and preferences will sometimes be best given effect by a decision that reflects their reasonably enduring values rather than their contemporaneous wishes. Under a true supported decision-making paradigm (where a supporter does not in practice make a decision for the person), this outcome may not be achievable. The person's supporter can seek to support the person to understand that their immediate wishes are at odds with their enduring values and (potentially) change their mind. However, like the scenarios considered above, the person may decline support or support may not be effective. Alternative solutions such as preventing the person from making the decision or requiring them to accept further decision-making support against their wishes would not be available. As a result, without decision making on behalf of a person as an available option, the person may make a significant decision on a passing whim, without being able to appreciate the tension with their enduring values.⁶⁹
- 7.92 Further, decision making on behalf of a person may be necessary to give legal effect to a decision that respects a person's will and preferences. This could be because the law specific to a decision requires it to be made by a person with decision-making capacity (or enables it to be subsequently invalidated if made by a person without decision-making capacity).⁷⁰ In response to questions addressed in Chapter 14, submitters gave examples of when legal certainty might be required, including when the person is interacting with professional organisations such as banks or housing providers. In these situations, a decision that enables a person to live their life the way they want to live it may not be able to be given effect unless a court or representative can make the decision on the person's behalf.⁷¹

⁶⁸ See Brent Hyslop and Grant Gillett "Ethical, Relational and Cultural Elements of Capacity" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 19.

⁶⁹ See Camilla Kong and Alex Ruck Keene *Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues* (Jessica Kingsley Publishers, London, 2019) at 31–32, noting that in some cases "we may need to take steps (on behalf of others) which may appear on the face of it to clash with ... [their] wishes and feelings but in reality are taken to support and enable them to maximise their autonomy" and that an unduly narrow concept of autonomy risks "potentially *sanctioning* their mistreatment and abuse" (emphasis in original). See also Matthe Scholten and Jakov Gather "Adverse Consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward" (2017) 44 *Journal of Medical Ethics* 226 at 228.

⁷⁰ On the validity of a contract entered into by a person who lacks decision-making capacity, see *O'Connor v Hart* [1985] 1 NZLR 159 (PC). On testamentary capacity, see *Banks v Goodfellow* (1870) LR 5 QB 549.

⁷¹ See Anita Smith "Are Guardianship Laws and Practices Consistent with Human Rights Instruments?" in A Kimberley Dayton (ed) *Comparative Perspectives on Adult Guardianship* (Carolina Academic Press, Durham (North Carolina), 2014) 247 at 256, arguing that guardianship (a form of court-ordered representative decision making) is "a powerful form of agency".

CONCLUDING REMARKS

- 7.93 We conclude this chapter by emphasising two points.
- 7.94 First, our recommendation that a new Act should provide for decision making on behalf of a person should not be understood to diminish the importance of supported decision making. Where a person with affected decision making can make an autonomous decision with support, they should be supported to do so rather than a court or representative making the decision for them.⁷² Making a decision on behalf of a person is appropriate only when decision-making support that is available to the person is not adequate to enable them to make their own decision.⁷³
- 7.95 Second, for decision making on behalf of a person to protect and promote their equality, dignity and autonomy, it must comply with the requirements in article 12 of the Disability Convention. The Disability Committee’s focus on supported decision making as the appropriate paradigm reflects important criticisms of how guardianship and related regimes have operated over time. While we do not agree with the Committee’s conclusion that decision making on behalf of a person should be abolished, we consider the framework for such decision making must be strengthened to help ensure the will and preferences of people with affected decision making are “at the centre of the decisions that shape [their lives]”.⁷⁴ We return to this concern throughout this Report.
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⁷² This principle applies regardless of whether a court-ordered representative arrangement has been put in place with respect to a person or whether an enduring power of attorney is in place. In Chapter 12, we make recommendations directed to ensuring that, when a representative has been appointed, they should not make decisions that the relevant person is able to make themselves.

⁷³ John Dawson “The CRPD and Mental Capacity Law” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 95 at 107. For a judicial discussion of the importance of supported decision making, see *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [70], n 53 and [101].

⁷⁴ Matthew Burch “Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis” (2017) 34 *Journal of Applied Philosophy* 389 at 399.

CHAPTER 8

The concept of decision-making capacity

IN THIS CHAPTER, WE CONSIDER:

- the concept of decision-making capacity that has been used in New Zealand law to identify when a person is not able to make an autonomous decision;
- how it operates in the PPPR Act; and
- whether a new Act should retain it.

INTRODUCTION

- 8.1 In Chapter 7, we conclude that sometimes, even with decision-making support, people are not functionally able to make an autonomous decision for themselves. Legal agency (the ability to act on and exercise legal rights) should only ever be denied to a person where that is so.
- 8.2 Under the Protection of Personal and Property Rights Act 1988 (PPPR Act), various tests are used to assess whether a person is functionally unable to make an autonomous decision for themselves. Satisfying these tests is a necessary (but not always sufficient) condition for the person's legal agency to be restricted. In commentary, tests of this kind are often described as tests of "decision-making capacity", although this phrase is not used in the PPPR Act.
- 8.3 This chapter considers whether a new Act should retain, as a necessary condition of any denial of legal agency, some kind of concept of decision-making capacity. We conclude that it should. In Chapter 9, we address how decision-making capacity should be defined in a new Act and how it should be assessed. In Chapter 14, we address other matters that a new Act should require before te Kōti Whānau | Family Court can make a decision or impose a representative arrangement that restricts a person's legal agency.

BACKGROUND

Meaning of decision-making capacity

- 8.4 We use the term “decision-making capacity” to describe a person’s functional ability to make an autonomous decision for themselves and to communicate that decision.¹ Assessing whether a person has decision-making capacity for a decision involves assessing their cognitive and communicative functions with respect to that particular decision. This includes assessing their ability to understand and weigh information relevant to the decision — that is, to reason from the outcomes they want to the decision they make. The conception of decision-making capacity we use is often described as a “functional approach”.²
- 8.5 When we refer to decision-making capacity, we refer to a concept that is defined by the law, not by a medical test. Health practitioners sometimes conduct cognitive tests to *inform* an assessment of whether a person satisfies the legal test of decision-making capacity for a decision or class of decisions.³ However, “[t]here is no test score which, in itself, justifies the presence or absence of a ‘specific’ person’s ability to make a ‘specific’ decision”.⁴ Rather, where the law uses the concept of decision-making capacity, it needs to define what it means for a person to have or lack decision-making capacity for a decision.

Overview of comparable concepts in the PPPR Act

- 8.6 In Aotearoa New Zealand, many laws set out tests to determine whether a person is able to make an autonomous decision. For example, there are specific legal tests for entering a marriage or civil union and making a will.⁵ However, the PPPR Act is the legislation that has the most significant impact on people’s lives in relation to their legal agency.⁶
- 8.7 The term “decision-making capacity” is not used in the PPPR Act. However, whether a person has sufficient functional ability to make a decision is fundamental to the scheme of the Act. As such, the PPPR Act uses a concept akin to what we are describing as decision-making capacity.
- 8.8 The PPPR Act uses multiple terms and tests for this concept. In addition, the role that this concept fulfils differs between enduring powers of attorney (EPOAs) and court-ordered arrangements.

¹ See Brent Hyslop and Grant Gillett “Ethical, Relational and Cultural Elements of Capacity” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 20–21.

² This approach can be compared to a “status approach”, which determines decision-making capacity based on a person’s diagnostic status or group membership, and an “outcome approach”, which determines decision-making capacity based on the content or expected outcome of an individual’s decision such as its perceived reasonableness.

³ See for example *NA v LO* [2021] NZFC 7685 at [56]–[69].

⁴ Alex Ruck Keene and others “Mental capacity — why look for a paradigm shift?” (2023) 31 *Med L Rev* 340 at 345.

⁵ See John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 13.

⁶ See John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 12.

- 8.9 For EPOAs, an attorney can make a decision on behalf of a donor where the donor is “mentally incapable”.⁷ No further reasons are required.
- 8.10 For court-ordered decisions and decision-making arrangements, the fact a person is not functionally able to make a decision triggers the Court’s jurisdiction to make an order, but more reasons are required:
- (a) For court-ordered decisions and welfare guardian orders, the Family Court’s jurisdiction to make an order is triggered where a person “lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare” or has such capacity but “wholly lacks the capacity to communicate decisions in respect of such matters”.⁸ For property manager orders, the Court has jurisdiction where a person “lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property”.⁹
 - (b) In deciding whether to make a court-ordered decision or impose a representative arrangement, the Family Court must be guided by the primary objectives of making the least restrictive intervention and enabling or encouraging the person to develop such “capacity” or “competence” as they have to the greatest extent possible.¹⁰
 - (c) Before appointing a welfare guardian, the Family Court must also be satisfied that the relevant person “wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person” and that appointing a welfare guardian is “the only satisfactory way to ensure that appropriate decisions are made” in relation to those aspects of the person’s personal care and welfare.¹¹
- 8.11 The different treatment of EPOAs (on the one hand) and court-ordered decisions and representative arrangements (on the other) can be seen to reflect their varying levels of intrusiveness. An EPOA is set up by a person in advance and is therefore, on one level, an exercise of their autonomy. By contrast, a court-ordered decision or representative arrangement is imposed on a person by the Family Court.
- 8.12 For EPOAs, a certificate that a person is “mentally incapable” can be given by certain health practitioners.¹² For the imposition of a court-ordered decision or arrangement, it is the Family Court that must determine whether a person has the specified functional ability.¹³ In practice, the Family Court’s determination is often informed by a health practitioner’s assessment.

⁷ Protection of Personal and Property Rights Act 1988, ss 97(5) and 98(3). An attorney can also act in relation to a donor’s property without the donor having been assessed as having lost decision-making capacity if the EPOA is stated to have effect while the donor is mentally capable: s 97(4)(a).

⁸ Protection of Personal and Property Rights Act 1988, s 6. The person must also be ordinarily resident in Aotearoa New Zealand. Under s 6, this jurisdictional requirement also applies to property administration orders.

⁹ Protection of Personal and Property Rights Act 1988, s 25(1)–(2). In addition, the person must be domiciled or ordinarily resident in Aotearoa New Zealand or the property must be situated in Aotearoa New Zealand.

¹⁰ Protection of Personal and Property Rights Act 1988, ss 8 and 28.

¹¹ Protection of Personal and Property Rights Act 1988, s 12(2).

¹² Protection of Personal and Property Rights Act 1988, ss 97(5), 98(3)(a) and 100A(2). We address health practitioners who can undertake decision-making capacity assessments for EPOAs in Chapter 19.

¹³ Protection of Personal and Property Rights Act 1988, ss 6(1), 12(2) and 25(1)(b).

- 8.13 For all decision-making measures under the PPPR Act, every person is presumed to have the “capacity” or “competence” specified in the relevant test until proven otherwise.¹⁴ The PPPR Act is also clear that a person’s wish to make a decision that “a person exercising ordinary prudence” would not make is not in itself sufficient grounds to find that the person does not have the relevant capacity or competence.¹⁵

Overseas approaches

- 8.14 All the jurisdictions we have considered use a concept like decision-making capacity in relevant legislation — that is, they all contain a test that focuses on a person’s functional ability to make an autonomous decision. Different terms are used such as “capacity” or “mental capacity”.¹⁶ Most jurisdictions provide for a presumption of decision-making capacity (or the equivalent concept).¹⁷
- 8.15 Almost all jurisdictions specify cognitive functions that the person must be able to carry out to be considered to have decision-making capacity for a decision. Most commonly, these are that the person can understand, retain, use and weigh information relevant to the decision and communicate the decision they make.¹⁸
- 8.16 In addition, the legal tests in some jurisdictions require that a person has a certain status. For example, the Mental Capacity Act 2005 (UK) provides that a person lacks “capacity” in relation to a matter if, at the material time, they are unable to make a decision for themselves in relation to the matter “because of an impairment of, or disturbance in the functioning of, the mind or brain”.¹⁹

¹⁴ Protection of Personal and Property Rights Act 1988, ss 5, 24 and 93B.

¹⁵ Protection of Personal and Property Rights Act 1988, ss 6(3), 25(3) and 93B(2)–(3).

¹⁶ See Guardianship of Adults Act 2016 (NT), s 5; Guardianship and Administration Act 2000 (Qld), sch 4 definition of “capacity”; Guardianship and Administration Act 1993 (SA), s 3(1) definition of “mental incapacity”; Guardianship and Administration Act 1995 (Tas), s 11; Guardianship and Administration Act 2019 (Vic), s 5; Mental Capacity Act 2005 (UK), s 2; Adults with Incapacity (Scotland) Act 2000, s 1(6); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 3(2); Mental Capacity Act (Northern Ireland) 2016, s 3; Adult Guardianship and Trusteeship Act SA 2000 c A-4.2 (Alberta), s 1(d); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 3; and Substitute Decisions Act SO 1992 c 30 (Ontario), ss 6 and 45.

¹⁷ See Guardianship of Adults Act 2016 (NT), s 5(2); Guardianship and Administration Act 2000 (Qld), s 11; Guardianship and Administration Act 2019 (Vic), s 5(2); Mental Capacity Act 2005 (UK), s 1(2); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(2); Mental Capacity Act (Northern Ireland) 2016, s 1(2); Adult Guardianship and Trusteeship Act SA 2000 c A-4.2 (Alberta), s 2(a); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 3(4); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 2. For an example of a statute that does not include a presumption of decision-making capacity, see Guardianship Act 1987 (NSW). The New South Wales Law Reform Commission recommended that a new Act should include a rebuttable presumption that a person has decision-making ability: *Review of the Guardianship Act 1987* (NSWLRC R145, May 2018), R6.2.

¹⁸ See Guardianship of Adults Act 2016 (NT), s 5A(2); Guardianship and Administration Act 1995 (Tas), s 11(2); Guardianship and Administration Act 2019 (Vic), s 5(1); Adults with Incapacity (Scotland) Act 2000, s 1(6) definition of “incapable”; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 3(2). These components formed part of the definition of “decision-making ability” recommended by the New South Wales Law Reform Commission: *Review of the Guardianship Act 1987* (NSWLRC R145, May 2018), R6.1.

¹⁹ Mental Capacity Act 2005 (UK), s 2(1). See also Guardianship and Administration Act 1993 (SA), s 3 definition of “mental incapacity”; Adults with Incapacity (Scotland) Act 2000, s 1(6); and Mental Capacity Act (Northern Ireland) 2016, s 3(1).

Significance of decision-making capacity for disabled people

8.17 For disabled people, decision-making capacity is particularly significant. Disabled people have historically been, and sometimes continue to be, affected by paternalism and assumptions about their abilities. This has meant the legal test for decision-making capacity has historically been based on incorrect assumptions about disability. The concept of decision-making capacity has also been used to unduly restrict disabled people's legal agency. These issues have resulted in criticisms of the law's use of this concept, which we discuss in this chapter.

RECOMMENDATION

R7

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

8.18 In this section, we explain why we have concluded that some kind of concept of decision-making capacity should be retained in a new Act. That a person lacks decision-making capacity should be a necessary (but not always sufficient) condition for any denial of legal agency.

8.19 In summary, we consider that decision-making capacity is intrinsically linked with autonomous decision making. Having lack of decision-making capacity as a threshold requirement for a decision to be made on a person's behalf ensures their legal agency cannot be restricted on the basis that others think their decisions are unwise. We are not aware of any concept that better identifies when a decision might need to be made for a person with affected decision making. While criticisms have been made of the concept, they do not provide a basis for a new Act to avoid it.

Decision-making capacity is intrinsically linked with autonomous decision making

8.20 Decision-making capacity is specifically directed to what it means for a person to be able to make an autonomous decision. As we explain in Chapter 7, by an "autonomous decision" we mean a decision that is made in a sufficiently reason-sensitive way, where the person has themselves reasoned from the outcomes they want to the decision they make to achieve them.²⁰ Whether a person has the functional ability to make a decision in this way is what the test for decision-making capacity seeks to measure.²¹

8.21 Decision-making capacity is not the *only* legal concept relevant to autonomous decision making. For example, it might not be appropriate to treat a decision that a person has made as autonomous if they were subject to undue influence when making it.²² However, decision-making capacity is the concept that is directed to whether a person has the functional ability to make an autonomous decision. It therefore captures all situations

²⁰ See Matthew Burch "Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis" (2017) 34 *Journal of Applied Philosophy* 389 at 391.

²¹ See Matthew Burch "Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis" (2017) 34 *Journal of Applied Philosophy* 389 at 391.

²² See generally *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [40].

where a person might need a decision to be made for them because of affected decision making.

The concept of decision-making capacity has important benefits

- 8.22 Properly designed and applied, a test of decision-making capacity provides a threshold requirement for imposing measures relating to a person's legal capacity that is protective in two ways.²³
- 8.23 First, for a person who is assessed to *have* decision-making capacity but is perceived to make questionable decisions, the threshold requirement ensures they do not have their legal agency restricted on that basis.
- 8.24 Second, for a person who is assessed *not* to have decision-making capacity for a decision or class of decisions, this assessment helps identify when it may not be appropriate for them to bear the risks of making the decision(s) themselves.
- 8.25 A well-designed functional test can therefore help ensure that legal measures that restrict legal agency protect and promote the equality, dignity and autonomy of people with affected decision making and impair rights no more than is necessary.

Practical considerations support retaining decision-making capacity

- 8.26 There are also practical reasons to retain decision-making capacity as the concept to identify when a decision might need to be made for a person. First, there are hundreds of statutory references to concepts akin to decision-making capacity and several common law rules relating to it. Taking a different approach in a new Act replacing the PPPR Act would result in a mismatch between that Act and the rest of the law. This mismatch might mean our recommended decision-making arrangements would not always work as intended unless other laws were also amended to reflect the different concept.²⁴
- 8.27 Second, judges, lawyers, health practitioners and other relevant experts are already familiar with concepts akin to decision-making capacity. Introducing a new concept would render existing knowledge and experience irrelevant. It would likely require extensive changes to practice, resulting in a period of uncertainty and potentially unforeseen consequences.
- 8.28 In our view, a new concept would need to have significant benefits compared to decision-making capacity (properly defined and assessed) to justify these risks and costs.

No obvious alternative to decision-making capacity

- 8.29 We are not aware of any concept that identifies when a decision might need to be made for a person with affected decision making better than decision-making capacity. As we note above, overseas jurisdictions we have investigated have not developed alternative concepts in new legislation. Other law reform bodies have also recommended retaining

²³ See Matthew Burch "Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis" (2017) 34 Journal of Applied Philosophy 389 at 391.

²⁴ As we discuss in Chapter 14, we think that appointment of a representative will sometimes be required because another area of law requires that the decision maker have legal capacity. For example, if a person without decision-making capacity needs to sell a house, a bank and any prospective buyer will likely want to be sure any decision to sell the house is made by a person with decision-making capacity to ensure the contract cannot be undone.

the concept.²⁵ We are, however, aware of three alternative approaches proposed by commentators, discussed below.

- 8.30 First, Michael Bach and Lana Kerzner have proposed an approach whereby people fall into one of three “decision-making statuses” — “legally independent status”, “supported decision-making status” and “facilitated decision-making status”.²⁶ The test for legally independent status is whether there is reasonable evidence that the person has the ability, by themselves or with assistance, to understand information relevant to making a decision and appreciate the reasonably foreseeable consequences of a decision.²⁷ Bach and Kerzner state that their three-status approach ensures that the exercise of legal capacity does not depend on decision-making capacity.²⁸ However, the test includes elements that commonly appear in functional tests for decision-making capacity (as we address in Chapter 9). It is accordingly unclear how this approach departs from decision-making capacity in substance.
- 8.31 Second, in the context of mental health law, Piers Gooding and Eilionóir Flynn have proposed the doctrine of necessity as a basis for intervention in emergency situations that does not take account of a person’s “perceived or actual mental capacity”. They suggest that intervention could be deemed necessary when “a person’s life, health or safety is at imminent and grave risk, and failure to intervene would constitute criminal or civil negligence”.²⁹
- 8.32 However, many questions about this proposal would need to be worked through. For example, it is unclear how the concept of necessity would distinguish between situations where intervention is justified and situations where someone is making a risky choice that should be respected. Without a concept to identify when a person has sufficient decision-making ability to make a particular decision, a necessity-based approach may give insufficient weight to the value of autonomy. Further, it is unclear how such a proposal could operate outside of mental health law and emergency situations. It does not address

²⁵ See for example Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [2.50]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R6.1–6.3; and Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [5.12].

²⁶ Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 162–163.

²⁷ Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 162.

²⁸ Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 92 and 99.

²⁹ Piers Gooding and Eilionóir Flynn “Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?” (2015) 4 *Laws* 245 at 261. Gooding and Flynn draw on and propose amendments to Bach and Kerzner’s concept of “serious adverse effects”. See Michael Bach and Lana Kerzner *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, October 2010) at 130–158.

what (if anything) should be done where the proposed threshold for intervention on the basis of necessity is not met but an important decision needs to be made.³⁰

- 8.33 Third, János Fiala-Butora has proposed a “Modified Support Framework” under which a disabled person’s ability to make their own decision (with support) depends on whether they can communicate the decision “in a form which a third person can understand”.³¹ For example, if a person were at the bank seeking to withdraw money, whether they could make that decision would depend on whether they could communicate it to the bank clerk.³² If the person could not communicate the decision, their supporter would be entitled to make the decision on their behalf (making all efforts to establish the person’s wishes).³³
- 8.34 This approach would avoid the need to assess whether a person has decision-making capacity for a decision. However, some important aspects of how the framework would work are not elaborated:
- (a) It is unclear how the model would operate where a decision is communicated online (for example, an electronic bank transaction) rather than in person (to a bank clerk).
 - (b) It is also unclear how safeguards would be implemented to prevent a person with affected decision making from making a decision that they do not understand and that will cause them significant harm. Fiala-Butora’s proposal deliberately prioritises autonomy over protection from harm.³⁴ Nevertheless, he recognises that some safeguards against harm are necessary.³⁵ He states that the rationale for overruling a person’s decision “should not be related to formal categories of legal capacity established through capacity assessments but to goals preventing specific harms based on objective criteria, which are not based on disability”.³⁶ However, he does not address what these criteria should be. In the absence of identified criteria, it is difficult to assess the proposal against approaches based on decision-making capacity.
 - (c) Further, the proposed model does not appear to address situations where a person communicates a decision that they do not understand and that, although not harmful (objectively assessed), will not achieve the outcome they want. It is unclear whether

³⁰ This may be more likely when property decisions are concerned. For example, a person may have been in the process of selling their property when they lose the ability to understand the transaction. Applying the decision-making capacity test, the Family Court could appoint a property manager with powers to complete the transaction. Applying the necessity doctrine, failure to complete the transaction would likely not put the person’s life, health or safety at imminent or grave risk — nor would it result in criminal or civil negligence. There would accordingly be no intervention, despite the person’s clear wish to sell their home.

³¹ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 125.

³² János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 129–130.

³³ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 125.

³⁴ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 138.

³⁵ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 97 and 138.

³⁶ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 142.

Fiala-Butora anticipates that safeguards should be put in place to address such decisions.

- 8.35 The absence of fully developed alternatives to the concept of decision-making capacity may not be surprising. As explained above, decision-making capacity speaks directly to the concept of an autonomous decision. As long as autonomous decision making features in the law, a concept akin to decision-making capacity is likely to be required.

Criticisms of decision-making capacity do not provide a basis to abandon it

- 8.36 There are three main criticisms of the concept of decision-making capacity: that it may result in unjustified discrimination; that it takes an individualistic approach; and that it may not adequately reflect how people make decisions. In our view, these criticisms do not provide a basis for a new Act to avoid the concept of decision-making capacity.

May result in unjustified discrimination

- 8.37 The United Nations Committee on the Rights of Persons with Disabilities (Disability Committee) has criticised representative decision-making regimes as resulting in unjustified discrimination. The Disability Committee is clear this criticism applies to regimes that assess decision-making capacity using a functional approach, stating it is “discriminatorily applied to people with disabilities”.³⁷
- 8.38 For the reasons explained in Chapter 7, we do not consider measures that restrict legal agency based on a lack of decision-making capacity (functionally assessed) necessarily result in unjustified discrimination. Where these measures are designed to protect people from serious harm or to give effect to their will and preferences, there is a strong argument that they do not result in material disadvantage and hence do not amount to discrimination. Even if a measure that restricts legal agency does result in discrimination, it might be justified. In our view, the purpose of these measures is to protect the equality, dignity and autonomy of people with affected decision making. This purpose is so important that, in some situations, treating people differently based on the concept of decision-making capacity can be justified.
- 8.39 However, as we explain in Chapter 7, in order for measures not to result in material disadvantage or (if they do) to be justified, they must be carefully designed to achieve their purpose and impair rights no more than necessary.³⁸

³⁷ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15].

³⁸ Whether measures meet these requirements depends on the legal standards and processes that apply to decision-making capacity assessments (considered in Chapter 9) and the precise legal consequences that flow from an assessment that a person lacks decision-making capacity (considered in subsequent chapters, in particular, Chapter 12).

Individualistic approach

- 8.40 Some authors have criticised the concept of decision-making capacity as having an individualistic approach to disability and decision making that values independence and focuses on the individual in isolation. This can be compared to relational or collective approaches that consider the person’s social reality, relationships, supports and values.³⁹
- 8.41 This may be a particular issue for Māori. Some authors consider that an individualist approach to disability “does not recognise the importance of ancestral connectivity and community collectivity” nor the centrality of whānau.⁴⁰ As we discuss in more detail in Chapter 4, an ao Māori perspective on disability “sees disability as a collective endeavour of both the individual and the whānau as a whole”.⁴¹ It may also be inconsistent with te ao Māori to focus only on a person’s cognitive functioning. Dr Hinemoa Elder has said that decision-making capacity “for Māori is not best understood as residing in the individual alone, rather as contained within a collective”.⁴² The individualistic nature of decision-making capacity may also be an issue for other cultures whose culture is more collective.
- 8.42 As we explain in Chapter 7, state law in Aotearoa New Zealand is premised on each (adult) person being able to make autonomous decisions — that is, decisions that are connected to the outcomes the person wants to achieve. Decision-making capacity, as a legal test, identifies when the law should regard that premise as valid and when it should not. While this means that it can fairly be considered to take an individualistic approach, that is because the usual premise of an ability to make autonomous decisions is itself inherently individualistic. The individualistic nature of decision-making capacity is therefore not a reason for abandoning it.
- 8.43 However, it is important that measures in a new Act are responsive to people’s social reality and cultural values. The concept of decision-making capacity should not prevent or undermine collective decision making where people want decisions relating to them to be made in that way.

³⁹ For discussions see Beverley A Clough “New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law” (2018) 26 *Med L Rev* 246 at 258–260; and Brent Hyslop and Grant Gillett “Ethical, Relational and Cultural Elements of Capacity” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 26–28.

⁴⁰ Huhana Hickey and Denise Wilson “Whānau Hauā: Reframing disability from an Indigenous perspective” (2017) 6 *MAI Journal* 82 at 84.

⁴¹ Huhana Hickey and Denise Wilson “Whānau Hauā: Reframing disability from an Indigenous perspective” (2017) 6 *MAI Journal* 82 at 87.

⁴² Hinemoa Elder “Te Puna a Hinengaro: He Tirohanga ki a Āheinga The Wellspring of Mind: Reflections on Capacity from a Māori Perspective” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 29 at 44. See also Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper* (NZLC IP49, 2022) at [5.34]–[5.43].

May not adequately reflect how people make decisions

- 8.44 Some authors have criticised the concept of decision-making capacity as not adequately reflecting how people make decisions in practice. These criticisms include:
- (a) The concept is binary — a person either has or does not have decision-making capacity. In reality, decision-making ability is more complex and is often dependent on environmental and social factors.⁴³
 - (b) The functional approach to assessing decision-making capacity is focused on a person’s cognition.⁴⁴ However, people’s decisions are often influenced by other factors such as emotions or intuition.⁴⁵
 - (c) Under the functional approach, decision-making capacity is intended to be assessed in a decision-specific manner. However, decisions are often “ongoing, interwoven with other decisions, and the decisions of others”.⁴⁶
- 8.45 As we explain above, the law requires a way to identify decisions that it may not be appropriate to treat as autonomous. In the absence of another concept or approach that can better perform this role, we do not think criticisms about the accuracy with which decision-making capacity reflects people’s decision-making processes provide a sufficient basis for the law to abandon the concept.
- 8.46 Further, we consider the concept of decision-making capacity needs to be binary. To provide clarity and certainty, a bright line is required between when the law should treat a person’s decision as autonomous and when it should not.⁴⁷ As we explain above, this bright line also serves a protective function. For example, it protects the legal agency of people whose decision making is affected to some extent but who can nonetheless make autonomous decisions. This is particularly important to prevent legal agency being restricted on the basis of disability alone.
- 8.47 While we do not think the criticisms discussed in this section provide a basis to abandon the concept of decision-making capacity, they should inform the development of a new Act. For example, we consider that practices for assessing decision-making capacity should be able to change over time as expertise develops. In addition, while the test for decision-making capacity needs to be binary and to concern the person’s ability to make

⁴³ See United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [14]; and Victoria Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [5.11].

⁴⁴ See Eilionóir Flynn and Anna Arstein-Kerslake “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10 *International Journal of Law in Context* 81 at 81–82; and United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [15].

⁴⁵ Amita Dhanda “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future” (2007) 34 *Syracuse J Intl L & Com* 429 at 459; and Camilla Kong and Alex Ruck Keene *Overcoming Challenges in the Mental Capacity Act 2005* (Jessica Kingsley Publishers, London, 2019) at 38.

⁴⁶ Beverley A Clough “New Legal Landscapes: (Re)Constructing the Boundaries of Mental Capacity Law” (2018) 26(2) *Med L Rev* 246 at 259–260.

⁴⁷ See Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 47, noting that decision-making capacity and incapacity are “separated by a ‘bright line’ that determines whether the law permits intervention in a person’s life”. See also Brent Hyslop and Grant Gillett “Ethical, Relational and Cultural Elements of Capacity” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 20 and 23.

the relevant decision in an adequately reason-sensitive manner, legal measures should recognise the potentially fluctuating nature of decision-making capacity.⁴⁸ They should also be sensitive to people’s social environment (including the decision-making support available to them) and facilitate the development of their decision-making abilities and exercise of legal capacity.

- 8.48 In Chapter 9, we consider how a new Act should define and assess decision-making capacity so that it best protects and promotes the equality, dignity and autonomy of people with affected decision making.
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⁴⁸ See Brent Hyslop and Grant Gillett “Ethical, Relational and Cultural Elements of Capacity” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17 at 25.

CHAPTER 9

Assessing decision-making capacity

IN THIS CHAPTER, WE CONSIDER:

- what the test for a lack of decision-making capacity should be; and
- how decision-making capacity should be assessed.

INTRODUCTION

- 9.1 In Chapter 8, we conclude that a new Act should retain, as a necessary (but not always sufficient) requirement before the law permits a decision to be made on a person's behalf, some kind of assessment of the person's functional ability to make the decision autonomously. We call this a test of decision-making capacity and explain that there are various different tests akin to decision-making capacity in the Protection of Personal and Property Rights Act 1988 (PPPR Act). In this chapter, we use the term "decision-making capacity" except where the specific wording of the PPPR Act is relevant.
- 9.2 For the reasons given in Chapter 8, the concept of decision-making capacity is an important component of a legislative scheme to protect and promote the equality, dignity and autonomy of people with affected decision making. However, much can be done to improve how the concept operates in a new Act. In this chapter, we make recommendations to:
- (a) provide a simple and clear legal test for decision-making capacity and associated rules;
 - (b) promote the accessibility of formal decision-making capacity assessments by qualified professionals;
 - (c) improve the knowledge and ability of people who undertake decision-making capacity assessments; and
 - (d) improve the circumstances in which decision-making capacity assessments are carried out.

ISSUES WITH DECISION-MAKING CAPACITY ASSESSMENTS UNDER THE PPPR ACT

9.3 In this section, we summarise the key issues with decision-making capacity tests and assessments under the PPPR Act. These issues reflect strong themes from feedback to our Preliminary Issues Paper and Second Issues Paper, as well as secondary sources.

The PPPR Act uses multiple terms and tests

9.4 The PPPR Act uses a number of terms to express concepts akin to decision-making capacity such as “capacity”, “competence” and “mentally incapable”. It also provides for several different tests to assess these concepts. The use of multiple terms and tests “produces unnecessary complexity”¹ and can cause confusion about what it means for a person to lack decision-making capacity.

Many tests in the PPPR Act do not provide sufficient guidance

9.5 Many of the tests in the PPPR Act do not provide sufficient guidance about what it means for a person to lack decision-making capacity. For example, one element of several tests is simply that a person lacks capacity to “make” a decision.² What it means to be able to make a decision is not spelt out.

Assessments take inconsistent approaches and are of varying quality

9.6 Under the current law, decision-making assessments can be carried out by certain health practitioners.³ These decision-making capacity assessments can take different approaches and are of varying quality. Many submitters told us that health practitioners do not always have sufficient expertise to complete assessments, their approaches are inconsistent and they may be inadvertently influenced by their own bias or assumptions.

9.7 Several of these concerns are reflected in Aotearoa New Zealand research. For example, a qualitative study of general practitioners published in 2020 found that general practitioners lack formal training, knowledge and confidence in decision-making capacity assessments and are unclear about the legal requirements.⁴ A study of different types of health practitioners published in 2024 also found that training was lacking in quantity and adequacy.⁵ While study participants felt more confident about their ability to conduct assessments than the general practitioners in the previous study, only a quarter of participants were very confident in their ability to explain decision-making capacity to

¹ Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, July 2016) at [4.32].

² Protection of Personal and Property Rights Act 1988, ss 12(2)(a) and 94(2)(a)(i).

³ Protection of Personal and Property Rights Act 1988, ss 97(5) and 98(3)–(3B). We discuss the current law in more depth later in this chapter.

⁴ Alisha Vara and others “General practitioners and decision-making capacity assessment: the experiences and educational needs of New Zealand general practitioners” (2020) 37(4) *Family Practice* 535 at 538–539.

⁵ Nicola Hickling and others “Exploring training, involvement and confidence: a study of healthcare professionals in decision-making capacity assessments” (2024) 137(1593) *NZMJ* 31 at 41.

patients. Both studies found that participants did not have a consistent approach to assessments, with the latter study concluding that approaches are “widely varied”.⁶

The circumstances of assessments do not reflect how people make decisions

9.8 We received a lot of feedback about the circumstances in which decision-making capacity assessments are carried out. Many submitters highlighted the importance of access to support during decision-making capacity assessments. Some submitters indicated that people whose decision-making capacity is being assessed by a health practitioner do not consistently have access to a support person or other types of support (such as an interpreter). We have also heard that assessments are generally held in a clinical setting rather than in an environment familiar to the person.

Assessments sometimes take a blanket approach

9.9 The ways that a person’s decision-making is affected and the extent to which it is affected may vary over time and depend on the nature of the decision.⁷ However, it appears that decision-making capacity is sometimes assessed by health practitioners in a general way. This can result in people being found not to have decision-making capacity for broad areas of their life, despite the fact they are able to make some decisions.⁸

Assessments do not always reliably assess decision-making ability

9.10 The issues discussed above impact on the potential reliability of decision-making assessments by health practitioners. Lack of social and cultural responsiveness during decision-making capacity assessments has also been raised by submitters and commentators as inhibiting the reliability of assessments.⁹

9.11 Unreliable assessments of decision-making capacity can result in people with affected decision making having their legal agency restricted in unjustified ways, undermining their equality, dignity and autonomy.

⁶ Nicola Hickling and others “Examining the approaches used to assess decision-making capacity in health care practice” (2024) 137(1598) NZMJ 22 at 29; and Alisha Vara and others “General practitioners and decision-making capacity assessment: the experiences and educational needs of New Zealand general practitioners” (2020) 37(4) Family Practice 535 at 537. See also Nicola Mooney and others “Decision-making capacity assessments in New Zealand and Australia: a systematised review” (2024) 31(5) Psychiatry, Psychology and Law 816 at 837, which found that a systematised review of relevant literature in New Zealand and Australia “highlighted the wide variation of approaches and processes underlying the current assessment of a patient’s [decision-making capacity]”.

⁷ See Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 45–46.

⁸ See Nicola Hickling and others “Examining the approaches used to assess decision-making capacity in healthcare practice” (2024) 137(1598) NZMJ 22 at 29.

⁹ See for example Joanne Baxter “Māori Perspectives” in Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington 2020) 153 at 162–163; and Ben Gray “Cultural diversity and the role of interpreters” in Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) 139 at 139–141.

Decision-making capacity assessments are inaccessible for many people

9.12 Decision-making capacity assessments can be inaccessible due to long waitlists, lack of availability of assessors and the cost of assessments. General practitioners have also raised with us a lack of time to properly undertake assessments.¹⁰

HOW THIS CHAPTER RESPONDS TO THESE ISSUES

9.13 The focus of our recommendations in this chapter is on improving the quality of decision-making capacity assessments. While we make several recommendations directed to increasing the availability of decision-making capacity assessors, issues about availability cannot be addressed comprehensively through law reform. A range of other initiatives is likely needed, including with respect to the resourcing of assessments.

9.14 To improve the quality of decision-making capacity assessments, a new Act needs to provide for people's decision-making capacity to be assessed reliably and consistently in the light of their lived reality. To do so, a new Act needs to ensure (to the extent possible) that:

- (a) legal tests for decision-making capacity and associated rules reflect the varying ways that affected decision making can be experienced by people, take account of individuals' lived reality and give sufficient guidance for people doing assessments to promote consistency;¹¹
- (b) people undertaking decision-making capacity assessments have the appropriate knowledge and support to do so; and
- (c) the circumstances in which professionals carry out decision-making capacity assessments are carefully considered to best ensure the reliability of assessments.

9.15 Our recommendations in other chapters are also relevant to these matters. In particular, some of our recommendations in Chapter 12 are directed to ensuring a decision-specific approach to decision-making capacity assessments. Further, our recommendations with respect to the development of information and guidance about representative arrangements in Chapter 24 are intended to improve the quality of decision-making capacity assessments by non-professionals such as representatives.

¹⁰ See also Greg Young, Alison Douglass and Lorraine Davison "What do doctors know about assessing decision-making capacity?" (2018) 131(1471) NZMJ 58 at 61.

¹¹ Relatedly, the Victorian Law Reform Commission observed that the way guardianship law describes and assesses decision-making capacity should be reformed to "better reflect the reality of the way impaired decision-making ability is experienced by different people": *Guardianship* (VLRC R24, 2012) at [7.5].

THE TEST FOR DECISION-MAKING CAPACITY

Current law

- 9.16 The PPPR Act has multiple tests for assessing when a person lacks functional capacity to make an autonomous decision.¹² In particular:
- (a) three tests relate to the jurisdiction of te Kōti Whānau | Family Court to make an order about a person’s personal care and welfare or to appoint a welfare guardian or property manager;¹³
 - (b) two related tests address the review of personal and property orders;¹⁴
 - (c) one test concerns the witnessing requirements to create a valid enduring power of attorney (EPOA);¹⁵ and
 - (d) two tests concern when attorneys can act under EPOAs in relation to property and personal care and welfare.¹⁶
- 9.17 These tests contain different terms for decision-making capacity and apply several different standards.¹⁷
- 9.18 The tests relating to personal care and welfare focus on “capacity” to “understand” or “make” a decision and capacity to “communicate” it.¹⁸ By contrast, the tests in relation to property focus on a person’s “competence” to “manage” their property.¹⁹ In conjunction with these concepts, several tests also use the phrase “mentally incapable”.²⁰
- 9.19 Some tests refer to a person “wholly or partly” lacking capacity or competence.²¹ Others refer to a person “wholly” lacking capacity or competence.²²

¹² In addition to the tests addressed in this paragraph, the PPPR Act also addresses situations where the Court can dispense with service of an application and excuse attendance at a hearing; Protection of Personal and Property Rights Act 1988, ss 63(2) and 74(2). However, these tests relate solely to a person’s ability to understand proceedings rather than their ability to make a decision. We address these tests in Chapter 25.

¹³ Protection of Personal and Property Rights Act 1988, ss 6(1), 12(2)(a) and 25(1)(b). See also s 108A concerning the definition of a “specified person” for the purposes of matters such as when a court is required to approve the settlement of a legal claim on behalf of a person.

¹⁴ Protection of Personal and Property Rights Act 1988, ss 86–87.

¹⁵ Protection of Personal and Property Rights Act 1988, s 94A(7)(b).

¹⁶ Protection of Personal and Property Rights Act 1988, s 94(1)–(2).

¹⁷ A table of many of the terms and tests used in the Protection of Personal and Property Rights Act 1988 was set out in our Second Issues Paper: *Te Aka Matua o te Ture | Law Commission He Arotake i te Ture mō ngā Huarahi Whakataua ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [7.42].

¹⁸ Protection of Personal and Property Rights Act 1988, ss 6(1) (making an order about a person’s personal care and welfare), 12(2) (appointing a welfare guardian) and 94(2) (activating an EPOA in relation to personal care and welfare).

¹⁹ Protection of Personal and Property Rights Act 1988, ss 25(2) (appointing a property manager) and 94(1) (activating an EPOA in relation to property).

²⁰ Protection of Personal and Property Rights Act 1988, ss 94(1)–(2) and 94A(7).

²¹ Protection of Personal and Property Rights Act 1988, ss 6(1) (making an order about a person’s personal care and welfare) and 25(1) (appointing a property manager).

²² Protection of Personal and Property Rights Act 1988, ss 12(2)(a) (appointing a welfare guardian), 63(2)(a) (dispensing with service), 74(2)(a) (concerning excusing attendance at a hearing) and 94(1) (activating an EPOA in relation to property).

- 9.20 The concepts of “capacity” and “competence” are not defined. With respect to capacity, tests variously refer to a person’s capacity to “understand the nature and foresee the consequences”, to “make” decisions, and to “communicate” decisions.²³
- 9.21 Although not expressed in the PPPR Act in this way, courts have sometimes referred to four factors as being important in determining whether a person has decision-making capacity to make relevant decisions. Reflecting the factors commonly stated in many overseas statutes, these factors are:²⁴
- (a) understanding of relevant information;
 - (b) appreciation of the situation and its consequences;
 - (c) manipulation of information — in other words, the person’s ability to follow a logical sequence of thought in order to reach a decision; and
 - (d) ability to communicate choice.

Consultation

Single test for decision-making capacity

- 9.22 In the Second Issues Paper, we expressed the preliminary view that there should be a single test for decision-making capacity. We asked submitters whether they agreed with this approach.
- 9.23 Sixty submitters gave feedback on this issue, although what we meant by “a single test” was not always understood. Some submitters thought we meant a rigid assessment that would not account for an individual’s unique circumstances or a one-off assessment that would not be decision-specific. In fact, we meant one consistent legal test for decision making as opposed to multiple tests in different provisions.
- 9.24 Of those submitters that understood the question as we had intended it, the large majority supported a single test. The most common reason given in favour of this approach was that a single test would be clearer and simpler for users of a new Act and would help alleviate confusion.
- 9.25 A small minority of submitters raised concerns about a single test. For example, a few submitters either thought that testamentary capacity (the ability to make a will) might require a different standard from other contexts or queried what bearing our proposed test would have on the common law test for testamentary capacity.

Elements of the test for decision-making capacity

- 9.26 We also asked submitters whether they agreed that, under a new Act, a person should be considered to have decision-making capacity if they are able to:
- (a) understand the information relevant to the decision and the effect of the decision;

²³ Protection of Personal and Property Rights Act 1988, ss 6(1) (making an order about a person’s care and welfare), 12(2)(a) (appointing a welfare guardian), 63(2)(a) (dispensing with service) and 94(2) (activating an EPOA in relation to personal care and welfare).

²⁴ See for example *X v Y* [2004] 2 NZLR 847 (HC) at [51]; *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [42]; and *Te Whatu Ora – Health New Zealand v P* [2025] NZHC 969 at [24]. See also John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 4.

- (b) retain that information as necessary to make the decision;
 - (c) use or weigh that information as part of the process of making the decision; and
 - (d) communicate the decision (whether by talking, using sign language or any other means).
- 9.27 Fifty submitters gave feedback on this issue.
- 9.28 There was broad support for the four-factor test we suggested. Submitters emphasised the importance of the test being a functional one — that is, focusing on whether a person is able to make a decision at a particular time based on an assessment of their cognitive functions. Some submitters noted the proposed test reflects current best practice in Aotearoa New Zealand or the approach taken in other jurisdictions. A few submitters said maintaining this well-known approach would promote consistency, reduce confusion and be cost-effective.
- 9.29 Approximately one-fifth of submitters that gave feedback on this issue noted other aspects of decision-making capacity they considered should inform the test. For example, some said it is not clear how lack of insight²⁵ and compulsion to act in a certain way factor into the proposed test. Another comment was that the test should take account of collective decision making. We explain and address points raised by submitters about these topics in our analysis below.
- 9.30 A minority of submitters fundamentally disagreed with the proposed four-factor test or had significant concerns about it. Some submitters said a binary approach to decision-making capacity is undesirable or that the test does not reflect the continuum of decision-making ability. A related concern raised by a few submitters was that the proposed test is too prescriptive or rigid.

Extent of support during an assessment

- 9.31 In response to another question, some submitters emphasised the importance of ensuring support during a decision-making capacity assessment.²⁶ Submitters' views on the appropriate extent of support during assessment diverged:
- (a) A few submitters considered that support during the assessment should reflect the support usually available to the person.
 - (b) Some submitters, including Public Trust, considered that the assessment should include support not usually available to the person. Two of these submitters suggested that additional support could come in the form of an independent advocate.

Recommendations

R8

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

²⁵ For example, where a person feels they are not mentally or physically unwell, despite clinical evidence to the contrary.

²⁶ We received this feedback in response to a question about how the circumstances of decision-making capacity assessments can be improved.

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(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.

A single test

- 9.32 A new Act should use a single test for decision-making capacity. This approach was supported by most submitters that understood our question as we had intended it. A single test would reduce confusion, help promote assessors' knowledge and confidence and facilitate greater consistency in practice.
- 9.33 Under our recommendations in subsequent chapters, the test would apply when assessing decision-making capacity for the purposes of:²⁷
- (a) appointing a formal supporter and amending and terminating a formal support arrangement (Chapter 11);
 - (b) creating and reviewing a court-appointed representative arrangement (Chapters 14 and 18);
 - (c) making a court-ordered decision (Chapter 14);
 - (d) executing an EPOA and determining when an attorney may make decisions under an EPOA (Chapter 19); and
 - (e) determining whether a particular decision may be made by a court-appointed representative or attorney acting under an EPOA (Chapter 12).
- 9.34 For clarity, our recommended test would only apply to a new Act to replace the PPPR Act. It would not replace pre-existing tests provided for in other legislation or the common law such as the test for testamentary capacity (the ability to make a will).²⁸

²⁷ For clarity, the test would not apply in relation to the statutory standard for when the Court can dispense with service of an application and excuse attendance at a hearing. Although these provisions use the term "capacity", they relate solely to a person's ability to understand proceedings rather than their ability to make a decision. We address these tests in Chapter 25.

²⁸ See *Banks v Goodfellow* (1870) LR 5 QB 549 at 565–568; and *Woodward v Smith* [2009] NZCA 215 at [19]. The Protection of Personal and Property Rights Act 1988 contains specific rules regarding the making of a will by a person subject to a property order. In short, a person is not incapable of making testamentary dispositions only because they are subject to a property order (s 54(1)), but the court can enable a property manager to execute a will on a represented person's behalf if satisfied they do not have testamentary capacity (s 55). As we address in Chapter 17, we consider these rules should continue. For completeness, we note that the UK Law Commission has recommended that the test of "capacity" in the Mental Capacity Act 2005 (UK) should apply to testamentary capacity: Law Commission (England and Wales) *Modernising Wills Law — Volume 1: Report* (Law Com No 419, 2025) at [2.103].

Framing of the test

9.35 The test we recommend is framed in the negative by setting out when a person does *not* have decision-making capacity. This approach avoids confusion with respect to the presumption of capacity (addressed below). If the test instead addressed when a person *has* decision-making capacity, it might give the impression that a person whose decision-making capacity is in doubt needs to demonstrate they have decision-making capacity. Rather, as we explain below, a person should be presumed to have decision-making capacity for a decision or class of decisions unless it is demonstrated they do not.²⁹

Taking available decision-making support into account

9.36 Our recommended test requires a person's decision-making capacity to be assessed in the light of the decision-making support that is expected to be available to them when they make the relevant decision or class of decisions. This would help to ensure the assessment reflects the person's lived reality. Together with other recommendations, it would also help to ensure that any arrangements adopted with respect to a person's decision-making capacity are the least restrictive that are reasonable in the circumstances. For example, it would mean that:

- (a) a court-ordered arrangement cannot be imposed where a person has decision-making capacity with the decision-making support available to them (see Chapter 14); and
- (b) where there is a court-appointed representative, they should not make a decision that the relevant person has decision-making capacity to make with the decision-making support available to them (see Chapter 12).

9.37 We discuss the meaning of decision-making support in Chapter 6. Our recommended definition includes assisting a person to identify information relevant to a decision and to identify and assess options for the decision (among other things).

9.38 Our recommended test for decision-making capacity refers to *available* decision-making support as opposed to all possible decision-making support. We make recommendations about decision-making support in later chapters that are relevant to the support that can be expected to be available to a person when making the relevant decision or class of decisions:

- (a) In Chapters 10 and 11, we recommend a formal support regime is established under which a person (or the Family Court with a person's consent) can appoint a person to provide decision-making support.
- (b) In Chapter 12, we recommend that representatives have obligations to ensure that decision-making support is provided.
- (c) We do not make recommendations about funded decision-making support, for reasons we explain in Chapter 6.

²⁹ For clarity, under our recommendations, it will sometimes be necessary to assess whether a person has decision-making capacity. For example, we recommend that a representative should not generally make a decision for which the represented person has decision-making capacity (see Chapter 12). One option is for a new Act to set out two mirror tests: one that addresses when a person has decision-making capacity and one that addresses when they do not. This approach is taken in the Australian Capital Territory: Powers of Attorney Act 2006 (ACT), s 9. This is a drafting issue that we do not consider further.

- 9.39 As noted above, some submitters suggested that decision-making support in addition to that expected to be available to a person when making the relevant decision(s) should be provided when assessing a person's decision-making capacity. This approach would mean the outcome of a decision-making capacity assessment would be less likely to depend on the support that a specific person generally has available to them and, in that sense, might be considered to treat people more equally.³⁰ However, providing support during a decision-making capacity assessment that is not expected to be available to the person when making the relevant decision(s) could be harmful. The additional support might mean the person is assessed as having decision-making capacity even though they will not have support available when making decisions in their everyday life. Consequently, measures (such as a court-ordered decision or decision-making arrangement) might not be put in place where they are needed. This outcome would not best protect and promote the person's equality, dignity and autonomy.
- 9.40 In our view, the aim of an assessment should therefore be to understand a person's actual decision-making capacity (with the support that is expected to be available to them when making the relevant decision(s)), not their potential decision-making capacity (with all support that could possibly be available to them). Under our recommended test, when a person is conducting a decision-making capacity assessment that is relevant to future decision making, they should turn their mind to the decision-making support the person has (or is proposed to have) during an assessment and form a view as to whether that support will be available to them with respect to the relevant decisions. (We address this issue again in relation to formal decision-making capacity assessments below.)

The four elements of the test

- 9.41 Our recommended test has four elements — in short, the ability to understand relevant information, retain that information, use and weigh the information and communicate a decision.³¹ The four elements reflect current understandings of decision-making functions and how they should be reflected in law.³² Our proposed elements are similar to those adopted in related contexts:
- (a) In New Zealand, the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 and the End of Life Choice Act 2019 use the same, or substantially the same, elements.³³ So does the Mental Health Bill.³⁴

³⁰ There would still be some difference, as some support cannot be provided effectively (or as effectively) on a short-term basis. For example, a supporter who has a long-term relationship with the person is likely to be more effective than a supporter who has not met the person before.

³¹ In the Second Issues Paper, we suggested that the first limb of the test should refer to understanding both relevant information and the effect of the decision: Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [7.56]. Our recommended test does not include reference to understanding the effect of the decision, because we consider it unnecessary and potentially confusing.

³² Anthony Duncan and Mark Fisher "Clinical Assessment of Capacity" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 45 at 46.

³³ Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 9; and End of Life Choice Act 2019, s 6.

³⁴ Mental Health Bill 2024 (87-2), cl 9(1). At the time of writing, the Bill has yet to be read a second time.

- (b) A New Zealand toolkit for assessing decision-making capacity sets out materially the same elements.³⁵ As noted above, New Zealand courts sometimes refer to very similar elements when considering decision-making capacity under the PPPR Act.³⁶
- (c) This approach is also used in several overseas jurisdictions, including in recently enacted legislation.³⁷
- 9.42 In our view, the proposed four factors are sufficiently detailed to facilitate consistency and objectivity. They direct people undertaking decision-making capacity assessments to distinct matters they must assess. The factors are also sufficiently flexible to accommodate ongoing development of expertise and understanding.
- 9.43 Some submitters raised other matters that might be addressed as part of the test or considered further. We have not incorporated these suggestions into our recommendation but address below some of the issues most raised.

Compulsion to act in a certain way

- 9.44 Some submitters, including Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Te Whatu Ora | Health New Zealand and Iris Reuvecamp, thought further consideration may be necessary to address the way in which compulsion to act in a certain way may impact on decision-making capacity. This could be relevant, for example, where a person has a substance addiction or a condition such as Prader-Willi syndrome.³⁸
- 9.45 In our view, a compulsion to act in a certain way will sometimes be relevant to the third proposed aspect of the test (ability to use or weigh relevant information as part of the process of decision making). However, a compulsion might sometimes not relate to decision-making capacity, instead relating to matters such as an inability to follow through with a decision or regulate behaviour. We do not consider these sorts of vulnerabilities should be addressed in a new Act alongside decision-making capacity. There are many types and sources of vulnerability, and they are best addressed on their own terms.³⁹

³⁵ Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 453.

³⁶ For example *X v Y* [2004] 2 NZLR 847 (HC) at [51]; *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [42]; and *Te Whatu Ora – Health New Zealand v P* [2025] NZHC 969 at [24].

³⁷ Guardianship of Adults Act 2016 (NT), s 5A(2); Guardianship and Administration Act 1995 (Tas), s 11(2); Guardianship and Administration Act 2019 (Vic), s 5(1); Mental Capacity Act 2005 (UK), s 3(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 3(2); and Mental Capacity Act (Northern Ireland) 2016, s 4(1). The approach was also recommended by the New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R6.1.

³⁸ Prader-Willi syndrome is a complex genetic condition that is associated with multiple physical and behavioural characteristics. Relevantly to decision-making capacity, people with Prader-Willi syndrome usually experience hyperphagia — the drive to consume excessive quantities of food. See Anna Murray and others “A scoping review of case law relating to support and treatment for people with Prader-Willi Syndrome” (2021) 78 *International Journal of Law and Psychiatry* 101733 at 101734.

³⁹ The jurisdictions we have considered do not address other vulnerabilities such as an inability to follow through with decisions alongside decision-making capacity. Some jurisdictions have legislation to safeguard vulnerable adults such as the Care Act 2014 (UK). This is in addition to the Mental Capacity Act 2005 (UK), which is the English and Welsh equivalent of the Protection of Personal and Property Rights Act 1988. Compare also the Adult Support and Protection (Scotland) Act 2007, which operates in addition to the Adults with Incapacity (Scotland) Act 2000. In Aotearoa New Zealand, Te Tāhū Hauora | Health Quality and Safety Commission identified a legislative gap regarding the safeguarding of vulnerable adults: Family Violence Death Review Committee *Responding to adults at risk who need care and support and who are experiencing family violence* (July 2023).

Vulnerabilities that do not relate to decision-making capacity are beyond the scope of this Report.

Lack of insight into relevant decisions

- 9.46 NZLS and Iris Reuvecamp submitted that we should consider the extent to which the four factors cover a lack of insight. Examples given by these submitters include where a person feels they are not mentally or physically unwell and/or have no ongoing need for medication, despite clinical evidence to the contrary.
- 9.47 In our view, lack of insight is adequately addressed by our recommended test. It is captured in either the first element of the test (a person’s ability to understand the information relevant to the decision and the effect of the decision) or the third element of the test (a person’s ability to use or weigh that information as part of the process of making the decision).⁴⁰ We do not consider lack of insight needs to be addressed separately in the test.⁴¹

Collective decision making

- 9.48 Health New Zealand and Te Tari Kaumātua | Office for Seniors said we should consider how collective decision making may be accommodated by the proposed test.
- 9.49 As we explain in Chapter 8, the fact that state law is premised on each (adult) person being able to make autonomous decisions means that decision-making capacity assessments need to identify whether a particular individual has decision-making capacity. However, our test would enable assessments to take into account the decision-making support a person gets from a collective if that is how they generally make decisions.
- 9.50 If a person is assessed to lack decision-making capacity, the person’s preference for collective decision making should be taken into account by the Family Court when appointing one or multiple representatives, as part of their wishes and values (see Chapter 14). In turn, any representative should take account of the person’s preference for collective decision making when making decisions (see Chapter 12).

A purely functional test is preferable

- 9.51 A few overseas jurisdictions we investigated include a status element in their test for decision-making capacity — that is, an element that refers to a person’s diagnostic status or group membership. For example, the Mental Capacity Act 2005 (UK) provides that people lack decision-making capacity when they are unable to make a decision for themselves “because of an impairment of, or a disturbance in the function of, the mind or

⁴⁰ Alison Douglass, Greg Young and John McMillan’s toolkit for assessing decision-making capacity refers to this issue in the context of the third element (using and weighing the information): “A person might not be considered able to use or weigh the information if they are unable to accept that they suffer from the condition that is requiring treatment. However, if the person refuses the advice of professionals, despite serious consequences, they may still be regarded as retaining capacity as long as they acknowledge these serious consequences”: *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 465.

⁴¹ The overseas jurisdictions we have considered do not incorporate lack of insight as a separate element in decision-making capacity. The Court of Protection (England and Wales) considered the relevance of insight in *CT v London Borough of Lambeth & Anor* [2025] EWCOP 6 (T3).

brain”.⁴² As some commentators observe, this approach operates to narrow the test because, in addition to not having decision-making capacity under the functional elements of the test, a person must meet a “diagnostic threshold”.⁴³

- 9.52 The PPPR Act already provides for purely functional tests of decision-making capacity. We recognise that, in practice, the Family Court generally has evidence of a diagnosed medical condition or impairment before determining that a person does not have decision-making capacity for a matter.⁴⁴ However, this is not required as a matter of law. As te Kōti Matua | High Court has observed, the absence of medical evidence is “not fatal” to an application that can only succeed if the court finds the relevant person lacks relevant decision-making capacity “because a lack of capacity could be established by other evidence”.⁴⁵
- 9.53 We do not consider a new Act should move away from a purely functional approach to decision-making capacity. In our view, including a status element in the test is unnecessary and carries significant risks. Providing for legal capacity to be restricted only where a person meets a diagnostic threshold could amount to unjustified discrimination on the basis of disability.⁴⁶ Conversely, it could result in harm through legal measures relating to the exercise of legal capacity not being put in place where they are needed. For example, a person who does not have a relevant medical diagnosis might lack decision-making capacity for a decision (and need a decision to be made for them) because they are overcome by intense grief and are unable to understand or weigh relevant information.

DIFFERENT TYPES OF ASSESSMENT

- 9.54 Greater formality is needed when assessing decision-making capacity in some contexts than in others. To account for this, a new Act should provide for three types of decision-making capacity assessments:
- (a) *Formal decision-making capacity assessments*: These are assessments made by professionals (other than the Family Court). For example, our recommendations in Chapter 19 require formal decision-making capacity assessments to be made in certain situations before an attorney can make a decision under an EPOA.
 - (b) *Decision-making capacity determinations by the Family Court*: This is where the Court determines whether a person has decision-making capacity, for example, when deciding whether it has jurisdiction to make a court-ordered decision or put in place a representative arrangement.
 - (c) *Other decision-making assessments*: Under our recommendations in later chapters, people’s decision-making capacity would need to be assessed in many situations where a formal assessment cannot practicably be undertaken. An example is where

⁴² Mental Capacity Act 2005 (UK), s 2(1).

⁴³ See Alex Ruck Keene and others “Mental capacity — why look for a paradigm shift?” (2023) 31 Med L Rev 340 at 350–351.

⁴⁴ To test this issue, we identified and reviewed 40 judgments where a person’s decision-making capacity was judicially determined under the PPPR Act. We did not identify any case where it was determined that a person lacked relevant decision-making capacity and did not have a diagnosed impairment or medical condition.

⁴⁵ *Malcolm v John* [2021] NZHC 406, (2021) 33 FRNZ 693 at [36].

⁴⁶ See Wayne Martin and others *The Essex Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (Position Paper, 2016) at 8 and 21.

a representative is deciding whether the represented person has decision-making capacity to make a particular decision (see Chapter 12).

9.55 We discuss each of these types of assessment below. Before doing so, we address matters relevant to all types of assessment.

MATTERS RELEVANT TO ALL THREE TYPES OF ASSESSMENT

9.56 The following issues are relevant to all three types of assessment:

- (a) whether a new Act should provide for a presumption of decision-making capacity;
- (b) whether a new Act should specify any matters as insufficient, by themselves, to lead to a finding that a person does not have decision-making capacity; and
- (c) how a new Act should provide for the decision-specific and potentially fluctuating nature of decision-making capacity.

Current law

9.57 Assessments of decision-making capacity under the PPPR Act start from a presumption of competence.⁴⁷ The PPPR Act is also clear that a person's wish to make a decision "that a person exercising ordinary prudence" would not make is not sufficient by itself to find that the person does not have decision-making capacity.⁴⁸

9.58 For EPOAs in relation to personal care and welfare, a donor's decision-making capacity in relation to a decision must be considered at the time of the decision and in relation to the personal care and welfare matter concerned.⁴⁹ However, the PPPR Act does not include more general provisions to reflect that decision-making capacity can be matter-specific or any provisions addressing how decision-making capacity should be assessed in contexts when it is fluctuating.

Consultation

Presumption of decision-making capacity

9.59 In the Second Issues Paper, we expressed our provisional view that the presumption of decision-making capacity should be maintained in a new Act. We asked whether submitters agreed with that approach.

9.60 Sixty-two submitters gave feedback on this matter. Fifty-two submitters supported retaining the presumption that a person has decision-making capacity. Five submitters partly agreed with a presumption. Four submitters disagreed.

9.61 The key reason submitters gave for retaining the presumption is to help ensure a person's legal capacity is not restricted without justification — unintentionally or intentionally. For example, a submission from Health New Zealand | Te Whatu Ora Waitematā Social Workers said the presumption is important due to assumptions that may be incorrectly made about a person's decision-making capacity based on matters such as their appearance, communication method, values or history (such as substance use).

⁴⁷ Protection of Personal and Property Rights Act 1988, ss 5, 24 and 93B(1).

⁴⁸ Protection of Personal and Property Rights Act 1988, ss 6(3), 25(3) and 93B(2)–(3).

⁴⁹ Protection of Personal and Property Rights Act 1988, s 98(3A).

McWilliam Tyree Lawyers reasoned that limiting a person's self-determination is significant and should only happen where there is clear evidence.

- 9.62 A few submitters that supported or partly supported a presumption of decision-making capacity emphasised that limitations on the presumption are necessary. They said that it can be dangerous to continually presume a person has decision-making capacity in the face of obvious risk. One submitter said there needs to be a clear mechanism to trigger a decision-making capacity assessment.
- 9.63 Of the few submitters that disagreed with the presumption, reasons given included that the law should avoid the notion of decision-making capacity altogether and that some medical conditions (for instance, in relation to eating disorders) might mean a presumption is inappropriate.

Insufficient grounds for finding a person lacks decision-making capacity

- 9.64 We also asked submitters what considerations should be insufficient, by themselves, to lead to a finding that a person does not have decision-making capacity and whether a new Act should specify these factors.
- 9.65 Thirty-two submitters gave feedback on this issue, with 26 supporting the inclusion in a new Act of a list of grounds that are insufficient for finding a person lacks decision-making capacity. Four submitters partly agreed with that approach. Two disagreed.
- 9.66 Among those submitters that supported such a list, some said it would reduce the risk of assessments being influenced by unfair assumptions and unconscious bias. For example, He Manaakitanga Kaumātua Aotearoa | Age Concern NZ said a list of insufficient factors would be a valuable education tool. A submission from Te Whatu Ora MidCentral — Palmerston North Hospital: Social Work said specific factors would provide clear guidance. Te Kāhui Tika Tangata | Human Rights Commission said the list should incorporate a purpose of non-discrimination.
- 9.67 Four submitters (including Health New Zealand and Iris Reuvecamp) considered that, if a list of grounds is included in a new Act, it should be explicitly non-exhaustive. One submission said that, because a list could never be exhaustive, a better approach may involve specifying instead what would trigger an assessment of decision-making capacity.
- 9.68 Among those submitters that disagreed or partly agreed with a list, the most common theme was that a list is unnecessary. For example, lawyer Chris Kelly considered that a specific list could be included in guidelines and warned against overcomplicating new legislation.

Fluctuating and varied decision-making capacity

- 9.69 In response to various questions, some submitters commented on matters relating to the nature of decision-making capacity.
- 9.70 Some submitters emphasised that the law must reflect the fact that a person may have decision-making capacity for some decisions and not others. Relatedly, some submitters said a new Act should recognise fluctuating decision-making capacity. Aged Care Association of New Zealand gave examples of a person's medication affecting their abilities at certain times of day and a person simply having an "off day" that inhibits their clarity of thought for a short time.

Recommendations

Presumption of decision-making capacity

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.

- 9.71 We agree with the majority of submitters that a new Act should retain the statutory presumption that a person has decision-making capacity. A statutory presumption is one of the protections needed to reduce the risk of a person being assumed or wrongly determined to lack decision-making capacity. A person must be presumed to have decision-making capacity until the relevant decision maker (be that the Family Court or a person undertaking a formal decision-making assessment) determines they do not in accordance with the prescribed process.
- 9.72 However, we recommend a new Act specifies that the presumption of decision-making capacity does not apply in two situations.
- 9.73 The first situation is where a court-appointed representative or an attorney under an EPOA⁵⁰ is assessing whether the represented person has decision-making capacity to make a decision. Under our recommendations in Chapter 12, all representatives would be prohibited from making decisions for which the represented person has decision-making capacity (unless the represented person wants the representative to make the decision). This would require representatives to assess whether the represented person has decision-making capacity for each decision. In our view, it would not be appropriate to require representatives to start from the presumption of decision-making capacity with respect to every decision. For example, where a person has been determined by the

⁵⁰ Except EPOAs relating to property that specify an attorney can act at a time before the donor has lost decision-making capacity.

Court to lack decision-making capacity with respect to a class of decisions, it may be reasonable for a representative simply to turn their mind to the issue and satisfy themselves (on a reasonable basis) that there has been no change in the person's decision-making capacity.

- 9.74 The second situation where we recommend the presumption of decision-making capacity not apply is where a formal supporter is considering whether the supported person has ceased to have and is unlikely to regain decision-making capacity to appoint the formal supporter to their role. In Chapters 10 and 11, we recommend a new Act establish a formal support regime that enables a person (or the Court with the person's consent) to appoint a supporter to assist them to make their own decisions. Under our recommendations, a formal supporter would be required to resign if the supported person loses decision-making capacity to appoint the formal supporter to their role and is unlikely to regain it. This is to ensure that a formal support arrangement does not continue where the supported person no longer has the relevant decision-making capacity. Were formal supporters required to start from a presumption of decision-making capacity when considering this issue, formal support arrangements could continue longer than appropriate. We therefore consider that a presumption of decision-making capacity should not apply.
- 9.75 Finally, we note a general point about situations where the presumption of decision-making capacity applies. In our view, the presumption should not be understood to inhibit an assessment of a person's decision-making capacity (or the initiation of an assessment) where there is good reason for it. Otherwise, measures relating to legal capacity may not be put in place for people with affected decision making where they are needed. This could result in significant harm.⁵¹ We envisage that the code of practice that we recommend later in this chapter would provide guidance about good reasons to assess decision-making capacity.

Recognising that decision-making capacity can be matter-specific and fluctuate

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.

⁵¹ See for example *Royal Bank of Scotland Plc v AB* [2020] UKEAT 02668/18/DA, where the UK Employment Appeal Tribunal observed at [22] and [26]–[27] that the Employment Tribunal's failure to determine whether a person lacked capacity to litigate (relying in part on a presumption of capacity) was wrong. See also Isabel Marie Astrachan, Alexander Ruck Keene and Scott Y H Kim "Questioning our presumptions about the presumption of capacity" (2024) 50 J Med Ethics 471 at 417–475; and Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 49–50.

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.

9.76 It is important for a new Act to address the potentially matter-specific and fluctuating nature of decision-making capacity. Our recommendations would require all people assessing decision-making capacity to have regard to the fact that decision-making capacity can be lost in relation to some decision(s) and not others and that any loss of decision-making capacity may be temporary.

9.77 Our recommendations also address how fluctuating decision-making capacity should be dealt with in the context of decision-making assessments. Under our recommendations, where a person is being assessed for decision-making capacity with respect to an *individual decision*, they only need decision-making capacity for the time needed to make and communicate the decision.⁵² This principle would apply in many contexts under our recommendations, for example, when:

- (a) an assessor is undertaking a formal decision-making assessment in the context of a significant decision being considered under an EPOA;
- (b) the Court is considering whether to make a court-ordered decision; or
- (c) a representative is assessing whether a represented person has decision-making capacity for a decision.

9.78 We also recommend a new Act allow an assessor to disregard brief or intermittent indications of decision-making capacity when assessing a person's decision-making capacity for the purposes of an *on-going arrangement* such as creating or continuing a court-ordered representative arrangement or enabling an attorney to act under an enduring power of attorney in relation to a class of decisions. This approach reflects that, for decision-making capacity assessments in relation to longer-term matters, emphasis should be on reliably understanding a person's decision-making capacity over time. For

⁵² A similar provision is included in Ireland: Assisted Decision-Making (Capacity) Act 2015, s 3(4). See also Guardianship and Administration Act 1995 (Tas), s 12(1)(c).

example, the fact that a person has decision-making capacity for brief periods should not prevent the Court appointing a representative if the appointment is needed.

Insufficient grounds for finding a lack 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.

9.79 People undertaking decision-making capacity assessments may sometimes be inadvertently influenced by their own biases or assumptions. There is a risk that certain characteristics or ways of presenting can be inadvertently treated as evidence of a lack of decision-making capacity.

9.80 To mitigate this risk, we consider a new Act should include a list of grounds that are insufficient as a basis for finding that a person lacks decision-making capacity. Most submitters on this question agreed with this approach. As suggested by some submitters, we consider the list should be non-exhaustive.

9.81 We have identified seven grounds that we consider should be listed in a new Act — namely:

- (a) the fact that others consider that decision(s) a person has made or intends to make are unwise or risky;
- (b) a person's medical diagnosis;
- (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; and
- (g) a person's behaviour or manner.

9.82 The first of these grounds reflects the position in the PPPR Act that imprudent decisions do not of themselves indicate a lack of decision-making capacity.⁵³ The other factors are based on submitters' suggestions. Some of them also reflect approaches in overseas jurisdictions.⁵⁴

FORMAL DECISION-MAKING CAPACITY ASSESSMENTS

9.83 We now turn to the first of the three types of assessment identified above. These are formal decision-making capacity assessments, which are assessments carried out by professionals (other than the Family Court).

9.84 In later chapters, we recommend that decision-making capacity assessments with formal safeguards be required in some situations, for example, before an attorney makes certain decisions under an EPOA. In this section, we do not discuss when a formal decision-making capacity assessment should be required. Rather, we address who should perform formal decision-making capacity assessments and how they should be performed.

Current law and practice

9.85 The PPPR Act provides that only a “relevant health practitioner” can certify that a person lacks decision-making capacity for the purpose of determining whether an attorney can make certain decisions under an EPOA.⁵⁵ A “relevant health practitioner” generally means a person:⁵⁶

- (a) who is registered with an authority as a practitioner of a particular health profession under the Health Practitioners Competence Assurance Act 2003; and
- (b) whose practice includes assessing mental capacity.

9.86 Certifying a person lacks decision-making capacity involves issuing a “certificate of mental incapacity”. The required content of these certificates is prescribed in regulations.⁵⁷ Among other things, certificates need to include the basis on which the health practitioner considers the person is mentally incapable and the reasons for that opinion.

9.87 The PPPR Act does not make any reference to professionals' assessments of decision-making capacity that might be used in other contexts. For example, we understand the Family Court often makes decision-making capacity determinations on the basis of medical evidence. The PPPR Act does not expressly refer to assessments for this purpose.⁵⁸

⁵³ Protection of Personal and Property Rights Act 1988, ss 6(3), 25(3) and 93B(2)–(3). See also *Re “Joe”* [1990] NZFLR 260 (FC) at 262; *Re G* [1994] NZFLR 445 (FC) at 649; and *Hutt Valley District Health Board v MJP* [2012] NZFLR 458 (FC) at [4].

⁵⁴ For example Guardianship and Administration Act 1995 (Tas), s 12; and Mental Capacity Act 2005 (UK), s 2.

⁵⁵ Protection of Personal and Property Rights Act 1988, ss 97(5) and 98(3)–(3B).

⁵⁶ Protection of Personal and Property Rights Act 1988, s 94(4) definitions of “health practitioner” and “relevant health practitioner”. Where an EPOA specifies a particular scope of practice (for example a specialist), “relevant health practitioner” refers to that scope of practice only.

⁵⁷ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, reg 5.

⁵⁸ However, the Ministry of Justice website includes a “medical expert report” form as one of the forms that it states an applicant for a welfare guardian order will “need” to give the Family Court: “Apply for a welfare guardian” (19 March 2025) Te Tāhū o te Ture | Ministry of Justice <www.justice.govt.nz>.

Consultation

Who should be able to carry out decision-making capacity assessments

- 9.88 We asked submitters who should be able to carry out a decision-making capacity assessment. We indicated we were interested in whether assessments currently carried out by health practitioners might be carried out by other people.
- 9.89 Sixty-eight submitters gave feedback relevant to this question.
- 9.90 Approximately half the submitters expressed support for expanding the range of professionals who can undertake decision-making capacity assessments beyond “relevant health practitioners”. Reasons given included the current costs and delays in obtaining assessments. The most commonly discussed professions in this context were social workers, nurse practitioners and nurse specialists, and lawyers.
- 9.91 A few submitters had concerns about widening the pool of assessors beyond relevant health practitioners. Several submitters indicated that, if this approach were taken, training would be critical.
- 9.92 Approximately a third of submitters expressed support for measures to increase the expertise of assessors such as an additional qualification, a postgraduate course on the topic, a mandatory course for practitioners or a separate vocation of decision-making capacity assessment.
- 9.93 Some submitters expressed support for an interdisciplinary or panel approach to assessing decision-making capacity. Of those submitters, a few favoured this approach if the decision-making capacity assessment is not conducted by a doctor.
- 9.94 A few submitters considered that having a professional understanding of the subject matter of the decisions in respect of which a person is being assessed is important. The Chief Ombudsman suggested we consider “the extent to which those involved in assessing decision-making capacity should reflect the nature and extent of the decision making in question”. He submitted that, for example, it may be appropriate for decisions relating to specific medical interventions, legal questions or financial decisions to involve a person with a sound understanding of the relevant matter. Another submitter gave the example of assessing a person’s decision-making capacity to create an EPOA. They considered this assessment should be completed by a legal professional who knows the legislation best.
- 9.95 In response to our general question about whether there are any other issues with decision-making capacity assessments we should consider, a significant theme in submissions was that assessments are inaccessible due to long waitlists, costs and lack of available assessors. Some submitters also said general practitioners and other health practitioners do not have sufficient time to conduct assessments and that some practitioners (particularly general practitioners) are reluctant to do so.

Improving the circumstances of decision-making capacity assessments

- 9.96 We also asked submitters how the circumstances of a decision-making capacity assessment can be improved. We gave potential examples of support and reasonable accommodation being provided for assessments, culturally responsible approaches to assessing decision-making capacity, and training and related guidance. We also asked specific questions about training and guidance and a potential code of practice.

- 9.97 Seventy-seven submissions gave feedback about improving decision-making capacity assessments. Many commented on the potential improvements that we had raised.

Ensuring available support and reasonable accommodation

- 9.98 Thirty-seven submitters agreed that people whose decision-making capacity is being assessed should be supported and accommodated through the assessment process. Approximately half mentioned that the person being assessed should be able to have a support person or persons present. Another significant theme was the importance of ensuring a suitable environment for the person being assessed – in particular, that undertaking assessments in clinics rather than at home or another familiar place can decrease their reliability.
- 9.99 Finally, a group of submitters emphasised the need to support the person being assessed to understand and communicate during the assessment. Some of these submitters raised the importance of presenting assessment information in plain language or Easy Read format. Spectrum Foundation suggested that a communication assessment could be conducted prior to decision-making capacity assessments to ensure the person's communication needs are met.

Responding to cultural needs

- 9.100 Twenty-two submitters said the social and cultural responsiveness of decision-making capacity assessment could be improved. Some of these submitters specifically referred to responsiveness to te ao Māori. For example, Volition said overprescriptive or standardised procedures are unlikely to be adequate for appropriately considering tikanga during an assessment. Age Concern NZ observed that different diagnostic tools provide useful models which include “relational and wairua aspects that are influential across cultures and communities of identity like takatāpui and rainbow people”.

Training and guidance

- 9.101 We asked submitters whether training and guidance for professionals who conduct decision-making capacity assessments should be improved. We suggested some potential reform options, including information on standard interview methods and tools, official guidance on how to conduct a decision-making capacity assessment and training for professionals who conduct decision-making capacity assessments.
- 9.102 Sixty-six submitters gave feedback on this issue. Almost all of them supported improved training and guidance.
- 9.103 A notable theme in submissions was that health practitioners do not always have sufficient expertise or confidence to complete decision-making capacity assessments and that the quality of assessments varies. Some submitters said training is necessary to address the reluctance of many doctors to undertake decision-making capacity assessments.
- 9.104 A few submitters said training would allow for a wider pool of professionals to be accredited to undertake assessments. The Office for Seniors and the Chief Ombudsman noted that, if professions beyond health practitioners could perform assessments, the need for quality training and strong oversight would be heightened.
- 9.105 Some submitters commented on potential topics for training and guidance. The topic discussed in most detail by submitters was how to communicate effectively with people

being assessed. Other topics included standard assessment methods and tools, disability rights and unconscious bias.

- 9.106 While submitters mostly supported improved training and guidance, a few submitters noted practical difficulties with doctors undergoing any further training due to their already busy workloads and training schedules. NZLS submitted that additional training and guidance should be provided in a way that does not conflict with or impact existing guidance and training.

Code of practice

- 9.107 We asked submitters whether a new Act should have an accompanying code of practice and, if so, how it should be developed and operate.
- 9.108 Twelve submitters said a new Act should have an accompanying code of practice for decision-making capacity assessments.⁵⁹ Several others remarked more generally on the need for a code of practice but did not specify whether in relation to assessors, representatives or both. Only one submitter opposed a code of practice for decision-making capacity assessments, stating that a code of practice is not suited as a guidance or training tool.
- 9.109 Some submitters commented on the process for developing a code. The most common theme was that a code of practice would require alignment with other existing professional obligations, for example, through a cross-disciplinary development process and (potentially) incorporation into existing codes of practice. A few submitters said there should be input from other groups, including people with lived experience of disability.

Other suggestions

- 9.110 Submitters also raised other ideas for improving decision-making capacity assessments and raised related issues. Some of the most common suggestions were:
- (a) assessments should be conducted over a period of time to accurately capture the person's decision making;
 - (b) the person should have the right to obtain a second opinion, appeal or peer review of assessment results;
 - (c) assessors should interview or take into consideration the person's support network (including whānau and professional medical support); and
 - (d) assessments should be subject to periodic review and appropriate oversight.
- 9.111 In response to our question about other issues with decision-making capacity assessments that we should consider, a few submitters said assessments are sometimes completed without the person present. Some submitters also indicated that interpretive support can be lacking.

⁵⁹ Answers to this question were split into those discussing a code of practice for capacity assessments and a code of practice for representatives. We only discuss responses regarding a code of practice for capacity assessments in this chapter.

Recommendations

Definition of formal decision-making capacity assessment

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.

9.112 We recommend that a new Act defines the term “formal decision-making capacity assessment”. In later chapters, we make recommendations about when decision-making capacity assessments that have formal safeguards:

- (a) should be required before an attorney can make a decision under an EPOA (see Chapter 19); and
- (b) should be able to be directed by the Family Court to be filed in evidence (see Chapter 14 and 18).

9.113 Our recommended definition captures the assessment required in both these situations.

9.114 For clarity, we recommend that the definition specifies that a formal decision-making capacity assessment does not include a determination by the Family Court of whether a person has decision-making capacity. As we explain below, a formal decision-making capacity assessment is intended to capture formal assessments undertaken by relevant professionals (such as by a person’s general practitioner). Decision-making capacity determinations by the Family Court are separate from this. We address them later in this chapter.

Rights to refuse a formal decision-making capacity assessment and be present at such an assessment

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.

9.115 We recommend that a new Act states the right of a person to refuse a formal decision-making capacity assessment.⁶⁰ A formal decision-making capacity assessment should not be undertaken under compulsion.⁶¹ Compelled assessments may engage the right to refuse medical treatment affirmed in the New Zealand Bill of Rights Act 1990.⁶² They would be in tension with the general right to refuse and withdraw consent to health and disability services under the Code of Health and Disability Services Consumers' Rights.⁶³ Further, they could lead to unreliable results. A few of the overseas jurisdictions we have investigated have a statutory right to refuse an assessment.⁶⁴

⁶⁰ For clarity, this recommendation would also apply where the Family Court has required a formal decision-making capacity assessment to be filed.

⁶¹ The Mental Health (Compulsory Assessment and Treatment) Act 1992 provides for compulsory assessment in specified situations where there are reasonable grounds for believing that a person poses a serious danger to themselves or others because of an abnormal state of mind: pt 1. This assessment is to determine whether a person has a "mental disorder" (as defined in s 2 of that Act), as opposed to whether the person has decision-making capacity for a decision or class of decisions.

⁶² New Zealand Bill of Rights Act 1990, s 11. *Smith v Attorney-General* HC Wellington CIV-2005-485-1785, 9 July 2008 at [99]–[100] suggests that cognitive or psychiatric testing will engage the right to refuse medical treatment if diagnostic or therapeutic in nature.

⁶³ Health and Disability Consumer (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 2 right 7(7). This right is subject to "any enactment, or the common law, or any other provision of this Code": right 7(1).

⁶⁴ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 54(1); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 78(1).

- 9.116 A few submitters said decision-making capacity assessments are sometimes undertaken without the relevant person. We do not know how often this occurs. We recommend a new Act clarify when this is permissible. In our view, formal decision-making capacity assessments should only be done without the relevant person present when the person refuses or cannot reasonably participate in an assessment and the assessment can still be undertaken reliably. A person might not be able to participate for a range of reasons, including their own particular impairments or circumstances, or the actions of a third party. We recommend that an assessor be required to be satisfied they can accurately assess the person’s decision-making capacity using the information available. This wording is based on the New Brunswick legislation.⁶⁵
- 9.117 There may be circumstances where a person does not wish to be assessed but it is necessary for a determination to be made about whether they have decision-making capacity. An example is where there is a credible basis to believe the person does not have decision-making capacity and that this may be putting them at a material risk of significant harm. In these situations, we recommend the Family Court be empowered to make a determination about the person’s decision-making capacity on the basis of the evidence before it.
- 9.118 We have considered whether people should have other rights in relation to formal decision-making capacity assessments — in particular, whether there should be a right to a second opinion, appeal or review, as some submitters suggested. We make no recommendation on this. If a person disagrees with a formal decision-making capacity assessment, they can seek a second opinion from a different assessor. A statutory provision is not required to enable this.⁶⁶ Further, as we address below, the Family Court already has jurisdiction to determine whether a donor under an EPOA has decision-making capacity, which we recommend continues. This jurisdiction provides a means for people who disagree with a formal decision-making capacity assessment to challenge it. For these reasons, it is not necessary for legislation to specify a right to challenge a decision-making capacity assessment.

Who can conduct a formal decision-making capacity assessment

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.

⁶⁵ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 55.

⁶⁶ The Code of Health and Disability Services Consumers’ Rights already provides that every consumer has the right to accurate answers to questions about how to obtain an opinion from another provider: Health and Disability Consumer (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch reg 2 right 6(3)(c).

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)).

9.119 We recommend that a new Act continue to enable relevant health practitioners to carry out formal decision-making capacity assessments. We also recommend that a new Act allow other classes of professionals to be authorised to carry out assessments. These recommendations are designed to ensure that formal decision-making capacity assessments are conducted by people with appropriate expertise and that there are sufficient assessors available.

Relevant health practitioners

9.120 Under the PPPR Act, a “relevant health practitioner” can assess a person’s decision-making capacity as required for EPOAs. A “relevant health practitioner” generally means a person who is registered with an authority as a practitioner of a particular health profession under the Health Practitioners Competence Assurance Act 2003 and whose scope of practice includes assessing mental capacity.⁶⁷ Assessments provided to the Family Court are often also conducted by these people.

9.121 In practice, we understand that the relevant health practitioners who generally conduct decision-making capacity assessments are general practitioners and that psychiatrists, geriatricians and psychogeriatricians may become involved in more complex cases.⁶⁸ As submitters’ responses make clear, availability of relevant health practitioners to conduct decision-making capacity assessments is currently a significant practical issue. It also appears that not all relevant health practitioners have sufficient knowledge and experience to conduct assessments confidently.⁶⁹

9.122 Increasing the number of relevant health practitioners whose scope of practice includes assessment of decision-making capacity and who have relevant expertise would address

⁶⁷ Protection of Personal and Property Rights Act 1988, s 94(4) definitions of “health practitioner” and “relevant health practitioner”. Where an EPOA specifies a particular scope of practice (for example, a psychiatrist), “relevant health practitioner” refers to that scope of practice only. See Chapter 19.

⁶⁸ Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 394.

⁶⁹ See Alisha Vara and others “General practitioners and decision-making capacity assessment: the experiences and educational needs of New Zealand general practitioners” (2020) 37(4) *Family Practice* 535 at 537; Nicola Hickling and others “Exploring training, involvement and confidence: a study of healthcare professionals in decision-making capacity assessments” (2024) 137(1593) *NZMJ* 31 at 41; and Nicola Hickling and others “Examining the approaches used to assess decision-making capacity in healthcare practice” (2024) 137(1598) *NZMJ* 22 at 30.

this issue. No change to the law is required for this to occur. The authority of each health profession is responsible for setting the scope of practice for the profession.⁷⁰

- 9.123 We recommend that the Government work with relevant professional authorities to encourage and enable this approach. This would help increase the availability of health practitioners. It would be important for relevant health practitioners to have and maintain the expertise to conduct formal decision-making capacity assessments accurately and reliably. Development of that expertise would likely involve appropriate training programmes.

Other classes of professionals

- 9.124 Given the feedback that there are too few decision-making capacity assessors, we also consider that a new Act should enable professionals who do not fall under the Health Practitioners Competence Assurance Act 2003 but have appropriate expertise to become assessors. We recommend that a new Act enable regulations to be made to authorise certain classes of people to carry out formal decision-making capacity assessments. Several overseas jurisdictions take this approach.⁷¹
- 9.125 Regulations would be useful to expand the pool of assessors if members of a profession have developed expertise but:
- (a) the profession does not fall within the definition of “relevant health practitioner” (for example, social workers or lawyers); or
 - (b) the profession falls within the definition but the profession’s authority has excluded decision-making capacity assessments from the relevant scope of practice.

Other suggestions raised by submitters

- 9.126 Some submitters suggested an accreditation be required for individual assessors to help ensure that every person who is authorised to undertake decision-making capacity assessments has the expertise to do so. This might, for example, require members of relevant professions to complete a course before they can be individually designated as assessors, as is the case in Ontario.⁷² However, an individual accreditation requirement of this nature would reduce the availability of assessors, at least in the short term. Given the current availability issues, we do not consider this option is viable.
- 9.127 Some of the other suggestions raised by submitters are relevant in some but not all situations. For example, in complex cases, a panel or interdisciplinary approach may be appropriate. Similarly, there may be occasions where the nature of a decision means that an assessor who has sound knowledge of the subject matter of the decision is best placed to do the assessment. These considerations are case-specific and not well suited to primary legislation.⁷³ We consider they could usefully be addressed in a code of practice (addressed next).

⁷⁰ Health Practitioners Competence Assurance Act 2003, s 11(1).

⁷¹ See for example Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 52; and Adult Protection Act SNL 2011 c A-4.01 (Newfoundland and Labrador), s 6(5).

⁷² Capacity Assessment O Reg 460/05 (Ontario), reg 2.

⁷³ We have identified one jurisdiction where it is a requirement for an interdisciplinary team to conduct a decision-making capacity assessment: Adult Protection Regulations NLR 2022 84/22 (Newfoundland and Labrador), s 4(4)–(6).

Improving the circumstances of formal decision-making capacity assessments

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.

9.128 We have heard the circumstances of decision-making assessments are not always conducive to reliable assessments of decision-making capacity, including because of:

- (a) lack of decision-making support during assessments;
- (b) inappropriate or disorienting environments for assessments; and
- (c) assessors' inconsistent understanding of the legal requirements and varying expertise.

9.129 We consider that a code of practice and accompanying guidance should be developed to address the circumstances and manner in which formal decision-making assessments are conducted.⁷⁴ It is important for rules about assessments to align with relevant professional expertise and requirements and to be updated as these evolve. A code of practice is better suited for these purposes than primary legislation.

9.130 It would be important for disabled people to be involved in developing the code. As we note in Chapter 3, the United Nations Convention on the Rights of Persons with Disabilities requires that states closely consult with and actively involve disabled people in the development of legislation and policies to implement the Convention.⁷⁵

9.131 Submissions we have received indicate it would be useful for a code of practice and guidance to address matters such as:

- (a) when it is appropriate for a formal decision-making capacity assessment to be conducted;
- (b) the decision-making support that a person should have during a formal decision-making capacity assessment, including:
 - (i) support from a person or people who are generally expected to be available to support the person to make the relevant decision(s);
 - (ii) other support that is generally expected to be available to the person to make the relevant decision(s), including a device to help them communicate; and

⁷⁴ Alison Douglass makes the case for a code of practice in relation to decision-making capacity law in *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at ch 7.

⁷⁵ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(3).

- (iii) an interpreter, where the assessor does not speak a language that the person is comfortable or best able to communicate in;
- (c) things an assessor must do when conducting a formal decision-making capacity assessment such as:
 - (i) taking reasonable steps to inform the person whose decision-making capacity is being assessed of the nature and purpose of the assessment;
 - (ii) taking reasonable steps to conduct the assessment at a time at which, and in an environment in which, the person's decision-making capacity for the decision or class of decisions can be assessed most reliably;
 - (iii) taking reasonable steps to assess decision-making capacity in a culturally responsive way;⁷⁶
 - (iv) considering whether more than one meeting is necessary to make an assessment;
 - (v) taking reasonable steps to assess the communication needs of the person;
 - (vi) taking reasonable steps to communicate (including providing information and asking questions) in a way the person understands best; and
 - (vii) if a person has decision-making support for the assessment, taking reasonable steps to ascertain whether that support will be available to the person when making the decision or class of decisions; and
- (d) when it is appropriate for an interdisciplinary approach to be taken to assessing decision-making capacity.

9.132 We do not make recommendations about the content of a code of practice because detailed rules and guidance should be developed in conjunction with relevant professional bodies (to ensure they align with professional expertise and requirements) and relevant disabled people's organisations (to ensure they adequately take account of the lived experience of those being assessed). If a code of practice is developed, the Government should encourage professional bodies that regulate people authorised to conduct formal decision-making capacity assessments to take steps to align their own professional codes, regulations or other sources of professional guidance with the code of practice, where relevant.

⁷⁶ Guidance about cultural responsiveness could address ways the test for decision-making capacity can be worked through in culturally relevant ways. For example, recent work has resulted in the development of MANA (Māori Assessment of Neuropsychological Abilities), an assessment tool for dementia mate wareware. The test includes the usual cognitive and functional assessments but also includes a "wairua component". It asks the affected person about "their self-identity, how they perceive themselves, their relationships with mokopuna, whether they're able to manaaki people like they used to, and the places that are important to them". See Siena Yates "Makarena Dudley: Bringing te ao Māori to dementia" *E-Tangata* (Aotearoa New Zealand, 24 March 2023) <www.e-tangata.co.nz>.

Record keeping for formal decision-making assessments

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.

9.133 Clear, sufficiently detailed records of formal decision-making capacity assessments are necessary to ensure the assessment properly informs any next steps. We recommend that a new Act require a person who has conducted an assessment to prepare a report that outlines the circumstances of the assessment, the process followed, the assessor’s findings and any decision-making support the person needs. In our view, this is the minimum information needed to provide a clear record that can inform future steps.

9.134 Under the Privacy Act 2020 and the Health Information Privacy Code 2020, a person who has undergone a formal decision-making capacity assessment would be entitled to access the report (subject to narrow exceptions).⁷⁷

9.135 Our recommended reporting obligation would sit alongside the regulatory requirements about information to be included in a certificate that a person lacks decision-making capacity, which we envisage would continue.⁷⁸ Whereas a certificate serves the purpose of informing third parties about the conclusion of an assessment, the purpose of our recommended reporting obligation would be to provide an accurate and useful record of the assessment itself.

9.136 Some overseas jurisdictions provide mandatory forms for reports in regulations.⁷⁹ However, we consider that one form for all formal decision-making capacity assessments would be overly complex and could add unnecessary cost to assessments. We envisage that the code of practice we recommend above could include further guidance about records.

⁷⁷ An example of an exception is if disclosure of the information would be likely to prejudice the health of the individual concerned: Privacy Act 2020, s 49(1)(b); and Health Information Privacy Code 2020, cl 5 r 6(3)(a).

⁷⁸ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, reg 5. Our proposed record-keeping requirements would also build on the obligations of health practitioners outside of the Protection of Personal and Property Rights Act 1988 to keep clear and accurate patient records. See Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand *Managing patient records* (December 2020); Te Kaunihera Tapuhi o Aotearoa | Nursing Council of New Zealand *Code of Conduct for Nurses* (June 2012) at 20 (refer to standard 4.8); and Te Poari Kaimātai Hinengaro o Aotearoa | New Zealand Psychologists Board *Keeping Records of Psychological Services* (August 2017). Health agencies are also required to take reasonable steps to ensure health information is accurate before using or disclosing the information: Health Information Privacy Code 2020, r 8.

⁷⁹ See for example Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 102(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 53(3).

DECISION-MAKING CAPACITY DETERMINATIONS BY THE COURT

9.137 We now turn to the second of the three types of assessment identified above. These are decision-making capacity determinations by the Family Court.

Current law

9.138 The Family Court is currently responsible for making decision-making capacity determinations in some situations. Under the PPPR Act, the Family Court is required to determine whether a person lacks decision-making capacity for the purposes of making a court-ordered decision or imposing a representative arrangement.⁸⁰ Further, the Court must review a person's decision-making capacity when reviewing a representative arrangement.⁸¹

9.139 The Family Court also has jurisdiction to determine decision-making capacity as relevant to EPOAs.⁸²

Family Court's jurisdiction to determine decision-making capacity should continue

9.140 We consider that the Family Court's current role in making decision-making capacity determinations should continue.

9.141 In Chapter 14, we recommend that the Court continue to determine whether a person has decision-making capacity when it is considering making a court-ordered decision or representative arrangement. In Chapter 18, we recommend that the Court continue to be required to review a person's decision-making capacity when reviewing a court-ordered representative arrangement. In these situations, the Court itself should continue to determine whether the relevant person has decision-making capacity.

9.142 We also consider that the Family Court should continue to have jurisdiction to determine decision-making capacity as relevant to EPOAs. This jurisdiction can be relevant, for example, where a person disagrees with a formal decision-making capacity assessment or different formal decision-making capacity assessments have reached different conclusions.

9.143 We explain the Family Court's supervisory jurisdiction with respect to EPOAs in Chapter 19. We do not make recommendations about this aspect of the EPOA regime because we do not consider any material changes are needed.

OTHER DECISION-MAKING CAPACITY ASSESSMENTS

9.144 We now turn to the last of the three types of assessment identified above. These are assessments that are not covered by the above two categories (formal decision-making capacity assessments and decision-making capacity determinations by the Family Court). An example is a decision-making capacity assessment by a representative.

Current law

9.145 The PPPR Act provides for some situations where people other than "relevant health practitioners" and judges need to form a view about a person's decision-making capacity.

⁸⁰ Protection of Personal and Property Rights Act 1988, ss 6(1) and 25(1)(b).

⁸¹ Protection of Personal and Property Rights Act 1988, ss 86(2) and 87(3). We recommend this continue in Chapter 18.

⁸² Protection of Personal and Property Rights Act 1988, s 102(1)(b).

For example, an attorney under an EPOA must not act in respect of specified matters relating to the donor's personal care and welfare unless the attorney "believes on reasonable grounds that the donor is mentally incapable".⁸³

- 9.146 The PPPR Act does not provide for any guidance to be issued in respect of these informal assessments.

Guidance required for other decision-making capacity assessments

- 9.147 Under our recommendations, attorneys, court-appointed representatives and formal supporters would frequently need to assess the relevant person's decision-making capacity (see, in particular, Chapter 12). These assessments could not practically be subject to the same requirements as formal decision-making capacity assessments. It is nonetheless important that they be done well.
- 9.148 Publicly available guidance is critical to achieve this. Such guidance is available in many overseas jurisdictions.⁸⁴ In Chapter 24, we recommend that a new Act provide for the function of developing information and guidance about representative and formal support arrangements to be undertaken by an appropriate body and explain that this should include guidance on how to assess decision-making capacity.
- 9.149 In Chapter 24, we also recommend that the Government consider providing training for representatives and formal supporters. If training is provided, we consider that how to assess decision-making capacity would be an important component of this training.

⁸³ Protection of Personal and Property Rights Act 1988, s 98(3)(b).

⁸⁴ See for Australia: Legal Aid ACT *ACT Capacity Toolkit: A Guide for Assessing Capacity* (ACT Government, August 2020); New South Wales Department of Communities and Justice *Capacity Toolkit: Information for government and community workers, professionals, families and carers in NSW* (April 2020); Queensland Government *Queensland Capacity Assessment Guidelines 2020* (version 2, April 2021); and Tasmania Department of Health and Human Services *Capacity Toolkit: Information for government and community workers, professionals, families and carers in Tasmania* (December 2009). See for England and Wales: Department for Constitutional Affairs *Mental Capacity Act 2005 Code of Practice* (April 2007); and National Institute for Health and Care Excellence *Decision-making and mental capacity: NICE guideline* (NG108, October 2018). See for Ireland: Decision Support Service *Code of Practice for Supporting Decision-Making and Assessing Capacity* (March 2023).

PART 3:

FORMAL SUPPORT



1. This part addresses a new role that we recommend be introduced in a new Act: that of a formal supporter.
 2. In Chapter 10, we explain that people who provide decision-making support sometimes face challenges when dealing with third parties — in particular, difficulties in accessing relevant information. This can lead to a person with affected decision making needing a representative to be appointed. We recommend this issue be addressed by providing for the appointment of formal supporters.
 3. Chapter 11 addresses our recommended elements of a formal support regime, including how formal supporters should be appointed, their role and powers, and their duties.
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CHAPTER 10

The case for a formal support regime

IN THIS CHAPTER, WE CONSIDER:

- whether a new Act should authorise the appointment of formal supporters; and
- whether a new Act should provide for co-decision making.

INTRODUCTION

- 10.1 In Chapter 6, we discuss the importance of ensuring that a new Act actively foster the provision of decision-making support to people with affected decision making. One way in which a new Act should do that is by providing a regime for appointing formal supporters.
- 10.2 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.¹
- 10.3 The Protection of Personal and Property Rights Act 1988 (PPPR Act) does not include formal support arrangements. We consider that a new Act should do so. A statutory regime for formal supporters would give third parties clarity about the role of formal supporters and their entitlement to be involved in a supported person's decision making. This would help overcome the difficulties that some informal supporters face when engaging with third parties such as banks and care providers.
- 10.4 In this chapter, we explain why we consider a new Act should authorise the appointment of formal supporters. We discuss the details of our recommended formal support regime in Chapter 11.

¹ In Chapter 6, we recommend a new Act should define decision-making support to include various forms of assistance, including with accessing relevant information, identifying and evaluating options for the decision and communicating and giving effect to decisions. In this chapter, we use the term "decision-making support" in this way.

- 10.5 A few overseas jurisdictions provide for co-decision-making arrangements under which someone is appointed to make decisions jointly with a person whose decision making is affected. We do not consider a new Act should provide for co-decision making. Such a regime would be similar to the role we recommend is performed by court-appointed representatives and attorneys under an enduring power of attorney (EPOA). It would also overlap with our recommended formal support regime. Co-decision making arrangements are therefore unnecessary and would create confusion.

CURRENT LAW

- 10.6 The PPPR Act does not provide for formal support for people with affected decision making to make their own decisions or to make decisions together with another person. The focus of the PPPR Act is on representative arrangements where a third party makes decisions for a person. Such decisions are made by a court-appointed representative (such as a welfare guardian), an attorney acting under an EPOA or te Kōti Whānau | Family Court.
- 10.7 As we explain in Chapter 6, the PPPR Act includes provisions that seek to enable or encourage the relevant person to exercise and develop their decision-making capacity. For example, a welfare guardian is required to consult with the person and to encourage them to exercise their decision-making capacity and to act on their own behalf, as far as practicable.² However, these provisions do not expressly require representatives such as welfare guardians to provide decision-making support to the represented person.
- 10.8 Beyond the PPPR Act, some legislation recognises a person's right to appoint a supporter in particular contexts, as we address in Chapter 6. In some instances, these Acts expressly contemplate the supporter providing decision-making support.³ However, none of this legislation details powers or duties of supporters or contemplates a role for supporters beyond the specific context with which the particular legislation is concerned.

SHOULD A NEW ACT PROVIDE FOR A FORMAL SUPPORT REGIME?

Overseas approaches

- 10.9 Among the overseas jurisdictions we have considered, five have legislation providing for formal supporters.⁴ In two further jurisdictions that do not provide for formal support regimes, law reform bodies have recommended they be introduced.⁵

² Protection of Personal and Property Rights Act 1988, s 18(3) and 18(4)(c). Similar provisions apply to property managers (ss 36(1) and 43(1)(a)) and attorneys acting under EPOAs (s 99A).

³ For example Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 2 right 8; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 5, 21, 39 and 121; Retirement Villages Act 2003, sch 4 (Code of Residents' Rights) right 6; and Victims' Rights Act 2002, s 14. See also Mental Health Bill 2024 (87-2), cls 23 and 24.

⁴ Guardianship and Administration Act 2019 (Vic), pt 4; Powers of Attorney Act 2014 (Vic), pt 7; Assisted Decision-Making (Capacity) Act 2015 (Ireland), pt 3; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), pt 2 div 1; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), pt 3; and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), pt 1.

⁵ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at ch 4; and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at ch 7.

10.10 Jurisdictions that allow for the appointment of formal supporters take a range of approaches to matters such as the powers and duties of formal supporters, how formal supporters are appointed and how their role can be terminated. We address these matters in detail in Chapter 11.

Consultation

10.11 In our Second Issues Paper, we asked whether a new Act should include a formal supporter arrangement.⁶ Sixty-two submitters gave feedback on this issue.

10.12 The vast majority of submitters that gave feedback supported the inclusion of a formal support regime in a new Act. A few submitters opposed that approach, and a few were unsure.

10.13 Submitters that supported including a role for formal supporters noted a range of potential benefits. The most common benefit noted was that formal support arrangements could promote supported decision making or ensure support is person-centred. As part of this reasoning, some submitters said establishing a regime for formal supporters could help make New Zealand law consistent with the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention).

10.14 Some submitters said formal support arrangements would provide an alternative to representative arrangements or fill a gap between representative decision making and informal support. For example, Volition said providing an alternative that works for most people's needs would prevent unnecessary recourse to greater interventions. McWilliam Tyree Lawyers considered that formal supporters could help allow the supported person to have as much personal autonomy as possible.

10.15 Some submitters thought formal support arrangements could help overcome difficulties that supporters sometimes face with third parties such as care providers or banks by providing greater clarity and legitimacy. Difficulties identified by submitters were third parties not passing on necessary information to supporters, not having processes in place that provide for supporters or enable smooth interactions and not understanding that a supported person is involved in decision making.

10.16 Some submitters considered that formal support arrangements would be important to provide oversight and safeguards. A few submitters said existing informal support from family members can be coercive or include undue pressure and influence. Te Whatu Ora | Health New Zealand and another submitter said formalisation could clearly outline supporter responsibilities. A few submitters thought that many informal supporters do not have the necessary skills, knowledge or training to provide effective support, which could change if formal support arrangements impose standards.

10.17 Submitters that opposed a formal support regime or were unsure expressed several concerns about it. The most common concern was the potential marginalisation of informal supporters, including that third parties may be less willing to engage with informal supporters or may insist on support arrangements being formalised.

10.18 Some submitters raised concerns about increased complexity and the potential to confuse third parties. A few of these submitters noted there could be tension or duplication between the roles of supporters and representatives. One submitter

⁶ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024), Question 10.

considered that most of the “privacy problems” that supporters experience could be resolved if carers and health practitioners had adequate knowledge of privacy law and engaged in fewer defensive practices to avoid allegations of a privacy breach.

- 10.19 A few submitters thought formal support arrangements could increase cost or bureaucracy, particularly if formal supporters needed to be appointed by the Family Court. For example, Greg Kelly Trust Law considered the time and cost involved in applying for an order to appoint a supporter and for subsequent orders as the person’s decision-making capacity diminishes would be prohibitive for many people.

Issues

- 10.20 Most of the submitters that supported establishing a formal supporter arrangement concentrated on the benefits it could provide rather than issues with the current law. However, we are aware from our research and engagement that some informal decision-making supporters face challenges when engaging with third parties and that this sometimes leads to a representative being appointed. We expand on these issues below.

Informal supporters sometimes have difficulties with third parties

- 10.21 Third parties such as care providers or banks are sometimes reluctant to provide informal supporters with information they need due to privacy or confidentiality concerns.⁷
- 10.22 Existing law already provides some means to address this issue. Under the Privacy Act 2020 and related codes, an individual’s right to access their personal information can be exercised by their “representative”.⁸ In addition, an agency may disclose a person’s personal information to another person if they have reasonable grounds to believe that the disclosure is “authorised by the individual”.⁹
- 10.23 It follows that a person who wants an informal supporter to access their personal information can either advise a relevant agency that the informal supporter is their “representative” or provide the agency with an authorisation to disclose information to their informal supporter.
- 10.24 However, these options do not fully address the concern about informal supporters’ ability to access relevant information. First, the options may be difficult to implement if there are multiple third parties to be contacted. It could be particularly time-consuming if many of the third parties wish to discuss or query an informal supporter’s status as a representative or any related authorisation before acting on an access request. Second, the options apply only to “personal information” as defined in the Privacy Act — that is, “information about an identifiable individual”.¹⁰ In some cases, a person may wish their supporter to access other confidential information such as commercial information concerning a business with which they are involved.

⁷ See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.8].

⁸ Privacy Act 2020, ss 22 IPP6 and 40. See also Health Act 1956, s 22F(1).

⁹ Privacy Act 2020, s 22 IPP11(1)(c). See also Health Information Privacy Code 2020, cl 5 r 11(1)(b).

¹⁰ Privacy Act 2020, s 7 definition of “personal information”.

10.25 Beyond information disclosure, informal supporters can face other difficulties with third parties.¹¹ Third parties may not acknowledge the role of the informal supporter or understand that the person, with support, can make or communicate their own decisions. These issues can lead third parties to resist informal supporters' involvement in decision-making processes and to prefer to deal with people who have formal roles — that is, welfare guardians, property managers and attorneys under EPOAs.

Difficulties with third parties may result in a representative being appointed

10.26 If informal supporters cannot be effective — or a person does not have confidence that an informal supporter will be effective when required — a person with affected decision making may need a representative when a supporter would otherwise meet their needs. We cannot quantify the extent to which this is currently occurring. However, when it does, it restricts a person's legal agency more than necessary.¹² As such, it does not best protect and promote the person's equality, dignity and autonomy.

Options for reform

10.27 We have considered three options for reform.

Option 1: a new Act provides for the appointment of formal supporters

10.28 Under this option, a new Act would include a regime for appointing formal supporters. The role of a formal supporter would be to provide decision-making support to a person for those decisions or classes of decision specified in their appointment. Formal supporters would be expressly empowered to access information relevant to their role.

10.29 Providing for formal supporters would have a number of benefits. It would significantly mitigate the issues noted above. First, a specific statutory right to access relevant information would reduce third-party reluctance to disclose information to formal supporters. More generally, third parties can be expected to be more receptive to, and better understand the role of, a supporter whose role is recognised in statute. Second, the option to appoint a formal supporter would help ensure a representative is not appointed in situations where a supporter with appropriate powers would meet the person's needs. Appointment of a formal supporter would sometimes be a less restrictive option to appointing a representative.

10.30 In addition, providing for formal supporters could, over time, increase general familiarity with decision-making support, whether formal or informal. It could help third parties be more receptive to decision-making support and better understand that a person with affected decision making can make or communicate their own decisions if supported. This

¹¹ See Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [4.64]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.8]; and Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.43] and [8.66]. See also Gordon Ashton, Jonathan Baker and Marc Marin (eds) *Mental Capacity: Law and Practice* (4th ed, LexisNexis, London, 2018) at [1.85].

¹² See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.5] and [7.8]; and Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.47], [8.60]–[8.61] and [8.69].

benefit was raised in submissions and has been noted in the context of overseas law reform.¹³

10.31 Providing for formal supporters also has potential downsides. We consider there are three main risks:

- (a) As some submitters raised, a formal support regime might lead to informal support being marginalised. The existence of formal supporters might increase third parties' reluctance to deal with informal supporters. If this risk eventuated, it would exacerbate the barriers to equal participation in society experienced by the many people who are, and will continue to be, reliant on informal supporters.
- (b) A formal support regime could cause complexity and confusion, as some submitters highlighted.
- (c) The powers of formal supporters and their perceived status by virtue of statutory recognition could make it easier for supporters with bad intent to abuse their position. Many supported people are likely to be vulnerable to abuse.

10.32 Finally, it is not clear how often a formal support regime would be used. As some submitters raised, this would be influenced by how complex and costly it is to appoint a formal supporter.

Option 2: a new Act provides that informal decision-making supporters may access a person's personal and confidential information

10.33 Under this option, a new Act would not provide any mechanism to formalise an informal supporter's role. However, it would expressly refer to decision-making supporters and specify that they may access a person's personal information and other confidential information relevant to the provision of support.

10.34 This option might help address third-party reluctance to disclose relevant information to an informal supporter. However, it would entail unacceptable risks of abuse unless accompanied by a range of safeguards. For example, safeguards would need to ensure that:

- (a) only genuine informal supporters can access information; and
- (b) appropriate limitations apply in relation to the access, use and disclosure of information — in particular, so that a supporter does not access, use or disclose information in a way the supported person does not want.¹⁴

10.35 Addressing these matters satisfactorily would likely mean that many of the safeguards needed for a formal support regime would be required for informal supporters who access relevant information. It would also be necessary to decide whether informal supporters who rely on the statutory power should have accompanying duties.

10.36 Providing for these matters in relation to the pre-existing, non-statutory role of an informal supporter could have unintended consequences. For example, statutory

¹³ Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.64].

¹⁴ The information privacy principles in the Privacy Act 2020 address these matters. However, statutory authorisation in other Acts to access or disclose information overrides the Privacy Act 2020: s 24. Any express power in a new Act would therefore need to include or otherwise provide for appropriate safeguards. Further, as we explain above, the Privacy Act does not apply to confidential information that is not personal information.

requirements could risk discouraging people from becoming informal supporters or complicate their ability to do so.

Option 3: no new roles or powers are introduced in legislation, but the government takes steps to ensure guidance on informal decision making is widely available

10.37 This option would not involve legislative change. Instead, guidance would be provided on (informal) decision-making support. The material would need to cover the benefits of support, along with specific guidance about the current ways that supported people can authorise informal supporters to access their personal information.¹⁵ To be effective, the material would need to be widely available.

10.38 We consider this option has two main benefits.

10.39 First, it would likely involve minimal additional resources beyond those required to implement our other recommendations. As we explain throughout this Report, an emphasis on fostering decision-making support for people with affected decision making should be a central feature of a new Act. It should be an important element in decisions made for a person by the Family Court or a representative, and a person's decision-making capacity should be assessed in the light of available decision-making support. In relation to all these matters, widespread education and guidance on decision-making support would be helpful and likely necessary.¹⁶ Minimal additional investment would likely be required for this material to address decision-making support generally, including current information access provisions.

10.40 Second, guidance on decision-making support could help make third parties more receptive to it while avoiding the complications of a new formal support regime.

10.41 However, guidance about the current law would not address all the potential difficulties that informal supporters can face with third parties. As noted above, the current law does not enable supported people to authorise informal supporters to access all relevant information beyond their "personal information" such as commercially sensitive material. Further, guidance on the current law may not be as effective as a specific statutory right to access information, particularly where information is required from multiple third parties.

Recommendation

R25

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

¹⁵ This should be prepared by, or with the advice of, Te Mana Mātāpono Matatapu | Privacy Commissioner.

¹⁶ See our discussion of practical improvements in Chapter 24.

Option 1 (a new formal support regime) is preferable

- 10.42 In our view, option 2 (a new Act specifying that informal supporters can access information) is not advisable. To prevent abuse, the safeguards for informal supporters who use the power would need to be similar to some of those for formal supporters. There is a high risk that the resulting statutory regime would have unintended consequences.
- 10.43 Option 1 (a new formal support regime) and option 3 (guidance on informal decision-making support and the existing law) are finely balanced. We have concluded that option 1 is preferable. There are three main reasons for our view.
- 10.44 First, expressly providing for formal supporters would be more effective than guidance in overcoming some third parties' reluctance to acknowledge and involve decision-making supporters. It would also be the most effective way to ensure supporters are entitled to access information relevant to their role.¹⁷ These are the central issues with reliance on informal support. It is preferable for a new Act to address them in the most practicable way.
- 10.45 Second, the potential risks of providing for formal supporters (marginalising informal support, creating complexity and confusion, and facilitating abuse of vulnerable people) can be significantly mitigated and do not outweigh the benefits.
- 10.46 We acknowledge the risk that a formal support regime would result in informal supporters being marginalised. However, as long as guidance is provided about the new regime and the continuing role for informal supporters, we do not think this risk is high. If a formal support regime were introduced, third parties could be expected to remain reluctant to share confidential information with informal supporters without clear evidence they may do so. But this does not mean they would be more reluctant to accommodate informal supporters generally. On the contrary, as we note in relation to option 1 above, providing for formal supporters in a new Act could increase familiarity and comfort with decision-making support as a general concept, including informal support.¹⁸ The New South Wales Law Reform Commission considered fears of informal support being marginalised have not materialised in other jurisdictions that have introduced formal support regimes.¹⁹
- 10.47 With respect to the risk of complexity and confusion, we consider this can be mitigated through careful design and education. Ensuring the features of the formal supporter role are clearly distinct from the role of a representative would be critical. Again, widely available guidance about formal supporters would also help the new role to be understood as quickly as possible.
- 10.48 The risk of formal supporters abusing their position cannot be eliminated. As with representative arrangements under the PPPR Act, however, this risk could be mitigated by providing for safeguards in relation to appointment, appropriate limits on powers and appropriate duties.

¹⁷ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 93.

¹⁸ We discuss the significance of good guidance in connection with a new Act in Chapter 24.

¹⁹ New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.7].

- 10.49 The third reason to provide for formal supporters is that, of the three options identified, a formal support regime best meets New Zealand's obligations under article 12(3) of the Disability Convention. As we explain in Chapter 6, article 12(3) requires states to take appropriate measures to provide access by disabled people to the support they may require in exercising their legal capacity. Enabling people with affected decision making to appoint formal supporters would be a significant measure to help them access effective decision-making support. Over the last decade, a number of other jurisdictions have provided for decision-making support roles in legislation as part of broader reform to meet their obligations under the Disability Convention.²⁰
- 10.50 In addition to the three main reasons for providing for formal supporters, we consider there would be a secondary benefit. Where a formal supporter has been appointed, it would likely make transition to other arrangements easier, where that becomes necessary. For example, if a person with a progressive condition appointed a person both as their formal supporter and their attorney under an EPOA, this might make the eventual use of the EPOA easier for both.
- 10.51 A new formal support regime might be used infrequently at first. It may take some time for relevant professionals such as lawyers and care providers to become familiar with the concept of formal supporters and for those they advise to appoint them. This is not a reason not to provide for them. It does, however, underscore the importance of there being accurate, comprehensive and widely available guidance to increase understanding and facilitate uptake of the new arrangement. We address the need for guidance further in Chapter 24.

If option 1 is not implemented, other steps should be taken to promote decision-making support

- 10.52 As we explain above, our conclusion that option 1 (a new formal support regime) is preferable to option 3 (ensuring guidance on decision-making support is widely available) is finely balanced. If our recommendation is not accepted, we consider the Government should take other steps to address the current issues with informal support.
- 10.53 First, option 3 should be implemented. While we do not consider this would be as effective in addressing the issues currently facing informal supporters, it would nonetheless assist.
- 10.54 Second, the effectiveness of decision-making support should be reviewed after option 3 has been implemented and a new Act has bedded in. If the issues with informal supporters identified above continue, the new Act should be amended to provide for formal supporters.

²⁰ In relation to Victorian legislation introducing formal supporters see Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.10]–[8.12] and [8.94]. In relation to Irish legislation introducing formal supporters see (3 December 2013) 823(2) Dáil Éireann debates 239; and Assisted Decision-Making (Capacity) Bill 2013 (explanatory memorandum) at 2. In relation to Alberta legislation introducing formal supporters see (27 October 2008) 40e 27th Legislature First Session Alberta Hansard 1569. In relation to the Yukon's legislation introducing formal supporters see Michelle Browning *An investigation into new models of guardianship and the emerging practice of supported decision making* (Winston Churchill Memorial Trust of Australia, 2010) at 27–28.

SHOULD A NEW ACT PROVIDE FOR CO-DECISION MAKING?

Overseas approaches

- 10.55 Among the jurisdictions we have considered, four provide for co-decision-making arrangements under which someone is appointed to make decisions jointly with a person whose decision making is affected.²¹ Decisions made by the person with affected decision making alone are not legally valid.
- 10.56 Co-decision-making arrangements require the co-decision maker and the person with affected decision making to work together to reach agreement on decisions covered by the arrangement. However, the co-decision maker is usually required to accept the decision of the person with affected decision making unless it might result in harm to that person.²²
- 10.57 Similar to formal supporters, one of the key roles of co-decision makers is to support the person with affected decision making by helping them access information relevant to the decision and discussing it with them.²³ In contrast to formal supporters, co-decision makers are also authorised to make a decision jointly with the person with affected decision making.²⁴ Co-decision-making arrangements apply in situations where a person's decision making is affected to the extent that they do not have decision-making capacity to make certain decisions on their own (even with support) but can make those decisions together with another person.²⁵ There is considerable overlap between the two concepts, and the line between the two is not always clear.
- 10.58 Three of the four jurisdictions we have considered that provide for co-decision-making arrangements also provide for formal support arrangements.²⁶ All four also provide for court-appointed representatives who can make decisions on a person's behalf.²⁷

²¹ Assisted Decision-Making (Capacity) Act 2015 (Ireland), pt 4; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), pt 2 div 2; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), pt 3; and The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3 (Saskatchewan), pts 2 and 3. The New Brunswick legislation uses the term “decision-making supporter” for co-decision makers.

²² Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 19(5); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 18(4)–(5); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 27(2); and The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3 (Saskatchewan), ss 17(2) and 42(2).

²³ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 19(1)(a) and (c)–(d); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 18(2); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 24(2)(a) and 27(1)(a)–(b).

²⁴ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 19(1)(e); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 18(2)(b); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 24(2)(b); and The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3 (Saskatchewan), ss 17(1) and 42(1).

²⁵ Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [9.3].

²⁶ Assisted Decision-Making (Capacity) Act 2015 (Ireland), pts 3 and 4; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), pt 2 divs 1 and 2; and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), pts 2 and 3.

²⁷ Assisted Decision-Making (Capacity) Act 2015 (Ireland), pt 5 ch 4; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), pt 2 div 3; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), pt 4; and The Adult Guardianship and Co-decision-making Act SS 2000 c A-5.3 (Saskatchewan), pts 2 and 3.

Consultation

- 10.59 In our Second Issues Paper, we expressed a preliminary view that a new Act should *not* provide for co-decision-making arrangements.²⁸ We asked submitters whether they agreed with this approach.²⁹ Forty-two submitters expressed a view.
- 10.60 A considerable majority of these submitters agreed that a new Act should not provide for co-decision-making arrangements. The most common reason given was that which we discuss below — that there is no gap between formal support and representative regimes that co-decision making needs to fill. Others generally focused on the inevitability of disagreement between the person and the co-decision maker and the potential consequences, including fracturing of relationships, the difficulty of resolving differences of view and the potential for abuse.
- 10.61 Iris Reuevecamp and Te Kāhui Ture o Aotearoa | New Zealand Law Society argued that such arrangements could undermine the relevant person’s autonomy. New Zealand Down Syndrome Association, Aotearoa New Zealand Adult Safeguarding Alliance and Volition argued that requirements to co-sign decisions do not provide any practical support or advantage to the person.
- 10.62 The few submitters that said a new Act should provide for co-decision making said such arrangements can be appropriate in certain situations.

Reform not desirable

- 10.63 We do not recommend that a new Act provide for co-decision-making arrangements.
- 10.64 The role of a co-decision maker would not be materially different to the role we recommend for court-appointed representatives and attorneys under an EPOA. As we explain in Chapter 12, the primary decision-making role of these representatives should be to identify, and make decisions that reflect, the person’s values and wishes, which the person should be supported to express. We recommend that, in general, the representative should only be able to depart from the person’s values and wishes if they are not sufficiently ascertainable to make a decision or would give rise to a material risk of significant harm — and the extent of the departure should be no greater than needed.³⁰ This is very similar to the role of a co-decision maker.
- 10.65 Where a person is able, with support, to make decisions for themselves and wishes a formal arrangement to be put in place, we consider they should be able to appoint a formal supporter. As we describe above and elaborate in Chapter 11, the role of a formal supporter should be to provide decision-making support to a person for those decisions or classes of decision specified in their appointment. They should not be able to override a person’s decision on any basis, including where they consider it will cause significant harm to the person.
- 10.66 Given our recommendations about representatives and formal supporters, co-decision-making arrangements are not necessary. Nor are they desirable. As we discuss above, a

²⁸ Second Issues Paper at [8.57]–[8.60].

²⁹ Second Issues Paper, Question 12.

³⁰ We also recommend that a representative should be able to depart from the person’s values and wishes if giving effect to them would not be possible or would be unlawful: see Chapter 12.

key risk of providing for new arrangements in a new Act is complexity and resulting confusion. If formal supporters, representatives and co-decision makers were all provided for in a new Act, the overlap between the roles would risk significant confusion.³¹ In addition, providing for co-decision making might reduce the number of cases where supported decision making is used despite it being the least restrictive option.³² A similar concern is that co-decision making may, in reality, amount to “proxy or substitute decision-making”.³³

³¹ See New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2: Decision-making models* (NSWLRC, 2016) at [5.26].

³² See New South Wales Law Reform Commission *Review of the Guardianship Act 1987 — Question Paper 2: Decision-making models* (NSWLRC, 2016) at [5.24].

³³ New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.83].

CHAPTER 11

Elements of a formal support regime

IN THIS CHAPTER, WE CONSIDER:

- formal supporters' role and powers;
- the process for appointing formal supporters;
- formal supporters' duties;
- the legal consequences of formal supporters' actions; and
- the termination of formal support arrangements.

INTRODUCTION

- 11.1 In Chapter 10, we conclude that a new Act should provide for the appointment of formal decision-making supporters. In this chapter, we consider the elements a formal support regime should include.
- 11.2 As we explain in Chapter 10, five overseas jurisdictions that we have considered provide for formal support arrangements, and law reform bodies have recommended they be introduced in two further jurisdictions.¹ We draw on these examples when considering elements of a formal support regime throughout this chapter.
- 11.3 Key elements of our recommended regime for formal supporters include their role and powers, how they are appointed, their duties, the legal consequences of their actions and the termination of formal support arrangements.

¹ Victoria, Ireland, Alberta, New Brunswick and the Yukon provide for formal support arrangements. See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at ch 7; and Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at ch 4.

FORMAL SUPPORTERS' ROLE AND POWERS

11.4 In this section, we discuss the role of formal supporters and the powers they should and should not have.

Overseas approaches

11.5 The overseas jurisdictions that provide for formal support roles use varying terminology – “supportive guardians”, “supportive administrators”, “supportive attorneys”, “decision-making assistants”, “associate decision-makers” and “supporters”. In this chapter, we use the term “formal supporters”.

11.6 All jurisdictions we have considered that provide for formal supporters require the formal support arrangement to specify the matters or types of decisions to which the support arrangement relates. In a few jurisdictions, the legislation lists the possible types of decisions that can be specified.² Legislation in other jurisdictions does not.³ A few jurisdictions place restrictions on formal supporters providing assistance with financial matters.⁴

11.7 In overseas legislation, the powers given to formal supporters generally fall into four categories:

- (a) *Powers relating to information*: Most jurisdictions that we have considered include a statutory right to access information relevant to the formal supporter’s role.⁵ Most also specify in legislation that formal supporters are able to disclose information about the supported person when necessary to perform their role.⁶ Some jurisdictions have provisions on other matters, including obligations in relation to the security of information.⁷
- (b) *Communication powers*: In all jurisdictions we have considered that provide for formal supporters, those supporters have the power to assist the person to

² Assisted Decision-Making (Capacity) Act 2015 (Section 10(4)) Regulations 2023 (Ireland), reg 12, in connection with Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 2(1) definitions of “personal welfare” and “property and affairs”; and Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), sch form 1 reg 3.

³ See for example Guardianship and Administration Act 2019 (Vic), s 89(c)–(d); and Powers of Attorney Act 2014 (Vic), s 85(1).

⁴ Guardianship and Administration Act 2019 (Vic), s 93; Powers of Attorney Act 2014 (Vic), s 89; and Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), reg 5(1).

⁵ Guardianship and Administration Act 2019 (Vic), s 91(1); Powers of Attorney Act 2014 (Vic), s 87; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2)(a); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(4)(a); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10. See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-4(a); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.12(1)(b).

⁶ Guardianship and Administration Act 2019 (Vic), s 91(3); Powers of Attorney Act 2014 (Vic), s 87(3); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 11(4)(b); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10(3). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-4(a).

⁷ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(10)(c); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 9(3)(b); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 11(4)(c); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10(2)(c).

communicate decisions or to communicate for them.⁸ In New Brunswick, a formal supporter may decline to communicate a decision if the decision would cause serious harm to the person.⁹

- (c) *Making decisions*: Most jurisdictions we have considered empower formal supporters to help the person make decisions.¹⁰ Victorian legislation expresses it as a duty instead of a power.
- (d) *Powers to give effect to decisions*: Some of the jurisdictions we have considered empower formal supporters to give effect to the supported person’s decisions.¹¹

Consultation

- 11.8 In our Second Issues Paper, we asked what the key features of a formal support arrangement should be. All the feedback from submitters summarised throughout this chapter was provided in response to this question.
- 11.9 Sixty-seven submitters gave feedback on formal supporters’ role and powers.
- 11.10 Some of them said the role and powers of formal supporters should not reflect a “one size fits all” approach. Suggestions included that powers be tailored to the person and apply to specific decisions or classes of decisions.
- 11.11 Several submitters recommended formal supporters be given a range of specific powers. A few of them suggested formal supporters should have the power to be present at important events or for key decisions. Some submitters thought a key role of a formal supporter should be to provide communication assistance.
- 11.12 Some submitters said powers to assist a person to make a decision should be exercised in a way that reflects the person’s rights, will and preferences. This would include ensuring the person is included as much as they are able, offering advice and helping the person to articulate their views.
- 11.13 A few submitters suggested the formal supporter should have a “casting vote or veto” or be able to make decisions for the person in limited situations. However, others were clear this should never be possible. Te Whatu Ora MidCentral — Palmerston North Hospital: Social Work said the formal supporter’s role should focus on empowering the person to make their own decisions rather than making decisions on their behalf.

⁸ Guardianship and Administration Act 2019 (Vic), ss 90(1)(c) and 92(b); Powers of Attorney Act 2014 (Vic), s 88(b); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(1)(c)–(d); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2)(c); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(4)(b); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(1)(d). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-4(c); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.12(1)(a).

⁹ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 10(7).

¹⁰ Guardianship and Administration Act 2019 (Vic), s 8(1)(a)(i); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(1)(d); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2)(b); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 10(5); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(1)(a). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-5(a).

¹¹ Guardianship and Administration Act 2019 (Vic), ss 90(1)(d) and 93; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(1)(e); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(1)(e). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-4(d); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.12(3).

- 11.14 Several submitters addressed the power to obtain a supported person's information but also emphasised the importance of safeguarding privacy and preventing abuse:
- (a) Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) observed that a supporter can already obtain information with the person's consent but that a specific reference to a formal supporter's duty to respect the supported person's privacy and confidentiality would enhance the protection of their rights. Iris Reuvecamp agreed, noting that someone's status as a formal supporter may lead third parties to be less likely to recognise or address indications of impropriety.
 - (b) Another submitter said disclosure of financial information should be subject to special restrictions due to the high potential for abuse.

Recommendations

Nature of role

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.

- 11.15 We recommend that a formal supporter's role should be to provide decision-making support to the supported person in accordance with the terms of their appointment and legislative requirements. In Chapter 6, we recommend that decision-making support be defined to include assisting a person to (among other things):
- (a) access relevant information;
 - (b) identify and evaluate options for decisions; and
 - (c) communicate and give effect to their decisions.
- 11.16 A person appointing a formal supporter should be able to specify the matters for which they want decision-making support. Some people may want support for a wide range of matters (for example, all personal and healthcare decisions). Others may want it for specific matters (such as dealing with their home or investments). Some people may want different people to provide support for different matters.
- 11.17 As noted above, some overseas statutes list the types of decision to which a formal support arrangement may relate. In our view, it is preferable for people who need support (and courts) to be able to specify exactly what is required. People making appointments might find it helpful to have a list to refer to in considering what to specify in the appointment. However, we consider this would best be provided in guidance rather than in legislation.
- 11.18 We do not consider there should be any restrictions on formal supporters providing decision-making support relating to financial matters, as is the case in some jurisdictions. People can be particularly in need of support in relation to financial matters.¹² We acknowledge that financial decisions can give rise to risks of abuse. However, the limited nature of formal supporters' powers that we recommend (relating just to accessing

¹² New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.60].

information) means the potential for abuse would be lower than in jurisdictions that provide for broader powers (such as giving effect to decisions).

Power to access relevant information

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.

- 11.19 As we explain in Chapter 10, a key benefit of formal support arrangements is that formal supporters would have a statutory right to access information relevant to their role. A new Act should provide for this.¹³
- 11.20 In other jurisdictions we have considered, specific consent to access the supported person's information is not required once a formal supporter has been appointed, provided the information is accessed for the purpose of support.¹⁴ In our view, that is the preferable approach. Always requiring consent would be administratively burdensome and unnecessarily impede the arrangement's efficacy.
- 11.21 A formal supporter's ability to access a person's information should be subject to three important limits.

Any limitations specified in the appointment

- 11.22 There may be some information that a person does not wish their formal supporter to access or use — either at all or without their express consent. A new Act should enable this to be reflected in the supporter's appointment.

¹³ As noted above, a few submitters suggested that formal supporters also have power to be present at important events or for key decisions. It would be inappropriate for such a power to enable a supporter to be present when the supported person does not want them to be. Accordingly, the only relevance of such a power would be to overcome third party objections to the supporter's presence. However, we are not aware of significant resistance to informal supporters being present where a person wants them to be. In addition, such a power would need to be subject to careful limits in order to appropriately respect the rights of third parties (for example, the owner of a home in which an event is occurring). In the absence of an apparent need for such a power, we do not think it appropriate to recommend it.

¹⁴ Guardianship and Administration Act 2019 (Vic), s 91(1); Powers of Attorney Act 2014 (Vic), s 87; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2)(a); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 6(4)(a) and 24(2)(a); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10. See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-4(a); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.12(1)(b).

11.23 Other jurisdictions we have considered take different approaches to achieve this. In most jurisdictions, the formal supporter's powers must be specified in the order or agreement.¹⁵ In contrast, legislation in the Yukon lists formal supporters' powers but makes that list subject to the agreement.¹⁶ In our view, this latter approach is preferable. Setting out default powers in a new Act and enabling exclusions in the appointment is simpler than requiring each appointment to set out the specific powers.

Information must be within the scope of the appointment

11.24 A formal supporter should only be entitled to access information they reasonably consider is required for providing the support specified in their appointment. For example, if a formal supporter has been appointed in relation to health matters, it seems unlikely they would need to access the person's financial information.¹⁷

Third-party confidentiality obligations must be upheld

11.25 A formal supporter should only be entitled to access information that the supported person would be entitled to disclose to them (if the supported person held it). For example, a supported person may have access to confidential information about a third party as part of a business arrangement but be contractually obliged not to disclose that information to anyone else. A new Act should not enable third parties' rights to be overridden by the appointment of a formal supporter. This approach may sometimes limit the effectiveness of the support that can be provided. However, this consideration must be balanced against the rights of third parties relying on the maintenance of agreed commercial confidentiality.¹⁸

Powers that a new Act should specify formal supporters do not have

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.

¹⁵ Guardianship and Administration Act 2019 (Vic), s 90(1); Powers of Attorney Act 2014 (Vic), s 85(1); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(2); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 6(4) and 24. See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.12(1).

¹⁶ Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(1). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-4.

¹⁷ This approach reflects overseas jurisdictions: Guardianship and Administration Act 2019 (Vic), s 91(1)(a); Powers of Attorney Act 2014 (Vic), ss 85(1) and 87(1)(a); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 11(4)(a)–(b) and 25(1) and (5)–(6); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10(2)(a)–(b). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.13(1)(g).

¹⁸ We recommend a different approach in relation to the powers of representatives, reflecting their different role. See Chapter 18.

R30

A formal supporter should not have the power to delegate any of their powers.

- 11.26 To ensure the role of formal supporter is clearly defined and distinct from the role of representatives, a new Act should specify that formal supporters not have certain powers.

No power to make decisions

- 11.27 The key distinction between making decisions with the benefit of decision-making support — often called supported decision making — and decision making on behalf of a person is that, in supported decision making, it is the supported person who makes the decision rather than a representative or court. This is so fundamental that a new Act should expressly state that formal supporters may not make decisions for supported people.¹⁹

No power to communicate or give effect to decisions

- 11.28 Formal supporters in other jurisdictions often have a power to communicate or give effect to a supported decision on behalf of the person rather than simply to assist the person do so themselves. We do not recommend that formal supporters have such powers in Aotearoa New Zealand.
- 11.29 We acknowledge that these powers could be helpful for people with formal support arrangements. For example, a power to communicate decisions could help people who primarily communicate in non-verbal ways to communicate their decision to third parties.²⁰
- 11.30 However, the potential for abuse by a formal supporter is significantly greater if they can act on behalf of the supported person rather than just assisting the person to act themselves. This concern is compounded by the increased risk of confusion about the role of formal supporters if they are permitted to act on behalf of the people they support in the same way as representatives.²¹ To make the role of formal supporter as clear as possible, a new Act should specify that a formal supporter cannot communicate or give effect to a decision on behalf of the supported person.
- 11.31 This does not mean that a supported person would have no support in communicating or executing decisions. A formal supporter could *assist* the supported person to communicate or give effect to decisions, as informal supporters currently can.²² A formal

¹⁹ Compare Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(2); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 10(5) and 24(3). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-3(b); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.12(2)(a).

²⁰ See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.58].

²¹ See János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 95–96.

²² See our recommended definition of decision-making support in Chapter 6.

supporter could also be authorised to communicate or give effect to a decision by being appointed as an agent or attorney, again, as informal supporters currently can.²³

No power to act contrary to supported person's wishes

- 11.32 A formal supporter's actions should always be subject to the supported person's wishes. If a person decides they do not wish a formal supporter to provide some specific aspect of support or seek some personal information, the supporter should respect those wishes. This applies even if the supporter considers that the person does not understand the implications of their wish. The essence of the formal supporter role is to support the person's own decision making. It is not to make decisions on behalf of the person in the way a representative might.
- 11.33 To make this clear, a new Act should specify that a formal supporter has no power to take any action that they know, or ought to know, is inconsistent with the supported person's wishes.

No power to delegate the power to access information

- 11.34 A formal supporter should not be able to delegate their power to access information to another person. This is because the effectiveness of a formal support arrangement relies on the relationship between the formal supporter and the person. A third party may not have the same (or any) relationship with the supported person and may not be someone the person would have appointed themselves.²⁴ There may also be an increased risk of abuse if a formal supporter can delegate their powers to someone else.
- 11.35 For the same reason, we recommend later in this chapter that bodies corporate generally not be eligible to be appointed as formal supporters.

APPOINTMENT OF FORMAL SUPPORTERS

- 11.36 In this section, we discuss how formal supporters should be appointed, who should (and should not) be eligible to be a formal supporter and whether it should be possible for a person to have multiple formal supporters.

Overseas approaches

- 11.37 All jurisdictions we have considered that provide for formal supporters enable a person who needs decision-making support to appoint a formal supporter themselves. The requirements for appointing a formal supporter in these jurisdictions are similar to those typically required for appointing an enduring power of attorney such as witnessing requirements.²⁵

²³ If becoming a formal decision-making supporter means appointment as an agent or attorney is not possible, people may be dissuaded from appointing formal supporters.

²⁴ The same approach is taken in New Brunswick: Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 10(6) and 24(6).

²⁵ Powers of Attorney Act 2014 (Vic), ss 91–102; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10, in conjunction with Assisted Decision-Making (Capacity) Act 2015 (Section 10(4)) Regulations 2023 (Ireland), regs 4–7; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(3), in conjunction with Adult Guardianship and

- 11.38 Victoria also allows for formal supporters to be appointed by a court, with the supported person's consent.²⁶ The court must only make the appointment if satisfied of certain things, including that:
- (a) the person in need of support will have decision-making capacity in relation to the matters covered in the order if given practicable and appropriate support;²⁷ and
 - (b) the proposed supporter is a suitable person to act as the person's formal supporter.²⁸
- 11.39 The jurisdictions we have considered have similar sets of eligibility requirements for a person to be a formal supporter, including a minimum age threshold. The most common minimum age is 18.²⁹
- 11.40 Jurisdictions have varying prohibitions on who can act as a formal supporter. These include insolvent people,³⁰ people who have been convicted of certain offences in relation to the proposed supported person³¹ and people who themselves have a formal supporter or have an EPOA in effect due to a lack of decision-making capacity.³² In some jurisdictions, a circumstance is only prohibiting if the proposed supporter has not disclosed it to the person. For example, in Victoria, anyone who has been convicted of an offence involving dishonesty is prohibited from being appointed as a person's formal supporter for financial matters unless the proposed supporter has disclosed the offence to the person.³³

Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), sch form 1; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6; and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), ss 8–9. See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.3 and [7.36].

²⁶ Guardianship and Administration Act 2019 (Vic), ss 87(2)(a) and 88(1). The New South Wales Law Reform Commission also recommended this approach: *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [7.39]–[7.55].

²⁷ Guardianship and Administration Act 2019 (Vic), s 87(2)(b). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.7(1)(d).

²⁸ Guardianship and Administration Act 2019 (Vic), s 88(1)(b). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.7(1)(c).

²⁹ Guardianship and Administration Act 2019 (Vic), s 88(1); Powers of Attorney Act 2014 (Vic), s 91(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10(1); and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(1). New Brunswick provides for an age limit of 19: Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 9(1). The New South Wales Law Reform Commission recommended that formal supporters should be 16 or older: *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.2(a) and R7.9.

³⁰ Powers of Attorney Act 2014 (Vic), s 91(b); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 11(1)(c). In Ireland, the prohibition applies only in relation to financial matters: s 11(2).

³¹ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 11(1)(a).

³² Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), cl 2(b).

³³ Powers of Attorney Act 2014 (Vic), s 91(c). The New South Wales Law Reform Commission recommended a similar approach: *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.2(b).

- 11.41 Some jurisdictions specify that multiple formal supporters can be appointed for the same person.³⁴ In Victoria, while a person can appoint multiple supporters for themselves, there is no such power for the court.³⁵ Varying approaches are taken to whether multiple supporters are to act separately or jointly.³⁶

Consultation

Appointment

- 11.42 Thirty submitters gave feedback relating to the appointment of formal supporters. Some submitters said or implied that formal supporters should be appointed by te Kōti Whānau | Family Court. Others considered appointment could occur through a private document similar to an EPOA. Several submitters indicated that a formal supporter should only be appointed with the supported person's consent or if it accords with their will and preferences.
- 11.43 Several submitters said an appointment should only be made if the supported person has decision-making capacity to enter into or consent to the appointment. Two submitters suggested the supported person's ability to understand the support arrangement should be assessed prior to the arrangement. A few thought assessing the person's decision-making capacity should not be necessary.
- 11.44 Submitters were divided on the level of formality required of appointments. Some appeared to favour a degree of formality such as requiring appointments to be registered and specifying in the legislation when a formal support arrangement comes into force. One submitter expressed concern about the dangers of formal supporters being too easily appointed.
- 11.45 Others, however, cautioned against appointments being too formal. Te Kāhui Tika Tangata | Human Rights Commission said formalised support does not need to be overly formal in practice. Alzheimers New Zealand noted that formal legal arrangements can be expensive and argued the process should be straightforward and reduce financial burdens on families. Another submitter said greater formalisation increases barriers to appointing a formal supporter and suggested a new Act should lay out expectations, duties and standards without requiring formal appointment processes.
- 11.46 Donald Beasley Institute and People First NZ said final decisions about formal support arrangements should be written in accessible formats such as Easy Read.³⁷

³⁴ Powers of Attorney Act 2014 (Vic), s 92; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10(5); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 7; and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 9(2)–(3). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [4.48].

³⁵ Compare Powers of Attorney Act 2014 (Vic), s 92 with Guardianship and Administration Act 2019 (Vic), pt 4 div 3.

³⁶ Compare Powers of Attorney Act 2014 (Vic), s 92; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10(5); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 7; and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 9(2)–(3).

³⁷ Easy Read is a way of communicating information using simple language, clear sentence structure and supporting pictures. It assists people with learning disabilities to understand written information. See Kia Māmā Mai | Make it Easy "What is Easy Read?" <www.makeiteasy.org.nz>.

Suitability and eligibility

- 11.47 Fifteen submitters gave feedback relating to the suitability and eligibility of formal supporters. Several submitters suggested factors that would make a person suitable for appointment as a formal supporter.
- 11.48 Some of these factors related to personal attributes such as being of good character, trustworthy, neutral, and socially and culturally suitable (including committing to the principles of te Tiriti o Waitangi and tikanga Māori). One submitter suggested vetting to ensure the person is appropriate and capable of carrying out their duties, including a police check where money will be involved.
- 11.49 Other suggested factors related to relationships, knowledge, skills and experience. These factors included:
- (a) having a positive relationship with the supported person;
 - (b) being able to identify conflicts of interest;
 - (c) possessing adequate understanding of relevant clinical outcomes and options;
 - (d) understanding and respecting human rights;
 - (e) knowing how to communicate with the supported person; and
 - (f) ideally, having relevant lived experience.
- 11.50 New Zealand Down Syndrome Association and Aotearoa New Zealand Adult Safeguarding Alliance considered that any natural person should be eligible for appointment, including family members and people who have affected decision making. New Zealand Down Syndrome Association suggested that legal entities that are not natural persons such as trusts or iwi should also be eligible.
- 11.51 A small number of submitters thought there should be criteria that disqualify someone from acting as a formal supporter. McWilliam Tyree Lawyers suggested one such disqualifying criteria be bankruptcy in the case of property matters. Another submitter recommended that disqualifying criteria resemble those for representatives, including any convictions for dishonesty or offences involving the person.

Recommendations

Appointment either by the person themselves or the Family Court

R31

A new Act should enable formal supporters to be appointed by either the person who needs support or te Kōti Whānau | Family Court.

- 11.52 A new Act should enable formal supporters to be appointed either by the person themselves or by the Family Court. We envisage that formal supporters would most commonly be appointed by the person who needs support. In some situations, however, it might be useful for the Court to be able to appoint a formal supporter. An example might be where an application has been made to appoint a court-appointed representative but the Court considers that appointing a formal supporter would be an appropriate and less restrictive approach.

Eligibility to be a formal supporter

- R32** A new Act should provide that people are ineligible to be appointed as a formal supporter if they:
- a. are under the age of 18;
 - b. have a representative appointed by te Kōti Whānau | Family Court acting on their behalf;
 - c. have an attorney under an enduring power of attorney acting on their behalf;
 - d. are subject to compulsory treatment or are a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
 - e. 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.

- 11.53 Under our recommendations, formal supporters would have important responsibilities and be entitled to access confidential and personal information. If formal supporters undertook their role without care or with bad intent, they could expose potentially vulnerable people to abuse or other harm.
- 11.54 In line with our recommendations for people being appointed as attorneys under EPOAs in Chapter 19, we recommend that people under the age of 18 should not be eligible to be appointed as formal supporters. We do not consider the age of eligibility for formal supporters should be different from that for attorneys.
- 11.55 We recommend excluding people from eligibility who may not be suitable to act as a formal supporter because their own decision making is too affected. Some of the grounds for ineligibility we recommend are modelled on grounds for a person's ineligibility to be appointed as an attorney acting under an EPOA and on circumstances in which an EPOA ceases to have effect under the current law.³⁸
- 11.56 We recommend that bodies corporate generally not be eligible to be appointed as formal supporters, given the importance of a personal relationship between the supporter and the supported person to the effectiveness of decision-making support. However, we recommend an exception for trustee corporations. As we discuss in Chapter 19, trustee corporations should continue to be able to be appointed as attorneys under EPOAs in relation to property matters.³⁹ Enabling them also to be appointed as formal supporters in relation to property matters would enable an easier transition from a formal supporter arrangement to decisions being made under an EPOA. This might be considered by some people needing decision-making support to outweigh the disadvantages. However, as with EPOAs, appointing a trustee corporation as a formal supporter should only be

³⁸ Protection of Personal and Property Rights Act 1988, ss 95(3) and 106(1).

³⁹ Under the current law, trustee corporations can be appointed as attorneys acting under an EPOA: Protection of Personal and Property Rights Act 1988, s 95(3)(b).

possible in relation to property matters. Formal support in relation to care and welfare matters should only be provided by natural persons.

- 11.57 Nor do we recommend that people who are bankrupt be ineligible to be appointed as formal supporters.⁴⁰ We acknowledge that people who require support are vulnerable and must therefore be protected from formal supporters who may abuse their powers or who may provide support in ways that could lead to significant financial loss. However, as we explain above, a formal supporter's primary power under a new Act would be to access information in order to provide decision-making support to the supported person, not to communicate or give effect to the supported person's decisions. We do not consider the fact a person is bankrupt means there is too great a risk that they will abuse the information they obtain. The risk that they may provide inadequate support would exist whether they were a formal or informal supporter.
- 11.58 In Chapter 16, we recommend that people should be prohibited from being appointed as representatives by the Family Court in several additional circumstances. For example, a person should not be appointed if they are serving a sentence of imprisonment. In Chapter 19, concerning EPOAs, we explain that we did not consult on these additional circumstances in relation to EPOAs and so do not make any recommendations about them. However, we suggest the Government, when drafting a new Act, consider whether these prohibitions should also apply to EPOAs, at least to the extent a donor does not specify otherwise. As a self-instigated arrangement, formal support arrangements are more analogous to EPOAs than to court-appointed representative arrangements. The same approach that is taken in relation to EPOAs should also be applied to formal support arrangements.

Appointment by the supported person

R34

Where a person seeks to appoint a formal supporter themselves, a new Act should specify the following requirements for appointment:

- a. The appointment should be made in a prescribed form developed for this purpose.
- b. The person and the formal supporter should sign the appointment.
- c. 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.

⁴⁰ Under the current law, people who are bankrupt cannot be appointed as an attorney acting under an EPOA: Protection of Personal and Property Rights Act 1988, s 95(3)(a).

R35

A new Act should provide that, despite a failure to comply with any of the appointment requirements:

- a. Any action taken by the formal supporter under the appointment is valid if:
 - i. the formal supporter does not know of the failure and acts in good faith; or
 - ii. the failure is not material.
- b. A third party dealing with the formal supporter may treat any action of the supporter under the appointment as valid if:
 - i. the third party does not know of the failure and acts in good faith; or
 - ii. 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.

Process for appointment

- 11.59 In our view, where a person is appointing a formal supporter themselves, the appointment should be made and executed in broadly the same way as an EPOA. At a high level, this involves filling out a form, the relevant people signing the form and their signatures being witnessed. We acknowledge these requirements involve formality and some cost. Despite the potential barriers this may impose, we recommend these requirements for three reasons.
- 11.60 First, given the powers we recommend that formal supporters be able to exercise and the potential vulnerability of supported people, it is important that all parties understand the nature of the arrangement and enter into it with informed consent. The requirements would help ensure that a person appointing a formal supporter understands the effects and implications of the arrangement. In addition, requiring a witness to be alive to any concerns about the appointer's ability to understand the arrangement and whether they are subject to undue pressure or the victim of fraud would provide safeguards.
- 11.61 Second, there is overseas precedent for this approach. Some overseas statutes prescribe robust formal procedures for the creation and execution of formal support arrangements in order to provide clarity and appropriate safeguards. Most provide for a prescribed form⁴¹ and require that the appointer's signature be witnessed by another person.⁴² Some

⁴¹ Power of Attorney Act 2014 (Vic), s 94; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10(4)–(4A); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 4(3); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(5).

⁴² Power of Attorney Act 2014 (Vic), s 95; Assisted Decision-Making (Capacity) Act 2015 (Section 10(4)) Regulations 2023 (Ireland), reg 6; and Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), cl 3(1)(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(7).

jurisdictions require the witness to make certifications concerning the appointer's capacity and voluntary willingness to enter the arrangement.⁴³

- 11.62 A third reason is that there are advantages in aligning the process to enter formal support arrangements with the process to create and execute EPOAs. Professionals who act in this area will be familiar with the process for EPOAs. Further, we anticipate that people may wish to create a formal support arrangement at the same time as setting up an EPOA. They may use the same people to act as both formal supporters and attorneys. A different process might cause confusion or add unhelpful complication.
- 11.63 In Chapter 19, we make recommendations for review of the prescribed forms for EPOAs to improve their accessibility. The prescribed forms for formal supporters should reflect that review.

Non-compliance with appointment (or amendment) formalities

- 11.64 Under the Protection of Personal and Property Rights Act 1988, an EPOA must be in the prescribed form with all formalities observed.⁴⁴ A power of attorney that was not created consistently with these formalities can still have effect as an EPOA but only if no prescribed provision is substantially omitted and the differences are immaterial.⁴⁵ However, actions taken in good faith without knowledge of the deficiency are not affected.⁴⁶ We do not recommend any changes to these provisions in relation to EPOAs.
- 11.65 We recommend that a new Act include similar provisions in relation to deficiencies in the appointment of formal supporters. Any action taken by a formal supporter under a non-compliant appointment should be valid, and a third party dealing with the formal supporter should be able to treat any such action as valid, in two circumstances.
- 11.66 First, if the deficiency is immaterial, it should not affect the actions taken by the formal supporter. Nor should it affect any actions of a third party in reliance on the formal supporter's appointment (for example, providing the formal supporter the supported person's information). While the appointment formalities serve an important safeguarding function, substantial compliance should suffice.
- 11.67 Second, if the deficiency is more significant than this but a formal supporter or third party does not know of this and acts in good faith, they should be entitled to act as if the formalities were complied with. If this were not the case, people might be reluctant to deal with formal supporters without taking additional steps to satisfy themselves they are entitled to rely on the validity of the formal supporter's appointment. This could be time-consuming and potentially expensive.

Remote execution of formal supporter appointments

- 11.68 In Chapter 19, we recommend that a new Act permit the remote execution of EPOAs by audio-visual link, without the donor of the EPOA and the witness being in the same physical location. We also recommend that a new Act empower regulations to be made

⁴³ Power of Attorney Act 2014 (Vic), ss 95(1)(c) and 98; and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 6(5)(e).

⁴⁴ Protection of Personal and Property Rights Act 1988, ss 94A and 95(1).

⁴⁵ Protection of Personal and Property Rights Act 1988, s 95(2).

⁴⁶ Protection of Personal and Property Rights Act 1988, s 103A.

to prescribe a process that must be followed in the case of remote execution. We make the same recommendation in relation to the appointment of formal supporters. Importantly, regulations should only be made if the prescribed process can achieve an appropriate level of safeguarding.

Appointment by the Family Court

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.

11.69 We recommend the Family Court be able to appoint a formal supporter if satisfied of specified matters. These matters relate to the proposed supported person's views, their comprehension of the arrangement and the suitability of the proposed supporter. Our recommended approach is in line with relevant features of the regime in Victoria, which provides for formal supporters to be appointed by a tribunal.⁴⁷

11.70 We do not consider that the Family Court should need to be satisfied that a person requires support in order to appoint a formal supporter. This is because the person must consent to the appointment, and the Court must be satisfied as to the person's decision-making capacity for, and understanding of, that consent (and that it is not the result of undue pressure or fraud). We do not consider that the Court should be required to effectively second-guess that consent.

11.71 Nor do we consider that the role of a court-appointed formal supporter should automatically be subject to regular review in the way that a court-ordered representative

⁴⁷ Guardianship and Administration Act 2019 (Vic), ss 79–80, 87 and 90(2). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.6, R7.8 and R7.10.

arrangement would be, given the formal supporter could be appointed by the supported person themselves without any court oversight. However, in some circumstances, the Court might consider it appropriate to require review — for example, to assess the extent to which the required support is being provided and, if it is not, whether a representative is required. We therefore recommend the Court should have a power to review formal support arrangements at its discretion.

Multiple formal supporters

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.

- 11.72 We recommend that a person be entitled to have more than one formal supporter, including for the same decisions. This may be particularly important for Māori or people from other cultures that have a strong collective ethos. It may also be useful if a person requires support in relation to distinct issues and wishes multiple formal supporters with different strengths and expertise to help them.
- 11.73 The liability of multiple formal supporters for breach of their duties should be determined in the same way as the liability of multiple representatives. We address the liability of multiple representatives in Chapter 17.

Terms of appointment

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.

- 11.74 A formal supporter's appointment should clarify the scope of the appointment to provide both the supported person and the supporter with certainty as to the nature of the support arrangement.

When appointment takes effect

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.

- 11.75 A supported person should be able to decide when they want a formal support arrangement to take effect. We therefore recommend that a new Act specify that the arrangement can take effect immediately, on a certain date or on a certain event. If the arrangement is not to take effect immediately, this should be specified in the terms of appointment. Where the Court is appointing a formal supporter, the date the appointment takes effect should reflect the supported person's wishes.
- 11.76 This approach is different to our recommended approach for EPOAs. In Chapter 19, we explain that we do not recommend enabling donors of EPOAs to specify a triggering event entitling an attorney to act. One of our reasons is that the event specified may be unclear and lead to uncertainty about when the attorney can act.
- 11.77 This is of less concern for formal support arrangements because the supported person would still have relevant decision-making capacity and could revoke or amend the appointment if it operated in ways they did not intend. Guidance on how to specify an event on which a formal support arrangement takes effect would further mitigate any risk.⁴⁸

Changes to terms of appointment

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.

- 11.78 A new Act should provide that any change of a formal support arrangement must meet the requirements for appointing a formal supporter. For example, if a change expands the range of decisions to which it relates or removes restrictions on a formal supporter's powers, the same safeguards (including witnessing requirements) should apply. If this were not the case, a vulnerable person could be persuaded to change an appointment in ways they do not adequately understand.
- 11.79 Further, we recommend the terms of appointment for court-appointed formal supporters should only be able to be changed by the Family Court. We make this recommendation because the Court might sometimes appoint a formal supporter as a less restrictive

⁴⁸ We discuss the importance of guidance for the successful implementation of a new Act generally in Chapter 24.

option to the appointment of a representative. In this situation, it would not be appropriate for the arrangement to be changed without the Court being satisfied the proposed change will continue to be effective.

DUTIES OF FORMAL SUPPORTERS

11.80 In this section, we discuss the duties to which formal supporters should be subject and the limits on those duties.

Overseas approaches

- 11.81 Legislation in most overseas jurisdictions we have considered that provides for formal support arrangements requires formal supporters to act “honestly, diligently, and in good faith” (or uses an equivalent phrase).⁴⁹ In some jurisdictions, legislation also requires formal supporters to exercise “reasonable care” or “reasonable skill and care”.⁵⁰ In Alberta, formal supporters must act in the supported person’s best interests.⁵¹
- 11.82 A few jurisdictions provide for duties in relation to conflicts of interest. In Victoria, legislation requires a formal supporter to avoid acting when there is, or may be, a conflict of interest. If they act where there is a conflict, it requires a formal supporter to ensure that the interests of the supported person are the primary consideration.⁵² New Brunswick legislation requires a formal supporter to act in the person’s interests, not for their own benefit or the benefit of someone else.⁵³
- 11.83 Other duties provided for in various jurisdictions include:
- (a) not coercing, intimidating or unduly influencing the supported person;⁵⁴
 - (b) not assisting the supported person to conduct any illegal activity;⁵⁵
 - (c) record-keeping requirements;⁵⁶ and

⁴⁹ Guardianship and Administration Act 2019 (Vic), s 94(b); Powers of Attorney Act 2014 (Vic), s 90(1)(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(e); Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), reg 4(1); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 12(1). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-5(d); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.13(1)(b).

⁵⁰ Guardianship and Administration Act 2019 (Vic), s 94(c); Powers of Attorney Act 2014 (Vic), s 90(1)(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 12(1).

⁵¹ Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), reg 4(1). See also Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R4-5(c).

⁵² Guardianship and Administration Act 2019 (Vic), s 94(e). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.13(1)(d).

⁵³ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 12(2).

⁵⁴ Guardianship and Administration Act 2019 (Vic), s 94(h); Powers of Attorney Act 2014 (Vic), s 85(3)(b); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 5(2). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.13(1)(b).

⁵⁵ Guardianship and Administration Act 2019 (Vic), s 94(g); and Powers of Attorney Act 2014 (Vic), s 85(3)(a).

⁵⁶ Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta), reg 4(5); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 14.

- (d) protecting the confidentiality of sensitive information they hold in their capacity as a formal supporter.⁵⁷

Consultation

- 11.84 In our Second Issues Paper, we identified possible duties that a new Act might impose on formal supporters.⁵⁸ Ten submitters commented on the duties that formal supporters should hold. In their feedback, a few submitters expressly emphasised the importance of duties being imposed on formal supporters. One submitter noted the ability to impose duties on the formal supporter was one of the potential advantages of formal support arrangements.
- 11.85 Some submitters suggested specific duties that should be imposed on formal supporters, including to act ethically, honestly, diligently and in good faith and to treat the person with care, compassion and dignity. Eating Disorders Carer Support NZ submitted that formal supporters should be required to consider the person's welfare, safety and best interests. TGT Legal submitted that formal supporters should have fiduciary duties since they assume a position of trust and confidence.
- 11.86 Some submitters made comments about a supported person's relationships with other key people in their life that are relevant to the potential duties of formal supporters:
- (a) Changing Minds queried whether the existence of a formal supporter might adversely affect the important role played by friends or family members when a person experiences a mental health crisis.
 - (b) Two submitters suggested that family members should be included in decisions made with support, including to avoid conflict over them.
 - (c) Another submitter noted the potential for tensions between formal supporters and representatives where both have been appointed. NZLS said there should be duties and obligations concerning how the roles should intersect.
- 11.87 The Donald Beasley Institute and Ngā Tāngata Tuatahi | People First NZ noted that "commitment from supporters to acquiring knowledge about the supported person" is important.
- 11.88 Relatedly, 24 submitters commented on the importance of oversight in relation to formal supporters, including through clear guidelines and appropriate review mechanisms.

⁵⁷ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(10)(c)(i)–(ii); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 9(3)(b); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 11(4)(c); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10(2)(c)–(d).

⁵⁸ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [8.51].

Recommendations

Recommended duties

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 or action 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.

11.89 The duties we recommend fall into the following categories.

Making reasonable efforts to provide support in accordance with the appointment

11.90 Under a new Act, formal supporters should be required to make reasonable efforts to provide the decision-making support they have undertaken to provide and otherwise act in accordance with the terms of their appointment. The duty should not be more onerous than that. Otherwise, it would likely dissuade informal supporters from becoming formal supporters.

Acting honestly, in good faith and with reasonable care, diligence and skill

11.91 Acting honestly, in good faith and with reasonable care, diligence and skill are standard duties for a role of trust and confidence where one person is reliant on the assistance of another. As we note above, many jurisdictions provide for formal supporters' duties to this effect.

11.92 A new Act should specify the standard of care expected of formal supporters for clarity.⁵⁹ We consider the standard should be that of a reasonable person, except where a person is appointed as a formal supporter in their professional capacity. This approach would ensure that people with professional skills are not discouraged from being formal supporters outside of their professional capacity for fear of being held to a professional standard. We recommend the same approach with respect to the duties of

⁵⁹ The Trusts Act 2019 elaborates on the standard of care for trustees in a similar way: s 29.

representatives and explain in more detail how we anticipate this distinction would operate in Chapter 13.

Being informed about the supported person's situation

- 11.93 Formal supporters should have a duty to use reasonable efforts to be informed about the supported person's circumstances as relevant to the supporter's role. We consider this duty should encompass any relevant information rather than a list of specific sources of information. We consider a general duty is preferable, because specific sources of information may be relevant only in specific circumstances.
- 11.94 This requirement might be implicit in the duty to exercise reasonable skill, care and diligence. However, we recommend this separate duty to make it clear that formal supporters must proactively identify the information relevant to providing support.
- 11.95 As submissions made clear, it is important that formal supporters do not operate in isolation from any other formal supporters or representatives a person may have. We accordingly consider the duty to use reasonable efforts to be informed about the supported person should encompass liaising with these other people on matters relevant to their respective roles.⁶⁰ However, this requirement should be subject to the supported person's wishes. If the supported person does not want the formal supporter to consult others, the formal supporter should not do so. While this may reduce the effectiveness of the support, that is a matter for the supported person to decide. It is the role of the formal supporter to assist the person to understand the implications of their wishes, not to override them.

Managing conflicts of interest

- 11.96 Article 12(4) of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) requires measures relating to the exercise of legal capacity to have appropriate and effective safeguards, including being "free of conflict of interest".⁶¹ We do not interpret this requirement as imposing a strict prohibition on a person providing support for decisions on matters in which they have an interest. Formal supporters may frequently have an interest in decisions that supported people are making, particularly where they are family or whānau. Supported people may want their formal supporter to provide support despite a conflict. A strict prohibition on a formal supporter providing support in that situation, no matter the circumstances, would fail to respect the supported person's autonomy.⁶² A strict prohibition would also be impractical and ignore that family members are often best placed, and most willing, to provide support.
- 11.97 In addition to listing required safeguards, article 12(4) requires that the safeguards be "proportional to the degree to which ... measures affect the person's rights and interests". In our view, read as a whole, article 12(4) requires that measures relating to the exercise

⁶⁰ We recommend equivalent duties for representatives in Chapter 13.

⁶¹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

⁶² Compare Trusts Act 2019, s 34, which prohibits trustees from acting on any matters in which they have a conflict of interest.

of legal capacity are designed to ensure that any conflict of interest is managed effectively and appropriately.

- 11.98 The duty we recommend with respect to managing conflicts of interest addresses two matters.⁶³ The first is a formal supporter's disclosure obligations. We consider a formal supporter should have a duty to disclose all conflicts of interest in relation to matters within the scope of their appointment. This would ensure the supported person knows about the conflict and can decide whether they want the formal supporter to support them in relation to those matters.
- 11.99 The second matter addressed by our recommendation is when a formal supporter should be able to provide decision-making support despite having a conflict of interest. We consider formal supporters should be able to act in relation to (disclosed) conflicts of interest where:
- (a) the supported person has consented to them doing so; and
 - (b) the formal supporter reasonably considers the supported person understood the nature and foreseeable consequences of that consent when it was given and continues (or with available support would continue) to do so at the time of the formal supporter's action.
- 11.100 This recommended requirement goes beyond informed consent. A requirement for informed consent can be met when a person in a position of trust has made disclosure to the person reliant on them that is sufficient to enable the person to make an informed decision.⁶⁴ It does not matter if the person giving consent did not in fact understand the disclosure. In our view, this approach would not sufficiently protect the interests of supported people. A supported person may be vulnerable and in need of support to understand whether to provide consent. A formal supporter should not be able to exploit that vulnerability by relying on a consent that is not properly understood. Our recommended requirement is similar to that applying to legal practitioners when seeking consent from a client to act despite having conflicting duties to another client.⁶⁵
- 11.101 In practice, a supported person could give consent either as part of the formal supporter's appointment or at a later time. If a consent to a conflict is included in the appointment, the formal supporter might need to seek it again if circumstances change. The supported person would also be able to withdraw their consent at any time.
- 11.102 When a person is considering whether to consent to a formal supporter acting despite a conflict of interest, it may be prudent for the formal supporter to arrange for the person to receive additional support from other disinterested supporters. However, to avoid undue complexity and in the light of formal supporters' other duties, we do not recommend a new Act explicitly require this.

⁶³ Our approach differs from some domestic statutes that prohibit a person in a position of trust from acting on any matters in which they have a conflict of interest. See for example *Trusts Act 2019*, s 34.

⁶⁴ See *Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008*, ch 6; *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384 (SC); *Ilion Technology Corporation v Johannink* [2004] BCL 825 (HC); Andrew Butler "Fiduciary Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 585 at 671; and Andrew Beck "Conflicts of Interests" in Matthew Palmer (ed) *Professional Responsibility in New Zealand* (online ed, LexisNexis) at [22.4].

⁶⁵ See *Mouat v Boyce* CA59/91, 26 June 1991; *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (HC) at 440; and *Whalan v Fitchett* HC Wellington CP201/99, 11 December 2000 at [98] and [220]–[221].

Managing confidential information

- 11.103 Generally, people in positions of trust are obliged by applicable laws to protect the confidentiality of sensitive information they hold in that capacity.⁶⁶ As we note above, formal supporters in other jurisdictions are subject to such obligations.⁶⁷ We recommend that a new Act require a formal supporter to:
- (a) keep confidential any confidential or personal information acquired in the course of their role; and
 - (b) refrain from using or disclosing it for any other purpose, except to the extent the supported person has otherwise consented.
- 11.104 We also recommend that the supported person be able to waive the formal supporter's confidentiality obligations by giving consent to actions that would otherwise constitute a breach of them. As with conflicts of interest (addressed above), that consent could be given in the terms of appointment or provided later.
- 11.105 A person may wish to provide such consent for a range of reasons, including to enable the formal supporter to disclose specific information to people such as the supported person's carers or family members. The ability to waive confidentiality obligations by consent is commonplace in confidentiality arrangements generally. In our view, preventing supported people from doing so would be an unwarranted limitation on their autonomy.
- 11.106 However, consent should only be effective if the formal supporter reasonably considers the person understood its nature and implications both at the time it was given and at the time of the relevant action. This is not typically required in confidentiality arrangements. However, as we discuss above in relation to conflicts of interest, it is appropriate given the potential vulnerability of the supported person. It is also likely to encourage the formal supporter to ensure that there is a clear record of any such consent. As addressed above, the supported person would be entitled to withdraw their consent at any time.

Record keeping

- 11.107 We do not consider that formal supporters should have a duty to keep records. A duty to keep records could discourage people from becoming formal supporters. Similarly, we recommend in Chapter 18 that court-appointed representatives for personal care and welfare matters have no record-keeping obligations unless the Family Court imposes them.
- 11.108 However, we consider a new Act should enable regulations to be made to provide for record-keeping obligations. Regulations could be made if, over time, it becomes apparent that greater protection through record-keeping obligations is desirable despite the potential downsides.⁶⁸

⁶⁶ See for example Companies Act 1993, s 145; and Health Information Privacy Code 2020, cl 5 r 11.

⁶⁷ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(10)(c)(i)–(ii); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 9(3)(b); Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 11(4)(c); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 10(2)(c)–(d).

⁶⁸ See Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 14.

When formal supporters should have a duty to refrain from assisting

- 11.109 We consider formal supporters should have a duty *not* to assist the supported person to communicate or give effect to a decision in two situations.
- 11.110 First, formal supporters should not be permitted to help communicate or give effect to decisions they know or should know the supported person has made as a result of undue pressure or fraud. This obligation almost certainly falls within the duty to act in good faith. However, we consider it should be stated as a separate duty to make it explicit.
- 11.111 Second, formal supporters should have a duty not to support a person to communicate or to give effect to a decision if they know or ought to know that:
- (a) the decision will give rise to a material risk of significant harm to the person; and
 - (b) the person (with decision-making support) does not have decision-making capacity for the decision.
- 11.112 The supported person's dignity of risk means they should be able to take risks, even significant ones, in the same way as anyone else. However, as we discuss in Chapter 3, we do not consider that dignity of risk extends to taking significant risks that the person cannot comprehend. This is one of the circumstances in which we recommend that representatives be required to override a person's wishes and values, as we explain in Chapter 12. Under our recommendations, formal supporters would not have a power to override a supported person's decision. However, where a person's decision gives rise to a material risk of significant harm and the person (with decision-making support) does not have decision-making capacity for the decision, formal supporters should have a duty not to help communicate or give effect to it.
- 11.113 For clarity, where the person would lack decision-making capacity for such a decision solely because they would be unable to communicate it without support, the prohibition would not apply. This is because, with support to communicate the decision, the person would have relevant decision-making capacity.⁶⁹ However, where the person lacks relevant decision-making capacity as a result of an inability (even with decision-making support) to understand, retain, weigh or use relevant information and the decision would give rise to a material risk of significant harm, the formal supporter would be prohibited from assisting the person to communicate or give effect to it.

Limits on duty to use reasonable efforts to provide decision-making support

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.

⁶⁹ See our recommended test for decision-making capacity in Chapter 9.

- 11.114 As we address in the previous section, we recommend that formal supporters have a duty to use reasonable efforts to provide decision-making support in relation to matters within the scope of their appointment. This duty is subject to two duties that *prohibit* a formal supporter from helping a person to communicate or give effect to a decision. These are where the decision is a result of undue pressure or fraud or where the decision carries a material risk of significant harm to the person and the person (with decision-making support) does not have decision-making capacity for the decision.
- 11.115 This recommendation is different. It does not recommend a *prohibition* on a formal supporter providing support in additional situations. Rather, it concerns a *right to refuse* to support the supported person to communicate or give effect to a decision in three situations, explained below.

Decisions for which the person does not have decision-making capacity

- 11.116 A formal supporter should be entitled to refuse to help communicate or give effect to a decision, or to take an action in reliance on the supported person's consent, where they consider the person does not have decision-making capacity for the decision or consent.⁷⁰
- 11.117 Sometimes, despite receiving decision-making support from their formal supporter, a person may not be able to understand a decision. Informal supporters are not obliged to help implement a decision that the supported person is not able to understand. If becoming a formal supporter meant they could be required to assist a loved one to take an action they could not understand, informal supporters would likely decline to become formal supporters.
- 11.118 We have considered whether formal supporters should be *prohibited* from giving effect to decisions or taking actions that supported people do not understand, as is the case in New Brunswick.⁷¹ We do not favour that approach because it is inconsistent with the supported person's dignity of risk.
- 11.119 However, formal supporters should not continue in their role if the supported person has lost decision-making capacity to consent to the formal supporter performing their role. As we address later in this chapter, if the formal supporter knows or ought to know that the person has ceased to have decision-making capacity for the appointment and is unlikely to regain it, they should resign.⁷²

Decision or action that carries a material risk of significant harm

- 11.120 We consider a formal supporter should be entitled to refuse to help communicate or give effect to a decision or take an action that they consider carries a material risk of significant harm to the supported person that the supported person understands.⁷³
- 11.121 As we address in Chapter 3, the ability to make risky decisions is part of what it means to be human. People with affected decision making should be able to make these decisions,

⁷⁰ Compare Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 10(3).

⁷¹ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 10(3). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.13(1)(h).

⁷² See R50.

⁷³ Compare Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 10(7).

just as others can do. As part of their general duty to provide decision-making support, formal supporters should therefore be able to help communicate or give effect to a decision that carries a material risk of significant harm where the supported person (with decision-making support) has decision-making capacity for the decision.

- 11.122 However, they should not be required to do so. We recommend that formal supporters be permitted to refuse to help give effect to a person's decision that is likely to cause significant harm. Otherwise, people would likely decline to be appointed as formal supporters.

Decisions or actions that might lead to liability

- 11.123 Lastly, a formal supporter should be entitled not to help communicate or give effect to a decision or take an action if they consider that doing so might result in liability for them.

- 11.124 Later in this chapter, we recommend that a new Act make clear that formal supporters are not generally themselves bound, or otherwise liable for, decisions that they have supported someone to make. In Chapter 22, we also recommend that formal supporters who reasonably believe they are acting within the scope of their appointment generally have immunity from any action or omission in their role, except to the extent that they acted in bad faith or without reasonable care. Despite these provisions, some formal supporters might be concerned that they may nonetheless be liable for some decisions, for example, where they consider the decision might be unlawful and they could be liable for assisting in it. Again, if formal supporters were required to act despite such concerns, people who would otherwise agree to be appointed might decline to do so.

Formal supporters should otherwise use reasonable efforts to assist

- 11.125 Beyond the three situations addressed above, we consider formal supporters should be required to use reasonable efforts to assist people to communicate or give effect to decisions that they disagree with. It should not be open to formal supporters to decline to act for moral or religious reasons or because they consider a decision to be ill-advised. A formal supporter's role is to support the person's autonomy by assisting them to make and communicate their own decisions. It is not to restrict that autonomy by exercising some form of veto over their decisions.

- 11.126 For clarity, our three recommended limits on the general duty to provide decision-making support relate solely to supporting a person to communicate or give effect to a decision or to take an action in reliance on the supported person's consent. They do not entitle a person to cease all decision-making support in the three circumstances. To the contrary, ongoing support to help supported people understand complex or highly risky decisions is particularly important. Formal supporters should be obliged to provide it in the usual way.

LEGAL EFFECT OF DECISIONS MADE WITH FORMAL SUPPORT

- 11.127 In this section, we discuss the legal effect of decisions made with the involvement of a formal supporter.

Overseas approaches

- 11.128 All overseas jurisdictions we have considered that provide for formal supporters have legislation that addresses the circumstances in which a decision made or communicated with assistance from a formal supporter is the decision of the supported person. In Victoria, Ireland and Alberta, in most cases, a decision made or communicated with the assistance of a formal supporter (appointed by the supported person) will be regarded as the supported person's decision.⁷⁴ Although the Victorian law on court-appointed supporters does not expressly state that a decision made or communicated with assistance from a court-appointed formal supporter is the decision of the supported person, there is no indication to the contrary.⁷⁵
- 11.129 Other jurisdictions have some exceptions to this general rule. In New Brunswick, the formal supporter must have acted in accordance with their powers and duties.⁷⁶ The law in the Yukon clarifies that the rule is "subject to the laws regarding fraud, misrepresentation, and undue influence".⁷⁷ In Victoria, Alberta and New Brunswick, legislation specifically addresses the circumstances in which a decision in relation to third parties is effective if the formal supporter did not act in accordance with their powers or duties.⁷⁸

Recommendations

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.

- 11.130 For formal support arrangements to be of utility, supported people, formal supporters and third parties all need clarity about the legal effect of a decision made with formal support:⁷⁹

⁷⁴ Powers of Attorney Act 2014 (Vic), s 85; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 14(3); and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 6(1).

⁷⁵ See for example Guardianship and Administration Act 2019 (Vic), s 92(b), which refers to "a supported decision of *the supported person*" (emphasis added).

⁷⁶ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 13(1).

⁷⁷ Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 11.

⁷⁸ Powers of Attorney Act 2014 (Vic), s 114; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 13; and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 6(2).

⁷⁹ Te Kāhui Ture o Aotearoa | New Zealand Law Society recommended including such a provision. It noted that the Protection of Personal and Property Rights Act 1988 currently provides that decisions made by a welfare guardian, property manager or attorney are to have the same effect as if made by the relevant person as if they had decision-making capacity to make that decision.

- (a) Supported people need to know that the involvement of a formal supporter will not result in their decisions lacking legal effect. Otherwise, people may be reluctant to appoint formal supporters.
 - (b) Formal supporters need to know that decisions they have assisted the supported person with will be treated as decisions of the supported person, not the formal supporter. Otherwise, people may not wish to become formal supporters.
 - (c) Third parties need to know that the involvement of a formal supporter will not adversely affect their ability to rely on a decision or action of a supported person. Otherwise, third parties may be reluctant to deal with people who have formal supporters. In particular, they may be concerned that the involvement of the formal supporter might be taken as evidence that the supported person does not have the required decision-making capacity.
- 11.131 Accordingly, we recommend that a new Act clarify that the involvement of a formal supporter does not, by itself, mean the supported person's decision or action has no legal effect. This would not preclude the decision or action lacking legal effect for some other reason such as a failure to comply with any required formalities. It would simply ensure the formal supporter's involvement does not of itself compromise the legal effect of the decision or action.
- 11.132 For example, if a formal supporter assists a supported person with signing a tenancy agreement, a new Act should be clear that the supported person, not the formal supporter, will become party to the agreement. It should be clear to the third party — a landlord for example — that they would hold the supported person, not the formal supporter, liable for paying rent. Equally, the landlord could not assert that no valid tenancy agreement exists merely because the formal supporter helped the supported person with signing it.
- 11.133 However, some qualifications are necessary to protect supported people from abuse. In our view, formal supporters and third parties 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 were it not for that breach.
- 11.134 This approach seeks to protect supported people who might otherwise be taken advantage of without undermining the utility of formal support. To continue the example of the tenancy agreement, if the formal supporter had manipulated the supported person into signing a tenancy agreement in their name even though it was for the formal supporter's personal benefit, the supporter would not be able to claim that the tenancy agreement was entered into by the supported person rather than themselves. Nor would the landlord be able to hold the supported person liable for paying rent if they had known, or should have known, that the formal supporter breached their duties and the supported person would not have entered into the tenancy agreement had it not been for the supporter's manipulation.
- 11.135 An alternative approach would be to prevent a third party or a formal supporter from claiming that a decision binds supported people whenever there has been a material breach of the formal supporter's duties, regardless of whether the formal supporter or third party knew or ought to have known about it. This approach would provide greater

protection for supported people. However, it would threaten the effectiveness of formal support generally. Potential formal supporters might be reluctant to accept appointment for fear of exposure to undue liability. Similarly, third parties might be unwilling to deal with supported people in case it transpires the circumstances of a supported person's decision means it is not binding on them.⁸⁰

TERMINATION OF FORMAL SUPPORT ARRANGEMENTS

11.136 In this section, we discuss how a formal support arrangement should terminate and what should happen on termination.

Overseas approaches

11.137 Other jurisdictions variously provide that a formal support arrangement can end in four ways.

Termination by the supported person

11.138 In all jurisdictions we have considered that allow the supported person to appoint their formal supporter, the supported person can also revoke the arrangement.⁸¹ As mentioned above, Victoria also allows for formal supporters to be appointed by a tribunal. To terminate such an arrangement, the supported person needs to apply to the relevant tribunal.⁸²

Termination by the formal supporter

11.139 In most jurisdictions we have considered, formal supporters appointed by the supported person can resign at any point.⁸³ In contrast, formal supporters appointed by the relevant tribunal in Victoria need to apply to that tribunal to terminate the support arrangement.⁸⁴

⁸⁰ The requirement for actual or constructive knowledge is similar to the approach taken in the common law to contracts with persons who do not have contractual capacity. See for example *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 171.

⁸¹ Powers of Attorney Act 2014 (Vic), s 103; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10(3); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 7; and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 8(a). Although the Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon) does not make the right to terminate a supported decision-making agreement express, the phrasing of the relevant form makes clear that the supported person may terminate the agreement at any time by virtue of general contract law (provided they have decision-making capacity): Adult Protection and Decision-Making Regulation OIC 2005/078 (Yukon), sch form 1. See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.19(1)–(2).

⁸² Guardianship and Administration Act 2019 (Vic), s 96 and pt 7. The supported person's consent is needed for the appointment of a formal supporter. Upon reassessment, the relevant tribunal would therefore have to terminate the appointment if that consent was no longer given.

⁸³ Powers of Attorney Act 2014 (Vic), ss 111–113; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 10(3); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 16(2). Compare Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), which does not expressly allow for the formal supporter's resignation but permits them to refuse acting as a formal supporter at any point: s 4(5).

⁸⁴ Guardianship and Administration Act 2019 (Vic), s 96 and pt 7. Because the formal supporter's consent is needed for the arrangement, the relevant tribunal in Victoria would have to terminate the appointment upon application if that consent was no longer given.

Termination by direction of a tribunal or court

11.140 In most jurisdictions we have considered, a tribunal or court can end a formal support arrangement.⁸⁵

Termination on the occurrence of certain events

11.141 In some jurisdictions, formal support arrangements cease to have effect to the extent they are inconsistent with a subsequent order or in-force arrangement (such as an EPOA).⁸⁶

11.142 A few jurisdictions provide that a formal support arrangement ends if the supported person no longer has decision-making capacity for the matters to which it applies or no longer understands its nature and effect.⁸⁷

11.143 Other events that can terminate an arrangement include where the formal supporter no longer meets the eligibility criteria⁸⁸ and where a formal supporter is a spouse or de facto partner and they separate for a specified length of time.⁸⁹

Consultation

11.144 Five submitters discussed circumstances that should lead to a formal supporter's removal or the end of the arrangement. One submitted that these circumstances should be clear and that there should be straightforward processes. That submitter also queried whether the formal support arrangement should end if the person loses decision-making capacity or, alternatively, continue as an EPOA does.

11.145 NZLS, New Zealand Down Syndrome Association and Aotearoa New Zealand Adult Safeguarding Alliance thought that either the supported person or the formal supporter should be able to end the arrangement at any time.

11.146 NZ Down Syndrome Association and Aotearoa New Zealand Adult Safeguarding Alliance suggested that arrangements should have a natural expiry date but should be permitted to roll over if that is desirable and appropriate. They also recommended that any third party should be able to challenge an arrangement and that it should be possible to dissolve an arrangement if the formal supporter is not adhering to their role and duties.

⁸⁵ Guardianship and Administration Act 2019 (Vic), s 96 and pt 7; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 15(5); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 22(1)(c), 31(2)(c) and 32(5). See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.21(3)(d).

⁸⁶ Guardianship and Administration Act 2019 (Vic), s 96(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 12; and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 8.

⁸⁷ Powers of Attorney Act 2014 (Vic), s 102; and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), s 6. That the requirement in s 6 of the Yukon Act is continuous is evidenced by the phrasing of the relevant form: Adult Protection and Decision-Making Regulation OIC 2005/078 (Yukon), sch form 1 at 1.

⁸⁸ Powers of Attorney Act 2014 (Vic), s 109; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 13(4)–(5); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 16(3)(b).

⁸⁹ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 13(1)–(3).

Recommendations

Ways to terminate a formal support arrangement

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.

11.147 We recommend that a new Act provide for multiple ways in which a formal support arrangement can end. They include termination by the supported person, by the Family Court and by the formal supporter themselves. Most overseas jurisdictions we have investigated provide for these ways to terminate a formal support arrangement.

11.148 We consider formal supporters should be able to terminate the arrangement regardless of whether they were appointed by the supported person or the Family Court.

11.149 Our recommendation that a formal supporter's appointment end if another formal supporter is appointed for the same or overlapping decisions is to avoid uncertainty and confusion. If the supported person wants the first and second supporters to act together for some decisions, they can (and should) both be appointed together in the same appointment.

11.150 For similar reasons, we recommend that an arrangement cease if an attorney becomes entitled to act under an EPOA, or a court-appointed representative is appointed, in relation to decisions that overlap with those for which the formal supporter is appointed. In theory, these two roles could co-exist — the representative making decisions for which the person does not have decision-making capacity and the formal supporter acting in relation to those for which they do. In practice, however, this would likely lead to confusion over who should be acting in a particular circumstance. We consider it is preferable to rely on the representative's obligations to ensure the person has decision-making support, as we discuss in Chapter 12.

Accompanying recommendations

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.

- 11.151 A formal supporter should be obliged to resign if they know, or ought to know, that the supported person has ceased (even with support) to have the decision-making capacity required to make the appointment and is unlikely to regain it.⁹⁰ This should apply when the formal supporter knows, and when they ought to know, that the loss of decision-making capacity has occurred. Formal supporters should be expected to remain conscious of the person's level of decision-making capacity (with decision-making support) and, if in doubt, check.
- 11.152 Regardless of which pathway led to the termination of the arrangement, the formal supporter must cease acting as a formal supporter as soon as they are aware. However, they may still take any reasonable steps in their role as formal supporter to explain the situation to the supported person.
- 11.153 To prevent unnecessary disruption resulting from the termination of a formal support arrangement, we recommend that a formal supporter's actions taken after the termination of the arrangement should remain valid if the formal supporter did not know, and could not reasonably be expected to have known, of the termination.

⁹⁰ See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R7.13(1)(h).

11.154 Lastly, we recommend that the Family Court should have the power to terminate a formal support arrangement if the formal supporter fails to comply with the duties we recommend in this chapter. This recommendation is modelled on one part of the current legislative test for terminating an appointment of an attorney acting under an EPOA.⁹¹

⁹¹ See Protection of Personal and Property Rights Act 1988, s 105(1)(b).

PART 4:

FOUNDATIONS OF REPRESENTATIVE ARRANGEMENTS



1. This part addresses the foundations of arrangements under which a representative (whether a court-appointed representative or an attorney under an enduring power of attorney) can make decisions on behalf of a person.
 2. Chapters 12 and 13 are designed to work together. Chapter 12 addresses the rules that we recommend representatives be required to follow when making (or considering whether to make) a decision on behalf of a represented person.
 3. In addition to being required to follow decision-making rules, representatives should also have general duties concerning the standards of conduct they must meet and other obligations they must fulfil to ensure that the purposes of a new Act are achieved. Our recommended general duties are addressed in Chapter 13.
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CHAPTER 12

Decision-making rules

IN THIS CHAPTER, WE CONSIDER:

- what it means for legal measures relating to the exercise of legal capacity to respect a person's "rights, will and preferences", as required by article 12(4) of the Disability Convention; and
- the rules that representatives should be required to follow when making, or considering whether to make, a decision on behalf of a represented person.

INTRODUCTION

- 12.1 In Chapter 7, we explain that, where a person lacks decision-making capacity for a decision, a representative sometimes needs to make the decision for them to protect and promote their equality, dignity and autonomy. In these situations, the representative needs to understand what decision to make and how to go about making it.
- 12.2 Article 12(4) of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) requires measures relating to the exercise of legal capacity to respect the "rights, will and preferences" of the relevant person. As we explain in Chapter 6, article 12(3) of the Disability Convention requires states to take appropriate measures to provide disabled people access to decision-making support.
- 12.3 In this chapter, we recommend that a new Act meet these requirements by providing for three new decision-making rules for representatives. In summary, these are that:
- (a) decisions should be centred on the represented person's wishes and values and respect their rights;
 - (b) the represented person should participate in decisions and receive decision-making support for that participation; and
 - (c) decisions should be based on relevant information.
- 12.4 We address what requirements should apply to te Kōti Whānau | Family Court when making a decision on behalf of a person separately in Chapter 15.

BACKGROUND

Current law

- 12.5 The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides for three main types of representatives: welfare guardians, property managers and attorneys under enduring powers of attorney (EPOAs).¹ All these representatives can make decisions for a person in some circumstances.
- 12.6 There are separate provisions in the PPPR Act that govern decision making by welfare guardians, property managers and attorneys respectively. In essence, each provides that the paramount consideration of a representative is to promote and protect the best interests of the person while encouraging the person to develop and exercise the decision-making capacity they have to the greatest extent possible.²
- 12.7 As Alison Douglass has observed, the PPPR Act itself contains no guidance on what the concept of best interests means or how it should be applied.³
- 12.8 In *NA v LO* (decided in 2021), the Family Court held that the concept of best interests requires a decision maker to take into account the represented person's views. The Court accepted that, in the absence of guidance in the PPPR Act, it should be guided by the "best interests" test in section 4 of the Mental Capacity Act 2005 (UK) and that the following considerations are relevant:⁴
- (a) whether the person is likely to gain decision-making capacity in respect to the decision and, if so, when that is likely to be;
 - (b) how the Court can enable and encourage the person to participate as fully as possible in the decision affecting them;
 - (c) the person's past and present wishes and feelings — in particular, any relevant (written) statement made by them when they had decision-making capacity;
 - (d) the beliefs and values that would likely influence the person's decision if they had decision-making capacity;
 - (e) other factors the person would likely consider if they were able to do so; and
 - (f) the views of anyone the person says should be consulted, anyone caring for the person or interested in their welfare and any other decision-making representative.
- 12.9 With respect to the weight that should be given to the person's views, the Family Court observed that the person's views are not determinative but, where reasonably certain, "should be afforded great respect".⁵ The Court cited Lady Hale's judgment in the UK

¹ The PPPR Act also provides for property administrators: Protection of Personal and Property Rights Act 1988, s 11. See Chapter 14.

² Protection of Personal and Property Rights Act 1988, ss 18(3), 36, 97A(2) and 98A(2).

³ See Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at [5.6]; and Alison Douglass "Best Interests – a Standard for Decision-making" in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 63 at 63.

⁴ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [49]–[50]. See also Iris Reuevecamp *Protection of Personal and Property Rights: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2023) at 69.

⁵ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [51].

Supreme Court decision of *Aintree University Hospitals NHS Foundation Trust v James*, where Her Honour said:⁶

The purpose of the best interests test is to consider matters from the patient’s point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want ... But insofar as it is possible to ascertain the patient’s wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.

12.10 *NA v LO* concerned an application for a court-ordered decision. The case, therefore, did not directly concern representative arrangements. However, the case has been referred to in commentary in the context of representatives’ powers and duties.⁷

12.11 Beyond best interests, the PPPR Act addresses some other matters relevant to representatives’ decision-making:

- (a) A welfare guardian and an attorney acting under an EPOA for personal care and welfare must, to the greatest extent possible, encourage the represented person to act on their own behalf and seek to facilitate the person’s integration into the community.⁸
- (b) A property manager “may allow” the person to have control of and deal with any part of their property to encourage the person to “develop and exercise such competence as [they have]” to manage their own property affairs.⁹
- (c) All representatives must consult, so far as practicable, with the represented person.¹⁰
- (d) A welfare guardian or property manager must consult, so far as practicable, with people interested in the represented person’s welfare and competent to advise the representative.¹¹ If both a welfare guardian and a property manager have been appointed for a person, they must regularly consult with one another.¹²
- (e) An attorney acting under an EPOA must consult, so far as practicable, with anyone the person has specified in the EPOA to be consulted and any other attorneys.¹³
- (f) An attorney acting under an EPOA for personal care and welfare can only make decisions for the donor where there is a reasonable basis to conclude the donor does not have decision-making capacity. With respect to significant decisions, either a relevant health practitioner’s certification or the Family Court’s determination is required.¹⁴

⁶ *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591 at [45].

⁷ Iris Reuvecamp *Protection of Personal and Property Rights: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2023) at 69.

⁸ Protection of Personal and Property Rights Act 1988, ss 18(4) and 98A(3).

⁹ Protection of Personal and Property Rights Act 1988, s 36(2).

¹⁰ Protection of Personal and Property Rights Act 1988, ss 18(4)(c)(i), 43(1)(a) and 99A(1)(a).

¹¹ Protection of Personal and Property Rights Act 1988, ss 18(4)(c)(ii)–(iii) and 43(1)(b)–(c). This category can include a representative of a group that provides services and facilities for the welfare of people who lack decision-making capacity but not if the group’s work is for commercial gain: ss 18(4)(c)(iii) and 43(1)(c).

¹² Protection of Personal and Property Rights Act 1988, ss 18(5) and 43(6).

¹³ Protection of Personal and Property Rights Act 1988, s 99A(1)(b)–(d).

¹⁴ Protection of Personal and Property Rights Act 1988, s 98(3).

- (g) An attorney acting under an EPOA for property that has effect only if the donor becomes “mentally incapable” must not act unless a relevant health practitioner has certified, or the Family Court has determined, that the donor is “mentally incapable”.¹⁵
 - (h) An attorney acting under an EPOA for personal care and welfare must give due consideration to the financial implications of a decision in respect of the donor’s property.¹⁶
- 12.12 A welfare guardian, property manager or attorney acting under an EPOA may ask the Family Court for directions in difficult situations.¹⁷

Overseas approaches

- 12.13 Overseas statutes take a range of approaches to how decisions must be made. Several jurisdictions use a “best interests” test akin to that in the PPPR Act.¹⁸ Some jurisdictions refer to multiple factors that must be considered when determining a person’s best interests, including a person’s will and preferences.¹⁹ In many of the jurisdictions we considered (particularly those where relevant legislation has been enacted or substantively amended in connection with ratification of the Disability Convention), decision making is centred on a person’s will and preferences.²⁰ Where statutes address a person’s will and preferences, the concept is sometimes described in other ways such as “views, wishes and preferences”, “wishes and feelings” or “beliefs and values”.²¹
- 12.14 Overseas statutes also take different approaches to the relevant person’s participation in the decision. Some statutes require the person to be consulted, similar to the PPPR Act.²² Some require the person’s participation in decisions affecting them as far as

¹⁵ Protection of Personal and Property Rights Act 1988, s 97(5). If donors wish, they can authorise an attorney acting under a property EPOA to act while the donor is still mentally capable: s 97(4)(a).

¹⁶ Protection of Personal and Property Rights Act 1988, s 98A(4).

¹⁷ Protection of Personal and Property Rights Act 1988, ss 18(6), 38(2) and 101(1).

¹⁸ See for example Guardianship Act 1987 (NSW), ss 21A(2)(b), 25G(c), 45(3)(c) and 45AA; Guardianship and Administration Act 1990 (WA), ss 51(1) and 70(1); and Mental Capacity Act 2005 (UK), ss 1(5) and 4.

¹⁹ See for example Guardianship of Adults Act 2016 (NT), s 4(3); Guardianship and Administration Act 1990 (WA), ss 51(2)(e) and 70(2)(e); Mental Capacity Act 2005 (UK), s 4(6)(a); and Mental Capacity Act (Northern Ireland) 2016, ss 2 and 7(6)(a).

²⁰ See for example Guardianship and Administration Act 2000 (Qld), s 11B general principle 10; Guardianship and Administration Act 1995 (Tas), s 9(3); Guardianship and Administration Act 2019 (Vic), s 9(1)(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)(c).

²¹ See for example Guardianship of Adults Act 2016 (NT), s 4(3)(a); Guardianship and Administration Act 2000 (Qld), s 11B general principle 10; Guardianship and Administration Act 1995 (Tas), s 9(3); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)(c).

²² See for example Guardianship of Adults Act 2016 (NT), s 4(3)(a); Guardianship and Administration Act 2000 (Qld), s 11B general principle 10(3); Powers of Attorney Act 1998 (Qld), s 6C general principle 10(3); Guardianship and Administration Act 1993 (SA), s 5(b); Guardianship and Administration Act 1990 (WA), ss 51(2)(e) and 70(2)(e); Adults with Incapacity (Scotland) Act 2000, s 1(4)(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(b); and Representation Agreement Act SNBC 1996 c 405 (British Columbia), s 16(2)(a).

possible.²³ Others go further and describe how people should be assisted to participate,²⁴ sometimes expressly addressing the support they should be provided.²⁵

- 12.15 Few overseas statutes list specific information that should be taken into account when making a decision for a person, other than prior statements the person may have given (such as advance directives or specific directions). However, some overseas statutes specify people who should be consulted.²⁶ Other than the represented person, examples of people to be consulted include anyone specified by the person for that purpose, their nearest relative and people engaged in caring for the person.²⁷

What it means to respect a person's rights, will and preferences is unclear

- 12.16 A key safeguard required by article 12(4) of the Disability Convention is that measures relating to the exercise of legal capacity respect the “rights, will and preferences” of the person.
- 12.17 A person's rights, will and preferences are sometimes explained by comparison with a person's best interests.²⁸ If “best interests” is taken to mean “objective” best interests, the person's will and preferences are not relevant considerations. If “best interests” is taken to incorporate consideration of the person's will and preferences, they will be relevant, but to an uncertain extent, as the decision maker may consider other factors (such as the person's objective best interests) to be more important. The person's wishes, values and (in particular) dignity of risk may therefore not be respected. By contrast, respecting a person's rights, will and preferences entails proper acknowledgement of the person's equality, dignity and autonomy.
- 12.18 However, opinions vary on exactly what is required for measures relating to the exercise of a person's legal capacity to respect their rights, will and preferences.
- 12.19 The phrase “will and preferences” has been interpreted in different ways. Some commentators treat the phrase as a unitary whole.²⁹ Other commentators distinguish between a person's will and their preferences. On this approach, a person's will is

²³ See for example Powers of Attorney Act 2006 (ACT), sch 1 principle 1.6; Mental Capacity Act 2005 (UK), s 4(4); Mental Capacity Act (Northern Ireland) 2016, s 7(5); Assisted Decision-Making (Capacity) Act 2015, s 8(7)(a); and Substitute Decisions Act SO 1992 c 30 (Ontario), ss 32(3) and 66(5).

²⁴ See for example Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)(a).

²⁵ See for example Guardianship and Administration Act 2000 (Qld), s 11B general principle 8; Powers of Attorney Act 1998 (Qld), s 6C general principle 8; Guardianship and Administration Act 1995 (Tas), s 8(1)(b); Guardianship and Administration Act 2019 (Vic), s 8(1); and Powers of Attorney Act 2014 (Vic), s 21(1)(b) and (2)(b).

²⁶ See for example Mental Capacity Act 2005 (UK), s 4(7); Adults with Incapacity (Scotland) Act 2000, s 1(4)(b)–(d); and Mental Capacity Act (Northern Ireland) 2016, s 7(7).

²⁷ See for example Mental Capacity Act 2005 (UK), s 4(7); Adults with Incapacity (Scotland) Act 2000, s 1(4)(b)–(d); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(d).

²⁸ The Committee states that “[t]he ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others”: United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [21].

²⁹ Wayne Martin and others explain how “will and preferences” is often used “as if it were a single semantic unit”: *Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?* (Essex Autonomy Project, Position Paper, 22 September 2014) at 41. See also United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014): Article 12 — Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [20]–[22] and [26]–[29].

generally conceived as longer-term or more deeply held values and aspirations and preferences as more immediate inclinations or desires.³⁰

- 12.20 Understood as two separate terms, tensions may sometimes arise between a person’s will and their preferences for a particular decision. As the Scottish Mental Health Law Review noted, the making of a decision can involve reconciling those differences in the right way:³¹

A person’s will and preferences combine a longer-term sense of what a person is trying to achieve in their life with what they prefer to happen more immediately. ... [They] may not always be the same, in which case judgement would need to be exercised in the supported decision-making process as to which should be given priority.

- 12.21 A range of approaches can be taken to balancing a person’s immediate inclinations or desires and their more deeply held values and aspirations. For example, priority might be given to the person’s preferences. Alternatively, decisions could be made based on a person’s deeply held views and values, whether or not their immediate preferences are contradictory or not able to be discerned.
- 12.22 What is required to respect a person’s rights, alongside their will and preferences, is also contentious. Commentators disagree on whether it can ever be appropriate for a decision to be made for a person that is inconsistent with their wishes and preferences.³²

STRUCTURE OF THIS CHAPTER

- 12.23 In this chapter, we first summarise the feedback we received relevant to all topics addressed in this chapter. We take this approach because the relevant issues are intertwined and so the consultation questions cannot neatly be split across the different topics.
- 12.24 We then address our view on what is required for measures relating to the exercise of legal capacity to “respect the rights, will and preferences of the person”, as required by article 12(4) of the Disability Convention.
- 12.25 Following this, we describe the issues that we have identified with the current law and explain why we consider reform is desirable. Finally, we set out and explain our three recommended decision-making rules for representatives.

CONSULTATION

- 12.26 In our Second Issues Paper, we discussed and invited feedback on three broad issues concerning decision-making by representatives:

³⁰ For example Scottish Mental Health Law Review *Final Report* (September 2022) at 117; George Szukler “‘Capacity’, ‘best interests’, ‘will and preferences’ and the UN Convention on the Rights of Persons with Disabilities” (2019) *World Psychiatry* 34 at 38.

³¹ Scottish Mental Health Law Review *Final Report* (September 2022) at 117.

³² Compare United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014): Article 12 – Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [29(b)] and Wayne Martin and others *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation Across the UK* (Position Paper, 6 June 2016) at 40. See also the discussion of competing views in Chapter 7.

- (a) The decision-making framework that representatives should apply to ensure decisions respect a person's rights, will and preferences — that is, the criteria that they should apply.
 - (b) The process that representatives should follow to make decisions, including their obligations relating to decision-making support and consultation.
 - (c) When representatives should, and should not, make decisions.
- 12.27 We also asked submitters whether the same decision-making framework should apply to court-appointed representatives and attorneys under an EPOA.

What is required for decisions to respect a person's rights, will and preferences

- 12.28 To provide background for submitters, our Second Issues Paper addressed existing commentary on will and preferences.³³ We explained our preliminary view that neither a person's will (their longer-term beliefs, values and commitments) nor their preferences (their shorter-term inclinations or desires) should be given greater weight. Instead, we suggested a person's will and preferences are better considered together as part of an in-the-round assessment that is properly respectful of both.
- 12.29 We also suggested that, in some circumstances, making decisions solely on the basis of a person's will and preferences may not be sufficient to respect their rights. We suggested this could be the case when the person's will and preferences:
- (a) cannot be given effect to, for example, for financial reasons;
 - (b) cannot be determined;
 - (c) are not alone sufficient to determine the decision that should be made; or
 - (d) may be too harmful, for example, where they would give rise to a material risk of significant harm to the person.
- 12.30 We expressed a preliminary view that requiring representatives in such cases to make decisions based on the person's "rights" may not be workable because human rights are complex and not understood by everyone.
- 12.31 We asked submitters:
- (a) whether they agreed the person's will and preferences should be considered together as part of an in-the-round assessment;
 - (b) how the person's rights should be taken into account;
 - (c) when it might not be appropriate or sufficient for a representative to make a decision based only on a person's will and preferences; and
 - (d) how a representative should make decisions in such cases.

Will and preferences

- 12.32 There was considerable support in submissions for representative decision making to be based on a person's will and preferences. Submitters referred to article 12 of the Disability Convention, autonomy, the dignity of risk and the importance of ensuring that decisions are authentic to the person.

³³ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [10.21]–[10.28].

- 12.33 Several submitters expressly said that “best interests” decision making should be replaced by decision making based on a person’s will and preferences. However, this was not a universally shared opinion.
- 12.34 One submitter expressed concern that dispensing with a “best interests” test would deprioritise the need to protect against harm. A participant in the focus group we held with He Manaakitanga Kaumātua Aotearoa | Age Concern NZ said there was a risk of making it unduly hard for representatives to make decisions.
- 12.35 Several submitters, including Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Alison Douglass, Iris Reuvecamp, Te Whatu Ora | Health New Zealand and TGT Legal, noted that best interests, properly understood and applied, takes account of a person’s will and preferences.

How to determine a person’s will and preferences

- 12.36 Forty-six submitters addressed whether will and preferences should be considered together as part of an in-the-round assessment. Most agreed. The others agreed in part.
- 12.37 Some submitters discussed factors they saw as relevant to determining a person’s will and preferences. The factor most often referred to was the relevance of previous statements by the person, including advance directives, advance care plans and other written statements. Other factors suggested by submitters included:
- (a) the person’s wishes and wants;
 - (b) the extent of their comprehension;
 - (c) their social and cultural context (including tikanga);
 - (d) their language;
 - (e) their environment;
 - (f) their needs and their values; and
 - (g) the importance of taking all relevant factors into account.
- 12.38 Some submitters noted, in answer to other questions, the relevance of others’ views, in particular, family, professionals and others close to the person. However, some submitters also pointed to the need to be mindful of the person’s history with other people and the potential for them to be the subject of undue influence or duress.

Rights

- 12.39 Thirty-eight submitters addressed how a person’s rights should be taken into account.
- 12.40 Approximately a third of these submitters referred to the person’s right to be heard and have their views taken into account. Some submitters suggested that guidance and information about people’s rights should be provided.
- 12.41 Some submitters, including Greg Kelly Trust Law and TGT Legal, said a person’s will and preferences should be considered together with the person’s rights. Similarly, Te Kāhui Tika Tangata | Human Rights Commission said will and preferences should be considered “through a rights lens”.
- 12.42 A few submitters expressed concerns about potential uncertainty in interpreting what is meant by “rights”. However, the Human Rights Commission and TGT Legal disagreed with our suggestion that requiring a representative to consider the person’s human rights would be unworkable. The Human Rights Commission said:

Complex legal concepts can and should be translated into lay terms so that they can be used by lay people. ... With the right resourcing, including building rights knowledge and capacity in an empowering way, a rights-based approach can be achieved.

When a decision should not reflect a person's will and preferences

- 12.43 Fifty-five submitters addressed when a decision should not reflect a person's will and preferences. Fifty-six submitters agreed that, sometimes, a person's will and preferences alone are not an appropriate basis for decision making. Very few submitters completely disagreed.
- 12.44 A significant majority referred to harm, risk or danger as situations where it may not be appropriate to make a decision based on will and preferences alone. Some submitters referred simply to harm, danger, "poor life outcomes" or an outcome that "adversely affects [...] wellbeing". Others appeared to have a higher threshold in mind, using terms such as "significant harm", "significant risk" or "high risk". A participant in the focus group we held with Balance Aotearoa noted the importance of distinguishing between risk that is dignified and risk that is not.
- 12.45 There were also differences in the nature of the harm or risk that submitters described. Some submitters referred only to specific harms such as physical or financial harm. Others indicated a broad and inclusive approach. A significant number, including the Adult Guardianship Services Trust, the Australian and New Zealand Society for Geriatric Medicine and Aged Care Association of New Zealand, considered that harm should include risk, harm or danger not just to the relevant person themselves but to others. Some submitters, including NZLS, Iris Reuvecamp and Health New Zealand, considered that harm may not always be an easy concept to apply.
- 12.46 Submitters also noted a range of other circumstances in which departing from a person's will and preferences might be appropriate. The circumstances most commonly referred to were illegality, impossibility or impracticability, and when the person is (or is suspected to be) subject to duress or undue influence.
- 12.47 A number of submitters referred to inconsistency with past statements or decisions. (These submitters appeared to be thinking of a person's will and preferences as encompassing just their immediate inclinations or desires.) Other circumstances that submitters suggested included mental illness, stress, unreasonableness, when the decision is a significant one or concerns a particularly significant medical intervention, and when there are difficult or changing family dynamics. A participant in our focus group with Balance Aotearoa suggested that a person's will and preferences should not be followed when the relevant decision is irreversible and the representative knows the person is not mentally well and will regret it later.
- 12.48 Some submitters, including Public Trust, Canterbury West Coast Welfare Guardian Trust and the Australian and New Zealand Society for Geriatric Medicine, agreed with our suggestion that making a decision that does not reflect a person's will and preferences is appropriate when their will and preferences are not known. No submitters appeared to disagree.
- 12.49 The Australian and New Zealand Society for Geriatric Medicine noted that any departures from a person's will and preferences should not be common:
- If a person's will and preferences are understood with a very high degree of certainty then, as long as their will or preferences is not causing harm to others there would be very few situations in which it should not be followed. The more likely situation is that there is doubt

about subject person's will and preferences in which case a precautionary approach that sought to minimise harm to the person would be appropriate at least initially.

How decisions should be made in those circumstances

- 12.50 Fifty-seven submitters gave feedback on how decisions should be made when the person's will and preferences are insufficient or inappropriate, suggesting a range of relevant factors. Approximately a third referred expressly to the person's will and preferences as of continuing importance, even if not determinative. Some of these submitters indicated that the decision should depart no further than necessary from the person's will and preferences. One person at the focus group we held with Balance Aotearoa said the decision should be as close as possible to the person's will and preferences without harming them too much, given their personal risk tolerance.
- 12.51 Some submitters referred to what would be the least restrictive or least intrusive decision. Others referred to minimising or balancing risks. Several submitters referred to the person's rights, sometimes also referring to dignity, autonomy or equality. Other factors suggested by submitters included the consequences for other people, tikanga, fairness, needs, the person's welfare, the avoidance of harm and deciding on the basis of the person's will (their deeply held views and values) alone.
- 12.52 Approximately a third of submitters that gave feedback on how decisions should be made where a person's will and preferences are insufficient or inappropriate suggested that such decisions should be made in the person's best interests. However, the majority of these submitters saw other important considerations as either sitting alongside or informing the assessment of the person's best interests. These included what is known of the person's will and preferences, what would be least restrictive and the person's values, whānau, tikanga and history. Other considerations raised by submitters related to promoting the person's dignity, autonomy, health, safety, wellbeing and quality of life.
- 12.53 Submitters also discussed the information and views that should inform the decision. The most common theme was that the views of others who can shed light on the person are relevant. Other submitters referred to the importance of making decisions that are properly informed by the views of relevant experts such as medical staff, carers and financial advisers. We address the people that submitters said should be consulted in the next section.
- 12.54 Some submitters referred to prior statements by the person as being relevant, particularly those made at a time when they had relevant decision-making capacity. These included advance directives, advance care plans and/or other written statements (including wills). Most of these submitters saw such documents as guidance rather than determinative. A small number of submitters referred to previous decisions made by the person.
- 12.55 Some submitters thought there should be either general guidance or a personalised plan for how to proceed when a decision cannot be made in accordance with the person's will and preferences.

The process that representatives should follow to make decisions

- 12.56 We asked submitters how the representative role should provide for decision-making support. We suggested the representative could be required to: provide the represented person with, or ensure they have access to, practicable support; permit and encourage the represented person to participate in decision making as fully as possible; and explain their role to the represented person in a way the person is likely to understand.

- 12.57 We also sought submitters' views on:
- (a) who the representative should consult with and how; and
 - (b) whether there are any other steps the representative should follow when making a decision.

Providing for decision-making support

- 12.58 Forty-one submitters gave feedback on how the representative role should provide for decision-making support.
- 12.59 One-third of these submitters emphasised the importance of communication aids for represented people and ensuring representatives have skills to communicate with those they represent. Te Rōpū Tauwhiro i Aotearoa | Aotearoa New Zealand Association of Social Workers expressed concern about the lack of skills and time professionals have for ascertaining individuals' wishes using creative communication techniques. Spectrum Foundation said representatives "should be familiar with the person's communication needs, and ensure the person has full access to any communication devices or resources".
- 12.60 One-quarter of the submitters that gave feedback said that all decision making should involve the represented person's participation. One-fifth similarly said the representative role should be supportive by default and representatives should not make decisions unless necessary.
- 12.61 Several submitters that gave feedback said effective training and guidance for representatives is important for representatives to provide decision-making support.³⁴
- 12.62 A few submitters said consultation is an important feature of decision-making support, including with the represented person's whānau and wider support network. Consultation was also addressed separately, as we discuss below.
- 12.63 A few submitters said regular contact between the represented person and representative should be required. One submitter commented that, currently, some welfare guardians only see the person they represent annually. Consequently, rapport does not develop.
- 12.64 A few submitters agreed with the examples of support we provided in our Second Issues Paper. However, concerns were raised about our suggested phrasing of *permitting* represented people's participation in decision-making about them. Iris Reuecamp said it seemed inconsistent with the Disability Convention. Health New Zealand said that "supporting" participation in decision-making may be preferable.

Who representatives should consult with

- 12.65 Forty-nine submitters gave feedback on who representatives should consult with and how.
- 12.66 A significant majority of these submitters emphasised the importance of consultation with the represented person. Several considered this the most important consultation of all,

³⁴ Age Concern NZ said training was important for representatives to recognise their own biases, authentically support a represented person's choices, explain different options and discuss the merits of each with the person, implement collaborative and supportive decision-making processes, recognise the potential for their role to involve manipulation and coercion and know how to mitigate that risk.

saying it should be highly sensitive to the person's needs and wants. For example, some thought consultation should occur in an environment that is conducive to the person's participation and allow the person to go at their own pace. Some referred to communication aids being available. For example, Health New Zealand said:

[Someone] who does not communicate with words can still express their will and preferences via behaviour, vocalisations, and other informal and indirect communication methods.

12.67 Several submitters, including The Law Association of New Zealand, NZLS and Health New Zealand, said consultation should be culturally relevant and appropriate. Health New Zealand said:

In the case of a Māori person with affected decision-making, particular respect must be paid to the mana of the person's whānau, to honour the importance of whakapapa and the kinship obligations of whanaungatanga.

12.68 With respect to consultation with people other than the represented person, over two-thirds of the submitters that addressed consultation expressly referred to consultation with family or whānau, particularly the person's spouse or partner, adult children and siblings. Others mentioned included close friends, fellow church members, members of the person's community of identity, people who know the represented person well or are close to them, people who the represented person respects and interacts well with and anyone with relevant information.

12.69 Many submitters also suggested consultation with a range of experts and professionals, including the person's carers, general practitioner and other healthcare team members, attorneys, lawyers, financial advisers and property managers.

12.70 Whaikaha | Ministry of Disabled People suggested that the representative might also meet regularly (for example, annually) with a second person to discuss and review whether the representative is continuing to give effect to the represented person's will and preferences. Several other submitters also suggested regular meetings with others as worthwhile (for example, with family).

12.71 NZLS considered the purpose of consultation should be to ascertain the person's will and preferences rather than the preferences of those consulted. Others indicated a similar view. Relatedly, a few submitters noted the importance of the representative being alert to the potential for self-interest to affect what those who are consulted might say.

12.72 Several submitters noted the importance of considering the represented person's wishes in relation to who the representative should, or should not, talk with. Te Tari Kaumātua | Office for Seniors noted that some represented people may have a history of difficult or harmful relationships with family members.

12.73 A number of submitters cautioned against a mandatory list of people who must always be consulted or a prescribed form of consultation, given how onerous (and potentially unhelpful) this might be and noting that each person's situation will differ. A few submitters did, however, suggest that consultees should be specified in the court order appointing a representative.

The importance of being properly informed

12.74 One of the most consistent themes throughout submissions was the need for representatives to be adequately informed by obtaining and considering relevant information. Examples given included the represented person's medical information and

financial situation, their entitlement to financial aid or other support, information relevant to their safety, any advance directive or advance care plan and information on similar decisions previously made by the person when they had relevant decision-making capacity.

When representatives should make a decision

- 12.75 In our Second Issues Paper, we suggested that a representative should not be able to make a decision unless they consider the represented person does not have decision-making capacity in relation to that decision. We asked submitters whether they agreed with this.
- 12.76 Forty-four submitters gave feedback on this question. Nearly all agreed or partially agreed with our suggestion. Very few disagreed.
- 12.77 Some submitters said that the representative should be required to assess the represented person's decision-making capacity for each decision.
- 12.78 By contrast, some submitters expressed concern at the representative being required to assess decision-making capacity. TGT Legal suggested that an obligation to properly assess the represented person's decision-making capacity would add significantly to the burden on the representative and may make them avoid making decisions, to the detriment of the represented person. While they supported an approach that required the representative to carefully consider whether the person could make the decision themselves, they thought a black-and-white requirement for the person not to have decision-making capacity is undesirable.
- 12.79 NZLS and Iris Reuvecamp were also cautious of a strict rule, fearing it could lead to an unhelpful and potentially paralysing lack of clarity. NZLS favoured some limited flexibility, with appropriate safeguards such as requiring formal assessments of decision-making capacity whenever significant decisions were required, as is currently the case for EPOAs.
- 12.80 Another submitter raised related concerns. They noted the risk that a representative might fail to make a decision ostensibly on the basis that the represented person has decision-making capacity but in fact to enable the represented person to make a decision that benefitted the representative. They suggested that confirmation of the person's decision-making capacity might need to be required, which would add greater complexity.
- 12.81 Submitters that partially agreed with our suggestion gave a range of different reasons. Associate Professor Ben Gray considered that major decisions would likely effectively be shared ones, whether or not the person had relevant decision-making capacity. Similarly, Public Trust noted that, in many cases, the representative and the represented person will agree on the decision to be made and that it may be preferable for it to be the representative who actually makes it (for example, for reasons of legal certainty or to satisfy third parties).
- 12.82 A few submitters that agreed representatives should not be able to make a decision unless the represented person does not have decision-making capacity noted this may be difficult to enforce. For example, Public Trust and Volition said there would need to be adequate safeguards against improper actions by representatives in this context.

Whether the same rules should apply to court-appointed representatives and attorneys

- 12.83 In our Second Issues Paper, we expressed a preliminary view that the same decision-making rules should apply to court-appointed representatives and attorneys under EPOAs. We explained that the roles are broadly the same — both kinds of representative make decisions on behalf of people who do not have decision-making capacity for them. The key difference is who appoints the representative — the Family Court or the affected person themselves.
- 12.84 We asked submitters whether they agreed with that view. Thirty-seven submitters gave feedback on this issue.
- 12.85 A large majority of these submitters agreed that the same decision-making rules should apply to both court-appointed representatives and attorneys. Those submitters that gave reasons mostly emphasised the value in creating consistency for representative arrangements. NZLS explained:
- ... the roles and responsibilities of the court-appointed representatives and attorneys are the same. It would be confusing to have different frameworks, and could give rise to inconsistencies in the approach to decision-making
- 12.86 A few submitters disagreed that the same decision-making rules should apply to all representatives. Three submitters identified the donor’s decision-making capacity for creating their EPOA as a key distinction between attorneys and court-appointed representatives that justifies different approaches. These submitters considered that, because donors can express any wishes for how their attorney should exercise decision-making authority in their EPOA, additional decision-making rules for attorneys are not necessary. Rather, they should just follow the EPOA’s terms.

OUR VIEW ON RIGHTS, WILL AND PREFERENCES

- 12.87 Article 12 of the Disability Convention imposes important requirements in relation to decision making for people who lack decision-making capacity. We address the requirements of article 12(3) concerning the support to be provided to disabled people in relation to the exercise of their legal capacity in Chapter 6. We now address the requirement in article 12(4) for legal measures relating to the exercise of legal capacity to “respect the rights, will and preferences of the person”. We consider “will and preferences” and “rights” separately.

Will and preferences

Will and preferences as two distinct concepts

- 12.88 As noted above, commentators disagree on whether will and preferences should be interpreted as:
- (a) a unitary whole that describes one concept; or
 - (b) two distinct concepts — a person’s will (their longer-term or more deeply held values and aspirations) and a person’s preferences (their more immediate inclinations or desires).
- 12.89 We consider the phrase “will and preferences” is properly interpreted to entail two distinct concepts. As we explain below, this interpretation best enables both what the

person expresses and their deeper values and aspirations to be given appropriate weight in the decision.

- 12.90 There are several issues that would arise from a unitary understanding of “will and preferences”. First, it is unclear how a decision maker would know whether the person has received sufficient decision-making support to ensure that the views they express reflect what they genuinely want.
- 12.91 Second, a person’s expressed views may be very different if viewed in isolation, even if expressed with decision-making support, as opposed to being viewed in a broader context. For example, a person’s expressed views may be contrary to deeply held values that have informed their decisions throughout their life. This outcome is far from theoretical. As we explain in Chapters 8 and 9, where a person does not have decision-making capacity for a decision, this means they are unable to make a reason-sensitive decision even with decision-making support. If will and preferences were interpreted to refer only to the views a person expresses with decision-making support, a decision maker would not be able to take account of any deeper values that have been central to the person’s life if they do not express them at the time. This approach could give rise to decisions that do not reflect how a person wants to live their life, based on their own sense of what matters.

Resolving tensions between a person’s will and their preferences

- 12.92 Our conclusion that will and preferences are two distinct concepts means it is necessary to address how a person’s will and preferences should be identified where their will is inconsistent or in tension with their preferences.
- 12.93 Some Canadian jurisdictions specify that a person’s preferences (or analogous concepts) should be prioritised.³⁵ Other jurisdictions refer to both concepts in some way but do not prioritise either.³⁶ Our view is there should be no general rule prioritising either a person’s will or their preferences.
- 12.94 If a person’s will were prioritised, this would mean a decision could never be made that departs from their values. Yet almost all people make decisions at some point that are inconsistent with their underlying values. Discounting any preferences a person expresses that are inconsistent with any of their more deeply held values would remove this option from people who lack decision-making capacity, failing to protect and promote their equality, dignity and autonomy.
- 12.95 Conversely, if a person’s preferences were prioritised, this would prevent decision makers from taking account of deeply held values even if the person is not able to appreciate the implications and consequences of their more immediate views. This approach would also fail to protect and promote equality, dignity and autonomy.

³⁵ See for example Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 16; Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 12(2); Mental Health Act CCSM 1998 c M110 (Manitoba), s 96(2); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), ss 23 and 44.

³⁶ See for example Guardianship of Adults Act 2016 (NT), s 4; Guardianship and Administration Act 2000 (Qld), s 11B; Guardianship and Administration Act 1995 (Tas), s 9; Mental Capacity Act 2005 (UK), s 4; Adults with Incapacity (Scotland) Act 2000, s 1; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8; Mental Capacity Act (Northern Ireland) 2016, ss 2(2) and 7; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), ss 2(d), 35(1) and 56(1); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1).

12.96 Accordingly, we remain of the view set out in the Second Issues Paper that a person's will and preferences should be considered together as part of an in-the-round assessment. A number of jurisdictions take this approach.³⁷ As explained above, it was strongly favoured by submitters.

Rights

12.97 Measures relating to the exercise of legal capacity must respect a person's rights as well as their will and preferences.

12.98 Sometimes, the way a person exercises one right will affect their enjoyment of another right. For example, exercising the right to refuse medical treatment may be in tension with the full enjoyment of the right to the highest attainable standard of health.³⁸

12.99 Generally, rights are respected by enabling people to make autonomous decisions about how they want to exercise their various rights. Thus, if a person whose decision making is not affected decides to refuse medical treatment despite medical advice that the treatment would best promote their health, this does not mean that their right to the highest attainable standard of health has been breached. Rather, it means they have made a choice as to how they want to exercise both rights.

12.100 When a person has affected decision making such that they cannot make an autonomous decision (even with decision-making support), ensuring their rights are respected can be more complex. Exactly how the requirement to respect the person's rights relates to the requirement to respect their will and preferences is contestable.³⁹

12.101 In our view, in almost all situations, identifying the person's will and preferences (that is, their wishes and values) and ensuring they are given effect will respect their rights. As with people whose decision making is not affected, people with affected decision making should be able to live their life how they want to live it, based on their own sense of what matters.

12.102 Very occasionally, however, a person's wishes and values (properly understood) might be to suffer significant harm or for a state of affairs that puts them at risk of suffering significant harm.⁴⁰ In this situation (and this situation only), we consider that respect for

³⁷ See for example Guardianship and Administration Act 2000 (Qld), s 11B general principle 10; Powers of Attorney Act 1998 (Qld), s 6C general principle 10; Guardianship and Administration Act 1995 (Tas), s 9(3); Guardianship and Administration Act 2019 (Vic), s 9(1); Mental Capacity Act 2005 (UK), s 4(6); Adults with Incapacity (Scotland) Act 2000, s 1(4); Mental Capacity Act (Northern Ireland) 2016, s 7(6); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 2(d); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1).

³⁸ New Zealand Bill of Rights Act 1990, s 11; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 25.

³⁹ For discussion of different viewpoints, see Chapter 7.

⁴⁰ We say "very occasionally" because we think that people do not generally want to suffer significant harm but might more often refuse to accept that harm will result from a certain decision. Sometimes, a person with affected decision making may express such a wish, but it does not accord with their wishes and values when considered as part of an in-the-round assessment. As noted above, a similar point was made by the Australian and New Zealand Society for Geriatric Medicine in its submission.

the person's rights can sometimes require a decision to be made that is contrary to their wishes and values.⁴¹

- 12.103 This approach recognises the vulnerability of people who lack decision-making capacity for a decision. Enabling the person to suffer or run the risk of significant harm would treat them the same as a person who has decision-making capacity. However, in substance, there would be a clear distinction: only the decision made by the person with decision-making capacity would be an autonomous decision. Treating a significantly harmful decision that is not autonomous in the same way as a decision that is autonomous would be difficult to reconcile with the protective function of human rights. It would undermine the person's equal enjoyment of other rights (such as, potentially, the right to freedom from exploitation, violence and abuse or the right to an adequate standard of living) and as such fail to respect their dignity.⁴² As addressed above, many submitters agreed that a decision that does not respect a person's wishes and values may be necessary to protect them from significant harm.

ISSUES

- 12.104 We now turn to evaluate the PPPR Act's approach to decision making by representatives on behalf of represented people. We discuss below five issues that we have identified.

Basis on which representatives must make decisions is unclear

- 12.105 The PPPR Act does not clearly state how representatives are to make decisions for a person.
- 12.106 The PPPR Act provides that the paramount consideration is the best interests of the person.⁴³ The Family Court has held the person's views are relevant to the concept of best interests.⁴⁴ However, this is not evident from the statute. The PPPR Act does not give any explanation of what "best interests" means. The lack of legislative guidance means there is some uncertainty about the concept and how exactly it is to be assessed.
- 12.107 This uncertainty is compounded by the historical understanding of "best interests" as a purely objective assessment. The best interests approach remains associated with a paternalistic approach to decision making.

⁴¹ Our recommended decision-making rules provide for two other situations where a representative should not make a decision that gives effect to the represented person's wishes and values — namely, where the decision would be illegal or could not realistically be given effect. These exceptions are intended to reflect the limitations of law and reality, rather than to respect a person's rights. See our recommended Decision-Making Rule 1 later in this chapter.

⁴² With respect to the value of autonomy, not giving effect to a person's wishes and values (properly understood) clearly limits the person's autonomy at the time; it does not enable them to live their life how they wish. It could potentially enhance the person's autonomy in other ways, for example, by preserving their ability to make future decisions. Even where it is clear that the overall impact of a decision is to limit the person's autonomy, however, we think this limit can be outweighed by the need to promote their equality (through the equal enjoyment of rights beyond article 12) and dignity.

⁴³ Protection of Personal and Property Rights Act 1988, ss 18(3), 36(1), 97A(2) and 98A(2).

⁴⁴ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [49]–[50], citing *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591 at [45].

“Best interests” approach may not always respect rights, will and preferences

12.108 The Family Court has held that a person’s views are relevant to determining their best interests and “should be afforded great respect” where they are reasonably certain.⁴⁵ This approach will sometimes result in a person’s rights, will and preferences being respected, as required by article 12(4) of the Disability Convention. However, it may not always do so. The PPPR Act does not give sufficient guidance to ensure this is the case:

- (a) The PPPR Act does not address how to identify a person’s will and preferences (or any related concept).
- (b) The PPPR Act does not set out how to ensure a decision respects a person’s rights, in addition to their will and preferences. It does not address how to identify circumstances where the person’s rights might be in tension with their will and preferences or how a decision should then be made.
- (c) The PPPR Act does not address what decision should be made where a person’s will and preferences (or what can be known of them) are not sufficient to make a decision. Nor does it cover what to do when giving effect to a person’s will and preferences would be impossible or illegal.

No requirement for represented person to participate in decision making

12.109 Under the PPPR Act, a representative must consult the person. Various provisions also either require or enable representatives to “encourage” a person to act on their own behalf.⁴⁶ However, the PPPR Act does not require that the represented person be given the opportunity to actually participate in decisions to the extent they are willing and able to do so.

12.110 These circumstances may make it less likely that decisions by representatives respect the person’s will and preferences and, more generally, adequately protect and promote their dignity, autonomy and equality.

No requirement for decision-making support

12.111 Article 12(3) of the Disability Convention requires states to take appropriate measures to provide disabled people with access to the decision-making support they may require in exercising their legal capacity.⁴⁷ The fact that a decision is being made by a representative does not mean support is not required. To the contrary, decision-making support may be vital to ensuring the decision properly respects the person’s rights, will and preferences.⁴⁸ More generally, decision-making support is required to protect and promote the person’s equality and dignity by enabling them to participate in decisions to the fullest extent they can.

12.112 However, as we discuss in Chapter 6, the PPPR Act does not expressly require decision-making support to be provided for represented people.

⁴⁵ *NA v LO* [2021] NZFC 7685, [2022] NZFLR 253 at [51].

⁴⁶ See Protection of Personal and Property Rights Act 1988, ss 18(4)(a), 36(2), 97A(2) and 98A(3).

⁴⁷ See Chapter 6.

⁴⁸ We address the meaning of decision-making support in Chapter 6.

Representatives can make decisions for which a person has decision-making capacity

- 12.113 As we address in Chapter 17, it may not always be practicable to specify the scope of a representative's decision-making authority with sufficient precision to encompass only the decisions (or classes of decisions) for which the represented person does not have decision-making capacity. This can particularly be the case where the person's ability to make decisions fluctuates or changes over time.
- 12.114 In such cases, it is not always clear under the PPPR Act that the representative should not make decisions in relation to matters for which the represented person has decision-making capacity. An attorney for care and welfare may only act in relation to matters for which they have reasonable grounds to believe the person is "mentally incapable".⁴⁹ There is no equivalent provision for other representatives. With respect to attorneys for property, unless the EPOA expressly permits the attorney to act immediately, they must not act unless the person has been certified or determined to be "mentally incapable". However, they may then act in relation to all decisions.⁵⁰ No matter-by-matter assessment is required. Nor are court-appointed representatives required to assess a person's decision-making capacity before making a decision.⁵¹
- 12.115 The fact that not all representatives are required to consider whether a represented person has decision-making capacity before making a decision may result in decisions being made for people when they are able, and would prefer, to make those decisions themselves. This outcome is inconsistent with the fundamental values of equality, dignity and autonomy.

REFORM IS DESIRABLE

- 12.116 As has been recognised in many other jurisdictions, respect for a person's rights, will and preferences must be at the heart of decision making by representatives. A new Act should set out what is required for this to be achieved.
- 12.117 In our view, this requires the following matters to be addressed in a new Act:
- (a) What it means for a decision to reflect a person's will and preferences, including when there is a difference or tension between the person's will and their preferences.
 - (b) What decision should be made if the person's will and preferences are not sufficiently clear or certain to form the sole basis for a decision, would be illegal or cannot possibly be given effect.
 - (c) What decision should be made if there is tension between a person's will and preferences and their full enjoyment of their rights.

⁴⁹ Protection of Personal and Property Rights Act 1988, s 98(3)(b). For significant matters, the attorney can only act if a relevant health practitioner has certified, or the court has determined, the donor is "mentally incapable": s 98(3)(a).

⁵⁰ Protection of Personal and Property Rights Act 1988, s 97(4)–(5).

⁵¹ The duties of welfare guardians and property managers to encourage the relevant person to exercise and develop capacity indicates it may sometimes be preferable for these representatives not to make a decision for which the represented person has decision-making capacity: Protection of Personal and Property Rights Act 1988, ss 18(3) and 36(1). However, the PPPR Act does not expressly require this.

- (d) How to go about making a decision — in particular, how to ensure the represented person is properly involved and has adequate decision-making support and what information to take into account and where to seek it from.
- (e) When a representative should not make a decision because the person can make it themselves.

12.118 A new Act should address these matters in sufficient detail and with sufficient clarity to enable representatives who are not experts to understand and apply them. However, the decision-making requirements should not be any more detailed than that. Representatives need to make a wide range of decisions for a wide range of people in a wide range of circumstances. The requirements for decisions should be stated in sufficiently general terms to ensure they can be effectively applied in all cases.

RECOMMENDATIONS

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).

12.119 We recommend that a new Act provide for three decision-making rules. These rules would apply to all representatives — both those appointed by the Family Court and those appointed by the relevant person under an EPOA. We agree with the majority of submitters that commented on this issue that there is no reason for different rules to apply to different types of representatives.

12.120 In broad terms, the three decision-making rules we recommend address the decision that should be made, the involvement of the represented person in the making of the decision and the information on which the decision should be based. We address the content of these rules in our recommendations below.

12.121 We consider representatives should be required to use “reasonable efforts” to comply with the rules. Requiring strict compliance would not be workable. To enable the rules to apply to a wide range of circumstances, many of their elements are expressed in general terms. Were they strict requirements, potential representatives would likely consider the role too onerous. Representatives' decisions could be so susceptible to challenge (for example, by family members who disagree) as to make the role unworkable.

12.122 In our view, requiring representatives to use reasonable efforts to comply with the rules would achieve an appropriate balance. Potential representatives would be unlikely to see such an obligation as unduly onerous. However, a requirement to use reasonable efforts

is nonetheless a meaningful obligation. Representatives would know their actions stand to be judged against an objective standard.⁵²

12.123 Our recommended three decision-making rules do not individually refer to the “reasonable efforts” standard. Rather, they articulate what representatives should use reasonable efforts to achieve. It is important when considering the text of our recommended decision-making rules to bear in mind that a representative’s obligation would not be to perfectly satisfy each element but simply to use reasonable efforts to do so.

Decision-Making Rule 1: Wishes and values should be centred and rights respected

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.

⁵² As discussed in Chapter 13, we recommend a range of duties with which representatives should be required to comply, including that they exercise reasonable diligence, care and skill.

- 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.

Decisions made on behalf of a person should generally give effect to their wishes and values

12.124 In essence, our recommended Decision-Making Rule 1 would require a representative to use reasonable efforts to make decisions on behalf of a represented person that give effect to the represented person's wishes and values, except in specified circumstances.

12.125 As explained above, in almost all situations, identifying a person's wishes and values and ensuring they are given effect will also respect their rights. Generally, rights are respected by enabling people to make decisions about how they want to exercise those rights. Just like people who have decision-making capacity, people who do not have decision-making capacity for a particular decision should be able to live their life how they want, in accordance with their own sense of what matters. Consideration of values helps mediate in situations where a person's temporary desires are inconsistent with their longer-term goals. It is only in very occasional situations that respect for the rights of a person who does not have decision-making capacity might require a decision to be made that is contrary to their wishes and values, in line with the protective function of human rights.

12.126 Before explaining how a person's wishes and values should be identified and the circumstances in which other factors are relevant, we address the terminology that we use in Decision-Making Rule 1.

Terminology: "wishes", "values", "wellbeing" and "harm"

12.127 Our recommended Decision-Making Rule 1 is intended to require representatives to respect a person's "rights, will and preferences", as required by article 12(4) of the Disability Convention. However, we do not consider that a new Act should use those terms. Instead, we recommend the terms "wishes", "values", "wellbeing" and "harm".

Wishes and values

12.128 To convey the concepts of "will" and "preferences" in article 12(4), we consider a new Act should use the words "values" and "wishes".

12.129 In our view, if the words "will" and "preferences" were used in a new Act, they could easily be misunderstood. As we explain above, there is no consistent definition in commentary or overseas legislation of what exactly the phrase "will and preferences"

means or how it should be applied. Further, the words do not have a clear natural meaning. “Preferences” is not a commonly used term in the sense used in article 12(4) of the Disability Convention. The word “will” might be mistaken as a reference to the person’s testamentary will.⁵³

- 12.130 Our proposed Decision-Making Rule 1(b)(i) defines “wishes” to mean, in essence, what the person *expresses* in relation to the decision. A wish need not be a detailed and comprehensive decision, view or instruction. To protect and promote a person’s autonomy, any expression of (dis)approval or (dis)like in relation to a decision should be recognised as a wish.
- 12.131 The definition of “values” in our proposed Decision-Making Rule 1(b)(ii) focuses on a person’s *reasonably stable values* in relation to a decision. This includes their reasonably stable beliefs, goals, likes and dislikes. A person’s culture, spirituality, affiliations and aspirations should all be considered part of their values and beliefs. Proper respect for a person’s autonomy requires recognition of all such factors that are relevant to them in the context of a decision.
- 12.132 A key distinction between someone’s wishes and their values is that values are ongoing and of relatively consistent significance to the person, while wishes are more variable. It is important for this to be clear in a new Act. We therefore recommend that a person’s values are defined to be “reasonably stable”. “Reasonably stable” does not mean unchanging. The purpose of this definition is not to deny the person’s right for their values to change and evolve but to identify values that should inform a decision, in addition to the wishes that a person expresses.
- 12.133 In the remainder of this chapter, we use the phrase “wishes and values” instead of “will and preferences” unless the context dictates otherwise.

Wellbeing and harm

- 12.134 To give effect to the requirement in article 12(4) that a person’s “rights” should be respected, we recommend that a new Act use the words “wellbeing” and “harm”.
- 12.135 In our view, the word “rights” would not provide sufficient clarity in a new Act. Human rights are complex, and what is needed to give effect to them is not always well understood or even settled. Many people acting as representatives are family members without a legal background. Providing guidance and explanatory material (as the Human Rights Commission suggested) could help representatives who are not knowledgeable about human rights to engage with them to some extent.⁵⁴ However, we consider it is preferable for a new Act to specify more precisely what is required to respect a person’s rights.
- 12.136 We address in more detail the meaning of “harm” and “wellbeing” with respect to elements of Decision-Making Rule 1 later in this chapter. In short, we consider that:
- (a) “harm” is the clearest concept to identify situations in which a decision that does not give effect to a person’s wishes and values may be necessary to protect their rights; and

⁵³ A few submitters appeared to have interpreted “will” in this way.

⁵⁴ Indeed, guidance about how representatives should make decisions will be important no matter the approach a new Act takes. See Chapter 24.

- (b) “wellbeing” is the clearest concept to guide decisions where the person’s wishes and values cannot in themselves determine a decision in a way that protects and promotes the person’s rights.

Defining the phrase “best interests” not recommended

12.137 An alternative option would be for a new Act to use the phrase “best interests” but to define it in a way that is consistent with article 12(4) and provides sufficient clarity. We do not recommend that approach. Given its use in other areas of the law, the phrase too readily invites representatives to make decisions based on what they consider to be the represented person’s “objective” best interests.⁵⁵ As noted above, this risk is compounded by the paternalistic associations that the concept has in the context of the PPPR Act. In our view, it is important to depart from the terminology altogether.

What constitutes a decision that gives effect to a person’s wishes and values?

12.138 For the reasons explained above,⁵⁶ we consider a person’s wishes and values should be identified in an in-the-round assessment. In situations where a person’s wishes and values are inconsistent or in tension, neither should be automatically privileged over the other. Rather, article 12(4) requires measures relating to the exercise of legal capacity to respect both a person’s wishes and values.

12.139 However, simply providing for a person’s wishes and values to be taken into account in an in-the-round assessment would not provide sufficient guidance about what to do when some of them are in tension. The jurisdictions we have considered that adopt such an approach provide little guidance on how to proceed when different factors point in different directions.⁵⁷

12.140 In our view, when any of the person’s wishes or values are inconsistent, the representative should make the decision that appropriately balances those wishes and values in the light of the importance of the relevant values to the person.

12.141 To illustrate how this rule should work, we take the example of a parent with advanced dementia aware who has always believed that their children should be treated equally. An attorney might be considering making a loan to the youngest child to enable payment of university fees, in the same way and amount as each of the older children has been lent money for the same purpose. If, following a minor disagreement with the youngest child, the parent expresses a wish that the loan not be made, the representative might conclude that it is more consistent with the person’s wishes and values (viewed in the round) to make the loan. By contrast, if the person’s disagreement with the child is significant and enduring, the attorney might conclude that the loan should not be made. This might be because, although the person had generally sought to treat their children

⁵⁵ See for example Oranga Tamariki Act 1989, ss 4(1)(a)(i), 4(1)(i)(l) and 4A; Care of Children Act 2004, ss 3(1)(a), 4 and 5; and Companies Act 1993, s 131.

⁵⁶ In the section “Our view on rights, will and preferences”.

⁵⁷ See for example Guardianship of Adults Act 2016 (NT), s 4; Guardianship and Administration Act 2000 (Qld), s 11B; Guardianship and Administration Act 1995 (Tas), s 9; Mental Capacity Act 2005 (UK), s 4; Adults with Incapacity (Scotland) Act 2000, s 1; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8; Mental Capacity Act (Northern Ireland) 2016, ss 2(2) and 7; Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), ss 2(d), 35(1) and 56(1); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1).

more or less equally, this had never been a hard-and-fast “rule” and had always been subject to the state of the relationship with the relevant child.⁵⁸

- 12.142 How a person’s wishes and values should be balanced when they are in tension will often be difficult and involve a judgement call. In our view, however, the most useful direction a new Act can give is for a representative to undertake the balancing exercise in the light of the importance of the relevant values to the represented person. We envisage that this is an area that could usefully be addressed in non-statutory guidance for representatives (see Chapter 24).
- 12.143 Judgement will also be required when a person expresses inconsistent wishes about a particular decision. Our recommended Decision-Making Rule 1 does not include a separate statutory rule on how to address inconsistent wishes. As we discuss later in this chapter, however, a key aspect of the representative’s role should be to facilitate the provision of decision-making support to the person to enable as clear an understanding as possible of the person’s wishes for a particular decision. Where a person is expressing inconsistent wishes, this support should include seeking to assist the person to work out which wish is predominant.

What should a representative do where a person’s wishes and values are for collective decision making?

- 12.144 In some cases, a person’s wishes and values may be for a decision to be the one that is made by a collective such as a whānau or family. For example, the person’s predominant concern may be for family harmony and therefore for the decision to be whatever their family collectively decides, or their wishes and values may be for the decision to be made in accordance with tikanga, including in relation to how the decision is made.
- 12.145 In these situations, giving effect to the person’s wishes and values will involve seeking a decision from the relevant collective.

What should a representative do when wishes and values provide insufficient indication?

- 12.146 Sometimes, a person’s wishes and values may not provide enough information for a representative to make a decision. For example, a difficult decision may be needed concerning medical treatment for a person with high and complex needs. A representative may understand the person to have some wishes and values relevant to the decision such as how they like to be treated by their carers. However, that information alone may not provide a sufficient basis to make a decision about the specifics of the treatment.
- 12.147 As we address later in this chapter, a person should participate in a decision to the extent they want and are able to and should receive the decision-making support they want to assist that outcome.⁵⁹ Where a person’s wishes and values are insufficient to indicate what decision to make, a representative should consider whether further decision-making support would enable the person to express more specific wishes. Generally, this would require deferring the decision. However, deferral will not always be realistic. Sometimes,

⁵⁸ This example assumes that there is no time to defer the decision because the last date for payment of fees has arrived. Were that not the case, our recommendations would require the attorney to seek to ensure the person received additional decision-making support and to defer the decision until it had been.

⁵⁹ See recommended Decision-Making Principle 2(a)–(b).

not deciding will itself constitute a decision because options will expire or no longer be available. In other cases, it may be clear that no further information on the person's wishes and values will be forthcoming.

12.148 A new Act should set out how, in such cases, a representative should make a decision. Below we explain the interpretative approaches that some jurisdictions and commentators use to supplement the information a representative has. We then explain why we prefer the approach of stating additional considerations to guide the representative's decision.

Interpretive approaches do not provide sufficient guidance

12.149 Some jurisdictions and commentators set out interpretative approaches that the representative should use to supplement what they know of the person's wishes and values. These can be grouped into three categories:

- (a) In Victoria, court-appointed representatives are required to decide based on the person's "likely" wishes and values. This is to be determined based on all the information available, including information obtained by consulting the person's relatives, close friends and carers.⁶⁰ The Australian and New South Wales Law Reform Commissions have recommended similar approaches.⁶¹
- (b) In other jurisdictions, a "substituted judgment" test is employed. Under this approach, the representative must decide in the way that they consider the person would decide if they had decision-making capacity for the decision.⁶²
- (c) A third approach, outlined by the United Nations Committee on the Rights of Persons with Disabilities, is to decide on the basis of the "best interpretation" of the person's wishes and values.⁶³

12.150 In our view, a new Act should not adopt these approaches because they would not provide sufficient guidance for representatives.

12.151 As we explain above, we consider representatives should determine a person's wishes and values through an in-the-round assessment. This means they need to hear the wishes the person expresses that are relevant to a decision (including providing them with decision-making support to assist them to express their wishes).⁶⁴ In addition, they need to consider the reasonably enduring values, beliefs, goals, likes and dislikes of the person that bear on the decision. To identify these matters, the representative should draw on

⁶⁰ Guardianship and Administration Act 2019 (Vic), s 9(1)(b).

⁶¹ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R3-3(2)(b); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R5.4(b).

⁶² See for example Guardianship and Administration Act 2000 (Qld), s 11B general principle 10(4); Guardianship and Administration Act 1993 (SA), s 5(a); Powers of Attorney Act 2000 (Tas), s 32(1A)–(1B); Mental Capacity Act (Northern Ireland) 2016, s 7(6)(b); and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 12(2)(c).

⁶³ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014): Article 12 — Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [21]. There are various interpretations of what this requires. See for example Paul Skowron "Giving substance to 'the best interpretation of will and preferences'" (2019) 62 *International Journal of Law and Psychiatry* 125. No jurisdiction that we have considered has expressly adopted a "best interpretation" approach.

⁶⁴ See Decision-Making Principle 2(b) below.

all available information (see Decision-Making Rule 3 below). This will often include speaking with a person’s family or whānau and their close friends.

- 12.152 Identifying a person’s wishes and values is thus a comprehensive process. Where a person’s wishes and values (understood through this process) are insufficient to make a decision, it is not clear how the interpretive approaches set out above would assist. For example, it is not clear how a representative would determine what the person would “likely” want or what they “would” decide if they had decision-making capacity. More guidance for representatives is needed.
- 12.153 Absent further guidance, there is a risk that representatives would supplement what can be known of the person’s wishes and values with their own views on what the decision should be.

Stating additional considerations to guide decision making is preferable

- 12.154 We consider the preferable approach is for a new Act to state additional considerations to guide representatives on how to make decisions when what is known of a person’s wishes and values is insufficient. This could be done in various ways.
- 12.155 One approach would be to require representatives to make a decision that protects and promotes the person’s human rights. The Australian Law Reform Commission recommended this approach where what the person would “likely” have wanted cannot be determined. The Commission further recommended that representatives in this situation should act in the way least restrictive of the person’s human rights.⁶⁵
- 12.156 A number of jurisdictions require representatives to have regard to the represented person’s wellbeing. For example, in New Brunswick, where court-appointed representatives do not have sufficient knowledge of the person’s “wishes and preferences” to make a decision, they are required to make decisions that will “best promote the represented person’s well-being”.⁶⁶ Similar approaches are taken in Victoria and Nova Scotia and were recommended by the New South Wales Law Reform Commission.⁶⁷ Some of these jurisdictions also require a decision to be implemented that is least restrictive of the person’s human rights, as do a number of other jurisdictions.⁶⁸
- 12.157 Tasmanian legislation also refers to the represented person’s wellbeing and to representatives acting in the way that is least restricting of the person’s human rights.⁶⁹ However, the legislation is explicit that wellbeing considerations are relevant only to supplement the person’s wishes and values. The representative is still required to give

⁶⁵ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R3-3(2)(c), R3-4(1)(a) and at [3.76]–[3.79]. The Commission expressly rejected a “best interpretation” approach. However, at least one commentator has suggested that the “best interpretation” could be understood as the interpretation that is most rights-respecting. See Paul Skowron “Giving substance to ‘the best interpretation of will and preferences’” (2019) 62 *International Journal of Law and Psychiatry* 125 at 132.

⁶⁶ Supported Decision-Making and Representation Act 2022 c 60 (New Brunswick), s 44(2).

⁶⁷ Guardianship and Administration Act 2019 (Vic), s 9(1)(c); Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 40(1)(d); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R5.4(c).

⁶⁸ See for example Guardianship and Administration Act 2019 (Vic), s 8(1)(c); Powers of Attorney Act 2014 (Vic), s 21(1)(a); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 39(1)(a).

⁶⁹ Guardianship and Administration Act 1995 (Tas), s 8(f)–(g).

effect to the person’s wishes and values (understood on all the information available) “as far as practicable”.⁷⁰

What would best promote the person’s wellbeing

12.158 We recommend an approach that is similar to Tasmania’s. As set out in our recommended Decision-Making Rule 1(d), where a representative does not have sufficient information to make a decision that gives effect to a person’s wishes and values, we consider they should make the decision that:

- (a) gives effect to what they understand of the person’s wishes and values; and
- (b) will otherwise best protect and promote the represented person’s wellbeing in the least restrictive manner.

12.159 In our view, this approach best protects and promotes a person’s equality, dignity and autonomy.

12.160 The fact that the person’s wishes and values do not provide the whole answer does not mean they should be accorded any less respect. A representative should make a decision that gives effect to them to the extent they are understood. Otherwise, the person’s autonomy would be treated as of less importance than that of others. As such, the person would not be treated as of equal value as a person and their dignity would not be recognised.

12.161 Beyond giving effect to the person’s wishes and values, a representative’s decision should protect and promote the person’s rights. However, as we explain above, using the word “rights” would not give sufficiently clear guidance to representatives. Representatives cannot be expected to have an in-depth understanding of human rights or of what it means to protect and promote them. Instead, a new Act should use language that busy non-experts will readily understand and that, when applied, will protect and promote the person’s rights.

12.162 We consider that “wellbeing” is the best concept for this purpose. Specifying considerations directed to the person’s overall wellbeing is consistent with the underlying values of human rights, particularly dignity. By a person’s “wellbeing”, we mean all aspects of the represented person’s wellbeing, including their physical, mental, emotional and financial wellbeing. As mentioned above, we use the term “wellbeing” in this context because it is the clearest concept to guide decisions where the person’s wishes and values are insufficient in themselves to determine the decision.

12.163 Further, representatives should be required to act in the “least restrictive manner”. The concept of “least restrictive” intervention is reflected in the PPPR Act.⁷¹ As discussed in Chapter 5, it was also raised by some submitters. In the context of Decision-Making Rule 1(d), it would mean that, when there is more than one available option, the representative would be required to select the option that will result in the person being least restricted in how they live their life. More generally, it serves as a reminder of the underlying core values of autonomy, dignity and equality.

⁷⁰ Guardianship and Administration Act 1995 (Tas), s 9(3)(b)(i).

⁷¹ Protection of Person and Property Rights Act 1988, ss 8(a), 28(a) and 65(2)(b)(i). See also Guardianship and Administration Act 1995 (Tas), s 9(3)(b)(ii), under which the decision maker must act in a manner that promotes the person’s personal and social wellbeing and is least restrictive of their human rights.

12.164 We acknowledge that our proposed Decision-Making Rule 1(d) would require an exercise of judgement by the representative as to how considerations relevant to a person's wellbeing (such as physical, mental, emotional and financial considerations) should be balanced against each other and what might impose the least restriction on the person in their particular circumstances. However, we consider this to be clearer than a direct reference to a person's rights. We also do not consider it would be possible for a new Act to specify what the appropriate balance will be, or what might be least restrictive, in every case.

When should a representative not give effect to a person's wishes and values or be entitled not to do so?

12.165 Even where a person's wishes and values are clear, there are some circumstances in which we consider a representative should not make a decision that gives effect to them or should be entitled not to do so. We have identified four situations that we consider should be specified in a new Act. These are set out in Decision-Making Rule 1(e) and (f). We recommend that a representative:

- (a) should be *required* not to make a decision that is criminal, cannot realistically be given effect or will result in a material risk of significant harm to the represented person; and
- (b) should be *entitled* not to make a decision that would expose the represented person or the representative to civil liability.

Decisions that are criminal or expose the represented person or the representative to civil liability

12.166 It can never be appropriate for a representative to be party to a criminal act. No submitters challenged this.

12.167 Nor do we consider it appropriate to require a representative to be party to an act that would expose the represented person or the representative to civil liability such as committing a tort or breaching a contract. The law should not require people to act unlawfully. Were a new Act to do so, some people may decline to be appointed, whether due to moral objections or concerns about potential liability.

12.168 Tasmanian legislation permits representatives to refuse to act in accordance with the person's will and preferences if doing so would be unlawful.⁷² Some commentators also argue that illegality should be a valid reason not to follow a person's will and preferences.⁷³

12.169 The New South Wales Law Reform Commission recommended that representatives should be required to avoid exposing the represented person to civil liability as well as criminal liability.⁷⁴ We do not recommend this approach with respect to civil liability. In some cases, it may not be clear whether a decision could give rise to a civil claim.

⁷² Guardianship and Administration Act 1995 (Tas), s 9(5)(b).

⁷³ See Wayne Martin and others *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation Across the UK* (Position Paper, 6 June 2016) at 40–41.

⁷⁴ New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R5.4(d) and at [5.25].

Representatives should not be encouraged to be unduly risk averse. In other cases, the extent of unlawfulness may be minor, for example, a technical breach of a contractual requirement that is unlikely to trouble the other party to the contract but is important to realising the represented person’s wishes and values. While a person should be *able* to refuse to make a decision that could give rise to civil liability, they should not be *prohibited* from making such a decision unless it would give rise to a material risk of significant harm to the represented person. This is, of course, subject to it being clear that the person’s wishes and values are for that decision to be made.⁷⁵

Impossibility

- 12.170 We are not aware of any overseas jurisdiction that expressly provides an exception for “impossibility”. However, one commentator has recommended that representatives should not be required to give effect to a person’s will and preferences if that is impossible.⁷⁶ Some Canadian jurisdictions allow a decision to depart from a person’s will and preferences when compliance would be “unreasonable”,⁷⁷ which may cover impossibility. Submitters did not challenge the relevance of impossibility.
- 12.171 In our view, a new Act should be clear that a representative should not make a decision that cannot practically be given effect. Their role should involve being alert to the practical implications of decisions and avoiding the difficulties, delays and disappointments of trying to give effect to wishes and values that cannot be fulfilled.
- 12.172 We emphasise, however, that the question a representative must ask should be whether the represented person’s wishes and values can practically be given effect, not whether it is prudent or optimal for them to be given effect.

Harm

- 12.173 As explained above, occasionally, a decision that reflects a person’s wishes and values might put them at risk of harm. In this situation, respect for the person’s rights can sometimes require a decision to be made that is contrary to their wishes and values.⁷⁸
- 12.174 A new Act should address the threshold at which a risk of harm requires a representative to depart from the person’s wishes and values. As noted above, submitters expressed a range of views on the appropriate threshold, ranging from “harm” or outcomes that “adversely affec[t] ... wellbeing” to “significant harm” or “high risk”.
- 12.175 Laws and law reform reviews in other jurisdictions similarly reflect a range of approaches. Some jurisdictions enable a person’s will and preferences to be overridden when they are

⁷⁵ We discuss harm below.

⁷⁶ See Wayne Martin and others *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation Across the UK* (Project Paper, 6 June 2016) at 40–41.

⁷⁷ See Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 16(2); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 12(2)(c); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), ss 23(3) and 44(2).

⁷⁸ Our recommended decision-making principles provide for two other situations where a representative should not make a decision that gives effect to the represented person’s wishes and values — namely, where the decision would be illegal or could not realistically be given effect. These exceptions are intended to reflect the limitations of law and reality rather than to respect a person’s rights. See our recommended Decision-Making Principle 1 later in this chapter.

“unreasonable”, which is sufficiently broad to encompass a level of harm.⁷⁹ The Australian Law Reform Commission recommended that representatives be able to override will and preferences “where necessary to prevent harm”.⁸⁰ Ireland’s *Code of Practice for Supporting Decision-Making and Assessing Capacity* refers to a “significant risk of harm”.⁸¹ The New South Wales Law Reform Commission refers to an “unacceptable risk”.⁸² Tasmanian legislation refers to the prevention of “serious harm”.⁸³

- 12.176 In our view, proper respect for the represented person’s dignity of risk means a high threshold of harm is needed. Representatives are likely to want to protect represented people from harm. A new Act should clearly signal that the person’s dignity of risk must be respected, as some submitters noted. We therefore recommend that a representative should only depart from a person’s wishes and values to avoid the person running a *material risk of significant harm*.
- 12.177 Some submitters referred to specific harms (such as physical or financial harm). We do not recommend a new Act specify the types of harm that are relevant. Any type of harm should be able to be considered, including physical, mental, emotional or financial harm. What matters is not the type of possible harm but that the risk be material and the harm significant.
- 12.178 Determining whether a risk is material or harm is significant will not always be easy. Judgement will be required. Similar cases may lead to different conclusions. That is a consequence of the need both to respect a person’s dignity of risk and to ensure that risks are not inconsistent with the person’s dignity and equality.
- 12.179 For clarity, our recommendation that representatives should be required to depart from a person’s wishes and values to avoid them running a material risk of significant harm is subject to our recommendations about advance directives. As we explain in Chapter 21, the decision-making rules should not apply to situations where the person has made a valid and applicable advance directive. Decisions covered by such an advance directive should be treated as decisions of the person as if they still had the relevant decision-making capacity at the time of the decision.
- 12.180 Some submitters thought that a representative should be able to override a person’s will and preferences to avoid harm to others. We do not recommend this approach. In our view, a new Act should not operate as a protective mechanism for anyone other than the represented person. Other laws exist to protect wider society from harm. Provided a person does not breach the law, they are generally entitled to act in ways that may cause, or be perceived to cause, harm (and even significant harm) to another person, whether that be from hurtful words, vigorous commercial competition, legal action or otherwise. If

⁷⁹ Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 16(2)(b); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 12(2)(c); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), ss 23(3) and 44(2).

⁸⁰ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R3-3(2)(d).

⁸¹ Decision Support Service *Code of Practice for Supporting Decision-Making and Assessing Capacity* (March 2023) at [3.3].

⁸² New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R5.4(d).

⁸³ Guardianship and Administration Act 1995 (Tas), s 9(5)(a).

a representative were required to avoid these kinds of harm to other people, they may not be able to act consistently with the represented person's wishes and values.

12.181 However, potential harm to others may be relevant when identifying what decision would give effect to a person's wishes and values. For example, a decision that might otherwise reflect the person's wishes and values might not do so if it would cause harm to a loved one that the person would wish to avoid. Taking account of potential harm to another in that situation would be giving effect to a person's wishes and values rather than departing from them.

What should decisions that depart from wishes and values be based on?

12.182 Where a representative departs from a person's wishes and values in the above situations, they should not be entitled to make whatever decision they think is best. Rather, we recommend a new Act specify that they be required to decide in a similar manner to situations where the person's wishes and values are not sufficient to guide what decision should be made. This means they should decide:

- (a) in accordance with the person's wishes and values to the extent possible (that is, in a way that is legal, possible to implement and not unacceptably harmful); and
- (b) otherwise in a way that maximises the person's wellbeing in the least restrictive manner. As we explain above, a person's wellbeing should be understood broadly, including matters such as their physical, mental, emotional and financial wellbeing.

12.183 This recommended approach is addressed in Decision-Making Rule 1(g). The approach is similar to that taken in the Tasmanian legislation.⁸⁴ It ensures that a person's wishes and values are given effect to the extent possible in the circumstances, as a number of submitters sought. To the extent the person's remaining wishes and values provide insufficient indication of what decision to take, the decision should protect and promote the person's rights. As addressed above, we consider the concept of wellbeing is best suited for this purpose.

Wishes and values with which the representative disagrees

12.184 Some representatives will inevitably be tempted to avoid what they think are "bad" decisions. We recommend that a new Act specify that a representative should not decline to make a decision merely because they disagree with it or consider it unorthodox or unwise (Decision-Making Rule 1(f)).

12.185 A person's wishes and values may be unorthodox, they may have a different risk appetite to the representative or they may believe something that is unverifiable or inaccurate. They may balance their values (for example, their desire to save money and their desire to support family members) in ways with which the representative does not identify. This does not make those values, and how they are balanced, any less deserving of respect. As the Irish *Code of Practice for Supporting Decision-Making and Assessing Capacity* says, "[e]verybody has their own values and beliefs and what you consider to be an

⁸⁴ Guardianship and Administration Act 1995 (Tas), s 9(3).

unwise decision may reflect differences in values and beliefs between you and the relevant person”.⁸⁵

Decision-Making Rule 2: Decision-making support and participation

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.

12.186 Represented people should be entitled to participate in, and be provided with decision-making support to express their wishes for, decisions made on their behalf. We accordingly recommend that representatives be required to use reasonable efforts to comply with Decision-Making Rule 2. For the reasons discussed above, their obligation should be to use reasonable efforts, not to achieve perfect compliance.

Consultation, participation and support

12.187 The represented person must be at the centre of the decision-making process. This is necessary to properly acknowledge their equality, dignity and autonomy and to ensure that decisions respect their rights, wishes and values. In our view, this means the represented person must have the opportunity to:

- (a) be consulted about a decision;
- (b) participate in the decision making and express their wishes for the decision to the extent they are able; and
- (c) be supported to do so.

⁸⁵ Decision Support Service *Code of Practice for Supporting Decision-Making and Assessing Capacity* (March 2023) at [2.4].

- 12.188 As noted above, many submitters emphasised the importance of consultation with and participation by the represented person.
- 12.189 The PPPR Act requires representatives to consult the person so far as is practicable.⁸⁶ In our view, however, a represented person should be more than a source of information about a decision. They should be an active participant in it, to the extent they wish to be. We therefore recommend that, in addition to consulting the person, the representative should be required to take steps to ensure the person can actively participate in the making of the decision to the extent they are able.
- 12.190 Examples from overseas jurisdictions and law reform bodies include:
- (a) New Brunswick legislation requires court-appointed representatives to discuss the relevant information and reasonably foreseeable consequences of the available options with the represented person in a manner that they are likely to best understand, to the extent that it is reasonable to do so.⁸⁷
 - (b) In Tasmania, one of the principles that representatives are required to observe is that people who need support in decision making are to be provided with access to the support necessary to enable them to do certain things, as far as is practicable in the circumstances. Those things are to make and participate in decisions affecting them, express their will and preferences and develop their decision-making ability.⁸⁸
 - (c) The Australian Law Reform Commission has recommended that people be provided with access to the support needed for them to make, communicate and participate in decisions affecting their lives.⁸⁹
- 12.191 As these examples indicate, an essential part of ensuring a person can participate fully in a decision is the provision of decision-making support. Article 12(3) of the Disability Convention requires states to take appropriate measures to provide disabled people with access to the support they may require in exercising their legal capacity. As we discuss in Chapter 6, an important aspect of this is ensuring that legal frameworks enable and facilitate the provision of that support. We therefore recommend that a new Act requires representatives to use reasonable efforts to ensure the person receives the decision-making support they want with respect to a decision.
- 12.192 A representative need not provide that decision-making support themselves. Indeed, sometimes there may be others better able to do so. It should, however, be the representative's responsibility to use reasonable efforts to ensure the support the represented person wants is provided.

⁸⁶ Protection of Personal and Property Rights Act 1988, ss 18(4)(c)(i), 43(1)(a) and 99A(1)(a). Some overseas jurisdictions have similar requirements. See for example Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 12(2); Guardianship and Administration Act 1993 (SA), s 5(b); Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 16(2)(a); and Adult Protection and Decision-Making Act SY 2003 c 21 (Yukon), ss 23(1)(a) and 44(1)(a).

⁸⁷ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(1)(a).

⁸⁸ Guardianship and Administration Act 1995 (Tas), s 8(1)(b).

⁸⁹ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R3-1, Principle 2 and at [3.18]–[3.28]. See also Guardianship and Administration Act 2019 (Vic), s 8(1)(a); Power of Attorney Act RSBC 1996 c 370 (British Columbia), s 19(3)(c); and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R5.2(e) and R8.7(2).

Represented person's wishes about level of involvement and support

- 12.193 We recommend that a representative's obligation to consult the represented person and enable them to participate in a decision should only apply to the extent the represented person wishes to be consulted and to participate. Similarly, a representative should only be required to take steps to provide the represented person with the decision-making support that they wish to receive.
- 12.194 Our use of the word "wish" in this context is deliberate. It does not mean "wishes and values". If a person is expressing a wish not to be consulted, they should not be forced to do so on the basis that their wish does not reflect their "wishes and values", identified through an in-the-round assessment. Forcing them to participate would be neither practical nor respectful.
- 12.195 Where a person expresses a wish not to be involved in a decision or to receive decision-making support, it will sometimes be appropriate for the representative to ask again later. Whether the representative should take this approach will depend on the context, including the urgency with which the decision needs to be made. In accordance with the duties discussed in Chapter 13, representatives will need to exercise reasonable skill, care and diligence when deciding whether to defer making a decision for this purpose.

How the represented person can express their wishes

- 12.196 Proper respect for a person's wishes means respecting the way those wishes are expressed. Representatives should ensure that represented people are supported to express their wishes in the way they want to, whether verbally, by sign language, by gesture, by facial expression or otherwise.
- 12.197 The importance of represented people being able to express themselves in any form was emphasised by several submitters. It is also reflected in some overseas legislation and law reform recommendations. For example, Western Australian legislation provides for representatives to act "in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner".⁹⁰ Similarly, the Australian Law Reform Commission recommended that "in communicating will and preferences, a person is entitled to communicate by any means that enable them to be understood".⁹¹

⁹⁰ Guardianship and Administration Act 1990 (WA), ss 51(2)(e) and 70(2)(e).

⁹¹ Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014), R3-3(1)(b)(i).

When a representative should not make a decision

- 12.198 We recommend that representatives be required to use reasonable efforts to ensure that they do not make a decision for which the person has decision-making capacity, unless the represented person wants the representative to make the decision (Decision-Making Rule 2(c)).⁹² Legislation in some overseas jurisdictions takes a similar approach.⁹³
- 12.199 We envisage that represented people with decision-making capacity in respect of a particular decision may sometimes want their representative to make a decision because it is easier than making it themselves. In addition, they may want their representative to make a decision to address potential third-party concerns about the validity of the decision if they made it themselves (as submitters suggested).
- 12.200 Our recommended approach takes account of two practical issues raised by submitters. The first concerns the workability of representatives being required to assess the represented person’s decision-making capacity in relation to each decision. In our view, our recommended approach is workable.⁹⁴ Representatives would not need to conduct or arrange a detailed assessment ahead of each decision. Rather, they would need to be sufficiently informed about the person so that, whenever a decision is to be made, they are able to:
- (a) ascertain relatively easily whether the person has decision-making capacity for it; or
 - (b) recognise that closer consideration of that issue is required, for example, through an assessment by an appropriately qualified professional.
- 12.201 Guidance for representatives about how to assess decision-making capacity (as we recommend in Chapter 24) would simplify this task.
- 12.202 Second, one submitter raised concerns about representatives deliberately not making a decision in the knowledge that the represented person does not have decision-making capacity and will likely make a decision that benefits the representative. However, this would breach the duties we recommend in Chapter 13 and accordingly expose the representative to potential liability (see Chapter 22).

⁹² This position follows from Decision-Making Rule 2(c) (see R56(c)) and R54 (explained above). Under s 98(3)(b) of the PPPR Act, a welfare attorney may not make a decision on behalf of a donor unless the attorney “believes on reasonable grounds” that the donor is mentally incapable. Our recommended Decision-Making Rule 2(c) is not intended to impose a lesser obligation.

⁹³ See for example Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 41(3); and Mental Capacity Act 2005 (UK), s 20(1).

⁹⁴ As noted above, the PPPR Act requires attorneys under an EPOA for care and welfare to have “reasonable grounds” to believe the donor is “mentally incapable” in relation to a decision before making it: Protection of Personal and Property Rights Act 1988, s 98(3). We also address when attorneys may make decisions under an EPOA in Chapter 19.

Decision-Making Rule 3: Relevant information

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.

Decisions must be adequately informed

12.203 The essence of our recommended Decision-Making Rule 3 is that representatives' decisions should be adequately informed. This was one of the most consistent themes in submissions.

12.204 We recommend that representatives should be required to use reasonable efforts to ensure they have all material information necessary to make decisions in accordance with Decision-Making Rule 1.⁹⁵ Different information may be relevant to different aspects of Decision-Making Rule 1. For example:

- (a) to make decisions that reliably reflect a person's wishes and values, representatives need to have adequate information on what those wishes and values are;
- (b) to assess whether decisions may give rise to a material risk of significant harm, representatives may need to understand a range of matters such as the person's health conditions and finances; and
- (c) similarly, to assess what will protect and promote a represented person's wellbeing in the least restrictive manner, a representative will require an adequate understanding of the person and their circumstances.

12.205 The relevant information is likely to be context-specific. We therefore consider it is preferable for a new Act to express the requirement for a representative to ensure they have relevant information in general terms rather than specifying the information they must consider. However, as we explain next, it would be useful for the legislation to draw representatives' attention to the potential relevance of past statements and decisions.

⁹⁵ For the reasons discussed earlier in this chapter, the obligation of representatives should be to use reasonable efforts to comply with Decision-Making Rule 3, not to comply perfectly.

Past decisions and statements

- 12.206 We recommend that a new Act expressly require representatives to consider prior statements and decisions made by the person about the subject matter, and the circumstances of those statements and decisions, when making a decision.
- 12.207 As submitters noted, a represented person's past statements and decisions can be highly relevant to understanding their wishes and values. In some cases, a person may have made statements for the purpose of guiding a representative. For example, a donor may have recorded instructions that they want the attorney to follow. Other statements and decisions a person has made throughout their life may be equally relevant. In particular, a person's past decisions may help a representative to understand how the person has balanced various wishes and values in particular contexts. Given the potential importance of past statements and decisions, representatives should be required to consider them.⁹⁶
- 12.208 The nature and circumstances of past statements and decisions will affect their relevance. The specificity and clarity of a past statement will bear on how clearly it applies to a decision. A past statement's level of formality might also be relevant to the weight a representative should give it (although informal statements may sometimes be highly relevant). Similarly, the context and nature of a previous decision may heavily affect its reliability as a guide to the person's present wishes and values. When the statements and decisions were made or taken, what has happened since, whether the person had relevant decision-making capacity or was under duress at the time and whether the person may simply have changed their values and wishes may all be relevant.
- 12.209 A number of submitters identified advance directives as relevant to determining a person's wishes and values. Some overseas jurisdictions expressly require representatives to take account of a person's advance directive in this context.⁹⁷ While we agree that advance directives will sometimes be relevant, we do not consider Decision-Making Rule 3 should expressly refer to them.
- 12.210 As we explain in Chapter 21, a valid and applicable advance directive should be regarded as a decision that has already been made by the represented person. It is not a decision that the representative should remake, much less second-guess. An advance directive that is not applicable to a particular decision may nonetheless be relevant when a representative is identifying the person's wishes and values with respect to the decision. In such cases, a representative should take account of the advance directive in the same way they would any other past statement or decision. To avoid confusion, we consider it is preferable for Decision-Making Rule 3 not to refer expressly to advance directives and for them simply to be covered (when relevant) by the general requirement to consider relevant past statements and decisions.
- 12.211 We have considered whether a new Act should give greater emphasis to formal statements and decisions but do not favour that approach. In addition to advance

⁹⁶ A number of overseas statutes and law reform bodies recognise the potential significance of a person's prior wishes, feelings, values, statements or decisions. See for example Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [3.62]; Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [17.105]; Mental Capacity Act 2005 (UK), s 4(6)(a); and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 2(d).

⁹⁷ See for example Medical Treatment (Health Directions) Act 2006 (ACT), s 18; Guardianship and Administration Act 1993 (SA), s 31A; Guardianship and Administration Act 1995 (Tas), s 9(3)(a); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(3).

directives, there are many formal statements that might be relevant to particular decisions such as wills,⁹⁸ advance care plans, written statements of wishes prepared at the time an EPOA was executed, or specific instructions given in family or whānau meetings. As noted above, the formality of a statement may bear on the weight a representative should give it, as part of considering the statement's circumstances. However, less formal statements may also be highly relevant in some circumstances. In our view, a new Act should not suggest that some types of statement are always more relevant than others.

Sources of information

- 12.212 Understanding a person's wishes and values may sometimes require obtaining information from others such as their family or whānau and close friends. Understanding the implications of a possible decision may require obtaining relevant information from a person's carers, healthcare providers, lawyer, accountant, counsellor, spiritual adviser and others.
- 12.213 We recommend that a new Act requires representatives to use reasonable efforts to seek information from people identified by the represented person. As a number of submitters suggested, the represented person's wishes in relation to consultation should be respected.⁹⁹
- 12.214 We also recommend that a new Act require representatives to use reasonable efforts to seek information from any other relevant source and that it contain specific guidance about what to do when a person does not want the representative to seek that information. As noted above, some submitters said people should not be consulted if the represented person would not want them to be. We generally agree. Ensuring a decision is made in the way the person wants it to be made means respecting their views on people who should not be involved. However, we consider there should be an exception where the representative considers that failure to seek information from a person may expose the represented person to a material risk of significant harm. This approach reflects our approach to harm in Decision-Making Rule 1.
- 12.215 We deliberately refer to who a person "wants" to be consulted to distinguish it from their "wishes". What a person wants may be clear from their wishes. However, this may not always be the case if they are no longer able to express relevant wishes. If it is clear from previous statements and expressions of wishes who they do, and do not, want to be consulted, the person's inability to repeat those wishes should not mean they are treated as irrelevant.
- 12.216 Where a representative seeks information from a person, the purpose should be to seek information necessary for the representative to make a decision in accordance with Decision-Making Rule 1. As NZLS submitted, it should not be to consult the person about *their* views on what decision is best. Where the views of a particular person (such as a loved one) are relevant to a represented person's wishes and values, it may be important to ascertain how that other person feels about a possible decision. In that situation, the

⁹⁸ Consideration of a person's will is required in New Brunswick: Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(3).

⁹⁹ As we discuss in Chapter 13, an attorney acting under an EPOA is required to consult with any person specified in the EPOA. See Protection of Personal and Property Rights Act 1988, s 99A.

other person's views would be sought as a relevant source of information to identify the represented person's wishes and values, not as an independent factor bearing on the decision to be made. In addition, as we note above, a person's wishes and values in some circumstances may be for a decision to be the one that is made by a collective.

- 12.217 We have considered whether a new Act should include a list of people from whom representatives must seek information but do not recommend that approach. As a number of submitters observed, people's situations will vary widely. A predetermined list might require or encourage a representative to consult people who have nothing relevant to say. This could lead to unnecessary delay and cause confusion. It might also increase the risk of a representative failing to consult people who do have relevant information but who are not listed.
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CHAPTER 13

General duties of representatives

IN THIS CHAPTER, WE CONSIDER:

- the general duties that court-appointed representatives and attorneys should have.

INTRODUCTION

- 13.1 There is a significant power imbalance between represented people and representatives. To help address that imbalance, there need to be clear standards of behaviour for representatives — both court-appointed representatives and attorneys acting under enduring powers of attorney (EPOA).
- 13.2 In Chapter 12, we address the decision-making rules that should apply to decisions made on behalf of people who lack relevant decision-making capacity. These rules are critical to ensuring that decisions made by representatives protect and promote the equality, dignity and autonomy of represented people. However, these rules are designed to guide representatives when making a decision (or considering whether to make a decision) on behalf of a represented person. They are not a complete articulation of the duties that representatives should have. Therefore, in this chapter, we recommend a new Act specify general duties applying to representatives.
- 13.3 In addition to a duty to comply with the decision-making rules, we recommend that a new Act specify duties for representatives in relation to:
- (a) acting honestly, in good faith and with reasonable care;
 - (b) being informed about the represented person's situation and considering whether decisions are needed to respect their rights, wishes and values;
 - (c) appropriately managing conflicts of interest;
 - (d) appropriately managing confidential information;
 - (e) helping the represented person understand the representative role and develop decision-making capacity; and
 - (f) communicating with the represented person.

CURRENT LAW

13.4 The Protection of Personal and Property Rights Act 1988 (PPPR Act) addresses separately the duties of welfare guardians, property managers, attorneys in relation to personal care and welfare and attorneys in relation to property, although the duties are similar.

Welfare guardians

13.5 For welfare guardians, the first and paramount consideration is “the promotion and protection of the welfare and best interests of the person”.¹ In addition, a welfare guardian is to:²

... see[k] at all times to encourage [the represented] person to develop and exercise such capacity as that person has to understand the nature and foresee the consequences of decisions relating to the personal care and welfare of that person, and to communicate such decisions.

13.6 Without limiting these duties, a welfare guardian is also required to:³

- (a) encourage the represented person to act on their own behalf to the greatest extent possible;
- (b) facilitate the represented person’s integration into the community to the greatest extent possible; and
- (c) consult, as far as practicable, with:
 - (i) the represented person;
 - (ii) any property manager “on a regular basis”;
 - (iii) others who are competent to advise and are interested in the represented person’s welfare; and
 - (iv) non-profit organisations that provide services and facilities for the welfare of relevant groups.

Property managers

13.7 The first and paramount consideration of a property manager is “to use the property in the promotion and protection of the best interests of the person”.⁴ Similarly to welfare guardians, a property manager must also seek to encourage the represented person “to develop and exercise such competence as that person has to manage his or her own affairs in relation to his or her property”. To this end, a manager may allow the represented person to have control of and deal with any part of the property to which the order relates.⁵

¹ Protection of Personal and Property Rights Act 1988, s 18(3).

² Protection of Personal and Property Rights Act 1988, s 18(3).

³ Protection of Personal and Property Rights Act 1988, s 18(4).

⁴ Protection of Personal and Property Rights Act 1988, s 36(1).

⁵ Protection of Personal and Property Rights Act 1988, s 36(2).

- 13.8 A property manager must also consult with a welfare guardian “on a regular basis” if one has been appointed.⁶

Enduring powers of attorney in relation to welfare and property

- 13.9 The specified duties of attorneys in relation to personal care and welfare and attorneys in relation to property are similar to those of welfare guardians and property managers.⁷ The main difference is with respect to consultation. All attorneys are required to consult, as far as is practicable, with:⁸
- (a) the donor;
 - (b) any person that the EPOA specifies should be consulted; and
 - (c) any other attorney who has been appointed under the EPOA or another EPOA made by the donor.

Further duties in case law

- 13.10 The PPPR Act does not set out all duties of representatives. Case law has established that attorneys and property managers also owe further duties (including equitable duties) to the represented person.⁹ These include the duty to:¹⁰
- (a) act with absolute openness and fairness to the represented person;
 - (b) exercise reasonable care in all the circumstances;
 - (c) keep the represented person’s property separate and be able to account for it; and
 - (d) avoid any position where the representative’s interests conflict with this duty.
- 13.11 We have not found any such case law with respect to welfare guardians. However, applying the general case law on when such duties exist, it is likely that welfare guardians have similar further duties.¹¹

ISSUES

- 13.12 We have identified two main issues with the current law on representatives’ duties.
- 13.13 First, some of the current duties reflect a “best interests” decision-making framework. This is most explicit in the statutory references to best interests. It is also evident in the duties to facilitate the represented person’s integration into the community and to consult with certain people. These duties could potentially be inconsistent with the person’s wishes and values and hence their rights. Reform is needed to ensure representatives’ duties align with our recommended focus on people’s wishes and values.

⁶ Protection of Personal and Property Rights Act 1988, s 43(1) and (6).

⁷ These duties were added through an amendment in 2007. See Protection of Personal and Property Rights Act 1988, ss 97A and 98A.

⁸ Protection of Personal and Property Rights Act 1988, s 99A.

⁹ *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [36]–[37]; and *Flavell v Campbell* [2019] NZHC 799, [2019] NZFLR 18 at [69].

¹⁰ *Treney v Treney* [2009] NZFLR 208 (FC) at [55].

¹¹ See Andrew Butler “Fiduciary Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 585 at 697–705; and *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [37].

13.14 Second, the current law on representatives' duties is unclear and confusing. The PPPR Act does not set out representatives' duties comprehensively and some duties are only found in case law. Within the PPPR Act, the separately stated duties for welfare guardians, property managers, attorneys for personal care and welfare and attorneys for property add to the confusion by sometimes using different language to describe similar concepts.¹²

CONSULTATION

What duties a representative should have

13.15 We asked submitters what duties a representative should have, for example, whether a representative should be required to:

- (a) act honestly, diligently and in good faith;
- (b) exercise reasonable skill and care; and
- (c) manage and appropriately respond to any conflicts of interest.

13.16 Our questions about representatives' duties were asked in a chapter about court-appointed representatives.¹³ Many submitters may therefore have only had court-appointed representatives in mind in their responses.

13.17 Forty-five submitters gave feedback on the duties that representatives should have. Approximately two-thirds agreed with the three possible duties we listed in the question. No submitters expressly disagreed with the three listed duties.

13.18 Approximately half of all submitters that responded to this question discussed other duties that could be included. The most commonly raised duties were to require representatives to:

- (a) not use the position for profit or benefit;
- (b) not coerce, intimidate or unduly influence the person;
- (c) identify and respond to situations where there is a conflict, ensure the person's interests (or rights, will and preferences) are always the paramount consideration and seek external advice when necessary;¹⁴
- (d) keep the represented person's property apart and separate from their own unless otherwise authorised;
- (e) not use or disclose the represented person's confidential information except as required for the role or unless authorised by law;
- (f) support the represented person to participate in decision making to the extent possible and/or maximise their decision-making capacity;

¹² For example, welfare guardians and property managers have respective duties to encourage the represented person to develop and exercise their capacity (for welfare guardians) or competence (for property managers). It is unclear why different language is used.

¹³ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at 211.

¹⁴ This is an expanded version of the potential duty to manage and appropriately respond to any conflicts of interest noted above.

- (g) take reasonable steps to ascertain a person's will and preferences and/or take them into account;
- (h) consult with the represented person about relevant decisions in a way they are most likely to understand; and
- (i) consult with the represented person's family and support network.

Whether duties should be set out in statute

13.19 We also asked whether the duties of representatives should be set out in statute.

13.20 Forty-four submitters gave feedback on this issue. Almost all thought that duties of representatives should be set out in statute.

13.21 The most common reasons given were that it would help representatives to understand their duties and would provide clarity and certainty:

- (a) McWilliam Tyree Lawyers said that, in its experience, "most people who are asking to be appointed to a representative role are layperson family members who are doing it for the first time, and are not aware of what the role requires of them". In its view, "[t]he more expressly [a representative role] can be set out the better for both the person and the person applying to be appointed for them".
- (b) Similarly, He Manaakitanga Kaumātua Aotearoa | Age Concern NZ said it "repeatedly encounter[s] representatives being unclear about what the limits and responsibilities are". In its view, not having clear duties "heightens a lack of transparency about what ... representatives are doing and leads to unconscious as well as deliberate abuse in many instances".

13.22 A few submitters disagreed. Adult Guardianship Services Trust and Spectrum Foundation considered that a representative's duties should be set out in the court order. Spectrum Foundation said the representative should also be required to sign the order or another document to show they understand the requirements. One submitter thought duties should not be set out in statute as they should be common sense.

RECOMMENDATIONS

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.

The duties of representatives should be set out in statute

- 13.23 We agree with the vast majority of submitters that representatives' duties should be set out in a new Act. The duties we recommend are intended to cover the core obligations of all representatives. They are minimum standards of behaviour expected of representatives.
- 13.24 Our comparative analysis reinforces this conclusion. Every jurisdiction we investigated sets out representatives' duties in statute.¹⁵

Donors should not be able to modify the duties

- 13.25 We have considered whether a donor should be able to modify the duties we recommend in an EPOA. Allowing donors to modify the duties could be seen as consistent with the voluntary nature of EPOA arrangements. It could help to incentivise people to become attorneys if they were able to agree on the standards of behaviour that apply to them with a donor. Also, a donor must have decision-making capacity to create an EPOA, so it is safe to assume they are able to understand the implications of modifying any duties.
- 13.26 However, with the exception of some aspects of duties (e) and (f), concerning conflicts of interest and confidentiality requirements, we do not consider that donors should be able to modify the duties we recommend. This is the current position with respect to attorneys' duties in the PPPR Act and no-one raised this with us as an issue. It is also the position in all of the jurisdictions we have investigated.¹⁶
- 13.27 More fundamentally, once a donor loses relevant decision-making capacity, they can no longer change the terms of an EPOA. They may not be in a position to understand any issues that arise. Any modification of the duties the donor has made may no longer be appropriate due to changing circumstances after they lose relevant decision-making capacity. This could be particularly relevant if a donor had absolved their attorney of certain duties in an EPOA. In order to ensure the donor's human rights are upheld when they lose decision-making capacity, we consider that it should not be possible to modify our recommended duties in an EPOA (except some aspects of duties (e) and (f)).

Recommended duties

- 13.28 Our recommended duties fall into seven categories.

Complying with the decision-making rules

- 13.29 Representatives should have a duty to comply with the decision-making rules that we recommend in Chapter 12. This approach would ensure that the obligations of

¹⁵ See for example Guardianship Act 1987 (NSW), s 4; Guardianship and Administration Act 2000 (Qld), s 11B; Powers of Attorney Act 1998 (Qld), s 6C; Guardianship and Administration Act 1993 (SA), s 5; Powers of Attorney and Agency Act 1984 (SA), s 7; Guardianship and Administration Act 1995 (Tas), ss 8 and 26; Guardianship and Administration Act 2019 (Vic), ss 8–9; Powers of Attorney Act 2014 (Vic), s 21; Mental Capacity Act 2005 (UK), ss 1 and 4; Adults With Incapacity (Scotland) Act 2000, s 1; Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8; Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 43–44; and Substitute Decisions Act SO 1992 c 30 (Ontario), s 66.

¹⁶ In the jurisdictions we have investigated, the duties of attorneys are expressed in absolute terms and there is no provision in the relevant Acts to enable them to be modified.

representatives under the decision-making rules are recognised as duties. Several other jurisdictions take this approach.¹⁷

- 13.30 Our recommended duty requires representatives to “comply” with the decision-making rules. The standard of compliance would be set by the decision-making rules themselves. As we explain in Chapter 12, we recommend that that standard require the representative to use “reasonable efforts” to comply with the decision-making rules’ specific requirements.

Acting honestly, in good faith and with reasonable care

- 13.31 We recommend that representatives have duties to act honestly, in good faith and with reasonable care, diligence and skill. These are baseline duties for a role of trust and confidence where one person is reliant on the actions of another. Similar duties apply in other areas of the law.¹⁸
- 13.32 A new Act should specify the standard of care applying to these duties, for clarity. We consider the standard should be that of a reasonable person, except where a person is appointed as a representative in their professional capacity.¹⁹ This approach would ensure that people with professional skills are not discouraged from being representatives outside of their professional capacity for fear of being held to a professional standard.
- 13.33 For example, it would mean that an accountant who is appointed to be a friend’s attorney in their personal capacity would be held to the standard of a reasonable person, not a reasonable accountant. However, an accountant who is appointed as a representative of a client in their professional capacity would be held to the standard of care of a reasonable accountant.
- 13.34 Whether a person is acting in their professional or personal capacity will not always be clear and may need to be determined by the courts in difficult cases.²⁰ In our view, the following factors may be helpful when determining whether a person is acting in a professional capacity:²¹
- (a) whether the representative held themselves out as being a professional when they were appointed or when the relevant act occurred;
 - (b) whether the represented person understood the representative to be acting in a professional capacity; and
 - (c) whether the representative receives remuneration for acting in the role.

¹⁷ See for example Guardianship and Administration Act 2000 (Qld), ss 34–40; Guardianship and Administration Act 1995 (Tas), s 26; and Guardianship and Administration Act 2019 (Vic), s 41(1)(a).

¹⁸ See for example C Hawes and D Lester “Agency” in *The Laws of New Zealand* (online ed, LexisNexis) at [69]; and Companies Act 1993, s 137.

¹⁹ The Trusts Act 2019 takes a similar approach in relation to the standard of care for trustees: see s 29.

²⁰ See *National Standards Committee v Orlov* [2013] NZLCDT 45 at [47], citing the High Court of Australia in *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1, (2004) 204 ALR 8 at [20]. It noted that “[t]he dividing line between personal misconduct and professional misconduct is often unclear.” This was cited again by te Kōti Matua | High Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [103].

²¹ We do not consider it is necessary for a new Act to include these factors.

Being informed about the represented person's situation and making decisions

- 13.35 Representatives should have a duty to use reasonable efforts to be informed about the represented person's circumstances and to consider whether decisions need to be made to:
- (a) respect the person's wishes and values; or
 - (b) eliminate or mitigate a material risk of significant harm.
- 13.36 This recommended duty is intended to make it clear that representatives must be proactive.²² It is not sufficient for a representative to simply wait for a matter that requires a decision to be brought to them. Failing to act can remove options and opportunities from the represented person or perpetuate harm.
- 13.37 It is useful to clarify the relationship between this recommended duty and our recommended Decision-Making Rule 3 (in Chapter 12). Decision-Making Rule 3 would apply when a representative is making a decision. It would require the representative to use reasonable efforts to ensure they have all information necessary to make the decision. By contrast, the duty to be informed addressed here would apply generally (not just when making a decision). It is necessary for a representative to be informed about the represented person's circumstances in order to know whether decisions need to be made.
- 13.38 We considered whether this duty should refer to taking actions as well as making decisions. A decision will often be meaningless if action is not taken to implement it. For example, a property manager's decision to buy a property will have no effect if they do not sign the contract and complete other required steps. However, a duty to consider making decisions to ensure a person's rights, wishes and values are respected and to take actions where appropriate might have unintended and undesirable consequences. For example, it might sometimes be interpreted as imposing a duty to enforce a decision through force.²³ Accordingly, we consider the duty should not refer to taking actions. We envisage that the duty — along with the duties to act in good faith and with reasonable care — will be interpreted to require actions where appropriate.²⁴

Managing conflicts of interest

- 13.39 A new Act should specify that representatives have a duty to identify and respond appropriately to any conflicts of interest, including by:
- (a) ensuring the decision-making rules are always the sole considerations;
 - (b) complying with any record-keeping and reporting requirements; and
 - (c) complying with any conditions specified by the donor in an EPOA or by the Family Court.
- 13.40 The United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) requires measures relating to the exercise of legal capacity to be free from

²² Trustees have a similar duty. See Trusts Act 2019, s 32.

²³ The use of force to implement decisions is addressed in Chapter 23.

²⁴ An action to implement a decision can generally also be framed as a decision, for example, deciding whether or not to execute a contract.

conflicts of interest.²⁵ For the same reasons addressed in Chapter 11 with respect to formal supporters, we do not interpret the Disability Convention to require a strict prohibition on a representative making decisions about matters in which they have an interest. However, requiring representatives to identify and manage conflicts of interest appropriately is a key mechanism for preventing representatives from abusing their position (either unconsciously or deliberately).²⁶

- 13.41 To give as much guidance as possible, we consider a new Act should provide an inclusive list of requirements encompassed by the duty to identify and respond to conflicts of interest. The three matters listed in the recommendation are the most effective ways that representatives can manage conflicts of interest. With respect to EPOAs, under the approach we recommend, a donor could set any restrictions or obligations regarding conflicts of interest for the attorney. Any such restrictions or obligations would be relevant to the scope of an attorney's duty to identify and respond appropriately to conflicts of interest.
- 13.42 Other recommendations in this Report are also designed to manage conflicts of interest. In Chapter 16, we recommend suitability requirements for court-appointed representatives that include the Family Court considering any conflicts of interest a potential representative may have. In Chapter 17, we recommend that the Family Court be able to impose restrictions or obligations on court-appointed representatives where there is an actual or potential conflict of interest. In Chapter 18, we recommend record-keeping and reporting requirements for court-appointed property representatives and a discretion for the Court to impose such obligations with respect to welfare representatives. In Chapter 19, we recommend donors be able to impose conditions or restrictions on the attorney's authority, which would enable specific requirements to apply in relation to conflicts of interest. In Chapter 22, we recommend representatives and formal supporters not have an immunity from civil liability with respect to certain benefits they may receive in their role so that they may be liable to account for such benefits. Our recommended duty in this chapter is accordingly one part of our recommended statutory scheme to help ensure conflicts of interest are managed appropriately.
- 13.43 Our recommended duty regarding conflicts of interest for representatives is different to our recommended duty for formal supporters. In Chapter 11, we recommend that formal supporters:
- (a) must identify and disclose any relevant conflicts of interest to the person they support; and
 - (b) not be able to rely on any consent given to act in a position of conflict unless they reasonably consider the supported person understood the nature and foreseeable consequences of the consent when it was given and continues (or with available decision-making support would continue) to understand it when the action is taken.

²⁵ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

²⁶ As addressed in Chapter 18 (concerning safeguarding mechanisms for court-appointed representatives), different types of conflict could arise. Examples include where a representative may have a personal financial interest in a decision and where a decision affects people close to the representative (such as their whānau or friends).

13.44 We recommend a different approach for representatives because a person who has a formal supporter has decision-making capacity (with the support available to them) to consent to the formal supporter acting when they have a conflict of interest. Formal supporters should therefore be able to act with such consent, provided they reasonably consider the person they support understands what they are doing. Represented people are much less likely to be able to give informed consent to representatives acting when they have a conflict of interest. In place of being able to rely on the represented person's consent, the representative should be required to act in accordance with the decision-making rules we recommend in Chapter 12 and the terms of the court-order appointing them or the terms of an EPOA (as relevant), and to comply with applicable record-keeping and reporting requirements.

Managing confidential information

13.45 We recommend that a representative have a duty not to use or disclose confidential information received as a representative except as required for the role, unless authorised by an EPOA or the Family Court.²⁷

13.46 We have considered whether this duty is unnecessary in the light of a representative's obligations under the Privacy Act 2020. The information privacy principles set out in that Act prohibit people from using or disclosing personal information, except in specified circumstances.²⁸ These principles will cover a lot of confidential information received by representatives in their role. However, representatives may sometimes hold confidential information for the role that is not personal information. For example, they may hold confidential information about a commercial venture that the represented person has an interest in.

13.47 Accordingly, we think a duty not to use or disclose any confidential information the representative receives in their role (with appropriate exceptions) is necessary. This duty would not limit the information principles in the Privacy Act, which would continue to apply to the represented person's personal information.

13.48 Donors may wish to specify that certain uses of confidential information are permitted under their EPOA. There may also be good reasons for the Family Court to allow this for court-appointed representatives in some situations. These authorisations should be permitted. However, the Family Court should not be able to permit any use or disclosure of confidential information that conflicts with an express prohibition the donor has included in their EPOA. This is why we have specified that any authorisation by the Court is subject to any relevant EPOA.²⁹

13.49 We have considered whether a new Act should expressly require a representative to comply with any confidentiality obligations the represented person has with respect to third-party confidential information that the representative accesses. However, we do not recommend this approach. Equity is likely to impose obligations of this nature on the

²⁷ They should also, of course, be permitted to disclose information if required by law to do so. We do not consider it necessary for our recommended duties to specify this expressly.

²⁸ Privacy Act 2020, s 22 IPP10–11.

²⁹ A similar approach is taken in the PPPR Act to actions by an attorney that are not for the represented person's benefit: see Protection of Personal and Property Rights Act 1988, s 107(1).

representative in some situations.³⁰ Seeking to spell out a representative's duties with respect to third-party confidential information would risk confusion and unintended consequences.

Helping the person to understand the role and develop decision-making capacity

- 13.50 We recommend that representatives have a duty to use reasonable efforts to ensure that the represented person receives the decision-making support they want to receive to assist them to:
- (a) understand the representative's role; and
 - (b) have and develop decision-making capacity generally.
- 13.51 These duties are needed to protect and promote the equality, dignity and autonomy of represented people. The second duty here is similar to the current requirement in the PPPR Act for representatives to encourage the represented person to develop and exercise their decision-making capacity. We did not hear any concerns with this requirement and consider it should continue. We also consider it important for a representative to support the represented person to understand the role of the representative. This would help facilitate the represented person's participation in discussions about the arrangement and minimise confusion.
- 13.52 Both proposed duties are qualified so that the duty is only to use reasonable efforts to ensure the represented person has decision-making support for these matters if that is what the represented person wants. This ensures the duties would not be unduly onerous and would not conflict with the person's wishes and values.

Communicating with the represented person

- 13.53 A new Act should specify that representatives have duties to:
- (a) use reasonable efforts to communicate with the represented person in the way the person will be able to understand best; and
 - (b) use reasonable efforts to keep the represented person informed about decisions made, information obtained and steps taken by the representative.
- 13.54 We consider these duties are necessary to ensure a represented person can participate in decision making and exercise their decision-making capacity to the fullest extent possible.³¹ They apply to communications with the represented person in general and are wider than the specific consultation obligations contained in our recommended decision-making rules.³²
- 13.55 Our recommended duty requires the representative to identify the method of communication that works best for the represented person and to make reasonable efforts to use that method. This would help to ensure the represented person is able to

³⁰ See the discussion in Andrew Butler and Nathaniel Walker "Breach of Confidence" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 795 at 809–811, about third parties and obligations of confidence.

³¹ They are based on duties in Tasmanian legislation. See Guardianship and Administration Act 1995 (Tas), s 57.

³² The decision-making rules contain a number of consultation requirements with respect to *making* decisions. This duty includes a basic "reporting back" function so that the represented person is aware of decisions made, steps taken and information obtained by the representative.

participate in decision making. Effective communication between the representative and represented person can help to promote a number of the principles of the Disability Convention, including full and effective participation and accessibility.³³

- 13.56 We also recommend a representative be required to use reasonable efforts to keep the represented person updated about the performance of their role. This would help to ensure the represented person is informed and can hold the representative to account.

Duties considered but not recommended

- 13.57 We considered other potential duties suggested by submitters or that other jurisdictions that we have investigated have adopted. However, we do not recommend further duties, either because:

- (a) we have addressed the concerns to which the potential duties are directed in other recommendations;³⁴ or
- (b) the potential duties reflect a “best interests” approach to decision making and should therefore not be included in a new Act;³⁵ or
- (c) we consider they are unnecessary.³⁶

- 13.58 For clarity, we address a potential duty we have considered in relation to consultation. In Chapter 17, we make recommendations about consultation obligations between multiple representatives.³⁷ We have considered whether representatives should also have a duty to liaise with any formal supporter the represented person has.

- 13.59 We do not recommend this duty. Under our recommendations, representatives would be required to act in accordance with the decision-making rules proposed in Chapter 12. Under these rules, decisions must be based on relevant information. This includes seeking information from any person or other source from which the represented person wants the representative to seek information and (generally) from any other relevant source. Where the represented person has a formal supporter, the representative would be required to seek information from them in accordance with this rule whenever relevant. A further express duty to liaise with any formal supporter is therefore unnecessary.

³³ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3.

³⁴ These included: a duty not to coerce, intimidate or unduly influence the person (suggested in our Second Issues Paper at [11.62(b)]); a duty not to use the position for profit or benefit (suggested by submitters); a duty to keep the represented person’s property separate from their own unless otherwise authorised (suggested in our Second Issues Paper at [11.62(f)]); a duty to consult with a represented person’s family (suggested by submitters); and a duty to be culturally appropriate.

³⁵ Some submitters suggested duties to ensure the represented person is engaged in their community as much as possible and to be an advocate for the quality of life. In our view, such duties are inconsistent with the decision-making rules as they may be inconsistent with a person’s rights and wishes. For example, a person may have a firm wish not to be engaged in their community.

³⁶ These included a duty to seek supervision and support if needed and a duty not to exceed the powers granted under an order.

³⁷ Relatedly, in Chapter 11, we recommend that formal supporters have a duty to use reasonable efforts to be informed about the supported person’s circumstances, including by liaising with any representative the supported person has.

A new Act should not expressly exclude equitable obligations

- 13.60 As noted above, courts have found that the PPPR Act is not a self-contained code and that duties (including equitable duties) not provided for in the legislation can apply.³⁸ We have considered whether a new Act should exclude the application of equitable duties to the extent they are not covered in the Act. This approach could provide the greatest clarity and certainty about representatives' duties. However, no jurisdiction that we have investigated expressly excludes the application of equity.
- 13.61 In our view, excluding the application of equity is unnecessary. As is often observed, equity follows the law.³⁹ Equity cannot act contrary to a statute.⁴⁰ Additionally, where equity develops its own doctrines, it will (to the extent relevant) replicate or approximate to any relevant statute.⁴¹ Accordingly, where a statutory duty imposes a lesser standard than might be imposed in equity, equity will generally develop consistently with the statutory standard. This means, for example, that equity would not provide a basis to “read up” the recommended duty of representatives to identify and appropriately manage conflicts by requiring a representative to avoid conflicts all together.
- 13.62 Excluding equity might also have unintended consequences. While we have sought to articulate a comprehensive list of duties, we cannot rule out a situation where an equitable obligation that is in harmony with the proposed duties is identified.
- 13.63 Finally, as we discuss in Chapter 22, we consider that representatives should not have a general immunity from the equitable obligation to account to the represented person for benefits received in connection with their role. As we explain in that chapter, we consider it desirable for the courts to be able to consider the application of equitable principles to representatives and to any benefits they obtain in the light of the circumstances of each case.
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³⁸ This can include, for example, duties present in fiduciary relationships (such as that of a trustee and beneficiary or agent and principal) like the duty to avoid conflicts of interest or to make improper gains from the relationship.

³⁹ See Andrew Butler “Basic Concepts” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 23 at 32–34.

⁴⁰ *Re Motorola New Zealand Superannuation Fund* [2001] 3 NZLR 50 (HC) at [64].

⁴¹ See Andrew Butler “Basic Concepts” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 23 at 32.

PART 5:

COURT-ORDERED DECISIONS AND REPRESENTATIVE ARRANGEMENTS



1. In this part, we address the measures through which we recommend te Kōti Whānau | Family Court be able to provide for decisions to be made on behalf of a person. We recommend that a new Act continue to provide for two main types of such measures:
 - a) court-ordered decisions (where the Court itself makes a decision for the person); and
 - b) court-ordered representative arrangements (where the Court appoints a person to make decision(s) for a person).
 2. Chapter 14 addresses when the Family Court should have the power to order any of these measures.
 3. Chapter 15 concerns court-ordered decisions. We recommend that a new Act provide the Court with a general power to make court-ordered decisions about any welfare or property matter. We also address various ancillary and procedural matters.
 4. Chapters 16 to 18 concern court-ordered representative arrangements. In Chapter 16, we address who the Family Court should be able to appoint as a representative. Chapter 17 concerns the nature and scope of the court-appointed representative role. In Chapter 18, we consider safeguarding mechanisms for court-appointed representatives — in particular, record-keeping and reporting requirements and reviews.
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CHAPTER 14

Making court-ordered decisions and appointing representatives

IN THIS CHAPTER, WE CONSIDER:

- when the Family Court should have the power to impose a court-ordered decision or representative arrangement; and
- how a new Act should provide for court-ordered decisions or representative arrangements that are required urgently.

INTRODUCTION

- 14.1 In Chapter 7, we recommend that a new Act continue to allow te Kōti Whānau | Family Court and court-appointed representatives to make decisions on behalf of people with affected decision making in some situations. As we explain in that chapter, this is required for situations where supported decision making is not sufficient to protect and promote the equality, dignity and autonomy of people with affected decision making. In Chapter 12, we discuss how a representative should make decisions on behalf of a represented person.
- 14.2 In this chapter, we address when the Family Court should be able to make a decision on behalf of a person with affected decision making or appoint a representative for them. We refer to one-off decisions made by the Family Court as “court-ordered decisions”. We refer to orders by the Family Court appointing a court-appointed representative as “court-ordered representative arrangements” or, for short, “representative arrangements”.¹

¹ For clarity, a court-ordered representative arrangement does not include a formal support arrangement ordered by the Family Court.

- 14.3 We recommend a single test for when the Family Court may make a court-ordered decision or impose a representative arrangement. Under that test, the Court would have the power to make these orders if:
- (a) the relevant person lacks decision-making capacity for the relevant decision or class or decisions; and
 - (b) there is a need for the court-ordered decision to be made or the representative arrangement to be imposed.
- 14.4 We also recommend the Family Court have the power to make urgent orders in situations where it is satisfied that such an order is necessary in the circumstances.

IMPOSING A COURT-ORDERED DECISION OR REPRESENTATIVE ARRANGEMENT

Current law

- 14.5 The Family Court can make orders that are tailored to particular decisions, often on a one-off basis.² For example, the Court can order that a person lives in a particular place or receives medical treatment.³ These orders come within the term “personal orders” in the Protection of Personal and Property Rights Act 1988 (PPPR Act).⁴ As noted above, we refer to them as “court-ordered decisions”.
- 14.6 The Family Court can also make orders appointing a representative to make decisions for another person. There are two main types of representative the Court can appoint under the PPPR Act: welfare guardians and property managers. A welfare guardian is appointed to make decisions about a person’s personal care and welfare.⁵ A property manager is appointed to make decisions about a person’s property.⁶ In addition, the Court may appoint a person to administer property or income under a specified value.⁷ We refer to people appointed by the Court to make decisions for a person with affected decision making as “court-ordered representatives”.
- 14.7 There are different tests in the PPPR Act for when the Court can make a court-ordered decision, appoint a welfare guardian, appoint a property manager or appoint a person to administer a specific item of property.

Court-ordered decisions

- 14.8 For court-ordered decisions, the Family Court has jurisdiction in respect of any person who “lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and

² Protection of Personal and Property Rights Act 1988, s 10(1)(b)–(i). We discuss the orders that the Court can make further in Chapter 15.

³ Protection of Personal and Property Rights Act 1988, s 10(1)(e)–(f).

⁴ Along with orders that are tailored to particular decisions, the term “personal orders” is defined in the PPPR Act to include other orders, including an order appointing a welfare guardian. See s 2 definition of “personal order”.

⁵ Protection of Personal and Property Rights Act 1988, s 12(1).

⁶ Protection of Personal and Property Rights Act 1988, s 31(1).

⁷ Protection of Personal and Property Rights Act 1988, ss 10(1)(j) and 11. The current specified values are \$25,000 for any item of property and \$40,000 for any yearly income or benefit: s 11(2).

welfare” or who has such capacity but “wholly lacks the capacity to communicate decisions in respect of such matters”.⁸

Welfare guardians

14.9 The test for when the Family Court can make a court-ordered decision also applies as a threshold requirement for orders appointing a welfare guardian.⁹ In addition, the Court must be satisfied that:¹⁰

- (a) the person “wholly lacks” the capacity to make or communicate decisions in relation to any aspect of their personal care and welfare; and
- (b) the appointment of a welfare guardian is “the only satisfactory way to ensure that appropriate decisions are made” in relation to the aspect(s) at issue.

Property managers

14.10 For orders to appoint a property manager, the Family Court has jurisdiction in respect of any property owned by any person who, in the opinion of the Court, “lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property”.¹¹

People appointed to administer property

14.11 For orders appointing a person to administer an item of property under a specified value, the test for court-ordered decisions also applies as a threshold requirement.¹² In addition, the Family Court can only make an order if:¹³

- (a) the person is not subject to a property manager order;
- (b) the Court considers that making a property manager order instead would not be in accordance with statutory objectives (addressed below); and
- (c) the Court considers an order is necessary in all the circumstances.

Other considerations and objectives

14.12 Alongside the requirements set out above, the PPPR Act specifies that the Family Court does not have jurisdiction to impose any court-ordered decision or representative arrangement simply because the person has made or is intending to make any decision that a person “exercising ordinary prudence” would not make.¹⁴ The statutory

⁸ Protection of Personal and Property Rights Act 1988, s 6(1). The person must also be domiciled or ordinarily resident in Aotearoa New Zealand.

⁹ Protection of Personal and Property Rights Act 1988, s 6(1).

¹⁰ Protection of Personal and Property Rights Act 1988, s 12(2).

¹¹ Protection of Personal and Property Rights Act 1988, s 25. The person must also be domiciled or ordinarily resident in Aotearoa New Zealand (or, if not, the property must be situated in Aotearoa New Zealand). It has been held there is no real distinction between the terms “competence” (used with respect to property managers) and “capacity” (used with respect to other court-ordered arrangements). See *Re Tony* (1990) 5 NZFLR 609 (FC) at 613–614.

¹² Protection of Personal and Property Rights Act 1988, s 6(1).

¹³ Protection of Personal and Property Rights Act 1988, s 11(1).

¹⁴ Protection of Personal and Property Rights Act 1988, ss 6(3) and 25(3).

presumption that every person has decision-making capacity until the contrary is proved is also relevant.¹⁵

14.13 The PPPR Act also provides two primary objectives for the Family Court when exercising its jurisdiction in relation to all court-ordered decisions and representative arrangements. These are:¹⁶

- (a) to make the least restrictive intervention possible; and
- (b) to enable or encourage the person to exercise and develop their decision-making capacity to the greatest extent possible.

14.14 When considering an application for a court-ordered decision or representative arrangement, the Family Court must first determine whether it has jurisdiction to make an order. If it does, the Court must then consider whether it should make an order having regard to the primary objectives specified in the PPPR Act.¹⁷

14.15 In addition to these primary objectives, the Family Court also sometimes considers whether imposing a court-ordered decision or representative arrangement would be in the person's best interests. While not expressly stated in the PPPR Act, some courts have interpreted the PPPR Act to require consideration of this.¹⁸

The requirements of the Disability Convention and other human rights obligations

14.16 In Chapter 7, we conclude that the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) does not prohibit court-ordered decisions or representative arrangements in all situations. We also conclude that a new Act should provide for court-ordered decisions or representative arrangements because they are sometimes necessary to uphold the equality, dignity and autonomy of people with affected decision making.

14.17 However, the Disability Convention imposes important requirements in relation to court-ordered decisions or representative arrangements. They must:¹⁹

- (a) respect the rights, will and preferences of the person with affected decision making;
- (b) properly reflect the significance of support for decision making;
- (c) be free of conflicts of interest and undue influence;
- (d) apply for the shortest time possible;
- (e) be subject to regular review by a competent, independent and impartial authority or judicial body; and

¹⁵ Protection of Personal and Property Rights Act 1988, ss 5 and 24. We address the presumption in Chapter 9.

¹⁶ Protection of Personal and Property Rights Act 1988, ss 8 and 28.

¹⁷ Protection of Personal and Property Rights Act 1988, ss 9 and 29.

¹⁸ See for example *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 at 365–366 (HC); and *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [15]. See also Alison Douglass “Best Interests — A Standard for Decision-making” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 63 at 71.

¹⁹ Requirement (b) is found in article 12(3). Requirements (a), (c), (d), (e) and (f) are found in article 12(4). See Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12.

- (f) be “proportional and tailored to the person’s circumstances” and “proportional to the degree to which such measures affect the person’s rights and interests”.²⁰
- 14.18 Court-ordered decisions and representative arrangements also need to comply with other human rights obligations found in domestic and international law, including:²¹
- (a) the right to be free from discrimination;
 - (b) the right to an adequate standard of living;
 - (c) the right to the highest attainable standard of health; and
 - (d) the right to be free from arbitrary detention.
- 14.19 A decision or arrangement that limits rights is still lawful if the limitation on rights is justified in human rights terms. There is no one approach to determining whether a limit on a right is justified. However, some questions that are commonly addressed include whether:²²
- (a) the reason for limiting the right is sufficiently important to justify restricting rights or freedoms;
 - (b) the measure is sufficiently well designed to ensure both that it actually achieves its aim and that it impairs the right or freedom no more than is needed; and
 - (c) the gain to society justifies the extent of the intrusion on the right.
- 14.20 These questions overlap with multiple criteria set out in the Disability Convention — in particular, the proportionality requirement in article 12.

Issues

The person’s wishes and values may not always be centred

- 14.21 There is no express requirement in the PPPR Act for the Family Court to consider the relevant person’s wishes and values when deciding whether to impose a court-ordered decision or representative arrangement. We have also heard that, in practice, applications for court-ordered decisions or representative arrangements do not always centre the person’s wishes and values and that the person is not always supported to participate in proceedings.

The PPPR Act does not ensure court-ordered decisions and representative arrangements are proportional and justified

- 14.22 The PPPR Act goes some way to ensuring court-ordered decisions and representative arrangements are proportional and justified. For example, a welfare guardian cannot be appointed unless the Family Court is satisfied it is the “only satisfactory way to ensure that appropriate decisions are made relating to ... the personal care and welfare of that person”.²³ Similarly, an order for a person to administer property or income under a

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

²¹ See our discussion in Chapter 3, where we give further examples of rights that may be engaged.

²² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [103]–[104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103. The courts do not always apply these tests in such a formal and formulaic way. See *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [100]–[101], in which members of the Kōti Mana Nui | Supreme Court preferred a “simpler proportionality analysis”.

²³ Protection of Personal and Property Rights Act 1988, s 12(2)(b).

specified value can only be made if it is “necessary in all the circumstances”.²⁴ For all orders imposing court-ordered decisions or representative arrangements, the Court is required to have regard to the primary objectives specified in the PPPR Act (least restrictive intervention and encouraging the person to develop their decision-making capacity).

- 14.23 However, despite these requirements, the PPPR Act falls short of ensuring that the intrusion on individual autonomy caused by a decision or arrangement is proportional and justified. First, although property orders and court-ordered decisions can have a significant impact on a person, there is no requirement for the Court to be satisfied these are the “only satisfactory way” to make appropriate decisions or “necessary in all the circumstances”.
- 14.24 Second, although the Family Court has the objective of making the least restrictive intervention for all court-ordered decisions and representative arrangements, framing this as an “objective” does not go far enough by itself to ensure court-ordered decisions and representative arrangements are proportional and justified. This framing appears to leave open the possibility that the objective of least restrictive intervention could be outweighed by other objectives.
- 14.25 In addition to these issues with the framing of the PPPR Act, we have heard that orders appointing welfare guardians and property managers are often not tailored to the person’s circumstances in practice.

There is no clear basis for different tests

- 14.26 It is not clear why there are different tests for different court-ordered decisions and representative arrangements.
- 14.27 In particular, there is no clear basis for having a lower threshold to appoint a property manager than a welfare guardian. We have found no direct explanation of why there are different tests. However, the departmental report on the Bill that became the PPPR Act explains that the strict test for welfare guardians reflects that appointing a welfare guardian was considered to be a significant restriction of a person’s autonomy.²⁵ It is reasonable to infer that the appointment of a property manager was not considered to be as intrusive.
- 14.28 While financial and welfare decisions are of a different nature, in both cases the intervention can be intrusive. Some people experience a loss of control over financial decisions as “a deep infringement upon their autonomy and dignity”.²⁶
- 14.29 Similarly, while court-ordered decisions are tailored and generally one-off decisions, they can have a significant impact. For example, they can extend to matters that representatives are prohibited from making decisions about such as the decision to enter in a marriage or civil union or to refuse consent to a standard medical treatment.²⁷

²⁴ Protection of Personal and Property Rights Act 1988, s 11(1)(c).

²⁵ Department of Justice *Protection of Personal and Property Rights Bill: Report of the Department of Justice* (JL/87/308, 22 May 1987) at 10.

²⁶ Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [8.93]. As we note below, this point was also made by submitters and participants in the focus groups we held.

²⁷ Protection of Personal and Property Rights Act 1988, s 18(1)(a) and (c).

Consultation

Test for imposing a court-ordered decision or representative arrangement

14.30 In our Second Issues Paper, we expressed our preliminary view that the test for imposing a court-ordered decision or representative arrangement should contain three elements.²⁸ We said the Family Court should be satisfied that:

- (a) the relevant person lacks relevant decision-making capacity;
- (b) the circumstances give rise to a need for a representative; and
- (c) less intrusive measures are either not available or not suitable.

14.31 We asked submitters whether they agreed the Court should be satisfied of these three elements before imposing a decision or arrangement.

Lack of decision-making capacity

14.32 Thirty-three submitters gave feedback on whether the Family Court should have to be satisfied that the relevant person lacks relevant decision-making capacity to impose a court-ordered decision or representative arrangement. Almost all agreed. A few submitters disagreed or only partly agreed.

14.33 Of the submitters that agreed, almost all gave the reason (albeit expressed in a variety of ways) that court-ordered decisions and representative arrangements should never be imposed on a person with decision-making capacity because they can simply make their own decisions. Some of these submitters commented that a person can make an enduring power of attorney (EPOA) if they have decision-making capacity, so a court-ordered decision or representative arrangement is not necessary.

14.34 Conversely, a participant in one of the focus groups we held to hear from people with lived experience said requiring the person to lack decision-making capacity might mean they can continue harmful behaviour because they have been assessed as having decision-making capacity.

Need for the decision or arrangement

14.35 Thirty-seven submitters gave feedback on whether it should be a requirement that the person's circumstances give rise to a need for a court-ordered decision or representative arrangement. The vast majority agreed it should.

14.36 Most submitters that gave reasons said a lack of decision-making capacity is not enough for a court-ordered decision or representative arrangement to be justified. The other common reason given by submitters was that requiring a need for the decision or arrangement will help ensure that the least restrictive intervention is made.

Less intrusive or restrictive measures are not available

14.37 Forty-one submitters gave feedback on whether less intrusive or restrictive measures should need to be unavailable or unsuitable before a court-ordered decision or

²⁸ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakataua a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [10.66].

representative arrangement can be imposed. The vast majority agreed. A few submitters partly agreed and one disagreed.

14.38 For submitters that agreed, nearly all who provided reasons said imposing a court-ordered decision or representative arrangement has a significant impact on the relevant person and should only be done as a last resort or when no other options are available. A few submitters said this approach supports the person’s human rights. One of these submitters specified that this approach ensures that support is provided to the person before a decision is made or arrangement imposed. Another said this approach maximises the independence of the individual.

14.39 Of the submitters that disagreed, two provided reasons. One submitter said requiring that no less restrictive measures are available would increase complexity. Chris Kelly, a lawyer, said that the approach needs to be realistic. He said:

If further issues are likely to arise, it makes sense to put long term arrangements in place. Families should not be put to the stress and expense of further court interventions at a later time if a long-term measure would avoid this.

14.40 Some participants in our lived experience focus groups made relevant comments. One participant stressed that orders should only be made when “all other options have been exhausted”. Another said the law should create opportunities for people to make as many decisions in as many areas as possible and should “take over as little as possible”. Another participant said the law should “whakamana somebody’s ability to make a decision regardless of their impairment”.

When a need for a court-ordered decision or representative arrangement might arise

14.41 In our Second Issues Paper, we identified four possible circumstances in which a court-ordered decision or representative arrangement might be needed — namely:²⁹

- (a) where the relevant person needs a representative to interpret their will and preferences;
- (b) when what can be understood of the person’s will and preferences does not provide a sufficient basis on which to make a decision;
- (c) where there will be legal uncertainty if the decision is made by a person without decision-making capacity; and
- (d) where necessary to prevent significant harm to the person.

14.42 We asked submitters in what circumstances a court-ordered decision or representative arrangement is needed. Sixty-four submitters commented on this issue.

14.43 The most common response was that court-ordered decisions or representative arrangements might sometimes be needed to prevent harm. Most submitters that referred to harm expressed their views on both the relevant types of harm and what the threshold for harm should be.

14.44 With respect to the types of harm that may require a court-ordered decision or representative arrangement, the majority of submitters that commented focused on physical and financial harm to the relevant person. A few submitters said mental or

²⁹ Second Issues Paper at [9.34].

emotional harm is also relevant. A small number said a decision or arrangement might be necessary to prevent harm to others besides the relevant person.

- 14.45 With respect to the threshold for harm, most submitters used the language of “significant harm” when discussing harm as a basis for need. For example, Te Kāhui Tika Tangata | Human Rights Commission and Te Kāhui Ture o Aotearoa | New Zealand Law Society said departure from the person’s will and preferences should only be permitted if the harm is significant. Te Tari Kaumātua | Office for Seniors said there should be a “high bar for intervention”. The Adult Guardianship Services Trust said court-ordered decisions or representative arrangements should only come into play where there is the possibility of significant harm.
- 14.46 Some submitters also referred to the potential need for a court-ordered decision or representative arrangement to avoid legal uncertainty. An example was where the person is interacting with professional organisations such as banks or housing providers.
- 14.47 Many submitters also referred to the situation where a person needs a representative to interpret their will and preferences and the situation where what can be understood of a person’s will and preferences is not sufficient to make a decision.
- 14.48 A number of submitters said a court-ordered decision or representative arrangement may be required when there is simply a need to make a decision, without specifying a particular basis for need. A few of these submitters described situations where an EPOA had not been put in place and an order was needed so that decisions could be made.
- 14.49 Participants from the focus groups we held to hear from people with lived experience also expressed views about when a court-ordered decision or representative arrangement might be needed. Again, the most common response was that they may sometimes be needed to prevent harm. This was expressed in various ways, including through language such as “safety”, “risk” and “if they are in danger”. Some participants supported their reasons with personal accounts of harm they, or someone they knew, had suffered.

Whether the test should be the same for property and welfare representatives

- 14.50 In our Second Issues Paper, we expressed our preliminary view that the test for the Family Court to appoint a representative should be the same for both property and welfare representatives.³⁰ We asked submitters whether they agreed. Forty-two submitters gave feedback on this issue.
- 14.51 Approximately three-quarters of these submitters agreed that the tests should be the same. Most of these submitters that gave reasons said there is no reason the two tests should be different. A few submitters said both can have significant impacts on the relevant person. A few submitters said the current law is confusing and can lead to misunderstandings about the different roles.
- 14.52 Submitters that disagreed and gave reasons said the test should be different because the arrangements require different skills and relate to different types of decisions.

³⁰ Second Issues Paper at [10.65].

Recommendations

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 the period 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.

A single test for the imposition of any court-ordered decision or representative arrangement

14.53 We recommend that a new Act have a single test for determining whether any court-ordered decision should be made or any representative arrangement imposed. This would be a change from the PPPR Act, which contains different tests for appointing welfare guardians, property managers and property administrators and for making court-ordered decisions.

14.54 As we explain above, all types of court-ordered decisions and representative arrangements can have a significant impact on the person and raise important human rights considerations. We have not identified any reason to have a different test for the different types of orders. Every jurisdiction we investigated that specifies a need-based threshold for imposing a court-ordered decision or arrangement has a single test.³¹

14.55 The test we recommend would determine *whether* the Family Court is able to make a court-ordered decision or impose a representative arrangement. For court-ordered

³¹ See for example Guardianship Act 1987 (NSW), ss 14(1) and 25G(b); Guardianship and Administration Act 2019 (Vic), s 30(2)(b); Adults with Incapacity (Scotland) Act 2000, s 57(2)(c); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(5).

decisions, where the Court is also making the substantive decision on behalf of the relevant person, a new Act should also address *what* decision the Court should make. As we explain in Chapter 15, we consider that our proposed Decision-Making Rule 1 (that wishes and values should be centred and rights respected) should apply.

The person must lack decision-making capacity

- 14.56 The first element of our recommended test is that the person lacks relevant decision-making capacity. In Chapter 8, we explain why we consider the concept of decision-making capacity should be retained in a new Act to identify when a person cannot make an autonomous decision.
- 14.57 Lack of decision-making capacity has long been understood as a fundamental requirement for making a court-ordered decision or imposing a representative arrangement. Every overseas jurisdiction we investigated includes this requirement.³² In our view, it provides a crucial safeguard against people with affected decision making having their legal agency restricted on the basis of disability alone or without a logical connection between the court-ordered decision or representative arrangement and the decision(s) to which they relate.
- 14.58 The Family Court should have the option of directing that a formal decision-making capacity assessment be completed and the report filed in evidence with respect to an application. For example, the Court might make such a direction in advance of its determination of an application to appoint a representative. For clarity, the Court should continue to be able to receive other evidence relevant to determining a person's decision-making capacity, as it can under the PPPR Act.
- 14.59 Almost all submitters that gave feedback on this issue supported retaining lack of decision-making capacity as a threshold requirement for court intervention. However, we also heard this requirement can prevent people who are making harmful decisions from being helped where they have been assessed to have decision-making capacity. While we acknowledge these difficult situations, we do not consider a new Act should enable a person's legal agency to be restricted solely on the basis that their decisions may cause them harm.
- 14.60 As we explain in Chapter 3, the values of dignity, equality and autonomy often support people being able to make their own decisions, even if they appear harmful. At the same time, these values can support intervention to protect vulnerable people from harm. A lack of decision-making capacity is a particular vulnerability that indicates intervention might be justified. Whether other vulnerabilities might justify intervention is best considered with respect to each vulnerability on its own terms. The law relating to adult decision-making capacity should not be extended to enable intervention in relation to people who have decision-making capacity.
- 14.61 In Chapter 9, we recommend that decision-making capacity be assessed in the light of the support that a person is expected to have available to them when making the relevant decision or class of decisions. This means that, under our recommendations, the Family Court could only consider imposing a court-ordered decision or representative

³² See for example Guardianship and Administration Act 2019 (Vic), s 30(2)(a); Guardianship and Administration Act 2000 (Qld), s 12(a); Mental Capacity Act 2005 (UK), s 16(1); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 37 and 38.

arrangement where it is satisfied that a person lacks relevant decision-making capacity with that support.

There must be a need for the court-ordered decision or representative arrangement

- 14.62 The second element of our recommended test for making a court-ordered decision or imposing a representative arrangement is that there is a need for the decision or representative arrangement.
- 14.63 Court-ordered decisions and representative arrangements have the potential to engage or limit a range of rights. By their nature, they restrict a person’s legal agency, thus potentially limiting the right to enjoy legal capacity on an equal basis with others.³³ They may also limit or engage other rights. For example, a court-ordered decision that a person is to undergo a medical procedure might be in tension with the person’s right to refuse medical treatment. To ensure any limit on rights is justified, we consider that the test imposed by a new Act must ensure that any court-ordered decision or representative arrangement imposed is proportional and tailored to the person’s circumstances. A legislative requirement that there is a need for the decision or arrangement would help ensure this requirement is met.
- 14.64 Virtually all overseas legislation we have examined requires need to be present in some way before making an order.³⁴ Most statutes cast this need in general terms. For example, New South Wales legislation requires a tribunal to be satisfied that “the person is in need of a guardian”.³⁵ Similarly, in Scotland, an order can be made if it appears that “a guardianship order is necessary for the protection of the property, financial affairs or personal welfare of the adult”.³⁶ Of the jurisdictions we investigated, only legislation in South Australia and England and Wales does not have any kind of need requirement. However, in both cases, the body authorising any intervention must consider whether there are less restrictive interventions available.³⁷

The circumstances where a court-ordered decision or representative arrangement is needed

- 14.65 We recommend that a new Act specify the situations in which a court-ordered decision or representative arrangement is “needed”. By itself, a general requirement for a need may not prevent overly paternalistic intervention that undermines a person’s equality, dignity and autonomy. Specifying the situations where a need arises would help ensure the concept is consistently understood.
- 14.66 We address the situations in which a court-ordered decision or representative arrangement should be considered needed below. In our view, listing these situations

³³ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(2).

³⁴ See for example Guardianship Act 1987 (NSW), s 14(1); Guardianship of Adults Act 2016 (NT), s 11(1)(c); Guardianship and Administration Act 2000 (Qld), s 12(1)(b); Guardianship and Administration Act 1995 (Tas), ss 20(1)(b)(ii) and 51(1)(b)(ii); Guardianship and Administration Act 2019 (Vic), s 30(2)(b); Adults with Incapacity (Scotland) Act 2000, s 57(2)(c); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(5).

³⁵ Guardianship Act 1987 (NSW), s 14(1).

³⁶ Adults with Incapacity (Scotland) Act 2000, s 57(2)(c).

³⁷ Guardianship and Administration Act 1993 (SA), s 5(d); and Mental Capacity Act 2005 (UK), s 1(6).

exhaustively in a new Act would not unduly narrow the Family Court’s ability to make a decision or impose an arrangement. We are satisfied the situations we have identified would enable decisions to be made or arrangements imposed in all cases where they are needed.

The court-ordered decision or representative arrangement is needed to promote the person’s wishes and values

- 14.67 A new Act should provide that a court-ordered decision or representative arrangement is “needed” if it is required to promote the person’s wishes and values. We use the term “promote” because it is a sufficiently general term to capture the range of situations that may arise.
- 14.68 We consider that a court-ordered decision or representative arrangement is needed to promote a person’s wishes and values in two types of situation.
- 14.69 First, a court-ordered decision or representative arrangement is needed to promote a person’s wishes and values where there is a decision (or decisions) that the person wants or will be required to make but there is a danger that the decision(s) will not be made, or will be made in a way that does not reflect the person’s wishes and values, unless the Family Court or a representative makes the decision(s) (R62(a)(i)). This may be for a range of reasons.
- 14.70 For example, the person may need a decision maker to interpret or communicate their wishes and values for one or more decisions. This situation is anticipated by the United Nations Committee on the Rights of Persons with Disabilities, which notes that a person’s will and preferences will sometimes not be clear (even after significant efforts have been made to establish them).³⁸ Our consultation process affirmed that a court-ordered decision or representative arrangement is sometimes needed in this situation. People with affected decision making shared with us their lived experience of needing close family or whānau members or friends who could understand them best. We also heard from representatives, particularly parents, who explained that, because they have known the person for so long, they can understand what the person wants even though the person might be unable to communicate it clearly to others. Some submitters and focus group participants also emphasised the importance of having someone to speak authoritatively to the person’s wishes and values so that third parties do not make inaccurate assumptions or assessments that fail to respect the person’s wishes and values.
- 14.71 Other examples are where:
- (a) the decision that the relevant person wants or needs to make might not be made unless there is a positive communication by or on behalf of the person, which they are unable to provide themselves; or
 - (b) the person may be at risk of communicating a decision that does not reflect their wishes and values (perhaps because they have been manipulated into doing so).
- 14.72 In our view, a new Act should not seek to precisely identify the types of situation that might fall within this first category of need to promote a person’s wishes and values

³⁸ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [21]. We consider “interpreting” necessarily includes an element of communicating because the interpreter needs to communicate the decision to third parties. This is why we refer to interpret or communicate.

(R62(a)(i)). Individual circumstances will vary widely, and a more fine-grained articulation of need may unintentionally exclude some circumstances that should be included. The essential enquiry in all cases should be whether, in the person's particular circumstances, a court-ordered decision or court-appointed representative is needed to ensure that the person's wishes and values are given effect in relation to decision(s) that they wish, or will be required, to make.

- 14.73 As we discuss in Chapter 12, in some cases what can be understood of the person's wishes and values may not, alone, be sufficient to make a decision. Their wishes and values may be sufficient to eliminate some possible options but leave a number of other options remaining, each of which is consistent with what can be understood of their wishes and values. In such cases our recommended Decision-Making Rule 1 would require the decision to reflect factors additional to the person's wishes and values (that is, the person's wellbeing and what will be the least restrictive). Such a decision would nonetheless promote the person's wishes and values, so far as they can be understood, and would therefore come within the first category of need in R62(a)(i).
- 14.74 The second type of situation where a court-ordered decision or representative arrangement is needed to promote a person's wishes and values is where the person wants to make one or more decisions that, to be legally effective, must be made by someone with decision-making capacity (R62(a)(ii)). The need for a court-ordered decision or representative arrangement in this situation arises because of the legal barriers that people with affected decision making face. Many areas of the law require a person to have decision-making capacity to make a decision or enable decisions to be subsequently invalidated if made by a person without decision-making capacity.³⁹
- 14.75 For example, a person with advanced dementia may wish to move to an aged care facility but not have decision-making capacity to consent to that move. In those circumstances, the facility will require legal certainty that the decision to move is lawful. During our consultation process, we also heard personal stories of banks, landlords, hospitals and other service providers refusing to deal with people with affected decision making unless they had a representative or court order.

The court-ordered decision or representative arrangement is needed to prevent a material risk of significant harm to the person

- 14.76 A new Act should also provide that a court-ordered decision or representative arrangement is "needed" where there is a material risk of significant harm occurring to the relevant person if a decision is not made or a representative arrangement is not imposed. In Chapter 12, we explain that sometimes a decision that does not give effect to a represented person's wishes and values needs to be made to protect them from a material risk of significant harm.⁴⁰ This is the only situation where the Family Court should

³⁹ As we noted in our Second Issues Paper, we identified hundreds of references to decision-making capacity in statutes and several common law rules relating to it: at [7.33].

⁴⁰ In Chapter 12, we expand on what "material risk of significant harm" means, including the level of risk and harm required, as well as types of harm that are relevant. The same considerations apply here.

be permitted to make a court-ordered decision or impose a representative arrangement that it knows to be inconsistent with the person's wishes and values.⁴¹

- 14.77 Some submitters said the risk of harm should include harm to others besides the person in respect of whom the order is sought. While we recognise a person's decisions may sometimes give rise to a risk of harm to others, we do not consider that a court-ordered decision or arrangement should be able to be imposed on this basis. Other laws exist to protect wider society from harm,⁴² including to protect those who are dependent on the person with affected decision making such as children.⁴³ The focus of a new Act should be protecting and promoting the autonomy, dignity and equality of people with affected decision making.⁴⁴

Future needs

- 14.78 We recommend that, when the Family Court is considering whether there is a need for a court-ordered decision or representative arrangement, it should be able to consider the person's future needs where it is likely that the need will arise within the period of the order.
- 14.79 If future needs could never be considered, an applicant would be required to wait until the person's need has become urgent to make an application. This would mean the relevant person's needs may go unmet for a period, potentially resulting in significant harm to them. For example, a person with progressive dementia may be aware that they might not meet our recommended threshold for need, but it may be apparent that leaving them without a property representative will shortly risk significant financial harm to them. It should be possible to appoint a representative to meet this need.
- 14.80 However, court-ordered decisions and representative arrangements should not be imposed prematurely. Imposing a court-ordered decision or representative arrangement on the basis that a need may arise at an indefinite point in the future would unduly limit a person's legal agency, undermining their equality, dignity and autonomy. We therefore recommend that consideration of possible future needs be restricted to needs that are likely to arise within the period of the proposed arrangement (or the period in which the proposed decision will have effect).

Least restrictive intervention

- 14.81 We recommend that a new Act specify that a court-ordered decision or representative arrangement is not "needed" if a less restrictive intervention can reasonably meet the relevant person's need for the decision or arrangement. This recommendation applies both to the type of order (for example, appointing a welfare representative) and the scope of the order (for example, the matters about which a welfare representative can

⁴¹ Legislation in Victoria also recognises this. It is a decision-making principle of the Guardianship and Administration Act 2019 (Vic) that "the represented person's will and preferences should only be overridden if it is necessary to prevent serious harm to the represented person": s 9(1)(e).

⁴² For example, police safety orders or protection orders under the Family Violence Act 2018.

⁴³ For example, the powers granted in relation to the care and protection of children and young persons in pt 2 of the Oranga Tamariki Act 1989.

⁴⁴ There may be some situations where harm to others constitutes or contributes to harm to the person themselves. In that situation, harm to others should be relevant, but the harm should be measured by reference to the person themselves and not others.

make decisions). It also takes account of situations where the need can be met by measures other than a court-ordered decision or representative arrangement such as appointing a formal supporter.

- 14.82 This recommendation is critical to ensuring that any restrictions on a person’s legal agency are justified in human rights terms. As noted above, legal measures relating to the exercise of legal capacity must be “tailored to the person’s circumstances” and “proportional to the degree to which such measures affect the person’s rights and interests”.⁴⁵ Any limit on a right or freedom must “impair the right or freedom no more than is reasonably necessary”.⁴⁶ It follows that the Family Court should not be able to make a court-ordered decision or impose a representative arrangement that is overly restrictive, relative to the need for the decision or arrangement. Feedback during our consultation process reinforced this point.
- 14.83 However, the test for imposing a court-ordered decision or representative arrangement must also be workable. The needs of people with affected decision making vary widely in terms of their nature and extent. If the requirement for measures to be the least restrictive possible were taken too far, it would often be difficult to demonstrate the requisite need and to tailor a decision or arrangement appropriately. For example, it is sometimes appropriate for a representative to be appointed on a general basis such as with respect to the person’s welfare or for financial decisions. Where there is a general need for such an order, applicants should not be required to demonstrate a need with respect to every decision that could potentially be required within the period of the order. Such a requirement would result in decisions or arrangements tailored so prescriptively that they are too inflexible to meet the person’s needs.
- 14.84 For this reason, we recommend that a court-ordered decision or representative arrangement should not be considered necessary if a less restrictive intervention can *reasonably* meet the need for the court-ordered decision or representative arrangement. The reference to “reasonably” would allow the Family Court to make orders that are workable in the light of the potentially complex needs of people.
- 14.85 The decision-making rules we recommend in Chapter 12 are also relevant to ensuring that court-ordered decisions and representative arrangements are proportional and justified. One of our recommended rules is that a decision maker should use reasonable efforts not to make a decision for which the represented person has decision-making capacity, unless the represented person wants them to make the decision.⁴⁷
- 14.86 Every overseas jurisdiction we considered requires the relevant court to consider in some way whether a less restrictive intervention is available.⁴⁸ Some overseas legislation

⁴⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

⁴⁶ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

⁴⁷ See R56.

⁴⁸ Guardianship Act 1987 (NSW), s 4; Guardianship of Adults Act 2016 (NT), s 11(2)(e); Guardianship and Administration Act 2000 (Qld), s 11B general principle 9(b); Guardianship and Administration Act 1993 (SA), s 5(d); Guardianship and Administration Act 1995 (Tas), ss 20(2)(b) and 51(2)(b); Guardianship and Administration Act 2019 (Vic), s 8(1)(c); Mental Capacity Act 2005 (UK), ss 1(6) and 16(3); Adults with Incapacity (Scotland) Act 2000, s 1(3); and Assisted Decision-

describes the concept of less restrictive intervention more precisely. For example, they require an arrangement to be the least restrictive of the person’s “rights and personal autonomy”⁴⁹ or “freedom of decision and action”.⁵⁰ We do not recommend this approach because identifying the least restrictive court-ordered decision or representative arrangement is a highly contextual exercise and a wide range of considerations can be relevant. Describing the concept of “less restrictive intervention” more precisely could unduly limit the matters considered.

- 14.87 For clarity, we do not recommend that a new Act require the Family Court to automatically prefer either a court-ordered decision or a court-ordered representative arrangement. As we have explained, assessing the least restrictive intervention is a heavily contextual exercise that depends on the circumstances. There is no clear case that either type of order is less restrictive than the other. The terms of an order are equally relevant to its restrictiveness as the type of order imposed.
- 14.88 For example, a court-ordered decision might initially appear to be less restrictive than the Family Court appointing a representative. However, the only available court-ordered decision might be for the person to move into residential care whereas the ongoing support provided by a court-appointed representative might allow the person to continue living independently.⁵¹

The person’s wishes and values

- 14.89 We recommend that, when the Family Court is deciding whether a court-ordered decision or representative arrangement is needed, it should be required to take the person’s wishes and values into account. A person’s wishes and values will be relevant in different ways, depending on the reason (or reasons) a court-ordered decision or representative arrangement is needed.⁵²
- 14.90 Where a court-ordered decision or representative arrangement is needed to protect and promote a person’s wishes and values, it is obviously important for the Court to consider those wishes and values as they relate to the making of the decision or the appointment of the representative. Even where those wishes and values are not clear, the Family Court should consider what it understands of them.
- 14.91 Where a court-ordered decision or representative arrangement is needed to prevent a material risk of significant harm to the person, the decision or arrangement is likely to be inconsistent with the person’s wishes and values. As we note above, this is the only situation in which we consider the Family Court should be able to make a decision or impose a representative arrangement that it knows to be inconsistent with a person’s wishes and values. However, the person’s wishes and values remain relevant. In particular,

Making (Capacity) Act 2015 (Ireland), s 8(6)(a). Some legislation (for example in Scotland) requires the intervention to be the least restrictive. Other legislation (such as in the Northern Territory) instead refers to whether there are less restrictive alternatives. In each case, the essential enquiry is the same. Te Tari Tohutohu Pāremata | Parliamentary Counsel Office would be able to advise on how exactly our recommendation should best be reflected in a new Act.

⁴⁹ Guardianship and Administration Act 1993 (SA), s 5(d).

⁵⁰ Guardianship and Administration Act 1995 (Tas), ss 20(2)(b) and 51(2)(b).

⁵¹ In the Second Issues Paper, we asked whether there should be a statutory preference for a court-ordered decision or representative arrangement: at 227. For similar reasons, we do not recommend this.

⁵² Where there are multiple grounds of need, the person’s wishes and values will need to be considered with respect to multiple matters.

the person's risk tolerance will be relevant to determining whether a risk of harm to the person is sufficiently significant to warrant intervention. While not determinative, the person's wishes and values must therefore be considered.

- 14.92 Every overseas jurisdiction we considered requires the relevant court to consider the person's wishes and values (or analogous matters) in some way. We have seen examples of overseas legislation requiring the person's wishes and values to be considered as part of an assessment of need, as a factor for a court to consider when deciding whether and what order to make and as a principle for a court to take into account.⁵³

The power to make court-ordered decisions or impose arrangements different to those sought

- 14.93 We recommend the Family Court have a power to make a court-ordered decision or impose an arrangement that is different from that sought where it is less restrictive than the decision or arrangement sought or the Court is satisfied no interested party would oppose the order.
- 14.94 An applicant will not always be clear about what decision or arrangement is needed when making an application. For example, a person may apply for an order to be made appointing a welfare representative for a relative who is struggling to make decisions and living at home by themselves. The Family Court may consider, in the light of the evidence, that the relative's needs can be met through a less restrictive order such as appointing a formal supporter or making a court-ordered decision. To avoid unnecessary delay where a person may need a court-ordered decision or arrangement, the Court should be able to make an alternative order that is less restrictive than the order sought.
- 14.95 We also recommend the Family Court should be able to impose a more restrictive order if it is satisfied that no interested party would oppose the order. The Court should not be able to impose a more restrictive order where interested parties may oppose it. In that situation, interested parties must be given a chance to consider and oppose the order. This is important to ensure the relevant person's rights are not infringed without justification.

Related matters

- 14.96 For clarity, we address two matters not addressed directly or at length in our recommendations: orders to give effect to court-ordered decisions or representative arrangements, and orders to administer property.

Orders to give effect to court-ordered decisions or representative arrangements

- 14.97 Section 10(4) of the PPPR Act enables the Family Court to make ancillary orders "to give effect, or better effect" to a court-ordered decision, an order appointing a welfare guardian or an order appointing a person to administer a specific item of property. The power does not apply to orders appointing a property manager.

⁵³ Guardianship Act 1987 (NSW), s 4(d); Guardianship of Adults Act 2016 (NT), s 4(3)(a); Guardianship and Administration Act 2000 (Qld), s 11B, general principle 8(4); Guardianship and Administration Act 1993 (SA), s 5(a)–(b); Guardianship and Administration Act 1995 (Tas), s 8(1)(c); Guardianship and Administration Act 2019 (Vic), s 31(a); Mental Capacity Act 2005 (UK), s 4(6); Adults with Incapacity (Scotland) Act 2000, s 1(4)(a); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(b)–(c).

- 14.98 Te Kōti Matua | High Court has observed that section 10(4) of the PPPR Act “is clearly a broad power and should not be interpreted restrictively without good reason”.⁵⁴ The power has been used widely, including to:
- (a) allow remuneration for consequential services provided as the result of a welfare guardian’s decisions;⁵⁵
 - (b) authorise the use of force to give effect to decisions (as we address in Chapter 23);⁵⁶
 - (c) modify a tenancy arrangement;⁵⁷ and
 - (d) establish a professional panel to monitor a person’s treatment.⁵⁸
- 14.99 In Chapter 15, we discuss section 10(4) of the PPPR Act in relation to court-ordered decisions and recommend the Family Court continue to have the power to make ancillary orders to give effect to such decisions. The power to make ancillary orders is clearly required for court-ordered decisions to be effective.
- 14.100 We did not consult on section 10(4) of the PPPR Act and it was not raised as an issue during our consultation process. As we discuss in Chapter 23, more extensive review is required in relation to the use of force to give effect to decisions. This work will be relevant to the scope of the Family Court’s ancillary powers, including whether the Court requires a power to make ancillary orders in relation to court-appointed representative arrangements (as well as court-ordered decisions). Pending conclusion of that review, we anticipate that a new Act would continue to have a provision similar to s 10(4) of the PPPR Act.

Orders to administer property

- 14.101 The PPPR Act provides for the Family Court to appoint a person to administer the property, income or other benefit of another person under a specified threshold, without the need to become a property manager.⁵⁹ The Court must be satisfied that making such an order is “necessary in all the circumstances”.⁶⁰ It must also be satisfied that appointing a property manager instead would not accord with the objectives of making the least restrictive intervention possible and enabling or encouraging the relevant person to exercise and develop their decision-making capacity.⁶¹ Every person appointed to administer property must enable or encourage the relevant person to exercise and develop their decision-making capacity.⁶² The Court must also specify a date within three years for the person to apply for a review of such an order.⁶³

⁵⁴ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [42].

⁵⁵ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716.

⁵⁶ See for example *LH v CC* [2020] NZFC 8891, [2020] NZFLR 835.

⁵⁷ *CCS Disability Action (Wellington) Branch Inc v JCE* [2011] NZFLR 696 (FC).

⁵⁸ *Re S (shock treatment)* [1992] NZFLR 208 (DC).

⁵⁹ Protection of Personal and Property Rights Act 1988, s 11.

⁶⁰ Protection of Personal and Property Rights Act 1988, s 11(1).

⁶¹ Protection of Personal and Property Rights Act 1988, s 11(1).

⁶² Protection of Personal and Property Rights Act 1988, s 11(3).

⁶³ Protection of Personal and Property Rights Act 1988, s 11(4).

14.102 We did not consult on orders to administer property and are not aware of any issues with this power.⁶⁴ For this reason, we do not make any recommendations about the details of such arrangements. However, we recommend that the Family Court continue to be able to appoint a person to administer property. As we note in Chapter 17, we consider this power is useful in situations where a person has very modest property or income and needs someone to administer it for them. It means that a person applying to be a welfare representative (or any person generally) can apply to administer a represented person's property or income up to a certain threshold without having to make an application to be a property representative. Under our recommendations, a property administrator would be acting as a representative and accordingly be required to comply with the decision-making rules and be subject to the general duties of representatives.

URGENT ORDERS

14.103 In this section, we explain why we consider the Family Court should have the power to make urgent orders under a new Act.

Current law

14.104 The PPPR Act provides for different types of expedited orders for care and welfare and property matters.

14.105 For care and welfare matters, the PPPR Act allows for “interim orders” to be made by the Family Court (either of its own motion or following an application) pending final determination of an application for the imposition of a court-ordered decision or representative arrangement.⁶⁵ The PPPR Act states that every party to the application for an interim order and the person in respect of whom the order is sought must receive notice and is entitled to be heard.⁶⁶ However, the Family Court has held that an interim order can be made without the person in respect of whom the order is sought being served, as long as a lawyer has been appointed for the person and is in a position to be heard.⁶⁷ Interim orders can last no longer than six months. After making an interim order, the Court may make one further interim order, make a final order or dismiss the application.

14.106 For property matters, the PPPR Act provides for “temporary orders” to be made.⁶⁸ Orders may be made where the Family Court is satisfied that it is in the best interests of the person in respect of whom the order is sought that urgent provision be made “for the protection of his or her property or any part of it pending the final determination of the application”.⁶⁹ The person in respect of whom the order is sought is not entitled to be served or heard with respect to the application or to attend the court hearing. They also

⁶⁴ We did hear feedback that the threshold under which these orders can be made was too low. However, this amount was raised in 2024 and is scheduled to continue rising incrementally. See Protection of Personal and Property Rights Order 2024.

⁶⁵ Protection of Personal and Property Rights Act 1988, s 14.

⁶⁶ Protection of Personal and Property Rights Act 1988, s 14(2).

⁶⁷ *Public Trust v MJD* [2013] NZFC 2706, [2013] NZFLR 911 at [19].

⁶⁸ Protection of Personal and Property Rights Act 1988, s 30.

⁶⁹ Protection of Personal and Property Rights Act 1988, s 30(1)(c).

have no right to call or cross-examine witnesses.⁷⁰ However, the general requirement for a lawyer to be appointed for the person applies.⁷¹ A temporary order has a time limit of three months.⁷²

14.107 The Family Court has observed that applications for interim and temporary orders can be dealt with urgently. As long as a lawyer for subject person has been appointed and is in a position to be heard, an application can be set down to be heard “if necessary in a matter of hours”.⁷³

Overseas approaches

14.108 Some jurisdictions we have investigated also provide for “interim orders”, “urgent orders” or “emergency orders”.⁷⁴ The features of these orders and the extent to which procedural safeguards can be dispensed with vary widely. In particular, jurisdictions vary with respect to:

- (a) whether such an order can only be made on an interim basis (pending determination of a substantive application);
- (b) whether a court hearing is required;
- (c) whether notice needs to be given to interested parties;
- (d) the period for which such an order can have effect (this ranges from 21 days to six months); and
- (e) the threshold for urgency required to make such an order.

Issues

14.109 Interim and temporary orders can be useful in urgent situations. We consider a new Act should continue to provide for orders that can be made urgently. However, there are some issues with the way interim and temporary orders are provided for in the PPPR Act.

14.110 First, it is not clear why there are different requirements for interim orders in relation to welfare and temporary orders in relation to property. Commentators have observed that “decisions in relation to care and welfare are too significant to dispense with the usual safeguards” of an application.⁷⁵ This suggests that decisions in relation to property might be regarded as less significant. As we discuss above, however, orders relating to property

⁷⁰ Protection of Personal and Property Rights Act 1988, s 30(3).

⁷¹ Protection of Personal and Property Rights Act 1988, s 65(1).

⁷² Protection of Personal and Property Rights Act 1988, s 30(7).

⁷³ *Public Trust v MJD* [2013] NZFC 2706, [2013] NZFLR 911 at [19].

⁷⁴ Guardianship and Management of Property Act 1991 (ACT), s 67; Guardianship Act 1987 (NSW), s 25H (although only for financial management orders); Guardianship and Administration Act 2000 (Qld), s 80ZR; Guardianship and Administration Act (SA) 1993, s 66(2); Guardianship and Administration Act 1995 (Tas), s 65; Guardianship and Administration Act 2019 (Vic), s 36; Mental Capacity Act 2005 (UK), s 48; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 48.

⁷⁵ Greg Kelly and Kimberley Lawrence “Participation in Litigation” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 361 at 371.

can also have a significant impact on the relevant person. Conversely, orders relating to welfare can be required just as urgently as orders relating to property.⁷⁶

- 14.111 Second, both interim and temporary orders can only be made “pending the final determination of [an] application”.⁷⁷ Because of this, commentary suggests that interim orders are envisaged as “stopgap measures prior to the substantive hearing”.⁷⁸ There is no provision in the PPPR Act for situations where an urgent order needs to be made for a limited time without the need for a subsequent court hearing or a general order. Despite this, interim orders have been made on such a basis. For example, in *Nesbit v S*, the Family Court made interim orders to treat a person who did not want to receive treatment for toxoplasmosis and to enable reasonable force to be used for this purpose.⁷⁹ Once treatment was complete, there was no further need for an order.⁸⁰
- 14.112 Third, the PPPR Act is unclear about when interim orders should be made. No basis or threshold for making them is specified. By contrast, the PPPR Act specifies that temporary orders relating to property can only be made if “it is in the best interests of that person that urgent provision be made for the protection of his or her property”.⁸¹
- 14.113 Finally, the requirement that temporary orders be in the best interests of the person would not be appropriate in a new Act, given our conclusion that measures relating to the exercise of legal capacity should be centred on a person’s wishes and values.

Recommendations

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.

⁷⁶ As we note above, the Family Court has observed the statutory requirement for the subject person to be served with an application for an interim order (in s 14(2) of the PPPR Act) can be dispensed with, as long as a lawyer has been appointed for them and is in a position to be heard: *Public Trust v MJD* [2013] NZFC 2706, [2013] NZFLR 911 at [19].

⁷⁷ Protection of Personal and Property Rights Act 1988, ss 14(1) and 30(1)(c).

⁷⁸ Iris Reuvecamp *Protection of Personal and Property Rights: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2019) at 59.

⁷⁹ *Nesbit v S* FC Auckland FAM-2008-004-2320, 29 August 2008.

⁸⁰ See also *Waitemata District Health Board v F* FC Auckland FAM-2008-004-1797, 6 August 2008. In this case, an interim order was made to enable a caesarean section to be performed.

⁸¹ Protection of Personal and Property Rights Act 1988, s 30(1)(c).

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).

14.114 We recommend that a new Act continue to provide for orders that can be made to respond to situations where urgency is required. To signal their purpose, we suggest these orders be called “urgent orders”.

14.115 In our view, the process and requirements for urgent orders should be the same regardless of whether they relate to welfare or property matters. This approach aligns with our proposed single test for imposing court-ordered arrangements, addressed above. As we have explained, both welfare and property decisions can have a significant impact on the relevant person and can be required urgently.

14.116 To ensure the Family Court can make urgent orders whenever they are appropriate, it will require a reasonably wide discretion. However, we consider two requirements should be met. First, the Court should be satisfied that the person lacks decision-making capacity. As we explain above, this is a critical requirement for any order limiting a person’s legal agency to be justified. Second, the Court should be satisfied that an urgent order is necessary in the circumstances. This requirement would clearly be met where an urgent order is required to prevent a material risk of significant harm to a person. However, there may be other circumstances where the Court is satisfied that an urgent order is necessary, taking account of the purposes of the Act. For example, an order to protect and promote the person’s wishes and values might be urgent where it is necessary to prevent some form of harm.

14.117 We consider urgent orders should be able to be made regardless of whether a standard application for a court-ordered decision or representative arrangement has been (or will be) filed. As we note above, it appears that “interim orders” are currently sometimes

made in the absence of a substantive application. A new Act should expressly enable this to provide for urgent situations where no further order is required.

- 14.118 To safeguard the rights and interests of the relevant person and parties, we consider the standard procedural requirements of notice and the right to be heard should generally apply. However, we recommend the Family Court have the power to dispense with these procedural requirements if there is a serious and immediate risk of harm to the relevant person.⁸² This high threshold would recognise that natural justice requirements should only ever be limited in pressing circumstances.
- 14.119 Before an urgent order is made, the Court should be required to ensure the person with respect to whom the application is made has had a lawyer made available to them. This procedural safeguard should not be able to be dispensed with. As commentators have recognised, legal representation is a significant safeguard for the relevant person.⁸³ It is currently required for both interim and temporary orders, and we have not heard that this has created significant issues.
- 14.120 A statutory time limit is appropriate for urgent orders given that they would be able to be made without a full court hearing and, by their nature, might be made on the basis of less evidence than would generally be before the Court. In our view, a maximum time limit of six months is generally appropriate. However, where the Court dispenses with notice or the right to be heard, the maximum timeframe should be reduced to three months. These timeframes reflect those in the PPPR Act for interim and temporary orders respectively.⁸⁴
- 14.121 After an urgent order ends, the Family Court should have the power to make an additional and final urgent order or, if the urgent order was made pending the resolution of an application for a court-ordered decision or representative arrangement, to make or dismiss that application. These are the current powers the Court has for interim and temporary orders.
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⁸² Other legislation also allows certain procedural safeguards to be dispensed with in order to make orders in urgent situations. See for example Mental Health (Compulsory Treatment and Assessment) Act 1992, s 62; and Oranga Tamariki Act 1989, s 78.

⁸³ Greg Kelly and Kimberly Lawrence "Participation in Litigation" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 361 at 371.

⁸⁴ As explained above, interim orders have more procedural safeguards than temporary orders. Interim orders can be in force for six months, and temporary orders can be in force for three months: Protection of Personal and Property Rights Act 1988, ss 14(3) and 30(7).

CHAPTER 15

Court-ordered decisions

IN THIS CHAPTER, WE CONSIDER:

- the kinds of court-ordered decisions te Kōti Whānau | Family Court should be able to make; and
- the Family Court’s power to make orders to give effect to court-ordered decisions and other ancillary matters.

INTRODUCTION

- 15.1 Under the Protection of Personal and Property Rights Act 1988 (PPPR Act), te Kōti Whānau | Family Court can make orders that are tailored to particular, often one-off decisions. These orders are called “personal orders” in the PPPR Act.¹ We refer to them as “court-ordered decisions”.
- 15.2 In Chapter 7, we conclude that a new Act should continue to allow decisions to be made for people who lack decision-making capacity when needed. Where such a matter is before the Family Court, it is sometimes appropriate for the Court to appoint a representative to make decisions for the person (as we address in Chapters 16 to 18). At other times, the Family Court will be best placed to make a decision.
- 15.3 As we explain in this chapter, the Family Court’s power to make court-ordered decisions is overly narrow. We recommend a new Act contain a general power to make court-ordered decisions in relation to both welfare and property matters. In addition, the Family Court should continue to have power to make ancillary orders to give effect to a court-ordered decision.

¹ There are other types of orders that fall within the definition of “personal orders” in the PPPR Act, including an order appointing a welfare guardian: s 2 definition of “personal order” and ss 10–12.

BACKGROUND

Current law

15.4 In this section, we address the scope of the Family Court's current power to make court-ordered decisions, the process and principles governing court-ordered decisions, and ancillary orders and related matters.

Scope of power to make court-ordered decisions

15.5 Under the PPPR Act, the Family Court can make court-ordered decisions about a range of matters relating to a person's personal care and welfare. These matters are listed exhaustively in the PPPR Act. Given its importance to this chapter, we quote the relevant section in full:²

10 Kinds of order

(1) ... the court may make any 1 or more of the following orders:

(a) *[Repealed]*

(b) an order that any parent of the person make suitable arrangements for the personal care of the person after the parent's death:

(c) 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 specified in the order:

(d) an order that the person shall enter, attend at, or leave an institution specified in the order, not being a psychiatric hospital or a licensed institution under the Mental Health Act 1969:

(e) an order that the person be provided with living arrangements of a kind specified in the order:

(f) an order that the person be provided with medical advice or treatment of a kind specified in the order:

(g) an order that the person be provided with educational, rehabilitative, therapeutic, or other services of a kind specified in the order:

(h) an order that the person shall not leave New Zealand without the permission of the court, or shall leave New Zealand only on conditions specified in the order:

(i) an order appointing a person named in the order as next friend or guardian ad litem for the person for the purposes of any proceedings in the District Court or the Family Court:

(j) an order under section 11 that a person named in the order administer any item of property specified in the order:

(k) an order under section 12 appointing a welfare guardian for the person.

15.6 The orders provided for in section 10(j) and (k) concern representative arrangements. All of the other orders provided for in the section are court-ordered decisions.

15.7 The power to make these court-ordered decisions enables the Family Court to make several decisions that welfare guardians and attorneys acting under enduring powers of

² Protection of Personal and Property Rights Act 1988, s 10(1).

attorney are prohibited from making, such as consenting to electro-convulsive treatment.³

- 15.8 The PPPR Act does not expressly empower the Family Court to make court-ordered decisions relating to a person’s property. However, te Kōti Matua | High Court has held the Family Court’s jurisdiction to make ancillary orders (explained below) can be invoked to make decisions that involve property.⁴ This means the Family Court can make decisions relating to property where it would give effect or better effect to a decision relating to personal care and welfare.⁵ For example, in *JMG v CCS Disability Action (Wellington Branch) Inc*, the Family Court made an ancillary order vesting a tenancy in the person with affected decision making and his partner.⁶ This order was made to give effect to the Court’s decision that the person receive a range of services to assist in his day-to-day living.⁷
- 15.9 Where the Family Court does not have jurisdiction to make a court-ordered decision, the High Court’s *parens patriae* jurisdiction can be invoked.⁸

Process and principles for decision making

- 15.10 When considering whether to make a court-ordered decision, the Family Court must first determine whether it has jurisdiction. Jurisdiction is established if the person is assessed wholly or partly to lack decision-making capacity to make decisions about their personal care and welfare or to manage their own affairs in relation to their property.⁹
- 15.11 Where jurisdiction is established, the Family Court “may” make an order. The Court’s decision must be guided by two primary objectives. These are:¹⁰
- (a) to make the least restrictive intervention possible in the life of the person; and
 - (b) to enable or encourage the person to exercise and develop their decision-making capacity to the greatest extent possible.
- 15.12 These objectives do not refer to the concepts of “welfare” or “best interests”. However, as we explain in Chapter 5, courts have held that these concepts are relevant to the

³ See Protection of Personal and Property Rights Act 1988, ss 18(1) and 98(4). The Family Court’s power to order that a person receive certain medical advice or treatment under s 10(1)(f) of the PPPR Act addresses many of the prohibited decisions. Other legislation empowers the Family Court to make prohibited decisions not also listed in s 10(1). See Adoption Act 1955; Family Proceedings 1980; and Civil Union Act 2004. However, the Family Court cannot request assisted dying under the End of Life Choice Act 2019. The procedure provided by that Act does not provide for court intervention: s 12. It does not fall into any kind of decision listed in s 10(1) of the PPPR Act.

⁴ *JMG v CCS Disability Action (Wellington Branch Inc)* [2012] NZFLR 369 (HC) at [41].

⁵ Protection of Personal and Property Rights Act 1988, s 10(4).

⁶ *CCS Disability Action (Wellington Branch Inc v JCE* [2011] NZFLR 696 (FC) at [36]. See also *Loli v MWY* FC Auckland FAM-2009-004-1877, 14 January 2011.

⁷ *CCS Disability Action (Wellington Branch Inc v JCE* [2011] NZFLR 696 (FC) at [35].

⁸ *JMG v CCS Disability Action (Wellington Branch Inc)* [2012] NZFLR 369 (HC) at [41]. In that case, it was not necessary to make this order because Miller J held that s 10(4) of the PPPR Act provided jurisdiction to make property decisions for the purposes of giving effect or better effect to decisions about a person’s living arrangements: at [34].

⁹ Protection of Personal and Property Rights Act 1988, ss 6(1) and 25(1). The person must also be domiciled or ordinarily resident in Aotearoa New Zealand.

¹⁰ Protection of Personal and Property Rights Act 1988, s 8.

Family Court’s decision making.¹¹ Later case law also emphasises the concepts of autonomy and support.¹²

Ancillary orders and related matters

- 15.13 When making a court-ordered decision, the Family Court can make “such other orders and give such directions as may be necessary or expedient to give effect, or better effect” to the decision.¹³ These are sometimes described as “ancillary orders”.¹⁴ The Court can also specify a review period for any court-ordered decision.¹⁵
- 15.14 No-one (other than the person in respect of whom the application is made) is bound by a court-ordered decision unless they are a party to the proceeding.¹⁶

Overseas approaches

- 15.15 Equivalent statutes in England and Wales, Scotland and Ireland empower the relevant court to make court-ordered decisions.¹⁷ In each case, the power is expressed in non-exhaustive terms and extends to both welfare and property decisions.
- 15.16 In Australian states and territories, tribunals administer the legislation governing court-ordered decisions and arrangements. These tribunals do not have a general power to make court-ordered decisions. However, they have specific powers to make certain decisions, including some decisions that representatives are prohibited from making.¹⁸ More generally, the Supreme Court of each state or territory (the equivalent of New Zealand’s High Court) makes court-ordered decisions under their *parens patriae* jurisdiction.¹⁹

¹¹ *Re H* [1993] NZFLR 225 (FC) at 234; and *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354 (HC) at 365. See also *Re H and H [protection of personal & property rights]* (1999) 18 FRNZ 297 (FC) at 302; and *Wood v McKellar* [2015] NZHC 1281, [2015] NZFLR 1058 at [40].

¹² See for example *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78. We address the provisions relevant to the person’s participation in a hearing in Chapter 25.

¹³ Protection of Personal and Property Rights Act 1988, s 10(4).

¹⁴ See for example *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [41]; and *AN v Manukau District Court* [2017] NZHC 2190 at [50].

¹⁵ Protection of Personal and Property Rights Act 1988, s 10(3).

¹⁶ Protection of Personal and Property Rights Act 1988, s 10(2).

¹⁷ Mental Capacity Act 2005 (UK), s 16(2); Adults with Incapacity (Scotland) Act 2000, ss 3(1) and 53(1); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(2).

¹⁸ For example, relevant legislation gives the tribunals power to make specific medical decisions. The power is slightly different in each jurisdiction. See Guardianship and Management of Property Act 1991 (ACT), ss 2 definition of “prescribed medical procedure” and 70; Guardianship Act 1987 (NSW), ss 36(1)(b) and 44; Health Care Decision Making Act 2023 (NT), s 41(1)(d)–(e); Guardianship and Administration Act 2000 (Qld), s 81(1)(f); Guardianship and Administration Act 1993 (SA), s 61; Guardianship and Administration Act 1995 (Tas), s 45; Guardianship and Administration Act 2019 (Vic), ss 141 and 145; and Guardianship and Administration Act 1990 (WA), s 13(e)–(ea).

¹⁹ Anita Sekar “Mental Health and Intellectual Disability” in Gino Dal Pont and Dyson Heydon (eds) *Halsbury’s Laws of Australia* (online ed, LexisNexis) at [285–450]. The *parens patriae* jurisdiction is sometimes preserved by statute. See Guardianship Act 1987 (NSW), s 8; Guardianship and Administration Act 2000 (Qld), s 240; Guardianship and Administration Act 1995 (Tas), s 88A(2); and Guardianship and Administration Act 1990 (WA), s 3A.

- 15.17 In Canadian provinces and territories, the relevant courts do not have a general power to make court-ordered decisions but have specific powers to make certain decisions.²⁰ Like Australia, court-ordered decisions are generally made under the *parens patriae* jurisdiction.²¹
- 15.18 Similar to decision making by representatives, overseas statutes take a range of approaches to how courts or tribunals should make decisions on behalf of a person who lacks decision-making capacity. While several jurisdictions use a “best interests” test (some of them expressly including consideration of the person’s wishes),²² many other jurisdictions focus on a person’s will and preferences.²³ Overseas legislation we have considered usually does not contain a separate provision on court-ordered decisions but instead provides for general decision-making principles that apply to courts (and tribunals) and representatives alike.²⁴

SCOPE OF THE FAMILY COURT’S POWER TO MAKE COURT-ORDERED DECISIONS

Issue

- 15.19 The fact that the Family Court can only make court-ordered decisions about specified matters may limit its ability to produce workable outcomes that are the least restrictive possible.
- 15.20 The risk of the Family Court not having jurisdiction to make an appropriate court-ordered decision is highest in relation to property matters. As we note above, the Family Court can only make decisions for a person in relation to their property where the decision gives effect, or gives better effect, to an order relating to their personal care and welfare. However, the need for a court-ordered decision about property may arise in other situations. Where this is the case, the Court might need to make an order that is more restrictive than would otherwise have been required if the Court was empowered more generally to make a court-ordered decision about property. In particular, the Court might need to appoint a property manager with ongoing decision-making authority where a single court-ordered decision would have sufficed.
- 15.21 The restriction on the Family Court’s power to make court-ordered decisions about property matters is at odds with its ability to make other types of orders relating to property. The Court can appoint a property manager,²⁵ appoint a person to administer

²⁰ See for example Adult Guardianship Act SA 2008 c A-4.2 (Alberta), s 74(3)(a); and Adult Guardianship Act 1996 RSBC 1996 c 6 (British Columbia), s 56.

²¹ *Re Eve* [1986] 2 SCR 388 at [72]. The *parens patriae* jurisdiction is sometimes preserved by statute. See Adult Guardianship Act RSBC 1996 c 6 (British Columbia), s 62.2; Judicature Act RSNB 1973 c J-2 (New Brunswick), s 11(9); and Judicature Act RSNB 1989 c 240 (Nova Scotia), s 32A(1)(t).

²² For example Guardianship Act 1987 (NSW), ss 45(3)(c) and 45AA(2)(d); Guardianship of Adults Act 2016 (NT), s 4(3); Mental Capacity Act 2005 (UK), ss 1(5) and 4; and Mental Capacity Act (Northern Ireland) 2016, ss 2, 7(6)(a) and 113(3).

²³ For example Guardianship and Administration Act 2000 (Qld), s 11B general principle 10; Guardianship and Administration Act 2019 (Vic), s 9(1)(a); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(b).

²⁴ For example Guardianship and Administration Act 2019 (Vic), s 9(2); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8, in conjunction with s 2(1) definitions of “intervener” and “intervention”; and Mental Capacity Act (Northern Ireland) 2016, s 113(3).

²⁵ Protection of Personal and Property Rights Act 1988, s 31.

an item of property,²⁶ and approve gifts and property transactions above certain thresholds.²⁷ In addition, the Court has a supervisory jurisdiction over enduring powers of attorney (EPOAs).²⁸ This includes the ability to give property attorneys directions relating to the exercise of their powers and to authorise attorneys to make loans or advances of a donor's property subject to conditions it considers appropriate.²⁹ We do not know why the PPPR Act enables the Family Court to make these orders but not to make court-ordered decisions in relation to property — particularly given the breadth of the powers that the Court may authorise a property manager to exercise.

Consultation

- 15.22 In our Second Issues Paper, we asked submitters whether the Family Court should be able to make decisions about both personal and property matters and why or why not.³⁰
- 15.23 All 38 submitters that engaged with this topic agreed the Court should be able to make personal and property decisions. The key reasons given were that both kinds of decisions sometimes need making and that court-ordered decisions enable a flexible response to circumstances.
- 15.24 Some other reasons given by a few submitters were that:
- (a) the option of a court-ordered decision can allow the least restrictive intervention to be made;
 - (b) property and personal decisions are often interlinked;³¹
 - (c) court-ordered decisions are efficient in urgent situations;³² and
 - (d) the court's impartiality is useful for contentious matters.
- 15.25 One lawyer also said people have more respect for court-ordered decisions than decisions made by representatives and they can be enforced.

²⁶ Protection of Personal and Property Rights Act 1988, s 11.

²⁷ Protection of Personal and Property Rights Act 1988, sch 2. In Chapter 17, we recommend removing the monetary threshold over which property transactions must be approved by the Family Court. However, the current statutory requirement is illustrative of the Family Court's expertise in property transactions.

²⁸ Protection of Personal and Property Rights Act 1988, ss 101–105.

²⁹ Protection of Personal and Property Rights Act 1988, ss 101 and 102(2)(c) and (ga).

³⁰ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at 228.

³¹ An example was given of entering aged residential care, which involves personal matters of accommodation and care and property matters such as ending a tenancy and arranging for payment.

³² These submitters may have been referring to interim court-ordered decisions made under s 14 of the PPPR Act.

Recommendations

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.

A general power in relation to both welfare and property matters

15.26 We recommend that the Family Court have a general power to make court-ordered decisions. This power should be able to be exercised in all circumstances where our recommended test for imposing court-ordered decisions or arrangements in Chapter 14 is met.

15.27 The need for court-ordered decisions may arise equally in relation to property and welfare matters. For example, a court-ordered decision may be needed where a dispute is preventing a decision from being reached, where there is an urgent need for a decision or where no-one suitable is available to act as a representative. These situations can arise both in relation to property matters and welfare matters. We do not consider there is a

reason to limit the Court's ability to make court-ordered decisions to welfare matters. In some situations, a court-ordered decision about a property matter may be the most appropriate and effective means to protect and promote a person's equality, dignity and autonomy.

- 15.28 A general power for the Family Court to make court-ordered decisions is preferable to extending the current exhaustive list of matters about which orders can be made. Even if the current list were amended to include common property matters, situations not addressed in it would inevitably arise. A general power would give the Family Court flexibility to ensure it can make court-ordered decisions about all matters where such orders are necessary, in accordance with our recommended test for making court-ordered decisions or imposing representative arrangements in Chapter 14.
- 15.29 A general power for the Family Court is also preferable to requiring applications for court decisions about matters not specified in section 10(1) of the PPPR Act to be addressed by the High Court under its *parens patriae* jurisdiction. It will often be more practical and efficient for a decision to be made by the Family Court rather than requiring an interested party to apply to the High Court. This will particularly be the case where there are ongoing proceedings in the Family Court.
- 15.30 We recommend that a new Act specify that the Family Court's general power to make court-ordered decisions extends to making most decisions that representatives are prohibited from making. As we explain in Chapter 17, some kinds of decision have such a significant impact on represented people that they should not rest with representatives. Under the current law, the Family Court is able to make almost all decisions that representatives are prohibited from making. However, the Court cannot request assisted dying on behalf of a represented person under the End of Life Choice Act 2019.³³ We recommend that that prohibition continue in a new Act.
- 15.31 It is not possible to predict what types of order might be sought from the Family Court. While it is likely that many applications would be for orders the Family Court can currently make, there would inevitably be applications for orders it currently does not, or may not, have power to make. Such applications might sometimes be controversial or surprising compared to those which are currently made. We do not see this as a reason for preferring an exhaustive list. However surprising an application, the Family Court would only have power to make an order when there is a need which cannot reasonably be met by a less restrictive alternative.³⁴ The order would need to comply with Decision-Making Rule 1. It would also, of course, need to comply with other applicable legislation — including, in particular, the New Zealand Bill of Rights Act 1990.

An inclusive list of decisions the Family Court may make

- 15.32 Alongside a general power to make court-ordered decisions, we consider a new Act should provide an inclusive list of court-ordered decisions that the Family Court can make.

³³ This is because the exhaustive list in s 10(1) of the PPPR Act does not include assisted dying under the End of Life Choice Act 2019.

³⁴ See R60 to R63.

The decisions we list can currently be made by the Family Court under the PPPR Act.³⁵ They are orders:

- (a) for the person's parent to make suitable arrangements for the person's personal care after the parent's death;
- (b) for arrangements made by any parent of the person for the personal care of the person after the parent's death to be observed or varied;
- (c) for the person to enter, attend at or leave a specified institution, not being a hospital or psychiatric security institution under the Mental Health (Compulsory Assessment and Treatment) Act 1992;³⁶
- (d) for the person to be provided with specified living arrangements;
- (e) for the person to be provided with specified medical advice or treatment;
- (f) for the person to be provided with specified educational, rehabilitative, therapeutic or other services;
- (g) for the person not to leave Aotearoa New Zealand without the Court's permission or leave only on specified conditions; and
- (h) to appoint a next friend or litigation guardian for the person for the purposes of proceedings in te Kōti-ā-Rohe | District Court or the Family Court.³⁷

15.33 This approach would provide useful guidance about the kinds of decisions the Family Court can make.

15.34 For clarity, we note that two orders that the PPPR Act lists as “personal orders” do not come within our recommendation about court-ordered decisions. These are an order that a person administer a specified item of property and an order appointing a welfare guardian.³⁸ As explained above, these are representative arrangements. In our view, it is confusing for these to be addressed in the same provision as court-ordered decisions. They should instead be addressed in specific separate provisions.³⁹

DECISION-MAKING RULES FOR THE FAMILY COURT

15.35 In Chapter 14, we make recommendations about when the Family Court should have the power to make a court-ordered decision. It is also necessary to address the decision-making rules that the Family Court should be required to follow when it decides to make a court-ordered decision.

³⁵ Protection of Personal and Property Rights Act 1988, s 10(1)(d)–(i).

³⁶ The Mental Health Act 1969, to which s 10(1)(d) of the PPPR Act currently refers, has been repealed and replaced with the Mental Health (Compulsory Assessment and Treatment) Act 1992. The courts already interpret s 10(1)(d) as referring to the 1992 Act. See *AN v Manukau District Court* [2017] NZHC 2190 at [52]. If the Mental Health Bill 2024 is enacted, this provision should be adjusted to reflect the new legislation. See also Legislation Act 2019, s 38(2).

³⁷ We expect this court-ordered decision will remain unavailable for the sole purpose of commencing proceedings under the Family Violence Act 2018. This is the current position under the PPPR Act: s 10(2A)–(2B). The Family Violence Act contains its own procedure for litigation guardian appointments: s 166(1)(d).

³⁸ Protection of Personal and Property Rights Act 1988, s 10(1)(j)–(k).

³⁹ We address welfare representatives in Chapters 16–18. As we explain in Chapter 14, we do not make detailed recommendations about orders appointing a person to administer property in this Report but consider a new Act should continue to provide for them.

Issues

15.36 Similar issues arise as those addressed in Chapter 12 concerning decision making by representatives.

Basis on which the Family Court must make decisions is unclear

15.37 The PPPR Act does not clearly state how the Family Court is to make a decision for a person.

15.38 The PPPR Act states two primary objectives — least restrictive intervention and enabling the person to exercise their decision-making capacity to the greatest extent possible.⁴⁰ Courts have interpreted the PPPR Act in a way that gives significant weight to best interests in judicial decision making, despite the PPPR Act not expressly providing for this.⁴¹ Later case law also refers to the concepts of autonomy and support. In our view, this case law illustrates that the PPPR Act does not address how the Family Court is to make decisions for a person with sufficient clarity.

The current approach may not always respect rights, will and preferences

15.39 The lack of clarity in the PPPR Act as to how the Family Court is to make decisions for a person means there is not sufficient guidance for courts to make decisions that respect the rights, will and preferences of people with affected decision making, as required by article 12(4) of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention).⁴²

15.40 The PPPR Act does not address how to identify a person's will and preferences (or any related concepts).

15.41 Nor does it set out how to ensure a decision respects a person's rights. The PPPR Act does not address how to identify circumstances where the person's rights might be in tension with their will and preferences or how a decision should then be made.

15.42 Lastly, the PPPR Act does not address what decision should be made where a person's will and preferences (or what can be known of them) are not sufficient to make a decision or when giving effect to a person's will and preferences would be impossible or illegal.

Recommendation

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.

15.43 In Chapter 12, we explain the decision-making rules that we recommend representatives be required to follow under a new Act. We recommend that the first of those decision-

⁴⁰ Protection of Personal and Property Rights Act 1988, s 8.

⁴¹ We address this case law in Chapter 14.

⁴² We address the meaning of "rights, will and preferences" in Chapter 12.

making rules (Decision-Making Rule 1) also apply to the Family Court when making a court-ordered decision.

- 15.44 As we discuss in Chapter 12, Decision-Making Rule 1, in substance, requires a decision to respect a person’s “rights, will and preferences”, as required by article 12(4) of the Disability Convention. This rule is as relevant to decisions that the Family Court makes for a person as to decisions made by representatives. A new Act should specify that the Court must apply Decision-Making Rule 1 when making a court-ordered decision.
- 15.45 Decision-Making Rules 2 and 3, which we also recommend in Chapter 12, concern the involvement of represented people in decisions and the steps representatives should take to ensure they are fully informed when making decisions. These rules are not entirely apt for the Family Court. The way a person with affected decision making participates in the court process is different to the way they participate in decision making by their representative. Accordingly, we consider our proposed Decision-Making Rules 2 and 3 should not apply to the Family Court.
- 15.46 Nevertheless, we envisage the Family Court would have regard to these rules when making decisions. For example, if a person has not received decision-making support in relation to a decision that the Court is making, it might make orders to ensure this occurs. Similarly, if relevant information is not before the Court, the Court might direct it to be filed.

ANCILLARY AND PROCEDURAL MATTERS

Recommendations

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.

- 15.47 We recommend that procedural and ancillary matters that the PPPR Act addresses with respect to court-ordered decisions should continue in a new Act.

Ancillary orders to give effect to court-ordered decisions

- 15.48 In Chapter 17, we explain that court-appointed representatives should have all powers necessary to give effect to their decisions. Unlike representatives, the Family Court cannot take actions itself to give effect to its decisions. It therefore needs to be able to make orders to enable a person to do so.
- 15.49 The PPPR Act empowers the Family Court to “make such orders and to give such directions as may be necessary or expedient to give effect, or better effect” to a court-

ordered decision.⁴³ The Court has sometimes used this power to make orders empowering a specified person to give effect to a decision.⁴⁴

15.50 In our view, it is important that the Family Court continues to be able to make such orders.⁴⁵ For example, if the Court makes a court-ordered decision that a person's house is to be sold, it needs to be able to appoint and empower another person to take all necessary steps to give effect to that decision.

Procedural matters

15.51 A new Act should continue to empower the Family Court to require court-ordered decisions to be reviewed by the Court. Given that court-ordered decisions will often be one-off decisions, a review will often not be necessary. However, in accordance with our recommended purposes of a new Act, we envisage the Court will ensure that court-ordered decisions that have ongoing effect will be reviewed at an appropriate time.⁴⁶ As we note in Chapter 3, the Disability Convention requires all measures that relate to the exercise of legal capacity to be subject to regular review by a competent, independent and impartial authority or judicial body.⁴⁷

15.52 We also consider that 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. This is an important provision to protect people's right to natural justice.

⁴³ As we address in Chapter 14, this power also applies to orders appointing a person to administer a specific item of property and orders appointing a welfare guardian.

⁴⁴ See for example *AJI v LF* [2012] NZFC 9152; and *Rothera v Rothera* [2018] NZHC 375, [2018] NZFLR 32 (note however, in Chapter 23, we consider an express power for the Family Court to authorise the use of force would be preferable).

⁴⁵ Note however our discussion of ancillary orders that authorise use of force or deprivation of liberty, and related recommendation, in Chapter 23.

⁴⁶ For example, in *Re LEA FC Hamilton FAM-2005-019-893*, 21 November 2005, a court-ordered decision was made that a person was to reside at a named care facility, with efforts made to find suitable accommodation in the person's preferred location. The Judge directed that a review of the court-ordered decision was to take place approximately four months later to ensure the person's "wishes are not overlooked": at [18].

⁴⁷ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

CHAPTER 16

Court-appointed representatives: eligibility

IN THIS CHAPTER, WE CONSIDER:

- the test for assessing the suitability of a court-appointed representative;
- who should be prohibited from acting as a court-appointed representative;
- the minimum age of a court-appointed representative; and
- whether volunteer representatives should only be appointed as a last resort.

INTRODUCTION

- 16.1 Court-appointed representatives are the focus of the next three chapters. A court-appointed representative arrangement involves te Kōti Whānau | Family Court appointing a person to make decisions on behalf of another person. Court-appointed representative arrangements are distinct from enduring powers of attorney (EPOAs), which are self-instigated representative arrangements.¹
- 16.2 In previous chapters, we address the foundations of representative arrangements — namely, our recommended decision-making rules and duties of representatives. Chapter 14 considers the test for the Family Court to make a court-ordered decision or impose a representative arrangement. Beyond these matters, we do not recommend any foundational or significant structural changes to the framework for court-appointed representatives. Our recommendations over the next three chapters focus on refining particular aspects of court-appointed representative arrangements with a view to ensuring:
- (a) sufficient safeguards for people who have a court-appointed representative or for whom a court-appointed representative arrangement is being considered; and
 - (b) workability for court-appointed representatives and represented people.

¹ We discuss enduring powers of attorney in Chapters 19 and 20.

- 16.3 We do not address every aspect of court-appointed representative arrangements in Chapters 16 to 18.² Our recommendations are limited to issues that we have identified through our analysis or through consultation.
- 16.4 This chapter focuses on who should be allowed to act as a court-appointed representative. We make recommendations to:
- (a) provide more guidance to the Family Court about when a person is suitable to be appointed as a representative;
 - (b) modify and add to the current prohibitions on who can be a court-appointed representative;
 - (c) require some matters about prospective or appointed representatives either to be drawn to the Court's attention before appointment or to require a review; and
 - (d) lower the minimum age for court-appointed representatives from 20 to 18.

BACKGROUND

Terminology

- 16.5 Throughout the next three chapters we use the term “court-appointed representative” and, for brevity, “representative” to refer to a person appointed by the Family Court to make decisions on behalf of another person. Sometimes, the context requires us to differentiate between court-appointed representatives and attorneys under an EPOA (who are representatives appointed by the relevant person rather than the Court). In that situation, we use “court-appointed representative”.
- 16.6 Court-appointed representatives can be appointed in relation to welfare or property matters. Where the context requires us to distinguish between these types of representatives, we use the terms “welfare representative” and “property representative”. When referring to the current law, we use the current terminology for these roles: “welfare guardian” and “property manager”.
- 16.7 We use the term “represented person” to refer to a person who has a representative appointed for them. Where it does not make sense to use the term “represented person” (for example, because no representative has yet been appointed), we use the term “relevant person”.

Overview of court-appointed representative arrangements under the PPPR Act

- 16.8 The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides for two types of court-appointed representatives: welfare guardians and property managers.³ Welfare guardians make decisions for the represented person in relation to their personal

² For example, we do not address (among other things) the effect of a representative's decisions (Protection of Personal and Property Rights Act 1988, ss 19 and 44); the appointment of welfare guardians for non-compliance (s 23); security for the performance of a property representative's duties (s 37); the additional powers of Public Trust if appointed as a representative (s 39); or the procedure of reviews (s 88).

³ The PPPR Act also provides for property administrators to administer a person's property under a certain value. The focus of this chapter is on welfare guardians and property managers.

care and welfare.⁴ Property managers make decisions for the represented person in relation to property belonging to them.⁵

- 16.9 The scope of a welfare guardian's or property manager's decision-making powers is determined by the court order appointing them.⁶ For example, a welfare guardian's powers might relate only to the represented person's medical treatment.
- 16.10 Court-appointed representative arrangements can be in place for many years. In this regard, they differ from court-ordered decisions, which are made by the Family Court and generally deal with discrete issues or decisions.⁷
- 16.11 The PPPR Act contains a number of rules on who can act as a court-appointed representative. These include rules about suitability but also rules on prohibitions and suspension of representatives in certain situations. These rules are important to ensure that court-appointed representatives are able to carry out the duties and responsibilities required of them. We explain the detail of these rules as they become relevant to the topics we discuss in this chapter.

ASSESSING THE SUITABILITY OF A COURT-APPOINTED REPRESENTATIVE

Current law

- 16.12 Under the PPPR Act, the Family Court must not appoint any person as a court-appointed representative unless it is satisfied that certain requirements are met. These are:⁸
- (a) that the proposed welfare guardian or property manager can carry out their duties in a satisfactory manner, having regard to the needs of the relevant person and the relationship between them and the proposed appointee;⁹
 - (b) that the proposed appointee will act in the best interests of the relevant person;¹⁰ and
 - (c) if considering a proposed welfare guardian, that there is unlikely to be a conflict of interest.¹¹
- 16.13 In addition, the Family Court must consider the wishes of the relevant person to the extent practicable.¹² For property managers, the Court must also take into account any likely

⁴ Protection of Personal and Property Rights Act 1988, s 12(1).

⁵ Protection of Personal and Property Rights Act 1988, s 31(1).

⁶ Protection of Personal and Property Rights Act 1988, ss 12(1) and 31(1).

⁷ See Bill Atkin "Personal Orders" in *Family Law Service – Protection of Personal Property Rights* (online ed, LexisNexis) at [7.823].

⁸ We do not discuss the requirement that the representative must consent to the appointment. We consider this should be maintained.

⁹ Protection of Personal and Property Rights Act 1988, ss 12(5)(a) and 31(5)(a).

¹⁰ Protection of Personal and Property Rights Act 1988, ss 12(5)(b) and 31(5)(b).

¹¹ Protection of Personal and Property Rights Act 1988, s 12(5)(c).

¹² Protection of Personal and Property Rights Act 1988, ss 12(7) and 31(7).

conflict of interest.¹³ The PPPR Act also specifies that any person appointed as a property manager must be “suitable”.¹⁴

16.14 In deciding who to appoint as a representative, the Family Court has sometimes emphasised the importance of cultural considerations, including tikanga.¹⁵

Issues

16.15 Some of the current requirements for representatives reflect the PPPR Act’s “best interests” approach to decision making. As we address in Chapter 12, we recommend that a new Act move away from this approach by providing for decision-making rules that are centred on a person’s wishes and values. The criteria for appointing court-appointed representatives should reflect this.

16.16 In addition, the PPPR Act provides for different standards for welfare and property representatives with respect to conflicts of interest. In this chapter, we consider whether different standards should apply in a new Act and what the standard(s) should be.

16.17 Beyond those issues, questions arise concerning whether the current framework gives sufficient guidance and enables sufficient flexibility for the Family Court, in particular:

- (a) whether further statutory elaboration of the skills a representative needs for the role would be useful;
- (b) whether social and cultural considerations should be addressed expressly; and
- (c) whether any factors should be determinative or whether all factors should be considered as part of an overall suitability assessment.

Consultation

Factors relevant to suitability

16.18 In our Second Issues Paper, we asked what the Family Court should consider when determining if a representative is suitable. Forty-seven submitters gave feedback on this issue.

16.19 Approximately two-thirds of these submitters addressed the representative’s ability to carry out their role. Factors raised by submitters as relevant to assessing a prospective representative’s ability included the representative’s:

- (a) general competence;
- (b) prior experience and any relevant expertise;
- (c) relationship to the represented person, particularly a familial relationship;
- (d) physical and mental health;
- (e) support network; and
- (f) social and cultural competence.

16.20 Community Law Centres Aotearoa was not in favour of requiring a particular level of expertise for property managers. It said this would remove many people from consideration and discourage people from becoming property representatives.

¹³ Protection of Personal and Property Rights Act 1988, s 31(6).

¹⁴ Protection of Personal and Property Rights Act 1988, s 31(1).

¹⁵ See *Re [S]* [2021] NZFC 5911; and *IF v AN* [2025] NZFC 7862.

Community Law Centres Aotearoa also said the age of the represented person is an important factor in assessing the suitability of a representative. It noted that younger disabled people (18 to 24) have very different needs to older adults who lose their decision-making capacity.

- 16.21 Approximately a third of submitters that commented on the representative's ability to carry out their role said there should be background checks on either the financial history or criminal record of prospective representatives.
- 16.22 Some submitters that commented on the representative's relationship to the person expressed caution about this always being viewed as a positive factor. These submitters noted that sometimes an objective, independent assessment of the circumstances is what the represented person needs and this can be difficult for those close to the person, especially family or whānau members.
- 16.23 Approximately a third of submitters that gave feedback on factors relevant to the suitability of a representative commented on conflicts of interest the representative might have. Only a small number of submitters said that representatives should be ineligible for appointment if they have a conflict. Most of the submitters that commented on this issue said conflicts should be a consideration for the Family Court but not determinative. Most of these submitters explained that many suitable representatives will have conflicts arising out of a pre-existing relationship with the person. These submitters said the Court should consider the conflict, and how the representative would manage that conflict, as part of the suitability assessment.
- 16.24 Approximately a third of submitters that gave feedback said the suitability of a representative will depend on the needs of the represented person. Submitters that gave further reasons focused on the varying needs of represented people and thought the most suitable representative for a represented person is one who can best meet those needs.
- 16.25 Approximately a quarter of submitters that gave feedback on factors relevant to the suitability of a representative said they agreed with the factors we suggested in our Second Issues Paper as relevant considerations (namely, the ability of the representative to carry out the role, the will and preferences of the represented person, consideration of any conflicts of interest and how they could be managed, and social and cultural considerations).

Determinative factors

- 16.26 We asked submitters whether any factors should be determinative. Twenty-seven submitters gave feedback on this issue.
- 16.27 Approximately a quarter of these submitters said there should not be any determinative factors. Two main reasons were given. The first was that the Family Court is best placed to determine whether a particular factor should be determinative in the circumstances. The second was based on concern about the scarcity of representatives. These submitters considered that outright prohibitions might further diminish the availability of representatives.
- 16.28 Of the submitters that said there should be determinative factors, there was a range of responses as to what these should be. The most common response was that the ability to carry out the representative role should be determinative. A number of submitters also said prior criminal convictions, restraining or protection orders against the person or

convictions for fraud or dishonesty should disqualify a person from being appointed.¹⁶ Other potentially determinative factors identified by submitters included:

- (a) the potential representative's mental health;
- (b) the opinions of family or whānau;
- (c) the quality of the prospective representative's relationship to the represented person;
- (d) the potential representative's independence from the proposed represented person; and
- (e) a failure to commit to prioritising the represented person's will and preference.

Recommendations

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.

The Family Court must be satisfied the proposed representative is suitable

16.29 We recommend that a new Act provide that the Family Court should only appoint a representative if it considers they are suitable for appointment. The standard of "suitable" is currently used in the PPPR Act for property managers. In our view, it is equally apt for

¹⁶ These were some examples we identified from overseas jurisdictions in our Second Issues Paper. See Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [11.46].

welfare representatives. Nearly every comparative jurisdiction we have investigated uses this standard in legislation.¹⁷

Factors for determining suitability should not be determinative

16.30 We do not recommend that any single factor be determinative when the Family Court considers whether a person is suitable for appointment.

16.31 The ability to carry out the role was the only factor that received notable support from submitters as being essential to a representative's suitability. However, we do not recommend this be a determinative factor. In practice, it will be important for a representative to have the ability to carry out the role. However, there is no bright line test to determine a person's ability. We consider the Family Court should make an assessment by looking at all relevant factors. Singling out the factor of ability to carry out the role may overcomplicate the Court's assessment. It may also prevent the Court from appointing a representative where, for example, a person sits at the lower end of ability but there are no other alternatives for representatives.

Factors for the Family Court to consider when determining suitability

16.32 We recommend that a new Act specify factors that the Family Court must consider when determining whether a potential representative is suitable. We discuss below the four factors we think should be specified in a new Act. We recommend this be an inclusive list so the Court can also consider any other factor it considers relevant.

The ability of the representative to carry out the role

16.33 The first factor we propose is the ability of a potential representative to carry out the role. We recommend that, when assessing this, the Family Court be required to consider three matters (along with any other matters it considers appropriate).

16.34 First, the Family Court should consider the representative's ability to meet the particular needs of the represented person. The PPPR Act currently requires the Court to be satisfied the representative is capable of carrying out their duties "having regard to the needs of the [represented] person".¹⁸ Because we recommend the appointment of a representative be based on need, the representative's ability to carry out the role is directly connected to what the represented person needs. It is therefore important that the Court continues to consider the particular needs of the represented person when assessing the proposed representative's suitability. Many submitters said the Court should consider the represented person's needs.

16.35 Second, the Family Court should consider the representative's ability to make decisions in accordance with our recommended decision-making rules. The core role of representatives under our recommendations would be to make decisions in accordance with those decision-making rules (set out in Chapter 12). These rules would replace the current requirement for representatives to act in the relevant person's best interests. We

¹⁷ See for example Guardianship and Administration Act 1995 (Tas), ss 21(2)(b)(ii) and 54(2)(b)(ii); Guardianship and Administration Act 2019 (Vic), s 32(1)(c); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(5)–(6); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 37(1)(a)(iii). In Queensland, the applicable standard is "appropriate": Guardianship and Administration Act 2000 (Qld), s 15.

¹⁸ Protection of Personal and Property Rights Act 1988, ss 12(5)(a) and 31(5)(a).

recommend that this change be reflected in the approach to assessing the suitability of prospective representatives. Instead of the current requirement for the Court to be satisfied that a proposed representative will act in the relevant person's best interests, the Court should be required to consider the proposed representative's ability to make decisions in accordance with the recommended decision-making rules. This would include considering whether the representative has the time and ability to develop a good relationship with the represented person and identify the person's wishes and values.¹⁹

16.36 Third, the Family Court should consider the representative's relationship to the represented person, including whether the relationship will be beneficial or detrimental to the representative's ability to carry out the role. We heard during consultation (particularly from people with lived experience) that a close personal or familial relationship can create issues depending on what the represented person needs from the representative. However, we also heard that pre-existing and positive relationships can be extremely beneficial when acting as a representative. Given these different perspectives, we consider that a new Act should require the Court to consider the representative's relationship to the person but should not reflect any assumption about whether particular relationships are likely to be beneficial or detrimental. The Court should be required to consider any pre-existing relationship in context.

16.37 In our view, it is not necessary for a new Act to refer expressly to other factors identified by submitters as relevant to a potential representative's suitability. Considerations such as a proposed representative's health, social and cultural competence, general competence and relevant experience are clearly relevant but do not need to be specified in an inclusive list illustrating what can be relevant when assessing a potential representative's ability to carry out the role.²⁰ We address social and cultural considerations as a separate factor later in this section.

The wishes and values of the represented person

16.38 The second factor we propose is the wishes and values of the proposed represented person.²¹ This is relevant to the representative's suitability in two ways. Most obviously, the person may express a view on whether they want the proposed representative to act in that role. Additionally, it will be important to consider what is important to the person. For example, in a recent Family Court decision the importance of te ao Māori to the person who needed a representative played a pivotal role in determining who was suitable to act as their welfare guardian.²²

¹⁹ See a similar requirement in Guardianship and Administration Act 2019 (Vic), s 32(3)(d).

²⁰ For example, when considering whether a potential representative has the ability to act as a person's financial representative, it will clearly be relevant to consider their financial experience and expertise. However, we received feedback that a lack of specific expertise in a particular area does not always mean a person will make a poor representative.

²¹ As explained in Chapter 12, wishes and values means, briefly, a person's expressed wishes and their reasonably stable relevant values, where relevant balanced in light of the importance of the values to the person.

²² *Re [S]* [2021] NZFC 5911 at [50].

Conflicts of interest

- 16.39 The third factor we propose the Family Court must consider is whether any conflicts of interest exist and, if so, whether they can be adequately managed.
- 16.40 In our view, there should not be a blanket prohibition on the Court appointing a representative who has a conflict of interest. Given so many representatives will be family or whānau members, this prohibition could unnecessarily prevent suitable people from acting in the role. A prohibition may also be inconsistent with whānau obligations under tikanga.²³ As we explain in Chapter 11, we do not consider the United Nations Convention on the Rights of Persons with Disabilities requires representative arrangements to be totally free from conflicts of interest.
- 16.41 However, any conflicts of interest need to be adequately managed. The Family Court should be satisfied a proposed representative can do this. It may be necessary for the Court to place additional requirements on a representative in order to be satisfied of this. For example, as we discuss in Chapter 18, the Court might impose additional reporting obligations, including in relation to steps taken to manage conflicts of interest.

Social and cultural considerations

- 16.42 The final factor we propose the Family Court must consider when assessing a representative's suitability is social and cultural considerations. There may be social and cultural factors (such as whakapapa considerations for Māori) that are directly relevant to the suitability of a representative. Or it may be that, culturally, a person has already assumed the role of representative for the person and the Court should take this into account.

Any other matter that is relevant in the circumstances

- 16.43 The list of factors relevant to suitability should not be exhaustive. Given the diversity of represented people (and their needs) and potential representatives, the Family Court should be able to take into account any matter that it considers relevant in the circumstances.²⁴

PROHIBITIONS ON WHO CAN ACT AS A REPRESENTATIVE

Current law

- 16.44 The PPPR Act contains the following outright prohibitions on who can act as a welfare guardian or property manager:
- (a) A person cannot act as a property manager if they are in charge of a hospital, home or other institution and the person with affected decision making is a patient or resident of that institution.²⁵

²³ See further our discussion in Chapter 4.

²⁴ The court currently considers factors not specified in the PPPR Act. See for example *Re [S]* [2021] NZFC 5911 at [25].

²⁵ Protection of Personal and Property Rights Act 1988, s 31(4).

(b) A body corporate cannot act as a property manager unless it is a trustee corporation such as the Māori Trustee or Public Trust.²⁶

(c) A body corporate cannot act as a welfare guardian.²⁷

16.45 The PPPR Act also provides that both welfare guardians and property managers stop holding office if they are adjudicated bankrupt, are made a special patient or committed patient under the Mental Health Act 1969,²⁸ have a property manager appointed for them or are otherwise incapable of acting.²⁹ However, these matters do not permanently prohibit a person from acting as a court-appointed representative. They are eligible to be reappointed.

Issues

16.46 We have identified two issues with respect to these prohibitions.

16.47 The first issue concerns the particular matters or situations that prohibit someone from being appointed a representative or have other consequences. This issue involves considering whether all the matters specified in the PPPR Act are appropriate and whether any other matters should be addressed.

16.48 The second issue is the appropriate response if a specified matter or situation does occur. We consider whether the occurrence of various matters should always lead to a person being disqualified from being a representative or if lesser consequences could potentially be appropriate.

Consultation

Prohibitions on acting as a representative

16.49 We asked submitters whether there should be any prohibitions on who can act as a representative and, if so, what they should be. We gave some examples of people who could potentially be prohibited from fulfilling the role, including a person convicted of an offence or subject to a restraining order in relation to the relevant person. We also asked submitters whether the current restrictions in relation to bodies corporate are appropriate.

16.50 Thirty-six submitters commented on who should be prohibited from acting as a court-appointed representative.

16.51 The most common response, from approximately half of these submitters, was that a person with a previous criminal conviction should be prohibited from being appointed as a representative. Approximately half of those submitters thought this should only relate to convictions for an offence committed in relation to the person. Some submitters thought only convictions within a certain time period should be taken into account such as those within the last 10 years. Other submitters said the type of offence should be relevant such as convictions for domestic or elder abuse or other serious crimes.

²⁶ Protection of Personal and Property Rights Act 1988, s 31(3).

²⁷ Protection of Personal and Property Rights Act 1988, s 12(4).

²⁸ This Act has been repealed and replaced with the Mental Health (Compulsory Assessment and Treatment) Act 1992, but the PPPR Act still refers to the Mental Health Act 1969.

²⁹ Protection of Personal and Property Rights Act 1988, ss 22(b) and 52(b).

- 16.52 Approximately a quarter of submitters that gave feedback on this issue said any protection orders or restraining orders in relation to the person should disqualify the proposed representative from acting in that role.
- 16.53 Some submitters commented on prohibitions for bodies corporate. A few said bodies corporate should be able to act in both welfare and property roles provided they are accredited in some way. One submitter said bodies corporate should be able to apply to the Court to be appointed if it is appropriate for a specific case. Another submitter supported the current position under which bodies corporate cannot be welfare guardians and only trustee corporations can be property representatives, commenting that trustee corporations are subject to special legislation and accountability mechanisms that do not apply to general bodies corporate. Lastly, one submitter noted that professional trustees usually act through a corporate structure and said this option should be available for professional property representatives. This submitter said removing this prohibition could increase the availability of representatives although they doubted that it would be appropriate beyond professionals who are charging for their services.
- 16.54 A small number of submitters said bankruptcy should automatically disentitle a person to act as a property representative. Conversely, one submitter said bankruptcy should not have this consequence. None of these submitters gave reasons.
- 16.55 A small number of submitters commented on the current prohibition on those “in charge” of a hospital or aged care facility acting as a property manager for a person who is a patient or resident. These submitters said this prohibition should be broadened to include a wider range of professionals who have responsibility over the person.
- 16.56 A few submitters commented on whether there should be any outright prohibitions at all. One submitter said some factors should take the form of a rebuttable presumption against appointment because there may be rare circumstances in which it may nevertheless be appropriate to appoint them. The remaining submitters said an overall suitability assessment with no prohibitive factors is appropriate.
- 16.57 One submitter said the factors that make someone unsuitable as a trustee should also apply to court-appointed representatives.

Matters that must be drawn to the Family Court’s attention and may result in an interim prohibition

- 16.58 We also asked submitters whether there should be other matters that should be required to be drawn to the Court’s attention, with the representative required to stop acting until the Family Court has considered them.
- 16.59 Twenty-seven submitters gave feedback on this issue. The most common response was that the Family Court must be told if the representative is convicted of an offence. Some of these submitters said this would only be necessary if the conviction did not automatically disentitle the person from acting.
- 16.60 Some submitters said concerns that a person is acting inappropriately or may be abusing or neglecting the represented person should stop them from acting until the Family Court has considered the matter.
- 16.61 Other circumstances that submitters said should stop a representative from acting included:
- (a) where the representative loses decision-making capacity themselves;

- (b) where the representative is generally not performing their role well or is incompetent;
- (c) where the representative becomes bankrupt; and
- (d) where there is a “material” or “actual” conflict of interest.

Recommendations

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.

Outright prohibitions on acting as a representative

16.62 We consider the law should continue to contain some outright prohibitions on certain people being appointed by the Family Court as a representative. There are some situations where the arguments against appointment are so strong, or the practical barriers to acting as a representative are so great, that the matter is best addressed in legislation rather than leaving it to the discretion of the Court. Submitters indicated support for this approach. Several overseas jurisdictions we investigated have outright prohibitions in legislation.³⁰

16.63 We address the outright prohibitions we recommend below. We begin by explaining the new prohibitions we recommend and then address the current prohibitions that we recommend be modified or retained.

³⁰ See Guardianship and Administration Act 2000 (Qld), s 14(1); Guardianship and Administration Act 1993 (SA), s 29(3) and (5); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 39; Adults with Incapacity (Scotland) Act 2000, s 59(1)(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 40(3).

Active restraining or protection orders

- 16.64 A person who is the subject of an active protection or restraining order in relation to the relevant person should be prohibited from acting as their representative. There are two reasons for this. First, while such an order is in place, it will present a significant if not insurmountable barrier to performing the role of a representative. Second, the purpose of a protection or restraining order is to protect victims of harassment or family violence.³¹ In situations where the Family Court has considered it appropriate to grant one of these orders, the protective purpose of the order would be undermined if the subject of the order could still act as a representative for the relevant person.
- 16.65 Once the order ends, the person against whom it was made should no longer be prohibited from acting as a representative for the relevant person. However, as we address below, a potential representative should be required to bring this information to the Court's attention.

Serving a prison sentence

- 16.66 If a person is currently serving a prison sentence, they cannot practically act as a representative for the relevant person. We therefore recommend an outright prohibition on acting as a representative for people who are currently serving a prison sentence.
- 16.67 We have considered whether other types of sentence such as home detention should also prohibit a person from acting as a representative. However, the practical barriers to acting are most severe for people serving a prison sentence. Other types of sentence are more appropriately treated as matters the Family Court must consider. Sentences for offences in relation to or affecting the relevant person that result in home detention would be captured by our recommendations about convictions further below.

Special patients under the Mental Health Act

- 16.68 A "special patient" is a person detained in a hospital who would otherwise be detained in prison or a residence or has been acquitted of an offence on account of insanity.³² People in this situation are unlikely to be suitable to act as a representative and would likely also face significant practical barriers to doing so. We therefore recommend that special patients be prohibited from acting as representatives in all situations.

Lack of decision-making capacity

- 16.69 A person who lacks decision-making capacity for a decision or class of decisions should not be able to make similar decisions for another person. A person in this situation would not meet the eligibility requirements for the role (both under the current law and our proposed suitability factors at R80).
- 16.70 We consider a new Act should expressly prohibit people from being appointed, or continuing to act, as a representative in this situation. This would mean that, if a representative loses relevant decision-making capacity during their appointment, they would be required to cease acting. However, there should be an exception to this where

³¹ Family Violence Act 2018, s 79; and Harassment Act 1997, s 6.

³² Mental Health (Compulsory Assessment and Treatment) Act 1992, s 50.

the loss of decision-making capacity is short term and not expected to occur again — for example, where the person is in an induced coma for medical reasons.

The prohibition for those in charge of a hospital, home or other institution

- 16.71 As noted above, the PPPR Act prohibits a person in charge of a hospital, home or other institution from acting as a property manager for a patient or resident of the institution. With respect to rest home owners or managers, the original policy intention was to address concerns about the potential for abuse by those in charge of a care facility or other institution.³³ With respect to those in charge of hospitals, the prohibition was intended to address the expectation that such people have “neither the time, nor expertise, nor resources to carry ... out” the representative role.³⁴
- 16.72 We consider that issues of time, expertise and resources are better addressed in the context of assessing an individual’s suitability to act as a representative rather than as an outright prohibition. However, we consider the concern about abuse is appropriately addressed as a prohibition and is relevant in relation to all facilities where a person is a resident. Further, we consider similar concerns about the potential for abuse exist with regard to welfare guardians as property managers. In jurisdictions we have investigated that prevent such people from acting, the prohibition applies to both welfare and property representatives.³⁵
- 16.73 Accordingly, we recommend two modifications to the current prohibition:
- (a) The prohibition should only apply where a person is a resident of an institution (not a short-term patient).
 - (b) The prohibition should apply to welfare representatives as well as property representatives.
- 16.74 As noted above, two submitters suggested expanding the current prohibition on those “in charge” of a hospital, aged care facility or other institution from acting as a property representative for a person who is a patient or resident to include a wider range of professionals who have responsibility for the person. We do not recommend expanding the prohibition in this way. In our view, the policy concern about preventing abuse by those in charge of institutions where the relevant person is resident does not apply as strongly to all other professionals who have responsibility for the person. There are several reasons for this:
- (a) Residential care can provide longer-term, in-person access to the relevant person by the professional that does not exist in other professional settings.
 - (b) Aged care facilities are recognised as a setting in which there is an acute risk of abuse occurring.³⁶

³³ Department of Justice *Protection of Personal and Property Rights Bill: Report of the Department of Justice* (JL/87/308, 22 May 1987) at 28.

³⁴ Department of Justice *Protection of Personal and Property Rights Bill: Report of the Department of Justice* (JL/87/308, 22 May 1987) at 28.

³⁵ Guardianship and Administration Act 2000 (Qld), s 26(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 40(4); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 40(3).

³⁶ See Te Manatū Whakahiato Ora | Ministry of Social Development *Elder Abuse in Aotearoa: The role and current state of MSD’s Elder Abuse Response Services* (December 2019) at 5–7.

- (c) Potential conflicts of interest for other professionals can be addressed sufficiently by our recommendations regarding conflicts when assessing the suitability of representatives.
- 16.75 The concern about potential abuse may also arise in relation to employees of residential care facilities who also have long-term access to residents. However, no concerns were raised with us during consultation about such employees. As we are not aware of any problem, we make no recommendation to expand the prohibition to include employees of these facilities.

Bodies corporate acting as representatives

- 16.76 There are strong arguments in favour of generally allowing bodies corporate (such as a company established to provide representative services) to act as court-appointed representatives. In particular, this has the potential to significantly increase the number of available representatives. However, there are also strong arguments against it. On balance, we consider the current prohibitions should remain in place.
- 16.77 If Aotearoa New Zealand abandoned or even loosened the general prohibition on bodies corporate acting as representatives, it would be significantly out of step with approaches in other jurisdictions we have investigated. For welfare representatives, only one jurisdiction that we have investigated allows all bodies corporate to fulfil the role.³⁷ For property representatives, the vast majority only permit trustee corporations or the equivalent of a public guardian to act or do not allow any body corporate to act.³⁸
- 16.78 The primary policy reason for preventing bodies corporate from acting relates to the special nature of the representative role and the relationship between a representative and the represented person. While many professional roles that have a fiduciary nature (including professional trustees) act through a corporate structure, the representative role is unique. Representatives act for a vulnerable group of people who do not have decision-making capacity for a decision or class of decisions. The representative's role is to make decisions on behalf of the represented person, which carries with it a unique type of responsibility.³⁹
- 16.79 Under our proposed decision-making rules, it will be critical for a welfare representative to be able to establish an ongoing, close personal relationship with the represented

³⁷ New South Wales permits bodies corporate to act as welfare and property managers with no restrictions. See *Ability One Financial Management Pty Ltd v JB* [2014] NSWSC 245 at [122].

³⁸ Guardianship and Administration Act 2000 (Qld), s 14(1)(b); Guardianship and Administration Act 1993 (SA), s 35(2); Guardianship and Administration Act 1995 (Tas), s 54(1)(b); Mental Capacity Act 2005 (UK), s 19(1)(b); Adults with Incapacity (Scotland) Act 2000, s 59(1)(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 36(1); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 40. As noted above, New South Wales permits any body corporate to act. In Victoria, bodies corporate can act as administrators. See Guardianship and Administration Act 2019 (Vic), s 32(2).

³⁹ The special nature of the role was recognised during the development of the PPPR Act. In a response to submitter concerns that the prohibition would exclude community organisations from being representatives, the Department of Justice said in relation to the original PPPR Bill:

The nature of the welfare guardian's functions means that he or she should be appointed personally by the court. A community organisation should propose a specific person as welfare guardian, rather than seeking appointment itself.

See Department of Justice *Protection of Personal and Property Rights Bill: Report of the Department of Justice* (JL/87/308, 22 May 1987) at 10.

person. Bodies corporate act through employees or agents. It would be inconsistent with the nature of the role for the body corporate to be able to determine for itself which of its employees should perform the body corporate's obligations. We have considered whether a body corporate should be permitted to be appointed on the basis that only one person would undertake its responsibilities but do not recommend this. Staff turnover may mean the body corporate has to abruptly stop acting if an employee leaves. Further, an employee or agent of a company might have pressures or incentives arising from the corporate setting that are not solely about performing their responsibilities as a representative.

- 16.80 These concerns might also apply to trustee corporations acting as a property representative (as is allowed under the PPPR Act). However, we did not hear any feedback that trustee corporations being able to act in this role causes any issues.⁴⁰ We therefore do not make any recommendations about further limiting the ability of trustee corporations to act.
- 16.81 In our Second Issues Paper, we said a prohibition on bodies corporate acting would prevent iwi, hapū or kaupapa Māori organisations from acting as property representatives. We did not receive any submissions on this point. Whānau, hapū or iwi-based decision making for a represented person could be supported in a new Act by the appointment of multiple representatives under our recommendations in Chapters 5 and 17. In particular, when assessing whether the appointment of multiple representatives is appropriate, our recommendations would require the Family Court to take tikanga into account.⁴¹ Supporting a collective, whanaungatanga-oriented approach to decision making would clearly be a consideration for the Court in that context.
- 16.82 In our view, the ability for multiple representatives to act is a more appropriate avenue for whānau, hapū or iwi-based decision making than permitting bodies corporates to act generally. Our concerns about bodies corporate acting (as discussed above) are relevant to kaupapa Māori-based corporations or whānau, hapū or iwi acting through a corporate structure. Supporting the whānau, hapū or iwi itself to act through the appointment of multiple representatives rather than a corporate structure representing the same mitigates our concerns about corporations while enabling the law to support the tikanga of whānau, hapū and iwi.

Other matters that must be brought to the Family Court's attention or require a review

- 16.83 As noted above, the PPPR Act provides for a category of matters that result in a welfare guardian or property manager ceasing to hold office if they occur during their appointment.⁴² They do not, however, prohibit the representative from being reappointed.
- 16.84 In our view, there are good reasons to retain a category of matters that must be considered by the Family Court. Whether some matters are disqualifying will depend

⁴⁰ This might be explained by the very limited number of trustee companies. The Corporate Trustees Association currently only lists five trustee corporations that can be appointed as property managers. See "Powers to make decisions for others — Trustee corporations" (27 January 2020) Te Tāhū o te Ture | Ministry of Justice <www.justice.govt.nz>; and "CTA members" Corporate Trustees Association <www.cta.org.nz>.

⁴¹ See R3.

⁴² Protection of Personal and Property Rights Act 1988, ss 22(b) and 52(b).

heavily on the circumstances and so should require the safeguard of Court approval before a representative can be appointed.

- 16.85 However, whether these matters should result in automatic suspension for a representative who is currently acting is a more balanced issue. On the one hand, if matters are serious enough to require Court attention before a representative can be appointed, it might be safest (should they happen during appointment) for a representative to be prevented from acting until the Court has had a chance to consider them. On the other hand, automatic prohibition of a representative acting can cause significant disruption for the represented person.
- 16.86 We consider a more proportionate response is to require a representative who is acting to apply immediately for a review of the representative arrangement if one of the matters in this category occurs (if this is reasonably practicable). This approach would lessen the safeguarding impact of the current provisions because the representative could continue to act up until the Family Court's consideration of the matter (which, depending on Court timeframes, might take some time). However, this risk must be weighed against the potentially significant harm that could occur to a represented person by virtue of suddenly having no representative. On balance, we consider an automatic prohibition on continuing to act would be a disproportionate response to the occurrence of matters that do not justify outright prohibitions.
- 16.87 Accordingly, we recommend that a new Act include a category of matters that must be brought to the Family Court's attention — either at the time of appointment or when they occur (as relevant). We discuss the matters that should fall into this category below.

Convictions

- 16.88 We recommend that a person applying to be a representative must bring a conviction for two types of offence to the Family Court's attention. These recommendations supplement our recommendation that people who are serving a sentence of imprisonment be automatically prohibited from being appointed or continuing to act as a representative, as addressed above.
- 16.89 The first is an offence in relation to or affecting the person. Whether a conviction is for an offence in relation to or affecting the person will depend on the context. Sometimes, it may be clear, for example, where the proposed represented person was the victim of the offence. Other times it may not be so clear. For example, the person who lacks decision-making capacity may have witnessed the representative (or proposed representative) commit a crime and might therefore be less likely to trust them. This might affect the representative's ability to form a good relationship with the person.
- 16.90 The second type of offence is a prior conviction for which the proposed representative has served a prison sentence. In our view, convictions that have resulted in a prison sentence are significant enough potential indicators of a person's suitability that the Court should have the opportunity to consider them. This requirement only applies if the proposed representative has completed their sentence, because they would be prohibited from acting if they are currently serving a sentence of imprisonment.
- 16.91 We consider that restricting the requirement to bring convictions to the Family Court's attention to these two categories of offence is appropriate to ensure that unrelated offences do not unnecessarily disrupt a potential representative's appointment or existing arrangements.

16.92 Whether a particular conviction that is required to be brought to the Family Court’s attention should prevent a person from acting or require them to cease acting will depend on the context. In particular, it will depend on whether the conviction is an indicator that the proposed representative is unsuitable to act. Relevant factors may include the nature and circumstances of the conviction, the amount of time that has passed since the conviction and any evidence relating to the risk of reoffending such as the successful completion of any rehabilitative programmes.

Compulsory treatment orders

16.93 A compulsory treatment order may present practical barriers to being a representative. It may also be an indicator of unsuitability. However, the nature and circumstances of compulsory treatment orders can vary considerably. A compulsory treatment order can be either a community treatment order or an inpatient order.⁴³ An order may end at any time if the responsible clinician considers the patient is fit to be released from the order.⁴⁴ We therefore recommend that any compulsory treatment order (past or present) is brought to the Family Court’s attention prior to appointment or through a review rather than operate as an outright prohibition.

Certain other matters for property representatives

16.94 Some matters raise serious questions as to a person’s suitability to manage a represented person’s financial affairs but do not have the same level of relevance for a welfare representative role. We therefore recommend that they be required to be brought to the Family Court’s attention only in relation to acting or potential property representatives.

16.95 We recommend this approach in relation to bankruptcy and where a person is not qualified to be appointed as a director of a company under the Companies Act 1993.⁴⁵ Depending on the circumstances, these matters can indicate that a person is unsuitable to manage another person’s financial affairs. Submitters that discussed bankruptcy supported it as a matter that must be drawn to the Court’s attention for this reason. A number of overseas jurisdictions we have investigated require bankruptcy to be brought to the Court’s attention prior to appointment or if it occurs while a representative is acting.⁴⁶

Matters that we do not recommend be included

16.96 A small number of submitters suggested that a representative should stop acting when they have a “material” or “actual” conflict of interest until the Family Court can consider whether they should continue acting.

⁴³ Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 29–30.

⁴⁴ Mental Health (Compulsory Assessment and Treatment) Act 1992, s 35.

⁴⁵ See Companies Act 1993, s 151.

⁴⁶ Guardianship and Management of Property Act 1991 (ACT), s 10(2)(c); Guardianship of Adults Act 2016 (NT), s 15(2)(j); Guardianship and Administration Act 2000 (Qld), ss 14(1) and 26(2); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 39(1)(c) and 40(4)(c). It has also been recommended in New South Wales. See New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R8.15(4).

16.97 We consider such a rule would likely create more problems than it would solve. Conflicts of interest may arise at any time, particularly where a representative is also a family or whānau member. What is important is how the representative responds to them. This is why the Family Court should be required to be satisfied that a representative is suitable to manage any likely conflicts on appointment and why it is important that it have the ability to impose specific requirements on representatives, such as requiring them to consult with others on, or to record or report on, any decisions in which they have a conflict of interest. We make separate recommendations about these matters.⁴⁷

THE MINIMUM AGE OF REPRESENTATIVES

Current law

16.98 Under the PPPR Act, a welfare guardian or a property manager must be at least 20 years of age.⁴⁸

Issue

16.99 Minimum age requirements of 20 years are rare in Aotearoa New Zealand. While it is important for representatives to have enough experience to perform the role, setting the minimum age too high could prevent suitable people from taking up the role.

16.100 There is also a question about whether there should be any exceptions to a minimum age for representatives. Age is only one indicator of a person's experience, and it might be appropriate for younger people to be appointed in certain circumstances.⁴⁹

Consultation

Lowering the minimum age to 18

16.101 In our Second Issues Paper, we expressed a provisional view that the minimum age for court-appointed representatives should be lowered to 18.⁵⁰ We asked submitters whether they agreed with that approach.

16.102 Thirty-eight submitters commented on this issue. Approximately two-thirds said the minimum age should be lowered and one-third said it should not.

16.103 Of those that said it should, approximately a third reasoned that 18 is the accepted age of legal responsibility in Aotearoa New Zealand. Submitters gave examples of other things a person can do at 18 such as vote, become a trustee, stand for election and be appointed as a company director.

16.104 The other reason given by some submitters in favour of lowering the minimum age was that a person can be a suitable representative at 18 depending on the circumstances, and the proposed representative's other qualities might make them suitable.

⁴⁷ See R80 and R104.

⁴⁸ Protection of Personal and Property Rights Act 1988, ss 12(4) and 31(3).

⁴⁹ In our Second Issues Paper, we expressed a preliminary view that there should be no exceptions to an age limit of 18 years: at [11.55].

⁵⁰ Second Issues Paper at [11.54].

16.105 Submitters that disagreed and gave reasons said an 18-year-old does not have the experience or maturity to be a representative.

Appointing someone under 18 in some circumstances

16.106 We also asked whether the Family Court should ever be able to appoint a person younger than 18 as a representative. Thirty-six submitters commented on this issue. Approximately two-thirds said the Family Court should not be able to appoint a representative younger than 18 and one-third said it should.

16.107 Of those that said it should not, approximately half said people below 18 do not have the experience to be representatives. Some others said people below 18 are not legal adults and it would be anomalous for them to have decision-making powers for others that they do not have for themselves. Some of the submitters that disagreed said the responsibility of being a representative is too much for people under 18.

16.108 Of those that said the Family Court should be able to appoint a person younger than 18, most said sometimes a person under 18 might be suitable. Examples given were where a person under 18 is a joint representative with another person over 18 or where it is culturally appropriate for a person under 18 to be appointed.

Recommendation

R86

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

16.109 We consider reform is desirable to lower the age at which a person can be appointed as a representative to 18, for several reasons.

16.110 First, a minimum age of 20 is out of step with the approach in every other jurisdiction we have considered. Nearly all of them have a minimum age of 18.⁵¹ One has a minimum age of 19⁵² and one 16 (for welfare representatives only).⁵³ A few jurisdictions do not set a minimum age.⁵⁴ None set a minimum age of 20.

16.111 Second, a person of 18 can be appointed to many roles that have broadly analogous powers, duties and responsibilities, such as a trustee under the Trusts Act 2019⁵⁵ or a director of a company under the Companies Act 1993.⁵⁶ The age limits for these roles suggest a widely accepted age limit of 18 in legislation generally. The current age limit of 20 is out of step with this.

⁵¹ Guardianship Act 1987 (NSW), s 16(1)(a); Guardianship and Administration Act 2000 (Qld), s 14(1)(a); Guardianship and Administration Act 1995 (Tas), ss 3(1) definition of “adult”, 21(2) (for guardians) and 54(2) (for administrators); Guardianship and Administration Act 2019 (Vic), ss 22 and 23(1); Mental Capacity Act 2005 (UK), s 19(1); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 38(2)(b) and 87(2)(a).

⁵² Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 39(2) and 40(1)(a).

⁵³ Substitute Decisions Act SO 1992 c 30 (Ontario), s 44.

⁵⁴ South Australia and Scotland do not set age limits.

⁵⁵ Trusts Act 2019, ss 9 definition of “child” and 96(2)(a).

⁵⁶ Companies Act 1993, s 151(2)(a).

- 16.112 Third, while 18 and 19-year-olds may generally be less mature and experienced than 20-year-olds, whether an individual is suitable to undertake the role in the light of their age would be something for the Family Court to consider when assessing their suitability.
- 16.113 We consider there are good reasons to enable a person under 18 to be appointed in some circumstances. It may increase the pool of potential representatives. As with 18 and 19-year-olds, concerns about maturity and suitability could be seen as matters for the Family Court to assess when considering an application to appoint a representative younger than 18. We also acknowledge that an age limit of 18 may be out of step with the generally accepted ages of responsibility in some cultures. Lastly, although enabling the Court to appoint representatives under 18 only received minority support from submitters, a number of submitters still supported it.
- 16.114 On balance, however, we do not consider that the Family Court should be able to appoint anyone under 18 as a representative in any circumstance. New Zealand law provides a number of restrictions on what people under 18 can do. For example, contracts are unenforceable against minors (unless a court deems them fair and reasonable).⁵⁷ As some submitters raised, it would be unusual for the law to grant a person younger than 18 the power to make decisions for another person that they cannot make for themselves. Relatedly, these age limits in other areas of law mean that a person younger than 18 cannot have experience making these types of decisions. We also do not consider it would be appropriate to impose the legal duties and responsibilities that accompany the representative role on a person younger than 18. These duties and responsibilities potentially open representatives up to various forms of liability that would not be appropriate for people younger than 18.

SHOULD VOLUNTEER REPRESENTATIVES ONLY BE AVAILABLE AS A LAST RESORT?

Current law and practice

- 16.115 In Aotearoa New Zealand, there are welfare guardian trusts that recruit and train volunteers to act as welfare guardians.⁵⁸ In practice, these volunteer representatives only act when no-one else is available.⁵⁹
- 16.116 The PPPR Act is silent on volunteer representatives.

⁵⁷ Contract and Commercial Law Act 2017, ss 86–89.

⁵⁸ Welfare Guardians “Welfare Guardians Trusts NZ” <www.welfareguardians.nz>. In this context, we use the term “volunteer representative” to mean representatives who are acting on behalf of a volunteer organisation that provides representatives or who independently volunteer to undertake the role. We acknowledge that, given we recommend remuneration to continue to be prohibited for welfare representatives (see Chapter 17), it is always a voluntary role even for representatives close to the person.

⁵⁹ Welfare Guardians “Welfare Guardians Trusts NZ” <www.welfareguardians.nz>. Age Concern NZ also indicated this is current practice.

Issue

16.117 Some jurisdictions specify that the relevant court can only appoint volunteer representatives if no-one else is available.⁶⁰ This raises the question of whether Aotearoa New Zealand should take the same approach.

Consultation

16.118 We asked submitters whether volunteer representatives should be appointed only as a last resort. Thirty-nine submitters gave feedback on this issue.

16.119 Approximately half of these submitters considered that volunteer representatives should only be appointed as a last resort. Most did not give reasons. Those that did identified two reasons — namely, that it is better to have someone who knows the person be a representative for them, and that there are limited volunteer representatives available and so they should be prioritised for people who have no-one else.

16.120 Approximately a quarter of submitters that gave feedback on this issue disagreed that volunteer representatives should only be appointed as a last resort. The primary reason given was that sometimes a volunteer or independent representative is more appropriate or suitable as a representative than a family or whānau member. This may be the case where the person who needs a representative does not want a close person to act as a representative or where a family or whānau member has a significant conflict of interest.

16.121 He Manaakitanga Kaumātua Aotearoa | Age Concern NZ said that the current practice is only to seek a volunteer or independent representative after all other avenues have been exhausted.

16.122 One submitter said the lack of available representatives is the primary issue. This submitter also said volunteer representatives are reluctant to take up the role if there are family or whānau members involved because of the risk of conflict.

Reform not desirable

16.123 There are some good arguments for restricting the appointment of volunteer representatives to situations where no-one else is available. It may sometimes be preferable for someone who has an existing and positive relationship with the relevant person to take up the appointment. The potential for a volunteer representative to be appointed might lessen the incentive for people close to a person who needs a representative to take up the role. Also, appointing a volunteer representative for someone who has other options may mean that another person goes without a representative. As noted above, submitters emphasised the limited pool of volunteer representatives.

16.124 However, the wishes and values of the person who needs a representative are an important consideration when assessing a potential representative's suitability. Sometimes, a person who does not have an existing relationship with the relevant representative may be more suitable. During our focus groups, some people said they would prefer it if someone who was not a family or whānau member and did not know them was their representative. If there are volunteer representatives available for a person in this position, it is in their interests that they can be considered.

⁶⁰ See for example Guardianship and Administration Act 2019 (Vic), s 33(1); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(7).

16.125 On balance, we do not favour the law providing for volunteer representatives to be appointed only as a last resort. As submitters identified, volunteer organisations take a practical approach to appointing volunteer representatives anyway. If there is a suitable alternative, a volunteer representative will generally be reluctant to take up the role. We are not convinced that the law preventing appointment in such situations would change much in practice. Relatedly, having a fixed statutory rule would not allow any consideration of the circumstances of the proposed represented person and their wishes and values. Rather than ensuring volunteer representatives are reserved for those with no other options, such a rule may prevent volunteer representatives from acting where they are needed.

CHAPTER 17

Court-appointed representatives: nature and scope of the role

IN THIS CHAPTER, WE CONSIDER:

- whether there should be a single type of court-appointed representative arrangement;
- the rules that should apply in relation to multiple court-appointed representatives working together;
- the powers of court-appointed representatives;
- restrictions on certain decisions that representatives can make;
- participation in research by people who lack decision-making capacity to give informed consent;
- whether court-appointed representatives for welfare matters should be entitled to remuneration; and
- reserve representatives and other considerations relevant to when a court-appointed representative stops acting.

INTRODUCTION

- 17.1 This is the second of three chapters about court-appointed representatives. The focus of this chapter is on the nature and scope of court-appointed representative arrangements.
- 17.2 We recommend there should continue to be two types of representatives who can be appointed by te Kōti Whānau | Family Court — welfare representatives and property representatives. We also make recommendations that would:
- (a) clarify the responsibility and liability of court-appointed representatives in situations where more than one representative is appointed;
 - (b) help ensure court-appointed representatives' powers are fit for purpose — in particular, that representatives can access all information relevant to their role;

- (c) modify the decisions that require Family Court approval — for example, we recommend that Court approval be required for sensitive matters such as consenting to a sterilisation procedure, and we recommend the monetary threshold above which property representatives need Court approval for decisions be removed;
- (d) provide a workable pathway for people who lack decision-making capacity to consent to participate in research to be able to participate, where this accords with their wishes and values;
- (e) clarify when welfare representatives can receive payment for services provided as a result of decisions made by them or the represented person; and
- (f) enable the Family Court to appoint reserve representatives.

WHETHER A SINGLE TYPE OF REPRESENTATIVE ARRANGEMENT IS DESIRABLE

Current law

- 17.3 The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides for two kinds of court-appointed representatives: welfare guardians and property managers. These roles are addressed in different parts of the Act,¹ and appointments are made under separate orders.²
- 17.4 While many of the rules for welfare guardians and property managers are the same, there are some differences. As we explain in Chapter 14, the tests for appointing welfare guardians and property managers are different. There are also some differences between the roles, for example, in relation to remuneration and record-keeping obligations.³

Issue

- 17.5 Having two types of representative arrangement with slightly different rules can create complexity, especially where one person is acting or going to act in both roles. If there were a single type of representative arrangement, the Family Court could make one order appointing a representative to make both financial and welfare decisions. In addition, a single representative arrangement might sometimes help to streamline decisions relating to care and welfare that have financial implications.
- 17.6 In Chapter 14, we recommend a single test for determining whether a representative should be appointed. In this chapter, we consider whether the nature of the representative role in relation to welfare and property is sufficiently different to merit different types of representative arrangement. In particular, we consider whether separate representative arrangements have benefits that outweigh their potential complexity.

¹ Protection of Personal and Property Rights Act 1988, pts 2 (welfare guardians) and 4 (property managers).

² Protection of Personal and Property Rights Act 1988, ss 12 (welfare guardians) and 31 (property managers).

³ Protection of Personal and Property Rights Act 1988, ss 21 and 50 (remuneration) and 45 (record keeping for property managers). For example, welfare guardians cannot be remunerated while property managers can with Court approval. Also, welfare guardians do not currently have any record-keeping and reporting requirements, while property managers do.

Consultation

- 17.7 In our Second Issues Paper, we suggested that it would be preferable to have one type of representative arrangement.⁴ We asked whether welfare and property representatives should be separate roles. Fifty-one submitters gave feedback on this issue.
- 17.8 Approximately two-thirds of these submitters said the roles should be separate, and one-third said there should be a single role. A few submitters commented but did not express a particular view.
- 17.9 Of those submitters that said the roles should remain separate, the significant majority said the roles have different responsibilities and require different skills. Some submitters made other points in support of separate roles:
- (a) One submitter said there are good reasons to have separate legal rules attaching to the two roles and the current law does not preclude the same person acting in both roles.
 - (b) He Manaakitanga Kaumātua Aotearoa | Age Concern NZ said having different roles focuses the priorities of representatives. It considered that, even if the same person holds both roles, recognising the different responsibilities is still useful.
 - (c) A few submitters said having separate roles provides for some safeguards because having one person in both roles could create conflicts of interest.
- 17.10 Approximately a third of submitters that supported separate roles nevertheless said they could be combined or held by the same person if appropriate in the circumstances or noted that the current law permits the same person to be appointed to both roles. Two of these submitters identified the situation of a represented person having limited finances as one in which it is appropriate for a single person to hold both representative roles. A few other submitters said it could be appropriate when there is no conflict of interest.
- 17.11 Submitters that said there should be a single role gave the following reasons:
- (a) A few submitters said the roles should be the same when there is limited property or income to manage.
 - (b) A few submitters said the roles should be the same because welfare and property decisions are not always easily separated.
 - (c) One submitter said the roles could be the same when there is no conflict of interest.
 - (d) Community Law Centres Aotearoa said having a single role would make applications easier.

⁴ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [11.7].

Reform to combine welfare and property representative roles not desirable

- 17.12 We recommend that the law continue to provide for separate roles for welfare and property representatives. Approaches in overseas jurisdictions we investigated vary on this issue, although most have separate roles.⁵
- 17.13 Our main reason for this conclusion is that representative arrangements in relation to welfare and property sometimes require different legal rules. As we address in this chapter and the next, the law should continue to have some different rules in relation to remuneration and record keeping.⁶ We consider these different rules will be easier for representatives to understand and apply if there are separate representative arrangements for welfare and property. In our view, the conceptual clarity of separate roles outweighs the inconvenience and increased cost of needing to make two applications where the same person is proposed to perform both roles.
- 17.14 Further, the separate roles of welfare and property representatives are well understood and have existed since the PPPR Act was introduced without creating any significant issues. Third parties have knowledge of and established practices for working with the two types of representatives. Against this background, we consider there would need to be convincing reasons for reform to recommend a single representative role. We would have needed to hear from submitters that having two separate roles was creating real practical difficulties that needed to be addressed. This was not the case.
- 17.15 We acknowledge that having separate roles can create unnecessary complexity in some situations — in particular, where a person has limited financial resources or significant financial decisions are not required. However, this complexity is mitigated in part by the Family Court’s power, instead of appointing a property representative, to make an order authorising a person to administer limited amounts of property or income.⁷ That means that a person applying to be a welfare representative (or any person generally) can apply to administer a represented person’s property or income up to a certain threshold without having to make an application to be a property representative.⁸ As we note in Chapter 14, we consider the Family Court should continue to have such a power.
- 17.16 In Chapter 16, we discuss our use of the term “court-appointed representative” (or “representative” for short) to describe a person appointed by the Family Court to make decisions on behalf of another person. To align with this approach, we recommend that a new Act should use the terms “welfare representative” and “property representative” respectively to describe representatives appointed by the Family Court to make decisions relating to welfare or property.

⁵ Of the jurisdictions we investigated, only Ireland and New Brunswick have a single type of representative arrangement. See Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(2)(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 38(1). The New South Wales Law Reform Commission has recommended a single representative arrangement: *Review of the Guardianship Act 1987* (NSWLRC 145, 2018), R9.1.

⁶ See R105, R106 and R115 to R118.

⁷ Protection of Personal and Property Rights Act 1988, s 11.

⁸ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [59].

MULTIPLE COURT-APPOINTED REPRESENTATIVES

Background

- 17.17 The PPPR Act enables multiple representatives to be appointed to the same role. The Family Court can appoint more than one welfare guardian and more than one property manager.⁹ In practice, where more than one representative is appointed to the same role, they generally share the same responsibilities.¹⁰
- 17.18 The appointment of multiple representatives to the same role can be appropriate in various situations, including where:
- (a) the representative role is onerous and more than one suitable representative is available to share the load;¹¹
 - (b) having multiple representatives for the same decision is important for cultural reasons;¹²
 - (c) the appointment of multiple representatives can help support a collective, whanaungatanga-oriented approach under tikanga; and
 - (d) the greater checks and balances on the decision-making role that multiple representatives provide is advantageous.
- 17.19 In our view, multiple representatives should continue to be able to be appointed to a role (for example, two welfare representatives).¹³ In this section, we consider two topics related to multiple representatives: how responsibility and liability should be shared between representatives acting in the same role and the obligations of multiple representatives working together.

How responsibility and liability should be shared between multiple representatives in the same role

Current law

- 17.20 Under the PPPR Act, where more than one property manager is appointed, their responsibility is “jointly held, unless the [C]ourt orders otherwise”.¹⁴ For welfare guardians,

⁹ Protection of Personal and Property Rights Act 1988, ss 12(6) and 31(2). The appointment of more than one welfare guardian must be in the person’s best interests. There is no such explicit requirement for property managers.

¹⁰ Usually if multiple representatives are appointed, they are either parents or children of the person subject to the representative arrangement and share the role on a general basis. See Iris Reuecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 153. We found one case where the Court specified separate areas of responsibility for two property managers that were appointed for the same person. See *Re Moodie* [1990] NZFLR 568 (FC) at 574.

¹¹ In *AK v RJT*, the Court thought it was appropriate to appoint Mr T’s wife and daughter as welfare guardians so they could work in tandem and support each other: *AK v RJT* FC North Shore FAM-2009-090-2264, 29 August 2011 at [4].

¹² See our discussion about critiques of the individualistic nature of decision-making capacity in Chapter 8.

¹³ In our Second Issues Paper, we asked submitters whether the Family Court should be able to appoint more than one representative. Forty-four submitters gave feedback on this issue of which approximately three-quarters said it should. We do not consider this issue in detail in this Report because we do not think there are any strong arguments against the Court’s ability to appoint multiple representatives. Of the overseas jurisdictions we have investigated, only Tasmania restricts appointments to different decisions. See *Guardianship and Administration Act 1995* (Tas), s 20(4).

¹⁴ Protection of Personal and Property Rights Act 1988, s 31(2).

the PPPR Act does not specify how they should share responsibility for decisions or how this should be decided.

Issues

- 17.21 Where multiple representatives are appointed to the same role, they need to be clear about who is responsible for what and how liability is held between them. Further, the rules regarding liability should be fair as between representatives.
- 17.22 These issues do not arise where multiple representatives are appointed to different roles (for example, a welfare and property representative) as their respective spheres of responsibility and liability do not overlap.

Consultation

- 17.23 We did not ask a specific question about responsibility between multiple representatives, but a number of submitters commented on this issue.
- 17.24 The majority of these submitters said the Family Court should specify whether responsibility should be held jointly or severally when making an order. These submitters reasoned that this would enable the Court to tailor the way representatives work together on a case-by-case basis to reflect the represented person's will and preferences and the reasons for making the appointments.
- 17.25 A minority of submitters that commented on this issue said responsibility should be held jointly unless the Family Court directs otherwise because this would be more certain.

Recommendations

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.

- 17.26 A new Act should provide that, when making an order for multiple representatives in the same role, the Family Court is required to specify the decisions or classes of decisions that each representative is authorised to make. In our view, requiring the Court to turn its mind to these matters is preferable to a default rule (as the PPPR Act provides with respect to property managers). When there are multiple representatives in a role, considering their respective areas of responsibility should be a standard part of the Court's process of tailoring representative arrangements. Most legislation in jurisdictions we have investigated provides for the court to tailor representative arrangements in this way.¹⁵
- 17.27 We also recommend that a new Act clarify how liability is to be held as between multiple representatives. In our view:
- (a) when more than one representative is authorised to make a decision, each should be liable for the decision unless it was made without their agreement or consent — subject to any different rules provided for by the Family Court when appointing the multiple representatives; and
 - (b) when multiple representatives are authorised to make different decisions, each should be liable for their own decisions.
- 17.28 In broad terms, this approach would provide for liability to follow responsibility. Where more than one representative is authorised to make a decision, a representative would be protected from liability if another representative makes a decision on their own or there is a disagreement and another joint representative makes a decision anyway. This protection would help prevent representatives from being deterred from entering joint representative arrangements for fear of liability due to the actions of another representative. The Family Court's ability to modify this approach at the time of appointment would enable any specific considerations to be addressed.

¹⁵ For an example of a jurisdiction where the court is required to tailor representative arrangements for multiple representatives, see Mental Capacity Act 2005 (UK), s 19(4). By contrast, Queensland takes the same approach as the PPPR Act, where the default rule is for joint responsibility unless the court directs otherwise: Guardianship and Administration Act 2000 (Qld), s 38.

17.29 In Chapter 22, we make recommendations about immunities for court-appointed representatives. Our recommendations here are subject to those recommendations.

Obligations for multiple representatives working together

Current law

17.30 The PPPR Act contains some consultation obligations for multiple representatives. If there is a welfare guardian and a property manager, they must consult with each other on a regular basis.¹⁶ If two welfare guardians are appointed, they must “regularly consult each other”.¹⁷ There is no express consultation requirement for two property managers.

17.31 All welfare guardians and property managers may apply to the Family Court for directions regarding the exercise of their powers.¹⁸ While not specific to multiple representatives, this ability can be relevant where multiple representatives disagree or face other challenges.

Issues

17.32 Where a person has multiple representatives, the representatives need to be clear about their obligations to work together. We address below whether the PPPR Act’s different approach with respect to welfare guardians and property managers is justified — in particular, whether multiple property managers should have a statutory obligation to consult with each other, as multiple welfare guardians do. We also address whether the obligations specified in the PPPR Act provide sufficient clarity and flexibility.

Consultation

17.33 In our Second Issues Paper, we asked how multiple representatives should work together and whether a new Act should contain statutory obligations for multiple representatives or allow the Family Court to decide what the obligations are. Thirty-two submitters commented on how multiple representatives should work together.

17.34 Approximately half of these submitters favoured the Family Court setting obligations for multiple representatives working together on a case-by-case basis. Submitters that gave reasons considered that every situation will be different and flexibility is required to tailor representative arrangements appropriately. These submitters considered the Court is best placed to do this, based on the evidence before it. Two submitters said this approach would mean representative arrangements can be tailored to reflect the represented person’s will and preferences and the reasons for appointing the representatives.

17.35 A smaller number of submitters that gave feedback said there should be statutory obligations on multiple representatives in relation to how they work together, to provide clarity and transparency.

17.36 Approximately a quarter of submitters that gave feedback said there should be a mixture of statutory and court-imposed obligations. Most of these submitters said the obligation

¹⁶ Protection of Personal and Property Rights Act 1988, ss 18(5) and 43(6).

¹⁷ Protection of Personal and Property Rights Act 1988, s 12(6A).

¹⁸ Protection of Personal and Property Rights Act 1988, ss 18(6) and 38(2).

to consult with other representatives should be prescribed by statute and the Family Court should be able to tailor other obligations.

Recommendations

R90

Subject to R91, 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.

Statutory obligations on multiple representatives to consult each other

- 17.37 In our view, consultation is a core obligation for representatives when they are working together and should be provided for by statute.¹⁹ As noted above, a number of submitters identified consultation as a particularly important obligation for representatives working together, with some specifying that it should be the only obligation prescribed by statute.
- 17.38 Consultation obligations should apply to all types of representatives who are working together. In our view there is no good reason for multiple property representatives not to have the same statutory obligations as other representatives (as is the case under the PPPR Act).²⁰
- 17.39 We consider that a new Act should address the consultation obligations of multiple representatives in more detail than the PPPR Act. The level of obligation should reflect the respective importance of representatives consulting each other where their responsibilities are shared and where they are not. We therefore recommend the following:
- (a) Where multiple representatives share responsibility for a decision or class of decisions, they should be required to consult all other representatives who share that responsibility before making any such decision or decisions. Where multiple representatives are required to make decisions together, this will normally mean that their consultation requirements are met.
 - (b) Where multiple representatives have responsibility for different decisions, each should only be obliged to consult with another with respect to decisions that they know or ought to know have implications for any decision the other may be required to make.
- 17.40 These consultation obligations should not be absolute. We recommend two exceptions. The first is where it would be impractical to consult in the circumstances. Legislation in some overseas jurisdictions has this exception.²¹ It would ensure that consultation obligations do not inhibit decisions that need to be made urgently where consultation is not practicable.
- 17.41 Our second recommended exception is where a representative believes in good faith that another representative would agree with their intended decision. This exception would mean that representatives do not have to consult on trivial or uncontroversial decisions. We also anticipate this exception would enable representatives over time to resolve among themselves which decisions or types of decision do not require consultation.

¹⁹ Most jurisdictions we investigated have consultation obligations prescribed by the relevant legislation. See Guardianship and Administration Act 2000 (Qld), s 40; Guardianship and Administration Act 2019 (Vic), s 177(2); Mental Capacity Act 2005 (UK), s 4(7); Adults with Incapacity (Scotland) Act 2000, s 62(7); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(d)(ii).

²⁰ Legislation in all jurisdictions we investigated that have consultation obligations have the same consultation obligations for all types of representatives. See Guardianship and Administration Act 2000 (Qld), s 40(1); Guardianship and Administration Act 2019 (Vic), s 177(2); Mental Capacity Act 2005 (UK), s 4(7); Adults with Incapacity (Scotland) Act 2000, s 62(7); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(d)(ii).

²¹ See for example Mental Capacity Act 2005 (UK), s 4(7); Adults with Incapacity (Scotland) Act, s 62(7)(a); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 8(7)(d).

The Court should be able to impose further decision-making obligations

- 17.42 In addition to our proposed statutory obligation to consult, we recommend the Family Court have the power to impose further decision-making obligations on multiple representatives. This approach will enable flexibility. As noted above, a strong theme of submissions was that circumstances differ and the Court is best placed to decide which obligations are appropriate.
- 17.43 This approach may allow the Court to address potential suitability concerns with respect to representatives. For example, the Court might require unanimity on a particular decision where one or more representatives has a conflict of interest.²²
- 17.44 We consider a new Act should have a non-exhaustive list of potential obligations that might be imposed. This would provide the Court with some guidance for tailoring obligations between multiple representatives and give applicants an indication of what they might expect from an order.
- 17.45 Lastly, it is important that representatives continue to be able to apply for directions from the Family Court at any time. This should be available to address anticipated conflict between representatives and to resolve ongoing disputes. We do not make a recommendation on this issue but consider the current position should continue.

THE POWERS OF A COURT-APPOINTED REPRESENTATIVE

Current law

- 17.46 Under the PPPR Act, a welfare guardian has such powers “as may be reasonably required to enable the welfare guardian to make and implement decisions ... in respect of each aspect specified ... in the order”.²³ A property manager has “all such rights and powers as the court may confer on the manager in the property order”.²⁴
- 17.47 Some potential powers of property managers are set out in Schedule 1 of the PPPR Act. Where the Family Court decides to make a property manager order in relation to any property, it must determine which of the powers in Schedule 1 the manager is to have with respect to that property. In addition, the Court must specify any other powers that it decides should be granted, along with any restrictions to be imposed on the exercise of a property manager’s powers.²⁵ A property manager is entitled to the possession of the relevant property and can make decisions about it in accordance with the terms of the order.²⁶
- 17.48 The PPPR Act does not address the ability of a welfare guardian or property manager to access information. However, the Privacy Act 2020 provides that an individual is entitled to access their personal information from an agency on request and that such requests may be made “by the individual concerned or the individual’s representative”.²⁷ A welfare

²² See our discussion about decisions involving a conflict of interest later in this chapter.

²³ Protection of Personal and Property Rights Act 1988, s 18(2).

²⁴ Protection of Personal and Property Rights Act 1988, s 38(1).

²⁵ Protection of Personal and Property Rights Act 1988, s 29(3).

²⁶ Protection of Personal and Property Rights Act 1988, s 35.

²⁷ Privacy Act 2020, ss 22 IPP6 and 40.

guardian or property manager constitutes an individual's "representative" for this purpose.²⁸ On this basis, a welfare guardian or property manager has the power to request access to a represented person's information to the extent the information is relevant to their role, on behalf of the represented person.

Issue

17.49 The powers of representatives need to be sufficient to enable representatives to perform their role. However, they should not be so wide as to confuse the nature of the role or enable a representative to overstep it. In this section, we consider whether the current powers of welfare guardians and property managers strike the right balance between these two objectives.

Consultation

17.50 We asked submitters whether there are any issues with the current powers of welfare guardians or property managers that a new Act should address. We noted a potential example of a new Act specifying that representatives may obtain relevant information from any person. Twenty-three submitters gave feedback on welfare guardians' and property managers' powers.

17.51 Approximately half of the submitters that responded identified issues that they considered should be addressed in a new Act. A few submitters said no issues arise with the current powers of welfare guardians or property managers. The remainder did not express a particular view or raised issues that relate more directly to other consultation questions.²⁹

17.52 Some submitters addressed the powers of property managers. Public Trust considered these powers need review. In Public Trust's view, property managers' powers are currently very prescriptive and therefore cannot cover all situations. Further, it can be unclear if an action can be taken or not. Public Trust submitted that:

... [i]n theory the manager should have all the powers necessary to be able to manage, make decisions, and deal with the property they have been authorised by the court to, so they are as effective as the person themselves would have been in making those decisions.

17.53 Greg Kelly Trust Law said it might be helpful to have a default set of powers that apply to property managers unless the Family Court says otherwise. It noted that "[m]any people do not understand the PPPR Act well enough to realise that they have not selected the necessary powers, and while the lawyer for the subject person should have input in relation to this, occasionally it can be overlooked".

17.54 Approximately a quarter of submitters that gave feedback on representatives' powers responded to our suggestion of an express power to access relevant information:

(a) Greg Kelly Trust Law and another submitter considered that it would be helpful for this power to be spelt out. Greg Kelly Trust Law said it can sometimes be difficult for property managers to obtain information about jointly held assets (such as bank statements).

²⁸ The term "representative" is not defined. However, we consider it clearly encompasses a welfare guardian or property manager.

²⁹ Some submitters addressed the types of decisions that representatives should be able to make.

- (b) Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Iris Reuvecamp considered that the status of a welfare guardian or property manager as a representative for the purposes of legal frameworks such as the Privacy Act and Health Information Privacy Code 2020 is generally well understood.
- (c) Volition said it is not necessary to include an express power to access information in a new Act. It said this might have the unintended consequence of making it harder for people providing formal support to access information (if no similar power is provided for them).
- (d) Age Concern NZ said any power to access information should be appropriately limited. For example, it should not include the ability to exclude others from receiving information.

Recommendations

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.

No major reform required to general structure of powers for representatives

- 17.55 As set out above, the PPPR Act takes a different approach to the powers of welfare guardians and property managers. While welfare guardians have all powers reasonably required for them to make and implement decisions within their remit, the powers of property managers must be specified by the Family Court. In our view, this asymmetry should continue.
- 17.56 As we explain in Chapter 14, court-ordered decisions and representative arrangements should only be implemented where they are the least restrictive that can reasonably meet the need for the court-ordered decision or arrangement. This approach reflects the requirements of article 12(4) of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) that measures be “proportional and tailored to the person’s circumstances”. In line with this approach, we think it is appropriate for the Family Court to tailor orders to the circumstances.
- 17.57 For property, this objective is best achieved by requiring the Family Court to identify the particular powers that the representative should have with respect to the relevant property. Requiring the Court to identify the powers that are needed with respect to property in each case best ensures that an order is appropriately tailored to the needs of the person.³⁰ For example, a representative may be needed to manage a person’s day-to-day accounts, but it may not be appropriate for them to have the power to sell the person’s significant assets (for example, because the person has decision-making capacity to make those decisions or they are best made by the Court).
- 17.58 We recommend a different approach for welfare representatives. Welfare representatives should generally have all powers necessary to make and implement decisions that are within their remit. This is because much of the needed tailoring of an order is achieved through identifying the appropriate scope of the order — that is, the matters about which the representative can make decisions. When a matter is identified (such as the person’s health or a particular aspect of their health), it is difficult to foresee all necessary powers that a representative will need to perform their role.
- 17.59 However, we consider the Family Court should be able to exclude certain powers with respect to welfare matters where appropriate. For example, it may be appropriate for a representative to have decision-making powers with respect to a person’s health but not be able to consent to a significant operation. Such situations will sometimes be able to be excluded through the scope of an order, but in other cases, they may best be addressed by excluding a power.

We do not recommend a statutory default set of powers for property representatives

- 17.60 As noted above, Greg Kelly Trust Law submitted it might be helpful to have statutory default powers for property managers. We consider the merits of this option are finely balanced.
- 17.61 Including default powers may be more efficient for applicants, their lawyers and the Family Court and would likely reduce the risk that necessary powers are inadvertently

³⁰ As Professor Bill Atkin observes with respect to the PPPR Act, “[t]he Court should give careful consideration to the details of the management order”. Applying the least restrictive intervention principle, the Court should “give the manager only that authority which is necessary in the individual circumstances”: Bill Atkin “Property Orders and Management” in *Family Law Service — Protection of Personal Property Rights* (online ed, LexisNexis) at [7.847].

omitted from an order. Experienced lawyers told us that representatives sometimes need to go back to Court to modify an order because their powers are insufficient. The inclusion of default powers in a new Act would mitigate this risk.

- 17.62 However, there is a risk that a default set of powers would in practice lead to less consideration of which powers are necessary in each case. Experienced lawyers also told us that, due to resource constraints, the Family Court will often base its orders on a default set of powers rather than tailoring an order. Having a list of default powers in a new Act might reinforce this approach. While the existence of default powers would not lessen the Court's responsibility to consider carefully whether they are appropriate in a particular case, in practice, default powers might become assumed powers.
- 17.63 On balance, we do not recommend a default set of powers for the following reasons.
- 17.64 First, we only received one submission on this point. This indicates to us that the lack of a default set of powers is not causing significant practical issues.
- 17.65 Second, we think it is preferable to risk powers being inadvertently excluded rather than increase the likelihood of orders regularly being made that are too wide. If a property representative needs a certain power that they do not have to perform their role, they can apply to the Family Court to modify the order. However, if a property representative's powers are wider than they need to be, they are unlikely to go back to the Court to narrow the scope of the order. While applying to the Court will cause some delay, we consider this risk is preferable to having overly broad orders. As addressed later in this section, we consider the risk that powers are inadvertently omitted from an order can be partially mitigated by a new Act setting out potential powers more clearly.
- 17.66 Third, requiring the Family Court to expressly consider property representatives' specific powers is consistent with the requirement for orders to be the least restrictive possible, as explained above.

List of property representative's powers should be modernised and application forms amended

- 17.67 The available powers of property managers in Schedule 1 of the PPPR Act are broadly analogous with those in many other jurisdictions.³¹ We have not received any submissions indicating that any of the powers are inappropriate, beyond the monetary threshold for property decisions (addressed later in this chapter). We do not recommend significant reform to property managers' potential powers.³² However, we consider the law can be made clearer and more accessible.
- 17.68 First, with respect to the list of potential powers in Schedule 1:
- (a) We recommend the list be redrafted in a new Act using modern and concise language. Identifying the types of powers more clearly would make it easier for

³¹ Compare Protection of Personal and Property Rights Act 1988, sch 1 with Guardianship and Administration Act 1993 (SA), s 39; Guardianship and Administration Act 1995 (Tas), s 56; Guardianship and Administration Act 2019 (Vic), ss 46–52; Mental Capacity Act 2005 (UK), s 18; and Adults with Incapacity (Scotland) Act 2000, ss 64 and 66. Some jurisdictions broadly empower property managers to do anything the person could have done if they had capacity. See Guardianship and Administration Act 2000 (Qld), s 33(2); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 31. See also New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R9.12.

³² The PPPR Act generally refers to the “rights and powers” of property managers (see ss 29 and 38) whereas we refer only to the “powers” of property managers. We do not intend this different language to signal any proposed change. In our view, the word “powers” encompasses all matters that a court may wish to authorise a property manager to do.

applicants to identify necessary powers. In addition, we consider the drafting of some of the current powers to be overly granular. Framing powers in a more general way would reduce the risk that matters are inadvertently not covered.³³

- (b) Further amendments would be required to align the powers with our proposed decision-making framework. In particular, references to decisions that the property representative considers “reasonable” and “proper” should not be included.³⁴

17.69 Second, we recommend that the application forms for property representative orders be amended to:

- (a) require an applicant to list the powers sought; and
- (b) refer applicants to information about potential powers, including the non-exhaustive list of potential powers (currently in Schedule 1 of the PPPR Act).

17.70 The application forms in Schedule 9 of the Family Court Rules do not refer to the powers that should be conferred on a property manager as part of an order.³⁵ Requiring an applicant to address this issue would not limit the Court’s discretion about what powers to confer. However, it would require applicants to turn their mind to this issue and, in that way, assist the Court’s deliberation.

A new Act should include an express power to access relevant information

17.71 To perform their roles, welfare representatives and property representatives need to be able to access relevant information. A new Act should include an express power for representatives to access relevant information.

17.72 As noted above, the Privacy Act enables a representative to access personal information of the represented person that is relevant to their role, on behalf of the represented person. If representatives only needed to access a represented person’s personal information, it would not be necessary for a new Act to include a power to access information.³⁶

17.73 However, representatives will sometimes need to access other information. For example, a property representative might need to access confidential commercial information to perform their role with respect to the represented person’s business interests. Such information will not always be “about” the represented person and hence will not always clearly constitute the person’s personal information for the purposes of the Privacy Act.³⁷

³³ For example, it is not entirely clear what is covered by the reference to “furniture, clothing, and other articles of personal or household use or ornament (including motor vehicles)”: Protection of Personal and Property Rights Act 1988, sch 1 cl 1(b)(iv).

³⁴ See for example Protection of Personal and Property Rights Act 1988, sch 1 cl 1(b)(iii)–(iv).

³⁵ See Family Court Rules 2002, sch 9 PPPR cl 10–12.

³⁶ The Legislation Design and Advisory Committee guidelines caution against restating matters in new legislation that are already addressed in existing legislation. As the guidelines note, “[t]his kind of duplication often results in unintended differences”. See Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [3.3].

³⁷ See *Taylor v Chief Executive, Department of Corrections* [2018] NZHRRT 35 at [84]. See also Paul Roth and Blair Stewart *Privacy Law and Practice* (online ed, LexisNexis) at [PA7.20]. See especially [PA7.20(d)(vi)] (information about property as “personal information”).

- 17.74 Accordingly, we recommend that a new Act include an express power for a representative to access information that:³⁸
- (a) the represented person is entitled to access; and
 - (b) is relevant to the representative's role.
- 17.75 We anticipate that the gap in the law identified above will primarily apply to property representatives. For clarity and certainty, however, we consider the recommended power should extend to both property and welfare representatives.
- 17.76 The recommended power could sometimes entitle a representative to access confidential information that the represented person is not entitled to disclose.³⁹ Third parties owed obligations of confidentiality by the represented person in relation to that information may have a legitimate interest in the information not being disclosed to the representative. However, in our view, this interest does not outweigh the need for a representative to access the information to perform their job. If a representative could not access necessary information, their effectiveness would be undermined.
- 17.77 Importantly, in Chapter 13, we recommend that a new Act place a duty on representatives not to use or disclose confidential information received as a representative except as required for the role or as expressly authorised by law. Additionally, third parties would be able to seek relief based on equitable principles relating to misuse of confidential information.⁴⁰

PERSONAL DECISIONS A REPRESENTATIVE IS PROHIBITED FROM MAKING

Current law

- 17.78 The PPPR Act prohibits welfare guardians from making the following decisions on behalf of a represented person:⁴¹
- (a) Entering or ending a marriage or civil union.
 - (b) Making any decision relating to the adoption of a child.
 - (c) Refusing consent to a standard medical treatment intended to save the person's life or prevent serious damage to the person's health.
 - (d) Consenting to electro-convulsive treatment.
 - (e) Consenting to surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person's behaviour.

³⁸ In other jurisdictions that we have investigated, it is common to include an express power to access relevant information. See for example Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 41(2)(b); Substitute Decisions Act SO 1992 c 30 (Ontario), s 31.1; and Guardianship and Administration Act 2000 (Qld), s 44(1).

³⁹ For example, a represented person might be a party to a non-disclosure agreement that prevents the represented person from disclosing information that they are entitled to access to any other person. Under the proposed power, the representative would be entitled to access the information if it is relevant to their role.

⁴⁰ See Andrew Butler and Nathaniel Walker "Breach of Confidence" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 795 at 818–820.

⁴¹ Protection of Personal and Property Rights Act 1988, s 18(1).

- (f) Consenting to take part in any medical experiment other than one to be conducted for the purpose of saving that person's life or of preventing serious damage to the person's health.
 - (g) Requesting assisted dying.
- 17.79 Case law also requires certain health decisions such as pregnancy terminations and sterilisations to only be made by a welfare guardian if that power is expressly conferred by the Family Court.⁴²

Issues

- 17.80 The list of prohibited decisions in the PPPR Act has never been substantially reviewed.⁴³ We have found no evidence of the original policy intent behind the list of prohibited decisions as a whole. However, the reasoning given for certain individual decisions by the Department of Justice when developing the PPPR Act suggests they were identified on the basis that they are decisions that have significant implications for the represented person and for which the Family Court should therefore provide a safeguard.⁴⁴
- 17.81 In our view, whether a particular decision meets this threshold is informed by a range of factors, including social understandings and attitudes towards disability and the development of case law. Given there have been significant changes in these matters since the PPPR Act was introduced, we consider below whether the list of decisions that a welfare representative is prohibited from making is appropriate.

Consultation

- 17.82 We asked submitters whether, in addition to the current prohibitions, there are any other personal decisions that a representative should be prohibited from making. We noted some other restrictions that exist in overseas jurisdictions, including:⁴⁵
- (a) entering or ending a sexual relationship;
 - (b) making a decision about the care or wellbeing of a child;
 - (c) entering a surrogacy arrangement;
 - (d) making or discharging a parenting order; and
 - (e) stopping a person from having contact with a represented person.
- 17.83 We also asked whether any of the current prohibitions should be removed.
- 17.84 Thirty-five submitters gave feedback on the personal decisions a representative should be prohibited from making. The vast majority of submitters said the decisions on the current list remain appropriate or suggested additions.
- 17.85 Decisions that submitters suggested adding were:
- (a) the examples from other jurisdictions set out above;
 - (b) decisions about living arrangements;

⁴² *Re H* [1993] NZFLR 225 (FC).

⁴³ The decision to request assisted dying was added in 2021.

⁴⁴ Department of Justice *Protection of Personal and Property Rights Bill: Report of the Department of Justice* (JL/87/308, 22 May 1987) at 15–18.

⁴⁵ Guardianship and Administration Act 2019 (Vic), s 39; Mental Capacity Act 2005 (UK), s 27; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 44(1) and 138.

- (c) consenting to sterilisation; and
- (d) entering into a contract.

17.86 A small number of submitters suggested removing two decisions from the list:

- (a) First, the decision to consent to electro-convulsive treatment. These submitters reasoned that this is a recognised medical procedure for treating some serious illnesses.
- (b) Second, the decision to refuse consent to life-saving treatment. These submitters reasoned that some people choose to stop life-saving treatment when they are seriously ill or otherwise at the end of their life and the current prohibition removes this choice from those who lack relevant decision-making capacity.

Recommendations

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, 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.

Matters that should be added to the list of prohibited decisions

Consenting to sterilisation

17.87 As noted above, the decision to consent to sterilisation has been recognised in case law as requiring Family Court approval.⁴⁶ A number of submitters identified this decision as one that a representative should not be able to make on their own. Sterilisation is a highly invasive procedure that has significant and often irreversible consequences and “profound moral and ethical implications”.⁴⁷ We consider sterilisation fits squarely within the decisions that require the safeguard of Court approval.

17.88 Case law has recognised a distinction between sterilisation designed to remedy a medical condition and sterilisation solely for the purpose of avoiding pregnancy.⁴⁸ In the former category, there is a range of procedures performed for different objectives that may also result in sterilisation. In the latter category, sterilisation is both the procedure and the

⁴⁶ *Re H* [1993] NZFLR 225 (FC).

⁴⁷ *KR v MR* [2004] 2 NZLR 847 (HC) at [73].

⁴⁸ *Re H* [1993] NZFLR 225 (FC) at 235–236.

objective. The prohibition we recommend is limited to procedures performed for the purpose of sterilisation (the latter category).

- 17.89 Our recommendation to add sterilisation to the list would not affect the legal rules regarding the performance of any medical procedure (including sterilisation) in the context of a life-threatening emergency when the person cannot give informed consent and there is no welfare representative to consent on their behalf. Such procedures are governed by both the common law doctrine of necessity and the Code of Health and Disability Services Consumers' Rights (HDC Code).⁴⁹

Consenting to abortion

- 17.90 As noted above, abortion has also been recognised by case law as a decision that requires Family Court approval.⁵⁰ Some submitters said a represented person should not undergo an abortion without express approval from the Court. Abortion has consequences and ethical implications so significant that we consider Court approval should be required.
- 17.91 For the same reasons as apply to sterilisation, we consider that the restriction should be limited to procedures performed for the purpose of abortion. Similarly, our recommendation would not affect the legal rules regarding the performance of an abortion in the context of a life-threatening emergency when the person cannot give informed consent.

Consenting to participate in a surrogacy arrangement

- 17.92 Informed consent is a prerequisite to entering into a surrogacy arrangement.⁵¹ Entering into a surrogacy arrangement as an intended parent would currently require a legal adoption, which is already a prohibited decision.⁵² Entering into a surrogacy arrangement as a surrogate (which would have significant medical and physical implications) would also have material implications for all parties involved. In each case, we consider Family Court authorisation should be required before a representative can consent on behalf of a represented person to any form of participation in a surrogacy arrangement.⁵³

Prohibiting contact with certain people

- 17.93 Prohibiting a represented person from having contact with another person engages a range of fundamental rights, including in particular the right to freedom of association and, in some circumstances, the right to freedom of movement. However, there may be situations where the level of harm caused by contact with another person is such that intervention will be required. For example, during consultation and in discussion with our

⁴⁹ See Jeanne Snelling "Sexual Health, Reproductive Liberty and Adults with Impaired Capacity" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 251 at 256.

⁵⁰ *Re H* [1993] NZFLR 225 (FC) at 230.

⁵¹ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [A(1)]–[A(2)].

⁵² However, the Improving Arrangements for Surrogacy Bill 2021 (72-1) currently in the House would remove the requirement for a legal adoption: cl 17.

⁵³ Northern Territory, Victoria and England and Wales restrict welfare guardians from making any decisions about the represented person entering into a surrogacy arrangement. See Guardianship of Adults Act 2016 (NT), s 24(b)(ia); Guardianship and Administration Act 2019 (Vic), s 39(f); and Mental Capacity Act 2005 (UK), s 27(i).

Lived Experience, Whānau and Carers Expert Advisory Group, we heard about situations where intervention was considered necessary. There may also be situations where a representative considers the decision reflects the person's wishes and values.

17.94 However, we have also heard that restricting a represented person's contact with others is a form of abuse that sometimes occurs.

17.95 In our view, a decision to prohibit contact with another person should only be able to be made by the Family Court.

Matters we consider should not be added to the list of prohibited decisions

17.96 Some submitters raised other decisions they considered should be added to the list of prohibited decisions. These included where a person lives, entering into a sexual relationship, entering into a contract and making decisions about the care of children. In our view, none of these additional suggestions from submitters should be added to the list of prohibited decisions. Most of these suggestions were only supported by a small number of submitters. There was, however, one suggestion that was supported by a number of submitters — a person's living arrangements — and so we explain our reasons on this issue below.

Living arrangements

17.97 Some submitters said the Family Court should have to authorise decisions about where a person lives. In particular, these submitters were concerned about the decision to move a represented person into an aged care facility. These submitters reasoned that this decision has such an impact on the represented person's life that it should require Court oversight.

17.98 While we acknowledge the impact that this decision can have for a represented person, there are strong arguments against requiring Court approval for it:

- (a) First, as one submitter noted, this would have a significant impact on the Family Court's workload. Decisions regarding living arrangements need to be made much more frequently than the decisions we propose be added to the list of prohibited decisions.
- (b) Second, under our recommended decision-making rules, a decision to move a represented person into residential care that is not consistent with their wishes and values should only occur when the person is otherwise at a material risk of significant harm. When compared with a "best interests" approach under which the exact relevance of the person's wishes and values is not specified clearly, this mitigates concerns about premature moves into residential care.
- (c) Third, under our recommendations in Chapter 18, the Court could require a welfare representative to record and report on decisions regarding living arrangements. This would provide an additional level of accountability for these decisions.

(d) Lastly, no jurisdiction we have investigated prohibits representatives from making decisions about living arrangements.⁵⁴

17.99 For these reasons, we do not recommend requiring the Family Court to authorise decisions about living arrangements.⁵⁵

No decisions should be removed from the list of prohibited decisions

17.100 In this section, we address two decisions that some submitters suggested should be removed from the current list of prohibited decisions.

17.101 For clarity, we note that the prohibition on certain medical experiments in section 18(1)(f) of the PPPR Act should remain. However, it may need to be modified to ensure that our recommendations below about participation in medical research can be given effect in a new Act. This is why R97 is subject to R99 and R100.

Consent to electro-convulsive therapy

17.102 Electro-convulsive therapy (ECT) is “a therapeutic medical procedure for the treatment of severe psychiatric disorders”.⁵⁶ It is most commonly prescribed to treat severe depression.⁵⁷ It involves the delivery of a small electrical current to the brain sufficient to induce a seizure for therapeutic purposes. It is delivered under general anaesthetic. Memory loss is the side effect most strongly associated with it.⁵⁸

17.103 ECT is singled out in the Mental Health (Compulsory Assessment and Treatment) Act 1992 as requiring the patient’s consent while under compulsory care, even though other treatments generally do not require the patient’s consent.⁵⁹ This strongly signals that ECT is distinct from other forms of treatment. This, combined with low numbers of submitters identifying its inclusion as a problem, means we do not consider ECT should be removed from the list of decisions that require Court approval.

Refusing consent to standard medical treatment

17.104 We recognise that the prohibition on refusing consent to standard medical treatment can create difficult situations in relation to life-saving or end-of-life treatment. However, as a potential outcome of such a decision is the end of the represented person’s life and only a small number of submitters raised the issue, we do not consider it appropriate to recommend that the prohibition be removed.

⁵⁴ In fact, some jurisdictions expressly list where a person lives as a decision representatives can make. See for example Guardianship and Administration Act 1995 (Tas), ss 3 definition of “personal matter” and 25; and Mental Capacity Act 2005 (UK), s 17(1)(a). However, in New Brunswick, this must be expressly authorised in the order: Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), ss 1 definition of “personal care matter” and 41(5).

⁵⁵ We discuss enforcement of decisions and deprivation of liberty further in Chapter 23. We recommend the area be the subject of a separate review.

⁵⁶ Alan Weiss and others “Royal Australian and New Zealand College of Psychiatrists: professional practice guidelines for the administration of electroconvulsive therapy” (2019) ANZJP 1 at 3.

⁵⁷ See Manatū Hauora | Ministry of Health *Electroconvulsive Therapy (ECT) in New Zealand – What you and your family and whānau need to know* (Wellington, 2009) at 5.

⁵⁸ See Manatū Hauora | Ministry of Health *Electroconvulsive Therapy (ECT) in New Zealand – What you and your family and whānau need to know* (Wellington, 2009) at 8.

⁵⁹ Mental Health (Compulsory Assessment and Treatment) Act 1992, s 60. The Mental Health Bill 2024 (87–1) takes the same approach: cl 50.

17.105 Importantly, inclusion of the prohibition in a new Act would not affect a person’s election to refuse life-saving treatment if the election was made in a valid and applicable advance directive. As we explain in Chapter 21, such a decision should be regarded as having already been made by the person themselves and not one for the representative to make.

PARTICIPATION IN RESEARCH

Current law

17.106 The PPPR Act expressly prohibits representatives from consenting to participation in “any medical experiment” on behalf of the represented person other than one which is designed to save the person’s life or prevent serious damage to their health.⁶⁰ “Medical experiment” is not defined, but it is likely to cover a range of non-observational research.⁶¹

17.107 In addition, consenting to participate in medical research is likely not a type of personal decision that the Family Court is empowered to make under the PPPR Act. That is because medical research does not fit squarely within any of the “kinds of order” that the PPPR Act specifies the Court can make.⁶² Even if the Court held it could make such an order, having to apply to the Court for every participant in a research study would make the research “practicably impossible”.⁶³

17.108 The PPPR Act is not the only legislation relevant to participation in research by people with affected decision making. The Health and Disability Commissioner Act 1994 and the HDC Code made under it are also relevant.⁶⁴

17.109 The HDC Code “establishes the rights of [health] consumers, and the obligations and duties of providers to comply with the Code”, including in relation to participation in research covered by the HDC Code.⁶⁵ Right 7(4) of the HDC Code deals with situations where a consumer is not “competent” to make an informed choice and give informed consent and no person is entitled to consent on their behalf.⁶⁶ It says a provider may nevertheless provide services where:

- (a) it is in the best interests of the consumer; and
- (b) reasonable steps have been taken to ascertain the views of the consumer; and
- (c) either,—

⁶⁰ Protection of Personal and Property Rights Act 1988, s 18(1)(f). This also applies to attorneys acting under an enduring power of attorney: s 98(4).

⁶¹ Cordelia Thomas “Participation in Health or Disability Research” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 269 at 277.

⁶² Protection of Personal and Property Rights Act 1988, s 10(1). See Chapter 15.

⁶³ Joanna Manning “Non-consensual clinical research in New Zealand: Law reform urgently needed” (2016) 23 JLM 516 at 521.

⁶⁴ The HDC Code is a regulation made under the Health and Disability Commissioner Act 1994, s 74.

⁶⁵ Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch reg 2 right 9.

⁶⁶ “Services” are defined to include “health services” in Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch reg 4. “Health services” are widely defined in the Health and Disability Commissioner Act 1994 to mean services to promote and protect health and to prevent disease or ill-health: s 2 definition of “health services”. See also *Marks v Director of Health and Disability Proceedings* [2009] NZCA 151, [2009] 3 NZLR 108 at [11].

- (i) if the consumer's views have been ascertained, and having regard to those views, the provider believes, on reasonable grounds, that the provision of the services is consistent with the informed choice the consumer would make if he or she were competent; or
- (ii) if the consumer's views have not been ascertained, the provider takes into account the views of other suitable persons who are interested in the welfare of the consumer and available to advise the provider.

17.110 The HDC Code therefore provides a potential legal basis for participation in research by people who lack the decision-making capacity to consent, but only if the requirements in right 7(4) are met.⁶⁷

The Health and Disability Commissioner's review

17.111 In 2019, Te Toihau Hauora, Hauātanga | Health and Disability Commissioner reviewed the rights in the HDC Code relating to participation in research involving adult participants who are unable to provide informed consent.⁶⁸ Following the review, the Commissioner made a number of recommendations to the Minister of Health. These included that, in the context of research participation, the current "best interests" test in the HDC Code should be replaced with a test that allows for participation in research by people who cannot give informed consent if it poses "no more than minimal foreseeable risk and no more than minimal foreseeable burden" to such participants.⁶⁹

17.112 The Commissioner concluded that the current "best interests" test is unlikely to be met with respect to participation in research. The Commissioner reasoned that the "best interests" test does not provide for any consideration of "the potential for advances in knowledge that may benefit people other than the participant".⁷⁰ He also said it is difficult to predict what the benefits to the person might be in the context of medical research and that they could also include non-medical factors such as emotional and other benefits.⁷¹ The Commissioner recommended additional safeguards to protect such participants in research, including a set of principles that would require the person's wishes to be taken into account to the extent possible.⁷²

⁶⁷ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 6.

⁶⁸ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 55.

⁶⁹ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 7.

⁷⁰ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 6.

⁷¹ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 6.

⁷² Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 7–9. These include:

... comprehensive principles in the Code and elsewhere to underpin health and disability research with adults unable to consent; enhancements to the ethics review and approval processes and governance system for health and disability research with adults unable to consent; and monitoring and evaluation of any changes that are implemented, with a particular focus on outcomes for consumers.

17.113 These recommendations have not yet been implemented. In 2024, the Commissioner released a periodic review of the HDC Code and reaffirmed the 2019 recommendations.⁷³

Issue

17.114 The combined effect of the rules in the PPPR Act and HDC Code is that the law does not provide any workable basis for participation in research by people who lack decision-making capacity to give their informed consent. We consider below whether and, if so, how the law should enable participation in research by people who lack the decision-making capacity to consent.

Consultation

17.115 Although we did not ask specifically about participation in research, six submitters gave feedback on this issue in response to our general question about prohibited personal decisions.

17.116 All six submitters considered that there should be a framework for participation in research for people who do not have decision-making capacity to give informed consent. A few submitters explained that there are good reasons for such people to be able to participate in research. These included that it can be consistent with their wishes and values and that it can provide valuable information about an under-represented group in medical research.

17.117 Submitters made some further points about how people who lack decision-making capacity to consent should be able to participate in research:

- (a) One submitter said this issue should be dealt with in any new Act we propose.
- (b) One submitter said this issue should be dealt with by the HDC Code.
- (c) One submitter said most research projects are carefully considered and have ethics approval so a representative should not need to consent on behalf of the person.
- (d) One submitter said there should not be a requirement for a representative to consent on the person's behalf before they can participate in research. This submitter said this would exclude people who cannot give informed consent and do not have representatives from participating.

Recommendations

R99

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

⁷³ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Recommendations Report | He Tuhinga Taunaki — Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights | Ko te arotakenga o Te Ture Toihau Hauora, Hauātanga 1994 me te Tikanga o ngā Mōtika Kiritaki mō ngā Ratonga Hauora, Hauātanga* (December 2024) at 50–51. We note the Commissioner suggested the rights regarding participation in medical research without informed consent be moved to the Act rather than the Code. For brevity, we continue to refer to the Code, but our recommendations should still apply if the rights are moved to the Act.

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.

A legal avenue should be available for people who lack decision-making capacity to consent to participate in medical research

17.118 In our view, there are good reasons for people who lack decision-making capacity to be able to participate in medical research.⁷⁴ The main reason is to enable people's wishes and values to be respected. Further, as some submitters identified and the Commissioner emphasised in his review, people who lack decision-making capacity are already an under-represented group in medical research. There is a risk this cohort of people will not benefit on an equal basis from evidence-based medical advancements.⁷⁵

17.119 These considerations must be weighed against the potential risks of such participation in medical research by a vulnerable group.⁷⁶ As the 2019 report said:⁷⁷

The central challenge [is] to find the right balance between protecting vulnerable consumers and allowing research to progress in order to improve the effective delivery of health and disability services to such people.

How should the law enable participation in research by people who lack the decision-making capacity to consent?

17.120 The participation in research of people who lack decision-making capacity to consent is a complex issue raising overlapping health, ethical and human rights considerations. In our view, it is best dealt with by a single set of dedicated rules developed specifically to

⁷⁴ Most of these reasons were identified by the Health and Disability Commissioner in the 2019 review: *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 16.

⁷⁵ See Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 30.

⁷⁶ See Cordelia Thomas "Participation in Health or Disability Research" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 269 at 269–270 for an overview of the relevant considerations.

⁷⁷ See Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019) at 6.

balance the relevant considerations. This is preferable to having multiple frameworks governing the issue.

- 17.121 Our preferred approach is therefore for this issue to be dealt with by the HDC Code. This approach would enable a cohesive set of principles to apply to people who lack relevant decision-making capacity regardless of whether they have a representative who can make a decision on their behalf.⁷⁸ We therefore recommend that the Government progress the Commissioner's recommendations in the 2019 review. As summarised above, the Commissioner's recommendations provide a pathway for people who lack decision-making capacity to give informed consent to be able to participate in research, along with robust safeguards.
- 17.122 If the Commissioner's recommendations are implemented, where a welfare guardian or an attorney under an enduring power of attorney is appointed, they would be responsible for deciding whether the person should participate in the research.⁷⁹ Under our recommendations, this decision would need to be made in accordance with our proposed decision-making rules. This would mean that the representative should decide that the person will participate in the research if doing so:
- (a) reflects the person's wishes and values; and
 - (b) does not give rise to a material risk of significant harm to them.
- 17.123 If the HDC Code is not amended to provide a pathway to enable people who lack decision-making capacity to consent to participate in research, we consider a new Act should make provision for this. To do so, a new Act would need both to enable a decision to participate to be made on behalf of the relevant person and provide for robust safeguards. Our alternative recommendation above is designed to address this, drawing on recommendations in the Commissioner's review and requirements in some overseas statutes.⁸⁰

PROPERTY DECISIONS THAT MUST BE AUTHORISED BY THE COURT

Overview of current law

- 17.124 Under the PPPR Act, property managers are not expressly prohibited from making any decisions. However, there are certain decisions that a property manager may only make if authorised by the Family Court — namely:
- (a) gifts of over \$5,000 a year;⁸¹

⁷⁸ As addressed above, requiring the court to act as decision maker where a person does not have a representative is unlikely to be practical.

⁷⁹ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Health and disability research with adult participants who are unable to provide informed consent* (November 2019), R7(f).

⁸⁰ A range of safeguards exist in other jurisdictions. See for example Guardianship Act 1987 (NSW), s 45AA; Guardianship and Administration Act 2000 (Qld), s 64C; Guardianship and Administration Act 1995 (Tas), s 48; Mental Capacity Act 2005 (UK), ss 30–34; and Adults with Incapacity (Scotland) Act 2000, s 51.

⁸¹ Protection of Personal and Property Rights Act 1988, sch 1 cl 1(b)(ii). We don't make any recommendations about this prohibition as we have not heard any issues with it and consider it should continue. However, the amount should be adjusted for inflation as it has never been raised.

- (b) the purchase of a home (or other property-related transaction) of more than \$120,000;⁸² and
- (c) entering into a lease for a term of more than 10 years.⁸³

17.125 Additionally, the Family Court has a range of powers regarding the wills of people who have a property manager.⁸⁴ There is no outright prohibition, but the Court can set limits on the will making of people with a property manager or investigate any previously made wills.

Consultation

17.126 We asked submitters whether any reform is required to the property decisions that must be expressly authorised by the Family Court and, if so, what. Thirty submitters commented on the property decisions that must be expressly authorised by the Court.

17.127 Approximately half of these submitters addressed the monetary threshold of \$120,000, with most saying it is too low. A few submitters said the threshold should be removed entirely. These submitters said other safeguards could be in place such as requiring a valuation of the property before sale or requiring the sale of the property to be above the valuation amount. One submitter considered the monetary threshold is appropriate.

17.128 Other property decisions that submitters suggested should require Court authorisation were:

- (a) making a will;
- (b) any sale, lease, loan or transfer of ownership; and
- (c) gifts over a certain value.

The monetary threshold for property decisions

Current law

17.129 Schedules 1 and 2 of the PPPR Act set a specified sum of \$120,000 in relation to a number of decisions a property manager can make regarding real property, including the sale or purchase of a home.

17.130 If the financial consequences of these decisions exceed the specified sum, Court approval is required before the decision can be made. The specified sum has remained at \$120,000 since the PPPR Act was enacted.

Recommendation

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.

⁸² Protection of Personal and Property Rights Act 1988, sch 1 cls 1(b)(iii) and 3.

⁸³ Protection of Personal and Property Rights Act 1988, sch 1 cl 1(r). We do not make any recommendations about this prohibition as we have not heard any issues with it and consider it should continue.

⁸⁴ Protection of Personal and Property Rights Act 1988, s 54.

- 17.131 We have been unable to identify the policy intention underlying the threshold for certain property decisions in the PPPR Act. However, it appears to be intended to perform a safeguarding function to ensure that property managers cannot make large transactions involving real property without sufficient accountability.
- 17.132 We agree with the majority of submitters that addressed this issue that the current threshold is out of date. As noted above, it has never been raised despite house prices having increased significantly since the PPPR Act was introduced.⁸⁵
- 17.133 One potential response would be to increase the threshold. We do not recommend this approach. Monetary thresholds do not respond to geographic variations in property values or the significance of a particular amount to the represented person in the light of other factors such as their overall net wealth. They become out of date over time. Given the wider range of safeguarding mechanisms we recommend in this Report, a monetary threshold is unlikely to be of much additional benefit.
- 17.134 In our view, the preferable approach is to remove the threshold and enable the Family Court to assess whether any monetary thresholds or restrictions on specific items of property are appropriate in each case (see R94 and R104).

Executing a will

Current law

- 17.135 The PPPR Act contains specific rules regarding the making of a will by a person subject to a property order. Being subject to a property order does not mean that the person cannot make testamentary dispositions.⁸⁶ However, the Family Court has a range of powers to limit the person's ability to make a will, as well as to investigate testamentary dispositions made by them before they became subject to a property order.⁸⁷
- 17.136 Where the Court has limited the person's ability to make a will or is satisfied they do not have testamentary capacity, the Court can authorise the person's property manager to execute a will on the person's behalf.⁸⁸ In this situation, the Court must provisionally settle the proposed terms of the will.⁸⁹ The PPPR Act does not specify the objectives of the Court when exercising this power. Case law has established that the Court's task is to "give effect to what the testator with all his or her traits and foibles would have seen fit to do if now able to do it".⁹⁰ It has been observed that this test is not a test of best interests but one much more closely aligned with the person's known wishes.⁹¹

⁸⁵ Te Pūtea Matua | Reserve Bank of New Zealand "Housing (M10)" (11 July 2025) <www.rbnz.govt.nz>.

⁸⁶ Protection of Personal and Property Rights Act 1988, s 54(1).

⁸⁷ Protection of Personal and Property Rights Act 1988, s 54(2)–(6).

⁸⁸ Protection of Personal and Property Rights Act 1988, s 55.

⁸⁹ See further discussion of these provisions and the interaction with the common law relating to testamentary capacity in Bill Atkin "Will-making and capacity" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 333 at 340–345.

⁹⁰ *Re Manzoni (a protected person)* [1995] 2 NZLR 498 (HC) at 505.

⁹¹ Bill Atkin "Will-making and capacity" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 333 at 343. See also *Public Trust v Chandler* [2015] NZFC 4669, [2016] NZFLR 29 at [29], where the Court referred to what the relevant person "would" have done rather than "should" have done.

Recommendations

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.

17.137 Will making can be a difficult process. This can be particularly true for a person who lacks testamentary capacity and must involve a representative in the process. The current rules in the PPPR Act add an appropriate layer of court oversight. We recommend that a new Act retain these rules, with one modification. When exercising its powers with respect to wills, the Family Court’s objective should be to give effect to the person’s wishes and values. For clarity, we consider this objective should be specified in a new Act.

SETTLING OR COMPROMISING CLAIMS

17.138 Under section 108B of the PPPR Act, an agreement to settle or compromise a claim outside of court by a “person who is incapable of managing his or her own affairs” must be approved by a court to be valid.⁹² It is not clear whether the section applies if the relevant person has a representative, but in one case, all parties appear to have assumed that it does.⁹³ If the section does apply where a person has a representative, it effectively means the decision to compromise or settle a claim outside of court is a prohibited decision because it cannot be made by a representative.

17.139 Section 108B has been considered by te Kōti Mana Nui | Supreme Court in the context of settling an employment dispute. In *TUV v Chief of New Zealand Defence Force*, the Supreme Court held by majority that section 108B did not apply to disputes governed by the Employment Relations Act 2000 because it would undermine the central concepts and dispute resolution processes of that Act.⁹⁴ In particular, the Court said it would “be inconsistent with the thread of good faith running through the Act and the protection provided for the integrity of individual choice”.⁹⁵ It also reasoned that, if section 108B applied, it would not “fit well with the emphasis in the [Employment Relations Act 2000] on reducing the need for judicial intervention”.⁹⁶

17.140 We did not ask specific questions about section 108B and did not receive any feedback on it. However, the reasoning of the Supreme Court in *TUV* highlights some more general issues with the provision.

⁹² Protection of Personal and Property Rights Act 1988, s 108B. See also *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [78]. Section 108B applies whether or not the person falls within the scheme of the PPPR Act.

⁹³ See *Standing v Evans* [2021] NZHC 1145, [2021] NZFLR 385.

⁹⁴ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [44].

⁹⁵ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [44].

⁹⁶ *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [44].

- 17.141 First, we do not consider the protective purpose of section 108B is best achieved by a total prohibition on settling claims without court approval, particularly if the person has a representative.⁹⁷ Section 108B does not take into account the significance or monetary value of the settlement or compromise to the relevant person. Where the settlement or compromise is relatively small, requiring court approval may not be a proportionate response. Section 108B could also potentially undermine the ability for a person subject to the provision to make decisions in accordance with their wishes and values. It is difficult to reconcile a total prohibition on settling claims without court approval with the values of equality and autonomy and a focus on the person's rights, will and preferences contained in the Disability Convention.⁹⁸
- 17.142 Second, if section 108B does prohibit representatives from deciding to settle or compromise *any* claim outside of court, it is out of step with the types of decisions that representatives can make under the PPPR Act. The PPPR Act enables representatives for both welfare and property matters to make potentially significant and impactful decisions for the person they represent without court approval of specific decisions. For example, many property decisions regarding property up to the value of \$120,000 can be made by property managers without the approval of the Family Court.⁹⁹
- 17.143 Should section 108B continue in some form in a new Act, we consider that it would be more proportionate and consistent with its intended protective purpose if it only applied where a person does not have a representative. However, given we did not specifically consult on or receive feedback on section 108B, we do not make any recommendations about it.

DECISIONS INVOLVING A CONFLICT OF INTEREST

Current law

- 17.144 The PPPR Act does not contain any rules about welfare guardians or property managers making decisions involving a conflict of interest. However, the Family Court cannot appoint a welfare guardian unless it is satisfied there is unlikely to be any conflict between the interests of the proposed appointee and the relevant person.¹⁰⁰ For property managers, the Court is only required to take into account any likely conflicts of interest.¹⁰¹ Te Kōti Matua | High Court has held that “limitations or protections” may be required for certain representative arrangements where the possibility of a conflict exists in order to ensure that section 12(5)(c) (which requires the Family Court to be satisfied there is “unlikely to be any conflict” with respect to a welfare guardian’s appointment) is complied with.¹⁰² This anticipates that the Court has the power to tailor representative arrangements to address conflicts of interest.

⁹⁷ The protective element of s 108B was emphasised by the minority in *TUV*. See *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [81] and [85].

⁹⁸ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 3 and 12(4).

⁹⁹ Protection of Personal and Property Rights Act 1988, sch 1 cls 1 and 3.

¹⁰⁰ Protection of Personal and Property Rights Act 1988, s 12(5)(c).

¹⁰¹ Protection of Personal and Property Rights Act 1988, s 31(5)(c).

¹⁰² *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [84].

Issue

- 17.145 Restrictions on decisions by representatives that involve conflicts of interest can help safeguard the represented person's interests. However, restrictions should not be so extensive as to make the representative's role unworkable. Many representatives will have some form of interest in some decisions within their remit, including when a represented person's wishes and values are to make a decision that will benefit the representative.
- 17.146 In this section, we consider whether the law should expressly address these types of decisions and, if so, how.

Consultation

- 17.147 In response to our question about whether any reform is required to the property decisions that must be expressly authorised by the Family Court, eight submitters said that property decisions in which the representative has a conflict of interest should require Court approval. However, most of these submitters qualified this view by saying this should only be for "significant" decisions or where the representative would "materially benefit".
- 17.148 A few submitters said that, if representatives were required to obtain Court authorisation for every decision where there is a conflict, this could add significant time and cost to the role. One of these submitters said reporting requirements could also provide protection.

Recommendation

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.

- 17.149 Decisions involving conflicts of interest can be managed in several ways. Here, we address the Family Court's ability to impose restrictions in relation to decisions that may involve a conflict of interest. Elsewhere in this Report, we address conflicts as part of assessing the suitability of representatives (Chapter 16), the duties of representatives (Chapter 13) and the record-keeping and reporting requirements for representatives (Chapter 18). As a whole, these recommendations are intended to provide sufficient safeguards for represented people while maintaining the arrangement's workability.
- 17.150 We have considered whether there should be an outright statutory restriction with respect to some decisions involving conflicts of interest. An outright restriction could provide a clear boundary for representatives. To be workable, however, it could not encompass all potential conflicts. A threshold of some kind would be needed. Any threshold we might recommend (such as for "significant" decisions or decisions where there is a "material benefit" to the representative, as some submitters suggested) would require representatives to exercise judgement about whether it is met. The answer would not always be clear.
- 17.151 In our view, the preferable approach is to expressly empower the Family Court to impose restrictions and obligations on representatives to manage conflicts of interest. For example, the Court could prohibit particular types of decision (generally, or for specified

property) or decisions over a specified monetary threshold. It could require that certain decisions only be taken if someone else (for example, a family or whānau member who does not share the conflict) is given advance notice and an explanation of the reasons for it. A tailored restriction (or lack thereof) is likely to be clearer for representatives than an outright statutory restriction for certain conflicts of interest described in general terms. As noted above, the High Court has already interpreted the PPPR Act to implicitly allow representative arrangements to be tailored to address conflicts. Our recommendation would make this power explicit.

- 17.152 Few overseas jurisdictions expressly prohibit representatives from making decisions that involve a conflict of interest without approval from a court.¹⁰³ Most jurisdictions require the court to consider conflicts of interest in other ways such as when assessing the suitability of the representative.¹⁰⁴

REMUNERATION FOR WELFARE REPRESENTATIVES

Current law

- 17.153 Under the PPPR Act, expenses reasonably incurred by welfare guardians or properly incurred by property managers can be reimbursed from the represented person's property.¹⁰⁵ Only property managers may receive remuneration and only if directed by the Family Court.¹⁰⁶

Issues

- 17.154 We have not heard any concerns about the ability of court-appointed representatives to be reimbursed for costs reasonably incurred in their role or about the ability of property representatives to receive remuneration from the represented person with the Court's approval. We do not recommend any change to this position.¹⁰⁷
- 17.155 There is, however, a question about whether the prohibition on welfare representatives receiving remuneration remains appropriate. Allowing remuneration could increase the pool of available welfare representatives. However, we heard feedback from submitters that enabling remuneration for welfare representatives could change the nature of the role and create an inherent conflict.
- 17.156 There is also a related issue about remuneration for the provision of consequential services as a result of a welfare representative's decision.¹⁰⁸ Sometimes, a welfare representative or entity they control may stand to benefit from decisions the welfare representative makes. For example, a welfare guardian who has an interest in a care

¹⁰³ Only Queensland and Victoria expressly prohibit property representatives from entering into any transaction involving a conflict without approval from the court. See Guardianship and Administration Act 2000 (Qld), s 37; and Guardianship and Administration Act 2019 (Vic), ss 55, 57 and 58.

¹⁰⁴ See for example Guardianship of Adults Act 2016 (NT), s 15; Guardianship and Administration Act 1993 (SA), s 50; Guardianship and Administration Act 1995 (Tas), s 21; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38.

¹⁰⁵ Protection of Personal and Property Rights Act 1988, ss 21(1) and 50(1).

¹⁰⁶ Protection of Personal and Property Rights Act 1988, s 50(2).

¹⁰⁷ We do, however, suggest that a new Act use the same language for the reimbursement entitlements of both welfare representatives and property representatives.

¹⁰⁸ This issue was addressed by the court in *Grosser v Grosser* in the context of the current law. See *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 from [21] onwards. We discuss this case further below.

provider that could provide services to the represented person would stand to benefit based on decisions that the welfare guardian makes. There is a question about whether welfare guardians should be able to receive remuneration for consequential services provided as a result of the decisions they make in their role.

Consultation

- 17.157 We asked submitters whether representatives acting in relation to welfare matters should be entitled to remuneration from the represented person. Thirty-eight submitters gave feedback on this issue.
- 17.158 Submitters were roughly evenly split on whether welfare representatives should ever be able to receive remuneration, with a small number commenting but not providing a particular view.¹⁰⁹
- 17.159 The most common reason submitters gave in support of enabling welfare representatives to receive remuneration was that it could enable a professional to act where there is no other suitable representative available. Most submitters that supported remuneration for welfare representatives expressly limited their support for remuneration to “professional” or “independent” representatives or only in other exceptional circumstances. Very few submitters favoured widespread remuneration for all welfare representatives, for the same or similar reasons that people did not support remuneration at all (discussed below).
- 17.160 Another reason submitters gave in support of enabling remuneration for welfare guardians was that some welfare guardians deserve compensation because the role can be intensive. One submitter said the role involves responsibility and potentially personal risk and so should be able to be remunerated. Another said there is no reason why property representatives should receive remuneration while welfare guardians should not.
- 17.161 Submitters that considered that welfare representatives should not be able to be remunerated were primarily concerned with the impact remuneration could have on the role by creating a conflict of interest. Beyond simply stating the possibility of a conflict of interest, submitters described this issue in various ways:
- (a) One submitter said it would cause representatives to act out of self-interest.
 - (b) Another said they would question the motives of a person who was acting for remuneration.
 - (c) Age Concern NZ said remuneration could change the dynamics of representation.
 - (d) One submitter said receiving payment for decision making is likely to bias decisions or make the representative biased.
 - (e) Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand Auckland Branch said the financial status of the represented person would become a factor in whether a person takes up the representative role.
- 17.162 Submitters that gave feedback on remuneration for welfare representatives made some other points:

¹⁰⁹ A small number of submitters answered “yes” in response to the question but it was clear from their reasoning that they were meaning welfare guardians should be reimbursed for reasonable expenses incurred in their role, not remunerated for their services. We have not counted these submitters as supporting remuneration for welfare representatives.

- (a) A few submitters said that, if welfare guardians receive remuneration, they should be subject to record-keeping and reporting requirements.
- (b) A few submitters said a system where remuneration can only be received from the represented person would create inequalities because only those who could afford a welfare representative could ensure they have one. These submitters suggested any model should be publicly funded to avoid this.¹¹⁰
- (c) Two submitters said any remuneration should be reasonable and proportionate to the actual work undertaken as a representative.
- (d) Greg Kelly Trust Law said the situation where a person has no family or volunteers willing to take on the role of a welfare guardian does not arise commonly. In these situations, a property manager is sometimes appointed and possibly an order made requiring the person to be in care. Staff then make day-to-day welfare decisions.

Reform not desirable to enable welfare representatives to be remunerated

17.163 As submitters' responses demonstrate, strong arguments exist both for and against welfare representatives being able to receive remuneration.¹¹¹ In overseas jurisdictions, it is rare for welfare representatives to be able to receive remuneration.¹¹²

17.164 On balance, we consider the current position should continue. Court-appointed welfare representatives should not be able to receive remuneration. The primary basis for our conclusion is that remuneration would negatively impact the dynamics of this role. As one submitter put it:

We do not support remuneration for time spent, as if this becomes perceived as a paid role, it can change the dynamics of the purpose of representation ... if a representative is paid for their time, this becomes an ethical challenge with their priority for the person with affected decision-making's needs as opposed to their own reimbursement needs.

17.165 The decision-making rules and duties of a representative that we have recommended are focused on the represented person and promoting their rights, wishes and values. A representative properly fulfilling these should be acting without consideration for their own personal interests. While some representatives could certainly put aside such considerations, allowing remuneration could create incentives for representatives which make that more difficult and incline them to act out of self-interest. This would fundamentally conflict with their role and duties as a representative.

17.166 In our view, the same reasoning applies to property representatives. However, remuneration for property representatives was not raised with us during consultation so we do not make any recommendations about it. We note that property representatives may be more likely to act in a professional capacity and so prohibiting remuneration may have an impact on the number of property representatives available.

¹¹⁰ We address the potential provision of publicly available welfare representatives in Chapter 24.

¹¹¹ For clarity, we do not see our conclusion as inconsistent with government funding for family carers where the person needs care generally. This is because the provision of care is different to acting in a representative role for decision making.

¹¹² Of the jurisdictions we have considered, only England and Wales and New Brunswick allow it with court approval. See Mental Capacity Act 2005 (UK), s 19(7)(b); and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 38(4). Scotland and Ireland allow remuneration but only in very specific circumstances. See Adults with Incapacity (Scotland) Act 2000, s 68(4); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 42(2).

- 17.167 We have considered whether professional representatives should be able to receive remuneration to act as welfare representatives. As noted above, the main reason submitters provided in support of remuneration is that it would potentially increase the pool of available representatives by enabling people to take up the role as part of their professional work. This outcome would assist people who do not have a suitable person to act as their welfare representative and who can afford to pay for someone to do so.
- 17.168 However, we do not favour enabling professional or independent representatives to be able to be paid to act as welfare representatives for the following reasons:
- (a) This option might disincentivise family or whānau members or other people with established relationships with the represented person from taking up the role. These people will generally be best placed to act in accordance with our recommended decision-making rules, for example, because of their knowledge of the person's values over time.
 - (b) On a more fundamental level, enabling some welfare representatives to be paid would be unfair to those who take up the role because it is the right thing to do.
 - (c) We have not seen clear evidence that there is a significant number of people who need a welfare representative and do not have a suitable person to act for them but can afford to pay for someone to do so. Given the disadvantages noted above, we do not consider that enabling professional welfare representatives to be paid would be a proportionate response to this issue.

Remuneration for the provision of consequential services

Recommendations

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.

- 17.169 In *Grosser v Grosser*, the High Court identified a difference between a welfare guardian's role in making welfare decisions for the person and the consequential provision of services as a result of those decisions.¹¹³ The Court held that a welfare guardian's role is confined to decision making for the represented person. The provision of "consequential

¹¹³ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [31].

services to the subject person which are required as a consequence of [a] welfare guardian's decisions" is not within the scope of the role.¹¹⁴

- 17.170 The High Court then addressed issues that may arise when the welfare guardian, in a different capacity, offers to provide those consequential services. It identified that a conflict of interest may be present where a welfare guardian stands to receive payment as a consequence of the decisions they make for the represented person.¹¹⁵ However, the High Court held that the Family Court could allow payment for consequential services in limited situations.¹¹⁶ The High Court observed that such orders could only be appropriate where the obligations and suitability requirements of welfare guardians are met. These requirements include that there is "unlikely to be any conflict between the interests of the proposed appointee and those of the person in respect of whom the application is made".¹¹⁷
- 17.171 In our view, a new Act should expressly address whether welfare representatives should be able to receive payment for consequential services provided to the relevant person. In broad terms, we consider the position reached by the High Court in *Grosser v Grosser* should be codified.
- 17.172 Remuneration for the provision of consequential services raises the same risks and incentives as remuneration for the welfare representative's decision-making role. It should not generally be allowed. However, such orders might sometimes be necessary to respect a person's wishes and values and to ensure they are not subject to a significant risk of material harm. For example, a welfare representative might have an interest in an aged care facility that is the most suitable place for the represented person and where they want to live. Without an exception, the represented person may be forced to live somewhere unsuitable or that they do not like. Another potential scenario is when a potential representative is already providing care services to the person. Being required to stop on appointment as a representative may disincentivise them from taking up the role.
- 17.173 Accordingly, we consider the Family Court should be able to authorise a welfare representative to receive remuneration for providing consequential services — either directly or indirectly (for example, through a company they control). Before making such an order, a new Act should require the Court to be satisfied the welfare representative (if so authorised) would meet the suitability requirements we recommend in Chapter 16. Among other things, this would require the Court to satisfy itself that the welfare representative will be able to manage any conflicts of interest arising from payment for consequential services. In accordance with our other recommendations, the Court might also decide to put in place other safeguards — for example, imposing record-keeping and reporting obligations on the welfare representative with respect to the consequential services.¹¹⁸

¹¹⁴ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [31].

¹¹⁵ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [35].

¹¹⁶ The High Court relied on section 10(4), which allows the Family Court to make ancillary orders as may be necessary or expedient to give effect or better effect a court-ordered decision.

¹¹⁷ *Grosser v Grosser* [2015] NZHC 974, [2015] 3 NZLR 716 at [52]; and Protection of Personal and Property Rights Act 1988, ss 12(5) and 18(3).

¹¹⁸ See Chapter 18.

RESERVE REPRESENTATIVES AND NOTIFICATION REQUIREMENTS FOR REPRESENTATIVES WHO STOP ACTING

Current law

- 17.174 The PPPR Act does not provide for the appointment of reserve representatives in the event that an appointed representative can no longer act or stops acting during the course of their appointment.
- 17.175 Nor does the PPPR Act impose any notification requirements for welfare guardians or property managers if they stop acting during their appointment.

Issues

- 17.176 If a court-appointed representative stops acting during the course of their appointment, this can give rise to significant disruption for the represented person. We consider below whether a new Act should put in place any steps to seek to mitigate this disruption.

Consultation

- 17.177 We asked submitters what should happen if a representative stops acting or is unable to act during the course of their appointment. Thirty-two submitters gave feedback on this question.
- 17.178 In this section, we outline feedback relating to Family Court processes, reserve representatives and notification requirements. Some submitters also made suggestions about the role of a potential oversight body, which we address in Chapter 24.
- 17.179 The most common response, given by approximately two-thirds of submitters that answered this question, was that there needs to be a Family Court process to appoint a new representative if one stops acting. Most submitters did not go into further detail. A few submitters emphasised the need for the represented person to have a representative.
- 17.180 A small number of submitters supported the idea of reserve representatives who can take up the appointment if a representative stops acting or is unable to act.
- 17.181 A few submitters said the Family Court should be notified if a representative resigns or stops acting. These submitters said that sometimes a representative can stop acting and no-one knows this has happened.
- 17.182 Some submitters, including NZLS and Iris Reuvecamp, said that, if a representative wishes to stop acting, they will usually apply to be removed rather than simply stop acting. These submitters also said that, if a representative simply does stop acting, it is often the case that an application for personal or property orders is made by a health and disability provider.
- 17.183 Public Trust said that, if another representative is urgently needed, this may be dealt with by interim orders.

Recommendations

- 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.

17.184 We consider that the Family Court should be able to appoint reserve representatives to take up the role if an appointed representative stops acting. The ability to appoint reserve representatives would enable represented people and representatives to plan ahead to minimise disruption and ensure the represented person has continuing representation over the duration of the representative arrangement. By contrast, requiring a Family Court application to appoint a new representative can entail cost, disruption for the

represented person and possibly a period where the person goes without a representative. While interim orders are a possibility, our engagement with practitioners has indicated they are not always quick to obtain.

- 17.185 The majority of jurisdictions we have investigated enable reserve representatives to be appointed, and one law reform body has recommended the same.¹¹⁹ In addition, as we discuss in Chapter 19, the PPPR Act enables EPOAs to specify successive attorneys for care and welfare who can act as soon as the initial attorney's appointment ceases.¹²⁰
- 17.186 Our recommendations are designed to provide clarity and minimise disruption for the represented person and the new representative during a possibly difficult transition period.
- 17.187 Although some submitters supported the idea of a review if a representative stops acting, we do not recommend that the new representative be required to apply for a review on taking up the role. On our recommendations, the suitability of the reserve representative will already have been considered by the Family Court. It is preferable for a newly acting representative to be able to focus on becoming familiar with the role rather than applying for a potentially unnecessary review. If a newly acting representative, represented person or any other person considers a review is appropriate, they should be able to seek the Court's leave for a review (see Chapter 18).
- 17.188 We recommend notification requirements to help provide clarity about when a reserve representative should start acting. As some submitters raised, sometimes a representative stops acting and nobody knows. Under our recommendations, a reserve representative must always be notified by the appointed representative that they have stopped acting and the reserve representative must start acting (unless the appointed representative is incapacitated). We recommend that, when the reserve representative starts acting, they must notify the Family Court. This would enable any disagreement between appointed and reserve representatives as to who is acting to be identified and resolved by the Court. Equally, if the Court receives notice that the appointed representative has stopped acting but does not receive notice that the reserve representative has started acting, the Court would be able to make inquiries of the reserve representative.¹²¹
- 17.189 Our recommended requirement for appointed representatives to notify the Family Court and parties to the original application when they have stopped acting would apply regardless of whether there is a reserve representative.

¹¹⁹ Guardianship and Administration Act 2000 (Qld), s 14(6); Guardianship and Administration Act 1993 (SA), ss 29(2a) and 31B; Guardianship and Administration Act 1995 (Tas), s 22; Mental Capacity Act 2005 (UK), s 19(5); Adults with Incapacity (Scotland) Act 2000, s 63; and New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at 138–139.

¹²⁰ Protection of Personal and Property Rights Act 1988, s 95(5).

¹²¹ We anticipate that this function could be performed by the Court registrar.

CHAPTER 18

Court-appointed representatives: safeguards

IN THIS CHAPTER WE CONSIDER:

- record-keeping and reporting requirements for court-appointed representatives; and
- reviews of court-appointed representative arrangements.

INTRODUCTION

- 18.1 This is the third and final chapter concerning court-appointed representatives. The focus of this chapter is on safeguarding mechanisms for court-appointed representative arrangements.
- 18.2 We do not recommend major changes to the status quo. However, we consider modifications should be made to the current law to better balance the objectives of safeguarding represented people and ensuring workability for representatives and represented people.

RECORD-KEEPING AND REPORTING REQUIREMENTS

Current law

- 18.3 The Protection of Personal and Property Rights Act 1988 (PPPR Act) requires property managers to file financial statements with te Kōti Whānau | Family Court. These must be provided within three months of the initial appointment and then annually.¹ When a property manager's role ends, they must file the final financial statement within 30 days.²

¹ Protection of Personal and Property Rights Act 1988, s 45(2).

² Protection of Personal and Property Rights Act 1988, s 45(2).

The financial statements that property managers submit are relatively comprehensive statements of accounts with assets, liabilities, receipts and payments for the relevant period as well as necessary supporting documentation.³ A report does not need to contain the reasons for a property manager's decisions.

- 18.4 The financial statements are then forwarded to Public Trust to be examined.⁴ Public Trust prepares a report and files it with the Family Court.⁵
- 18.5 If a property manager fails to file a statement, the registrar must draw the matter to the attention of a judge, who can direct the manager to provide the report.⁶ The manager is also liable to pay a fine of up to \$1,000.⁷ If a manager files a statement knowing it to be false, they are liable on conviction to imprisonment for up to three years.⁸
- 18.6 Any person may, by leave of the Family Court or registrar, inspect or make a copy of any statement or report.⁹ The PPPR Act does not provide for any person to access such statements or reports as a matter of course.¹⁰
- 18.7 There are no record-keeping or reporting requirements for welfare guardians. The Family Court's power to make ancillary orders in section 10(4) of the PPPR Act has been used to require a welfare guardian to provide itemised accounts to a property manager for fees charged for their consequential services.¹¹ The Family Court has also required a welfare guardian to provide health-related information to a represented person's children.¹² We have not identified any case where the Family Court has required a welfare guardian to report to the Court.

Issues

- 18.8 Record-keeping and reporting requirements can be key safeguarding mechanisms for represented people. Alongside periodic reviews of representative arrangements, they provide the strongest avenue for accountability of representatives. However, overly onerous record-keeping and reporting requirements can discourage compliance and deter people from taking up the representative role.¹³
- 18.9 When considering whether the current record-keeping and reporting requirements strike the right balance between safeguarding and workability, key issues that arise are:
- (a) when financial reporting should be required;
 - (b) whether reporting should be required for non-financial matters;

³ See the template forms provided by Public Trust: "Managing someone's affairs as a Property Manager" <www.publictrust.co.nz>.

⁴ Protection of Personal and Property Rights Act 1988, s 46.

⁵ Protection of Personal and Property Rights Act 1988, s 46.

⁶ Protection of Personal and Property Rights Act 1988, s 48(1).

⁷ Protection of Personal and Property Rights Act 1988, s 45(4).

⁸ Protection of Personal and Property Rights Act 1988, s 45(3).

⁹ Protection of Personal and Property Rights Act 1988, s 47.

¹⁰ The represented person is able to access any statements or reports as they contain their personal information.

¹¹ *Re Woodsman* [2013] NZFC 3907 at [86].

¹² *Re CA* [2017] NZFC 7045 at [85].

¹³ In this context, see our discussion later in this Chapter concerning the fees charged for auditing financial records of represented people with little wealth or income.

- (c) whether there should be specific reporting requirements for decisions involving conflicts of interest;
- (d) who should receive or review the reports; and
- (e) whether sanctions for non-compliance are appropriate.

Consultation

When should financial reports be required?

- 18.10 We asked submitters when financial reports should be required. Forty-six submitters gave feedback on this issue.
- 18.11 Approximately half of those submitters said reports should be required annually. The most common reason given was that regular reporting is important for safeguarding reasons. A smaller number of submitters supported the current position, under which an initial report is due in three months and thereafter annual reports are required.
- 18.12 Other comments made by submitters included:
- (a) the Family Court should have discretion to alter reporting requirements depending on the circumstances;
 - (b) the current financial threshold at which a property manager is required to be appointed to administer property (and therefore financial reporting is required) should be raised;¹⁴ and
 - (c) property managers should only have to report on large or significant expenditure.
- 18.13 Approximately a third of submitters that gave feedback emphasised the need for reporting to be easy for representatives to do. Most of these submitters emphasised the cost and effort involved in record keeping and reporting. A few submitters, particularly lawyers, said many property managers do not comply with the current reporting requirements as they are too onerous or poorly understood.

Non-financial decisions

- 18.14 We asked submitters whether there should be any non-financial decisions that should be subject to record-keeping and reporting requirements. Thirty-eight submitters gave feedback on this issue. A significant majority either agreed with having non-financial reporting requirements for welfare decisions or specified what such requirements should be. As to the decisions to which record-keeping and reporting obligations should apply:
- (a) Approximately a third said they should apply to all welfare decisions, with submitters emphasising the need to safeguard represented people. Some submitters said it is equally as important for welfare guardians to keep a record as it is for property managers.
 - (b) Approximately a third supported record-keeping and reporting obligations for medical decisions. The main reason given was that these will almost always be significant decisions that impact the represented person's life.

¹⁴ While there is technically no threshold for property managers to report, under s 11 of the Protection of Personal and Property Rights Act 1988, an order can be made to administer property under a certain threshold without the need to appoint a property manager. This means no financial reporting is required. Additionally, this threshold has recently been raised and will continue to rise on a yearly basis.

- (c) Other types of decisions that some submitters suggested should have record-keeping and reporting requirements included all “significant” decisions, decisions to move to residential care and decisions made contrary to a represented person’s will and preferences.
- 18.15 There were eight submitters that did not support record-keeping and reporting requirements for welfare decisions. The main reason given was that the types of decisions that should attract such requirements would be medical decisions and these will be on the person’s health records anyway. Another reason given was that requirements for welfare decisions would be too onerous, particularly since the role is unpaid and is usually performed by a close family member.
- 18.16 A small number of submitters emphasised the need for Family Court discretion in setting record-keeping and reporting requirements for welfare representatives.

Decisions involving a conflict of interest

- 18.17 We asked whether decisions involving a conflict of interest should be subject to record-keeping and reporting requirements. Forty-two submitters gave feedback on this issue. Nearly all said there should be, although most did not give reasons. Those that did emphasised the safeguarding purpose of these requirements and that they could help ensure accountability and transparency.
- 18.18 A few submitters said there should not be record-keeping and reporting requirements for decisions involving conflicts of interest, with one submitter saying there would be no way to monitor them. Another submitter, while not expressing a particular view, said that record-keeping and reporting obligations for decisions involving a conflict of interest would be difficult to interpret, apply and enforce, and that there are constantly conflicts of interest between family members.

Recommendations

When property representatives should be required to provide financial reports

- 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.

- 18.19 We consider that a statutory annual reporting period for property representatives remains appropriate, as does the reporting requirement after a property representative's role ends. However, we recommend the Family Court should be given the power to impose additional requirements and that the current initial three-month period should not continue.
- 18.20 The majority of overseas jurisdictions we investigated give discretion to the relevant body to set or alter financial reporting requirements.¹⁵ Some jurisdictions have a mandatory annual reporting requirement.¹⁶
- 18.21 In our view, mandatory reporting is necessary to safeguard represented people. An annual timeframe provides a significant safeguard while being reasonably workable for representatives.¹⁷ Annual reporting received the most support from submitters, including those from a range of backgrounds and interests.
- 18.22 We acknowledge that some representatives find annual reporting burdensome. Rather than decreasing the required frequency of reports or enabling the Family Court to do so, we consider the reporting process should be made easier for representatives in ways that do not adversely affect its safeguarding effectiveness.¹⁸ In Chapter 24, we discuss approaches adopted by overseas oversight bodies that are responsible for receiving reports, including an online portal for submitting financial records. Even if our recommendations to consolidate oversight functions into a single body are not adopted, there would still be merit in developing an accessible and efficient online reporting system.¹⁹ This could make the process easier for some representatives and increase efficiency in receiving and examining reports.
- 18.23 In some circumstances, reporting requirements beyond the mandatory annual report may be necessary to safeguard the represented person. The Family Court should have discretion to impose such additional requirements. This would mean, for example, that the Court could require a property representative to give reasons for a particular decision or class of decisions or it could increase the required frequency of reports.
- 18.24 We do not consider the current requirement for property managers to report within three months of their initial appointment is necessary. It is a very short period of time and so can be difficult for representatives to meet, particularly where they do not have relevant

¹⁵ New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at 147; Guardianship and Administration Act 2000 (Qld), s 49; Guardianship and Administration Act 1993 (SA), s 44; Guardianship and Administration Act 1995 (Tas), s 66(1); Guardianship and Administration Act 2019 (Vic), s 61(2); Mental Capacity Act 2005 (UK), s 19(9)(b); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 46(2).

¹⁶ Guardianship and Administration Act 1995 (Tas), s 66(1); Guardianship and Administration Act 2019 (Vic), s 61(2); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 46(1).

¹⁷ Record-keeping and reporting safeguards have been recognised as contributing to the requirement for appropriate and effective safeguards for measures affecting the exercise of legal capacity. See for example Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC R124, 2014) at [4.121]–[4.127].

¹⁸ We do not make any recommendations about the nature of financial records as we did not consult on it and we consider it is largely a matter of practice. The reports that property managers submit are already comprehensive statements of accounts with assets, liabilities, receipts and payments for the relevant period as well as necessary supporting documentation. See the template forms provided by Public Trust: “Managing someone’s affairs as a Property Manager” <www.publictrust.co.nz>.

¹⁹ While the purpose is different, it is useful to compare the online register for companies. It allows people to incorporate, register, file annual returns, upload consents, search the company register and reserve company names. See New Zealand Companies Office “Online services” <www.companiesoffice.govt.nz>.

experience. None of the jurisdictions we have investigated provide for an analogous requirement, and it received little support from submitters.

Record-keeping and reporting requirements for welfare representatives

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.

- 18.25 As noted above, the PPPR Act contains neither express reporting requirements for welfare representations nor a power for the Family Court to impose such requirements. Section 10(4) of the PPPR Act has been used to require welfare guardians to report to certain specific people but (as far as we are aware) has never been used to require a welfare guardian to submit reports to the Court. We recommend a new Act provide an express power for the Court to do this.
- 18.26 Mandatory reporting requirements would provide safeguards for represented people, as many submitters raised. However, in our view, mandatory record-keeping and reporting requirements for all decisions would be too onerous. To provide a significant safeguarding function, records would need to include the recording of reasons for decisions made (not just the decisions themselves). Given the number of decisions that a welfare representative may need to make, this would not be workable for all representatives. In addition, as discussed in Chapter 17, we recommend that the welfare representative role continue to be unpaid. The role can already be time-consuming and stressful. Overly onerous reporting requirements could dissuade suitable people from becoming welfare representatives, to the detriment of people who need them.
- 18.27 Only a few overseas jurisdictions that we examined impose record-keeping and reporting obligations for all welfare decisions.²⁰
- 18.28 We have considered whether there should be any statutory record-keeping and reporting requirements for specific types of decisions. Some submitters suggested potential thresholds such as limiting the obligation to “significant” decisions only. This approach might strike a better balance between safeguarding and workability. However, a descriptive threshold could be unclear and confusing for representatives. In addition, it would be difficult for a statutory threshold to capture the many different types of decisions that could, in specific circumstances, warrant the safeguard of record-keeping and reporting requirements.
- 18.29 In our view, the better approach is to expressly enable the Family Court to set tailored record-keeping and reporting obligations for welfare guardians when making or reviewing an order. The Court could use this power to respond to safeguarding concerns by imposing requirements on representatives when it considers they are needed to provide additional safeguarding for a decision or class of decisions. For example, the Court might set record-keeping and reporting obligations for:

²⁰ Guardianship and Administration Act 1995 (Tas), ss 27A(1) and 66(1); Adults with Incapacity (Scotland) Act 2000, s 65; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 46.

- (a) certain medical decisions;
- (b) a decision to move the represented person into an aged care facility;
- (c) decisions that are contrary to the represented person's wishes and values (that the representative considers necessary to avoid a material risk of significant harm);
- (d) certain decisions involving a conflict of interest; or
- (e) significant decisions about a person's care.

Record-keeping and reporting requirements for decisions involving a conflict of interest

18.30 We consider that record-keeping and reporting requirements for conflicts of interest are best addressed on a case-by-case basis rather than through a statutory threshold. Our recommendations above would enable this approach. We therefore do not make any specific recommendations about record-keeping and reporting requirements for decisions involving a conflict of interest.

Sanctions for non-compliance with reporting obligations

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.

- 18.31 The PPPR Act contains penalties for non-compliance and knowingly false compliance with reporting requirements.²¹ A new Act should do likewise.
- 18.32 Submissions indicated that non-compliance with reporting obligations is rarely wilful. Rather, lack of awareness and difficulties with complying are the primary barriers. Harsher sanctions should not be considered before other measures have been taken to address general awareness of obligations and to make it easier to comply. We make recommendations in this regard in Chapter 24. The Family Court should also be able to take account of material non-compliance at a review when considering a representative's ongoing suitability.
- 18.33 Given we recommend that the Family Court should be able to impose record-keeping and reporting obligations on welfare representatives, a new Act should extend the current penalties for property managers to all representatives.
- 18.34 Te Tāhū o te Ture | Ministry of Justice may wish to consider whether the current maximum fine of \$1,000 in section 45 of the PPPR Act for failure to file a required statement remains appropriate.

²¹ Property managers who knowingly submit false statements are liable for up to three years' imprisonment. Property managers who fail to file a statement are liable for a fine of up to \$1000: Protection of Personal and Property Rights Act 1988, s 45.

The cost of reviewing records

- 18.35 The cost of reviewing records that are provided to Public Trust is borne by the represented person unless the Family Court orders otherwise.²² Until recently, this cost was subsidised by the government for represented people with little wealth.²³ In October 2024, the Government removed the subsidy, while shortly afterwards increasing the assets and income thresholds at which a property manager must be appointed (and therefore the threshold at which reports must be reviewed by Public Trust).²⁴ The media has reported concerns about the removal of the subsidy.²⁵ The Government has stated the issue could be considered at the same time as this Report.²⁶
- 18.36 As government guidance sets out, many considerations are relevant when determining whether the government should recover the costs of an activity, including effectiveness, efficiency, equity and simplicity.²⁷ Where cost recovery is determined to be appropriate, the government must consider how this should occur, including whether costs should be recovered in whole or in part and whether all fee payers should be charged at the same rate.²⁸
- 18.37 Above, we recommend that property representatives continue to be required to submit financial records for review annually, and that the Family Court have the power to set reporting requirements for welfare representatives. As the subsidy was removed after the publication of our Second Issues Paper, we did not consult on who should bear the costs of reviewing representatives' records. We therefore make no recommendations on this issue.
- 18.38 However, to the extent a person subject to a court-appointed representative order is required to pay for the cost of reviewing records, it will be important for the Government to ensure the requirement does not constitute unjustified discrimination under section 19 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). Relevant considerations include:²⁹
- (a) Most (if not all) people subject to court-appointed representative orders are disabled. The fees therefore generally (if not only) arise with respect to disabled people. People who are not subject to court-appointed representative orders are not required to pay for review of their financial (or other) records.

²² Protection of Personal and Property Rights Act 1988, s 46(5). If the Court orders otherwise, it can only order the cost be borne by the property manager personally or some combination of the represented person and their property manager.

²³ Tony Wall "She helped a vulnerable man manage his money – then came a \$2400 bill that shocked her" *Stuff* (Aotearoa New Zealand, 19 October 2025) <www.stuff.co.nz>.

²⁴ See Tony Wall "She helped a vulnerable man manage his money – then came a \$2400 bill that shocked her" *Stuff* (Aotearoa New Zealand, 19 October 2025) <www.stuff.co.nz>; and Protection of Personal and Property Rights Order 2024, cls 4 and 6(1).

²⁵ See for example "This man queried a surprise \$600 bill, and was charged \$21.50 for the phone call" *Stuff* (Aotearoa New Zealand, 23 October 2025) <www.stuff.co.nz>.

²⁶ See Tony Wall "'Some would call this thievery': Backlash to new fees for the vulnerable revealed" *Stuff* (Aotearoa New Zealand, 20 December 2025) <www.stuff.co.nz>.

²⁷ Te Tai Ōhanga | The Treasury *Guidelines for Setting Charges in the Public Sector* (April 2017) at 9–10.

²⁸ Te Tai Ōhanga | The Treasury *Guidelines for Setting Charges in the Public Sector* (April 2017) at 25–32.

²⁹ We outline some questions that courts in Aotearoa New Zealand commonly address when considering whether a limit on a right is demonstrably justified in Chapter 7.

- (b) People have no choice as to whether the Court appoints a representative for them or whether their representative's records are reviewed. Any applicable fees will therefore be mandatory.
- (c) While the income and assets thresholds at which a property manager must be appointed have been raised, the current thresholds are still modest. For represented people who are close to these thresholds, the costs of auditing records may be a significant portion of their assets or income, depending on how the fees are determined.³⁰ If our recommendation that the Family Court be able to impose reporting obligations with respect to welfare representatives is accepted, the same consideration would also arise in relation to such orders.
- 18.39 In our view, charging fees for recovering the cost of reviewing court-appointed representatives' records may treat people who are subject to such orders differently from others based on disability. Disability is a prohibited ground of discrimination.³¹ Depending on how any mandatory fees are structured, they may result in a material disadvantage to represented people, when viewed in context. To the extent this is the case, it will be necessary for the Government to ensure that any fees charged are demonstrably justified under the NZ Bill of Rights.³²

REVIEWS OF ARRANGEMENTS

Current law

- 18.40 Under the PPPR Act, court-appointed representative arrangements are subject to periodic review.³³ The Family Court must specify a date within three years of the original order by which the welfare guardian or property manager is required to apply to the Court for review of the order.³⁴ In addition, several people, including the property manager, welfare guardian and represented person, can apply at any time for review of an order appointing a welfare guardian or property manager, and any person can apply for a review with the Court's leave.³⁵ If, after reviewing an order, the Court decides to extend the original order, it may set a date up to five years away for the next review.³⁶

³⁰ See for example Tony Wall "This man queried a surprise \$600 bill, and was charged \$21.50 for the phone call" *Stuff* (Aotearoa New Zealand, 23 October 2025) <www.stuff.co.nz>; and Tony Wall "Scandalous: The fees that drained a disabled man's income – and the dispute over his mother's will" *Stuff* (Aotearoa New Zealand, 15 November, 2025) <www.stuff.co.nz>.

³¹ Human Rights Act 1993, s 21(1)(h); and New Zealand Bill of Rights Act 1990, s 19(1).

³² New Zealand Bill of Rights Act 1990, s 5. As we explain in Chapter 7, questions that are commonly asked when determining whether a limit on a right is demonstrably justified include: whether the reason for limiting the right is sufficiently important to justify restricting rights or freedoms; whether the measure is sufficiently well designed to ensure both that it actually achieves its aim and that it impairs the right or freedom no more than is necessary; and whether the gain to society justifies the extent of the intrusion on the right.

³³ Separate from review of arrangements, the Family Court can also review a particular decision of a welfare guardian or property manager. The person who is the subject of the order, or any other person with the Court's leave, may apply for such a review at any time. When reviewing a decision, the Court can make any order it thinks fit: Protection of Personal and Property Rights Act 1988, s 89.

³⁴ Protection of Personal and Property Rights Act 1988, ss 12(8) and 31(8).

³⁵ Protection of Personal and Property Rights Act 1988, ss 86(1) and 87(2).

³⁶ Protection of Personal and Property Rights Act 1988, ss 86(7) and 87(8).

- 18.41 During a review, the Family Court must review the decision-making capacity of the person but has discretion about what else to review.³⁷ The primary objectives of the Court on review are to make the least restrictive intervention possible in the life or affairs of the relevant person and to encourage the person to develop their decision-making capacity.³⁸ Following a review, the Court may:³⁹
- (a) vary or decline the order;
 - (b) discharge or decline to discharge the order;
 - (c) extend the order for a further period; or
 - (d) make any order that it could have made in the original application, whether in addition to or instead of the order under review.

Issues

- 18.42 Article 12 of the United Nations Convention on the Rights of Persons with Disabilities requires that all measures relating to the exercise of legal capacity are subject to “regular review by a competent, independent and impartial authority or judicial body”. Court reviews of court-appointed representative arrangements are a strong safeguarding mechanism for represented people. At the same time, review mechanisms must be workable for both representatives and represented people.
- 18.43 In considering whether the review mechanisms are appropriately balanced, we have focused on two issues — namely:
- (a) whether the timeframes for periodic reviews are appropriate; and
 - (b) whether more guidance on what the Family Court should consider in a periodic review would be useful.

Consultation

Frequency of reviews

- 18.44 We asked submitters how frequently periodic reviews of court-ordered arrangements should be held. Forty-nine submitters gave feedback on this issue.
- 18.45 Most submitters considered that periodic reviews should be required at least every three years. Of these submitters, a majority supported the status quo. A minority suggested reviews should be required sooner, suggesting periods ranging from three months to two years. Submitters that supported more frequent reviews emphasised the need to safeguard the represented person.
- 18.46 Several submitters suggested a review may not be needed before five years if the person’s decision-making capacity is unlikely to change. Te Kāhui Ture o Aotearoa | New Zealand Law Society said some lawyers consider that reviews should be five-yearly with the option of extending to 10 years where the person will not regain their decision-making capacity.

³⁷ Protection of Personal and Property Rights Act 1988, ss 86(2) and 87(3). The only exception is where an application for review is for a new representative to be appointed in place of the present representative.

³⁸ Protection of Personal and Property Rights Act 1988, ss 86(4) and 87(5).

³⁹ Protection of Personal and Property Rights Act 1988, ss 86(5) and 87(6).

- 18.47 Approximately half of all submitters that responded said the appropriate period for a review depends on the circumstances of the case. Circumstances that submitters identified as relevant included whether the person's decision-making capacity is likely to change, whether the representative is likely to properly respect the represented person and the risks of abuse or exploitation, including any previous complaints.
- 18.48 Some submitters said the first review should be within one year of the initial appointment, with longer periods for subsequent reviews. These submitters reasoned that the first review will be the most important in assessing how well the arrangement is working and to make any adjustments needed.
- 18.49 Some participants in our focus groups said the review process needs to be easier than it is now. Two participants who were representatives said the process and frequency of reviews means that it can be very expensive to be a representative.

Court considerations during a review

- 18.50 We asked submitters what the Family Court should consider when carrying out a review. Thirty-eight submitters gave feedback on this issue.
- 18.51 The most common response was that the Court should consider the represented person's wellbeing. This included their overall wellbeing and health, engagement in the community, access to support, their living situation and their financial wellbeing.
- 18.52 A significant number of submitters said the represented person's will and preferences should be taken into account during a review.
- 18.53 Many submitters said the Court should consider whether the representative is doing their job well. This included whether the representative is supporting the person to make their own decisions, the representative's overall competency (including, where relevant, with respect to property and financial matters), whether the representative is actually engaging with the represented person and any concerns the represented person has raised.
- 18.54 Some submitters supported the current obligation to review the person's decision-making capacity. Approximately half of these submitters said a medical certificate should not be required if the person's decision-making capacity is unlikely to have changed. One submitter said a medical certificate should always be required.
- 18.55 One submitter said there should be a rebuttable presumption that the arrangement will end during every review.

Recommendations

Frequency of periodic reviews

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.

18.56 Our recommendations would largely continue the current frequency of periodic reviews.⁴⁰

18.57 The only change we propose is with respect to subsequent reviews. As set out above, the PPPR Act currently requires the date for subsequent reviews to be set up to five years from the last review. We consider that a new Act should set a standard maximum period of three years, with the Family Court able to set a period of up to five years if it considers it appropriate to do so. This approach reflects the strong support from submitters for three-yearly reviews to provide greater safeguards for represented people, while acknowledging the views of other submitters that such frequent reviews may not always be necessary.

18.58 We also recommend that a new Act sets out matters for the Court to consider when considering extending a review beyond the standard three-year maximum period. These considerations are intended to indicate that good reasons are required for a longer review period.

18.59 With respect to the first periodic review of an arrangement, we considered recommending a maximum period of one year but concluded that this would be too onerous.

⁴⁰ We consider that the rules regarding who can apply for a review of a personal or property order at any time in ss 86(1) and 87(2) of the Protection of Personal and Property Rights Act 1988 should continue. We have not heard any concern with these rules.

Considerations during a review

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.

18.60 We recommend that the Family Court continue to be required to assess the represented person's relevant decision-making capacity during a review. As we explain in Chapter 14, lack of relevant decision-making capacity is a threshold requirement for a court-appointed representative arrangement.

18.61 To assist the Family Court's review of the person's decision-making capacity, the Court should be able to direct that an updated formal decision-making capacity assessment be undertaken in accordance with our recommendation in Chapter 14.⁴¹ An updated formal assessment would be particularly important where a represented person's decision-making capacity has a realistic prospect of changing over time. However, it should not be a requirement at every review. Almost all submitters that commented on this point said updated medical certificates should not be required where the person's decision-making capacity is unlikely to change. There would be potentially significant costs for the represented person associated with providing a medical certificate at every review.

18.62 The PPPR Act allows the Family Court to dispense with a review of the person's decision-making capacity if an application for review is made to appoint a new representative in place of an existing one.⁴² No submitter raised this as a concern, and we consider it could reduce the costs involved for a review where the only purpose of a review is to appoint a new representative. We therefore recommend this power continue. For clarity, the Court should still be able to choose to review the relevant person's decision-making capacity and request a formal decision-making capacity assessment if it thinks it is required.

⁴¹ See R61. This direction could be made at a previous review or at the time an order setting up an arrangement is made. If an updated formal decision-making assessment has not been undertaken in advance of a review and it becomes clear during the review that it is required, the Court could adjourn the hearing to enable an assessment to be undertaken.

⁴² Protection of Personal and Property Rights Act 1988, ss 86(3) and 87(4).

- 18.63 Beyond decision-making capacity, a new Act should contain an inclusive list of matters for the Family Court to consider. Our recommended list addresses matters fundamental to:
- (a) whether an arrangement should be in place at all (whether it is necessary, and the wishes and values of the person relevant to whether it should continue); and
 - (b) whether an arrangement is operating as intended (whether it is achieving its purpose and the ongoing suitability of the representative).
- 18.64 The purpose of these recommendations is to direct the attention of the Family Court to whether there are any changes that have occurred that mean the arrangement is no longer needed or needs to be modified. The Court should not be required to approach each review as if it were the first application for an arrangement. That would be unworkable. Accordingly, we have set out an inclusive list of matters for the Court to consider on review rather than referring to our recommended test for putting an arrangement in place (see Chapter 14).
- 18.65 We do not consider there should be a presumption at every review that a court-appointed representative arrangement will be dissolved.⁴³ A presumption that the arrangement will end could create undue uncertainty for both representatives and represented people. Placing the burden on the parties to convince the Family Court not to dissolve an arrangement would also increase the cost of the review process.

Powers following a review

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.

- 18.66 We consider the Family Court's powers following a review under the current law should continue. No submitters expressed any concern with the current powers. In our view, they are appropriately wide to allow the Court to make any order it sees fit regarding the arrangement, including any order it could have made in response to the original application.

⁴³ We raised this as a possible option in our Second Issues Paper: *Te Aka Matua o te Ture | Law Commission He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [10.108]. Only one submitter supported it. As noted above, a stronger theme of submissions was that the review process is uncertain and burdensome for those involved. A rebuttable presumption would likely exacerbate these concerns.

PART 6:

**SELF-INSTIGATED
ARRANGEMENTS**



1. This part addresses two decision-making arrangements that are put in place by the relevant person themselves: enduring powers of attorney (EPOAs) and advance directives. EPOAs involve a person appointing another person to make decisions on their behalf (generally if and when they lose decision-making capacity for relevant decisions). Advance directives involve a person themselves making a decision about potential future medical treatment in case they lose decision-making capacity to make that decision later on.
 2. Chapters 19 and 20 concern EPOAs. In Chapter 19, we make various recommendations to improve the accessibility of EPOAs and ensure there are sufficient safeguards to protect those making them. In Chapter 20, we recommend that a national register for the voluntary registration of certain EPOA information be established to help make it easier for EPOAs to be located when they need to be used.
 3. Chapter 21 concerns advance directives. We recommend that a new Act specify that a person's medical treatment decisions expressed in a valid and applicable advance directive are outside the scope of representative decision making under the Act. We also explain that the case law on advance directives is limited and unclear and recommend that the Government review the common law with a view to establishing whether the law on advance directives should be codified and, if so, how.
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CHAPTER 19

Enduring powers of attorney

IN THIS CHAPTER, WE CONSIDER:

- how enduring powers of attorney are created;
- the appointment of multiple attorneys for welfare matters;
- some specific issues about eligibility to be an attorney;
- when attorneys may make decisions under an enduring power of attorney;
- the decisions that welfare attorneys should be prohibited from making; and
- safeguarding mechanisms for enduring powers of attorney.

INTRODUCTION

- 19.1 An enduring power of attorney (EPOA) 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. An EPOA may confer authority on an attorney for either property matters or welfare matters.
- 19.2 EPOAs are provided for in Part 9 of the Protection of Personal and Property Rights Act 1988 (PPPR Act). In our view, they should remain available in a new Act. They are flexible, generally well-understood tools that help to ensure a person's wishes and values are respected.
- 19.3 In our Second Issues Paper, we focused on aspects of EPOAs that are distinct from court-appointed representatives. For example, we addressed how EPOAs should be created and executed, and when decisions should be able to be made under them. In addition to addressing these matters in this chapter, we also consider some other matters where feedback that we received in relation to court-appointed representatives makes clear that reform in relation to EPOAs is also needed.
- 19.4 In this chapter, we make recommendations to improve the accessibility of EPOAs and ensure there are sufficient safeguards to protect donors. Specifically, we make recommendations to:

- (a) improve the prescribed forms for creating EPOAs;
- (b) enable donors to appoint multiple attorneys under both property EPOAs and welfare EPOAs;
- (c) enable EPOAs to be executed remotely by audio-visual link;
- (d) lower the minimum age at which a person can be an attorney to 18 years;
- (e) remove the restriction on people who are bankrupt being able to act as attorneys in relation to welfare matters; and
- (f) clarify when attorneys can make decisions under an EPOA and provide for some additional safeguards.

BACKGROUND

Terminology

- 19.5 Throughout this chapter, we refer to “creating” and “executing” EPOAs. As indicated above, we refer to the person giving someone else the power to make decisions on their behalf under an EPOA as the “donor” and to the person who is given that power as the “attorney”.
- 19.6 When we discuss *creating* an EPOA, we mean the overall process under which a donor fills out the EPOA forms and tailors them to suit their wishes, with the assistance of a witness who must explain the features of the EPOA.
- 19.7 When we discuss *executing* an EPOA, we refer to one component of creating an EPOA, which is the formal process where a donor and an attorney sign an EPOA in the presence of a witness, who must make several certifications.
- 19.8 We avoid the terminology of “activating” an EPOA. Activation is sometimes used to explain the point at which an attorney is empowered to make decisions under an EPOA. For reasons we discuss below, we think this term is confusing. Instead, we refer to when an attorney can make decisions under an EPOA.
- 19.9 The PPPR Act uses the terminology of “EPOAs in relation to personal care and welfare” whereas we refer to “EPOAs in relation to welfare”. For brevity, we sometimes refer to EPOAs in relation to property as “property EPOAs” and EPOAs in relation to personal care and welfare as “welfare EPOAs”.

Why the law provides for EPOAs

- 19.10 EPOAs were introduced by the PPPR Act. At common law, a person could give another the power to act for them under the law of agency (a power of attorney). However, the attorney’s authority ended when the person ceased to have the mental capacity to maintain the arrangement.¹ This meant that the agency relationship ceased at the point in time a person may be most likely to benefit from an attorney’s help.²

¹ See *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [28].

² See Iris Reuecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 141–142; and *Courteney v Estate of Courteney* [2016] NZDC 20578, [2017] DCR 390 at [14].

19.11 The PPPR Act addressed this gap by empowering a person to appoint an attorney to act for them in the event they become “mentally incapable”.³ The aim of this reform was to facilitate individual autonomy, in preference to te Kōti Whānau | Family Court determining all decision-making arrangements. As the Rt Hon Geoffrey Palmer (then Minister of Justice) explained during the Second Reading of the Protection of Personal and Property Rights Bill:⁴

There is no policy reason that a donor of a power of attorney should not provide for what is to happen during his or her mental incapacity. Indeed, the law should encourage people to do that, because it is likely to reduce the claims made on the family court resources by application under the Bill for personal and property orders. It is even more important, because a person can tailor an enduring power of attorney to suit his or her particular circumstances. Clearly, a person is in a much better position than a court to say what he or she wants to happen in those circumstances.

19.12 The policy reasons behind providing for EPOAs are consistent with the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention). As we discuss in Chapter 12, the Disability Convention requires that legal measures relating to the exercise of legal capacity respect a person’s rights, will and preferences.⁵ It also requires appropriate measures to provide access by disabled people to the support they may require in exercising their legal capacity.⁶ The United Nations Committee on the Rights of Persons with Disabilities (Disability Committee) has observed that “the ability to plan in advance is an important form of support”.⁷ EPOAs can be seen as a form of advance planning.⁸

Overview of current law

19.13 The PPPR Act establishes two kinds of EPOAs: enduring powers of attorney in relation to property and enduring powers of attorney in relation to care and welfare.⁹ The provisions governing these two types of EPOAs are similar but have some important differences.

19.14 Donors may create one or both kinds of EPOA. To create an EPOA, a donor must fill out a form provided by secondary legislation.¹⁰ They must state who they are appointing as their attorney and can also appoint successive attorneys, the appointment of one being conditional on the cessation of the appointment of another.¹¹ Donors of property EPOAs

³ Protection of Personal and Property Rights Act 1988, s 93A(1).

⁴ (18 February 1988) 486 NZPD 2120.

⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4); and United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [20].

⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(3).

⁷ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014) — Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [17]. As we address in Chapter 8, the Disability Committee’s views on self-instigated representative instruments like EPOAs is unclear. However, we interpret this statement to include EPOAs as an advance planning tool.

⁸ We discuss other forms of advance planning in Chapter 21.

⁹ Protection of Personal and Property Rights Act 1988, ss 97 and 98.

¹⁰ Protection of Personal and Property Rights Act 1988, s 94A(2). See also Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008.

¹¹ Protection of Personal and Property Rights Act 1988, s 95(5).

- can appoint more than one attorney.¹² Donors may appoint the same or different attorneys for property and for personal care and welfare.¹³
- 19.15 Donors have options to tailor their EPOA. For example, a donor can state that their attorney may make all decisions relating either to property or personal care and welfare, or only specific decisions.¹⁴ The EPOA creation process requires a witness to explain the effects, implications and certain other features of the EPOA to the donor.¹⁵
- 19.16 The donor, attorney(s) and any successor attorneys must sign the EPOA.¹⁶ The signature of the donor and all attorneys must be witnessed.¹⁷ The witness to the donor's signature must make several certifications, including that the witness has no reason to suspect the donor is "mentally incapable".¹⁸
- 19.17 Once the EPOA is executed in this way, the attorney(s) can make decisions for the donor in certain circumstances. For property EPOAs, a donor may authorise their attorney to make decisions on the donor's behalf either immediately or only when the donor becomes "mentally incapable".¹⁹ For welfare EPOAs, an attorney can only make decisions on the donor's behalf when the donor is "mentally incapable".²⁰ A certificate by a relevant health practitioner that the donor is mentally incapable for the relevant decision(s) (or a Court determination to that effect) is required in some circumstances.²¹
- 19.18 Attorneys have statutory duties. These include consulting the donor and any other attorneys, providing information relating to their exercise of powers to people specified for that purpose in the EPOA and (for property attorneys) keeping records of financial transactions.²²
- 19.19 When an attorney is making a decision, the paramount consideration is the promotion and protection of the donor's best interests.²³ Welfare attorneys must also seek to encourage the donor to develop and exercise their capacity to understand and communicate decisions.²⁴ Property attorneys must seek to encourage the donor to develop competence in managing their property.²⁵

¹² Protection of Personal and Property Rights Act 1988, s 94A(6)(c)(i).

¹³ Protection of Personal and Property Rights Act 1988, s 99(1).

¹⁴ Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

¹⁵ Protection of Personal and Property Rights Act 1988, s 94A(6).

¹⁶ Protection of Personal and Property Rights Act 1988, s 94A(3)–(4).

¹⁷ Protection of Personal and Property Rights Act 1988, s 94A(4) and (5).

¹⁸ Protection of Personal and Property Rights Act 1988, s 94A(7).

¹⁹ Protection of Personal and Property Rights Act 1988, s 97(4).

²⁰ Protection of Personal and Property Rights Act 1988, s 98(3).

²¹ Protection of Personal and Property Rights Act 1988, ss 97(5) and 98(3)(a).

²² Protection of Personal and Property Rights Act 1988, ss 99A–99C. Attorneys must consult any person specified in the EPOA to be consulted: s 99A(1)(b).

²³ Protection of Personal and Property Rights Act 1988, ss 97A(2) and 98A(2).

²⁴ Protection of Personal and Property Rights Act 1988, s 98A(2).

²⁵ Protection of Personal and Property Rights Act 1988, s 97A(2).

- 19.20 A donor may replace or terminate their EPOA at any time while they are “mentally capable of doing so”.²⁶ A donor who “has been, but is no longer, mentally incapable” can suspend their attorney’s authority to act by giving the attorney written notice.²⁷ That attorney cannot act under the EPOA unless the donor is again deemed mentally incapable.²⁸
- 19.21 The PPPR Act lists other circumstances in which an EPOA ceases to have effect, including where:²⁹
- (a) the donor dies;
 - (b) the Family Court revokes the appointment or the whole EPOA;
 - (c) the attorney resigns by giving “notice of disclaimer”;³⁰ or
 - (d) the attorney dies, becomes bankrupt, becomes subject to a compulsory treatment order or a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992, becomes subject to a welfare guardian or property manager order or otherwise becomes incapable of acting.
- 19.22 Different rules apply in respect of some of these circumstances where an EPOA provides for successive attorneys.³¹
- 19.23 The Family Court has a supervisory jurisdiction over EPOAs. Several people can apply as of right for the Court to exercise its jurisdiction, including the donor, a relative of the attorney or donor, a social worker or a medical practitioner.³² The Court’s jurisdiction is wide. For example, it can:
- (a) give directions to an attorney about the exercise of their powers;³³
 - (b) require an attorney to provide accounts, information or documents in their possession;³⁴
 - (c) determine an attorney’s suitability;³⁵
 - (d) review an attorney’s decisions;³⁶
 - (e) modify the scope of an EPOA by including or excluding specific matters;³⁷ or

²⁶ Protection of Personal and Property Rights Act 1988, ss 95A and 106(1)(a). Donors may also terminate an attorney’s appointment without terminating the whole EPOA: s 106(1)(ba).

²⁷ Protection of Personal and Property Rights Act 1988, s 100A(1).

²⁸ Protection of Personal and Property Rights Act 1988, s 100A(2).

²⁹ Protection of Personal and Property Rights Act 1988, s 106(1).

³⁰ If an attorney wishes to resign while the donor has decision-making capacity, the donor receives the notice. If the donor does not have decision-making capacity, the Family Court receives the notice: Protection of Personal and Property Rights Act 1988, s 104(1).

³¹ Protection of Personal and Property Rights Act 1988, s 106(2).

³² Protection of Personal and Property Rights Act 1988, ss 102A and 103(1). Any person may apply with the Family Court’s leave: ss 102A(b) and 103(2).

³³ Protection of Personal and Property Rights Act 1988, ss 101 and 102(2)(c).

³⁴ Protection of Personal and Property Rights Act 1988, s 102(2)(e).

³⁵ Protection of Personal and Property Rights Act 1988, s 102(2)(i).

³⁶ Protection of Personal and Property Rights Act 1988, s 103.

³⁷ Protection of Personal and Property Rights Act 1988, s 102(2)(d).

- (f) revoke an attorney’s appointment.³⁸

Twin policy objectives

- 19.24 For the law relating to EPOAs to be effective, it needs to provide for and balance two objectives — accessibility and safeguarding.³⁹
- 19.25 With respect to accessibility, as the Kōti Pira | Court of Appeal has explained, the provisions relating to EPOAs in the PPPR Act are intended to provide “a user-friendly mechanism for arranging ... future affairs”.⁴⁰ EPOAs should be as simple to make and as inexpensive as possible. If they are too complex, people will not create and use them.⁴¹ If people do not create EPOAs, more people will need the Family Court to appoint a decision-making representative for them.
- 19.26 With respect to safeguarding, the law governing EPOAs should protect vulnerable people. EPOAs generally come into effect when a person is assessed not to have decision-making capacity.⁴² The donor cannot revoke their EPOA at that stage. They may be unable to supervise their attorney’s actions effectively.⁴³ It is important that the law provide sufficient safeguards to protect against their misuse.⁴⁴
- 19.27 The objectives of accessibility and safeguarding are also reflected in the Disability Convention. Accessibility is an underlying principle of the Convention.⁴⁵ The Disability Committee has stated that “[a]ccessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society”.⁴⁶ The Convention also requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse, as we explain in Chapter 3.⁴⁷

Reviews of law relating to EPOAs

- 19.28 The objectives of accessibility and safeguarding have informed several previous reviews of the law relating to EPOAs in Aotearoa New Zealand.

³⁸ Protection of Personal and Property Rights Act 1988, s 105.

³⁹ *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [40]–[42].

⁴⁰ *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [40].

⁴¹ A study conducted in England and Wales found a key reason people cited for not creating EPOAs was perceiving the process as too complicated. See Anna Beckett and others *The Future of Lasting Power of Attorney: A Research Report for the Office of the Public Guardian* (Office of the Public Guardian, March 2014) at 7.

⁴² As we later discuss, donors may authorise their EPOA for property matters to have immediate effect: Protection of Personal and Property Rights Act 1988, s 97(4).

⁴³ See *Read v Almond* [2015] NZHC 2797 at [267].

⁴⁴ See (7 December 2006) 636 NZPD 7036–7037; and Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws: Report Volume 3* (QLRC R67, 2010) at [16.49]. The Disability Convention also requires states to ensure that measures relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse: Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

⁴⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 3(f).

⁴⁶ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 2 (2014) — Article 9: Accessibility* UN Doc CRPD/C/GC/2 (22 May 2014) at [1].

⁴⁷ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

- 19.29 In 2001, Te Aka Matua o te Ture | Law Commission reviewed the misuse of EPOAs. It concluded there were insufficient safeguards to protect donors' interests and recommended new safeguards.⁴⁸
- 19.30 In 2007, several safeguards were introduced to the PPPR Act in response to the Commission's report and other government consultation. The Protection of Personal and Property Rights Amendment Act 2007 tightened requirements for creating EPOAs and clarified the process for when attorneys can make decisions under EPOAs.⁴⁹
- 19.31 In 2014, the Minister for Senior Citizens reviewed the effectiveness of the 2007 amendments. This review found that more changes were needed to achieve the right balance between protecting people and making EPOAs accessible. It also found there was a need for clearer information about EPOAs.⁵⁰ The number of EPOAs being made had decreased since the amendments took effect, which consulted parties said was largely due to the increased complexity and cost of setting up an EPOA.⁵¹ In response, the law was amended. Changes included enabling witnesses to donors' signatures to meet their explanation obligations by following a template contained in the EPOA form and updating the forms to be in plain language.⁵²

A NEW ACT SHOULD CONTINUE TO PROVIDE FOR EPOAS

R124

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

- 19.32 As law and policy makers have consistently concluded, EPOAs serve important objectives. A new Act should continue to provide for them.
- 19.33 As we explain in Chapter 7, sometimes a person who does not have relevant decision-making capacity needs a decision (or decisions) to be made for them. Enabling people to decide for themselves who will be responsible for making such decisions in the event they lose relevant decision-making capacity protects and promotes their equality, dignity and autonomy. A representative appointed by the person themselves may be best placed to understand and give effect to the person's wishes and values.
- 19.34 For these reasons, EPOAs should be accessible. At the same time, the law must provide robust safeguards to prevent misuse of EPOAs, as required by the Disability Convention. The subsequent recommendations in this chapter are intended to better realise and balance these objectives.

⁴⁸ Te Aka Matua o te Ture | Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [7]–[9] and [45]–[46].

⁴⁹ See Protection of Personal and Property Rights Amendment Act 2007, ss 7–14.

⁵⁰ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 2.

⁵¹ See Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 12.

⁵² Statutes Amendment Act 2016, pt 23; and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Amendment Regulations 2017, reg 5.

THE PRESCRIBED FORMS FOR CREATING EPOAS

Current law and practice

- 19.35 An EPOA must be created using a prescribed form signed by the donor and the attorney.⁵³ The forms for welfare EPOAs and property EPOAs are separate.⁵⁴ Therefore, where the same person is appointed attorney for both personal care and welfare and property decisions, two prescribed forms must be completed.⁵⁵
- 19.36 There are also prescribed forms for the standard explanation that witnesses must give donors about the effect and implications of their EPOA. The standard explanations for property EPOAs and welfare EPOAs are separate.⁵⁶
- 19.37 Currently, the forms for the two types of EPOAs (including explanatory notes) and the standard explanation to be given by witnesses can be downloaded from Te Tāhū o te Ture | Ministry of Justice website.⁵⁷ They can be completed in Microsoft Word or by hand.

Issue

- 19.38 In feedback, we heard that the prescribed forms are unwieldy, take too long to complete and are difficult to understand.⁵⁸ They have been described as “bulky and verbose”.⁵⁹ While the EPOA forms were updated in 2017 to be in plain English,⁶⁰ they remain complex.
- 19.39 The complexity and length of the prescribed forms can add to the cost of creating an EPOA. This can deter people from creating EPOAs.

Consultation

- 19.40 We asked submitters about how EPOA forms could be updated to improve their usability. We noted some options for shortening the forms, including by removing the explanatory information to a separate document, allowing users to delete irrelevant sections of the form or combining the separate prescribed forms for property EPOAs and welfare

⁵³ Protection of Personal and Property Rights Act 1988, s 94A(2).

⁵⁴ Section 99(1) states that specified provisions bearing specifically on property EPOAs and welfare EPOAs do not prevent a donor appointing an attorney in respect of both property and personal care and welfare in the same document. However, the prescribed forms do not provide for this.

⁵⁵ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 1 and 3.

⁵⁶ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 2 and 4.

⁵⁷ Te Tāhū o te Ture | Ministry of Justice “The court & enduring power of attorney (EPA)” (26 May 2025) <www.justice.govt.nz>.

⁵⁸ Not all submitters shared this view. For example, Auckland District Law Society said their committee was “divided” about the forms. Some members criticised their length, while others felt the forms were effective in ensuring that practitioners engaged with their clients about the kinds of powers that can be granted.

⁵⁹ “PP9 Powers of Attorney” in *Family Precedents* (online ed, Thomson Reuters).

⁶⁰ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Amendment Regulations 2017.

- EPOAs.⁶¹ We also expressed interest in whether it would be easier to complete an EPOA form online.⁶²
- 19.41 Fifty submitters engaged with this topic. Most thought improvements could be made.
- 19.42 Nearly half of the submitters that gave feedback on this issue said the prescribed forms contain too much information or are too long. Lawyer Chris Kelly said “[a]nything over [two] pages is challenging to many people and they get put off even bothering with a power of attorney”. Some submitters, including Public Trust and Te Tari Kaumātua | Office for Seniors, suggested the forms could be shortened by moving the explanatory notes from the forms into a separate document. On that approach, the form itself would be only a few pages long.
- 19.43 Several submitters thought the explanatory information could be made easier to navigate. Some of these submitters suggested that an online platform for creating EPOAs would improve how explanatory information is presented in the creation process. Submitters also suggested that the law could enable the prescribed form to be adapted into a “digital document builder”. This would provide for a “tick the box” approach to drafting (but not executing) EPOAs.⁶³ However, some submitters said creating an EPOA using a digital document builder would still be a long, complicated process if users were required to consider many different options.
- 19.44 Nearly half the submitters that gave feedback considered the prescribed forms should use less complicated language. Some submitters said the forms can be particularly inaccessible for disabled people or suggested making them available in Easy Read formats.⁶⁴
- 19.45 A few submitters supported the possibility of a combined form for welfare and property EPOAs. They said this approach could save time and cost where a donor intends to appoint one attorney for both welfare and property decisions. However, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and The Law Association of New Zealand (Law Association) opposed combining the forms. They said that property EPOAs and welfare EPOAs require different considerations and are used in different ways. For example, they considered it would be inappropriate for banks to record details about customers’ welfare EPOAs.
- 19.46 A few submitters said accessibility issues with creating EPOAs can lead to inequity. For example, Te Rōpū Tauwhiro i Aotearoa | Aotearoa New Zealand Association of Social Workers (the Social Workers’ Association) said creation costs are an equity issue “as

⁶¹ This option is available in Queensland: “Power of attorney and advance health directive forms” (6 November 2025) Queensland Government <www.publications.qld.gov.au>. A submission to our Second Issues Paper from Gawith BurrIDGE Lawyers specifically endorsed the Queensland approach to EPOA forms.

⁶² This option is available in England and Wales and in Ireland (but the forms must still be printed and signed to complete the process). See Office of the Public Guardian “Lasting power of attorney forms” (17 November 2025) GOV.UK <www.gov.uk>; and Decision Support Service “Making an enduring power of attorney” <www.decisionsupportservice.ie>.

⁶³ For example, completing the online form could enable users to indicate they have considered, and decided to omit, a section from their EPOA (such as attorney consultation obligations). That section would not feature in the final EPOA, so the final document would be shorter and simpler.

⁶⁴ Our focus groups and expert advisory groups also emphasised that the prescribed forms and related information could be simplified and made more accessible.

those who can afford to set up EPOAs have more autonomy as they can choose their alternative decision-maker”.

Recommendations

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.

Content of prescribed forms

19.47 We recommend that a new Act continue to provide for prescribed forms covering all aspects of creating an EPOA. There should be separate forms for property EPOAs and welfare EPOAs. Each should include explanatory notes for donors and witnesses and a certificate that witnesses must complete when executing an EPOA.

19.48 Prescribed forms and explanatory notes for EPOAs have existed since EPOAs were first introduced in 1988. No submitter suggested their removal. There are clear advantages in continuing the use of prescribed forms, including cost savings and uniformity. Witnesses will be familiar with their contents, enabling them to provide clear explanations to donors. Third parties (for example, health providers) will be able to navigate them easily.

19.49 We do not recommend combining welfare EPOAs and property EPOAs in one document. We agree with NZLS and the Law Association that these documents serve different purposes, require different explanations and are used in different ways. Combining them could be confusing and have unintended consequences.

Revising the prescribed forms to improve accessibility

19.50 We recommend that the prescribed forms are revised to improve accessibility. The Ministry of Justice is best placed to undertake this work.

19.51 Some ways in which the forms could be revised include using plainer language, separating the explanatory notes from the body of the prescribed forms themselves, creating alternative accessible versions such as Easy Read translations and enabling EPOAs to be created through an online digital document builder.⁶⁵ The Ministry of Justice may identify

⁶⁵ A document builder is a software tool that enables a person to create or tailor and edit a document using templates, prompts, drop-down items and other functions.

other potential revisions such as ways to present explanatory material so that it is easier to navigate and understand.

TAILORING EPOAS

Current law

- 19.52 The PPPR Act enables donors to tailor the terms of their EPOAs in various ways.
- 19.53 A donor can tailor the scope of decisions their attorney is empowered to make under the EPOA.⁶⁶ This can involve conferring wide powers such as decision-making authority for all personal care and welfare matters. Alternatively, a donor can specify that an attorney is only authorised to act in relation to specified matters such as healthcare. Whichever approach is taken, a donor can impose conditions and restrictions on the attorney's powers.⁶⁷
- 19.54 A donor can also specify a person or people whom the attorney is to consult when making decisions under the EPOA — either generally or in relation to specified matters.⁶⁸ In addition, a donor may choose to specify a person or people to whom the donor must provide information about the exercise of their powers under the EPOA.⁶⁹
- 19.55 Finally, a donor may specify that an assessment of their decision-making capacity is to be undertaken by a health practitioner within a particular scope of practice provided that scope includes the assessment of a person's mental capacity (for example, psychiatry).⁷⁰

Issues

- 19.56 We have identified two issues with respect to the tailoring of EPOAs.
- 19.57 First, we understand that donors seldom tailor their EPOAs.⁷¹ This may be because it is difficult for a donor to predict the kinds of decisions that will need to be made on their behalf or the circumstances in which decisions will need to be made. People may also not fully understand their options for tailoring their EPOA. The cost or perceived difficulties involved may also deter donors from tailoring their arrangements.
- 19.58 Second, the option for a donor to specify that an assessment of their decision-making capacity must be undertaken by a health practitioner within a particular scope of practice appears to cause confusion. We have heard that donors sometimes specify a *particular person*, for example, naming their general practitioner. However, the PPPR Act does not provide this ability. It only enables donors to specify a *scope of practice* (for example, general practice, geriatrics or psychiatry). If the donor has mistakenly named an individual to conduct their decision-making capacity assessments, the donor's support network

⁶⁶ Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

⁶⁷ Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

⁶⁸ Protection of Personal and Property Rights Act 1988, s 99A(1)(b).

⁶⁹ Protection of Personal and Property Rights Act 1988, s 99B.

⁷⁰ Protection of Personal and Property Rights Act 1988, s 99D(2). See Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at [7.30]. The practitioner's scope of practice must also include the assessment of a person's mental capacity: s 94(4).

⁷¹ Iris Reuvecamp "Enduring Powers of Attorney, Welfare Guardians and Property Managers" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 142.

may try to arrange this and encounter significant difficulties.⁷² Attorneys may be prevented from making important decisions in the meantime.

- 19.59 Even where a donor has properly specified a scope of practice in their EPOA, there are impracticalities. It may be difficult to obtain an assessment from a health practitioner within the specified scope of practice due to pressures on the healthcare system.
- 19.60 A 2014 review of the law relating to EPOAs conducted by the Minister for Senior Citizens reported submitters' concerns that, on the relevant form, donors can require that their decision-making capacity be assessed by a specialist rather than a general practitioner. Geriatricians had advised during the review that decision-making capacity assessments are often a poor use of specialists' time because general practitioners can usually carry out the assessment and refer complex cases to a specialist. The Minister recommended that the option be removed from the form, noting that a donor could still request a specialist assessment if they wish.⁷³

Consultation

Issues with tailoring the scope of EPOAs

- 19.61 We asked submitters whether there are any issues with tailoring the scope of EPOAs. Twenty-one submitters addressed this topic. There were few common themes among responses.
- 19.62 Several submitters considered that the ability to tailor EPOAs is useful and donors should be encouraged to consider it when creating EPOAs. Public Trust suggested we consider how greater flexibility could be provided in EPOA drafting.
- 19.63 A few submitters said the tailoring options are confusing. He Manaakitanga Kaumātua Aotearoa | Age Concern NZ suggested they could be clarified in the explanatory material. Te Whatu Ora | Health New Zealand commented that producing the material in a range of accessible formats would likely assist people to tailor their EPOA to reflect their wishes.
- 19.64 Two submissions from health practitioners emphasised the difficulties with the ability of donors to specify a scope of practice for assessments that we describe above.
- 19.65 A few submitters expressed concern that the tailoring options may mean donors inadvertently fail to provide for changes in their circumstances by the time the EPOA is needed. One suggested removing the ability to tailor EPOAs and instead encouraging donors to create advance directives or statements of wishes alongside EPOAs to guide attorneys in making decisions according to their will and preferences. They said this would allow flexibility.

Specifying consultation obligations

- 19.66 We asked submitters whether donors should be able to specify their attorney's consultation obligations. We said we were interested in how this tailoring option would

⁷² For example, the named GP may have retired or moved to another location, or it may be impossible to see the GP for several weeks.

⁷³ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 13–14.

work alongside the requirement that the attorney respect the donor's rights, will and preferences.

- 19.67 Thirty-nine submitters engaged with this question. Most of these submitters considered that donors should continue to have the ability to specify with whom their attorney should consult. Many submitters thought this ability is important to ensure donors' wishes and values are at the forefront of attorneys' decisions. For example, McWilliam Tyree Lawyers said many donors consider it important that other people (such as their children) feel engaged in the decision-making process.
- 19.68 A few submitters commented that the option to specify with whom an attorney should consult is currently well utilised. Two submitters emphasised the practical benefits of the attorney's consultation obligations being located in the EPOA, with one noting that it prevents attorneys from consulting more people than the donor considered necessary. One submitter supported the ability of donors to specify people who are to be consulted because consulting people can reduce challenges to attorneys' decisions in the Family Court.
- 19.69 Two submitters that supported the ability of donors to specify in their EPOA people who are to be consulted discussed what should happen if consultation obligations no longer reflect the donor's wishes at the point the attorney begins making decisions. This situation could arise, for example, where there has been a falling out between a specified consultee and the donor some time after the EPOA is executed. One submitter suggested the EPOA could include "contingencies" where relationships fail. McWilliam Tyree Lawyers said the issue "is addressed by way of the requirement being consultative, and that decision making power still rests with the attorney".
- 19.70 Six submitters thought that donors should not be able to specify people who are to be consulted in their EPOA. Two of these submitters were concerned that attorneys would not understand consultation obligations specified by a donor, with one suggesting the consultation process could be more prescribed. One submitter said it may not be realistic for attorneys to meet a donor's specifications.

Capturing donors' wishes

- 19.71 We asked submitters how a person's wishes could best be captured when creating an EPOA. Thirty-three submitters addressed this topic. The majority of responses discussed the use of advance directives, advance care plans and statements of wishes.
- 19.72 Several submitters suggested that statements of wishes or advance directives could be integrated with EPOAs or with their preparation. NZLS said its membership suggested that advance care planning could be linked to EPOA creation. However, the Office for Seniors expressed concerns about how this idea would work in practice. It cautioned that the option may be difficult for attorneys to navigate, for example, where a donor subsequently expresses a preference for a decision that is contrary to their earlier statement of wishes.

Recommendations

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.

Most options for donors to tailor their EPOAs should continue

- 19.73 We recommend that, with one exception, the tailoring options that donors have under the PPPR Act should continue in a new Act. Donors should remain able to:
- (a) authorise an attorney to act generally in relation to their property or welfare or only in relation to specified matters;
 - (b) impose restrictions or conditions on the attorney's authority;
 - (c) require an attorney to consult with specified people; and
 - (d) require an attorney to provide information to specified people regarding the exercise of their powers (we make a separate recommendation on this point later in this chapter).
- 19.74 These options enhance donor autonomy over how decisions should be made if they lose relevant decision-making capacity. If the only available option was for an attorney to have unrestricted authority, a person may not wish to create a EPOA. The ability to tailor the EPOA may encourage them to do so.
- 19.75 Legislation in other jurisdictions we investigated takes similar approaches. It is common for donors to be able to restrict an attorney's authority to certain matters or impose conditions.⁷⁴
- 19.76 We agree with Health New Zealand that improving the accessibility of the explanatory material could help people tailor their EPOAs to reflect their wishes. The review of the prescribed forms that we recommend the Ministry of Justice undertake could include devising ways to support donors to understand and exercise the tailoring options.

Donor's ability to specify scope of practice of health practitioner should be removed

- 19.77 We recommend that a new Act not provide for donors to specify that their decision-making capacity can only be assessed by a health practitioner with a specific scope of practice.
- 19.78 As explained above, this option appears to cause confusion. Further, there are circumstances where specifying a particular scope of practice may adversely affect the

⁷⁴ Powers of Attorney Act 2006 (ACT), s 17; Advance Personal Planning Act 2013 (NT), s 18; Powers of Attorney Act 1998 (Qld), s 32(1)(b); Guardianship and Administration Act 1995 (Tas), s 32(2A)(a); Powers of Attorney Act 2000 (Tas), s 31(1); Powers of Attorney Act 2014 (Vic), ss 22(2) and 24; Mental Capacity Act 2005 (UK), s 9(4)(b); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 59(1); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 7(1)(c); and Substitute Decisions Act SO 1992 c 30 (Ontario), ss 7(6) and 46(6).

donor. For example, it may cause delay in obtaining a decision-making capacity assessment where there are few practitioners with the relevant scope of practice in the donor's region. In our view, the enhanced autonomy that this option provides to the donor does not outweigh its disadvantages.

No recommendation to integrate EPOAs with other advance planning documents

19.79 We do not recommend the integration of advance directives, advance care plans or statements of wishes into EPOAs. While a donor may wish to consider completing such documents at the same time as they create an EPOA, this will not always be the case. In addition, integrating such documents into an EPOA may give rise to confusion or increased costs if the donor subsequently wishes to change them without changing the rest of the EPOA.

APPOINTMENT OF MULTIPLE ATTORNEYS

Current law

19.80 For EPOAs in relation to personal care and welfare, the PPPR Act does not allow a donor to appoint more than one attorney.⁷⁵ No such limitation exists for EPOAs in relation to property.⁷⁶

19.81 The PPPR Act does not include a provision directly addressing how responsibility and liability should be shared between multiple property attorneys who have been appointed in relation to the same decisions. However, the provisions addressing when an EPOA ceases to have effect refers to the possibilities of there being more than one attorney with “joint but not several authority”, “several authority” or “joint and several authority”.⁷⁷ The prescribed forms reflect this approach.⁷⁸

19.82 For both types of EPOAs, a donor may specify successor attorneys to take up the appointment if an attorney's role ceases.⁷⁹

Issue

19.83 The inability to appoint more than one attorney in relation to personal care and welfare is inconsistent with other decision-making arrangements. As just noted, donors can appoint multiple attorneys in relation to property. In addition, the Family Court can appoint multiple welfare guardians and multiple property managers for the same person.⁸⁰

19.84 Further, as discussed above, the PPPR Act does not make clear how responsibility and liability should be shared between multiple property attorneys. A new Act should address

⁷⁵ Protection of Personal and Property Rights Act 1988, s 98(2).

⁷⁶ That this was the legislature's intention can be inferred from provisions that mention multiple attorneys in relation to property but not in relation to personal care and welfare: Protection of Personal and Property Rights Act 1988, ss 93A(1) and 94A(6)(c)(i).

⁷⁷ Protection of Personal and Property Rights Act 1988, s 106(1)(e)–(ea).

⁷⁸ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch form 1(F).

⁷⁹ Protection of Personal and Property Rights Act 1988, s 95(5).

⁸⁰ Protection of Personal and Property Rights Act 1988, ss 12(6) and 31(1).

this issue. If a new Act also enables multiple welfare attorneys to be appointed, it will need to address this issue with respect to them too.

Consultation

19.85 We did not ask a specific question about the appointment of multiple attorneys in our Second Issues Paper. However, five submitters said we should examine the inconsistency between property and welfare attorneys. This included a submission from a group of social workers that suggested allowing for more than one attorney for welfare matters.

19.86 In addition, the Office for Seniors said the decision-making arrangement that EPOAs provide is not culturally responsive. Several submitters emphasised the importance of the law facilitating collective decision making for Māori.⁸¹

Recommendations

- R130** A new Act should enable a donor to appoint more than one attorney, for the same decisions or different decisions, under both:
- an enduring power of attorney in relation to welfare; and
 - 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:
- the decisions or classes of decisions that each attorney is authorised to make; and
 - 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:
- Those attorneys should generally be jointly and severally liable for decisions made.
 - 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.

⁸¹ See Chapter 5 for further detail.

- 19.87 We recommend that a new Act enable multiple attorneys to be appointed under an EPOA, regardless of whether it relates to welfare or to property. A donor should be able to appoint multiple attorneys in relation to either the same decisions or different decisions.
- 19.88 We have not identified any reason for the PPPR Act to enable multiple property attorneys but only single welfare attorneys. The Family Court can appoint multiple welfare guardians (as well as multiple property managers) for the same or different matters.⁸² Our recommended approach would provide for consistency across both EPOAs and court-appointed representative arrangements.⁸³ In all overseas jurisdictions we considered, donors can appoint multiple attorneys for welfare matters.⁸⁴
- 19.89 In Chapter 17, we explain that it is sometimes appropriate for the Family Court to appoint multiple representatives to the same role. We think those reasons apply equally to EPOAs. For example, appointing multiple attorneys may be useful where the attorney role is onerous and more than one person is willing and able to share responsibility. Appointing multiple representatives can also help support a collective approach to decision making where required by the person's wishes and values and can provide for greater checks and balances.
- 19.90 The decision-making authority and liability of multiple attorneys appointed under the same EPOA should be clarified in a new Act and in the prescribed forms. We recommend that donors who appoint more than one attorney for the same decisions be required to specify whether they must make decisions together (that is, they must all agree with the decision) or can each make decisions alone. Where multiple attorneys are authorised to make the same decisions, those attorneys should generally be jointly and severally liable for decisions made. However, if one attorney makes a decision without the agreement or consent of another attorney, only the attorney who makes the decisions should bear any resulting liability.
- 19.91 This recommended approach to decision-making authority of multiple attorneys appointed under the same EPOA is similar to that taken in overseas jurisdictions we have investigated.⁸⁵
- 19.92 The approach also reflects our recommendations in Chapter 17 with respect to court-appointed representatives, with one exception. While we recommend the Family Court have the option of specifying different liability arrangements, we do not recommend a

⁸² Protection of Personal and Property Rights Act 1988, ss 12(6) and 31(2). We explain in Chapter 17 how, in practice, where more than one representative is appointed to the same role, they share the same responsibilities.

⁸³ In Chapter 11, we also recommend that a person should be able to appoint multiple formal supporters.

⁸⁴ See for example Powers of Attorney Act 2006 (ACT), s 13(2); Advance Personal Planning Act 2013 (NT), s 8(1)(c); Powers of Attorney Act 2000 (Tas), s 32AE(5)(a) and sch 1 forms 3 and 4; Powers of Attorney Act 2014 (Vic), s 30(1); Mental Capacity Act 2005 (UK), s 9(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 64(1); Powers of Attorney Act RSA 2000 c P-20 (Alberta), s 13(2)(a); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 3(2); and Substitute Decisions Act SO 1992 c 30 (Ontario), ss 7(4) and 46(4).

⁸⁵ See for example Powers of Attorney Act 2014 (Vic), s 30(2)–(3); Mental Capacity Act 2005 (UK), s 10(4); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 64(1); Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 5(2)–(3); and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 14(2). Many overseas jurisdictions we investigated provide that their authority is joint by default (unless the EPOA specifies otherwise). See for example Powers of Attorney Act 2014 (Vic), s 30(3)(b); Mental Capacity Act 2005 (UK), s 10(5); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 64(1); Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 5(3); and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 14(2).

new Act expressly provide donors with this option. In our view, including such an option would carry too great a risk of confusion for many donors.⁸⁶

- 19.93 We do not consider it necessary to specify a limit on the number of attorneys a donor can appoint. There is no limit on the number of attorneys a person can currently appoint in relation to property matters or the number of representatives the Family Court can appoint. Donors are best placed to determine what is desirable and practical for them.⁸⁷

WITNESSING SAFEGUARDS

Current law

- 19.94 An EPOA must be signed by the donor and the attorney.
- 19.95 The donor's signature must be witnessed by a person who is a lawyer, an officer or employee of a trustee corporation or a legal executive who meets certain criteria (including that they have at least 12 months' experience).⁸⁸ The witness must also be independent of the attorney.⁸⁹
- 19.96 The attorney's signature must be witnessed by a person other than the donor or the donor's witness.⁹⁰
- 19.97 The witness to the donor's signature has several responsibilities in the creation process. They must:
- (a) explain the effects and implications of the EPOA to the donor;⁹¹
 - (b) advise the donor of their options for tailoring the EPOA such as specifying the scope of the attorney's powers and appointing a person to monitor the attorney's actions;⁹²
 - (c) advise the donor of their right to suspend or revoke the EPOA;⁹³
 - (d) certify that they believe the donor understands the nature of the EPOA, including its potential risks and consequences;⁹⁴
 - (e) certify that they believe the donor is not acting under undue pressure or duress;⁹⁵ and

⁸⁶ If a donor wishes to provide for a different liability arrangement, there would still be ways to do so. For example, they could request the attorneys to enter a private arrangement to that effect.

⁸⁷ We only identified one jurisdiction with legislation prescribing a limit — Queensland. Section 43(3) of the Powers of Attorney Act 1998 (Qld) limits donors to four attorneys.

⁸⁸ Protection of Personal and Property Rights Act 1988, s 94A(4) and (9).

⁸⁹ Protection of Personal and Property Rights Act 1988, s 94A(4). There is an exception to this independence requirement when two people appoint each other as attorney: s 94A(4A).

⁹⁰ Protection of Personal and Property Rights Act 1988, s 94A(5).

⁹¹ Protection of Personal and Property Rights Act 1988, s 94A(6). The witness must also certify that they have done so: s 94A(7)(a).

⁹² Protection of Personal and Property Rights Act 1988, s 94A(6)(a) and (c); and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 2 and 4. The witness must also certify that they have done so: Protection of Personal and Property Rights Act 1988, s 94A(7)(a).

⁹³ Protection of Personal and Property Rights Act 1988, s 94A(6)(b). The witness must also certify that they have done so: s 94A(7)(a).

⁹⁴ Protection of Personal and Property Rights Act 1988, s 94A(7)(ab)(i)–(ii).

⁹⁵ Protection of Personal and Property Rights Act 1988, s 94A(7)(ab)(iii).

- (f) certify that they have no reason to suspect the donor does not have decision-making capacity to sign the EPOA.⁹⁶
- 19.98 As noted above, prescribed forms cover the standard explanation and advice that witnesses must give to donors about the effect and implications of their EPOA and related matters.⁹⁷ Witnesses may give the explanation by providing the donor with a copy of the form and following prescribed instructions for giving a verbal explanation to the donor.⁹⁸ If the form and instructions do not cover all the matters a witness is required to explain, the witness must use other appropriate means to explain the effects and implications of the EPOA.⁹⁹
- 19.99 There is no requirement for a health practitioner to certify that a donor has decision-making capacity to create an EPOA. However, if there is uncertainty, the witness may ask the donor to undergo a decision-making capacity assessment by a relevant health practitioner to fulfil their responsibility to certify that they have no reason to suspect the donor does not have decision-making capacity.¹⁰⁰ Medical certification decreases the likelihood of later challenges to an EPOA's validity on the basis that the donor lacked decision-making capacity when they created it.
- 19.100 If a witness fails to take appropriate steps to satisfy themselves that the donor has decision-making capacity to create an EPOA, this can lead to the EPOA's validity being challenged or a claim in negligence or disciplinary action against the witness.¹⁰¹

Issue

- 19.101 The various responsibilities of witnesses are intended to safeguard donors. Iris Reuevecamp explains that “the witness’s role is intended to protect vulnerable people from abuse, neglect and exploitation”.¹⁰² However, witnessing safeguards for EPOAs can add complexity, time and cost to the process. These factors can affect the accessibility of EPOAs or deter people from creating them altogether.¹⁰³

⁹⁶ Protection of Personal and Property Rights Act 1988, s 94A(7)(b). The wording used in this section is “mentally incapable”.

⁹⁷ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 2 and 4.

⁹⁸ Protection of Personal and Property Rights Act 1988, s 94A(6A).

⁹⁹ Protection of Personal and Property Rights Act 1988, s 94A(6A)(c).

¹⁰⁰ See *NJF v MIF FAMC Rotorua* FAM-2008-063-759, 20 December 2010 at [40]; Iris Reuevecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 144; and Theresa Donnelly “Practical Legal Issues Relating to EPAs — Spotlight on the Attorney” (Cradle to Grave Conference, Auckland District Law Society, Auckland, 2021) at 20.

¹⁰¹ Iris Reuevecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 145; and Theresa Donnelly “Practical Legal Issues Relating to EPAs — Spotlight on the Attorney” (Cradle to Grave Conference, Auckland District Law Society, Auckland, 2021) at 19–20.

¹⁰² Iris Reuevecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 144.

¹⁰³ In our consultation with focus groups, cost was a frequently raised issue. We received several comments about the barriers of needing an eligible witness.

Consultation

- 19.102 In our Second Issues Paper, we expressed a preliminary view that the signatures of the donor and attorney should continue to be witnessed. We asked submitters:
- (a) whether EPOAs should continue to be witnessed;
 - (b) if so, who should be able to act as a witness; and
 - (c) what safeguards should accompany the creation of EPOAs other than witnessing requirements.
- 19.103 We also asked submitters a general question about how the process of creating EPOAs could be more accessible and culturally responsive.

Witnessing and eligibility to witness EPOAs

- 19.104 Thirty-nine submitters commented on whether EPOAs should continue to be witnessed, with all agreeing that witnessing requirements should continue.
- 19.105 Forty-three submitters commented on who should be able to act as a witness.¹⁰⁴ Approximately one-third of these submitters thought justices of the peace should be eligible to be witnesses, though several noted they should receive training first. One submitter explicitly opposed this idea. We understand their concern to relate to justices of the peace lacking the required expertise.
- 19.106 Approximately one-quarter of submitters that gave feedback supported retaining the status quo that limits eligibility to lawyers, certain legal executives and trustee corporation employees or officers. Several of these submitters reasoned that the specialist role and safeguarding responsibilities of a witness means only suitably trained people should be eligible.
- 19.107 Several submitters raised the possibility of a training or accreditation pathway to becoming an eligible witness. Two submissions suggested social workers would be ideal for this role. Lawyer Chris Kelly suggested a panel of trained witnesses could be assembled and that two panel members could potentially fulfil the witnessing requirements.
- 19.108 Other suggestions were that witnessing could be performed by “anyone”, an independent person or a person from any regulated profession.
- 19.109 Approximately one-quarter of submitters that gave feedback on this issue said there is a general need to increase the availability and affordability of witnesses. Community Law Centres Aotearoa said the main feedback from their branches was that “cost continues to be a real barrier for making an EPOA [...] yet we recognise that certification is an important safeguard in the process”.
- 19.110 Approximately one-quarter of submitters that gave feedback on this issue (mainly legal professionals) thought the requirement that witnesses be independent of attorneys should be removed. Many of these submitters noted that law firms often act for members of the same family. Where the donor wishes to appoint a family member as attorney, their lawyer will therefore often not be independent of the attorney and cannot be the witness. One submitter said a lawyer’s familiarity with the donor and attorney can be

¹⁰⁴ Submitters’ opinions generally reflected the responsibilities they thought witnesses should have.

advantageous.¹⁰⁵ Gawith Burridge Lawyers said practising lawyers regularly manage conflicting interests and can be trusted to manage conflicts regarding EPOAS “as they would for any other area of law”.

- 19.111 Several submitters expressed support for the independence requirement. Two lawyers suggested that, if the independence requirement is retained, the meaning of “independent” should be clarified in law.

Witnesses’ safeguarding responsibilities

- 19.112 Forty-eight submitters commented on the safeguarding responsibilities that a donor’s witness should have. A significant majority supported retaining the current certification requirements outlined above.¹⁰⁶ Many submitters emphasised the safeguarding benefits of those requirements.

- 19.113 Two submitters suggested revisions to the requirement that a witness certify their reasonable belief that the donor is not acting under undue pressure or duress.¹⁰⁷ McWilliam Tyree Lawyers suggested rewording the requirement so witnesses instead certify that they have no reason to believe the donor is subject to undue pressure. NZLS said a donor may still be under undue pressure regardless of the witness’s certification. Age Concern NZ supported the requirement but noted it was not foolproof as donors can be coerced and coached before they execute their EPOA with a witness.

- 19.114 Several submitters commented on the requirement for witnesses to certify that they have no reason to believe that the donor does not have decision-making capacity. A few said a healthcare professional practitioner should be required to confirm the donor has decision-making capacity. However, an equal number said that decision-making capacity should be the starting presumption.¹⁰⁸

- 19.115 Some submitters suggested that the witness should also be required to explain aspects of the EPOA to the *attorney* (as well as the donor). Submitters variously suggested that witnesses should explain what supported decision making involves, the requirement (for property attorneys) to keep “good transparent financial records”, the rules concerning “what can be reimbursed” and the attorney’s general responsibilities. One submitter suggested the witness should also check the attorney is not acting under duress or being pressured into accepting the role.

- 19.116 Two submitters thought the current explanation and certification safeguards should not apply. One provided reasons and said that, while good in theory, the safeguards can impede the process of appointing someone to help with the donor’s affairs.

Improving accessibility and cultural responsiveness of the EPOA creation process

- 19.117 Thirty-seven submitters gave feedback on improving the accessibility and cultural responsiveness of the EPOA creation process. Approximately one-third considered that

¹⁰⁵ Similarly, a member of our Lived Experience, Whānau and Carers Expert Advisory Group expressed concern that it can be hard for witnesses to detect abuse when they do not know the donor well.

¹⁰⁶ Members of our Professional Expert Advisory Group also thought that the witnessing safeguards should remain.

¹⁰⁷ Protection of Personal and Property Rights Act 1988, s 94A(7)(ab)(iii).

¹⁰⁸ Under the current law, the starting presumption is that the person has decision-making capacity: Protection of Personal and Property Rights Act 1988, s 93B.

reducing the cost barriers to creating EPOAs was important for improving accessibility. Health New Zealand and the Social Workers' Association said the law should provide for people to be able to make EPOAs on an equitable basis. Several submitters suggested additional funding or a subsidy to assist people in certain groups to create EPOAs.¹⁰⁹

19.118 Approximately one-third of submitters that gave feedback on this issue commented on the need for education and training about how to create EPOAs. Some submitters suggested more explanatory materials could be developed such as short videos. NZLS said the absence of a public entity responsible for providing information and guidance about EPOAs is a “fundamental gap”.

19.119 Several submitters said the EPOA forms could be made clearer or shorter.

19.120 A few submitters respectively supported:

- (a) increasing the role of technology in creating EPOAs;¹¹⁰
- (b) expanding witness eligibility criteria, as this could assist with cultural barriers to creating EPOAs; and
- (c) translating the prescribed forms or key terms into other languages.

Recommendations

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.

19.121 We recommend that the requirement for the signature of the donor and attorney to be witnessed be retained. The current requirements of the witness should also be retained, with minor amendment. Submitter feedback confirmed that, while there are tensions

¹⁰⁹ For example, Public Trust suggested a subsidy applicable to superannuitants or people on low incomes. Disabled Persons Assembly NZ recommended that funding could be provided to community organisations such as He Manaakitanga Kaumātua Aotearoa | Age Concern NZ or Community Law Centres Aotearoa so they can create EPOAs at a lower cost.

¹¹⁰ For example, Public Trust submitted “that greater use of online forms / the digital creation of EPOAs will increase the accessibility and cultural adaptability of the EPOA creation process”.

between the accessibility of EPOAs and effective safeguarding, it is important that witnessing requirements remain.

Responsibilities of witnesses

19.122 We consider that witnesses to the donor’s signature should retain their current responsibilities in the creation of EPOAs (with one minor amendment that we address later in this section). As set out above, witnesses have two types of responsibilities — explaining matters to the donor and certifying various matters.

19.123 With respect to the explanation requirements for witnesses, our recommendations that these be retained in a new Act would mean the following:

- (a) The witness would continue to be required to explain the effects and implications of the EPOA to the donor.¹¹¹ As is currently the case, we consider witnesses should be instructed to adapt their explanation to each donor’s needs and circumstances.¹¹² Forms should continue to be prescribed to assist witnesses with this responsibility.¹¹³
- (b) The witness would remain required to advise the donor of their options for tailoring the EPOA — for example, the ability to specify the scope of the attorney’s powers and specify a person the attorney must consult when making decisions.¹¹⁴
- (c) The witness would continue to be required to advise the donor of their right to suspend or revoke the EPOA.¹¹⁵

19.124 We also recommend that witnesses’ current certification responsibilities should remain, with one change. The current requirement that the witness certify they “believe on reasonable grounds” that the donor is not acting under undue pressure or duress should be amended.¹¹⁶ We agree with submitters that there are difficulties in requiring witnesses to certify this matter. A witness may feel obliged to take active steps to satisfy themselves of the absence of undue pressure, adding time and cost to the execution process. Even if undue pressure is present, the witness may be unable to detect it.

19.125 In our view, requiring witnesses to instead certify they have *no reason to suspect* the donor is acting under undue pressure or duress would strike a better balance between safeguarding and accessibility. It could reduce time and cost as well as any reluctance of eligible potential witnesses to perform the role based on the current requirement.

19.126 A new Act should continue to require witnesses to certify that:¹¹⁷

- (a) they have given the required explanations to the donor;

¹¹¹ Protection of Personal and Property Rights Act 1988, s 94A(6).

¹¹² The prescribed forms currently provide this: Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 2 and 4 (see “Instructions for authorised witness”).

¹¹³ Protection of Personal and Property Rights Act 1988, s 94A(6A).

¹¹⁴ Protection of Personal and Property Rights Act 1988, s 94A(6)(a). The matters referred to in the notes to the prescribed form include the different options a donor has to tailor their EPOA. See Protection of Personal and Property Rights (Enduring Powers of Attorney and Prescribed Information) Regulations 2008, sch forms 1 and 3 (see “Notes to enduring power of attorney”).

¹¹⁵ Protection of Personal and Property Rights Act 1988, s 94A(6)(b).

¹¹⁶ This requirement is currently provided by the Protection of Personal and Property Rights Act 1988, s 94A(7)(ab)(iii).

¹¹⁷ Protection of Personal and Property Rights Act 1988, s 94A(7).

- (b) they believe the donor understands the nature of the EPOA, including its potential risks and consequences; and
 - (c) they have no reason to suspect the donor does not have decision-making capacity to sign the EPOA.¹¹⁸
- 19.127 The last of these requirements reflects the presumption of decision-making capacity and requires witnesses to be alive to indicators that may displace that presumption.¹¹⁹ It is likely to be an effective screening process. Where doubt exists, best practice is for witnesses to require a medical assessment before certifying capacity.¹²⁰
- 19.128 We recognise that our recommended witnessing requirements and their associated costs would continue to present barriers for many people to creating EPOAs. However, given the considerable powers granted to attorneys, robust safeguards are appropriate. Submitters generally supported this position.
- 19.129 We do not recommend that witnesses to an attorney’s signature have new responsibilities to explain features of the EPOA to attorneys. Some submitters reported that attorneys do not always understand their role, and this could be addressed through additional explanation requirements. However, it would likely add cost to creating EPOAs. In Chapter 24, we recommend that an appropriate government agency or agencies develop information about representative arrangements and provide support and advice to representatives. These functions could help attorneys to understand their role and responsibilities without increasing costs for donors.

Eligibility to be a witness

- 19.130 We recommend that the people who are currently able to witness a donor’s signature — lawyers, trustee corporation officers or employees, and registered legal executives — remain eligible to do so under a new Act. In our view, the safeguarding functions of witnesses that we address in the previous section need to be discharged by trained professionals. Lawyers, legal executives and trustee corporations have developed expertise in this area, enabling them to communicate the effects and implications of the EPOA to donors most effectively.¹²¹
- 19.131 We also recommend that the Government be able to expand the list of eligible witnesses through regulation. Regulations could, for example, provide a training and accreditation pathway for people to become qualified witnesses. Regulations might be appropriate if concerns about the availability of witnesses persist and it is considered that appropriate safeguards can be put in place to ensure witnesses are suitable.

¹¹⁸ We refer to “decision-making capacity” for consistency with our recommendations in Chapter 9. However, the PPPR Act refers to the witness having no reason to suspect the donor was or may have been “mentally incapable”: Protection of Personal and Property Rights Act 1988, s 94A(7)(b).

¹¹⁹ Theresa Donnelly “Practical Legal Issues Relating to EPAs — Spotlight on the Attorney” (Cradle to Grave Conference, Auckland District Law Society, Auckland, 2021) at 20, citing *HF v SZ LCRO* 186/09 (3 March 2010) at [13].

¹²⁰ Iris Reuvecamp “Enduring Powers of Attorney, Welfare Guardians and Property Managers” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 144–145; and Theresa Donnelly “Practical Legal Issues Relating to EPAs — Spotlight on the Attorney” (Cradle to Grave Conference, Auckland District Law Society, Auckland, 2021) at 19–20.

¹²¹ Trustee corporations often deal with arrangements like EPOAs. See Trustee Companies Act 1967, s 7(2).

19.132 We do not recommend a new Act authorise justices of the peace to witness EPOAs (as suggested by some submitters). The role of a witness to an EPOA is of a different nature to the existing functions of justices of the peace. Those existing functions consist of certifying documents, taking oaths and declarations, and judicial duties such as issuing search warrants and issuing remands and bail.¹²² Justices of the peace are not generally expected to explain the effect and implications of documents nor be alive to potential undue pressure and decision-making capacity issues.¹²³

Witness to donor's signature should not have to be independent of attorney

19.133 We recommend that the current requirement for a witness to the donor's signature to be independent of the attorney be removed. A new Act should instead provide that any eligible person may witness the signature of both a donor and attorney provided there is no more than a negligible risk of a conflict of interest.¹²⁴ We recommend this reform for three reasons.

19.134 First, the PPPR Act already provides that, when two people appoint each other as attorney:¹²⁵

- (a) the witnesses for each EPOA can be from the same law firm or trustee corporation; and
- (b) the same person can witness both EPOAs where the witness is satisfied it does not constitute more than a negligible risk of a conflict of interest.

19.135 In our view, the potential for abuse through this type of EPOA arrangement is the same as for other EPOAs. We have not heard any concerns about this rule. If conflicts can be adequately managed in this situation, we see no reason for this rule not to be extended to all EPOAs.

19.136 Second, the standard of “no more than a negligible risk of a conflict of interest” is consistent with lawyers' co-existing professional obligations.¹²⁶ It is a widely understood and practised approach in legal work generally. Other eligible witnesses will also be familiar with this standard because the PPPR Act already requires them to observe it.¹²⁷ Applying this standard to executing all EPOAs would be a manageable adjustment.

19.137 Third, we consider this approach would help to make it simpler to create an EPOA while retaining appropriate safeguards. As some submitters identified, donors sometimes want their family lawyer to witness their EPOA appointing another family member as attorney. In many cases, the risk of a conflict of interest will be no more than negligible given the

¹²² See Te Tāhū o te Ture | Ministry of Justice “Justice of the Peace” (22 May 2024) <www.justice.govt.nz>.

¹²³ Justices of the peace have more substantive duties in a few instances. See Royal Federation of New Zealand Justices' Associations Inc *Justice of the Peace Manual* (2020) at [2.16]–[2.19]. For example, if a child is signing, swearing, affirming or declaring something, the justice of the peace must ascertain that the child understands the implications of the document. However, they are not required to have expertise in explaining documents, assessing decision-making capacity or identifying signs of undue pressure to complete these actions.

¹²⁴ Some overseas jurisdictions use the same witness (or witnesses) for both signatures: see Powers of Attorney Act 2014 (Vic), s 33(1); The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), regs 9(3)(b) and 9(6)(b); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 60(4); and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4(1)(c)–(d).

¹²⁵ Protection of Personal and Property Rights Act 1988, s 94A(4A).

¹²⁶ Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008, sch r 6.1.

¹²⁷ Protection of Personal and Property Rights Act 1988, s 94A(4A)(b).

nature of the witnessing responsibilities. Where that is the case, we consider the family lawyer should be able to witness the donor’s signature.

REMOTE EXECUTION OF EPOAS

Current law

19.138 The PPPR Act states that the signature of a donor and attorney “must be witnessed”.¹²⁸ The PPPR Act does not specify whether the signature can be witnessed remotely. Remote witnessing involves the signatory and the witness being in different places but in contact through an audio-visual link that enables continuous and contemporaneous audio and visual communication.

19.139 While the PPPR Act is silent on this issue, the prescribed EPOA forms specify that an EPOA must be executed “in the presence of” the witness.¹²⁹ The option of remotely executing an EPOA is provided for in several overseas jurisdictions we have examined.¹³⁰ During the COVID-19 pandemic, remote execution of EPOAs was temporarily permitted.¹³¹

Issue

19.140 Requiring an EPOA to be executed in the physical presence of a witness may limit the accessibility of EPOAs for some people. Permitting remote execution of EPOAs could support disabled people’s autonomy by removing this barrier.¹³² It would mean they could execute an EPOA from their own home, providing the necessary technology is available.

19.141 However, remote execution raises safeguarding concerns. In particular, in-person execution of EPOAs might better enable witnesses to identify signs of undue pressure and abuse.

Consultation

19.142 In our Second Issues Paper, we asked submitters whether EPOAs should be able to be executed remotely by audio-visual link or other technology. Just over 50 submitters addressed the topic. Approximately two-thirds of these submitters supported this change.

19.143 Submitters that supported the ability to execute EPOAs remotely reasoned that this would improve accessibility for groups such as disabled people with accessibility needs and people in remote areas. Some submitters said remote execution worked well when it was temporarily permitted during the COVID-19 pandemic.

¹²⁸ Protection of Personal and Property Rights Act 1988, s 94A(4) and (5).

¹²⁹ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, form 1 at [3] and form 3 at [3].

¹³⁰ Electronic Transactions Act 2000 (NSW), s 14G; Powers of Attorney Act 2014 (Vic), s 5A; Powers of Attorney Act RSA 2000 c P-20 (Alberta), s 2.1; The Remote Witnessing and Commissioning Act SM 2020 c 25 (Manitoba), s 10.1(1); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4.1(2)–(5); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 3.1(1)–(2).

¹³¹ Epidemic Preparedness (Protection of Personal and Property Rights Act 1988 — Enduring Powers of Attorney) Immediate Modification Order 2020, cl 4(6)–(7).

¹³² See Belinda Bennett and others “Assistive technologies for people with dementia: ethical considerations” (2017) 95 Bull World Health Organ 749 at 752. The comments refer to advance planning tools and assistive technologies generally.

19.144 Submitters that opposed the change were concerned that witnesses would not be able to effectively detect undue influence via audio-visual link. For example, some said the witness could not be certain they were speaking to the donor alone. Some of the submitters in support of remote witnessing also recognised this risk and suggested that additional precautions may be required for witnesses.¹³³

Recommendation

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.

19.145 There are arguments for and against reform on this issue. While many overseas jurisdictions we have examined enable EPOAs to be executed remotely,¹³⁴ some have decided against this due to safeguarding concerns.¹³⁵

19.146 As noted, a number of submitters said remote execution worked well during the COVID-19 pandemic. The ability to execute an EPOA remotely lowers accessibility barriers for people currently unable to execute an EPOA in person. We therefore recommend that a new Act enable EPOAs to be executed remotely via audio-visual link.

19.147 To address concerns that the safeguarding functions of a witness may be undermined by enabling remote execution of EPOAs, we recommend a procedure be developed for executing EPOAs remotely. We consider these requirements should be prescribed by secondary legislation rather than fixed in a new Act to enable regular review and updates.¹³⁶

19.148 In addition to the witnessing and certification requirements recommended above, the safeguards for remote execution could include the following requirements:¹³⁷

¹³³ Those submitters did not suggest precisely what that might involve.

¹³⁴ Electronic Transactions Act 2000 (NSW), s 14G; Powers of Attorney Act 2014 (Vic), s 5A; Powers of Attorney Act RSA 2000 c P-20 (Alberta), s 2.1; The Remote Witnessing and Commissioning Act SM 2020 c 25 (Manitoba), s 10.1(1); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 4.1(2)–(5); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 3.1(1)–(2).

¹³⁵ When the UK Office of the Public Guardian proposed remote execution in 2014, it received significant opposition. Insufficient safeguarding was the primary reason cited: Law Commission (England and Wales) *Electronic Execution of Documents* (Law Com No 386, 2019) at [2.100]. Remote execution was reconsidered and rejected during subsequent rounds of consultation by the Law Commission in 2019 and the Ministry of Justice in 2022. See Law Commission (England and Wales) *Electronic Execution of Documents* (Law Com No 386, 2019) at [2.103]–[2.105]; and Ministry of Justice *Modernising Lasting Powers of Attorney: Government Response* (CP 677, May 2022) at [67] and [69]. See also Powers of Attorney Act 1998 (Qld), s 44.

¹³⁶ See Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 67–69.

¹³⁷ This list is based on prescribed processes in overseas jurisdictions that permit remote execution. See for example Electronic Transactions Act 2000 (NSW), s 14F definition of “audio visual link”; Powers of Attorney Act 2014 (Vic), s 5A(4)(a); Powers of Attorney Act RSA 2000 c P-20 (Alberta), s 2.1(1); Powers of Attorney Act Remote Witnessing Regulation MR 80/2021 (Manitoba), reg 5; and Substitute Decisions Act SO 1992 c 30 (Ontario), s 3.1(1).

- (a) The audio-visual link must enable the parties to see and hear each other in real time.¹³⁸
- (b) The witness must verify the identity of the party whose signature they are witnessing.¹³⁹
- (c) If witnessing the donor's signature, the link must enable the witness to:
 - (i) be satisfied that the donor is apart from the attorney;¹⁴⁰
 - (ii) explain the effects and implications of the EPOA to the donor and advise the donor of the matters referred to in the prescribed forms of the EPOA; and
 - (iii) certify that they believe on reasonable grounds that the donor understands the nature of the EPOA and the potential risks and consequences of the EPOA.
- (d) The witness must observe the party sign the document.¹⁴¹
- (e) The witness must sign the document as soon as practicable.¹⁴²
- (f) The witness must be satisfied that the document they sign is the one they witnessed the party sign.¹⁴³ However, the witness may sign identical copies of the document in counterpart.¹⁴⁴
- (g) The witness must additionally certify that the EPOA was executed in accordance with the prescribed remote execution process.¹⁴⁵

19.149 A separate prescribed form for EPOAs executed via audio-visual link could be helpful for setting out the additional requirements.

19.150 A witness should only agree to remotely witness an EPOA where they are confident the procedure will not compromise their ability to discharge their explanatory responsibilities and to discern undue pressure or any indication that the donor lacks decision-making capacity. Where doubt exists, a witness should require in-person execution.

¹³⁸ See for example Electronic Transactions Act 2000 (NSW), s 14F definition of "audio visual link"; Powers of Attorney Act 2014 (Vic), s 5A(4)(a); Powers of Attorney Act Remote Witnessing Regulation MR 80/2021 (Manitoba), reg 5 step 1; Powers of Attorney Act, RSA 2000 c P-20 (Alberta), s 2.1(1); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 3.1(1). Note that this requirement is narrower than the definition of "audiovisual link" contained in s 2 of the Oaths and Declarations Act 1987.

¹³⁹ See for example Powers of Attorney Act Remote Witnessing Regulation MR 80/2021 (Manitoba), reg 5 step 2.

¹⁴⁰ See for example Powers of Attorney Act Remote Witnessing Regulation MR 80/2021, reg 5 step 3(c). The requirement that the donor and attorney be "apart" may require further specification to achieve its safeguarding aim. For example, regulations could require the witness to be satisfied the signatories are in different rooms or that they are not otherwise in contact when signing the EPOA.

¹⁴¹ See for example Electronic Transactions Act 2000 (NSW), s 14G(2)(a); Powers of Attorney Act 2014 (Vic), s 5A(4)(a); and Powers of Attorney Act Remote Witnessing Regulation MR 80/2021 (Manitoba), reg 5 step 5.

¹⁴² See for example Powers of Attorney Act 2014 (Vic), s 5A(3), which requires all elements of the remote witnessing procedure to be carried out on the same day; and Substitute Decisions Act SO 1992 c 30 (Ontario), s 3.1(2)(b), which requires the signatures to be made "contemporaneously".

¹⁴³ See for example Electronic Transactions Act 2000 (NSW), s 14G(2)(c); Powers of Attorney Act 2014 (Vic), s 5A(7)(a); and Powers of Attorney Act Remote Witnessing Regulation MR 80/2021, reg 5 step 7.

¹⁴⁴ See for example Electronic Transactions Act 2000 (NSW), s 14G(3); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 3.1(3). Note, however, that counterpart documents cannot constitute a valid EPOA in some jurisdictions. See Powers of Attorney Act 2014 (Vic), s 5B(4); and Powers of Attorney Act Remote Witnessing Regulation MR 80/2021 (Manitoba), reg 5 steps 7–8.

¹⁴⁵ See for example Electronic Transactions Act 2000 (NSW), s 14G(2)(d); Powers of Attorney Act 2014 (Vic), s 5A(7)(b); and Powers of Attorney Act Remote Witnessing Regulation MR 80/2021, reg 5 step 8.

- 19.151 If a new Act establishes formal supporters and enables formal support arrangements to be executed by audio-visual link (as we recommend in Chapter 11), the secondary legislation prescribing the respective processes for remotely executing each instrument by audio-visual link should be consistent.
- 19.152 Enabling remote execution of EPOAs could create inconsistencies with similar instruments such as wills and relationship property agreements, which cannot currently be witnessed or executed via audio-visual link.¹⁴⁶ The Government may also wish to consider allowing the remote execution of such instruments, which are often executed alongside EPOAs.

MINIMUM AGE TO BE APPOINTED ATTORNEY

Current law

- 19.153 Under the PPPR Act, people younger than 20 years old are ineligible to be appointed as attorneys.¹⁴⁷

Issue

- 19.154 Age restrictions of 20 years are rare in Aotearoa New Zealand.¹⁴⁸ Setting the minimum age for attorneys too high could unreasonably prevent donors from appointing the person they want to act as their attorney.

Recommendation

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.

- 19.155 We recommend that the minimum age to be appointed as an attorney be lowered from 20 to 18 years. 18-year-olds are legally capable of taking actions that may be required of attorneys such as entering contracts. Broadly similar roles such as trusteeship can be held from age 18.¹⁴⁹ Several overseas jurisdictions we considered allow attorney appointments from that age.¹⁵⁰
- 19.156 In Chapter 16, we recommend lowering the minimum age for court-appointed representatives from 20 to 18 years. Submitters supported this change. We consider that the same minimum age should apply to attorneys.

¹⁴⁶ Wills Act 2017, s 11(4); and Property (Relationships) Act 1976, s 21F(2).

¹⁴⁷ Protection of Personal and Property Rights Act 1988, s 95(3)(a).

¹⁴⁸ One of the few examples is s 4(1)(b) of the Adoption Act 1955.

¹⁴⁹ Trusts Act 2019, ss 9 definition of “child” and 96(2)(a).

¹⁵⁰ See for example Powers of Attorney Act 2006 (ACT), s 13(3); Powers of Attorney Act 1988 (Qld), s 29(1)(a)(i); Guardianship and Administration Act 1995 (Tas), s 32(3); Powers of Attorney Act 2014 (Vic), s 28(1); Mental Capacity Act 2005 (UK), s 10(1)(a); Assisted Decision-Making (Capacity) Act 2015 (Ireland), 59(1); and Powers of Attorney Act RSA 2000 c P-20 (Alberta), s 2(2). In Alberta, only “adults” are eligible for appointment, 18 being the age of majority: Age of Majority Act RSA 2000 c A-6 (Alberta), s 1.

ELIGIBILITY OF BANKRUPT PERSON TO ACT AS ATTORNEY

Current law

19.157 One of the situations in which the PPPR Act prohibits a person from being appointed as an attorney is when the person is bankrupt.¹⁵¹ The PPPR Act also provides that an attorney's power ceases to have effect if they become bankrupt.¹⁵²

Overseas approaches

19.158 In some overseas jurisdictions we considered, a person cannot be appointed as an attorney in relation to property if they are bankrupt and their power ceases if they become bankrupt.¹⁵³ Some jurisdictions only provide the latter.¹⁵⁴

19.159 In Nova Scotia, bankrupt people may be attorneys in relation to property if they disclose their bankrupt status to the donor while the donor has relevant decision-making capacity and the donor acknowledges and consents to the appointment in writing.¹⁵⁵

19.160 None of the overseas jurisdictions we considered impose any restrictions on bankrupt people being appointed as a welfare attorney or continuing in that role.

Issue

19.161 A donor's ability to assess the suitability of and appoint an attorney is an expression of autonomy and their wishes. This ability should only be limited where it is necessary to safeguard the donor against attorney wrongdoing.

19.162 Bankruptcy status relates to a person's financial affairs. It may indicate unfitness to manage another person's finances. However, the relationship between bankruptcy status and a person's ability to make personal care and welfare decisions on behalf of another person is unclear. The prohibition on a donor appointing a bankrupt person as their welfare attorney may not be necessary.

Recommendation

Welfare attorneys

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.

¹⁵¹ Protection of Personal and Property Rights Act 1988, s 95(3).

¹⁵² Protection of Personal and Property Rights Act 1988, s 106(1)(d).

¹⁵³ See Powers of Attorney Act 2006 (ACT), ss 14(1)(b) and 62; Powers of Attorney Act 1998 (Qld), ss 29(1)(a)(v) and 57(2); Powers of Attorney Act 2014 (Vic), ss 28(1)(b) and 54(1)(a); Mental Capacity Act 2005 (UK), ss 10(2) and 13(3); Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 65(1)(c), 65(2), 66(4)(c) and 66(5); and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), ss 6(2) and 11(1)(d).

¹⁵⁴ See Powers of Attorney Act 2003 (NSW), s 5(d); Powers of Attorney Act 2000 (Tas), s 32AE(5)(b); Adults with Incapacity (Scotland) Act 2000, ss 15(5) and 16(7); Powers of Attorney Act RSBC 1996 c 370 (British Columbia), s 29(2)(d)(iii)–(iv); and Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 28(1)(a). The latter only applies to the extent that a personal care and welfare attorney has been given authority to conduct "routine management of the adult's financial affairs" under s 7(1)(b), which includes activities such as paying bills and purchasing groceries.

¹⁵⁵ Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 9(1)–(2).

- 19.163 We recommend there be no restriction on a person who is bankrupt from being appointed as an attorney under a welfare EPOA. Nor should their role cease if they later become bankrupt.
- 19.164 In Chapter 16, we recommend some amendments with respect to the ability of bankrupt people to be (and continue being) court-appointed representatives. Currently, a welfare guardian or property manager ceases to hold office if they are adjudicated bankrupt,¹⁵⁶ although the Family Court can reappoint them. We recommend removing this requirement for court-appointed representatives. With respect to court-appointed property representatives (but not welfare representatives), we recommend that a person be required to disclose they are bankrupt when applying to be a representative and, if they are appointed, in the event they subsequently become bankrupt.
- 19.165 Our reasoning in Chapter 16 with respect to court-appointed welfare representatives is also relevant to welfare attorneys. Bankruptcy does not have the same level of relevance for a welfare role as for a property role. If a donor wants to make sure the person they are appointing as their attorney is not bankrupt, they can check the insolvency register to ascertain a person's bankruptcy status.¹⁵⁷ A donor could also take steps to require their attorney to cease acting if they are adjudged bankrupt when the donor lacks relevant decision-making capacity. A donor could specify as a condition of an attorney's power that they may not act if they become bankrupt.¹⁵⁸ Alternatively, a statement of wishes produced by the donor, or a separate deed between the donor and attorney, could provide for this circumstance.¹⁵⁹
- 19.166 No overseas jurisdiction we have considered prohibits bankrupt people from being welfare attorneys.

Property attorneys

- 19.167 We have also considered whether the current position with respect to property attorneys needs reform, particularly given our recommendation in Chapter 16 that bankruptcy, while needing to be drawn to the Family Court's attention, should not automatically prohibit a person being appointed or continuing to act as a court-appointed property representative. Without reform, the outcome would be that a bankrupt person could be appointed by the Family Court but not by a donor.
- 19.168 As noted above, we recommend that a potential or current court-appointed property representative be required to disclose their bankruptcy to the Family Court and that a

¹⁵⁶ Protection of Personal and Property Rights Act 1988, ss 22(b) and 52(b)-(c).

¹⁵⁷ A public register of discharged and undischarged bankrupt people is established by s 62 of the Insolvency Act 2006. See New Zealand Insolvency and Trustee Service "Search Insolvency register" <www.app.insolvency.govt.nz>. There are also options for removing a bankrupt welfare attorney in accordance with a donor's wishes. The donor and attorney may separately execute a deed wherein the attorney agrees to resign if they become bankrupt. An application can be made to the Family Court to review whether the attorney remains suitable for their role: Protection of Personal and Property Rights Act 1988, s 102(2)(i). We anticipate this option remaining in a new Act.

¹⁵⁸ Protection of Personal and Property Rights Act 1988, ss 97(1) and 98(1).

¹⁵⁹ If a statement of wishes expresses a donor's wish for their attorney to cease acting if they become bankrupt, this may require the attorney to resign. Alternatively, the statement of wishes may be relevant to a Family Court determination of whether the attorney is suitable to be the donor's attorney or whether the attorney's appointment should be revoked or modified.

court-appointed property representative who becomes bankrupt remain in the role pending a Court review. The comparable approach for property attorneys would seemingly be to require that a potential or current property attorney disclose to the donor if they are bankrupt either before or after appointment.

19.169 However, there are difficulties with this approach. First, at the time a property attorney becomes bankrupt, a donor may not have decision-making capacity to decide whether to agree to the attorney continuing in their role. Disclosure to the donor would not be an effective safeguard in that situation. Second, we recommend that court-appointed representative arrangements continue to be subject to regular review by the Family Court. EPOAs are not currently subject to mandatory reviews and we make no recommendation that they be so. This might justify a different approach to bankruptcy for property attorneys and court-appointed property representatives.

19.170 As we did not ask a specific question on this issue, or receive detailed feedback on it, we make no recommendation to take a different approach to that taken in the PPPR Act (that is, that people who are bankrupt are ineligible to be appointed, or continue acting, as property attorneys).

OTHER ELIGIBILITY REQUIREMENTS

19.171 In addition to the rules with respect to a potential attorney's age and bankruptcy status, the PPPR Act also specifies that:¹⁶⁰

- (a) an individual cannot be appointed as an attorney if they are subject to a personal order (such as a court-ordered decision or an order appointing a welfare guardian) or a property manager order; and
- (b) a corporation cannot be appointed as an attorney, unless it is a trustee corporation.

19.172 As explained earlier in this chapter, the PPPR Act also lists other circumstances in which an EPOA ceases to have effect, including where the attorney becomes subject to a compulsory treatment order or a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992, becomes subject to a welfare guardian or property manager order or otherwise becomes incapable of acting. We did not consult specifically on these matters and so do not make any recommendations about these requirements. However, we consider they should continue.

19.173 As we explain in Chapter 16 with respect to court-appointed representatives, we recommend that people be prohibited from being appointed by the Family Court as a representative in additional situations, including where a person is serving a sentence of imprisonment. We did not specifically seek submitters' views on whether all circumstances that prohibit a person from being appointed by the Family Court as a representative should also operate to prohibit them from being appointed as an attorney under an EPOA. We therefore do not consider it appropriate to make recommendations on these matters. However, in drafting a new Act, we suggest the Government consider whether each of the circumstances in which we recommend people be prohibited from being appointed as a court-appointed representative should also operate to prohibit

¹⁶⁰ Protection of Personal and Property Rights Act 1988, s 95(3).

them from being appointed as an attorney, at least where the donor has not specified otherwise in the EPOA.

WHEN AN ATTORNEY MAY MAKE DECISIONS

Current law

19.174 Under the PPPR Act, there are different rules for when property attorneys and welfare attorneys can make decisions.

Property EPOAs

19.175 The donor of a property EPOA may authorise the attorney to make decisions either immediately or only once the donor becomes “mentally incapable”.¹⁶¹ If the latter option is chosen, the attorney may not act unless a “relevant health practitioner” has certified or the Family Court has determined that the donor is “mentally incapable” in relation to property.¹⁶² As we discuss in Chapter 8, the donor is mentally incapable for this purpose if they are “not wholly competent to manage [their] own affairs in relation to [their] property”.¹⁶³ The PPPR Act does not expressly require the attorney to revisit, or initiate a review of, the health practitioner’s assessment or the Family Court’s determination that led to the attorney being able to act under the EPOA.

19.176 Once a property EPOA has become effective, the attorney may make any decision within the scope of the EPOA.

Welfare EPOAs

19.177 Unlike property EPOAs, a donor does not have the option of specifying when a welfare EPOA is to have effect. For all welfare EPOAs, the attorney’s ability to act depends on whether the donor is “mentally incapable” in relation to personal care and welfare.¹⁶⁴ A donor is mentally incapable for this purpose if, in relation to a personal care and welfare matter, they lack “capacity” to make a decision, understand the nature of a decision, foresee the consequence of a decision or communicate a decision.¹⁶⁵

19.178 The process for determining whether the donor is mentally incapable with respect to a personal care and welfare decision depends on whether the decision concerns a “significant matter”. For these purposes, a “significant matter” means:¹⁶⁶

a matter that has, or is likely to have, a significant effect on the health, well-being or enjoyment of the life of the donor (for example, a permanent change in the donor’s residence, entering residential care, or undergoing a major medical procedure).

¹⁶¹ Protection of Personal and Property Rights Act 1988, s 97(4).

¹⁶² Protection of Personal and Property Rights Act 1988, s 97(5).

¹⁶³ Protection of Personal and Property Rights Act 1988, s 94(1).

¹⁶⁴ Protection of Personal and Property Rights Act 1988, ss 98(3)–(3A) and 94(2).

¹⁶⁵ Protection of Personal and Property Rights Act 1988, s 94(2).

¹⁶⁶ Protection of Personal and Property Rights Act 1988, s 98(6).

- 19.179 If the decision concerns a significant matter, the attorney must not act unless a “relevant health practitioner”¹⁶⁷ certifies or the Family Court determines that the donor is mentally incapable.¹⁶⁸ Generally, this certification or determination must be undertaken in relation to the particular matter at the time the relevant decision is made or proposed to be made.¹⁶⁹ However, if a relevant health practitioner has previously certified that the donor is mentally incapable in relation to a personal care and welfare matter because of a health condition that is likely to continue either indefinitely or for a specified period that has not (at the time of the decision) expired, no further certification or determination is required.¹⁷⁰
- 19.180 If a decision concerns a matter that is not a “significant matter”, the attorney must not act unless they “believe on reasonable grounds” that the donor is mentally incapable in relation to the matter at the time the decision is made or proposed to be made.¹⁷¹

Issues

- 19.181 We have identified three issues in relation to when attorneys may make decisions under an EPOA.

Formal assessment not required before a welfare attorney can make some decisions

- 19.182 Where a decision does not relate to a “significant matter”, the PPPR Act states that a welfare attorney can make a decision where they “believe on reasonable grounds” that the donor does not have decision-making capacity for the specific decision at the relevant time.¹⁷² The PPPR Act does not expressly provide that a certificate from a relevant health practitioner or Court determination is needed before any decision can be made under the EPOA.
- 19.183 On its face, the PPPR Act therefore appears to indicate that, if a non-significant decision is the first decision that may need to be made under a welfare EPOA, an attorney can form their own assessment of whether the donor lacks the relevant decision-making capacity. By contrast, a property attorney who is not expressly authorised by the EPOA to act immediately cannot make any decision before a relevant practitioner has certified, or the Family Court has determined, that the donor is “mentally incapable”.¹⁷³
- 19.184 In practice, we understand that a formal assessment of a donor’s decision-making capacity is generally understood to be required before an attorney can make decisions under a welfare EPOA. This process is often described as “activating” an EPOA. Publicly

¹⁶⁷ A “relevant health practitioner” generally means a person registered with an authority as a practitioner of a particular health profession under s 5(1) of the Health Practitioners Competence Assurance Act 2003 and whose scope of practice includes assessing mental capacity. However, where an EPOA specifies a particular scope of practice, “relevant health practitioner” refers to practitioners from that scope of practice only: Protection of Personal and Property Rights Act 1988, s 94(4) definitions of “health practitioner” and “relevant health practitioner”. See Chapter 9.

¹⁶⁸ Protection of Personal and Property Rights Act 1988, s 98(3)(a).

¹⁶⁹ Protection of Personal and Property Rights Act 1988, s 98(3A).

¹⁷⁰ Protection of Personal and Property Rights Act 1988, s 98(3B).

¹⁷¹ Protection of Personal and Property Rights Act 1988, s 98(3)(b) and (3A).

¹⁷² Protection of Personal and Property Rights Act 1988, s 98(3)(b).

¹⁷³ Protection of Personal and Property Rights Act 1988, s 97(5).

available guidance reflects this approach.¹⁷⁴ There is therefore an inconsistency between the express requirements of the PPPR Act and the general understanding of the law.

Attorneys may make decisions for which donors have decision-making capacity

- 19.185 The provisions relating to the certification of mental incapacity in the PPPR Act can result in attorneys being authorised to make decisions for which donors have decision-making capacity, even when donors do not want them to.
- 19.186 With respect to property EPOAs, once a donor has been certified as “mentally incapable”, the attorney is authorised to make all decisions that fall within the scope of the EPOA. However, the fact a donor has been certified as “mentally incapable” does not mean they lack decision-making capacity for all property-related decisions. A donor is mentally incapable for this purpose if they are “not wholly competent to manage [their] own affairs in relation to [their] property”. Just because a donor does not have decision-making capacity for *some* property-related decisions does not mean they lack decision-making capacity for *all* such decisions.
- 19.187 With respect to welfare EPOAs, we have identified situations where, under the current law, an attorney may be able to make decisions about significant matters that a donor has decision-making capacity to make. Where a certificate has been issued that a donor is mentally incapable because of “a health condition that is likely to continue indefinitely”, no further certificate is required in relation to “any further personal care and welfare matters”.¹⁷⁵ Similarly, where a certificate has been issued that a donor is mentally incapable because of a health condition that “is likely to continue for a period specified in the certificate”, no further certificate is required during that period.¹⁷⁶ Although not expressly addressed in the PPPR Act, it appears that the relevant certificate need only relate to one significant matter, as opposed to all significant matters that might arise during the relevant period.¹⁷⁷
- 19.188 We have two related concerns in relation to these provisions. First, the fact that an ongoing health condition means a donor does not have decision-making capacity for one significant welfare matter (either indefinitely or for a specified period of time) does not mean they lack decision-making capacity for all significant matters during the relevant period. Second, the fact that a donor currently lacks decision-making capacity because of an ongoing health condition does not mean they will always lack decision-making capacity while they have that health condition. For example, some health conditions may result in a person’s relevant decision-making capacity fluctuating. In that situation, a person will sometimes have relevant decision-making capacity during the period specified in the certificate.

¹⁷⁴ See for example Public Trust “Enduring Power of Attorney (EPA)” <www.publictrust.co.nz>; and Te Kāwanatanga o Aotearoa | New Zealand Government “Personal care and welfare enduring power of attorney” (press release, 21 January 2025) <www.govt.nz>.

¹⁷⁵ Protection of Personal and Property Rights Act 1988, s 98(3B)(a).

¹⁷⁶ Protection of Personal and Property Rights Act 1988, s 98(3B)(b).

¹⁷⁷ Certificates that a person is “mentally incapable” for the purposes of welfare EPOAs are generally sought with respect to a specific matter: see Protection of Personal and Property Rights Act 1988, s 98(3)(a) and (3A)(a). Section 98(3B), concerning certificates in relation to ongoing health conditions, does not specify a different approach is required.

There is uncertainty about when attorneys can make decisions

- 19.189 There is some confusion among attorneys, service providers and other professionals about when an EPOA takes effect and when an attorney may make decisions under it.¹⁷⁸ There is also some confusion about what should happen for donors who have fluctuating decision-making capacity or who can make some decisions within the scope of their EPOA but not others.
- 19.190 In our view, this confusion likely results in part from the range of possible scenarios that may exist, depending on the type and terms of the EPOA, the nature of the decision and the terms of any certificate from a relevant health practitioner. The issues discussed above are also likely to be contributing factors, along with the widespread use of the term “activation” in relation to EPOAs.
- 19.191 The PPPR Act does not refer to EPOAs being activated. However, the term is frequently used in practice to mean, broadly, the time from which an attorney can make decisions under the EPOA — usually, because a certificate has been provided from a relevant health practitioner. The term is used in educative materials, commentary and case law.¹⁷⁹ However, the term can suggest that, for all EPOAs, a medical certificate is a green light for the attorney to make all decisions within the scope of the EPOA. While this is the case for property EPOAs, welfare EPOAs generally require a decision-specific approach to determining whether an attorney may act or not.

Consultation

Legal threshold for decision making

- 19.192 In our Second Issues Paper, we expressed a provisional view that a loss of relevant decision-making capacity is a sufficient trigger for an EPOA to come into effect so that the attorney may exercise some decision-making powers. For example, we considered that there should not be any requirement that a decision needs to be made (as we propose for court-appointed representatives) because, unlike court-appointed arrangements, donors enter into EPOAs voluntarily. We asked submitters whether they agreed with our view that loss of relevant decision-making capacity is a sufficient trigger for an attorney to make some decisions and whether donors should be entitled to specify a different trigger.
- 19.193 Thirty-one submitters addressed this topic. Most agreed that loss of decision-making capacity is a sufficient legal threshold for attorneys to act. Two submitters proposed different thresholds. One suggested that attorneys could be authorised to act if the person requires full-time care or is a danger to themselves or others. Another submitter

¹⁷⁸ See also Mark Fisher “‘This is not my home’: An audit of legal authorities in Aged Residential Care” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, 2018) 11 at 13 and 15.

¹⁷⁹ For educative materials, see for example Public Trust “Enduring Power of Attorney (EPA)” <www.publictrust.co.nz>; Te Kāwanatanga o Aotearoa | New Zealand Government “Personal care and welfare enduring power of attorney” (21 January 2025) <www.govt.nz>; and Te Kāwanatanga o Aotearoa | New Zealand Government “Property enduring power of attorney” (21 January 2025) <www.govt.nz>. For commentary, see for example Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 80–84. For case law, see for example *Hobson v Hobson* [2025] NZHC 494 at [6]; *OG v JK* [2016] NZFC 9831 at [16(c)]; and *MHF v KMB* [2013] NZFC 1970, [2013] NZFLR 891 at [12].

suggested that attorneys should consider the importance of the decision before invoking their powers.

- 19.194 Submitters were divided on whether donors should be entitled to specify a different trigger. Several considered the status quo should remain. They said clinical and legal difficulties can arise if a donor has decision-making capacity but their attorney purports to make decisions on their behalf. Caution was expressed that specifying another trigger could be difficult to interpret and standardised options would still be needed. Other submitters supported enabling donors to specify a different trigger.¹⁸⁰ Another submitter said that the different triggering event would need to be clearly specified to provide certainty.
- 19.195 Some submitters commented on the ability of donors to authorise a property attorney to make decisions immediately on execution of the EPOA. Submitters said this option can provide useful support for donors. An attorney can sign documents and handle property matters for a donor who, while retaining relevant decision-making capacity, feels unable to interact with service providers or institutions. For example, they might have limited computer access or skills and not be readily able to use the online processes sometimes preferred by organisations with which they need to deal.
- 19.196 In contrast, Age Concern NZ submitted that property attorneys should not be able to act until the donor loses decision-making capacity. It said EPOAs with immediate effect cause huge misunderstanding and confusion for donors, attorneys and third parties. In Age Concern's view, those EPOAs are vulnerable to abuse as both donors and attorneys perceive the attorney's role as being to complete all financial transactions and to decide how the donor's money should be spent.

Whether attorneys should be given authority for all decisions or on a case-by-case basis

- 19.197 We asked submitters whether, once an EPOA comes into effect, attorneys should have authority for all decisions provided for by the EPOA or on a case-by-case basis (depending on the donor's ability to make a particular decision). Thirty submitters gave feedback on this question.
- 19.198 Two-thirds of these submitters supported a case-by-case approach to attorneys' powers. The most common reason was that a case-by-case approach protects donors' autonomy. A few also explained that determinations that a person wholly or partly lacks decision-making capacity are often inaccurate. The Office for Seniors said the law concerning EPOAs needs to account for the "fluctuating nature of capacity", which accordingly requires the attorney to act on a case-by-case basis.
- 19.199 A minority thought attorneys should be able to make all decisions within the scope of the EPOA once the donor has been assessed to lack decision-making capacity. They reasoned that the case-by-case approach would be impractical. TGT Legal was concerned about the burden of requiring many formal decision-making capacity assessments. The Australian and New Zealand Society for Geriatric Medicine said there were insufficient resources for such assessments. Chris Kelly explained that it could create difficulties with third parties needing to confirm an attorney's authority.

¹⁸⁰ Most submitters in this category did not give reasons or provide examples of other possible triggers.

19.200 A few submitters, including Public Trust, suggested that donors could choose whether their attorney can act on all decisions or on a case-by-case basis.

When formal decision-making capacity assessment should be required

19.201 We also asked submitters when a formal decision-making capacity assessment (conducted by a professional) should be required. Twenty-eight submitters addressed this topic.

19.202 Half of these submitters supported requiring formal assessment or a Court determination for “significant decisions” and allowing the attorney to determine the donor’s decision-making capacity for other matters. They reasoned that attorneys are often familiar with the donor and can discern deteriorations or fluctuations in their decision-making capacity. Some of these submitters considered a distinction between significant decisions and other decisions should apply to welfare EPOAs *and* property EPOAs.

19.203 Approximately one-fifth of submitters that gave feedback thought *all* decisions made by an attorney should require a formal decision-making capacity assessment. However, other submitters cautioned that requiring a medical certificate for all decisions would add cost and complexity.

19.204 A few submitters, including NZLS, suggested that donors could be permitted to specify decisions they consider to be significant matters (in addition to those currently identified in section 98(6) of the PPPR Act). The consequence would be that, for decisions specified in a donor’s welfare EPOA as “significant matters”, the attorney would only be able to make the decision if the donor has been formally assessed (or determined by the Family Court) to lack relevant decision-making capacity.¹⁸¹

Recommendations

19.205 In this section, we first explain how the decision-making rules we recommend in Chapter 12 would affect when attorneys can make decisions under an EPOA. We then make further recommendations about when attorneys should be able to make decisions, addressing welfare EPOAs and property EPOAs separately.

The relevance of the decision-making rules

19.206 Two key issues identified above are that:

- (a) the PPPR Act appears to enable attorneys to make some decisions for which donors have decision-making capacity (beyond the context of property EPOAs that are specified to have that effect); and
- (b) there is uncertainty about when attorneys can make decisions.

19.207 The decision-making rules we recommend in Chapter 12 are a key mechanism for responding to these issues. As we explain in that chapter, we consider that the rules should apply to all representatives, including attorneys acting under EPOAs. Our recommended Decision-Making Rule 2(c) would provide that a representative should not make a decision for which the represented person has decision-making capacity unless

¹⁸¹ Protection of Personal and Property Rights Act 1988, s 98(3)(a). In this chapter, we recommend that this remains the case in a new Act.

the represented person wants the representative to make the decision. Representatives would be required to use reasonable efforts to comply with that rule.¹⁸²

19.208 If our recommendation is implemented, this would make it clear that, even where a property attorney or a welfare attorney has been authorised to make a decision or class of decisions, the attorney must make reasonable efforts to:

- (a) turn their mind to whether the donor has decision-making capacity for the specific decision at the relevant time; and
- (b) only make the decision if the person lacks the decision-making capacity to make the decision.

Requirements for when welfare attorneys may make decisions

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.

¹⁸² See R54.

Formal assessment should be required before an attorney can make any decisions

19.209 We recommend welfare attorneys not be able to make any decision under an EPOA before a formal decision-making capacity assessment or the Family Court has determined that the donor does not have decision-making capacity in relation to at least one decision that is covered by the EPOA. This is currently the case for property attorneys, but the PPPR Act does not expressly require it for welfare attorneys.

19.210 As we explain above, we understand the general practice is for welfare attorneys to seek a formal assessment before making any decision under an EPOA (sometimes described as activating the EPOA). This practice provides an important safeguard against attorneys making decisions prematurely. We consider a new Act should expressly require this approach.

19.211 We address the meaning of “formal decision-making capacity assessment” in Chapter 9. In short, we propose that such an assessment must be conducted by a relevant health practitioner (as currently defined in the PPPR Act)¹⁸³ or a member of another class of people prescribed by regulations.

Formal assessment should also be required in relation to significant matters

19.212 We recommend that a new Act continue to provide for additional safeguards in relation to decisions by welfare attorneys about significant matters. A welfare attorney should not be entitled to make any decision concerning a significant matter unless the donor has been formally assessed (or determined by the Court) to lack decision-making capacity for that decision at the time it is made or is proposed to be made. In other words, the relevant formal assessment must be about the specific decision that relates to a significant matter.

19.213 There are, however, some situations where a decision-specific formal assessment or determination should not be required even if a significant matter is concerned. We recommend a decision-specific formal assessment in relation to a significant matter not be required where:

- (a) 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
- (b) a relevant health practitioner has certified that, due to an ongoing health condition, the donor is not likely 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.

¹⁸³ There are two components to the definition of “relevant health practitioner” in the PPPR Act. A “relevant health practitioner” means either a health practitioner whose scope of practice includes the assessment of a person’s decision-making capacity (s 94(4) definition of “relevant health practitioner”, para (a)), or only a health practitioner from a scope of practice specified by a donor in their EPOA (s 94(4) definition of “relevant health practitioner”, para (b)). As we recommend removing the ability for donors to specify a scope of practice from which a health practitioner must assess their decision-making capacity, we do not propose the latter part of the statutory definition continue.

- 19.214 This approach would largely continue the current law. However, we recommend reform in relation to situations where a health practitioner certifies that a donor lacks decision-making capacity due to an ongoing health condition.¹⁸⁴
- 19.215 Under the PPPR Act, where a relevant health practitioner has certified that a donor lacks decision-making capacity for a decision due to an ongoing health condition, no further certificate is required in relation to “any further personal care and welfare matters” for the period specified in the certificate. As we explain above, this approach appears to mean the requirement for a decision-specific certificate is sometimes dispensed with in situations where a donor may have relevant decision-making capacity. This can seemingly occur where:
- (a) the donor does not have decision-making capacity for one significant matter but retains decision-making capacity for other significant matters; or
 - (b) the donor’s ongoing health condition results in fluctuating decision-making capacity.
- 19.216 To address these situations, we recommend that the requirement for a decision-specific assessment or Court determination can only be dispensed with where the certificate specifies that the ongoing health condition means the donor is unlikely to have decision-making capacity for a class of decisions and the decision at issue falls within that class of decisions.
- 19.217 We consider that the requirement for the certificate to specify that the donor’s lack of relevant decision-making capacity is due to an ongoing health condition should continue. This is to ensure decision-specific assessments are only dispensed with where they are clearly not required. A donor whose condition or other circumstances are only likely to affect their decision-making capacity for a short time period would not meet the threshold.
- 19.218 We also consider the requirement for the certificate to be given by a relevant health practitioner continue. Assessing whether a person is likely to lack decision-making capacity on an ongoing basis because of an ongoing health condition requires medical expertise.¹⁸⁵
- 19.219 We recommend that the definition of “significant matter” in the PPPR Act be retained in a new Act. This means it would encompass matters likely to have a significant effect on a donor’s health, wellbeing or enjoyment of life. In addition, as some submitters suggested, we recommend that a new Act enable a donor to specify any additional matters that they consider to be significant. This would give donors the option of ensuring that a formal assessment of their decision-making capacity is undertaken before any decisions that are particularly important to them are made.
- 19.220 Some submitters suggested a formal assessment or a Court determination should occur every time a decision needs to be made. We disagree with this suggestion. We do not consider it would be workable or reasonable.

¹⁸⁴ For clarity, this refers to R140(b) and R144(b).

¹⁸⁵ In Chapter 9, we recommend that a formal decision-making capacity assessment should be able to be conducted by either a relevant health practitioner (as defined in the PPPR Act) or a member of another class of people prescribed by regulations. In our view, this approach should not apply in relation to certificates about ongoing lack of decision-making capacity.

Donors specifying different triggers for an attorney's decision-making powers not desirable

19.221 Our recommendations in this section are all premised on a donor's lack of decision-making capacity for a decision being the appropriate trigger for an attorney to be able to make that decision. We do not consider that a donor should be able to specify a different trigger. In our view, enabling a donor to specify a different trigger would risk creating more uncertainty for attorneys and those seeking to understand whether they can rely on their decisions.

Requirements for when property attorneys may make decisions

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.

Donors should continue to be able to specify that a property EPOA takes effect immediately

19.222 We recommend that a donor continue to be able to elect that their property EPOA takes effect immediately. As some submitters noted, this approach can be useful where a donor who retains decision-making capacity finds it difficult and would prefer not to engage with

institutions or technology necessary to make decisions. While some people in this position will want to be supported to make decisions themselves, others may prefer to authorise a person of their choice to make decisions. A new Act should continue to enable them to do so.¹⁸⁶

Approach under property EPOAs that do *not* take effect immediately

19.223 Where a property EPOA does not specify that it is to take effect immediately, we recommend that an attorney not be able to make any decisions under it unless a formal decision-making capacity assessment or the Family Court has determined that the donor does not have decision-making capacity for one or more decisions to which the EPOA relates. This general approach would effectively continue the approach under current law.

19.224 However, we recommend one important change from the current position. As some submitters suggested, we consider a donor should be able to specify significant matters for which a formal decision-making capacity assessment (or Family Court determination) is required before a property attorney can make a decision. We cannot see any reason for donors to be able to do this in relation to welfare matters but not property matters. For example, a donor may wish to specify that selling their house is a “significant matter”.

19.225 Specifying additional significant matters in an EPOA may sometimes have unfavourable consequences. For example, the requirement for a formal decision-making capacity assessment (or Family Court determination) could sometimes result in opportunities being lost. A potential buyer of a house may not be prepared to wait the necessary time for a formal decision-making capacity assessment to be undertaken. It would also entail additional cost. We envisage a donor’s lawyer could advise them of these possibilities and other options for recording their wishes for any matters they consider significant.¹⁸⁷

19.226 Unlike the current law concerning welfare EPOAs, we do not recommend a new Act define a class of “significant matters” that applies to all property EPOAs. It is not possible to identify matters relating to property that will be significant for every person in the same way as for care and welfare matters. For example, the significance of a decision involving a certain amount of money is likely to vary between different people depending on matters such as their net worth.

19.227 We recommend that a decision-specific assessment or certificate not be required where a relevant health practitioner has certified that the donor of a property EPOA does not have decision-making capacity for a relevant class of decisions over the period during which the decision is proposed to be made. This aligns with our recommendation in relation to welfare EPOAs.¹⁸⁸

¹⁸⁶ Submitters did not suggest that the same option should be available in relation to welfare EPOAs. We therefore make no recommendation on that issue.

¹⁸⁷ Our recommended decision-making rules would require any statements of wishes to be taken into account by an attorney. See Chapter 12.

¹⁸⁸ As we note above, there are two components to the definition of “relevant health practitioner” in the PPPR Act. A “relevant health practitioner” means either a health practitioner whose scope of practice includes the assessment of a person’s decision-making capacity (s 94(4) definition of “relevant health practitioner”, para (a)), or only a health practitioner from a scope of practice specified by a donor in their EPOA (s 94(4) definition of “relevant health practitioner”, para (b)). As we recommend removing the ability for donors to specify a scope of practice from which a health practitioner must assess their decision-making capacity, we do not propose the latter part of the statutory definition continue.

DECISIONS AN ATTORNEY IS PROHIBITED FROM MAKING

Current law

19.228 The PPPR Act prohibits welfare attorneys from making decisions that welfare guardians are prohibited from making.¹⁸⁹ As we explain in Chapter 17, these decisions include matters such as adopting a child, refusing consent to standard medical treatment intended to save the person's life and consenting to electro-convulsive treatment.¹⁹⁰ A donor can make an advance directive with respect to some of the decisions that a welfare attorney cannot make (most commonly, to refuse medical treatment).¹⁹¹

19.229 The PPPR Act does not specify decisions that property attorneys are prohibited from making.¹⁹²

Issue

19.230 In Chapter 17, we recommend retaining the list of decisions that welfare guardians currently cannot make. We also recommend four additional decisions that should be included in the list in a new Act. These decisions are:

- (a) consenting to a sterilisation procedure;
- (b) consenting to an abortion procedure;
- (c) consenting to a surrogacy arrangement; and
- (d) prohibiting contact between the represented person and another person.

19.231 In this section, we consider whether welfare attorneys should also be prohibited from making these decisions.

Recommendation

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.

19.232 We recommend that an attorney under an EPOA in relation to welfare continue to be prohibited from making any decisions that a court-appointed welfare representative is prohibited from making. This should include the four additional decisions that we recommend in Chapter 17 that welfare representatives be prohibited from making.

19.233 As we explain in Chapter 17, some decisions have such an impact on a person that they should not be made on the person's behalf without the Family Court's approval. Our

¹⁸⁹ Protection of Personal and Property Rights Act 1988, ss 18(1) and 98(4).

¹⁹⁰ The other prohibited decisions are: making any decision relating to the entering into marriage or civil union by the donor or to the dissolution of the donor's marriage or civil union; consenting to the performance on the donor of any surgery or other treatment designed to destroy any part of the brain or brain function for the purpose of changing the donor's behaviour; consenting to the donor's taking part in any medical experiment other than one to be conducted for the purpose of saving that donor's life or of preventing serious damage to that donor's health; and requesting, on behalf of the donor, the option of receiving assisted dying under the End of Life Choice Act 2019.

¹⁹¹ Alison Douglass, Greg Young and John McMillian *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 355.

¹⁹² Protection of Personal and Property Rights Act 1988, s 97(2).

reasoning with respect to court-appointed welfare representatives also applies to attorneys. While we did not ask specifically about prohibited decisions for welfare attorneys in our Second Issues Paper, three submitters said that attorneys should be restricted in the same way as welfare representatives. Submitters also emphasised in their feedback the importance of a consistent approach to representative arrangements.

19.234 In Chapter 17, we also make recommendations about the ability of represented people to participate in research.¹⁹³ If implemented, these recommendations would reform the law as relevant to welfare EPOAs. In short, represented people are generally prevented from participating in research. The effect of our recommendations in the EPOA context would be that, where a donor of a welfare EPOA cannot give informed consent to participate in research, their attorney would be responsible for making that decision, in accordance with a specific legal framework.

WHETHER DONORS SHOULD BE ABLE TO APPOINT A MONITOR

Current law

19.235 Under the PPPR Act, a donor may appoint a person to observe or monitor the attorney's actions.

19.236 For both property EPOAs and welfare EPOAs, as we note above, the donor may specify one or more people who are entitled to information about how the attorney is carrying out their role.¹⁹⁴

19.237 For property EPOAs only, the PPPR Act also provides that a donor can specify that the attorney's decisions are "monitored".¹⁹⁵ The PPPR Act does not specify what the role of the monitor is or what powers they have. The prescribed forms for property EPOAs do not have a separate section about monitoring.¹⁹⁶

Overseas approaches

19.238 A few overseas jurisdictions we have considered provide for a monitoring role. In New Brunswick and Nova Scotia, donors may appoint a monitor in their EPOA. The monitor has powers to visit and communicate with the donor and request records from the attorney.¹⁹⁷ The monitor is also required to advise the donor and any other attorney if the monitor suspects an attorney is not complying with the legislation.¹⁹⁸

¹⁹³ See R99 and R100.

¹⁹⁴ Protection of Personal and Property Rights Act 1988, s 99B(a). Section 99B(b) also requires attorneys to promptly comply with requests for information made by a lawyer for subject person about financial transactions maintained under s 99C of the Act. We did not specifically seek feedback from submitters on this provision and do not address it in this Report.

¹⁹⁵ Protection of Personal and Property Rights Act 1988, s 94A(6)(c).

¹⁹⁶ The prescribed forms only refer to the option donors have to specify people that are entitled to information about how the attorney is carrying out their role. See Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch form 1(J) (property) and form 3(G) (personal care and welfare).

¹⁹⁷ Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 16(2); and Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 16(3).

¹⁹⁸ Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 16(3); and Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 16(4).

19.239 British Columbia also provides for a monitoring role for representatives (the equivalent of attorneys). Donors *must* appoint a monitor unless an exception applies.¹⁹⁹ The monitor must make reasonable efforts to determine whether a representative is meeting their duties.²⁰⁰ They may also visit the donor.²⁰¹ If the monitor has reason to believe a representative is not complying with their duties, they can require the representative to provide records or report to the monitor on specified matters.²⁰² Monitors may escalate their concerns to the Public Guardian and Trustee.²⁰³

Issue

19.240 As we noted at the beginning of this chapter, the Disability Convention requires Aotearoa New Zealand to ensure measures relating to the exercise of legal capacity have appropriate and effective safeguards. It is important that the law provides safeguards against attorneys abusing their role or not carrying it out adequately.

19.241 However, the PPPR Act's reference to donors of property EPOAs being able to specify that the attorney's dealings with the donor's property are to be "monitored" is confusing. In particular, it is not clear whether there is any practical difference between a donor's ability to appoint a monitor for property EPOAs and a donor's ability to appoint one or more people who are entitled to information from an attorney.

Consultation

19.242 In our Second Issues Paper, we asked whether donors should be able to appoint a monitor and, if so, what powers a monitor should have. Thirty-one submitters engaged with this topic.

19.243 Two thirds of these submitters supported donors being able to appoint a monitor. The possibility of abuse by attorneys was the most common reason given. Te Tāhū Hauora | Health Quality and Safety Commission National Mortality Review Committee (Mortality Review Committee) said it is rare for anyone to oversee an EPOA arrangement once the donor has lost decision-making capacity and placing responsibility on donors to complain about their own attorney's actions "further embeds inequitable power relationships between the donor and the attorney" and "exposes them to further abuse". Some submitters said the ability to appoint a monitor is consistent with the donor's ability to tailor their EPOA to reflect their wishes. Age Concern NZ considered that monitors could be a useful intermediary step before court intervention.

19.244 Approximately one third of submitters that commented on this issue supported the monitor role but did not think the donor should appoint a monitor themselves. The Family Court, a new oversight body, community organisations and independent third parties were variously suggested as appropriate monitors.

19.245 Few submitters that supported a monitor role made suggestions about the powers a monitor might have. Age Concern NZ and the Mortality Review Committee supported the

¹⁹⁹ Representation Agreement Act RSBC c 405 (British Columbia), s 12(1). If an exception applies, donors may still appoint a monitor: s 12(3).

²⁰⁰ Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 20(1).

²⁰¹ Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 20(2).

²⁰² Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 20(4)(a).

²⁰³ Representation Agreement Act RSBC 1996 c 405 (British Columbia), s 20(5).

New Brunswick and Nova Scotia models (described above). Two submitters said monitors should have access to relevant records.

19.246 Several submitters said there is no need for an additional monitor role to be created. The main reason given by these submitters was that pre-existing options to tailor an EPOA can address the objectives of the role of monitor. A few submitters also thought it was unclear what the scope of the monitor role would be. McWilliam Tyree Lawyers commented:

... there would need to be clear rules set around their obligations in that role, and what if any consequences there would be for a failure to act in accordance with those obligations. We suspect this may be a deterrent to people taking on the role, and consider that the consultation and information sharing, along with a mechanism for reporting concerns, would address the issue.

19.247 NZLS echoed these concerns and said current issues regarding insufficient monitoring of EPOAs are often due to a lack of understanding of attorneys' consultation and information-sharing obligations. NZLS supported better education about these existing options instead of creating a new monitoring role.

19.248 Submitters generally agreed that oversight of EPOAs needs improving and that the Family Court's supervisory jurisdiction is an insufficient safeguard. However, two submitters cautioned that increased safeguards could make the attorney role unnecessarily difficult and considered they would be a disproportionate response to the number of attorneys who abuse their power.

Recommendation

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.

19.249 As we have set out in general terms earlier in this chapter, we recommend that donors continue to be able to appoint one or more people who are entitled to be provided with information relating to the exercise of an attorney's powers. This enables donors to specify if they want a person or people to "keep an eye" on the attorney's actions, as the prescribed forms currently express it. Where such a person has a concern about the attorney's actions, we consider they should be able to lodge a complaint with a dedicated complaints mechanism, as we recommend in Chapter 24. They would also be able to apply to the Family Court to review the attorney's decision(s) or revoke their appointment (as currently provided for under the PPPR Act).²⁰⁴ Other general avenues for raising concerns such as informing Ngā Pirihimana o Aotearoa | New Zealand Police of suspected fraud or abuse would also continue to be available.

²⁰⁴ Protection of Personal and Property Rights Act 1988, ss 103 and 105.

- 19.250 We also recommend that a new Act does not separately provide for donors of property EPOAs to specify that an attorney's dealings with the donor's property are to be monitored, as the PPPR Act currently does. As we note above, it is unclear whether (and, if so, what) this option adds. We agree with NZLS that it is preferable to focus on educating donors about the ability to specify people in their EPOA who are entitled to receive information.
- 19.251 In Chapter 24, we recommend that the Government consider making a public agency responsible for actively monitoring representative arrangements (including EPOAs). This would be a useful safeguard for donors who do not have people in their life who are willing and able to be appointed to keep an eye on an attorney's actions.

RECORD-KEEPING AND REPORTING REQUIREMENTS FOR ATTORNEYS

Current law

- 19.252 Under the PPPR Act, property attorneys must keep records of financial transactions undertaken while the donor is "mentally incapable".²⁰⁵ Failure to do so is an offence and attorneys can be fined up to \$1,000 on conviction.²⁰⁶
- 19.253 Property attorneys are not required to file their records with the Family Court or supply them to any agency.
- 19.254 Welfare attorneys have no statutory obligation to keep records.
- 19.255 As we explain in the previous section, donors of both property EPOAs and welfare EPOAs can specify a person who is entitled to be provided with information relating to the exercise of the attorney's powers on request.²⁰⁷ If such a person has been appointed and requests records held by the attorney, the attorney must provide those records on request.
- 19.256 The Family Court has powers to require attorneys to provide the Court with information or documents in their possession.²⁰⁸ The Court can also give directions for how the donor's property should be managed or disposed of.²⁰⁹ Similarly, for welfare EPOAs, the Court may give directions for any matter relating to the donor's personal care and welfare.²¹⁰ These powers may allow the Court to create record-keeping and reporting requirements for attorneys if needed.

Issue

- 19.257 Record-keeping and reporting obligations can provide a safeguard for donors, being one means through which attorneys' decisions can be monitored. This can help to prevent

²⁰⁵ Protection of Personal and Property Rights Act 1988, s 99C(1).

²⁰⁶ Protection of Personal and Property Rights Act 1988, s 99C(2).

²⁰⁷ See Protection of Personal and Property Rights Act 1988, s 99B(a). See also Iris Reuecamp "Enduring Powers of Attorney, Welfare Guardians and Property Managers" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 141 at 149.

²⁰⁸ Protection of Personal and Property Rights Act 1988, s 102(2)(e). For property EPOAs, the Court can similarly give directions regarding the rendering of accounts by the attorney and production of records the attorney keeps for that purpose: s 102(2)(c)(ii).

²⁰⁹ Protection of Personal and Property Rights Act 1988, s 102(2)(c)(i).

²¹⁰ Protection of Personal and Property Rights Act 1988, s 102(2)(c)(iv).

abuse by attorneys. However, record-keeping and reporting obligations can be onerous and may disincentivise people from being attorneys. It is necessary to consider how best to balance these considerations.

19.258 The appropriate balance may differ with respect to each arrangement. As we explain above, property attorneys currently have record-keeping obligations while welfare attorneys do not. In addition, the reporting obligations of property attorneys differ from those of property managers (who are appointed by the Family Court). Whereas property managers are required to file records with the Family Court (with such records subsequently being examined by Public Trust), property attorneys have no such obligations.

Consultation

Reporting requirements for property attorneys

19.259 In our Second Issues Paper, we expressed a preliminary view that property attorneys should continue to be required to keep financial records. We asked whether property attorneys should, in addition, be subject to third-party reporting requirements for financial records. Forty-two submitters engaged with this topic.

19.260 Most of these submitters supported statutory reporting requirements for property attorneys. Many cited the need for increased accountability and safeguards against improper attorney behaviour. Some submitters reasoned that the reporting requirements of property attorneys and property managers (who are required to file statements with the Family Court) should be consistent. One submitter said it would be useful for the Family Court or an oversight body to have attorneys' reports available if a complaint is laid.

19.261 A small number of submitters opposed additional reporting requirements. The main reason given was the onus it would place on attorneys. Greg Kelly Trust Law explained that the lesser reporting obligations of property attorneys is a "significant selling point" for people who are reluctant to create an EPOA. NZLS said reporting requirements would likely add cost and complexity in situations where donors have "small and dwindling" assets and the attorney is whānau or a friend. A few submitters thought the status quo was appropriate because donors can specify in their EPOA any reporting requirements they deem necessary. Public Trust noted attorneys are required to produce their records to the Family Court if a concern is raised.

Record-keeping requirements for welfare attorneys

19.262 We also asked whether welfare attorneys should be required to keep records for some types of personal decisions and, if so, what those requirements should be. Thirty-four submitters addressed this topic.

19.263 Approximately two-thirds of these submitters supported some form of record-keeping requirement for welfare attorneys. Submitters that provided reasons again cited the need to safeguard donors.

19.264 Twenty submitters made suggestions about what welfare attorneys could be required to keep records for. There was little consensus. Half suggested records could be required for major decisions. Examples given included medical interventions and changing a donor's permanent residence. Some submitters thought all decisions should be recorded. A few said attorneys should record their decision-making process, including how the

donor's will and preferences were taken into account. Two submitters raised the option of a template attorneys could fill out to reduce the burden.

- 19.265 Approximately one-third of submitters on this issue opposed statutory record-keeping requirements for welfare attorneys. Two submitters said this would be too onerous. A few considered that the pre-existing record-keeping and complaints mechanisms provide a sufficient check on attorneys' actions. NZLS said the purpose of additional requirements would be unclear given that all major decisions welfare attorneys may make are usually recorded anyway (for example, in medical records). NZLS also noted that "attorneys in relation to personal care and welfare are often making decisions for a loved one in highly distressing circumstances" and additional requirements in this context should be carefully considered. Another submitter said it was unclear how such requirements could be enforced.

Recommendations

Financial record-keeping and reporting requirements for property attorneys

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.

- 19.266 We recommend that property attorneys continue to be required to keep financial records. This is an important safeguard to prevent abuse. We have not heard any suggestion that this requirement should be removed.

- 19.267 In addition, we recommend that donors of property EPOAs have the option of requiring their attorney(s) to provide their financial records to the agency responsible for examining property representatives' financial records, for examination.²¹¹ This would allow property donors to choose whether to have their financial records examined in the same manner as a person represented by a court-appointed property manager. We envisage the cost of examining the records would be charged to the donor.²¹² A donor may wish to take this option where they do not know a person who is able and willing to be appointed to keep an eye on the attorney through receiving relevant information.

²¹¹ Currently, Public Trust examines court-appointed property representatives' financial records: Protection of Personal and Property Rights Act 1988, ss 45(2) and 46. In Chapter 24, we recommend that the Government consider consolidating this function (alongside other oversight and support functions) in a single, unspecified, agency. Our discussion here about financial reporting for property attorneys therefore does not specify an agency.

²¹² The PPPR Act currently provides that the costs incurred by Public Trust in auditing property managers' financial records can be recovered from the represented person's property: s 46(6). The Government has recently removed the subsidy for those costs. We discuss issues that would need to be considered in this context under a new Act in Chapter 18.

19.268 Although mandatory financial reporting would provide an additional safeguard for donors, we do not recommend that *all* property attorneys be required to file their financial records with the Family Court or another agency. Such an obligation would mean that all property donors would have the financial burden that reporting entails, including those who have arranged for a third party to keep an eye on the attorney’s property dealings. As some submitters indicated, the cost of mandatory financial reporting may dissuade some people from creating property EPOAs.

19.269 In our view, the balance between these competing objectives is appropriately struck by giving donors the option of requiring financial reporting, along with enhancing other oversight functions. In Chapter 24, we recommend that the Government provide for a complaints mechanism to respond to complaints about representatives. It would have all necessary powers to investigate complaints, including the power to compel the provision of records to be examined. This complaints mechanism would operate alongside the current ability for anyone to apply to the Family Court to revoke an attorney’s appointment²¹³ and thereby increase the accessibility of complaints mechanisms.²¹⁴

Donors of welfare EPOAs should have the option of requiring record keeping

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.

19.270 We recommend that a new Act enable donors to specify that their welfare attorney must keep a record of certain decisions. This approach would enable donors to decide to provide for the safeguard of record keeping where they consider it appropriate but would not impose an additional burden on all welfare attorneys.

19.271 In Chapter 18, we explain why we consider mandatory record-keeping requirements for all welfare representatives would be too onerous. This reasoning also applies to welfare attorneys.

REIMBURSEMENT OF EXPENSES

Current law

19.272 Under the PPPR Act, attorneys must not, at any time while the donor is “mentally incapable”, recover expenses from the donor’s property except to the extent that:²¹⁵

- (a) the EPOA entitles them to do so;
- (b) the Family Court authorises them to do so, subject to any conditions or restrictions in the EPOA; or

²¹³ Protection of Personal and Property Rights Act 1988, ss 102A and 105. The PPPR Act lists people who may apply for the Family Court to exercise its supervisory jurisdiction at any time: s 103(1). Anyone else may bring an application with leave from the Court: s 103(2).

²¹⁴ See also our recommendation in Chapter 24 that the Government consider providing for the active monitoring and supervision of representatives.

²¹⁵ Protection of Personal and Property Rights Act 1988, s 107.

- (c) except to the extent that the EPOA expressly provides otherwise:
 - (i) the expenses are out-of-pocket expenses (other than lost wages or remuneration) reasonably incurred; or
 - (ii) the attorney has accepted the appointment in a professional capacity or has undertaken work to give effect to decisions under the EPOA in a professional capacity, and the expenses were reasonably incurred.

No recommendation for reform

19.273 It is important that attorneys continue to be entitled to appropriate reimbursement. We did not ask a specific question concerning attorneys' current reimbursement entitlements and have not heard of any significant issues arising with them. We therefore make no recommendation for reform.

19.274 As we discuss in Chapter 22, representatives (including attorneys) should continue to be liable to account to the represented person for certain benefits they receive in connection with their role. A new Act should be clear that this does not apply to permitted reimbursements.

CHAPTER 20

A register for enduring powers of attorney

IN THIS CHAPTER, WE CONSIDER:

- the uncertainty experienced when an enduring power of attorney cannot be found; and
- five options for addressing that issue, including the creation of a register for enduring powers of attorney.

INTRODUCTION

- 20.1 In Chapter 19, we describe the purpose of enduring powers of attorney (EPOAs) and discuss the requirements for creating and using them. We have heard throughout this review that it is common for EPOAs to be misplaced or for people to be unaware of their existence at the point when they need to be used.
- 20.2 In this chapter, we recommend that a national register for the voluntary registration of certain EPOA information be established to help address this issue. We recommend that access to the register is restricted to people who have a legitimate need for the information.

ISSUE

- 20.3 A key issue encountered when a person has lost decision-making capacity for a significant decision is uncertainty about whether an EPOA exists, where it is located or whether an existing EPOA has been revoked or replaced. At the crucial time when an EPOA needs to be used, the donor may be unable to help resolve this uncertainty.

- 20.4 It is common practice for the donor's lawyer to retain the original EPOA and for the attorney and donor to hold certified copies.¹ However, uncertainty arises if the donor forgets where they stored their copy or people involved with the donor's care after they have lost relevant decision-making capacity do not know which lawyer assisted with the creation of the EPOA or who was appointed as attorney.
- 20.5 It is possible for a donor to include information about their welfare EPOA and attorneys on *My Health Passport*. This is a physical booklet provided by Te Toihau Hauora, Hauātanga | Health and Disability Commissioner in which people can record their health and disability information and preferences.² But if a donor has not used that document or it cannot be located, it is of no assistance.
- 20.6 If an EPOA cannot be found, a new EPOA may need to be created (if the donor has decision-making capacity to do so). If the donor does not have decision-making capacity to make a new EPOA or a decision needs to be made urgently, an alternative way of making a decision may be needed. For example, a doctor may have to make a decision for the donor based on their best interests.³ Alternatively, te Kōti Whānau | Family Court may be asked by the donor's whānau to make the decision or appoint a representative. That representative may not be the person who was appointed attorney under the lost EPOA.
- 20.7 These problems can result in delays, inefficiencies, extra cost and decisions that do not necessarily reflect the donor's wishes and values. They can place unnecessary pressure on the Family Court. They may result in people being consulted on a decision contrary to the donor's wishes. The donor's desire for a person they had specified in their EPOA to keep an eye on their decision maker's actions may not be fulfilled.⁴ In these ways, the wishes and values expressed by their EPOA may be ignored.

Current law and guidance

- 20.8 The Protection of Personal and Property Rights Act 1988 (PPPR Act) is silent on how EPOAs should be stored once executed. However, some guidance is available from public and private sources that includes advice on the management of the EPOA document, for example, by encouraging donors to consider who should hold a copy of their EPOA.⁵

¹ Peter Orpin "Enduring power of attorney: answers to some commonly asked questions" *LawNews* (online ed, Aotearoa New Zealand, 10 November 2023). This practice will vary where circumstances require. For example, a charity law organisation such as Community Law may assist to execute EPOAs but not store them. Trustee corporations may have different protocols as well.

² Te Toihau Hauora, Hauātanga | Health and Disability Commissioner "My Health Passport" (25 June 2024) <www.hdc.org.nz>. See in particular pages 7–8 of the downloadable versions of *My Health Passport*, which include a dedicated space for recording EPOA information.

³ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 2 right 7(4).

⁴ Donors may specify one or more people in their EPOA who are entitled to information about how the attorney is carrying out their role: Protection of Personal and Property Rights Act 1988, s 99B(a).

⁵ Te Tari Kaumātua | Office for Seniors "Creating an Enduring Power of Attorney" (24 July 2025) <www.officeforseniors.govt.nz>; Public Trust "Enduring Power of Attorney (EPA)" <www.publictrust.co.nz>; Te Tāhū o te Ture | Ministry of Justice "Powers to make decisions for others – The court & enduring power of attorney (EPA)" (26 May 2025) <www.justice.govt.nz>; and Community Law "Enduring powers of attorney: Planning ahead by choosing someone to make decisions for you" <www.communitylaw.org.nz>.

Consultation and commentary

- 20.9 Submitters to our Preliminary and Second Issues Papers reported problems in ascertaining whether an EPOA exists. Many submitters reported problems locating the document itself. Several gave examples of EPOAs being lost altogether. In some instances, nobody could remember where the EPOA was kept, while in other cases, the donor’s lawyer or law firm that might have the original document could not be located. Te Whatu Ora | Health New Zealand explained in its submission on our Preliminary Issues Paper that, even when the relevant lawyer is known, it is sometimes difficult to get hold of them in urgent circumstances.
- 20.10 Several submitters recalled instances where donors forgot whether they had created an EPOA and said this happens frequently. For example, Third Age Health, a primary care provider, explained:
- Many people who have an EPOA appointed are unable to recall if this documentation exists, where it is stored, or even who the appointed EPOA is. This often results in health professionals needing to chase up paperwork and contact multiple parties, risking the patient’s confidentiality and utilising significant healthcare resources.
- 20.11 Commentators have also discussed this issue. Barrister Andrew Finnie has noted how often he encounters this issue:⁶
- I have lost count of the number of occasions where I act for family members who can’t locate a copy of the enduring powers of attorney of a family member. The potential difficulty in locating previously granted enduring powers of attorney is a very real one for both family members and for legal practitioners.
- 20.12 We heard from a few submitters that decisions are sometimes made when an EPOA document cannot be found on the assumption that it exists and that a particular person has been appointed as attorney. The examples given were of healthcare decisions and placements in aged residential care. This may mean the decision is made without authority.⁷
- 20.13 The Chief Ombudsman submitted that, in his role overseeing secure units in care facilities, he has observed a range of poor record-keeping practices, including reliance on incomplete EPOAs. He gave examples of observing healthcare staff having trouble locating an EPOA, sometimes resulting in the absence of any decision-making authority on a person’s file.⁸

⁶ Andrew Finnie “Using and working with the PPPR Act – the challenges” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, June 2018) 21 at 23.

⁷ Third Age Health said families and supporters are often unable to confirm an attorney’s authority, especially if the healthcare issue is urgent. It said this places healthcare professionals in the difficult position of relying on a person’s or family’s word without proof of authority.

⁸ See also Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman’s Observations 2021–2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, March 2025) at 14–16. An earlier study of aged residential care providers found that 17.5 per cent of residents without decision-making capacity were there without the provider having a copy of the legal authority: Mark Fisher “‘This is not my home’: An audit of legal authorities in aged residential care” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, June 2018) 11 at 18.

OPTIONS FOR REFORM

20.14 We have considered five reform options that could address uncertainty about whether an EPOA exists and where it is located. We consulted on two of these options (Options 4 and 5) in the Second Issues Paper. The other three options were identified in the light of feedback received and further analysis. We discuss comparative approaches and the results of consultation under each option where relevant.

Option 1: Improved public guidance on managing an EPOA document

20.15 Under this option, one or more relevant government entities would provide practical guidance to donors about managing their EPOA document in a manner that decreases the risk of it being lost or forgotten. This could include emphasising the importance of storing an EPOA in a safe place and letting whānau, support networks and relevant organisations such as banks and general practitioners know about it.

20.16 That guidance could be provided by updating pre-existing resources about EPOAs (such as websites and brochures) or could be included in the prescribed forms for creating EPOAs.⁹

20.17 This option could also involve an information campaign. The Minister for Senior Citizens recommended an information campaign in 2014.¹⁰ Such a campaign could encourage general practitioners to discuss EPOAs with patients and record attorneys on patient information systems. It could also encourage people to advise their banks and legal professionals of their property attorneys and encourage the recording of property attorney details as part of client information.

20.18 Improved guidance on managing an EPOA document would help to address the problem of lost or forgotten EPOAs by prompting donors and attorneys to think specifically about where they will store the document and who they should talk to about it. However, these matters would be most likely to be considered at the point an EPOA is created. This could be a long time before the donor loses decision-making capacity for relevant decisions, which may mean any arrangements put in place are forgotten or no longer effective. This option would also rely on donors and attorneys having effective storage systems and good communication channels, which may not always be the case.

20.19 A publicly administered register for EPOAs would not form part of this option. However, it would remain open to the private sector to fill that gap. For example, we are aware of two private entities offering registers for wills in Aotearoa New Zealand, one of which also offers to register EPOAs. We have not investigated these private options but note the potential for new technologies to enable privately administered solutions for registering EPOAs and other documents that are available to the general public.

Option 2: Enabling EPOAs to be recorded on existing registers or databases

20.20 Under this option, an existing publicly administered register or database would be used to record information about the existence or location of EPOAs. For example, submitters

⁹ See Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, sch forms 2 and 4. We discuss the standard explanation and other forms in Chapter 19 of this Report.

¹⁰ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 16–17.

suggested that the National Health Index or My Health Record mechanisms may be suitable for this purpose. Both are managed by Health New Zealand.

- 20.21 An advantage of using these health databases is that they already exist, so the cost of this option may be less than of creating a new database or register for EPOA information. Also, they can be accessed by healthcare providers who are often involved with a donor at the time when an EPOA is needed.
- 20.22 On the other hand, their existing architecture may mean that adapting these databases is more complex or expensive than creating a new register. They are also health databases so may not be appropriate for property EPOAs. Further, they may not easily accommodate the need for non-healthcare providers (such as the donor's family members) to access information about the EPOA.

Option 3: Storage obligations on witnesses

- 20.23 Under this option, a new Act would place a duty on a witness to a donor's signature (when executing an EPOA) to retain the original document in secure storage and to provide a certified copy to the attorney and to the donor. This reflects current common practice of witnesses, who must be a lawyer, an officer or employee of a trustee corporation or a legal executive.¹¹ A new Act could also require witnesses to make efforts to inform donors and attorneys if custody of the EPOA changes, for example, if the witness's legal practice is sold.
- 20.24 This option would assist to locate an EPOA when the witness or the attorney is known or can be guessed and can be contacted in a timely manner. However, it would not assist in other cases. Also, given this option reflects the current common practice, it is unlikely to result in much practical advantage over the status quo.

Option 4: A notification scheme

- 20.25 Under this option, a new Act would require certain parties to make notifications when key events related to an EPOA occur. The PPPR Act only requires that attorneys are notified if the EPOA they are appointed under has been suspended or revoked.¹² There are various possibilities for when further notifications could be required such as when the EPOA is replaced or when decisions are first made under it. There are also various options for who should give notice and who should receive it.

Overseas approaches

- 20.26 A notification scheme for EPOAs has been established in several of the jurisdictions we have considered. The triggers for a notification about an EPOA matter vary. Notification can be required:
- (a) when the EPOA is executed;¹³
 - (b) when the EPOA is activated;¹⁴ and

¹¹ Peter Orpin "Enduring power of attorney: answers to some commonly asked questions" *LawNews* (online ed, Aotearoa New Zealand, 10 November 2023).

¹² Protection of Personal and Property Rights Act 1988, ss 100A(1) and 106(1)(a).

¹³ Though now repealed, this was previously required by the Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 61.

¹⁴ Powers of Attorney Act 2014 (Vic), s 40(1); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13; and Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 15(1).

- (c) when the EPOA is registered or the donor or attorney intends to register it.¹⁵
- 20.27 In many jurisdictions, the person required to give notice is the attorney.¹⁶ Other jurisdictions place notification requirements on the donor¹⁷ or the person conducting the formal decision-making capacity assessment.¹⁸
- 20.28 In some jurisdictions, there is a statutory requirement to give notice to people specified by the donor in the EPOA document.¹⁹ Other jurisdictions specify that notice must be given to the donor's family members²⁰ or to an oversight body.²¹
- 20.29 Several jurisdictions we considered do not have notification schemes. In some of these jurisdictions, the relevant law reform body has specifically considered the option and recommended against it.²²

Consultation

- 20.30 We discussed the option of a notification scheme in our Second Issues Paper. Thirty-two submitters commented on this option, with half of those supporting a notification scheme. Key reasons included:
- (a) it may be helpful for donors to specify third parties such as banks and general practitioners that should be notified;
 - (b) it could help detect whether a donor has made an EPOA when subject to undue pressure; and
 - (c) it could enhance understanding between organisations, whānau and other supporters about the EPOA's features and attorney's responsibilities.
- 20.31 Approximately one-fifth of submitters that commented on this option opposed a notification scheme. Key reasons included the following:
- (a) A donor may have legitimate reasons for not wanting their EPOA to be widely known about. For example, they may be worried about family discord or anger.

¹⁵ Mental Capacity Act 2005 (UK), sch 1 cls 4(2) and 6; Adults with Incapacity (Scotland) Act 2000, s 22(1); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 68(3).

¹⁶ Powers of Attorney Act 2014 (Vic), s 40; Mental Capacity Act 2005 (UK), sch 1 cl 6(2); Adults with Incapacity (Scotland) Act 2000, s 22(1); Assisted Decision-Making (Capacity) Act 2015, s 68(3); Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13; and Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 15(1).

¹⁷ Mental Capacity Act 2005 (UK), sch 1 cl 6(1). Though now repealed, this was previously also required by the Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 61.

¹⁸ Substitute Decisions Act SO 1992 c 30 (Ontario), s 9(3).

¹⁹ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 71A(3)(j); and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 13.

²⁰ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 71A(3); and Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 15(2).

²¹ Adults with Incapacity (Scotland) Act 2000, s 22(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 71A(1); and Powers of Attorney Act RSNS 1989 c 352 (Nova Scotia), s 15(1).

²² South Australian Law Reform Institute *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (SALRI R15, 2020) at [8.3.10]–[8.3.13]; New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018) at [14.64]; and Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws: Report Volume 3* (QLRC R67, 2010) at [16.281].

- (b) Notification requirements could add time and complexity. They could be impracticable to complete when the attorney needs to act under the EPOA. Notification could make the EPOA creation process longer.
- (c) The law currently does not prevent donors notifying people about their EPOAs.
- 20.32 Several other submitters that commented on this topic thought notification could be made available but not *required*. The main reason given was because the donor should be able to decide whether notifications are needed at any point regarding their EPOA.
- 20.33 Fourteen submitters commented on the key features of a notification scheme. Regarding the events that could trigger notice, most agreed that notification should occur when an attorney acts under an EPOA. A small number considered notification could be required when the donor is assessed not to have decision-making capacity.
- 20.34 Regarding who should give notice, most submitters that gave feedback considered the attorney should fulfil any notification requirements. Two suggested the donor’s lawyer could be required to make notifications.²³
- 20.35 As to who should receive notice, most said the donor should decide this. Two submitters considered a donor should be able to *exclude* parties from receiving notifications about their EPOA, and a few also said a donor’s whānau should receive notifications.

Analysis

- 20.36 This option would ensure that those people who are required to be notified of an EPOA are aware it exists. It could also provide a safeguard for donors. If an EPOA is created but a donor subsequently replaces it with another EPOA, whānau or other supporters who have been notified can raise concerns about the new arrangement (for example, that undue influence may have been involved in its creation).
- 20.37 However, it is doubtful whether this option would adequately address the uncertainty issue. For a notification scheme to ensure an EPOA can be located when it is needed, notified parties would need to be in the right place, at the right time. For example, in an emergency medical situation where hospital staff cannot confirm whether their patient has an EPOA, a notification scheme can only assist if the notified people are present or contactable. It would also be unclear what a notified party is meant to do once notified.
- 20.38 Further, donors can already choose to notify anyone they like about their EPOA. This practice is encouraged in guidance about creating EPOAs.²⁴ It is unclear what a formal scheme would add.

Option 5: An EPOA register

- 20.39 Under this option, a register would be established under a new Act and maintained by a government entity. The register would provide a central place for the donor or their attorney, whānau or support people to quickly search for information about the existence and location of an EPOA. When a donor who has registered their EPOA loses relevant decision-making capacity, a register would enable prompt identification of the EPOA’s

²³ These submitters may have been contemplating situations where the donor’s lawyer is their EPOA witness.

²⁴ See Te Tari Kaumātua | Office for Seniors “Creating an Enduring Power of Attorney” (24 July 2025) <www.officeforseniors.govt.nz>; and He Manaakitanga Kaumātua Aotearoa | Age Concern New Zealand “Enduring Power of Attorney” <www.ageconcern.co.nz>.

existence and location and potentially the identity of the witness and attorney. Even before that point, if a donor cannot locate their EPOA or remember its details, a register would enable them to find that information and avoid the need to create a new EPOA.

Overseas approaches

- 20.40 A register for information about EPOAs (and sometimes other decision-making arrangements) is administered by a government body in many jurisdictions we have considered, including Northern Territory,²⁵ Tasmania,²⁶ England and Wales,²⁷ Scotland²⁸ and Ireland.²⁹ Such registers have also been recommended by law reform bodies in the Australian Commonwealth, Australian Capital Territory, South Australia and Victoria, but have not yet been implemented in those jurisdictions.³⁰
- 20.41 Setting up a mandatory EPOA register was not recommended by the law reform bodies in New South Wales and Queensland,³¹ which noted concerns about increased costs and complexity and about unnecessary intrusions into donors' privacy. However, in both cases, EPOA documents could already be registered on registers catering for other types of documents. The question being addressed was the value of a separate EPOA register, rather than the ability to register EPOAs at all.

Consultation

- 20.42 We found overwhelming support for an EPOA register during this review. Experts and stakeholders we spoke with mostly supported the establishment of an EPOA register. Despite not asking directly about an EPOA register in our Preliminary Issues Paper, 25 submissions suggested that one could be established. When we asked directly about it in our Second Issues Paper, 65 submitters gave feedback on this topic.³² Most supported establishing an EPOA register.
- 20.43 Submitters suggested that an EPOA register would improve the clarity and accessibility of information about EPOAs. McWilliam Tyree Lawyers said that it would provide a way to quickly ascertain whether there is someone with decision-making powers, particularly in emergency situations, and make the document easy to locate. Public Trust thought a register would address the difficulties that currently exist in identifying whether an EPOA exists.

²⁵ Powers of Attorney Act 1980 (NT), ss 7, 8 and 13.

²⁶ Powers of Attorney Act 2000 (Tas), s 16; and Guardianship and Administration Act 1995 (Tas), s 89.

²⁷ Mental Capacity Act 2005 (UK), s 9(2)(b).

²⁸ Adults with Incapacity (Scotland) Act 2000, s 19.

²⁹ Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 68–72.

³⁰ Australian Law Reform Commission *Elder Abuse — A National Legal Response* (ALRC R131, 2017), R5–3; ACT Law Reform Advisory Council *Guardianship report* (ACT LRAC 4, 2016) at [7.5.1] (see R9–R10); South Australian Law Reform Institute *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (SALRI R15, 2020) at [8.2.104]; and Victorian Law Reform Committee *Guardianship* (VLRC R24, 2012) at 364 (see R259–R260).

³¹ New South Wales Law Reform Commission *Review of the Guardianship Act 1987* (NSWLRC R145, 2018), R14.9; and Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws: Report Volume 3* (QLRC R67, September 2010) at [16.259].

³² Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at 283 (Question 75).

- 20.44 A few submitters said it would help meet Aotearoa New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention). The Australian and New Zealand Society for Geriatric Medicine said knowing whether an EPOA exists is a necessary first step towards recognising the rights, will and preferences of the donor.
- 20.45 Four submitters opposed the establishment of a register. One cited the likely costs and two cited privacy concerns.

Recommendation

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.

- 20.46 In our view, there is a strong public interest in greater certainty about the existence and location of EPOAs and some form of register is the best option to achieve that objective. At present, considerable time and cost can be spent searching for EPOAs or recreating them if they cannot be found. It often falls to healthcare professionals to respond to situations where the existence and location of an EPOA is unclear.
- 20.47 Addressing this problem aligns with the requirements of the Disability Convention because better enabling EPOAs to be located would better enable respect for the donor's rights, will and preferences. Establishing a register of EPOAs would align Aotearoa New Zealand with many other overseas jurisdictions we have considered. It would also go some way to alleviating the Ombudsman's concerns and the administrative burden on aged care facilities and whānau to ensure an appropriate legal basis for a person's residence at a facility.³³
- 20.48 We recommend that the register be administered by a government entity. This approach would provide public assurance that the register is permanent and reliable. If a single body performs the oversight functions we recommend in Chapter 24, we consider that body should be responsible for the register.
- 20.49 The register we propose below would be a relatively straightforward system for recording EPOA information. It would be publicly administered and searchable by members of the public who fit the qualifying criteria. In addition to having the facility to register EPOA information, donors should have the facility to deregister EPOA information. The entity responsible for administering the register should consider mechanisms for ensuring that registered EPOA information remains current.³⁴ Information on the register would need to be subject to appropriate security safeguards in accordance with Information Privacy Principle 5.³⁵

³³ Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman's Observations 2021–2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, March 2025) at 16.

³⁴ Information Privacy Principle 9 provides that an agency must not keep personal information for longer than is required for the purposes for which it may lawfully be used. See Privacy Act 2020, s 22 IPP9. Options include regularly obtaining information on the registration of deaths and removing any registered EPOA information when a donor dies.

³⁵ Privacy Act 2020, s 22 IPP5.

- 20.50 A register would need to be accompanied by public information about the importance of registration and other measures to specifically address how EPOA documents should be managed by relevant parties.
- 20.51 Although establishing an EPOA register is likely to incur greater establishment and ongoing costs than the other options we considered, it is the option that would best address the difficulty in locating EPOAs when they are most needed.

Previous consideration of an EPOA register

- 20.52 Two previous reviews have considered and rejected the option of a national register to securely store information about EPOAs. We outline the conclusions of those reviews here and explain why we have reached a different conclusion.
- 20.53 First, in a 2001 report, Te Aka Matua o te Ture | Law Commission considered whether an EPOA register would address the problem of the misuse of EPOAs.³⁶ The Commission did not recommend a register as a means of addressing that problem. It was unconvinced that the benefits of registration would outweigh the expenses incurred by a central register and the loss of privacy.³⁷ However, the Commission noted that some submitters supported the idea of a register, particularly to address the practical difficulty in discovering whether an EPOA exists.
- 20.54 We agree with the conclusion in the Commission's previous report that a register would not detect the primary form of attorney abuse, which is the misuse of powers properly granted to them. However, the scope of our current review is not limited to the misuse of EPOAs. For the reasons explained above, we consider that a register is the best reform option to address difficulties in locating EPOAs when they are needed, which remains a pressing issue.
- 20.55 Second, in 2014, the Minister for Senior Citizens reviewed amendments to the PPPR Act made in 2007.³⁸ Several submitters to the Minister's review supported the establishment of a national EPOA register. They said it would help health, legal and banking professionals determine whether patients or clients have EPOAs and to identify who the attorneys are.³⁹ However, the Minister did not recommend an EPOA register because set-up and administration costs would deter EPOA uptake. The Minister identified from submitters' responses that costs and complexity were already the main barriers for people wanting to create EPOAs. A register would unnecessarily raise these barriers.⁴⁰

³⁶ Te Aka Matua o te Ture | Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001).

³⁷ Te Aka Matua o te Ture | Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [40].

³⁸ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014).

³⁹ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 16.

⁴⁰ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 16.

20.56 We agree that the risk of a register increasing the barriers for people to create an EPOA must be considered carefully. We consider this concern can be addressed through the design of the register, as we explain below.

DESIGN OF THE REGISTER

20.57 We have considered how an EPOA register should be designed to address the issue of uncertainty about the existence and location of EPOAs while mitigating the risk that it may discourage the creation of EPOAs.

20.58 We heard concerns that a public register could deter people from creating EPOAs. Research about EPOA uptake in England and Wales (where registration is required) confirmed that process barriers are common reasons for not creating EPOAs. These include the cost of registration or feeling it would be too complicated and attitudinal barriers, including being of the opinion that decision-making arrangements are private matters.⁴¹ In our review, a significant number of submitters noted that costs and complexity are already barriers to creating EPOAs. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) warned that additional complexity and safeguards may add little further protection and risk making the creation of EPOAs even less accessible than they currently are.

20.59 We consider there are three potential consequences of an EPOA register that could deter the creation of EPOAs. Consideration of these factors has been central to our recommendations on the design of an EPOA register.

Additional administrative burden

20.60 Registration would add a step to the process of creating an EPOA. Greg Kelly Trust Law expressed a strong preference not to increase bureaucracy. Community Law Centres Aotearoa said that its member branches encountered people in desperate situations who need EPOAs but already could not afford the witnessing fees. It was concerned that the additional time that registration may require, and any registration fee, could increase the cost and make EPOAs further out of reach. A few submitters shared this concern.

Privacy intrusion

20.61 Some donors may prefer that details of their EPOA, or even the fact that they have made an EPOA, remain private. For example, a donor may consider it necessary to withhold the terms of their EPOA from some family members until they lose relevant decision-making capacity in the interests of preserving family harmony or avoiding pressure to revoke the EPOA. A donor may have a general aversion to public data collection. Aged Care Association of New Zealand supported a register but said data privacy concerns could deter some people from creating EPOAs.

20.62 However, Third Age Health noted in its submission that privacy is already frequently breached when donors cannot recall whether an EPOA exists or who the attorney is. In

⁴¹ Anna Beckett and others *The Future of Lasting Power of Attorney: A Research Report for the Office of the Public Guardian* (Office of the Public Guardian, March 2014) at 7 and 22; and Kelly Purser and others "Strengthening the Response to Elder Financial Abuse and the Proposed Enduring Power of Attorney Register: Suggested First Steps" (2023) 2 UNSW Law Journal Forum at 7.

those circumstances, healthcare professionals needing to obtain paperwork will contact multiple parties, risking the confidentiality of the patient's information.

Cost

20.63 Establishing and maintaining a public register would involve costs that, if recovered through a registration fee, may inhibit the use of the register. That risk needs to be balanced against the time and costs currently spent trying to identify whether there is an EPOA and, if so, where it is. It could also avoid the costs of creating a new and unnecessary EPOA or the legal costs and filing fees of applying to the Family Court for decisions.

SHOULD IT BE VOLUNTARY OR MANDATORY TO REGISTER EPOA INFORMATION?

20.64 If registration were voluntary, a donor could choose to register their EPOA information to ensure that their EPOA can be located by others when the donor has lost relevant decision-making capacity. An EPOA would be valid whether it was registered or not, but a registered EPOA would not be valid if there was a more recent unregistered EPOA.

20.65 A register with a mandatory registration requirement ("mandatory register") could have a larger impact on reducing uncertainty because it would provide a more comprehensive record of valid EPOAs. However, for the register to be completely comprehensive — that is, a definitive record of all EPOAs — a new Act would likely need to provide that unregistered EPOAs are of no effect. Even then, the benefits of the register being definitive may take some time to materialise because it would be necessary to provide a reasonable opportunity for existing EPOAs to be registered. Registering existing EPOAs would also entail cost.

20.66 There are other disadvantages of mandatory registration:

- (a) People could not avoid the administrative and privacy implications associated with registration. This may deter people from creating EPOAs at all. If the costs of a register were recovered (in full or in part) through a registration fee, this would be a further deterrent.
- (b) A donor's wishes expressed in an EPOA that is not registered may be ignored or overridden because the EPOA would not be valid.⁴²
- (c) Mandatory registration may also be limiting for donors who execute property EPOAs that are intended to come into effect immediately. If there is any delay in registration, an EPOA would not take immediate effect in accordance with the donor's wishes.⁴³

20.67 While a voluntary register would not have the comprehensive coverage that a mandatory register could have, it would still provide a central database for people to consult as an initial step in seeking to understand whether a person has made an EPOA. A voluntary register would not have the same privacy, financial or administrative implications as a

⁴² See Kelly Purser and others "Strengthening the Response to Elder Financial Abuse and the Proposed Enduring Power of Attorney Register: Suggested First Steps" (2023) 2 UNSW Law Journal Forum at 8; and Trevor Ryan and others "Protecting the rights of those with dementia through mandatory registration powers? A comparative analysis" (2015) 36(2) *Adel L Rev* 355 at 364.

⁴³ Some jurisdictions deliberately delay registration to allow for an objection period. See *The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK), reg 12; and *Assisted Decision-Making (Capacity) Act* (Ireland), s 71(1).

mandatory register. Under a voluntary register, a donor would register their information if they consider that the advantages of certainty about the existence and location of their EPOA outweighed any privacy concerns they have. A donor who would prefer to avoid the costs and process of registration can decide not to register their EPOA without concerns that their EPOA will not be effective.

Overseas approaches

- 20.68 Registration of EPOAs is mandatory in England and Wales, Scotland, Ireland, Northern Ireland and Tasmania.⁴⁴ Mandatory registration has also been recommended by law reform bodies in the Australian Commonwealth, Victorian, South Australia and Australian Capital Territory but not yet implemented.⁴⁵ However, in most of the jurisdictions with mandatory registers we examined, registration of some sort (for example, with the court) has been mandatory since EPOAs were first established there.⁴⁶ It is therefore difficult to determine any negative effect of mandatory registration on the uptake of EPOAs in those jurisdictions.
- 20.69 Legislation in Nunavut requires the Public Trustee to establish and maintain a register for the voluntary registration of EPOAs.⁴⁷ Legislation in Manitoba permits the voluntary filing of a copy of the EPOA with the Public Guardian and Trustee.⁴⁸ Queensland and New South Wales allow property EPOAs to be noted on existing registers for property titles and deeds.⁴⁹

Consultation

- 20.70 In our Second Issues Paper, we asked submitters whether registering an EPOA should be mandatory or voluntary. Thirty submitters gave feedback on this question.
- 20.71 A large majority of these submitters said registration should be mandatory. Several were concerned that a voluntary register would be ineffective. For example, the Bank of New Zealand said a voluntary register would likely be an incomplete record, which would create uncertainty about whether an unregistered EPOA exists. Three submitters stated that mandatory registration would maximise the benefits a register could achieve. He

⁴⁴ Powers of Attorney Act 2000 (Tas), ss 4, 9(1)(h) and 11; Mental Capacity Act 2005 (UK), s 9(2) and sch 1 pt 2; Adults with Incapacity (Scotland) Act 2000, s 19; Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 59(4) and 68–69; and Enduring Powers of Attorney (Northern Ireland) Order 1987, s 3(1)(b).

⁴⁵ Australian Law Reform Commission *Elder Abuse — A National Legal Response* (ALRC R131, 2017) at [5.99]–[5.100]; Victorian Parliament Law Reform Committee *Inquiry into Powers of Attorney: Final Report* (Parliamentary Paper 352, August 2010) at 234; Victorian Law Reform Committee *Guardianship* (VLRC R24, 2012) at 365 (see R261); South Australian Law Reform Institute *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (SALRI R15, 2020) at [8.2.97] and [8.2.104] (see R99); and ACT Law Reform Advisory Council *Guardianship report* (ACT LRAC 4, 2016) at [7.5.1] (see R10).

⁴⁶ See for example Mental Capacity Act 2005 (UK), sch 4 cl 11; and Powers of Attorney Act 1996 (Ireland), s 10. Section 81 of the Assisted Decision-Making (Capacity) Act 2015 (Ireland) provides that the current Act does not affect EPOAs made under the 1996 legislation.

⁴⁷ Powers of Attorney Act SNU 2005 c 9 (Nunavut), s 14.

⁴⁸ Powers of Attorney Act CCSM 1996 c P97 (Manitoba), s 12.

⁴⁹ Powers of Attorney Act 2003 (NSW), s 51; and Powers of Attorney Act 1998 (Qld), s 25. The New South Wales Act names a specific location EPOAs may be registered whereas the Queensland Act does not. Queensland Public Trustee advises there is no central registry for EPOAs, but a copy can be uploaded to the donor's health record for clinician use: "Frequently asked questions about powers of attorney" (20 November 2024) <www.pt.qld.gov.au>.

Manaakitanga Kaumātua Aotearoa | Age Concern NZ said a mandatory register would make confirming EPOAs, and identifying potential misuse, easier for professionals.

- 20.72 Three submitters, including NZLS, said registration should be voluntary. Two of these submitters suggested that registration could be voluntary initially and become mandatory if its benefits were demonstrated.

Recommendation

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.

- 20.73 Both a mandatory register and a voluntary register have advantages and disadvantages, which need to be balanced. A mandatory register would resolve the main issue of uncertainty as to the existence and location of an EPOA. However, it has significant drawbacks that could undermine respect for the will and preferences of a donor who, whether intentionally or due to error or oversight, does not register their EPOA.
- 20.74 On the other hand, while a voluntary register would not provide a comprehensive database of all EPOAs, it would mitigate the issue of uncertainty to some extent and has significantly fewer drawbacks. The degree to which donors voluntarily register their EPOAs will determine the extent of its coverage and the degree to which it can reduce uncertainty about the existence and location of EPOAs. On balance, we think a voluntary register is the better option.
- 20.75 We recognise this recommendation departs from the views of most submitters. However, submitters that opposed mandatory registration offered compelling reasons about the implications of establishing such a register. Submitters that supported mandatory registration seldom addressed the risks and difficulties.
- 20.76 A voluntary register could be a stepping stone towards mandatory registration. Jurisdictions where a law reform body recommended a mandatory register with no prior registration system have not yet implemented the recommendation.⁵⁰ The shift from no register to a mandatory register appears to be a large one. If, after a voluntary register has been introduced, a move to a mandatory system is considered necessary, it would likely be easier to progress that change with registration infrastructure already established and a degree of public awareness of the benefits achieved by (voluntary) registration.
- 20.77 Consistent with our recommendation that it should be voluntary to register EPOA information, we also consider that a person should be able to deregister some or all of their EPOA information on the register. Even with the restricted access settings we recommend below, a donor may wish to deregister their information if they develop

⁵⁰ Victoria, South Australia and the Australian Capital Territory do not have EPOA registers despite recommendations from their respective law reform bodies: Victorian Law Reform Committee *Guardianship* (VLRC R24, 2012), R261; South Australian Law Reform Institute *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (SALRI R15, 2020), R99; and ACT Law Reform Advisory Council *Guardianship report* (ACT LRAC 4, 2016), R10.

concerns about certain people having access to it. This is consistent with people having control over their personal information.

WHAT INFORMATION SHOULD THE REGISTER CONTAIN AND WHO SHOULD REGISTER IT?

- 20.78 We have considered a variety of options for the information that an EPOA register should contain, from the full EPOA document to the minimum information required to identify its existence and location. We have also considered who should be able to register that information.
- 20.79 The advantage of registering the full EPOA document is that the registered document would be immediately available as authority for an attorney's decision, without any need to search further.
- 20.80 Registration of the minimum information needed to locate an EPOA would be much simpler. However, an attorney would need to take further steps to obtain the EPOA in order to have authority to make a decision.
- 20.81 Generally, the more information the register contains, the greater the cost to establish and maintain the register and the greater the potential to intrude on the donor's privacy.

Consultation

- 20.82 In our Second Issues Paper, we asked submitters what information an EPOA register should contain. Twenty-six submitters addressed this topic.
- 20.83 Submitters' responses often related to who they thought should be able to access information on the register. Generally, submitters that thought a greater amount of information should be on the register also thought that access should be restricted.⁵¹ In contrast, Public Trust said the register should be public but only contain limited information to reduce donors' privacy concerns.
- 20.84 Submitters suggested a wide range of information that could be registered, including:
- (a) the name and contact details of the attorney(s);
 - (b) the scope of the registered EPOA, in particular, whether it concerns property or welfare;
 - (c) whether the donor has been assessed as not having relevant decision-making capacity;
 - (d) the date the EPOA was executed;
 - (e) the lawyer for the witness or donor;
 - (f) any additional conditions in the EPOA; and
 - (g) the location of the original EPOA.
- 20.85 Twenty-nine submitters addressed whether and which other instruments should be included on a register. Most suggested that advance directives could also be registered. Approximately one-third suggested that PPPR Act orders (welfare guardian and property manager orders) could be registered. A small number of submitters suggested

⁵¹ For example, Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand Auckland Branch stated that the information a register should collect from donors will depend on who can access it.

“statements of wishes” or wills could be included.⁵² In contrast, another submitter thought it was preferable to “see how it goes” before extending the register beyond EPOAs, to defuse opposition and reduce privacy concerns.

Recommendations

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.

Information an EPOA register should be able to hold

20.86 Although the information privacy principles are subject to other legislation, our recommendations aim to achieve compliance with them.⁵³

20.87 Information Privacy Principle 1 was our starting point for considering the information that an EPOA register should be able to hold.⁵⁴ That principle provides that personal information must not be collected by an agency unless the collection is necessary for the purpose. This principle supports requiring that people who decide to register an EPOA only provide the minimum information necessary to achieve the objective of addressing

⁵² Some commentators have also made this suggestion. See Iris Reuecamp “Plugging the gaps: Strengthening the rights of mentally incapacitated adults pending substantive law reform” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, June 2018) 37 at 46–47, where Reuecamp supports an EPOA register and suggests advance directives and wills could be included; and Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) at [8.11], where Douglass supports an EPOA register and suggests advance directives and organ donor information could be included.

⁵³ Privacy Act 2020, s 24.

⁵⁴ Privacy Act 2020, s 22 IPP1(1)(a).

uncertainty about its existence and location. On that basis, we recommend requiring registration of:

- (a) information sufficient to identify the donor;
- (b) the type of EPOA the donor has executed — that is, a property EPOA or a welfare EPOA; and
- (c) the location of the original EPOA.

20.88 Communicating the location of the EPOA will require sufficient details about that location so others can identify it. The register should describe the person or entity that holds the original EPOA instrument. For example, if the original is located with the lawyer that witnessed it, the register could note their office and name of their practice. If the instrument is held by the donor's spouse or partner, their contact details could be noted on the register. If the donor themselves holds their EPOA, the register could note this.

20.89 In addition, we recommend that donors have the option of choosing to register additional information about the EPOA — namely:

- (a) the attorney's name and contact details;
- (b) further details about how a donor has tailored their EPOA arrangements;
- (c) the location of any certified copies of the EPOA; and
- (d) a copy of the EPOA.

20.90 Enabling registration of that additional information is consistent with the autonomy we intend a voluntary register to provide. Additional registered information may provide administrative efficiencies. For example, identifying the attorney may be a quicker way of accessing a copy of the EPOA (where a copy is not held on the register). Further, knowing the limits of the arrangements under the EPOA may indicate whether finding the document itself is necessary. Where a donor wishes to provide a copy of the EPOA, that would enable the terms of the EPOA to be accessed as quickly as possible.

20.91 While we recommend that a register should enable the registration of this additional information, we note a qualification. We do not know whether this functionality would materially increase the cost of establishing and maintaining a register. If it did so and such cost was to be borne by donors who do not wish to provide the additional information, we do not consider that providing for such additional functionality would be appropriate. In our view, the key design objective should be for the register to contain the minimum information necessary to address the problem of uncertainty while minimising barriers to people using the register.

20.92 Some of our recommended options for registering additional information would involve registering the personal information of the attorney (as well as that of the donor). Given our recommendations in the next section would limit access to the register to those people who have a legitimate need for it, this is unlikely to raise significant privacy concerns for many attorneys. However, an attorney might still not want their personal information to be held on the register. The public agency responsible for administering the register would need to develop a process to address this.

20.93 We have not extended our recommendation to the registration of other decision-making instruments, despite support for this among submitters. While the issue of uncertainty may affect other decision-making instruments such as advance directives and wills, we have concerns about the costs involved and the potential for other consequences we

have not been in a position to properly consider in this Report.⁵⁵ However, we can see the potential for a register with broader coverage and suggest the Government consider whether a register could be usefully expanded in future.

Who should be able to register information

- 20.94 As to who should be permitted to register information about an EPOA, we consider this needs to balance administrative efficiency, privacy concerns, and ensuring the accuracy of the information registered. In our view, a donor or, if asked to by the donor, the donor's agent, witness or attorney should be permitted to register information for an EPOA they were involved with. Both the witness and attorney are involved in the creation of the EPOA so will be familiar with its contents and can ensure the information registered is accurate and no more than the donor wishes to register. Similarly, the donor has already sought the witness and the attorney to assist with their EPOA, so asking them also to assist with registration could remove one step in the process for the donor, making it easier and more likely to occur.
- 20.95 In addition, we recommend donors be able to authorise others to register their EPOA information. This may occasionally be preferable for a donor and the law should not prevent this.
- 20.96 Information Privacy Principle 2 provides that personal information must be collected from the individual concerned unless one of the exceptions applies.⁵⁶ In this case, one of two exceptions would authorise the collection of a donor's EPOA information from the witness or the attorney. Either the donor would have authorised the agent, witness or attorney to register the information or the registration of the information by them would not prejudice the interests of the donor.⁵⁷
- 20.97 With respect to collection of the attorney's personal information, the public agency responsible for collecting the information would need to develop a process to ensure that collection of this information is also consistent with Information Privacy Principle 2.

WHO SHOULD BE ABLE TO ACCESS INFORMATION ON THE REGISTER?

- 20.98 Our starting point for considering the access settings for the register is Information Privacy Principle 11, under which an agency that holds personal information must not disclose it to others unless one of the specified exceptions apply.⁵⁸ The exceptions include that the disclosure is one of the purposes for which the information was collected.⁵⁹ The key purpose of registering EPOA information is to ensure that parties who have a legitimate need for it after the donor has lost relevant decision-making capacity can access it. The access settings should provide for this purpose.
- 20.99 We have considered three general approaches to regulating access to an EPOA register:

⁵⁵ For example, including other decision-making instruments would also affect the necessary access settings for the register. We discuss access in the next section.

⁵⁶ Privacy Act 2020, s 22 IPP2.

⁵⁷ Privacy Act 2020, s 22 IPP2(2)(a) and (c).

⁵⁸ Privacy Act 2020, s 22 IPP11.

⁵⁹ Privacy Act 2020, s 22 IPP11(1)(a).

- (a) *Full-access register*: Any person may search and obtain all registered information.⁶⁰
- (b) *Tiered-access register*: Some information held by the register is publicly accessible and some is accessible only under certain circumstances or by particular people. For example, a register could allow anyone to learn whether someone has registered EPOA information but only allow limited groups (such as healthcare professionals and lawyers) to view the substantive information.
- (c) *Restricted-access register*: No information is public by default. Access is restricted to certain people or classes of people. Under some versions of this option, access could also be obtained by demonstrating a need or legitimate interest in registered information to the administering body.⁶¹

Consultation

20.100 In our Second Issues Paper, we asked submitters for their views on who should have access to information on a register.⁶² Thirty submitters addressed this topic.

20.101 One-third of these submitters supported anyone having access to some types of information about EPOAs. Among these submitters, versions of a tiered-access structure were preferred. Public Trust suggested that anyone should be able to enquire whether an EPOA is registered. Te Tari Kaumātua | Office for Seniors suggested that minimum information should be available to anyone on request such as that a document exists and who the attorneys are, with further information being available to healthcare professionals, social workers and related professionals.

20.102 Two-thirds of submitters that gave feedback on this issue supported a form of restricted-access register:

- (a) Several submitters said access should be given to people or professionals who need to know EPOA information. One suggested a formal request system under which any person can access information by explaining why they need it.
- (b) Several submitters said classes of people or entities should be able to access registered information. NZLS discussed different systems of access and raised the possibility of approved registered professional users such as lawyers and healthcare professionals. A group of social workers said trustee corporations, the courts and Ngā Pirihi mana o Aotearoa | New Zealand Police should have access. Aged Care Association of New Zealand also suggested that registered nurses in aged residential care facilities be able to view the register. A group of academics from Waipapa Taumata Rau | University of Auckland cautioned that access controls should be stringent and audited regularly.
- (c) A few submitters said the donor should be able to specify parties that can access their registered information. NZLS considered the donor should have control over who is entitled to access registered information.

⁶⁰ See for example Powers of Attorney Act 2000 (Tas), ss 5 and 6; The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (UK), reg 31; Adults with Incapacity (Scotland) Act 2000, s 6(2)(b); and Enduring Powers of Attorney Ordinance Cap 501 1997 (Hong Kong), s 9(5)(b).

⁶¹ See for example Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 25(3), 45(3) and 72(3); and Assisted Decision-Making (Capacity) Act 2015 (Inspection of Registers and Receipt of Copies of Documents) Regulations 2023 (Ireland), reg 3.

⁶² Second Issues Paper at 284 (Question 76(c)).

Recommendations

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.

Access to the EPOA register should be restricted

20.103 While a full-access register has the attraction of simplicity, we do not consider it is appropriate for Aotearoa New Zealand. Many donors have a legitimate desire to limit who can access their EPOA information. A full-access register is not likely to be trusted or used in sufficient numbers to effectively resolve uncertainty about the existence and location of EPOAs. It could also increase risks of donor abuse and neglect by being used to identify potentially vulnerable people or to expose donors to social isolation, undue influence or pressure from family members who are unhappy with the EPOA arrangements.

20.104 We consider that donors and attorneys are more likely to be comfortable with registration of EPOA information if there are clear limits on who can access it. People should only be able to access registered EPOA information if they have a legitimate need to do so, but all people with a legitimate need should have access to the information they need. We describe below how we suggest those limits be set.

Guiding considerations for secondary legislation prescribing register access settings

20.105 While the general policy should be that classes of people who need to access registered EPOA information should have access to the specific information they need, the actual list of occupations and the conditions on their access should be prescribed in secondary legislation. Determining these settings is a significant and technically complex task. It may involve listing many kinds of people permitted to access the register. For example, the regulations in Ireland list 23 such categories of people.⁶³ Key stakeholders should ideally be involved in determining who should be included. It is possible that the relevant classes of people will change over time, so access settings should allow some flexibility.⁶⁴ These

⁶³ Assisted Decision-Making (Capacity) Act 2015 (Inspection of Registers and Receipt of Copies of Documents) Regulations 2023 (Ireland), reg 3. See also Decision Support Service *User Guidelines (Terms and conditions) for Accessing and Searching Decision Support Service Arrangement Registers for Approved Persons and Organisations* (effective from August 2024).

⁶⁴ Guidance on creating registry regimes cautions against legislation that is overly prescriptive and becomes inflexible. Settings governed by regulations can be more easily adapted: New Zealand Companies Office *Guidance on creating a registry regime* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2024) at 12. These considerations are also listed in the Legislation Design and Advisory Committee guidelines as examples of subject areas that may be appropriate for secondary legislation: Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [14.1].

considerations are best accommodated through secondary legislation. The administering agency would be best placed to undertake this work.

20.106 Te Mana Mātāpono Matatapu | Privacy Commissioner should be consulted on the development of the secondary legislation to ensure that privacy interests are adequately protected. For example, privacy interests are more likely to be protected when access is provided to occupations and entities that are subject to specific legislative information management or privacy obligations such as the Health Information Privacy Code 2020 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

20.107 We offer some guidance about the classes of people who may need or benefit from access to an EPOA register below.

The donor should have access to their registered information

20.108 Any person should be able to search the register to ascertain whether their EPOA information is on the register and to download any of that information. This is consistent with Information Privacy Principle 6.⁶⁵ A donor should have this access for any purpose because it is their information.

An attorney under an EPOA should have access to registered information about that EPOA

20.109 In appointing a person as their attorney, the donor has established that they trust that person to make decisions for them when the donor has lost relevant decision-making capacity. The attorney has signed the EPOA, so is aware of its contents. Depending on the extent of the information registered, the information may include the attorney's personal information. An attorney under an EPOA should be able to access all the registered information about that EPOA at any time for any purpose.

Certain occupations should have access to registered EPOA information as required

20.110 People in some occupations will sometimes need to know whether a person has created an EPOA. For example:

- (a) Healthcare practitioners may need to search the register to determine whether a patient who has lost or is losing relevant decision-making capacity has appointed a welfare attorney.
- (b) Social workers may need to know if a person has created an EPOA to accurately understand their circumstances. One submitter explained how social workers in hospital settings prepare discharge plans for patients, including patients with affected decision making. Knowing whether the person has attorneys for welfare and property matters would assist their planning.
- (c) Lawyers who are asked by a client to help them create an EPOA may need to search the register to determine whether an EPOA has already been created for that particular client.
- (d) Providers of residential care for people who have lost relevant decision-making capacity may need to search the register to determine whether that person has

⁶⁵ Privacy Act 2020, s 22 IPP6. This principle is that an individual is entitled to receive access to their personal information from an agency upon request.

appointed a welfare attorney to authorise care or a property attorney to authorise payment for their accommodation.

- (e) Registered banks or accountants may need to search the register to determine whether a property EPOA has been created for a customer or client who has lost relevant decision-making capacity.

Courts should have access to registered EPOA information

20.111 When the Family Court receives an application for a court-appointed representative, it may need to access registered EPOA information to determine whether the person in respect of whom an application has been made has previously appointed either a property attorney or a welfare attorney.

People who can apply to the Family Court for court-ordered arrangements would benefit from access to registered EPOA information

20.112 People with standing to make an application for a court-ordered arrangement as of right would benefit from access to any registered EPOA information in relation to the relevant donor because that information could help to determine whether the application is necessary.⁶⁶ Avoiding unnecessary court processes is a clear advantage of an EPOA register.

20.113 However, the list of people with standing as of right to apply for a court-ordered arrangement is very broad, including relatives of the person for whom decisions are sought.⁶⁷ Authorising this list of people to access registered EPOA information might contravene a donor's wishes or any attorney's wishes (where personal information relating to them is included in the register). In some situations, it could raise safety concerns — for example, if a donor or attorney's address is disclosed to a disaffected relative. Practical difficulties may also arise. For example, it may prove difficult to determine, in a cost-effective manner, whether a person wanting to view registered information of a donor is their relative.

20.114 For these reasons, secondary legislation must weigh the interests of those who might bring a Family Court application against donors' and attorneys' privacy interests and administrative considerations.

Public sector agencies should have access to registered EPOA information for law enforcement purposes

20.115 Agencies involved in law enforcement should be able to search the register for a purpose that relates to the maintenance of the law (including the prevention, detection, investigation, prosecution and punishment of offences).⁶⁸ For example, a law enforcement agency may benefit from knowing the identity of a donor's property attorney to investigate financial abuse.

⁶⁶ See Protection of Personal and Property Rights Act 1988, ss 7 and 26. We have not recommended any changes to those lists of qualified people.

⁶⁷ Protection of Personal and Property Rights Act 1988, s 7(a).

⁶⁸ Compare Personal Property Securities Act 1999, s 173(h).

Access settings we do not recommend

- 20.116 We have considered whether donors should be able to nominate people to have access to their registered information. We also considered whether the government entity responsible for administering the register could evaluate applications to view registered information where a person does not otherwise qualify.⁶⁹ To perform this function, the entity would require powers to permit or deny access to registered information.
- 20.117 The main reason we do not recommend these options concerns their practicability. While these options could be useful components of an EPOA register's access settings, they may be expensive to administer. Allowing one-off applications to view registered information would add ongoing costs to manage and determine those requests. Allowing donors to nominate anyone they like to view their information could also become costly to manage. If a donor with registered EPOA information wants someone who does not fall into another access category to know about their EPOA, they can arrange this directly.

FUNDING A PUBLIC REGISTER

- 20.118 A new register will incur establishment costs and ongoing costs for its administration.⁷⁰ There are two options for funding — Crown funding and cost recovery through user-pays fees. Under the Crown funding option, there would be no fee for registering EPOA information, deregistering EPOA information or searching the register. The costs to establish, maintain and administer the register would be funded from general taxation. Under a user-pays option, the register would be funded or part-funded from a fee for registering or deregistering information or for searching the register.
- 20.119 Government guidelines for setting charges explain that a relevant consideration when determining the approach that should be taken is the extent to which a service delivers private benefits and/or public benefits.⁷¹ Quantification of these benefits and how they relate to a funding model is beyond our expertise. We therefore make no recommendations with respect to funding. However, we identify below some relevant considerations.
- 20.120 Registration of EPOA information has the following private benefits:
- (a) Donors would receive greater certainty that their wishes and values will inform decisions about them after they have lost capacity.
 - (b) A register would help avoid unnecessary duplication of EPOAs before a donor has lost decision-making capacity. Registration of EPOA information would assist donors who forget about or cannot locate an EPOA created years earlier. This benefit would also avoid confusion caused by multiple EPOAs existing for a donor.⁷²

⁶⁹ This option exists in Ireland. See *Assisted Decision-Making (Capacity) Act 2015 (Ireland)*, ss 25(3)(b), 45(3)(b) and 72(3)(b).

⁷⁰ *New Zealand Companies Office Guidance on creating a registry regime* (Hikina Whakatutuki | Ministry of Business, Innovation and Employment, May 2024) at 10.

⁷¹ See *Te Tai Ōhanga | The Treasury Guidelines for Setting Charges in the Public Sector* (April 2017) at 18–19.

⁷² The *Protection of Personal and Property Rights Act 1988* requires attorneys to be notified if a new EPOA is created stating that it revokes an earlier EPOA of the same kind: s 95A. The EPOA continues in effect until notice is given. This

- (c) A register would help avoid unnecessary court processes after a donor has lost decision-making capacity for relevant decisions. If an EPOA can be found and the attorney located using information on the register, a court-ordered arrangement may not be required.

20.121 Registration also has public benefits:

- (a) It would result in better use of public resources. Commonly, it is healthcare professionals and staff at residential care facilities that spend time trying to locate an EPOA after a person has lost capacity. A register would be their first port of call for such a search. That improved efficiency would represent a better use of public funds, given healthcare professionals and care facilities are usually publicly funded or partly publicly funded.
- (b) It would reduce pressure on the Family Court. Enabling the efficient identification of the existence and location of EPOA information after a donor has lost relevant decision-making capacity will avoid the need to apply to the courts for a court-ordered arrangement.

20.122 A further consideration is the impact that a fee would likely have on the rates of registration of EPOA information. In Chapter 19, we describe submitters' concerns that the cost of creating an EPOA already inhibits the creation of them for some people. One submitter considered this as an equity issue — those people who can afford to create an EPOA have more autonomy because they can choose their representative decision maker. The greater the cost of registration the more likely it is to inhibit the registration of EPOAs for some people and further exacerbate that equity concern.

does not prevent multiple EPOAs being in circulation and causing confusion even if only one is effective. A few submitters explained the difficulty of ascertaining whether the EPOA produced is the current one. The Law Association of New Zealand said it would help with identifying the valid EPOA if donors can easily update the register upon revoking an EPOA. Bank of New Zealand supported an EPOA register providing a “source of truth”.

CHAPTER 21

Advance directives and other statements of wishes

IN THIS CHAPTER, WE CONSIDER:

- how advance directives should relate to decision making by representatives and the Family Court; and
- whether a new Act should provide for other statements of wishes.

INTRODUCTION

- 21.1 An advance directive is a statement recording a person's decision(s) in relation to potential future medical treatment in case they lose decision-making capacity for those decisions later on. An advance directive becomes relevant if the person subsequently loses their decision-making capacity with respect to a relevant matter and healthcare professionals need to make a treatment decision.
- 21.2 The right to make future decisions through an advance directive is generally understood as an extension of the principle that autonomous decisions about people's own healthcare should be respected.¹ Advance directives also help operationalise the right to refuse consent to treatment.²
- 21.3 The issue of when an advance directive should be followed raises difficult ethical questions.³ 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 may not represent their current wishes.

¹ See Iris Reuecamp "Advance Decision-Making about Personal Care and Welfare" in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at 209.

² New Zealand Bill of Rights Act 1990, s 11.

³ See for example Alasdair R Maclean "Advance Directives, Future Selves and Decision-Making" (2006) 14(3) *Med Law Rev* 291; Sam McMullan "Advance Directive" (2010) 6 *NZFLJ* 359 at 360; and Raanan Gillon "Why I wrote my advance decision to refuse life-prolonging treatment: and why the law on sanctity of life remains problematic" (2016) 42(6) *J Med Ethics* 376.

- 21.4 For advance directives to operate alongside decision making by representatives and the Family Court under a new Act, 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 healthcare professional who makes the relevant treatment decision. On that basis, we recommend in this chapter that such decisions should be outside the scope of decision making by representatives and the Family Court under a new Act.
- 21.5 We also discuss in this chapter whether statements of wishes other than advance directives should be covered by a new Act. We conclude that it is neither necessary nor desirable for an Act to include express provisions on this and that the decision-making rules we recommend in Chapter 12 are sufficient.

ADVANCE DIRECTIVES

Current law

General law on advance directives

- 21.6 In Aotearoa New Zealand, the law on the creation and legal consequences of advance directives is found in case law rather than legislation. However, the Code of Health and Disability Services Consumers' Rights (HDC Code), which is binding on providers of healthcare or disability services, affirms the right to make advance directives. It states that "[e]very consumer may use an advance directive in accordance with the common law".⁴
- 21.7 The HDC Code defines an advance directive as:⁵
- a written or oral directive—
 - (a) by which a consumer makes a choice about a possible future health care procedure; and
 - (b) that is intended to be effective only when he or she is not competent.
- 21.8 As originally conceived at common law, advance directives concerned decisions to refuse medical treatment.⁶ The HDC Code, on the other hand, specifies that advance directives can relate to either refusing or *receiving* treatment.⁷ In practice, the ambit of advance directives to receive treatment is limited despite the wording of the HDC Code. No person can require a healthcare professional to provide treatment that is unavailable or not

⁴ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 2 right 7(5).

⁵ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 4 definition of "advance directive".

⁶ See for example *Re T (Adult Refusal of Medical Treatment)* [1992] 4 All ER 649 (EWCA) at 664–665 per Lord Donaldson MR; and *R (Burke) v General Medical Council (Official Solicitor and others intervening)* [2005] EWCA Civ 1003, [2006] QB 273 at [31]–[32].

⁷ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch reg 4 definition of "choice".

clinically indicated.⁸ Accordingly, “an advance directive to receive services does not entitle a person to demand the receipt of those services in the future”.⁹ It may nevertheless help to express the person’s preference where there are multiple options for clinically indicated treatment.¹⁰

- 21.9 Case law on advance directives from New Zealand courts is sparse. We are aware of only three cases that discuss advance directives substantively, all in te Kōti Matua | High Court.¹¹ These cases do not traverse all matters relevant to advance directives. Two relate to the validity of advance directives made by prisoners on hunger strikes, while one confirms that compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 overrides a refusal of such treatment in an advance directive.¹²
- 21.10 To understand the position of advance directives at common law in Aotearoa New Zealand, it is therefore necessary to also look to common law cases from other jurisdictions. Case law from the United Kingdom (UK) is particularly relevant, because the New Zealand High Court has so far relied on UK decisions about advance directives.
- 21.11 We give an overview of relevant case law below.

When is an advance directive valid and applicable?

- 21.12 In *Chief Executive of the Department of Corrections v Shaw* — the second of the two New Zealand hunger strike cases — the High Court decided that Mr Shaw’s declaration refusing medical treatment was valid because:¹³
- (a) Mr Shaw had the decision-making capacity to make an advance directive;
 - (b) he had “accurate and sufficient information” about the decision; and
 - (c) he was “aware of the common and severe consequences” of his decision.

⁸ *R (Burke) v General Medical Council (Official Solicitor and others intervening)* [2005] EWCA Civ 1003, [2006] QB 273 at [31]–[32] and [50]. The UK Supreme Court endorsed this view in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591 at [18]. See also Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 356.

⁹ Iris Reuecamp “Advance Decision-Making about Personal Care and Welfare” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at 211. See also Law Commission (England and Wales) *Mental Incapacity* (Law Com No 231, 1995) at [5.12], where the Law Commission saw no need to recommend extending advance decisions beyond refusals of treatment.

¹⁰ See Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 355. In the absence of an advance directive consenting to a certain treatment, the responsible healthcare professional may still treat patients who cannot give consent to the treatment if it is in their best interest: Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch reg 2 right 7(4). See also *F v West Berkshire Health Authority* [1990] 2 AC 1 (HL).

¹¹ *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433, [2014] 3 NZLR 404; *Gordon v Attorney-General* [2023] NZHC 2332, [2023] NZFLR 190; and *Chief Executive of the Department of Corrections v Shaw* [2024] NZHC 2976.

¹² The Mental Health Bill 2024 (87-2) proposes to establish “advance mental health directives” through which a person can, among other things, specify methods of care to improve mental health they consent to or do not consent to: cls 12–15.

¹³ *Chief Executive of the Department of Corrections v Shaw* [2024] NZHC 2976 at [46]. See also Iris Reuecamp “Advance Decision-Making about Personal Care and Welfare” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at 212–215.

- 21.13 These criteria are consistent with older case law from UK courts, although the law on advance directives has now been codified there by the Mental Capacity Act 2005 and the accompanying Code of Practice.¹⁴ At common law, the following three conditions must be met to establish the validity of an advance directive:¹⁵
- (a) The person had decision-making capacity when making the directive.
 - (b) The person was not pressured by other people into making the directive.
 - (c) The person has received sufficient information about the issues or choices involved.¹⁶
- 21.14 To be given effect, the advance directive must also be applicable to the situation at hand. At common law, an advance directive is not applicable if:¹⁷
- (a) it is based on incorrect information;
 - (b) its meaning is unclear; or
 - (c) there is uncertainty whether the advance directive applies to the situation at hand, including where it is unclear that the advance directive still reflects the person's current wishes.¹⁸
- 21.15 The burden of proof is on those who seek to establish the existence and continuing validity and applicability of an advance directive.¹⁹ In doubt, life must be preserved.²⁰

What is the legal consequence of a valid and applicable advance directive?

- 21.16 An advance directive, if valid and applicable, must be treated by healthcare professionals as a decision of the patient as if the patient still had the decision-making capacity to make the decision.²¹

¹⁴ See Department for Constitutional Affairs and Department of Health *Explanatory Notes to the Mental Capacity Act 2005* at [84]; and Department for Constitutional Affairs *Mental Capacity Act 2005: Code of Practice* (April 2007) at ch 9. This codification was prompted by recommendations from the Law Commission of England and Wales: Law Commission (England and Wales) *Mental Incapacity* (Law Com No 231, 1995) at pt 5.

¹⁵ See for example *Re T (adult: refusal of medical treatment)* [1993] Fam 95, [1992] 4 All ER 649; *Re B (adult: refusal of medical treatment)* [2002] EWHC 429 (Fam), [2002] 2 All ER 449; *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408; and *NHS Trust v T (adult patient: refusal of medical treatment)* [2004] EWHC 1279 (Fam), [2005] 1 All ER 387.

¹⁶ This third requirement is particularly contentious and overlaps with the question of applicability. See Iris Reuevecamp "Advance Decision-Making about Personal Care and Welfare" in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at 213–215.

¹⁷ *Re T (adult: refusal of medical treatment)* [1993] Fam 95, [1992] 4 All ER 649 at 664 per Lord Donaldson MR and 668 per Butler-Sloss LJ; *W Healthcare NHS Trust v KH* [2004] EWCA Civ 1324, [2005] 1 WLR 834 at [21]; and *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408 at [49]. See also Iris Reuevecamp "Advance Decision-Making about Personal Care and Welfare" in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at 215–217. Compare Alison Douglass, Greg Young and John McMillan *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) at 359, who discuss similar matters under the heading of "validity" rather than "applicability".

¹⁸ *Re AK (Medical Treatment: Consent)* [2001] 1 FLR 129 at 134.

¹⁹ *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408 at [23] and [42].

²⁰ *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408 at [50].

²¹ *Re T (adult: refusal of medical treatment)* [1993] Fam 95, [1992] 4 All ER 649 at 653.

- 21.17 The codification of the law on advance decisions in England and Wales has expressly adopted this understanding.²² It excuses a healthcare professional from providing treatment where they would otherwise have a duty to provide it.
- 21.18 Providing treatment contrary to a valid and applicable advance directive is unlawful and may result in criminal liability.²³

Advance directives and the PPPR Act

- 21.19 The Protection of Personal and Property Rights Act 1988 (PPPR Act) refers to advance directives in one section only — section 99A, headed “Attorney’s duty to consult”. This section requires an attorney acting under an enduring power of attorney (EPOA) to consult as far as is practicable with various people, including the donor and any other appointed attorney. With respect to advance directives, section 99A provides that:
- (a) subject to any consultation, a welfare attorney “may ... have regard to any advance directive given by the donor”;²⁴
 - (b) an attorney “may follow” any advance directive given by the donor and is not liable for anything done or omitted in accordance with an advance directive unless they have acted in bad faith or without reasonable care;²⁵ and
 - (c) an attorney may apply to a court for directions in respect of any advance directive given by the donor.²⁶
- 21.20 Section 99A was inserted into the PPPR Act by the Protection of Personal and Property Rights Amendment Act 2007.²⁷ The references to advance directives were added at the select committee stage, and legislative materials do not explain the reason for these additions.²⁸
- 21.21 The PPPR Act does not include any equivalent provisions with respect to welfare guardians.²⁹ Nor does the PPPR Act address how advance directives relate to the ability of te Kōti Whānau | Family Court to make court-ordered decisions.

²² Mental Capacity Act 2005 (UK), s 26(1). See also PDG Skegg “The End of Life” in PDG Skegg and R Paterson (eds) *Health Law in New Zealand* (online ed, Thomson Reuters) at [21.4.3(4)].

²³ See generally PDG Skegg “Consent to Treatment: Introduction” in PDG Skegg and R Paterson (eds) *Health Law in New Zealand* (online ed, Thomson Reuters) at [6.2].

²⁴ Protection of Personal and Property Rights Act 1988, s 99A(2).

²⁵ Protection of Personal and Property Rights Act 1988, s 99A(3).

²⁶ Protection of Personal and Property Rights Act 1988, s 99A(4).

²⁷ Protection of Personal and Property Rights Amendment Act 2007, s 14.

²⁸ (11 September 2007) 642 NZPD 11750–11763; (12 September 2007) 642 NZPD 11818–11826; and (18 September 2007) 642 NZPD 11970–11982.

²⁹ With respect to liability, welfare guardians are also protected from liability by virtue of a more general provision, which covers anything done or omitted in their capacity as a welfare guardian: Protection of Personal and Property Rights Act 1988, s 20.

Overseas approaches

General law on advance directives

- 21.22 Most overseas jurisdictions that we have investigated have enacted legislation on advance directives (or equivalent concepts).³⁰ In some of them, legislation on advance directives has been enacted but the common law is expressly preserved and continues to operate in parallel.³¹
- 21.23 In overseas legislation we have considered, provisions on advance directives only apply to refusing consent to specific medical treatment. Some statutes state that an advance directive consenting to, rather than refusing, treatment is not binding.³²
- 21.24 The Mental Capacity Act 2005 (UK) states that validity and applicability are the main criteria that must be met for an advance decision to have effect.³³ Broadly, the statutory requirements mirror the requirements at common law outlined above.³⁴ In addition, the Act provides that, if an advance decision is to refuse life-sustaining treatment, the decision must be in writing and signed in the presence of a witness to be applicable.³⁵

Relationship between advance directives and representative decision making

- 21.25 Some overseas legislation stipulates how advance directives relate to the decision-making powers of a representative. Most give priority to a valid and applicable advance directive over any contrary views of representatives.³⁶
- 21.26 Laws in Northern Territory, Queensland, Tasmania, England and Wales, and Ireland clarify that decisions covered by a valid and applicable advance directive are out of scope of representative decision making. Each states that an advance directive acts as if a current healthcare decision was made by a fully informed adult with the required decision-making capacity.³⁷ For example, legislation in England and Wales states that a valid and applicable

³⁰ Medical Treatment (Health Directions) Act 2006 (ACT); Mental Health Act 2015 (ACT), pt 3.3; Advance Personal Planning Act 2013 (NT); Guardianship and Administration Act 2000 (Qld), ch 3; Powers of Attorney Act 1998 (Qld), ss 35–36; Advance Care Directives Act 2013 (SA); Guardianship and Administration Act 1995 (Tas), pt 5A; Medical Treatment Planning and Decisions Act 2016 (Vic), pt 2; Guardianship and Administration Act 1990 (WA), pt 9B; Mental Capacity Act 2005 (UK), ss 25–26; Assisted Decision-Making (Capacity) Act 2015 (Ireland), pt 8; Personal Directives Act RSA 2000 c P-6 (Alberta), pt 2; and Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 19.

³¹ Powers of Attorney Act 1998 (Qld), s 39; Guardianship and Administration Act 1995 (Tas), s 35ZL; Medical Treatment Planning and Decisions Act 2016 (Vic), s 10; and Guardianship and Administration Act 1990 (WA), s 110ZB.

³² Advance Care Directives Act 2013 (SA), s 19; Guardianship and Administration Act 1995 (Tas), s 35M; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 84(3).

³³ Mental Capacity Act 2005 (UK), s 25(1). See also *X (Primary Care Trust) v XB* [2012] EWHC 1390 (Fam); and *NHS Cumbria CCG v Rushton* [2018] EWCOP 41 at [13]–[25].

³⁴ Mental Capacity Act 2005 (UK), s 25(3)–(4).

³⁵ Mental Capacity Act 2005 (UK), s 25(6).

³⁶ Health Care Decision Making Act 2023 (NT), s 19; Guardianship and Administration Act 2000 (Qld), ss 65(2) and 66(2); Powers of Attorney Act 1998 (Qld), s 35(3); Guardianship and Administration Act 1995 (Tas), s 35ZE; Guardianship and Administration Act 2019 (Vic), s 41(2), in connection with Medical Treatment Planning and Decisions Act 2016 (Vic), ss 60–61; Guardianship and Administration Act 1990 (WA), s 110ZJ; Mental Capacity Act 2005 (UK), s 26(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 86(1); and Personal Directives Act SNS 2008 c 8 (Nova Scotia), s 15(2)(a).

³⁷ Health Care Decision Making Act 2023 (NT), s 19; Powers of Attorney Act 1998 (Qld), s 36(1)(b); Guardianship and Administration Act 1995 (Tas), s 35Q(2); Mental Capacity Act 2005 (UK), s 26(1); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 86(1).

advance decision “has effect as if [the person] had made it, and had had capacity to make it, ... when the question arises whether the treatment should be carried out or continued”.³⁸

- 21.27 In Queensland, “[a] direction in an advance health directive has priority over a general or specific power for health matters given to any attorney”, but there are limited circumstances where life-saving treatment can be refused through an advance health directive.³⁹ In Alberta, a decision maker has no authority to make a healthcare decision in respect of which the adult has made a personal directive.⁴⁰
- 21.28 Some jurisdictions give representatives more discretion to override an advance directive than those discussed above — for example, if it is “not reasonable” or not “reasonably practical” to act consistently with a directive.⁴¹ The New Brunswick Supported Decision-Making and Representation Act states that a healthcare directive “shall be considered along with other expressions of the person’s wishes and preferences”.⁴²
- 21.29 Of the legislation in other jurisdictions we considered, only New Brunswick’s statute concerning EPOAs gives priority to decisions made by a healthcare attorney over a healthcare directive.⁴³

Issues

The law on advance directives is unclear

- 21.30 As we explain above, the common law governs advance directives in Aotearoa New Zealand. However, the limited amount of case law means there is uncertainty about the requirements for making a valid advance directive and under what circumstances healthcare professionals must follow it.
- 21.31 In response to the Second Issues Paper, some submitters suggested that we should make recommendations to reform the law of advance directives beyond the confines of the PPPR Act, including through codifying the law. However, proper consideration of the issues with advance directives would require careful engagement with health law, the practical operation of the healthcare system and issues of medical ethics concerning specific proposals for reform. We have not been in a position to do this and do not consider it appropriate to make specific recommendations for reform of the law on advance directives as a whole in this Report.
- 21.32 Rather, our focus here is on how advance directives should relate to decision making by representatives and the Family Court under a new Act.

³⁸ Mental Capacity Act 2005 (UK), s 26(1).

³⁹ Powers of Attorney Act 1998 (Qld), ss 35(3) and 36(2).

⁴⁰ Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 88(1). Although this is subject to regulations, the regulations do not affect the precedence of a personal directive: Adult Guardianship and Trusteeship Regulation Alta Reg 219/2009 (Alberta); and Adult Guardianship and Trusteeship (Ministerial) Regulation Alta Reg 224/2009 (Alberta).

⁴¹ Medical Treatment (Health Directions) Act 2006 (ACT), s 18; Advance Care Directives Act 2013 (SA), s 35; and Guardianship and Administration Act 1993 (SA), s 31A.

⁴² Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 44(3).

⁴³ Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 20.

PPPR Act references to advance directives are unclear and anomalous

- 21.33 As we note above, section 99A of the PPPR Act states that attorneys under an EPOA may “have regard to” advance directives (subject to their general consultation obligations) and “may follow” an advance directive. These statements are unclear and give rise to anomalies.
- 21.34 First, it is unclear how an attorney’s ability to give effect to an advance directive relates to the statutory restrictions on attorneys’ decision making, including the provision on refusing standard life-saving medical treatment. As the High Court observed in obiter in *Gordon v Attorney-General*:⁴⁴
- There is an ambiguity in the provisions on how the Attorney will deal with the existence of an advance directive. Section 18(1)(c) of the PPPR Act provides that Attorneys *shall not* have the power to refuse to consent to life-saving medical treatment. However, s 99A(2) states that the Attorney *may have regard* to any advance directive given and in s 99A(3) that they *may follow* the advance directive. Attorneys therefore may have regard to advance directives but only to the extent their actions are not inconsistent with s 18, which expressly limits the Attorney’s power.
- 21.35 Second, commentary has suggested that the permissive language of section 99A — that an attorney *may* follow an advance directive — is in tension with the obligations on attorneys. Iris Reuvecamp has stated that:⁴⁵
- Section 98A(2) of the [PPPR Act] says that the paramount consideration of the attorney is to promote and protect the welfare and best interests of the donor while seeking at all times to encourage the donor to develop and exercise their capacity. It seems, therefore, that the [attorney under an EPOA] should generally follow any advance directive issued by the donor, because following it would promote the “welfare and best interests” of the donor (of which the donor is the best judge), and because it would respect the donor’s earlier exercise of their capacity in issuing the advance directive.
- 21.36 A 2014 review recommended amending the PPPR Act “so that it is clear to attorneys that they cannot act contrary to a donor’s advance directive”.⁴⁶
- 21.37 Third, while section 99A provides that attorneys may have regard to advance directives, no such provision exists for welfare guardians. It is unclear whether this different treatment is intentional. As outlined above, the core decision-making principles under the PPPR Act are otherwise the same for welfare guardians and attorneys. It is also unclear whether and how the Family Court should take advance directives into account when issuing personal orders under the PPPR Act.

⁴⁴ *Gordon v Attorney-General* [2023] NZHC 2332, [2023] NZFLR 190 at [145].

⁴⁵ Iris Reuvecamp “Advance Decision-Making about Personal Care and Welfare” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 209 at 221.

⁴⁶ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (Te Manatū Whakahiato Ora | Ministry of Social Development, June 2014) at 14.

Should a decision covered by a valid and applicable advance directive be excluded from decision making by representatives and the Family Court?

- 21.38 A more fundamental question is whether attorneys, court-appointed representatives or the Family Court are authorised to overrule a person’s decision they have stated in a valid and applicable advance directive. The PPPR is unclear on this point.
- 21.39 Section 99A appears to be enacted on the assumption that a decision covered by a valid and applicable advance directive may sometimes be overruled by an attorney acting under an EPOA. Otherwise, it would not make sense for the provision to state that an attorney “may ... have regard” to an advance directive.
- 21.40 However, this position is inconsistent with the common law. As we explain above, the current position at common law is that a decision stated in a valid and applicable advance directive is to be treated as a valid decision of the person who made it, as if it had been made at the time when the question arises whether treatment should be carried out or continued.⁴⁷ The decision is addressed at the health professional tasked with making the decision whether treatment should be carried out or continued. This position was made express in the Mental Capacity Act 2005 (UK).⁴⁸ It is also the approach of legislation in other jurisdictions we investigated.⁴⁹
- 21.41 It is desirable to clarify the position in a new Act.

Consultation

Whether representatives should be able to consider advance directives

- 21.42 We asked submitters whether court-appointed representatives and attorneys should be able to act on advance directives. Thirty-eight submitters addressed this matter. Most of them submitted that court-appointed representatives and attorneys should be able to consider advance directives when making decisions for represented people.
- 21.43 Some legal practitioners who informed the submission of Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and one other submitter disagreed. They considered that advance directives should always take precedence over decisions made by court-appointed representatives or attorneys rather than merely being taken into account. Iris Reuvecamp and Te Whatu Ora | Health New Zealand submitted that the view of the relevant healthcare care professional on whether to act on an advance directive should prevail over any contrary views of a court-appointed representative or attorney.

Whether provisions for court-appointed representatives and attorneys should be the same

- 21.44 We also asked whether the statutory requirements for representatives and attorneys should be the same. Thirty-five submitters gave feedback on this matter. Almost all of them thought that the statutory requirements to consider advance directives should be the same for court-appointed representatives and attorneys.

⁴⁷ *Re T (adult: refusal of medical treatment)* [1993] Fam 95, [1992] 4 All ER 649 at 653.

⁴⁸ Mental Capacity Act 2005 (UK), s 26(1).

⁴⁹ Health Care Decision Making Act 2023 (NT), s 19; Powers of Attorney Act 1998 (Qld), s 36(1)(b); Guardianship and Administration Act 1995 (Tas), s 35Q(2); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 86(1).

When representatives should not follow advance directives

- 21.45 We asked submitters how a court-appointed representative or attorney should take account of an advance directive, if they are able to act on them. In particular, we asked if there could be times when a court-appointed representative or attorney should not follow an advance directive.
- 21.46 Forty-one submitters addressed this matter. Almost all of them agreed that there could be times when a court-appointed representative or attorney should not follow an advance directive. There was a range of views on when exactly a court-appointed representative or attorney should depart from an advance directive:
- (a) Some submitters said a court-appointed representative or attorney should depart from an advance directive wherever the will and preferences of the person differ from the advance directive.
 - (b) Most submitters considered that a slightly higher threshold should apply, along the lines that an advance directive should only be departed from if the relevant circumstances have changed significantly. Multiple submitters gave the example of a new medical procedure becoming available after the advance directive was created.
 - (c) Other submitters said a court-appointed representative or attorney should only depart from an advance directive in “exceptional circumstances”.
 - (d) The highest threshold, suggested by two submitters, was that a court-appointed representative or attorney should only depart from an advance directive if they have reasonable doubts that the advance directive was validly made. Examples given were that the person did not have relevant decision-making capacity at the time of creating the advance directive or that it was made under duress from family members.
- 21.47 Some legal practitioners who informed the NZLS’s submission considered that only the relevant healthcare professionals — not a court-appointed representative or attorney — should be the person to decide whether to follow an advance directive. Iris Reuevecamp and Health New Zealand shared this view. Two other submitters said a healthcare professional should at least be consulted.

Whether more legislative guidance is needed

- 21.48 We also asked submitters whether a new Act should give more guidance on when representatives and attorneys may choose not to follow or must follow an advance directive. Thirty submitters gave feedback on this issue.
- 21.49 Most of these submitters said a new Act should provide more guidance on when a representative may choose not to follow or must follow an advance directive. The main reasons given were that determining how an advance directive relates to a person’s will and preferences is a complex and important task and that the PPPR Act currently provides little guidance. Some submitters said setting out examples would be most helpful. Two submitters said further legislative guidance was not necessary.

Recommendations

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:

- a. te Kōti Whānau | Family Court;
- b. court-appointed representatives; and
- c. 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.

Decisions in advance directives should be excluded from decision making by representatives and the Family Court

21.50 In our view, a decision about medical treatment that is covered by a valid and applicable advance directive should be treated as already having been made by the relevant person. As we explain above, while New Zealand case law is scarce, this appears to be the position at common law. However, this position is confused by the current wording in section 99A of the PPPR Act. We recommend that a new Act clarify that decisions covered by valid and applicable advance directives lie outside the scope of decision making by representatives or by the Family Court (court-ordered decisions). This approach reflects that taken in several other jurisdictions.

21.51 On our recommended approach, the common law on the validity and applicability of an advance directive would determine both:

- (a) whether a health practitioner must follow an advance directive; and
- (b) whether a decision is out of scope of representative decision making under a new Act.

21.52 Removing decisions covered by valid and applicable advance directives from the scope of representative decision making best protects and promotes the equality, dignity and autonomy of people who lack decision-making capacity for medical treatment decisions. Making an advance directive is an exercise of autonomy. Giving effect to a valid and applicable advance directive when a person lacks relevant decision-making capacity treats the person's decision on an equal basis with others, upholding their dignity.

21.53 Our recommended approach is consistent with our recommended decision-making rules. As we explain in Chapter 12, a representative should not make a decision for a person where that person has decision-making capacity to make the decision themselves.⁵⁰ Consistent with that rule, a representative should not make decisions that the relevant person has already made by way of a valid and applicable advance directive.

⁵⁰ We recommend limited exceptions for when the represented person cannot practicably make the decision or the represented person wants the representative to make the decision. See Chapter 12.

- 21.54 We agree with submitters that the statutory provisions with respect to advance directives should be the same for both court-appointed representatives and attorneys. Further, we consider the same approach should apply to courts. We have not found good reasons to treat any type of decision making on behalf of a person, whether by representatives or by the Family Court, differently.
- 21.55 Our recommended approach means that we do not need to address whether and when a decision maker may decide not to follow an advance directive (as we asked submitters). Decisions covered by a valid and applicable advance directive would simply be out of scope.
- 21.56 Many of the situations in which submitters thought representatives should be able to deviate from an advance directive (as summarised above) would be covered by the common law on the validity and applicability of advance directives. For example, an advance directive is not valid if it was made under duress or when the person did not have the required decision-making capacity. An advance directive is also unlikely to apply where relevant circumstances have changed significantly since the advance directive was made. This includes situations where the advance directive is no longer consistent with the person's wishes and values.
- 21.57 On our recommended approach, where an advance directive is not valid or applicable, the decision could be made by the relevant decision maker — whether the Family Court, a court-appointed representative or an attorney acting under an EPOA. In accordance with the common law position, it would be for the relevant healthcare professional to determine whether an advance directive is valid and applicable. We acknowledge that the criteria for validity and applicability at common law are currently not easily accessible to healthcare professionals. However, this issue can only be resolved in the process of codifying the law on advance directives and cannot be part of this review of the PPPR Act. We explain this point later in this chapter.

Decision makers should be able to take account of an advance directive in other decisions

- 21.58 Our recommended approach would not prevent the Family Court, a court-appointed representative or an attorney from taking an advance directive into account when making decisions for the represented person on matters to which the advance directive does not apply. The decision-making rules for a new Act that we recommend in Chapter 12 would allow decision makers to consider an advance directive alongside other sources for determining a person's wishes and values.
- 21.59 For example, an advance directive refusing life-saving treatment may be relevant to a representative's decision on whether the person's wishes and values are to remain in hospital while receiving palliative care or to receive that care in their home.

A specific review of the law on advance directives is required

- 21.60 As we note above, the common law on advance directives provides that, in order to bind healthcare professionals, an advance directive must be both valid and applicable. This provides important safeguards. However, because the New Zealand case law on advance directives is so sparse, the criteria for these safeguards are uncertain.
- 21.61 Only one New Zealand case covers the validity criteria, and none cover the applicability criteria. As a result, people must rely on case law from other jurisdictions. To date, New Zealand courts have found the UK case law most relevant. The law in the UK has now

been codified. The need to refer to overseas case law (particularly case law that has since been replaced by statute law) makes for inaccessible and uncertain law. Multiple commentators have noted the paucity of case law on advance directives.⁵¹

- 21.62 This is why we recommend that the Government review the common law on advance directives in Aotearoa New Zealand. In our view, such a review would entail extensive analysis of other common law jurisdictions that have codified the law on advance directives, engagement (in particular) with healthcare professionals and experts in medical ethics and public consultation.

OTHER STATEMENTS OF WISHES

Current law and practice

- 21.63 Health New Zealand provides an “advance care plan” template that can be used by anyone to note down what is important to them in relation to treatment and care choices. This template includes sections that constitute an advance directive and sections that are other statements of wishes.⁵² We understand that, in addition to making advance directives, people often make such other statements of wishes.
- 21.64 However, the PPPR Act does not provide for statements of wishes outside of advance directives. As a result, the legal effect of such statements is no different than a spoken expression of a person’s wishes — for example, in informal conversations with their attorney.
- 21.65 We consider in this section whether it would be desirable to formalise written statements of wishes in a new Act.

Overseas approaches

- 21.66 Among the jurisdictions we have considered, statements of wishes outside the scope of advance directives are rarely provided for in legislation. Only a few Australian statutes provide for such statements of wishes. All these statutes provide for witnessing requirements.⁵³
- 21.67 South Australia and Tasmania provide for “non-binding provisions” of advance directives that relate to healthcare but are not binding treatment decisions.⁵⁴ A refusal of a particular type of healthcare constitutes a binding provision whereas any other provision is non-binding.⁵⁵ The Tasmanian legislation illustrates what a non-binding provision could look like, stating that it may include a statement on:⁵⁶

(a) what is important to the person regarding any future health care;

⁵¹ See for example Sam McMullan “Advance Directive” (2010) 6 NZFLJ 359 at 365; Hui Yun Chan “Advance Directives refusing treatment: A proposal for New Zealand” (2016) 27 NZULR 38 at 53; and Iris Reuvecamp “Advancing individual autonomy in healthcare decision making — the role of advance directives” [2015] NZLJ 79 at 79–80.

⁵² Te Whatu Ora | Health New Zealand “Advance care planning information for clinicians” <www.myacp.org.nz>.

⁵³ Advance Personal Planning Act 2013 (NT), s 10; Advance Care Directives Act 2013 (SA), s 15; Guardianship and Administration Act 1995 (Tas), ss 35H–35L; and Medical Treatment Planning and Decisions Act 2016 (Vic), s 17.

⁵⁴ Advance Care Directives Act 2013 (SA), s 19; and Guardianship and Administration Act 1995 (Tas), s 35M.

⁵⁵ Advance Care Directives Act 2013 (SA), s 19(1) and (3); and Guardianship and Administration Act 1995 (Tas), s 35M(1) and (3).

⁵⁶ Guardianship and Administration Act 1995 (Tas), s 35M(4).

- (b) what gives the person quality of life;
- (c) what health care outcomes the person regards as acceptable;
- (d) the person's preferred places of care and place to die;
- (e) cultural or religious beliefs which may impact on future health care;
- (f) any other matter that the person wishes to be taken into account in making decisions about their future health care.

- 21.68 Health practitioners (and, in Tasmania, authorised decision makers) must comply with a binding provision whereas they “should, as far as is reasonably practicable” comply with a non-binding provision relating to healthcare.⁵⁷
- 21.69 Victorian legislation is similar. It provides that an “advance care directive” may comprise both a binding “instructional directive” and a non-binding “values directive”.⁵⁸ A health practitioner must give effect to an instructional directive. If there is no instructional directive for the proposed treatment, the person’s “medical treatment decision maker” must make the decision they believe the person would have made if they had capacity. In doing so, they must “first consider any valid and relevant values directive”.⁵⁹
- 21.70 Among the jurisdictions we have considered, Northern Territory is the only one to provide for statements of wishes that are separate from advance directives but binding on decision makers. They are called advance care statements and “set out the adult’s views, wishes and beliefs as the basis on which the adult wants anyone to act if they make decisions for the adult”.⁶⁰ The decisions may be about “all or any aspect of the adult’s care and welfare (including healthcare) and property and financial affairs”.⁶¹ A decision maker must give effect to the advance care statement unless doing so would be impracticable, unlawful, unreasonable or unreasonably burdensome.⁶²

Consultation

- 21.71 In the Second Issues Paper, we discussed the option of providing for formalised but non-binding “statements of wishes” under a new Act for matters that would not be covered by an advance directive.⁶³ We said there might be advantages to referring to such statements in the law. For example, statements of wishes could be used:
- (a) to record things that are important to the person but could easily be overlooked such as whether they would like music to be played in their room;⁶⁴ or
 - (b) to state “what the person wants to happen if they die to help families, whānau or others who were close to the person make decisions at a difficult time”.⁶⁵

⁵⁷ Advance Care Directives Act 2013 (SA), s 36(1); and Guardianship and Administration Act 1995 (Tas), ss 35S–35T.

⁵⁸ Medical Treatment Planning and Decisions Act 2016 (Vic), s 12. The provision gives effect to a recommendation made by the Victorian Law Reform Commission: *Guardianship: Final Report* (VLRC R24, 2012), R134.

⁵⁹ Medical Treatment Planning and Decisions Act 2016 (Vic), ss 60–61.

⁶⁰ Advance Personal Planning Act 2013 (NT), s 8(1)(b).

⁶¹ Advance Personal Planning Act 2013 (NT), s 8(2).

⁶² Advance Personal Planning Act 2013 (NT), ss 22(2) and 23(2).

⁶³ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [15.52]–[15.76].

⁶⁴ Second Issues Paper at [15.53(b)].

⁶⁵ Second Issues Paper at [15.53(b)].

21.72 Against this background, we asked submitters about several issues.

Whether to provide for statements of wishes in a new Act

21.73 We asked whether it would be helpful if a new Act provided for people to make a statement of wishes or referred to these kinds of statements. Forty-six submitters addressed this issue.

21.74 Most of these submitters said it would be helpful. The most common reason given was that recording a statement of wishes would provide useful guidance for representatives or attorneys to determine a person's will and preferences. Some submitters noted that providing for statements of wishes in legislation would help to raise awareness about the importance of documenting one's wishes.

21.75 A few submitters were concerned that providing for or referring to a statement of wishes would "unhelpfully formalise" people's will and preferences, that it may undermine other expressions of will and preferences and that it may blur the boundary between non-binding statements of wishes and binding advance directives.

Possible safeguards against abuse

21.76 We also asked what safeguards (if any) are needed when making a statement of wishes. Twenty-eight submitters gave feedback on this issue. Some of them made suggestions for possible safeguards, including witnessing requirements and decision-making capacity assessments at the time of making a statement, and periodic reviews. Two submitters said the safeguards should be the same as the safeguards that apply to advance directives. One submitter said there should be consequences for pressuring a person into making a statement of wishes.

21.77 Approximately a fifth of the submitters that gave feedback on this matter said that no safeguards should be required for non-binding statements of wishes.

Departing from a statement of wishes

21.78 We asked submitters whether a statement of wishes should always be followed and, if not, in what situations it might be acceptable not to do so.

21.79 Twenty-seven submitters addressed when it should be possible to depart from a statement of wishes. Most said a statement of wishes should *not* always be followed. Three submitters pointed out that a statement of wishes would not be binding, which implies that it should not always be followed.

21.80 Submitters suggested a range of possible thresholds for not following a statement of wishes. The threshold suggested most often was that a statement should not be followed if it is outdated and the circumstances have changed significantly. An example given by submitters was that there may have been advances in medicine since the statement was made. Another suggestion was that a statement should not be followed if the stated wish is contrary to the will and preferences of the person.

21.81 Three submitters pointed out that implementing stated wishes is not always factually possible, either because the wishes are contradictory or because necessary resources are not available.

Reform not desirable

- 21.82 Statements of wishes (written or recorded in another way) can be a helpful tool for people to document their wishes and values. Their use should be encouraged. However, we do not consider statements of wishes should be expressly provided for in legislation. Instead, such statements should be one potential source among many for informing the decisions of the Family Court, court-appointed representatives and attorneys pursuant to the decision-making rules we recommend in Chapter 12.
- 21.83 In consultation, we have heard that the main benefits of providing for statements of wishes in a new Act would be to raise awareness about their usefulness and to provide guidance for decision makers about how to take them into account. In our view, neither of these aims justifies providing for them in legislation.
- 21.84 First, the Legislation Design and Advisory Committee guidelines are clear that legislation should be used only when the policy aim cannot be realised through non-legislative measures.⁶⁶ Legislation is not necessary to raise awareness about the usefulness of statements of wishes.
- 21.85 Second, the decision-making rules that we recommend in Chapter 12 provide an appropriate framework for identifying a person's wishes and values. In particular, they require regard to be had to the person's relevant previous statements and their circumstances. No further legislative guidance is required about statements of wishes specifically. To the extent that guidance would be useful, it could be provided as part of the general guidance on the decision-making rules that we anticipate an oversight body could publish (see Chapter 24).
- 21.86 We acknowledge that providing for statements of wishes in legislation might sometimes be a useful safeguard.⁶⁷ For example, the law could require attorneys and representatives to record reasons for departing from a statement of wishes when they make a decision that is inconsistent with the person's statement of wishes.
- 21.87 However, there are also potential downsides to elevating the status of these kinds of statements above other evidence of wishes and values. First, it would be necessary to provide for safeguards such as witnessing and certification requirements. Such requirements would inevitably come with associated costs. Second, elevating written statements of wishes above other indications of a person's wishes would risk creating an overly complex and potentially arbitrary hierarchy of sources for wishes and values. They may not always accord with cultural practices and could create a chilling effect for informal records of wishes and values.
- 21.88 Most importantly, the decision-making rules we recommend in Chapter 12 would provide a robust framework for decision makers to ascribe the appropriate significance to a written or otherwise recorded statement of wishes. A representative can interpret a statement of wishes with reference to their broader understanding of a person's values and wishes. Relying on the decision-making rules would also avoid any risk of creating an overly complex and potentially arbitrary hierarchy of sources for wishes and values as well as unnecessary costs.

⁶⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 9. See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 177.

⁶⁷ Second Issues Paper at [15.58].

21.89 We therefore do not recommend that a new Act contain additional provisions to formalise statements of wishes.

PART 7:

RELATED AND PROCEDURAL MATTERS



1. This part addresses several matters that are related to the decision-making arrangements addressed in previous parts, along with some procedural matters.
 2. Chapter 22 concerns liability and immunity for representatives and formal supporters. We recommend a general immunity from civil liability for representatives and formal supporters unless they have acted in bad faith or without reasonable care, diligence or skill. We also recommend the general immunity not extend to certain benefits that they may receive in connection with their role.
 3. In Chapter 23, we consider the use of force on people who lack decision-making capacity for the purpose of implementing decisions made by the Family Court or representatives. We also consider the deprivation of liberty of people who lack relevant decision-making capacity and who reside at secure care facilities, hospitals and other care settings. We recommend that the Government specifically review the law relating to the use of force and deprivation of liberty of people who lack decision-making capacity.
 4. Chapter 24 concerns the oversight of representative and formal support arrangements. We recommend that a new Act provide for a range of oversight and support functions, and that they be consolidated in a single agency.
 5. In Chapter 25 we address court processes. We conclude that the Family Court should have jurisdiction under a new Act. We also make several recommendations to improve court processes under a new Act.
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CHAPTER 22

Liability and immunity for representatives and formal supporters

IN THIS CHAPTER, WE CONSIDER:

- when representatives and formal supporters should have immunity from liability for actions or omissions; and
- when representatives should be personally liable for contracts entered into and other liability incurred.

INTRODUCTION

- 22.1 The representative role can be intensive. Our recommended new formal supporter role may be similarly demanding. To encourage people to take on these roles, some form of immunity from civil liability is appropriate. At the same time, represented and supported people should be able to bring legal claims for improper behaviour. To balance these objectives, we recommend that representatives and formal supporters generally have immunity from civil liability for any action or omission in their role, except to the extent they acted in bad faith or without reasonable care, diligence and skill.
- 22.2 However, in order to deter representatives from abusing their role, we recommend the immunity not apply in relation to benefits that representatives or formal supporters receive in their role unless they were acting in accordance with their duties, with the consent of the supported or represented person or with the permission of te Kōti Whānau | Family Court.
- 22.3 We also recommend that a representative be personally liable if they enter into a contract or arrangement with another person, or incur liability, and fail to disclose they are acting as a representative.

CURRENT LAW

- 22.4 The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides that, generally, the actions of a representative are treated as the actions of the person they represent. Third parties can rely on their actions and do not have to inquire into them.¹ This means that, usually, where liability is incurred because of a representative's actions, third parties will be able to sue the represented person for those actions. We do not review these rules.
- 22.5 The PPPR Act has various rules relating to the liability and immunity of representatives, which may be relevant where a represented person or a third party makes a claim against a representative. The rules vary as between different types of representatives. Equitable obligations are also relevant.

General immunity for actions undertaken in good faith and with reasonable care

- 22.6 A civil claim cannot be brought against either a welfare guardian or a property manager in respect of the exercise of powers conferred by the PPPR Act unless it is shown they acted "in bad faith or without reasonable care".²
- 22.7 There is no comparable provision for an attorney under an enduring power of attorney (EPOA).

Immunities in the context of following advice or directions

- 22.8 Both property managers and attorneys have civil immunity that applies in the context of their duties to consult. Where a property manager or an attorney is following the advice of any person with whom they have an obligation to consult (including the represented person or donor), they cannot be held liable unless they were acting "in bad faith or without reasonable care".³
- 22.9 For attorneys, this immunity extends to situations where they have regard to an advance directive given by the donor.⁴ The PPPR Act also provides that attorneys and property managers cannot be held liable for following directions from the Family Court.⁵
- 22.10 There are no comparable provisions for welfare guardians.

Liability when failing to disclose certain actions taken in a representative capacity

- 22.11 A welfare guardian or property manager is personally liable in respect of any contract or arrangement entered into or liability incurred if they failed to disclose to the third party that they were acting as a representative before entering into the contract or arrangement or incurring the liability.⁶

¹ Protection of Personal and Property Rights Act 1988, ss 19, 44 and 103B. There is an exception to this general rule if a welfare guardian or property manager fails to disclose the capacity they are acting in. We discuss this below.

² Protection of Personal and Property Rights Act 1988, ss 20(1) and 49(1). These provisions are subject to the liability rules when a welfare guardian or property manager fails to disclose the capacity in which they are acting; ss 20(2) and 49(2).

³ Protection of Personal and Property Rights Act 1988, ss 43(3) and 99A(3).

⁴ Protection of Personal and Property Rights Act 1988, s 99A(3).

⁵ Protection of Personal and Property Rights Act 1988, s 99A(5).

⁶ Protection of Personal and Property Rights Act 1988, ss 20(2) and 49(2).

22.12 For welfare attorneys, the PPPR Act provides that their actions have effect as if they were taken by the donor.⁷ For property attorneys, the PPPR Act provides they are authorised to act “on behalf of” the donor with respect to property that is within the scope of the EPOA.⁸ Commentary and case law suggests that this means that the attorney’s actions will be taken as those of the donor unless the EPOA says otherwise.⁹ Unlike for court-appointed representatives, there is no provision that explains who is liable if an attorney fails to disclose the capacity they are acting in when entering a contract or incurring liability.

Liability to account for benefits received while acting as a representative

22.13 The PPPR Act is silent on the liability of welfare guardians, property managers and attorneys in relation to benefits received in their role.

22.14 With respect to attorneys, however, the PPPR Act sets out some rules about the extent to which an attorney may act to their own benefit.¹⁰ We summarise these rules so far as they relate to expenses incurred by the attorney in Chapter 19. So far as concerns other benefits, an attorney acting under an EPOA must not act to the benefit of anyone besides the donor while the donor is mentally incapable, except where:¹¹

- (a) the donor has specified a power for the attorney to act to their own benefit in the EPOA;
- (b) the Family Court has authorised the attorney to do so and the EPOA does not specify otherwise;
- (c) the action is related to property that the attorney and donor jointly own, they are in a marriage, civil union or de facto relationship, they are living together and sharing their incomes, and the EPOA does not specify otherwise; or
- (d) the benefits are professional fees for an attorney who has accepted the appointment in a professional capacity or has undertaken work to give effect to decisions under the EPOA in a professional capacity, and the EPOA does not prohibit such payments.

22.15 Where an attorney may have improperly received a benefit (including expenses), specified people (including the donor, their relative, a social worker or a medical practitioner) may apply to the Family Court as of right for review of any decision of an attorney.¹² Anyone else may apply with the Court’s leave.¹³ The Court may review the

⁷ Protection of Personal and Property Rights Act 1988, s 98(5). See also *Carrington v Carrington* [2018] NZHC 505 at [108].

⁸ Protection of Personal and Property Rights Act 1988, s 97(2).

⁹ See Iris Reuvecamp *Protection of Personal and Property Rights: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2023) at 198–199; and *Moffat v Police* [2011] NZFLR 747 (HC) at [17] and [20]–[21].

¹⁰ To the extent there is any difference between the general equitable rules and those provided for in the PPPR Act, the general equitable rules are likely to follow those in the PPPR Act. See Andrew Butler “Basic Concepts” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 23 at 32–34.

¹¹ Protection of Personal and Property Rights Act 1988, s 107(1). There is also an exception for any loan, advance or other investment that a trustee could make under s 58 of the Trusts Act 2019: s 107(1)(c)(iii).

¹² Protection of Personal and Property Rights Act 1988, s 103(1).

¹³ Protection of Personal and Property Rights Act 1988, s 103(2).

decision and make any order it thinks fit.¹⁴ Such an order could include requiring the attorney to return any benefits they received.¹⁵

- 22.16 Case law establishes that property managers and attorneys owe fiduciary duties to the represented person.¹⁶ The same position likely applies to welfare guardians.¹⁷ Generally, a fiduciary has an obligation to account to the person to whom their fiduciary obligations are owed for any benefit or gain they obtain as a result of a breach of duty — in essence, to ensure that the benefit or gain is delivered to the person to whom the fiduciary obligations are owed. Even if they have not breached any obligation, they have an obligation to account if the benefit was obtained by reason of or sufficiently in connection with their position as a fiduciary.¹⁸ The underlying purpose of the rule is:¹⁹

... to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation.

- 22.17 If a fiduciary is obligated to account for such benefits, a court does not have a discretion to decide whether or to what extent an account should be ordered. However, a court may make an equitable allowance to recognise any contribution the fiduciary made that enabled the profit to be derived.²⁰

OVERSEAS APPROACHES

- 22.18 Overseas jurisdictions we have investigated take a range of approaches to the civil liability and immunities of representatives.
- 22.19 In Australia, a number of jurisdictions provide that a court (or tribunal) may relieve a representative (including a court-appointed representative or attorney) from liability for breaching the relevant legislation if they have acted in good faith or honestly and “ought fairly to be excused”.²¹ New South Wales provides civil immunity for representatives (including court-appointed representatives and attorneys) if they have acted in good faith or honestly and in accordance with court advice or directions.²²

¹⁴ Protection of Personal and Property Rights Act 1988, s 103(4).

¹⁵ See *NP v JR* [2023] NZFC 1477, [2023] NZFLR 282 at [24] and [279]; and *WJT v PJT* [2012] NZFC 3763, [2012] NZFLR 855 at [27].

¹⁶ *Vernon v Public Trust* [2016] NZCA 388, [2016] NZFLR 578 at [36]–[37]; and *Flavell v Campbell* [2019] NZHC 799, [2019] NZFLR 18 at [69].

¹⁷ For a discussion of the courts’ approach to determining whether a fiduciary obligation exists, see Andrew Butler “Fiduciary Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 585 at 692–705.

¹⁸ *Keech v Sandford* [1726] EWHC Ch J76; *Boardman v Phipps* [1967] 2 AC 46 (HL) at 70, 93, 107 and 118; and *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10. For a recent comprehensive discussion of this principle, see *Drylandcarbon GP One Ltd v Leckie* [2025] NZHC 2915 at [248], [252]–[262], [278]–[289] and [306].

¹⁹ *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10 at [16] per Lord Briggs.

²⁰ *Drylandcarbon GP One Ltd v Leckie* [2025] NZHC 2915 at [457] and [466].

²¹ Powers of Attorney Act 2006 (ACT), s 52; Guardianship and Administration Act 2000 (Qld), s 58; Powers of Attorney Act 1998 (Qld), s 105; Guardianship and Administration Act 2019 (Vic), s 182; and Powers of Attorney Act 2014 (Vic), s 74.

²² Guardianship Act 1987 (NSW), s 30; and Powers of Attorney Act 2003 (NSW), s 38(3).

- 22.20 In England and Wales, the relevant court may relieve an attorney wholly or partly from any liability they incur as a result of a breach of their duties.²³
- 22.21 In Scotland, a representative will not incur liability for any breach of a duty of care or fiduciary duty owed to a relevant person if they have acted reasonably, in good faith and in accordance with the general principles of the relevant Act.²⁴
- 22.22 Some Canadian jurisdictions provide immunity or allow the relevant court to relieve liability for certain actions — for example, actions taken:
- (a) in good faith;²⁵
 - (b) in good faith and with reasonable care;²⁶
 - (c) honestly and reasonably;²⁷
 - (d) honestly, reasonably and in good faith;²⁸
 - (e) honestly, reasonably and diligently;²⁹ or
 - (f) in good faith and in connection with powers and duties under the relevant Act.³⁰

ISSUE

- 22.23 The rules in the PPPR Act regarding the liability and immunity of representatives are inconsistent, unclear and not comprehensive.
- 22.24 The PPPR Act provides some immunities for certain types of representatives but not others. In particular:
- (a) property managers and welfare guardians have general immunities but attorneys do not; and
 - (b) property managers and attorneys have certain immunities when following the advice of specified people but welfare guardians do not.
- 22.25 Other rules in relation to liability are also inconsistent. For example, the PPPR Act specifies that welfare guardians and property managers are personally liable in respect of any agreement entered into or liability incurred if they failed to disclose to the third party that they were acting as a representative. However, the PPPR Act is silent on this issue with respect to attorneys.
- 22.26 We have not identified any reason for the variation in these rules with respect to different types of representatives.
- 22.27 In addition to the above inconsistencies, the PPPR Act does not clarify whether the general immunity of property managers and welfare guardians applies where they act outside the scope of their appointment but believe they are acting within it.

²³ Mental Capacity Act 2005 (UK), s 23(3)(d).

²⁴ Adults with Incapacity (Scotland) Act 2000, s 82.

²⁵ Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 62.

²⁶ Enduring Powers of Attorney Act SNB 2019 c 30 (New Brunswick), s 24.

²⁷ Powers of Attorney Act SNS 2022 c 23 (Nova Scotia), s 6(2).

²⁸ Enduring Powers of Attorney Act RSNL 1990 c E-11 (Newfoundland and Labrador), s 6(3).

²⁹ Substitute Decisions Act SO 1992 c 30 (Ontario), s 33(2).

³⁰ Substitute Decisions Act SO 1992 c 30 (Ontario), s 66(19).

- 22.28 The inconsistency across the various rules (as described above) can make it difficult to understand the rules as a whole. Some of the rules are worded differently although the intended effect appears to be the same.³¹
- 22.29 Unclear and inconsistent rules may discourage people from acting as representatives.

CONSULTATION

- 22.30 We asked submitters when it should be possible to bring a civil claim against a representative.³² Thirty submitters gave feedback on this issue.
- 22.31 Most submitters considered that civil claims should be available for certain levels of improper conduct. All such submitters thought it should be possible for a represented person to bring a civil claim with respect to intentional and serious misconduct. Beyond this, submitters suggested various bases on which civil claims should be available, including where a representative is acting in their own interests, acting without reasonable care, acting in bad faith, acting with gross negligence or acting recklessly.
- 22.32 A small number of submitters referred to the standards imposed on trustees in the Trusts Act 2019. One submitter considered that the process for challenging a trustee's conduct should also apply to representatives. Under that process, the applicant must produce evidence that "raises a genuine and substantial dispute" about whether the trustee's action was reasonably open to the trustee in the circumstances. If this can be shown, the trustee must prove that their conduct was reasonably open to them in the circumstances.³³ Another submitter said a property manager should be able to be sued if they are "grossly negligent", as defined in the Trusts Act.³⁴
- 22.33 A few submitters expressed caution about exposing representatives to liability. One submitter said that, in their experience, family members can make unfounded claims against representatives.
- 22.34 Two submitters said there should be no civil immunity for representatives.

³¹ For example, the rules regarding how third parties can treat the actions of an attorney are essentially the same for attorneys in relation to care and welfare and attorneys in relation to property. However, as discussed above, the rules are worded very differently.

³² Although we asked the question in relation to all representatives, it was asked within the context of a chapter about court-appointed representatives only. Submitters' responses should be read with this context in mind.

³³ Trusts Act 2019, s 127.

³⁴ Section 44 of the Trusts Act 2019 provides a court must consider whether:

... the trustee's conduct (including any action or inaction) was so unreasonable that no reasonable trustee in that trustee's position and in the same circumstances would have considered the conduct to be in accordance with the role and duties of a trustee.

The Act then provides a number of factors to assist the court in making this determination.

RECOMMENDATIONS

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:

- a. the care, diligence and skill that a reasonable person would exercise in the same circumstances; or
- b. 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:

- a. the benefit results from the performance of their obligations in accordance with their duties; or
- b. the supported person has consented to the benefit in accordance with R43(e) or R43(f) and R45; or
- c. 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
- d. 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.

- 22.35 We recommend that a new Act continue to provide for immunities for representatives and also provide for immunities for formal supporters. Providing for immunities would recognise that these may be challenging and demanding roles and would help to encourage people to take up these roles by protecting them from liability as long as they meet certain requirements.
- 22.36 Our recommendations address a general immunity for representatives and formal supporters, the limits of that immunity in relation to personal benefits obtained, and the situations in which representatives should be personally liable for contracts entered into or liability incurred.

General immunity of representatives and formal supporters

- 22.37 Subject to the recommendations we discuss below, we recommend that representatives and formal supporters have immunity from civil liability for any action or omission in their role, except to the extent that they acted in bad faith or without reasonable skill, care or diligence. This would largely continue the current immunities that apply to welfare guardians and property managers. However, the immunities would be extended to apply to attorneys under an EPOA as well as to formal supporters.
- 22.38 In our view, the standard for immunity should be the same for court-appointed representatives, attorneys and formal supporters. There is no compelling reason for different standards to apply to the different roles. Almost all the overseas jurisdictions we have considered take the same approach for court-appointed representatives and attorneys.³⁵ Of those jurisdictions we investigated that have a formal supporter type role and provide immunity for formal supporters, approximately half take the same approach.³⁶
- 22.39 We use the phrase “reasonable care, diligence and skill” to align with the duties we recommend for representatives and formal supporters in Chapters 11 and 13. Actions taken in bad faith or without reasonable care featured prominently in submitters’ responses concerning when representatives should be liable for actions taken in their role. In our view, providing immunity except for actions taken in bad faith or without reasonable care, skill and diligence strikes the right balance between:³⁷
- (a) safeguarding people by allowing them to bring legal claims against their representatives or formal supporters for improper or inadequate behaviour; and
 - (b) encouraging people to become representatives and formal supporters by protecting them from liability.

³⁵ As noted above, of the jurisdictions we have investigated, only legislation in England and Wales takes a different approach. It allows the court to relieve attorneys from liability they incur as a breach of their duties but does not have equivalent rules for court-appointed representatives. Compare Mental Capacity Act 2005 (UK), ss 20 and 23(3)(d).

³⁶ Alberta and New Brunswick apply the same immunities to all people exercising powers of performing duties under the relevant Acts. See Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 23; and Supported Decision-Making and Representation Act SNB 2022 c 60 (New Brunswick), s 62.

³⁷ See Brent Hyslop and Grant Gillett “Ethical, Relational and Cultural Elements of Capacity” in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 17, who at 25 acknowledge that substitute decision makers should be accountable for their decisions but caution against “placing excessive regulatory burdens on substitutes, who in the overwhelming majority of cases will be acting in good faith”.

Representatives and formal supporters acting in a professional capacity

22.40 In our view, whether a representative or formal supporter is acting with reasonable care, skill and diligence should be informed by whether they are acting in a professional capacity. As we explain in Chapter 13, a person who is acting in a professional capacity should exercise the care, diligence and skill reasonably expected of that profession. However, a person who happens to belong to a profession but is not appointed in their professional capacity should only be held to the standard of a reasonable person. In our view, this approach would help to ensure that people with professional skills are not discouraged from being representatives or formal supporters outside of their professional capacity for fear of being held to a professional standard.³⁸

Acting outside the scope of appointment

22.41 We recommend that, where a representative or formal supporter acts outside the scope of their appointment but reasonably believes they are acting within scope, the general immunity should continue to apply.

22.42 The PPPR Act does not address this issue. In our view, holding representatives to an objectively assessed standard of belief in such situations strikes the best balance between safeguarding represented and supported people and encouraging people to take up the role of representatives and formal supporters.

22.43 The standard we recommend differs from that applying to an agent who acts outside of their authority. At common law, an agent who purports to act on behalf of a principal is deemed to warrant that they have authority to act in this way.³⁹ If the agent in fact lacks authority, they are liable to face a claim for breach of that warranty by any third party who was induced by the agent's conduct to act and has suffered loss as a result. It is irrelevant whether the agent reasonably believed they had such authority.⁴⁰

22.44 If applied to representatives and formal supporters, such a position would mean that people acting in these roles could be exposed to liability for an act undertaken in good faith that they reasonably believed was within the scope of their authority. In our view, this could discourage people from taking up representative and formal supporter roles, particularly if (as we propose) the scope of representative appointments becomes more tailored. We therefore consider a new Act should provide for the general immunity to apply where a representative or formal supporter acts outside the scope of their appointment but reasonably believes they are acting within scope.

22.45 For clarity, we envisage our proposed immunity would protect representatives and formal supporters in situations where their appointment has been revoked or ended but they

³⁸ A similar distinction is made in the common law of agency where gratuitous agents owe a duty to exercise a degree of care that would reasonably be expected in the circumstances whereas an agent for reward must demonstrate the competence and exercise the skill and care of a reasonably competent and careful agent in the circumstances. See C Hawes and D Lester "Agency — Duties of Agent to Principal: Care, Skill, and Diligence" in *The Laws of New Zealand* (online ed, LexisNexis) at [69]–[71].

³⁹ C Hawes and D Lester "Agency — Agent's Warranty of Authority" in *The Laws of New Zealand* (online ed, LexisNexis) at [140].

⁴⁰ C Hawes and D Lester "Agency — Agent's Warranty of Authority" in *The Laws of New Zealand* (online ed, LexisNexis) at [140].

have not yet received notice, and could not reasonably otherwise be aware, that revocation or termination has occurred.

Potential liability to account for benefits received

- 22.46 Our recommended general immunity applies in relation to liability for loss or damage resulting from the representative's or formal supporter's actions or omissions. However, in our view, a different approach is appropriate in relation to benefits they obtain as a result of their position (whether directly or indirectly via associated people such as companies they own or close family members).
- 22.47 People with affected decision making are particularly vulnerable to those they rely on abusing their position to gain a benefit for themselves. As discussed above, equity seeks to deter fiduciaries from abusing their role by requiring them to account for all personal benefits resulting from their position. A new Act should not weaken that deterrence. If the general immunity we recommend were to extend to personal benefits, the deterrence would be weakened. That is because it would be necessary to show not only that there was a benefit received but that it resulted from bad faith or a lack of skill, care or diligence. We therefore recommend that the immunity not apply to such benefits except in four situations.
- 22.48 First, the immunity should apply where a benefit results from the performance of a representative's obligations in accordance with their duties. Under our recommended decision-making rules, a decision that reflects the represented person's wishes and values might result in a personal benefit for the representative. Assuming the representative, in making the decision, has complied with all their duties (including any specific requirements of the Family Court or EPOA in relation to conflicts of interest), they should not be required to account for any resulting benefit. The benefit would not result from the representative's succumbing to "human frailty" but from their diligent performance of their role.⁴¹ Requiring the benefit to be accounted for could undermine the represented person's wishes and values. For these reasons, a court may find that the usual equitable principle requiring disgorgement of the benefit should not apply. However, in our view a new Act should put the matter beyond doubt by extending our recommended immunity to benefits that result from the performance of a representative's or formal supporter's obligations in accordance with their duties.⁴²
- 22.49 Second, the immunity should apply in situations where a formal supporter has received a benefit and the supported person has consented to the formal supporter benefitting, in accordance with R43(e) or R43(f) and R45. It might be considered unnecessary for a new Act to include a provision to this effect, as equity will generally permit a fiduciary to act inconsistently with their usual fiduciary obligations if they disclose the material facts to

⁴¹ *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10 at [16] per Lord Briggs.

⁴² See *Reilly v Reilly* [2017] NSWSC 1419 at [116]: "Where a fiduciary ... exercises a power which results in his or her obtaining some incidental benefit, there may be nothing *per se* improper with his or her having that benefit if the benefit itself is, in the circumstances, an inevitable consequence of his or her properly exercising the power which produces it."

the beneficiary and obtain their informed consent.⁴³ However, we recommend that a new Act make this clear.⁴⁴

- 22.50 Third, we recommend that the immunity extend to personal benefits that are expressly permitted by an enduring power of attorney, or not prohibited by an enduring power of attorney and expressly permitted by the Family Court. This largely reflects section 107(1)(a) and (b) of the PPPR Act and is consistent with respecting the wishes and values of the donor (as set out in the EPOA). For clarity, this situation would encompass benefits expressly permitted by the Family Court with respect to court-appointed representatives where there is no relevant EPOA.
- 22.51 Fourth, the immunity should apply in relation to benefits that constitute the reimbursement of expenses, in accordance with the applicable rules relating to reimbursement.⁴⁵
- 22.52 We have considered whether a new Act should positively require representatives and formal supporters to account for benefits in certain situations. However we do not recommend that approach. The exact nature of fiduciary duties may vary depending on the individual circumstances of the case and the type of relationship concerned.⁴⁶ In our view, other than providing for certain immunities, it is preferable for the courts to consider the application of equitable principles to formal supporters and representatives under a new Act, and to any benefits they obtain, in the light of the specific facts and circumstances of each case.⁴⁷

No specific immunity necessary for following advice of specified people or court directions

- 22.53 Under the PPPR Act, property managers and attorneys are not liable for anything done or omitted to be done on the advice of people they are required to consult (including the represented person or donor) unless they acted in bad faith or without reasonable care. They also do not incur any liability in respect of anything done or omitted in accordance with any directions from the Family Court.
- 22.54 In our view, to the extent these immunities are appropriate, they are covered by the general immunity we propose for actions undertaken in good faith and with reasonable care, diligence and skill. We therefore recommend that a new Act not continue to provide expressly for these specific immunities.

⁴³ See Andrew Butler “Fiduciary Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 585 at 608.

⁴⁴ In addition, as we explain in Chapter 11, under R45 we recommend that specific requirements apply to a formal supporter’s entitlement to rely on a consent from the supported person.

⁴⁵ We recommend in Chapter 11 that the appointment of a formal supporter be able to specify the supporter’s entitlement to reimbursement — see [R40(e)]. In Chapter 17 we explain that we do not recommend material changes to the rules concerning reimbursement of expenses incurred by welfare representatives and property representatives. In Chapter 19 we explain that we do not recommend material change to the rules concerning attorneys’ entitlement to reimbursement of expenses.

⁴⁶ See *New Zealand Netherlands Society ‘Oranje’ Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166. See also Andrew Butler “Fiduciary Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2025) 585 at 600–601.

⁴⁷ The Family Court has the same equitable jurisdiction as the High Court provided the amount claimed or value of the property the subject of the proceedings does not exceed \$350,000. Claims in excess of this must be made in the High Court. It is outside the scope of this review to consider that limit.

22.55 In addition, the immunities in the PPPR Act relating to following advice are not entirely consistent with the decision-making rules we recommend in Chapter 12. For example, we recommend that the wishes and values of represented people should generally be followed. However, in rare situations, it may not be appropriate for the representative to follow the represented person's wishes and values (most notably, where this would give rise to a material risk of significant harm to the represented person). Potential immunity for a representative who gives effect to a represented person's wishes and values despite knowing that the decision will give rise to a material risk of significant harm to them would not be appropriate.

Liability when failing to disclose the capacity a representative is acting in

22.56 We recommend that a representative 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. This would continue the current position for welfare guardians and property managers but extend it to also apply to attorneys.

22.57 This approach requires representatives to be proactive about disclosing the capacity they are acting in when engaging with third parties. In our view, this is appropriate to protect both third parties and represented people. Without such a rule, third parties may not know who they are actually engaging with.

22.58 Our recommendation does not refer to formal supporters because they would not have the power to enter into any contract or arrangement or to incur liability. As we explain in Chapter 11, we recommend that formal supporters only have powers with respect to obtaining confidential information. To the extent a formal supporter incurred any liability through any further use of this information, it would be clear they were acting outside the scope of their role. Our proposed general immunity would therefore not apply.

CHAPTER 23

Use of force and deprivation of liberty

IN THIS CHAPTER, WE CONSIDER:

- the use of force on people who lack decision-making capacity in order to implement decisions made by te Kōti Whānau | Family Court or by representatives;
- the deprivation of liberty of people who lack decision-making capacity and who reside at secure care facilities, hospitals or other care settings; and
- the involvement of police in these matters.

INTRODUCTION

- 23.1 In some cases, a person may resist a decision made by te Kōti Whānau | Family Court or a representative — that is, a court-appointed representative or an attorney acting under an enduring power of attorney. For example, a represented person may need medical attention to avoid significant harm but refuse to agree to it because of fear of the medical procedure, or a person may not want to move to a secure care facility, even though they cannot live safely at home.
- 23.2 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.
- 23.3 Some of these situations can be resolved by increasing efforts to explain the decision to the people affected and to respond to any concerns they may have. In cases where such efforts are fruitless, however, the decision may only be able to be implemented with the use of force. This chapter considers under what circumstances that might be appropriate and, when it can be appropriate, how it should be authorised. The chapter also considers situations where a person is deprived of liberty, for example, if they reside at a secure care facility that they cannot leave.
- 23.4 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 Protection of Personal and Property Rights Act 1988 (PPPR Act) is also unclear.

- 23.5 Law reform is needed. However, some of these issues were not raised with us in consultation until after the publication of our Second Issues Paper. Because use of force and deprivation of liberty are particularly sensitive topics, comprehensive recommendations of reform in these areas require extensive consultation.
- 23.6 Undertaking another round of public consultation after the publication of the Second Issues Paper was not feasible. We therefore recommend that the Government further consult on these issues before developing policy.
- 23.7 Importantly, however, as we explain in this chapter, the implementation of the recommendations that we make elsewhere in this Report is not contingent on this further work.

BACKGROUND

Terminology

- 23.8 This chapter deals with several closely related concepts — use of force, restraint, detention and deprivation of liberty.
- 23.9 New Zealand legislation does not provide a consistent definition of the term “use of force” but lists various situations in which use of force is permissible.¹ Some Acts refer to “restraint” and “force” as closely related concepts, though the relationship between the two is not always clear.²
- 23.10 “Detention” is often used in human rights law to refer to substantial restrictions on a person’s freedom of movement. The term is used in multiple contexts, including immigration law, mental health law and criminal law.³ The concept of detention is intertwined with that of deprivation of liberty.⁴ For example, article 9(1) of the International Covenant on Civil and Political Rights refers to both terms. In the context of decision-making capacity law, legislation, case law and commentary tend to refer to deprivation of liberty rather than detention.
- 23.11 The European Court of Human Rights has drawn a distinction between *restriction* of liberty (governed by the right to freedom of movement)⁵ and *deprivation* of liberty

¹ For example Crimes Act 1961, ss 39–65; Mental Health (Compulsory Assessment and Treatment) Act 1992, s 122B; and Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 109. See also Mental Health Bill 2024 (87-2), cl 200.

² For example Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 61(3)(a); and Education and Training Act 2020, s 99(4) definition of “physically restrain”.

³ See for example *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA) at 316; *Everitt v Attorney-General* [2002] 1 NZLR 82 (CA) at 87; *Chief Executive, Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495; *Deliu v Police* [2020] NZHC 2506 at [201]; *AW v Minister of Health* [2024] NZHC 2279, [2024] 3 NZLR 622; and *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103.

⁴ See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary* (2nd ed, LexisNexis, Wellington, 2015) at [20.5.16]. See also *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [33].

⁵ Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto CETS 046 (opened for signature 16 September 1963, entered into force 02 May 1968), art 2.

(governed by the right not to be deprived of liberty).⁶ The European Court of Human Rights has repeatedly observed that the difference between the two “is merely one of degree or intensity, and not one of nature or substance”.⁷ The distinction has been incorporated into the Mental Capacity Act 2005 (UK), which requires different standards to be met to justify a restriction of liberty (there, conceptualised as a restraint) and a deprivation of liberty.⁸

- 23.12 In this chapter, we use the phrase “use of force” to describe actions such as laying hands on a person or using equipment to restrict a person’s ability to move. Conceptualised in this way, use of force encompasses restrictions on liberty as conceived in the European Court of Human Rights jurisprudence — for example, locking a car door so a person cannot get out while travelling to the doctor.
- 23.13 We use “deprivation of liberty” to describe situations where a person is locked in, or otherwise not able to leave, a place on a longer-term basis. As the European Court of Human Rights jurisprudence acknowledges, the distinction between this concept and lower-level restrictions of liberty (which we call use of force) is not clear-cut. An example of a deprivation of liberty as conceived in this chapter is long-term residence at a secure care facility.
- 23.14 Where other sources refer to restraint instead of force or to detention instead of deprivation of liberty, we do so as well.

Current use of force and deprivation of liberty practices

- 23.15 Our engagement with stakeholders suggests that force is frequently used in the care and treatment of people who lack relevant decision-making capacity. Stakeholders told us that some form of force is often necessary to facilitate the care of people with complex care needs, both in residential care facilities and in private homes.
- 23.16 Use of force in relation to people who lack relevant decision-making capacity can take many different forms. The Chief Ombudsman distinguished between four types of restraint in his 2025 report on the conditions of secure aged care facilities in Aotearoa New Zealand:⁹
- Staff using their own body to limit residents’ movement (**personal restraint**). For example, grabbing a resident by the arm.
 - Staff using equipment to limit residents’ movement (**physical restraint**). For example, intentionally placing furniture in front of a resident’s seat to prevent them from leaving it.
 - Staff using medication or a chemical substance to restrict residents’ movement or decision-making capacity (**chemical restraint**).

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms CETS 005 (opened for signature 04 November 1950, entered into force 03 September 1953), art 5.

⁷ For example *Guzzardi v Italy* (1980) 3 EHRR 333 at [93]; *HM v Switzerland* (2004) 38 EHRR 17 at [42]; *HL v United Kingdom* (2005) 40 EHRR 32 at [89]; *Storck v Germany* (2006) 43 EHRR 6 at [71]; *Stanev v Bulgaria* [2012] 1 ECHR 81 (Grand Chamber) at [115]; *Austin v United Kingdom* (2012) 55 EHRR 14 at [57]; and *Buzadji v Moldova* ECHR 23755/07, 5 July 2016 (Grand Chamber) at [103].

⁸ Mental Capacity Act 2005 (UK), ss 4A–6. See also Alex Ruck Keene and others *Court of Protection Handbook: a user’s guide* (4th ed, Legal Action Group, 2022) at [1.322]–[1.328].

⁹ Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman’s Observations 2021 to 2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, 4 March 2025) at 4.

- Staff intentionally restricting residents' access to their normal environment (**environmental restraint**). For example, locking the door to the garden to prevent residents from going outside.
- 23.17 In particularly sensitive situations, police assistance may be needed to restrain a person who lacks relevant decision-making capacity in order to give effect to a decision made under the PPPR Act. As we detail below, courts have repeatedly made orders for police to assist in such situations. However, we have heard that police are reluctant to assist with enforcing arrangements under the PPPR Act because the legislation contains no express legal basis for police to intervene.
- 23.18 Commentators have noted as a distinct issue the practice of depriving people who lack relevant decision-making capacity of liberty by placing them in residential care facilities. A 2018 study found that 23.7 per cent of people residing at residential aged care facilities in Aotearoa New Zealand were held there without any legal authority.¹⁰
- 23.19 The Chief Ombudsman noted in his submission that he had highlighted “concerns about the lack of consistent or reliable processes to verify and record the legal basis for consent to a resident’s placement in a secure unit” in several instances.¹¹ Alison Douglass submitted that she frequently receives inquiries from lawyers, health professionals and family members of people who lack relevant decision-making capacity expressing concern about them being deprived of liberty.

Current law

- 23.20 In this section, we consider three potential legal bases to use force or deprive a person of liberty to implement a decision made under the PPPR Act — namely:
- (a) the PPPR Act and associated case law;
 - (b) the common law; and
 - (c) health and disability legislation.

PPPR Act and associated case law

- 23.21 The PPPR Act does not expressly address either the use of force or deprivation of liberty. However, courts have interpreted some provisions in the PPPR Act to empower the Family Court to authorise the use of force to implement decisions made by the Court or by welfare guardians.
- 23.22 Consenting on behalf of a person for them to be deprived of liberty is a form of decision making (in contrast to the act of using force to implement a decision). We single out and discuss decisions leading to a deprivation of liberty in this chapter because they may require more express statutory language and additional safeguards than other types of decisions to ensure they are consistent with human rights. We discuss this issue in detail later in this chapter.

¹⁰ Mark Fisher “‘This is not my home’: An audit of legal authorities in Aged Residential Care” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, Auckland, 2018) 11 at 11.

¹¹ See also Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman’s Observations 2021 to 2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, 4 March 2025) at 14–15.

Court-ordered decisions

- 23.23 In some decisions, the Family Court has authorised the use of force pursuant to section 10(4) of the PPPR Act. This section provides that, where the Court makes any “personal order” (including a welfare guardian order or a court-ordered decision), it may make “such other orders and give such directions as may be necessary or expedient to give effect, or better effect, to the personal order”.¹²
- 23.24 For example, the Family Court has authorised “reasonable force” to be used to provide a represented person with medical treatment¹³ or to transport them to a residential care facility.¹⁴ The Court has also authorised “[r]estraint and/or sedation” to ensure that a person receives dental treatment.¹⁵ Conversely, in one instance, the Court made an order under section 10(4) to expressly forbid the use of restraint on a person by their caregiver (who was not appointed as a welfare guardian).¹⁶
- 23.25 In some instances, the Family Court has authorised actions, or considered authorising actions, under section 10(4) to prevent third parties from frustrating the implementation of a decision.
- 23.26 In *Rothera v Rothera*, evidence indicated that the represented person’s husband would resist implementation of the welfare guardian’s decision that the person should live in a residential facility. The personal order made by the Family Court authorised the welfare guardian to use reasonable force, including with police assistance, to transport the represented person to the residential care facility if the person’s husband refused to cooperate.¹⁷ The order was upheld by te Kōti Matua | High Court on appeal.¹⁸
- 23.27 In the case of *Re L*, the Family Court ordered the relocation of residents at a residential care facility, but the organisation responsible for the facility opposed this relocation. The Family Court issued orders under section 10 of the PPPR Act that required the organisation not to obstruct the relocation and authorised police to offer “active assistance”.¹⁹

¹² Protection of Personal and Property Rights Act 1988, s 10(4). The courts have interpreted the power under s 10(4) as wide and flexible, holding that it goes beyond elaborating or refining personal orders expressly contemplated by s 10(1): *Re R* (1993) 10 FRNZ 224 (FC) at 227; and *JMG v CCS Disability Action (Wellington Branch Inc)* [2012] NZFLR 369 (HC) at [29].

¹³ *KR v TM* FAMC Auckland PPPR-2005-4-1213, 11 August 2005; *CD v JMT [Interim personal order]* [2013] NZFLR 817 (FC) at [30(3)]; and *LH v CC* [2020] NZFC 8891, [2020] NZFLR 835 at [38].

¹⁴ *Loli v MWY* FC Auckland FAM-2009-004-001877, 13 January 2011 at [24(2)]; *MAS v RJE* FC Manukau FAM-2010-092-1922, 13 October 2010 at [5(b)]; and *Hewgill v DN and AN* FC Manukau FAM-2016-092-007, 17 August 2016, cited in *AN v Bupa Care Services (New Zealand) Ltd* [2017] NZSC 49, [2017] NZFLR 194 at [1], n 1.

¹⁵ *Re HWK* [2012] NZFC 9497, [2013] NZFLR 1050 at [33(3)].

¹⁶ *Re D* FAMC Levin FAM-2006-031-000061, 19 May 2009 at [47].

¹⁷ *Rothera v Rothera* FC Auckland FAM-2015-4-1144, 17 August 2017, referred to in *Rothera v Rothera* [2018] NZHC 375, [2018] NZFLR 32 at [33]. The Family Court may also appoint a welfare guardian for the specific purpose of resolving a situation where a person fails to comply with any of the requirements of a personal order: Protection of Personal and Property Rights Act 1988, s 23(1). However, we are unaware of any cases where this power was used.

¹⁸ *Rothera v Rothera* [2018] NZHC 375, [2018] NZFLR 32.

¹⁹ *Re L* [2001] NZFLR 310 (DC) at [100(4)].

23.28 In theory, the Family Court can also enforce a court decision under the Contempt of Court Act 2019.²⁰ For that Act to apply, the obstructing third party in question must be bound by the order. In our engagement with practitioners, we have heard that the Contempt of Court Act is rarely applied in the context of the PPPR Act.²¹

Decisions made by welfare guardians

23.29 Section 18(2) of the PPPR Act provides that a welfare guardian:²²

... shall have all such powers as may be reasonably required to enable the welfare guardian to make and implement decisions for the person for whom the welfare guardian is acting in respect of each aspect specified by the court in the order by which the appointment of the welfare guardian is made.

23.30 The PPPR Act is silent on the ability of a welfare guardian to use force on the person, deprive them of liberty or consent to others doing those things.

23.31 The Family Court has found that approving the use of force on a represented person can be part of a welfare guardian's role pursuant to section 18(2) if authorised by the Court. In the test case of *Re B*, the Court authorised a welfare guardian to give general consent to the use of "reasonable restraints (including seclusion)" as part of the relevant person's day-to-day care at a specified residential facility.²³ However, *Re B* arose in a very specific context in the 1990s following the commencement of the Mental Health (Compulsory Assessment and Treatment) Act 1992, which caused the legal status of many informal patients at the facility concerned to become uncertain.²⁴ We are not aware of any section 18(2) orders authorising restraint and seclusion outside that context.

23.32 In *E v E*, the High Court observed in obiter that it was "common ground" in that case that the PPPR Act "does not give coercive detention powers".²⁵ The Court noted the breadth of section 18(2) but said it had not received any submissions suggesting that section 18(2) would extend to compelling the subject of a welfare guardian order "to live at home by locking doors".²⁶ Notwithstanding these observations, welfare guardians do in practice consent on behalf of the represented person to them living in a place that the person is not able to leave such as a secure residential facility.²⁷

²⁰ Subpart 4 of Part 2 the Contempt of Court Act 2019, concerning the enforcement of certain court orders, applies to the Family Court pursuant to the Family Court Act 1980, s 15A.

²¹ But see for example *JMG v CCS Disability Action (Wellington Branch Inc)* [2012] NZFLR 369 (HC) at [52], where the High Court indicated that interfering with personal orders "would be to risk contempt action".

²² Protection of Personal and Property Rights Act 1988, s 18(2). Subsection 1 excludes a list of matters from the welfare guardian's powers (further discussed in Chapter 17).

²³ *Re B [seclusion]* (1993) 11 FRNZ 174 at 184.

²⁴ See *Te Aka Matua o te Ture | Law Commission Protections Some Disadvantaged People May Need* (NZLC R80, 2002) at [4]. Some of the published decisions authorise a welfare guardian to give general consent to the use of reasonable restraint (but not seclusion), for example *Re A* (1993) 10 FRNZ 537; and *Re G* (1993) 10 FRNZ 541. See also *Re X [PPPR]* (1993) 10 FRNZ 104 at 107–108, where the Court held that an application seeking "blanket powers" was too general.

²⁵ *E v E* HC Wellington CIV-2009-485-2335, 20 November 2009 at [49].

²⁶ *E v E* HC Wellington CIV-2009-485-2335, 20 November 2009 at [49].

²⁷ See Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman's Observations 2021 to 2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, 4 March 2025) at 12.

Decisions made by attorneys

23.33 The PPPR Act is silent on whether an attorney acting under an enduring power of attorney (EPOA) can use or consent to the use of force or deprivation of liberty with respect to the donor. As with welfare guardians, however, it appears to be accepted practice that an attorney can consent to the represented person residing somewhere they cannot leave.²⁸

Common law grounds

23.34 In this section, we address common law grounds for using force or depriving a person of their liberty to implement a decision in relation to a person who lacks decision-making capacity.

“Best interests” necessity defence

23.35 The common law defence of “best interests” necessity can sometimes be relied on by people who use force in the context of providing necessary care and treatment to a person without relevant decision-making capacity.²⁹ The defence may be relevant where the use of force is not authorised under statute or by the Family Court. However, its ambit is unclear.

23.36 The defence has been developed in English common law and has mostly been applied in medical contexts to protect health practitioners from criminal and tortious liability.³⁰ Aotearoa New Zealand has incorporated a “best interests” necessity defence under health and disability legislation.³¹

23.37 There is little case law developing the “best interests” necessity defence in Aotearoa New Zealand. Courts have applied the defence in relation to actions of health practitioners.³² However, it is not clear whether the defence can apply in circumstances relating to the use of force outside medical contexts or to a deprivation of liberty and, if it can, what its limits are. For example, it is unclear whether the defence is limited to short-term uses of

²⁸ See Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman’s Observations 2021 to 2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, 4 March 2025) at 12; and Mark Fisher “‘This is not my home’: An audit of legal authorities in Aged Residential Care” in Mark Fisher and Janet Anderson-Bidois (eds) *This is not my home: A collection of perspectives on the provision of aged residential care without consent* (Te Kāhui Tika Tangata | Human Rights Commission, Auckland, 2018) at 11.

²⁹ See Alison Douglass “Rethinking necessity and best interests in New Zealand mental capacity law” (2018) 18 *Med L Int* 3 at 4.

³⁰ See Nathan Tamblyn *The Law of Duress and Necessity: Crime, Tort, Contract* (Routledge, London, 2017) at 149. The authoritative case is *F v West Berkshire Health Authority* [1990] 2 AC 1, [1989] 2 All ER 545 (HL).

³¹ Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch reg 2 right 7(4). Section 41 of the Crimes Act 1961 provides for a type of “best interests” necessity defence but only in relation to preventing suicide and certain offences.

³² *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC); *Re G* [1997] 2 NZLR 201 (HC); *Auckland Healthcare Services Ltd v L* [1998] NZFLR 998 (HC); *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA); *R v Harris* HC Palmerston North CRI-2006-054-1008, 21 November 2006 at [41]; and *Hutt District Health Board v B* [2011] NZFLR 873 (HC).

force (such as when transporting a person to receive treatment) or whether it could apply to a long-term deprivation of liberty at a residential facility.³³

- 23.38 The European Court of Human Rights has found that, for the purposes of the European Convention on Human Rights, relying on the common law doctrine of necessity defence alone is insufficient to ensure that deprivations of liberty of “compliant” patients who lack relevant decision-making capacity and cannot leave a hospital or other care setting are lawful.³⁴ It is possible that New Zealand courts would take a similar approach under New Zealand human rights law.

The High Court’s *parens patriae* jurisdiction

- 23.39 The High Court has general jurisdiction in relation to “mentally impaired persons” who, in the opinion of the High Court, lack the competence “to manage their own affairs”.³⁵ This jurisdiction is referred to as the High Court’s *parens patriae* jurisdiction.³⁶ It is an inherent jurisdiction of the High Court by virtue of the common law and has been affirmed in statute in Aotearoa New Zealand.³⁷ The exercise of this jurisdiction “is founded on necessity”, as the Canadian Supreme Court put it in a landmark case.³⁸
- 23.40 Today, this jurisdiction remains only in relation to matters that are not covered by the PPPR Act or where the remedy sought is not available under the that Act.³⁹ It is another way the common law could provide authority for the use of force against, or deprivation of liberty of, a person who lacks decision-making capacity in order to implement decisions relating to them where:
- (a) it is in the best interests of the person for a court to authorise the use of force or deprivation of liberty; but
 - (b) the Family Court has no authority to make that order under section 10(4) of the PPPR Act.

³³ See Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, July 2016) at [3.65]–[3.70] and [3.95]; Iris Reuecamp and John Dawson “Healthcare in the Absence of Consent” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 125 at 137–138; and Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Lawyers and Doctors* (Victoria University of Wellington Press, Wellington, 2020) at 204–207.

³⁴ See *HL v United Kingdom* (2004) 40 EHRR 32 (ECHR) at [116]–[124].

³⁵ Senior Courts Act 2016, s 14(1).

³⁶ See generally *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [10]–[11]; and *Re W* [1994] 3 NZLR 600. See also John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 10–12.

³⁷ Section 14 of the Senior Courts Act 2016, which replaced s 17 of the Judicature Act 1908.

³⁸ *Re Eve* [1986] 2 SCR 388 at 389.

³⁹ *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [45]–[48]. See also John Dawson “General Principles and Sources of Mental Capacity Law” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 3 at 12.

23.41 When considering any exercise of the *parens patriae* jurisdiction in relation to the use of force or deprivation of liberty, we anticipate the High Court’s reasoning would draw on the requirements of the “best interests” necessity defence.⁴⁰

Health and disability legislation

23.42 Health and disability legislation provides some authority to providers of health services or disability services to use force and deprive a person of liberty in certain circumstances.

Right 7(4) of the Health and Disability Services Consumers’ Rights Code

23.43 The Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996 (HDC Code) provides for legal grounds on which a healthcare professional may treat a person in specific situations even if they are incapable of informed consent.

23.44 Right 7(4) of the HDC Code concerns the provision of health or disability services where a consumer is not “competent to make an informed choice and give informed consent”. In that situation, a health practitioner can provide services if:⁴¹

- (a) no person entitled to consent on behalf of the consumer is available;
- (b) it is in the best interests of the consumer;
- (c) reasonable steps have been taken to ascertain the views of the consumer; and
- (d) the provider believes that the provision is consistent with the informed choice the consumer would make if they were competent or has taken into account the views of other people interested in the welfare of the consumer.

23.45 Right 7(4) imposes conditions on the provision of services very similar to those for relying on the “best interests” necessity defence at common law. Some commentators suggest that conduct falling within the scope of right 7(4) will also fall within that of the broader “best interests” necessity defence.⁴²

Ngā Paerewa: Health and Disability Services Standard

23.46 Where providers of hospital care, residential disability care or rest home care use force, they must comply with the relevant regulatory standard: *Ngā Paerewa: Health and*

⁴⁰ The “best interests” necessity defence was “rediscovered” by the UK courts after the *parens patriae* jurisdiction was extinguished by statute. The jurisdiction has been described by one UK judge as “indistinguishable” from the *parens patriae* jurisdiction: *E v Channel Four Television Corporation* [2005] EWHC 1144 (Fam), [2005] 2 FLR 913 at [55]. In Aotearoa New Zealand, the *parens patriae* jurisdiction has not been extinguished: *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [14].

⁴¹ Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch reg 2 right 7(4).

⁴² Sylvia Bell and Warren Brookbanks *Mental Health Law in New Zealand* (online ed, Thomson Reuters) at [8.6], citing Peter Skegg “Capacity to Consent to Treatment” in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 213 at 249.

Disability Services Standard.⁴³ This is the case regardless of whether the legal basis for using force is a decision made under the PPPR Act or the common law.

23.47 The standard refers to restraint and defines it as “[t]he use of any intervention by a service provider that limits a person’s normal freedom of movement”. It also refers to seclusion, which it defines as “[a] type of restraint where a person is placed alone in a room or area, at any time and for any duration, from which they cannot freely exit”.⁴⁴

23.48 The standard requires services to aim for a restraint and seclusion free environment.⁴⁵ However, it acknowledges that restraint and seclusion may be needed as a last resort.⁴⁶ Where restraint or seclusion are needed, the standard requires several procedural safeguards to be observed, including that restraint or seclusion are monitored and recorded and that restraint and seclusion practices are periodically reviewed.⁴⁷

Overseas approaches

23.49 Almost all jurisdictions we have considered make some provision for the implementation of decisions relating to people who lack decision-making capacity. Most of these jurisdictions address the use of force more expressly than the PPPR Act, and a few also make express provision for deprivation of liberty. However, the way these issues are addressed varies widely.

23.50 In our analysis of overseas approaches, we have focused on legislation that is similar in scope to the PPPR Act. In some jurisdictions, that legislation overlaps with separate regimes on the use of force and deprivation of liberty in the specific context of professional care. For example, in Australia, restrictive practices in professional aged care are provided for under federal law, separately from the respective legislation on adult decision making in the Australian states and territories.⁴⁸

Scope of provisions authorising the use of force

23.51 The scope of relevant provisions differs across jurisdictions in several ways.

23.52 First, jurisdictions differ in the extent to which specific authorisation by the relevant court is required to give effect to a decision (including through using force).⁴⁹ In some jurisdictions, the court may authorise a representative to take specified steps to give

⁴³ Te Mana Tautikanga o Aotearoa | Standards New Zealand *Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021). The standard has been approved by the Minister of Health, thus elevating it to the status of secondary legislation: Health and Disability Services (Safety) Act 2001, ss 13–14 and 18; and Health and Disability Services (Safety) Standards Notice 2021. The standard is binding only on those services that require certification under the Health and Disability Services (Safety) Act 2001. Section 9 provides that these are hospital care, residential disability care and rest home care.

⁴⁴ Te Mana Tautikanga o Aotearoa | Standards New Zealand *Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021) at [0.3].

⁴⁵ Te Mana Tautikanga o Aotearoa | Standards New Zealand *Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021) at [6.1.1] and [6.4.1].

⁴⁶ Te Mana Tautikanga o Aotearoa | Standards New Zealand *Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021) at [6.2.1].

⁴⁷ Te Mana Tautikanga o Aotearoa | Standards New Zealand *Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021) at [6.2.1]–[6.4.9].

⁴⁸ Aged Care Act 2024 (Cth), ss 17–18 and 162–163; and Aged Care Rules 2025 (Cth), rr 6-15–6-20, 17-5 and 162-5–163-5.

⁴⁹ In some jurisdictions, a tribunal deals with these matters rather than a court. We do not make this distinction in the text, referring always to a court.

effect to a future decision.⁵⁰ In contrast, other jurisdictions require an application to the court to implement a particular decision when the need arises.⁵¹

23.53 Second, overseas approaches vary as to who may be authorised to use force to give effect to a decision. The various options include authorising:

- (a) a court-appointed representative to give effect to their own decision;⁵²
- (b) a person specified by a court (for example, a healthcare professional) to give effect to a representative's decision;⁵³
- (c) a person authorised by the representative (rather than by the court) to give effect to the representative's decision;⁵⁴ and
- (d) police to assist with implementing a decision, but usually only in specific situations where entry onto a third party's premises is required.⁵⁵

23.54 Third, jurisdictions take different approaches as to whom force may be used against. Some jurisdictions only address the compliance of the represented person with a representative's decision.⁵⁶ Other jurisdictions also address situations where third parties obstruct the implementation of a decision.⁵⁷

Statutory thresholds for using force

23.55 Overseas jurisdictions take different approaches to the threshold required to permit the use of force by a representative or another person. The most common approach is to provide that the relevant court may authorise a representative or other person to use

⁵⁰ Guardianship Act 1987 (NSW), s 21A(1); Guardianship and Administration Act 1995 (Tas), s 28; and Mental Capacity Act 2005 (UK), ss 16(5) and 20(8).

⁵¹ Guardianship of Adults Act 2016 (NT), s 35; Guardianship and Administration Act 2019 (Vic), s 45; Adults with Incapacity (Scotland) Act 2000, s 70(1); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38; and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 33(1). See also Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws: Report Volume 3* (QLRC R67, 2010), R20-13.

⁵² Guardianship Act 1987 (NSW), s 21A(1)(a); Guardianship of Adults Act 2016 (NT), s 35(1); Guardianship and Administration Act 1995 (Tas), s 28(1); and Guardianship and Administration Act 2019 (Vic), s 45(1).

⁵³ Guardianship Act 1987 (NSW), s 21A(1)(b); Guardianship and Administration Act 1995 (Tas), s 28(1); Guardianship and Administration Act 2019 (Vic), s 45(1); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(2); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 33(2).

⁵⁴ Guardianship Act 1987 (NSW), s 21A(1)(c); and Mental Capacity Act 2005 (UK), s 20(12).

⁵⁵ Guardianship and Management of Property Act 1991 (ACT), s 68(1); Guardianship Act 1987 (NSW), s 11(1)(b); Guardianship and Administration Act 2000 (Qld), s 149; Guardianship and Administration Act 1993 (SA), s 32(4)(a); Guardianship and Administration Act 1995 (Tas), s 29(1) and (3); Guardianship and Administration Act 1990 (WA), s 49(3); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 59(3). Compare Adults with Incapacity (Scotland) Act 2000, s 70(1) and (5); and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(2). A similarly broad power was also recommended in Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws: Report Volume 3* (QLRC R67, 2010), R20-15.

⁵⁶ Guardianship Act 1987 (NSW), s 21A(1); Guardianship of Adults Act 2016 (NT), s 35(1); and Guardianship and Administration Act 1995 (Tas), s 28(1).

⁵⁷ Guardianship and Administration Act 2019 (Vic), s 178; Mental Capacity Act 2005 (UK), s 16(5); Adults with Incapacity (Scotland) Act 2000, s 70(2); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(1)(a)(ii); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 33(1)(a)(ii).

force if the health or safety of the represented person would otherwise be seriously at risk.⁵⁸

- 23.56 A slightly different approach taken in some jurisdictions is to specify the circumstances under which a court-appointed representative is exempt from liability for using force as a representative.⁵⁹
- 23.57 A third group of jurisdictions provides for general liability exemptions that are not targeted at using force but relate to any actions taken by a person in their function as a representative (or, in the case of England and Wales, certain actions taken by anyone).⁶⁰ Some of these statutory liability exemptions mirror the “best interests” necessity defence.⁶¹

Procedural safeguards

- 23.58 Most jurisdictions we have considered rely on procedural safeguards that apply to representatives generally rather than the use of force specifically. These include record-keeping obligations, periodic reviews by a court or tribunal, the power of a court or tribunal to issue directions and appeal rights against court orders.
- 23.59 Few jurisdictions provide for safeguards that are specific to the context of giving effect to decisions. Northern Territory and Victoria require a reassessment of orders that authorise actions to ensure that a represented person complies with the representative’s decision as soon as practicable but in any event within 42 days.⁶² Scotland allows police constables to use force based on a warrant issued by a sheriff in specific situations.⁶³

Approaches to authorising deprivations of liberty

- 23.60 Overseas jurisdictions take different approaches to addressing deprivations of liberty. Most jurisdictions we have considered do not have special provisions for deprivations of liberty in relation to people who lack relevant decision-making capacity, although some law reform bodies have recommended it.⁶⁴ South Australia and England and Wales do have special provisions.

⁵⁸ Guardianship of Adults Act 2016 (NT), s 35(4); Guardianship and Administration Act 1993 (SA), s 32(1)(c) and (2); Mental Capacity Act 2005 (UK), s 20(10); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(1)(b); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 33(1)(b). See also Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws: Report Volume 3* (QLRC R67, 2010), R20-14.

⁵⁹ Guardianship Act 1987 (NSW), s 21A(2); Guardianship of Adults Act 2016 (NT), s 35(5); Guardianship and Administration Act 1995 (Tas), s 28(2); and Guardianship and Administration Act 2019 (Vic), s 45(3). The relevant provisions do not expressly refer to “use of force”. Rather, they authorise acts done to ensure a person “complies with” a decision the representative has made in their function.

⁶⁰ Mental Capacity Act 2005 (UK), s 5(2)–(3); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 42; and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 67.

⁶¹ Guardianship Act 1987 (NSW), s 21A(2); Guardianship of Adults Act 2016 (NT), s 35(5); and Mental Capacity Act 2005 (UK), s 5(2)–(3).

⁶² Guardianship of Adults Act 2016 (NT), s 35(4); and Guardianship and Administration Act 2019 (Vic), s 45(2). See also Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws: Report Volume 3* (QLRC R67, 2010), R20-16.

⁶³ Adults with Incapacity (Scotland) Act 2000, s 70(1) and (5).

⁶⁴ Tasmania Law Reform Institute *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 25, 2018) at [14.6.21] and [14.6.29]; and Scottish Law Commission *Report on Adults with Incapacity* (Scot Law Com No 240, 2014) at [4.60]–[4.63].

- 23.61 In South Australia, detention is addressed in a specific provision that empowers the relevant court to authorise the detention of a person who lacks the required decision-making capacity at their defined place of residence.⁶⁵
- 23.62 In England and Wales, people who lack relevant decision-making capacity may be deprived of their liberty only in the following three situations:
- (a) The deprivation of liberty is necessary for life-sustaining treatment.⁶⁶
 - (b) The Court of Protection has authorised the deprivation of liberty by making an order in relation to the relevant person's personal welfare.⁶⁷
 - (c) The managing authority of the hospital or care home where the relevant person is detained has authorised the deprivation of liberty based on various assessments of the person, including an assessment of their "mental capacity".⁶⁸ The elements of this authorisation process are referred to as "Deprivation of Liberty Safeguards". We discuss them and their legal background later in this chapter.
- 23.63 Case law from the European Court of Human Rights suggests that a deprivation of liberty based merely on the consent of a court-appointed representative or an attorney under an EPOA on behalf of a represented person might breach the rights to liberty and freedom from arbitrary detention in applicable international and domestic human rights instruments.⁶⁹

SUBMITTER FEEDBACK AND THE COMMISSION'S PREVIOUS VIEWS

- 23.64 In our Second Issues Paper, we did not ask specific questions about use of force or deprivation of liberty to give effect to decisions by the court or representatives. However, Iris Reuevecamp, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Te Whatu Ora | Health New Zealand and the judiciary's Legislation and Law Reform Committee raised issues about the implementation or enforcement of welfare guardians' decisions.
- 23.65 They noted that it is unclear whether the PPPR Act provides the Family Court with the power to authorise the use of force or deprivation of liberty of a person who lacks decision-making capacity. Examples of relevant situations given by submitters of where the law is unclear included where a person who lacks decision-making capacity:
- (a) needs to be transported from one place to another in a car with locked doors;
 - (b) needs to be transferred from hospital or home into residential care; or

⁶⁵ Guardianship and Administration Act 1993 (SA), s 32(1)(b).

⁶⁶ Mental Capacity Act 2005 (UK), s 4B.

⁶⁷ Mental Capacity Act 2005 (UK), ss 4A(3)–(4) and 16(2)(a). But see also s 16A of that Act.

⁶⁸ Mental Capacity Act 2005 (UK), s 4A(5) and sch A1.

⁶⁹ The European Court of Human Rights has found violations of art 5 of the European Convention on Human Rights (right to liberty and security) despite a representative consenting to the deprivation of liberty on the represented person's behalf. See for example: *Stanev v Bulgaria* [2012] 1 ECHR 81 (Grand Chamber) at [127]–[130]; *Kędzior v Poland* 45026/07, 16 October 2012 (ECHR) at [62]–[71]; and *Mihailovs v Latvia* 35939/10, 22 January 2013 (ECHR) at [141]–[153]. In *Re D (A Child)* [2019] UKSC 42, [2020] 2 All ER 399 at 415, the UK Supreme Court held that parents could not consent to a child's detention in a psychiatric hospital because it would deny the child the safeguards of art 5 of the European Convention on Human Rights. See also Law Commission (England and Wales) *Mental capacity and deprivation of liberty* (Law Com No 372, 2017) at [10.17], which chose to recommend that deputies and donees should not be allowed to consent to a deprivation of liberty on behalf of the represented person.

- (c) leaves a residential care facility and attempts are made to return them, often with police involvement.
- 23.66 The judiciary’s Legislation and Law Reform Committee commented that “[a]t present the Family Court does not have the necessary powers to monitor and enforce the orders that it makes under the PPPR Act”.
- 23.67 In a previous review, Te Aka Matua o te Ture | Law Commission expressed doubts that sections 10 and 18 of the PPPR Act are “clear enough to justify physical restriction”.⁷⁰ The Commission recommended that a new section be inserted into the PPPR Act to expressly allow the Family Court, when making a personal order, to authorise physical restrictions if necessary to avoid endangering the relevant person’s health or safety. The Commission recommended that any order allowing physical restrictions must be sufficiently particular and that the physical restriction should not be greater or last longer than required.⁷¹
- 23.68 The Commission also proposed further safeguards, including:⁷²
- (a) more frequent Family Court reviews;
 - (b) extending the powers and obligations of district inspectors under the Mental Health (Compulsory Assessment and Treatment) Act to include hospitals and services “where people in respect of whom coercive orders are made reside or are treated”;
 - (c) regular visits by an appointed lawyer;
 - (d) the ability of the Family Court to impose conditions when authorising coercion; and
 - (e) a legislative requirement that coercive powers must be exercised so as not to compromise unnecessarily the dignity, privacy or self-respect of the person concerned.
- 23.69 The Commission’s recommendations related to court-ordered decisions (“personal orders”) under section 10 of the PPPR Act. To clarify the powers of welfare guardians, the Commission recommended that section 18(2) of the PPPR Act be amended to clarify that a welfare guardian has the power to subject the represented person to physical restriction “only to the extent that a direction authorising such restriction has been given” by the Family Court under the proposed new section.⁷³
- 23.70 Iris Reuevecamp subsequently wrote in commentary that the Commission’s approach “raises the question of the purpose of s 10 of the PPPRA, if not to provide authorisation for the imposition of certain restraints on a person’s liberty”. She argued that the Commission underestimated the “lawful effect” of section 10(4) in this regard.⁷⁴

⁷⁰ Te Aka Matua o te Ture | Law Commission *Protections Some Disadvantaged People May Need* (NZLC R80, 2002) at [18].

⁷¹ Te Aka Matua o te Ture | Law Commission *Protections Some Disadvantaged People May Need* (NZLC R80, 2002) at [30].

⁷² Te Aka Matua o te Ture | Law Commission *Protections Some Disadvantaged People May Need* (NZLC R80, 2002) at [33]–[38].

⁷³ Te Aka Matua o te Ture | Law Commission *Protections Some Disadvantaged People May Need* (NZLC R80, 2002) at [39].

⁷⁴ Iris Reuevecamp “Long-term Placement in Aged Residential Care” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 223 at 234.

23.71 The government at the time responded that further work was needed to evaluate the Commission's proposals.⁷⁵ The proposals have not been implemented to date. We recommend below that the Government should review the law relating to the use of force on and deprivation of liberty of people who lack decision-making capacity. In such a review, the Government may wish to revisit the Commission's proposals, while bearing in mind that the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) had not yet been drafted at the time.

RELEVANT HUMAN RIGHTS FRAMEWORK

23.72 Using force on people who lack decision-making capacity or depriving them of liberty may engage multiple human rights, including the rights:

- (a) not to be subjected to arbitrary detention;⁷⁶
- (b) to freedom of movement;⁷⁷
- (c) not to be subjected to torture or cruel treatment;⁷⁸
- (d) to be treated with humanity and with respect for the inherent dignity of the person when deprived of liberty;⁷⁹
- (e) to refuse to undergo medical treatment;⁸⁰
- (f) to be free from exploitation, violence and abuse;⁸¹ and
- (g) to have one's physical and mental integrity protected.⁸²

23.73 There are many differences between these rights. They are affirmed in different human rights instruments (primarily the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights), the International Covenant on Civil and Political Rights and the Disability Convention), which means their legal status in Aotearoa New Zealand varies. These rights also differ in their legal architecture. Some of them are absolute — they cannot be limited (for example, the right not to be subjected to torture or cruel treatment under section 9 of the NZ Bill of Rights). In contrast, other rights can be limited under specific circumstances.

⁷⁵ *Government response to Law Commission report on "Protections some disadvantaged people may need"* (27 February 2003).

⁷⁶ New Zealand Bill of Rights Act 1990, s 22; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 9.1; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 14.

⁷⁷ New Zealand Bill of Rights Act 1990, s 18; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 12.

⁷⁸ New Zealand Bill of Rights Act 1990, s 9; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 7; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 15.

⁷⁹ New Zealand Bill of Rights Act 1990, s 23(5); and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 10.1.

⁸⁰ New Zealand Bill of Rights Act 1990, s 11; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 17 and 25(d).

⁸¹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 16.

⁸² Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 17.

- 23.74 Among the rights that can be limited, there are, again, different sets of rules for determining whether a limitation is justified. Some of these rights — such as the right to freedom of movement — are capable of limitation under section 5 of the NZ Bill of Rights. That section provides that the rights and freedoms that the NZ Bill of Rights contains “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁸³ In considering whether a measure that limits a right is demonstrably justified, some questions that are commonly addressed include:⁸⁴
- (a) whether the reason for limiting the right is sufficiently important to justify restricting rights or freedoms;
 - (b) whether the measure is sufficiently well designed to ensure that it actually achieves its aim and that it impairs the right or freedom no more than is necessary; and
 - (c) whether the gain to society justifies the extent of the intrusion on the right.
- 23.75 Other rights are designed so that these questions are addressed not as a separate justification exercise but as part of determining whether the right is engaged or not. For example, determining whether someone’s right to be free from arbitrary detention is breached does not depend on whether the test in section 5 of the NZ Bill of Rights is met. Rather, the focus is on whether a detention qualifies as arbitrary or not.⁸⁵ If a detention is found to be arbitrary, it cannot be justified. However, the considerations involved in this exercise (including assessing elements of reasonableness, necessity and proportionality) are similar to those when assessing justification under section 5 of the NZ Bill of Rights.⁸⁶
- 23.76 In the context of measures relating to the exercise of legal capacity, appropriate and effective safeguards are also expressly required by the Disability Convention. The purpose of these safeguards is “to prevent abuse”. They include requirements that measures are tailored to the person’s circumstances, proportional and subject to regular review.⁸⁷
- 23.77 In short, it is a complex task to assess whether a person’s human rights are breached by the use of force against them, or the deprivation of their liberty, in the context of adult decision-making law. For the purposes of this chapter, we do not undertake a detailed human rights law analysis with respect to each right. However, we outline some of the key requirements that must be complied with for the use of force to implement a decision, or a deprivation of liberty, to be justified.
- 23.78 First, if legislation confers powers that have the potential to significantly restrict a person’s human rights, this must be stated clearly by legislation. For example, powers

⁸³ New Zealand Bill of Rights Act 1990, s 5.

⁸⁴ See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], citing the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

⁸⁵ See for example *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103 at [88] per Ellen France and Miller JJ and [175]–[176] per Winkelmann CJ.

⁸⁶ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [163]. See also United Nations Human Rights Committee *General Comment No 35: Article 9 (Liberty and security of the person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [12].

⁸⁷ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 12(4) and 14. See also *Report of the Committee on the Rights of Persons with Disabilities* UN Doc A/72/55 (11 May 2017) at Annex [19].

related to search and surveillance must be defined in detail in statute.⁸⁸ The same applies to the use of force or deprivation of liberty.⁸⁹ To ensure these requirements are met, we consider the Family Court's ability to authorise the use of force or deprivation of liberty should be expressly provided for in statute.

23.79 Second, any legislation authorising the use of force to implement a decision or a deprivation of liberty needs to provide for appropriate and effective safeguards to ensure that any use of force or deprivation of liberty is justified in human rights terms. This might be achieved by setting out mandatory requirements, giving sufficient guidance to assist the Family Court to ensure appropriate and effective safeguards are in place or a combination of the two. Whichever approach is taken, we consider that the safeguards need to ensure that:

- (a) using force or depriving a person of their liberty is only authorised where required to eliminate or mitigate a sufficiently serious risk of harm to the person; and
- (b) the extent of force or deprivation of liberty is no greater and lasts for no longer than is reasonably necessary.

23.80 In addition, with respect to the use of force, we consider that the safeguards need to ensure that any force used is necessary to implement the decision in question and that the extent of force used is proportionate to the significance of the decision to be implemented.

ISSUES

Legal basis for use of force and deprivation of liberty is not sufficiently clear

23.81 Under the common law principle of legality, fundamental rights cannot be overridden by “general or ambiguous words”.⁹⁰ Where fundamental rights appear to be overridden by general or ambiguous words, courts will read down the provision to the point that no such overriding occurs. As the High Court has observed, “unless the words of a statute expressly or by necessary implication curtail a fundamental right, the words ... will be read subject to the basic rights of the individual”.⁹¹ To prevent this, legislative provisions that confer legal powers with the potential to significantly restrict a person's human rights must state that clearly.

23.82 The PPPR Act does not expressly provide for the use of force or deprivation of liberty. The Family Court has interpreted sections 10(4) and 18(2) to empower it to authorise the

⁸⁸ See *Hamed v R* [2011] NZSC 101; [2012] 2 NZLR 305 at [20] and [33]–[47] per Elias CJ. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [18.20.4]–[18.20.9]; and Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [11.38]–[11.40].

⁸⁹ See for example *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103 at [205] per Winkelmann CJ.

⁹⁰ See for example *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 130 per Lord Hoffmann; and *Mitchell v New Zealand Police* [2019] NZHC 2017 at [19], citing *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25]. See also *Diamond Laser Medispa Taupo Ltd v Human Rights Review Tribunal* [2019] NZHC 2809, (2019) 17 NZELR 86 at [38] per Grice J; and *Diamond Laser Medispa Taupo Ltd v Human Rights Review Tribunal* [2020] NZCA 437, (2020) 17 NZELR 569 at [38] per French J. See generally Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at ch 11 n 6.

⁹¹ *Mitchell v New Zealand Police* [2019] NZHC 2017 at [19].

use of force or a deprivation of liberty in some situations.⁹² But there have also been some differing views. As noted above, in *E v E*, the High Court observed that it was “common ground” in that case that the PPPR Act “does not give coercive detention powers”.⁹³

23.83 Even if sections 10(4) and 18(2) do allow for the use of force and deprivation of liberty, several important matters remain unclear, including:

- (a) to what extent the Family Court’s express authorisation is needed for welfare guardians, attorneys or others such as managers of secure care facilities to use, or consent to the use of, force;
- (b) to what extent the Family Court’s express authorisation is needed for welfare guardians, attorneys or others such as managers of secure care facilities to deprive a person of their liberty or consent to the deprivation of their liberty;
- (c) to the extent that court authorisation is required, how specific the Family Court needs to be; and
- (d) whether welfare guardians or attorneys may, even with court authorisation, use force or deprive a person of liberty themselves, or whether they may only consent to certain other people such as healthcare professionals, using force or depriving a represented person of their liberty.

23.84 Using force to implement a decision in relation to a person who lacks decision-making capacity and depriving them of liberty to protect them from harm can restrict the person’s rights in profound ways. It is therefore particularly problematic that the PPPR Act does not make clear who may impose restrictions and under what circumstances.

23.85 As we address above, most of the jurisdictions we have considered address the circumstances in which force may be used to implement decisions of courts or representatives more expressly than the PPPR Act. Almost all these jurisdictions require the prior authorisation of a court, either as a part of an order appointing a representative or in a separate order.⁹⁴

Current law does not provide sufficient safeguards

23.86 The PPPR Act does not provide for sufficient safeguards in relation to the use of force and deprivation of liberty. The Family Court is required to exercise its statutory power to make orders consistently with the NZ Bill of Rights.⁹⁵ However, the PPPR Act does not provide sufficient guidance for the Court about when orders are appropriate and what safeguards should be imposed to protect a person’s rights.

⁹² For example in *Loli v MWY FC* Auckland FAM-2009-004-001877, 14 January 2011 at [24(2)]; and *MAS v RJE FC* Manukau FAM-2010-092-1922, 13 October 2010 at [5(b)].

⁹³ *E v E* HC Wellington CIV-2009-485-2335, 20 November 2009 at [49].

⁹⁴ Guardianship Act 1987 (NSW), s 21A(1)(a); Guardianship of Adults Act 2016 (NT), s 35(1); Guardianship and Administration Act 1993 (SA), s 32(1)(b) and (1a); Guardianship and Administration Act 1995 (Tas), s 28(1); Guardianship and Administration Act 2019 (Vic), s 45(1); Mental Capacity Act 2005 (UK), s 16(5); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(2); Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 33(2); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 59(3).

⁹⁵ New Zealand Bill of Rights Act 1990, ss 3(a) and 6.

Threshold for authorising force

23.87 The PPPR Act provides no guidance on the circumstances in which the Family Court may authorise the use of force beyond the general requirement that it must make “the least restrictive intervention possible”.⁹⁶ Many overseas jurisdictions we have investigated are much more specific, providing that the relevant court can authorise measures to give effect to, or ensure compliance with, a decision only where the health and safety of a person is in danger.⁹⁷

Manner in which force may be used

23.88 The regulatory standard applying to restraint and seclusion is binding only on providers of hospital care, residential disability care and residential aged care. It will apply in most situations where force is used on a person who lacks decision-making capacity by professionals. However, it does not cover whether a representative may consent to a deprivation of liberty of the represented person or whether the representative themselves may use force and, if so, how. The requirement for representatives to act in the best interests of the relevant person does not provide sufficient guidance either.⁹⁸ Some jurisdictions we have considered have legislation setting out conditions for the use of force that operate in addition to any conditions in a court order.⁹⁹

Framework for identifying and authorising deprivations of liberty

23.89 The PPPR Act does not provide rules for when it may be justified for the Family Court or a welfare guardian to make a decision that will operate to deprive a person of liberty. As Alison Douglass puts it, the PPPR Act is not designed to “be effective in identifying deprivation of liberty in advance of a person’s detention”.¹⁰⁰

Regular review

23.90 Court reviews of EPOAs only take place if initiated by one of the people authorised to apply for a review.¹⁰¹ While we consider this framework is broadly adequate for general purposes (and so do not recommend changing it — see Chapter 18), it is unlikely to be

⁹⁶ Protection of Personal and Property Rights Act 1988, s 8(a).

⁹⁷ Guardianship of Adults Act 2016 (NT), s 35(4); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(1)(b); and Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 33(1)(b). See also Queensland Law Reform Commission *A Review of Queensland’s Guardianship Laws: Report Volume 3* (QLRC R67, 2010), R20-14.

⁹⁸ Protection of Personal and Property Rights Act 1988, ss 18(3) and 98A(2).

⁹⁹ For example, in England and Wales, the conditions include that the representative reasonably believes that it is necessary to do the act in order to prevent harm to the represented person and that the act is a proportionate response to the likelihood of the represented person’s suffering harm and the seriousness of that harm: Mental Capacity Act 2005 (UK), s 20(7)–(12).

¹⁰⁰ Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, July 2016) at [3.95].

¹⁰¹ Protection of Personal and Property Rights Act 1988, s 103.

sufficient if the attorney consents to the use of force or deprivation of liberty of the represented person.¹⁰²

- 23.91 Review obligations apply under the regulatory standard applying to restraint and seclusion. However, this standard applies only to professional providers of hospital care, residential disability care or residential aged care and only in relation to restraint practices and seclusion events.¹⁰³

Record keeping

- 23.92 The PPPR Act does not require welfare guardians or attorneys to keep a record of events where they have authorised the use of force or a deprivation of liberty. Nor would welfare guardians or attorneys be bound by the regulatory standard applying to restraint and seclusion were they authorised to use force themselves. The standard requires only professional providers of hospital care, residential disability care or residential aged care to keep a written record of instances where force was used.¹⁰⁴

Inspections

- 23.93 Under the PPPR Act, there is no designated role of inspector or another monitoring mechanism that goes beyond that required by the Crimes of Torture Act 1989. New Zealand legislation that authorises the deprivation of liberty of people typically provides for designated inspectors.¹⁰⁵

Broader issues arise in relation to deprivations of liberty

- 23.94 As noted above, the PPPR Act does not provide a sufficiently clear basis for deprivations of liberty and does not provide for sufficient safeguards. These deficiencies overlap with broader issues relating to potential deprivations of liberty in care settings in Aotearoa New Zealand.
- 23.95 Overseas case law of the past two decades has highlighted that the right not to be subjected to arbitrary detention is engaged in wider circumstances than sometimes understood. In 2004, the European Court of Human Rights considered the application of this right to “informal patients” — that is, “compliant patients” who are admitted to a hospital or other institution without the decision-making capacity to give their consent.¹⁰⁶ The Court found that the informal patient in question was deprived of liberty because he “was under continuous supervision and control and was not free to leave”.¹⁰⁷ Applying

¹⁰² In the context of compulsory care under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, the Kōti Mana Nui | Supreme Court has emphasised the importance of mechanisms that ensure that a detention of a person under that Act only continues for as long as it is proportional: *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103 at [88] per Ellen France and Miller JJ.

¹⁰³ The regulatory standard requires that service providers conduct “comprehensive reviews at least six-monthly” of all restraint practices and seclusion events: *Te Mana Tautikanga o Aotearoa | Standards New Zealand Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021) at [6.3.1] and [6.4.7].

¹⁰⁴ *Te Mana Tautikanga o Aotearoa | Standards New Zealand Ngā paerewa: Health and disability services standard* (NZS 8134:2021, June 2021) at [6.2.4].

¹⁰⁵ Compare Corrections Act 2004, ss 27–28; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, ss 95–101 and 144; Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 94–99; and Public Safety (Public Protection Orders) Act 2014, ss 78–84 and 127.

¹⁰⁶ *HL v United Kingdom* (2004) 40 EHRR 32 (ECHR).

¹⁰⁷ *HL v United Kingdom* (2004) 40 EHRR 32 (ECHR) at [91].

- this test, the UK Supreme Court held in the 2014 case *P v Cheshire West and Chester Council and another* that the situation of people in non-institutional settings (such as foster care) can also amount to a deprivation of liberty.¹⁰⁸
- 23.96 At the time of the European Court of Human Rights' decision, many countries did not provide for procedural safeguards for when people who lack the relevant decision-making capacity but are compliant or passive are deprived of liberty in hospitals or residential care facilities (the so-called "Bournemouth gap").¹⁰⁹
- 23.97 Some jurisdictions that we have considered have responded, or are in the process of responding, to this gap. These processes have proved particularly complex. In relation to England and Wales, the UK Parliament addressed the gap through 2007 legislation, which added safeguards to the Mental Capacity Act 2005 (called the "Deprivation of Liberty Safeguards"). To authorise a deprivation of liberty in accordance with the Act, multiple assessments must be undertaken to ascertain that all requirements for a deprivation of liberty in accordance with the Act are present.¹¹⁰
- 23.98 The Deprivation of Liberty Safeguards have been criticised as overly complex and ineffective.¹¹¹ The Law Commission of England and Wales subsequently recommended replacing the Safeguards with an improved set of "Liberty Protection Safeguards".¹¹² The UK Parliament has enacted amendments to give effect to the Law Commission's recommendations.¹¹³ However, these amendments have not yet entered into force.¹¹⁴ The UK Government will undertake further public consultation on the implementation of the Liberty Protection Safeguards in 2026.¹¹⁵
- 23.99 The Governments of Scotland and Ireland have published reports that highlight the need to address the Bournemouth gaps in their respective legislation through new safeguards.¹¹⁶ However, the proposals in these reports have not been implemented in either jurisdiction. Similarly, the Victorian Law Reform Commission recommended changes to guardianship provisions and a safeguarding system similar to the Deprivation of Liberty Safeguards in the UK.¹¹⁷ They were not implemented as part of the Guardianship and Administration Act 2019.

¹⁰⁸ *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19, [2014] 2 All ER 585 at 606–607.

¹⁰⁹ The gap was named after Bournemouth Hospital, where the relevant person was detained: *R v Bournemouth Community and Mental Health NHS Trust, ex parte L (Secretary of State for Health and others intervening)* [1998] 3 All ER 289 (HL).

¹¹⁰ Mental Capacity Act 2005 (UK), sch A1 pt 4.

¹¹¹ House of Lords Select Committee on the Mental Capacity Act 2005 *Mental Capacity Act 2005: post-legislative scrutiny* (HL Paper 139, 2014) at [270]–[272]; and Law Commission (England and Wales) *Mental capacity and deprivation of liberty* (Law Com No 372, 2017) at [4.13].

¹¹² Law Commission (England and Wales) *Mental capacity and deprivation of liberty* (Law Com No 372, 2017).

¹¹³ Mental Capacity (Amendment) Act 2019 (UK).

¹¹⁴ The amendments enter into force on a date the Secretary of State appoints by regulations: Mental Capacity (Amendment) Act 2019 (UK), s 6(3)(b). No such regulation has been made to date.

¹¹⁵ UK Department of Health and Social Care and Stephen Kinnock "Improved safeguarding and protections for vulnerable people" (press release, 18 October 2025).

¹¹⁶ Scottish Government *Adults with Incapacity (Scotland) Act 2000: Proposals for Reform* (2018); and Department of Health (Ireland) *The Deprivation of Liberty Safeguard Proposals: Report on the Public Consultation* (2019).

¹¹⁷ Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012), R232–R234.

- 23.100 Commentators have identified that there is a Bournemouth gap in Aotearoa New Zealand.¹¹⁸ In other words, New Zealand law does not provide for procedural safeguards to ensure that all those who are deprived of liberty as informal patients or in care settings are appropriately protected. The gap was mentioned in the Health and Disability Commissioner’s 2024 review of the HDC Code.¹¹⁹
- 23.101 A deprivation of liberty with insufficient safeguards may breach the right not to be arbitrarily detained under section 22 of the NZ Bill of Rights.¹²⁰ If a detention occurs “without following proper procedures”, it may be arbitrary detention in breach of section 22.¹²¹
- 23.102 We consider that, in Aotearoa New Zealand, further safeguards are likely required for:
- (a) people who lack relevant decision-making capacity on whose behalf a welfare representative or welfare attorney has consented to an arrangement that amounts to a deprivation of liberty; and
 - (b) passive or compliant people who lack relevant decision-making capacity and are held in a care setting without appropriate statutory safeguards (the Bournemouth gap scenario).
- 23.103 Accordingly, issues with respect to deprivation of liberty arise in the context of the PPPR Act but are broader than that legislation because they concern not only people who have representatives but those who do not. Law reform in this area would require investigating the possible need for legal safeguards beyond the PPPR Act. For example, it might be appropriate to implement a system of safeguards (akin to the proposed Liberty Protection Safeguards in the UK) to ensure that hospitals, residential care facilities and other relevant care settings have appropriate legal authorisation for anybody who is deprived of liberty in their care and that appropriate protections are in place.¹²²

It is unclear in what situations police may assist with enforcement

- 23.104 As outlined above, the Family Court has repeatedly issued orders authorising police assistance where the court anticipates resistance from either the person who lacks

¹¹⁸ Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, July 2016) at [3.65]–[3.70]; Iris Reuecamp and John Dawson “Healthcare in the Absence of Consent” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 123 at 137–138; Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Lawyers and Doctors* (Victoria University of Wellington Press, Wellington, 2020) at 204–207; and Mark Fisher “Is there a suitable framework for the deprivation of liberty in New Zealand?” in Alison Douglass, Greg Young and John McMillan (eds) *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers* (Victoria University of Wellington Press, Wellington, 2020) 213 at 213–215. See also Peter Boshier *OPCAT Aged Care Monitoring: Chief Ombudsman’s Observations 2021 to 2024* (Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman, 4 March 2025) at 14–16.

¹¹⁹ Te Toihau Hauora, Hauātanga | Health and Disability Commissioner *Recommendations Report | He Tuhinga Taunaki Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers’ Rights | Ko te arotakenga o Te Ture Toihau Hauora, Hauātanga 1994 me to Tikanga o ngā Mōtika Kiritaki mō ngā Ratonga Hauora, Hauātanga* (December 2024) at 49.

¹²⁰ Iris Reuecamp and John Dawson “Healthcare in the Absence of Consent” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 123 at 137–140.

¹²¹ *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at 441–442.

¹²² Alison Douglass made recommendations with respect to liberty safeguards in 2016: Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, July 2016) at 98.

- decision-making capacity themselves or a third party.¹²³ However, it is unclear to what extent police can enforce a personal order made by the court or a decision of a welfare guardian, given that the PPPR Act contains no express legal basis for police to intervene.
- 23.105 A constable's legal authority to use force primarily derives from the Crimes Act 1961.¹²⁴ Some of the legal grounds in the Crimes Act concern the use of force to prevent harm. In particular, the Crimes Act authorises the use of force to prevent suicide or an offence that would likely cause immediate and serious injury to a person or to property.¹²⁵ However, this authorisation is unlikely to encompass the use of force to implement decisions under the PPPR Act. For example, transporting a person to a secure residential facility by force might be necessary for the long-term safety and wellbeing of the person in question, but it is unlikely to be necessary to prevent an offence that would cause immediate and serious injury.
- 23.106 In engagement with practitioners and Ngā Pirihimana o Aotearoa | New Zealand Police, we heard that police are reluctant to assist with enforcing decisions made on behalf of a person under the PPPR Act. Where they are involved, they usually restrict themselves to supervising the situation rather than actively using force. The PPPR Act is not listed as one of the sources of legal authority to use force in the Police Manual.¹²⁶ In the context of long-term residential aged care, Iris Reuvecamp has observed that, because nothing in the PPPR Act expressly authorises police involvement, "the enforceability of orders under the PPPRA ... tends to raise the most difficulties".¹²⁷
- 23.107 Other New Zealand statutes relating to vulnerable people authorise a constable to use force in situations not covered by the Crimes Act. For example, under the Mental Health (Compulsory Assessment and Treatment) Act, a designated health professional "may call to his or her assistance a constable" to ensure that assessment or treatment can be carried out, including by entering premises, taking the person concerned to the place of the assessment or treatment and detaining the person there for no longer than six hours.¹²⁸ The Mental Health Bill 2024 contains a similar clause.¹²⁹ Under the Care of Children Act 2004, a court may, on application of certain people, issue a warrant authorising a constable, social worker or any other person named in the warrant to take the child concerned (using reasonable force if necessary) and to deliver the child to the applicant or another specified person.¹³⁰
- 23.108 Many overseas jurisdictions expressly authorise police to use reasonable force in certain situations where a person who lacks relevant decision-making capacity needs to be

¹²³ See for example *Loli v MWY* FC Auckland FAM-2009-004-001877, 13 January 2011 at [24(2)]; *MAS v RJE* FC Manukau FAM-2010-092-1922, 13 October 2010 at [5(b)]; and *Re L* [2001] NZFLR 310 (DC) at [100(4)].

¹²⁴ "Use of force: overview" in Ngā Pirihimana o Aotearoa | New Zealand Police *Police Manual* (March 2024) <www.police.govt.nz> at 12.

¹²⁵ Crimes Act 1961, s 41.

¹²⁶ "Use of force: overview" in Ngā Pirihimana o Aotearoa | New Zealand Police *Police Manual* (March 2024) <www.police.govt.nz> at 13–22.

¹²⁷ Iris Reuvecamp "Long-term Placement in Aged Residential Care" in Iris Reuvecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 223 at 235–236.

¹²⁸ Mental Health (Compulsory Assessment and Treatment) Act 1992, s 41.

¹²⁹ Mental Health Bill 2024 (87-2), cl 181.

¹³⁰ Care of Children Act 2004, s 72(2).

removed from a particular place.¹³¹ Some jurisdictions also enable the relevant court to authorise police assistance to give effect to any decision by a representative.¹³²

RECOMMENDATION

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.

Reform is needed

- 23.109 Reform is required to address the issues currently arising that we describe above. The PPPR Act does not provide sufficient clarity on many issues relating to the use of force and deprivation of liberty, which requires the Family Court and individual decision makers to respond to issues with little legislative guidance. Nor is it clear in what situations decision makers can call upon police to assist with the enforcement of decisions. This approach is not sufficient to ensure people's rights are protected.
- 23.110 Our recommended decision-making rules (see Chapter 12) do not provide a framework for implementing decisions where they are resisted. In our view, further procedural safeguards are required for situations involving deprivation of liberty, even when the decision has been made on a person's behalf in accordance with our recommended decision-making rules.
- 23.111 Our analysis of the laws in other jurisdictions we have considered reinforces this conclusion. As noted above, those jurisdictions tend to provide for powers to implement decisions in more express terms and in more detail than the PPPR Act.

General points for consideration

- 23.112 How the law should address the use of force to implement a decision and deprivation of liberty involves sensitive and complex issues. With respect to the use of force to implement a decision, issues include:
- (a) who the Family Court should be able to authorise to use force;¹³³
 - (b) how specific the Court's authorisation must be;
 - (c) how the grounds for authorising the use of force should be framed; and
 - (d) what other safeguards should be required.

¹³¹ Guardianship and Management of Property Act 1991 (ACT), s 68(1); Guardianship Act 1987 (NSW), ss 11(1)(b) and 12; Guardianship and Administration Act 2000 (Qld), s 149; Guardianship and Administration Act 1993 (SA), s 32(4)(a); Guardianship and Administration Act 1995 (Tas), s 29(1) and (3); Guardianship and Administration Act 1990 (WA), s 49(3); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(2); and Substitute Decisions Act SO 1992 c 30 (Ontario), s 59(3).

¹³² Adults with Incapacity (Scotland) Act 2000, s 70(1) and (5); and Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 38(2). A similarly broad power was also recommended in Queensland Law Reform Commission *A Review of Queensland's Guardianship Laws: Report Volume 3* (QLRC R67, 2010), R20-15.

¹³³ For example, this could be limited to professionals who are trained in the use of force. Alternatively, family and whānau members could be authorised to use force to implement a decision where appropriate safeguards are in place.

- 23.113 With respect to deprivation of liberty, issues include:
- (a) where a person has a representative (either court-appointed or an attorney under an EPOA), what may be required beyond our recommended decision-making rules to ensure adequate safeguards;
 - (b) where a person lacks decision-making capacity but does not have a representative, what is required to ensure adequate safeguards; and
 - (c) the extent to which the applicable safeguards should differ depending on the nature of the residence concerned (for example, whether it is a hospital, mental health facility, aged care facility or private home).
- 23.114 An issue with respect to both the use of force and deprivations of liberty is whether a statutory doctrine of “best interests” necessity that extends beyond professional care settings is needed to address urgent situations where prior authorisation of use of force or deprivation of liberty is not practicable.

Consideration of police powers

- 23.115 Another finely balanced issue is whether police should have powers to use reasonable force to give effect to a decision made by the Family Court, a court-appointed representative or an attorney acting under an EPOA.
- 23.116 In situations where a person who lacks relevant decision-making capacity poses an acute danger to themselves or others, the Crimes Act already provides grounds for police to intervene.¹³⁴
- 23.117 However, it is possible that additional powers may be needed to authorise the use of force to give effect to certain decisions made for a person who lacks relevant decision-making capacity. For example, such powers might be needed to authorise a constable to enter premises where the person is. Or such powers might be needed to take the person to the place where they are required to be, for example, to return them to a care facility where they were required to remain for their own safety.
- 23.118 We have received diverging feedback on this issue. The limited feedback we have received through public consultation supported clarifying police powers in relation to the PPPR Act. NZLS and Health New Zealand supported an enforcement mechanism in the new legislation. Health New Zealand specifically said it was essential to clarify the powers of police to give effect to any orders.
- 23.119 In engagement with care professionals, we have heard that health practitioners or social workers may sometimes only feel safe to attempt to give effect to decisions made in relation to a person who lacks decision-making capacity with the assistance of police. Legal practitioners have also pointed out that, although enforcing decisions made for people who lack decision-making capacity is not core policing work, there is no agency other than police that could fulfil this role.
- 23.120 In contrast, New Zealand Police itself told us that it does not support having powers to use force beyond core policing matters.¹³⁵ It noted concerns that authorising police to use force in health contexts is fraught with operational difficulties and that the involvement of

¹³⁴ See for example ss 41 (prevention of suicide and certain offences) and 48 (self-defence and defence of another).

¹³⁵ See also Ngā Pirihi Mana o Aotearoa | New Zealand Police *Strategic Intentions 2024–2028* (October 2024) at 15.

uniformed police officers in non-criminal matters can have counterproductive and potentially traumatising effects on the people concerned.

Conclusion

- 23.121 Detailed consideration is required to work through the issues discussed in this chapter. Relevant provisions under the PPPR Act must be considered together with relevant common law, laws regulating the provision of health and disability services and legislation authorising compulsory treatment or care of people with mental disorders or intellectual disabilities. The position of people who lack relevant decision-making capacity but who do not have a representative and may fall within the “Bournewood gap” must also be addressed. The issues might not best be resolved through the new Act that we recommend should replace the PPPR Act. As we explain above, many overseas jurisdictions regulate these matters through multiple statutes.
- 23.122 In addition, comprehensively addressing the issues we have discussed in this chapter requires a deeper understanding of the use of force and deprivation of liberty in care settings than we have been able to attain at this stage of our review. In particular, extensive consultation with people who are affected by these matters is needed — people who lack decision-making capacity, welfare guardians, attorneys, family members, care workers and police.
- 23.123 For these reasons, we recommend that the Government review the law relating to the use of force against, and the deprivation of liberty of, people who lack relevant decision-making capacity.
- 23.124 Importantly, however, the recommendations we make elsewhere in this Report are not contingent on the Government undertaking that review first. The current practices in relation to use of force and deprivations of liberty could continue while a new Act is in force. We recommend the Family Court and court-appointed representatives should have the powers they may reasonably need to make and implement decisions for the represented person, akin to sections 10(4) and 18(2) of the PPPR Act. Although the current lack of clarity is not desirable, continuing it in the interim is preferable to delaying the implementation of the numerous improvements to other aspects of the PPPR Act we recommend.
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CHAPTER 24

Practical improvements and oversight

IN THIS CHAPTER, WE CONSIDER:

- what oversight and support functions should be provided for in a new Act;
- whether oversight and support functions should be consolidated in a single agency; and
- the potential provision of public welfare representatives.

INTRODUCTION

- 24.1 For our recommendations in this Report to achieve their purpose, there will need to be effective oversight of representative arrangements (both court-appointed representative arrangements and enduring powers of attorney (EPOAs)) and formal support arrangements. In addition, people involved with these arrangements will need to be supported. The focus of this chapter is on oversight and support provided by public agencies, as opposed to te Kōti Whānau | Family Court.
- 24.2 In this chapter, we recommend that a new Act provide for oversight and support functions, including a complaints mechanism, information and guidance, and tailored support and advice. We also recommend that the Government consolidate oversight and support functions in a single agency. This approach would align with overseas jurisdictions we have investigated, all of which have a single oversight body for these arrangements.
- 24.3 Finally, we discuss the potential provision of public welfare representatives. An effective public representative system would be the best way to address current shortages of welfare representatives. However, its effectiveness would depend on how well the system were funded. Whether the expenditure required for an effective system is appropriate would need to be weighed by the Government against its other priorities.

BACKGROUND ON OVERSIGHT FOR REPRESENTATIVE ARRANGEMENTS

Current approach

- 24.4 Currently, the courts, various government departments and other bodies undertake various oversight and support roles in relation to representative arrangements:
- (a) The Family Court has the primary role in dealing with complaints in relation to representative arrangements through reviews of court-appointed representative arrangements and its supervisory jurisdiction in relation to EPOAs.
 - (b) Various government bodies can also potentially be involved in complaints about court-ordered and self-instigated arrangements such as Te Kāhui Tika Tangata | Human Rights Commission,¹ the Aged Care Commissioner² and Te Toihau Hauora, Hauātanga | Health and Disability Commissioner.³
 - (c) The Family Court receives financial statements from property managers for filing. It then forwards them to Public Trust for review.⁴
 - (d) Te Tāhū o te Ture | Ministry of Justice, Te Tari Kaumātua | Office for Seniors and Public Trust all provide information and forms for setting up an enduring power of attorney (EPOA) or applying to become a court-appointed representative.⁵ Several non-government bodies provide guides for making applications to be a representative.⁶
 - (e) A number of non-government bodies prepare their own support, training and advice for people involved with representative arrangements.⁷
- 24.5 Some of these agencies have functions that are specific to arrangements under the Protection of Personal and Property Rights Act 1988 (PPPR Act), while other agencies have general functions that can include these arrangements.

Overseas approaches

- 24.6 All the jurisdictions we have examined have a single oversight body for representative arrangements. These bodies perform a range of different functions. Common functions

¹ See Te Kāhui Tika Tangata | Human Rights Commission “Making a complaint” <www.tikatangata.org.nz>.

² See Te Toihau Hauora, Hauātanga | Health and Disability Commissioner “Aged Care Commissioner” (4 March 2024) <www.hdc.org.nz>.

³ See Te Kaitiaki Mana Tangata | Ombudsman New Zealand “Health & Disability Commissioner (HDC)” <www.ombudsman.parliament.nz>.

⁴ Protection of Personal and Property Rights Act 1988, ss 45(2) and 46.

⁵ See Te Tāhū o te Ture | Ministry of Justice “Powers to Make Decisions for Others” (18 October 2021) <www.justice.govt.nz>; Te Tari Kaumātua | Office for Seniors “Promoting enduring power of attorney (EPA)” <www.officeforseniors.govt.nz>; and Public Trust “Enduring Power of Attorney (EPA)” <www.publictrust.co.nz>.

⁶ See for example Te Roopu Taurima “Our Services” <www.terooputaurima.org.nz>; Te Wai Kahukura Atawhai | Spectrum Care “Welfare Guardianship” <www.spectrumcare.org.nz>; and Welfare Guardians Trusts NZ “Information” <www.welfareguardians.nz>.

⁷ See for example Community Law “Individual Rights & Freedoms” <communitylaw.org.nz>; and Welfare Guardians “Information” <www.welfareguardians.nz>.

include:⁸ operating a complaints mechanism; providing support and advice; public education; acting as or providing representatives; maintaining a register of EPOAs; receiving and examining representatives' records; developing information about arrangements; and supervising representative arrangements.

- 24.7 All the oversight bodies we are aware of have websites.⁹ The websites vary as to the level of detail and information they provide, including whether information is available in accessible formats such as EasyRead. However, some common features include:
- (a) template forms for the various applications involved with each type of representative arrangement;
 - (b) an online reporting system for representatives' record-keeping and reporting obligations;
 - (c) information on a range of topics, such as how to be a representative, relevant human rights, how to navigate the courts and relevant group of people, including lists of panelled representatives (we discuss this topic further below) and specialised lawyers;
 - (d) the ability to lodge complaints through the website;
 - (e) a "contact us" section with a phone number, physical address and email address; and
 - (f) a virtual platform for holding seminars or "information sessions" for those involved in representative arrangements.
- 24.8 The equivalent website in Aotearoa New Zealand is a subsite of the Ministry of Justice website: [Powers to make decisions for others | New Zealand Ministry of Justice](#). The website provides some basic information such as template forms to apply to be an attorney under an EPOA or a court-appointed representative. The information is not available in accessible formats such as Easy Read.

Relevant requirements under the Disability Convention

- 24.9 The United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) requires all measures relating to the exercise of legal capacity to provide for

⁸ This list is taken from the relevant legislation in Australia, England and Wales, Scotland, Ireland and Canada. The relevant statutes are: Public Trustee and Guardian Act 1985 (ACT); Guardianship Act 1987 (NSW); Guardianship of Adults Act 2016 (NT); Public Guardian Act 2014 (Qld); Guardianship and Administration Act 1995 (Tas); Guardianship and Administration Act 2019 (Vic); Guardianship and Administration Act 1990 (WA); Mental Capacity Act 2005 (UK); Adults with Incapacity (Scotland) Act 2000; Assisted Decision-Making (Capacity) Act 2015 (Ireland); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta); and Public Guardian and Trustee Act RSBC 1996 c 383 (British Columbia).

⁹ Public Trustee and Guardian "Home" <www.ptg.act.gov.au> (Australian Capital Territory); New South Wales Government "The Public Guardian is my guardian" <www.nsw.gov.au>; Northern Territory Public Guardian and Trustee "Welcome to the Public Guardian and Trustee" <www.pgt.nt.gov.au>; Public Guardian Queensland "Office of the Public Guardian" <www.publicguardian.qld.gov.au>; Government of South Australia "Office of the Public Advocate" <www.opa.sa.gov.au>; Tasmanian Government Department of Justice "Office of the Public Guardian Tasmania" <www.publicguardian.tas.gov.au>; Office of the Public Advocate "Safeguarding people with disability and mental illness" <www.publicadvocate.vic.gov.au> (Victoria); Government of Western Australia "Office of the Public Advocate" <www.wa.gov.au>; "Office of the Public Guardian" <www.gov.uk> (England and Wales); Office of the Public Guardian (Scotland) "Home" <www.publicguardian-scotland.gov.uk>; Decision Support Service "Home" <decisionsupportservice.ie> (Ireland); Government of Alberta "Office of the Public Guardian and Trustee (OPGT)" <www.alberta.ca>; Public Guardian and Trustee of British Columbia "Public Guardian and Trustee of BC" <www.trustee.bc.ca>; and Government of Ontario "Office of the Public Guardian and Trustee" <www.ontario.ca>.

“appropriate and effective safeguards to prevent abuse in accordance with international human rights law”.¹⁰ Oversight is an important aspect of this.

- 24.10 The Disability Convention also requires states to take appropriate measures to ensure that disabled people have access, on an equal basis with others, to a wide range of information and services.¹¹ According to the United Nations Committee on the Rights of Persons with Disabilities (Disability Committee), the denial of equal access to information and services can engage the right to be free from discrimination.¹² The Disability Committee has also said ensuring full access to information and services is a “vital precondition” for the enjoyment of many of the rights in the Disability Convention.¹³ In the context of legal measures relating to the exercise of legal capacity, this requires states to ensure that information about those measures is available and accessible. More active assistance may also be required.¹⁴ Without readily available and accessible information about these measures, people affected by them may not be able to make fully informed decisions about them or participate effectively in their design and implementation.
- 24.11 As we note in Chapter 3, the Disability Convention’s requirements extend beyond the content of legislation. States are required to adopt “all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the ... Convention”.¹⁵ Administrative measures may be critical for legislative change to be implemented effectively.

ISSUES IN RELATION TO OVERSIGHT AND SUPPORT

- 24.12 Feedback in response to our Preliminary Issues Paper and Second Issues Paper highlighted two key issues.
- 24.13 The first issue concerns the adequacy of oversight of representative arrangements.¹⁶ This function is primarily fulfilled by the Family Court. However, the cost and complexity of the Court process can make it inaccessible, and in some situations, the Court may not be best placed to respond to an issue. There may also be a gap in oversight for situations where a complaint needs to be raised but is not sufficiently serious to merit making an application to the Court or a complaint to Ngā Pirihimana Aotearoa | New Zealand Police.

¹⁰ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4). See also art 4(g)–(i), which places a range of obligations on states, including to provide accessible information on certain topics and to train professionals and staff working with persons with disabilities.

¹¹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 9(1).

¹² United Nations Committee on the Rights of Persons with Disabilities *General Comment No 2 (2014) Article 9: Accessibility* UN Doc CRPD/C/GC/2 (22 May 2014) at [13].

¹³ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 2 (2014) Article 9: Accessibility* UN Doc CRPD/C/GC/2 (22 May 2014) at [36].

¹⁴ For example, art 9(2)(e) of the Disability Convention requires states to take appropriate steps to “[p]rovide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public”. See also United Nations Committee on the Rights of Persons with Disabilities *General Comment No 2 (2014) Article 9: Accessibility* UN Doc CRPD/C/GC/2 (22 May 2014) at [29].

¹⁵ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(1)(a).

¹⁶ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [16.54].

People may also be reluctant to use court processes or contact police where family or whānau are involved.

- 24.14 The second issue is the adequacy of help and support for people involved with representative arrangements. The current information available about representative arrangements is limited and is not always accessible. There is also a lack of guidance and active support or advice for people in representative roles. This can be particularly problematic where representatives are dealing with difficult decisions.
- 24.15 The inadequacies and gaps in oversight and support mean problems may develop and escalate that could otherwise have been avoided. This risk is exacerbated by the fragmented nature of the current oversight and support functions. It can be confusing and difficult when multiple agencies are responsible for related functions.¹⁷
- 24.16 In addition to these two issues, consideration needs to be given to what oversight and support functions are appropriate for formal supporters. We recommend the establishment of a formal supporter role in Chapters 10 and 11.

OVERSIGHT AND SUPPORT FUNCTIONS

- 24.17 In this section, we consider the oversight and support functions required for the recommendations we make in this Report to be effective. In the next section, we discuss who should perform these functions.

Consultation

- 24.18 In our Second Issues Paper, we discussed what oversight and support functions are necessary in the context of the potential functions of an oversight body.¹⁸ We asked submitters what functions an oversight body should perform if one is established. Separately, we asked questions related to information, guidance, training and a potential code of practice.¹⁹
- 24.19 Forty-eight submitters gave feedback on the functions an oversight body should have. Responses varied widely, but there were some consistent themes.

A complaints mechanism

- 24.20 Just over half of submitters that gave feedback about an oversight body's functions said there should be a mechanism to address complaints about representatives. Some of these submitters said there is currently a gap in oversight where concerns or complaints are not sufficiently serious to involve the Family Court or police. Examples included where there are "family issues rather than legal issues" and where a representative may simply need training, support or advice to address any concerns. Some submitters also noted that a complaints mechanism would be able to provide a simpler and quicker way to resolve disputes than the Family Court.

¹⁷ Second Issues Paper at [16.60].

¹⁸ Second Issues Paper at [16.56]. These included providing services for making EPOAs or advance directives, reviewing financial reports, maintaining a register of EPOAs, acting as a representative and providing guidance on decision-making arrangements.

¹⁹ Second Issues Paper at ch 16. Where submitters' responses are relevant to oversight and support functions, we discuss them in this section.

Providing guidance and training

- 24.21 Over a third of submitters that gave feedback about an oversight body's functions said it should provide guidance and training for representatives and others involved with representative arrangements such as lawyers and health professionals. Submitters thought guidance and training could increase people's willingness to become a representative and minimise issues during an arrangement.
- 24.22 In response to our specific question on guidance and training, all 43 submitters that gave feedback thought better guidance and training should be available to representatives. Some of these submitters said many representatives do not understand their role. Others said guidance and training could help reduce unintentional breaches of the law and reduce the need for the Family Court to resolve disputes.
- 24.23 Some submitters also noted that, if a formal supporter role is introduced, guidance and training should be developed for them.²⁰ The Human Rights Commission said reluctance to become a formal supporter could be mitigated by ensuring that people who accept the role have access to adequate support, training and resources.
- 24.24 In response to our specific question about a code of practice to accompany a new Act, 29 submitters discussed a code of practice for representatives.²¹ The majority of these submitters supported such a code, largely because it would be a useful source of guidance. For example, the Human Rights Commission said a code could translate an approach focused on rights, will and preferences into plain language for representatives. The submitters that did not support a code of practice for representatives said it would be too prescriptive.

Monitoring arrangements

- 24.25 Approximately a third of submitters that gave feedback about an oversight body's functions said it should have an active role in monitoring arrangements. Submitters suggested an oversight body could conduct random audits of arrangements, investigate arrangements of its own motion or conduct ongoing monitoring of arrangements, for example by providing "arrangement supervisors".

Developing information about representative arrangements

- 24.26 Approximately a third of submitters that gave feedback on an oversight body's functions said it should develop accessible information about representative arrangements. Submitters that gave reasons identified a current lack of accessible information. A few submitters suggested the oversight body should develop a dedicated website for providing information.
- 24.27 In response to our specific question on information about representative arrangements, all 60 submitters that gave feedback considered the information currently available could be improved. Over half of these submitters emphasised the need for accessible explanations of representative arrangements and related processes. Te Kāhui Ture o

²⁰ These submissions were in response to our questions about formal supporters generally. However, as they are relevant to oversight, we discuss them here.

²¹ Some submitters discussed a code of practice for decision-making capacity assessments. We discuss a code of practice for formal decision-making capacity assessors separately in Chapter 11.

Aotearoa | New Zealand Law Society said the absence of an agency that provides information and guidance on EPOAs is a “fundamental gap”. Participants in the focus groups we held gave similar feedback.

Providing support and advice

24.28 Approximately a third of submitters that gave feedback on an oversight body’s functions said it should provide support or advice to those involved with representative arrangements — by which they meant specific support or advice with respect to individual arrangements rather than more general information, guidance and training. As well, in response to our questions on information, guidance and training, 18 submitters also mentioned support and advice.

24.29 Specific types of support or advice suggested by submitters included having a helpline, information desk or drop-in service. A few submitters said an oversight body could provide advice to representatives for difficult decisions. Community Law Centres Aotearoa said:

We have had experiences of representatives requiring additional support with decision-making. [Auckland Disability Law] has had enquiries from representatives who have been appointed as welfare guardians and property managers seeking advice from them about how to make decisions for a person. It appears that at least some representatives find making decisions difficult and may need support with this.

We think it is important to add that we do not think that adding in self-help resources or more public information of itself would necessarily help many of our clients and/or their representatives to fill out forms or fulfil duties. We see many clients that have low literacy skills, low computer literacy and potentially limited access to internet ... Many of the whānau [Community Law Centres] help need in-person assistance [from Community Law Centre] staff to explain the documents, language, roles and responsibilities and answer questions about them.

Reviewing arrangements

24.30 Approximately a quarter of submitters that gave feedback on an oversight body’s functions said it should conduct periodic reviews of arrangements. Most of these submitters reasoned that reviews would be more accessible and less costly if undertaken by an oversight body, as compared to the Family Court.

Record keeping and reporting

24.31 Approximately a quarter of submitters that gave feedback on an oversight body’s functions said it should monitor and audit record keeping and reporting by representatives. Some of these submitters noted that Public Trust and the Family Court currently share this role but considered it would make sense for an oversight body to do it instead.

Other functions

24.32 Submitters suggested several other functions an oversight body could have, including maintaining a register of EPOAs and providing a dispute resolution service.

Recommendations

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.

24.33 Certain functions are critical to ensuring effective oversight and support for representative arrangements (both court-appointed representative arrangements and EPOAs) and formal support arrangements under a new Act. We recommend a new Act provide for these functions.

24.34 There are some further functions that would contribute to more effective oversight and support but that we do not consider critical. We recommend the Government consider whether these functions should be also provided for, with a view to achieving oversight

of representative arrangements that is as effective as possible while being justified in cost-benefit terms.

- 24.35 We address these two categories of functions below, along with the powers that an agency would need to perform them. For clarity, our recommendations about these functions apply regardless of whether oversight and support functions are consolidated in a single agency (as we address later in this chapter).
- 24.36 A third category of oversight functions is not appropriate for a public agency and should remain with the Family Court. We address these functions below as well.

Functions that are required for effective oversight and support

- 24.37 We consider there are six functions that need to be carried out by a public agency or agencies to ensure that effective oversight and support are provided for representative and formal support arrangements.

Operating a complaints mechanism

- 24.38 An effective complaints mechanism is needed to ensure adequate oversight of representative and formal support arrangements. As noted above, we have heard that the current complaints process available through the Family Court is costly and complex and that there is a gap in oversight for complaints that do not rise to the level of requiring Court or police involvement. A new Act should provide for a complaints mechanism that addresses these concerns.²²
- 24.39 This function would likely be more affordable and efficient than the current Family Court review process. If an applicant wants to raise a complaint through the Family Court, they must apply for a formal review of an arrangement or decision.²³ An application must comply with both the PPPR Act and the Family Court Rules.²⁴ A public agency would be able to run a complaints process in a less formal way, making it more accessible than the Family Court.
- 24.40 In other jurisdictions we have investigated, almost all oversight bodies operate a complaints mechanism.²⁵ A complaints mechanism would take pressure off the Family Court and other bodies that can technically receive complaints. It would also reduce the risk of a complaint about a representative arrangement being lodged with, and separately investigated by, multiple bodies.
- 24.41 For a complaints process to be effective, the responsible agency would need to have certain powers to investigate and resolve complaints. One such power is the ability to

²² In 2001, the Commission noted a lack of effective safeguards, including a complaints mechanism for EPOAs. It noted the problems with the current Family Court processes, including reluctance to initiate proceedings where family is involved. See Te Aka Matua o te Ture | Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001) at [7].

²³ Protection of Personal and Property Rights Act 1988, ss 86–87 and 89.

²⁴ Protection of Personal and Property Rights Act 1988, s 88.

²⁵ Public Trustee and Guardian Act 1985 (ACT), s 19B(1)(b); Guardianship of Adults Act 2016 (NT), s 61(1)(e); Public Guardian Act 2014 (Qld), s 12(1)(c); Guardianship and Administration Act 1995 (Tas), s 17(1); Guardianship and Administration Act 2019 (Vic), s 16(1)(g); Guardianship and Administration Act 1990 (WA), s 97(1)(c); Mental Capacity Act 2005 (UK), s 58(1)(h); Adults with Incapacity (Scotland) Act 2000, s 6(c); Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 96(1); Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 75; and Public Guardian and Trustee Act RSBC 1996 c 383 (British Columbia), s 17(1).

require relevant people or organisations to provide information for the purposes of investigating a complaint.²⁶ Another is the power to initiate proceedings in the Family Court.²⁷ This might be necessary, for example, where the agency reaches the view that a representative needs to be removed or the scope of an order needs to be amended.

Developing information and guidance

- 24.42 As we note above, the current information available about representative arrangements is fragmented, uneven and sometimes inaccessible. A new Act should require an agency to produce comprehensive and accessible information about representative and formal support arrangements.
- 24.43 The information should include guidance for representatives and formal supporters about how to perform their roles. We anticipate that examples of how representatives can work through the decision-making rules that we recommend in Chapter 12 would be particularly useful. This would include information and guidance on decision-making support, which would be relevant both to representatives and to formal supporters.
- 24.44 The information should also include guidance on how to assess a person's decision-making capacity. Under our recommendations, representatives and formal supporters will frequently need to consider the relevant person's decision-making capacity (see, in particular, Chapter 10). These assessments cannot practically be subject to the same requirements as formal decision-making capacity assessments. It is nonetheless important that they be done well. Publicly available guidance is required to achieve this. Such guidance is available in many overseas jurisdictions we have investigated.²⁸
- 24.45 The availability of uniform materials produced by a single agency would have significant advantages over the current, fragmented approach. It would provide a single point of access for people, making it easier for them to find information when they need it. The availability of good information is likely to reduce costs elsewhere by clarifying issues that would otherwise cause difficulties or be escalated.
- 24.46 Many oversight bodies in other jurisdictions we have investigated have a statutory function of developing information or generally educating the public.²⁹ Even where they do not, the websites run by these bodies usually provide a range of useful information.

²⁶ See for example Guardianship and Administration Act 2019 (Vic), s 16(1)(i).

²⁷ See for example Guardianship and Administration Act 2019 (Vic), s 16(1)(b).

²⁸ See for example Legal Aid ACT *ACT Capacity Toolkit: A Guide for Assessing Capacity* (ACT Government, August 2020); New South Wales Department of Communities and Justice *Capacity Toolkit: Information for government and community workers, professionals, families and carers in NSW* (New South Wales Government, April 2020); Queensland Government *Queensland Capacity Assessment Guidelines 2020* (Version 2, April 2021); Tasmania Department of Health and Human Services *Capacity Toolkit: Information for government and community workers, professionals, families and carers in Tasmania* (December 2009); Department for Constitutional Affairs *Mental Capacity Act 2005 Code of Practice* (April 2007) (United Kingdom); National Institute for Health and Care Excellence *Decision-making and mental capacity: NICE guideline* (NG108, October 2018) (United Kingdom); and Decision Support Service *Code of Practice for Supporting Decision-Making and Assessing Capacity* (March 2023) (Ireland).

²⁹ Public Trustee and Guardian Act 1985 (ACT), s 19B(1)(c); Guardianship of Adults Act 2016 (NT), s 61(1)(h); Public Guardian Act 2014 (Qld), s 12(1)(j); Guardianship and Administration Act 1995 (Tas), s 15(1)(i); Guardianship and Administration Act 2019 (Vic), s 15(f); Guardianship and Administration Act 1990 (WA), s 97(1)(f)–(g); Mental Capacity Act 2005 (UK), s 58(1)(i); and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 95(1)(a) and (j).

24.47 Although some submitters supported it, we do not recommend a code of practice be developed for representatives.³⁰ A code of practice for representatives would set certain standards of behaviour with which representatives would be expected to comply whereas guidance simply helps representatives to understand their role. Representatives are not professionals. Under our recommendations (as under the PPPR Act), representatives would have significant duties and the potential for civil liability if they breach them.³¹ A code of practice that set (or was perceived to set) further standards of behaviour might deter people from becoming representatives.

Providing tailored support and advice

24.48 A new Act should provide for a public agency to have the function of providing support and advice to people involved with representative arrangements and formal support arrangements. This would involve tailored support for particular people rather than general information and guidance (as we address above). For example, it could involve helping a representative to work through a complex decision that they need to make.

24.49 A significant number of submitters noted the need for this type of support. If new legislation is enacted as we recommend, this type of support would be particularly important to help people learn about the features and requirements of a new Act, including the decision-making rules and the new role of formal supporters.

24.50 Statutes in most jurisdictions we considered require a public agency to provide support and advice. This function is performed in a number of ways. For example, some agencies maintain a panel of professionals available to provide support or offer in-person or phone advice.

Receiving, keeping and examining records

24.51 A new Act should continue to provide for a public agency to have the function of receiving, keeping and examining records.

24.52 As we explain in Chapter 18, under the PPPR Act, record keeping is mandatory for property representatives but not for welfare guardians. We recommend that this general approach continue but that the Family Court have an express power to specify record-keeping obligations for welfare representatives and additional record-keeping obligations for property representatives.

24.53 The function of receiving, keeping and examining records is currently shared between the Family Court and Public Trust.³² Public Trust accordingly has extensive experience auditing financial records from property managers.

24.54 We do not make a recommendation about which agency or agencies should have responsibility for receiving, keeping and examining records. It may be appropriate for Public Trust to continue to have this power (at least with respect to property representatives' records) so that its experience is not lost. Public Trust is also well known

³⁰ However, in Chapter 11, we recommend a code of practice for professionals undertaking formal decision-making capacity assessments.

³¹ See our discussion of civil liability and immunities in Chapter 22.

³² Protection of Personal and Property Rights Act 1988, ss 45(2) and 46.

for providing various financial services,³³ and removing this function may create confusion for existing property managers. On the other hand, if oversight and support functions are consolidated in a single agency (discussed below), it might be clearest for the records function to sit with that agency.

24.55 Whichever agency or agencies have records functions, appropriate powers will be needed, including a power to compel the provision of records to be examined. We envisage these powers would need to be similar to those that currently exist in relation to property managers' records.³⁴

Developing and maintaining a website

24.56 A new Act should require a public agency to develop and maintain an accessible website that assists people to access the oversight and support functions provided for in a new Act. We envisage a website could:

- (a) have an online portal for making complaints;
- (b) provide a wide-reaching platform for distributing information;
- (c) have an online portal for accessing support and advice;
- (d) host a public-facing interface for a register of EPOAs;
- (e) have an online portal for submitting records; and
- (f) provide a public-facing and easily accessible source of guidance and information for anyone involved in formal supporter or representative arrangements.

24.57 Providing these features in a website would maximise their accessibility and effectiveness, while being cost-effective.

Functions that would contribute to effective oversight and other related functions

24.58 There are three additional functions that, while not necessary for oversight and support to be effective, would nonetheless improve their effectiveness. We recommend that the Government consider whether these functions should be provided for, with a view to achieving oversight that is as effective as possible while being justified in cost-benefit terms. The Government's consideration of these functions should include the extent to which they will apply to formal support arrangements.

Active monitoring of arrangements

24.59 There are several ways that a public agency could provide active monitoring of representative and formal support arrangements. As submitters noted, this could include:

- (a) conducting random audits of arrangements;
- (b) investigating arrangements of its own motion through interviews or house visits; and
- (c) ongoing monitoring of arrangements such as having "arrangement supervisors".

24.60 Active monitoring of arrangements could uncover issues that are not identified through complaints or other oversight functions such as Family Court reviews. This would be particularly relevant for EPOAs, which are not monitored by the Court.

³³ Public Trust Act 2001, s 8(1). See also Public Trust "Products and Services" <www.publictrust.co.nz>.

³⁴ Protection of Personal and Property Rights Act 1988, ss 45(2), 46 and 48(1).

Providing training

- 24.61 As a significant number of submitters raised, training can meaningfully contribute to a representative's understanding and performance of their role. However, we do not consider it is essential to ensuring effective support for those involved with representative or formal support arrangements under a new Act. Providing training would respond to the same issues as providing general information and guidance and tailored support and advice. Whether it is necessary in addition to those functions may be best assessed over time.
- 24.62 If training is provided, we envisage it would likely be most useful to address decision-making support, our recommended decision-making rules and informal decision-making capacity assessments. These are key elements of our recommended regime that representatives would need to understand. Decision-making support and decision-making assessments would also be of central importance to formal supporters.

A dispute resolution service

- 24.63 Providing a dispute resolution service to resolve issues in representative and formal support arrangements would have several advantages. We discuss these advantages in Chapter 25 and make recommendations relating to alternative dispute resolution where an application is before the Family Court. Disputes also arise outside of that context.
- 24.64 There are already some dispute resolution mechanisms available that might be adapted to cover disputes regarding arrangements under a new Act. The Ministry of Justice, for example, offers a Family Dispute Resolution mediation service that “helps parents, guardians, and whānau agree on how to care for their child without going through the Family Court”.³⁵ There is also a number of private mediation and restorative justice services that it might be more efficient to fund to provide dispute resolution services rather than establishing a new service.
- 24.65 Whether such a service is established as part of the administrative framework for a new Act or is made available in some other way, it would likely be of significant benefit to those involved with representative and formal support arrangements. The effectiveness of such arrangements will frequently be reliant on the maintenance of good relationships (particularly within family or whānau). Resolution options that can preserve and enhance such relationships are desirable.

Functions that should remain with the Family Court

- 24.66 In our view, two of the oversight functions raised by some submitters are not appropriate to be addressed by a public agency. These functions should remain with the Family Court.

Removing or appointing representatives

- 24.67 Some submitters suggested that an oversight body should be able to remove or appoint representatives. We do not consider this function should sit with a public agency. Removing and appointing representatives involves a careful balancing of rights in often complicated circumstances. This task fits squarely within the role of the Family Court.

³⁵ Te Tāhū o te Ture | Ministry of Justice “Find a service to help with disputes — Overview” <www.justice.govt.nz>.

24.68 The Disability Convention requires safeguards to be “proportional to the degree to which [measures that relate to the exercise of legal capacity] affect the person’s rights and interests”.³⁶ Appointing or removing a representative has a significant impact on the represented person’s rights and interests, meaning that a high degree of safeguarding is required. In Aotearoa New Zealand, this type of oversight is appropriately provided by courts, not by employees of a public agency.

Periodic reviews of representative arrangements

24.69 Some submitters suggested that an oversight body should be able to undertake periodic reviews of representative arrangements either instead of or in addition to the Family Court. We acknowledge this approach would have potentially significant practical advantages. Reviews could be undertaken less formally, with less cost and delay.³⁷ This would make them more accessible.

24.70 However, a decision to continue, modify or end an arrangement at a review involves the same complex weighing of rights as a decision about whether to impose an arrangement. Periodic reviews are the primary safeguarding mechanism for court-appointed representative arrangements. The decision maker must be satisfied the arrangement continues to be justified in human rights terms. Only courts should undertake this role.

24.71 This is the case even where the person’s relevant decision-making capacity and circumstances are unlikely to change over time. Complicated assessments and decisions may still be required in that context. A decision to continue or end an arrangement is only one of the possible outcomes of a review. The review body needs to be alive to other avenues available to tailor an arrangement to ensure it continues to be justified, even where it is long term. The courts have the expertise for this role.

CONSOLIDATING OVERSIGHT AND SUPPORT FUNCTIONS

24.72 In this section, we consider whether a single public agency should have responsibility for the oversight and support functions recommended above.

Consultation

24.73 In our Second Issues Paper, we noted several potential advantages that a single oversight body might provide. We asked submitters whether a specific oversight body should be established.³⁸

24.74 Sixty submitters gave feedback on this issue, with the vast majority supporting the establishment of a single oversight body. A small number did not or expressed no particular view.

24.75 Approximately a third of submitters who gave feedback on this issue said a single oversight body would improve oversight of representative arrangements. A number of these submitters said oversight is disjointed across multiple agencies or lacking in certain

³⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 12(4).

³⁷ We understand that, after a representative has applied for a review, they may wait anywhere from six to 18 months for the actual review hearing.

³⁸ Second Issues Paper at [16.60]–[16.61].

areas. Some submitters said there is a gap in oversight where concerns need to be raised that are not appropriate to bring to police or are too urgent to wait for an application to be heard by the Family Court.

- 24.76 Over half of submitters on this issue pointed to overseas jurisdictions having a single oversight body such as the Office of the Public Guardian in England and Wales and the Office of the Public Advocate in some Australian states.
- 24.77 A few submitters said a single oversight body would improve efficiency by consolidating existing functions that are currently spread across multiple bodies. A few submitters also said the need for an oversight body will increase over time as the number of representative arrangements is increasing with an ageing population.
- 24.78 Of the submitters that did not favour establishing an oversight body, only Associate Professor Ben Gray provided reasons. He said that the problematic areas an oversight body might address fall into distinct policy areas and may end up with other agencies anyway.
- 24.79 Feedback from focus groups that we held was overwhelmingly supportive of a single oversight body. Participants said it can be very confusing knowing where to go.

Recommendations

Consolidating oversight and support functions

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

- 24.80 There is a strong case for consolidating oversight and support functions held across multiple agencies into a single agency. That agency would not be the sole relevant agency. The Family Court would continue to hold a key oversight function, and other bodies such as police would still be needed in relation to some issues. However, a single agency that holds key oversight and support functions that are specific to representative and formal support arrangements outside of those held by the Family Court would be more effective and efficient than the current fragmented approach.
- 24.81 For clarity, our recommended oversight and support functions (addressed above) are not contingent on a single responsible agency being identified or established. Even if undertaken across multiple agencies, the functions would considerably improve the status quo. However, we consider these functions would be most effective if performed by a single body.
- 24.82 Te Kawa Mataaho | Public Service Commission provides guidance for assessing options for structural change in government.³⁹ It provides four perspectives for assessing potential reform:
- (a) **The system/sector perspective** involves considering how an option fits within the wider strategic context, including whether an option improves cohesion for the “customer” and for wider government.

³⁹ Te Kawa Mataaho | Public Service Commission “Guidance: Making structural or governance changes in government – Options and analysis” (1 August 2022) <www.publicservice.govt.nz>.

- (b) **The governance/accountability perspective** involves asking questions such as whether the role, mandate and responsibilities of a body are clear and whether an option creates any conflicts of interest.
- (c) **The performance perspective** involves considering how an option will affect delivery, capability, capacity, and costs and savings over time. It also asks whether the option is appropriate to the scale of the service or function involved.
- (d) **The implementation perspective** involves asking how easy or difficult implementation will be and what the costs of implementation are.

24.83 In our view, centralising oversight and support functions is supported by the first three of these perspectives. We are not in a position to assess what the costs of implementation would be.

The system/sector perspective

24.84 Centralising closely-related oversight and support functions for formal support and representative arrangements would improve cohesion for both the “customer” (in this case, people involved with formal support and representative arrangements) and wider government.

24.85 With respect to the customer, we heard in consultation that the first step to dealing with a problem — knowing where to go — is often the biggest hurdle. Having core functions sit within the same body would make this much simpler. For example, currently a person who wants to complain about a representative’s behaviour must either apply to the Family Court for a review or lodge a complaint with one of the various other bodies that might be able to assist.⁴⁰ A central body with a complaints function would provide a clear first point of contact for people who have concerns about a representative arrangement.

24.86 A single agency would also reduce the risk of unnecessary duplication of tasks within government. For example, it could make it less likely that people lodge complaints with multiple agencies because they would be more confident about the appropriate agency to receive their complaint. It would also enable existing functions to be provided in more effective and efficient ways than at present and make it easier to develop streamlined platforms such as a website or online reporting system.

The governance/accountability perspective

24.87 Dispersing different functions related to formal support and representative arrangements across government reduces opportunities to identify problems with how the functions are performed and design effective responses. If oversight and support functions for these arrangements were consolidated in a single agency, we anticipate it would be easier to hold that agency to account.

24.88 A consolidated body would also make it easier for governance arrangements reflecting te Tiriti o Waitangi to be put in place. We discuss this issue later in this chapter.

⁴⁰ These include Te Toihau Hauora, Hauātanga | Health and Disability Commissioner, the Aged Care Commissioner, Te Kaitiaki Mana Tangata | Ombudsman and Ngā Pirihimana o Aotearoa | New Zealand Police.

The performance perspective

- 24.89 We expect that consolidating oversight and support functions in a single agency would improve the standard of delivery of these functions, particularly over time. Our recommended functions are related. There is overlap in the knowledge and expertise required to perform them. Over time, a single agency could be expected to build institutional expertise that enhances the delivery of all its functions. Consolidating functions would enable cohesive approaches to be developed more easily than under the current fragmented model.
- 24.90 As noted above in relation to the system/sector perspective, consolidating functions would also reduce the risk of duplication and enable existing functions to be provided in more effective and efficient ways.
- 24.91 Consolidating oversight and support functions is a relatively large structural change. However, it responds to the growing number of representative arrangements that are likely to be required in the future and the corresponding pressure on government resources. While there are no data available on the exact number of representative arrangements, data from the Ministry of Justice show that the number of applications to appoint a welfare guardian or property manager more than doubled from 2013 to 2022.⁴¹ Given the country's ageing population and significantly increasing rates of dementia mate wareware,⁴² we expect a similar upwards trend for the creation of EPOAs. With the increasing demand for representative arrangements, performance inefficiencies will be compounded over time — even more so if our recommended formal supporter role is introduced. In our view, this consideration further supports consolidating functions in a single body.

Consolidation is supported by comparative analysis

- 24.92 Aotearoa New Zealand's lack of a centralised oversight body for representative arrangements makes us an outlier. As we explain above, every other jurisdiction we investigated has a body such as an Office of the Public Guardian.

Functions could be undertaken by a new or existing agency

- 24.93 We do not make a recommendation on whether a new or existing agency should be responsible for the consolidated oversight and support functions. There would be some benefits to establishing a new agency. In particular, it would likely be easier for the public to understand the purpose and functions of a new agency than if functions were consolidated within an existing agency. However, we also expect that establishing a new agency would be the more expensive option in the short term.
- 24.94 The Legislation Design and Advisory Committee guidelines state that a new public body should only be created if “no existing body possesses the appropriate governance

⁴¹ Email from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding PPPR data (5 September 2025).

⁴² A report by researchers from Te Whare Wānanga o Tāmaki Makaurau | University of Auckland indicates that, by 2050, rates of dementia mate wareware will increase by 240 per cent to over 3 per cent of the total population and the economic cost will increase to over \$10 billion (adjusted for inflation). See Etuini Ma'u and others *Dementia Economic Impact Report 2020* (Waipapa Taumata Rau | University of Auckland, September 2021) at 14–15 and 22.

arrangements or is capable of properly performing the necessary functions”.⁴³ The Public Service Commission has issued guidance that makes a similar point.⁴⁴ Accordingly, despite the benefits of a new agency, there may also be a case for modifying the role of an existing public body so that oversight and support functions are consolidated in it instead of a new agency.

24.95 In our view, the key response to the issues we have identified is consolidation of the existing fragmented oversight functions. Whether this is done in a new or existing agency is less relevant to overall effectiveness than the fact of consolidation.

Advisory committee for responsible agency

24.96 If oversight and support functions are consolidated in a single agency, we consider the agency could benefit from having an advisory committee to provide advice on the performance of its functions.⁴⁵ An advisory committee would help to ensure the oversight body has input from important stakeholder communities so that it meets their needs. It would also help build trust and confidence within stakeholder communities.

24.97 To help realise these benefits, an advisory committee could require membership with relevant experience and expertise in key areas.

24.98 First, we envisage an advisory committee should have members with lived experience of disability, consistent with New Zealand’s obligations under the Disability Convention to actively involve disabled people in the implementation of relevant legislation and policies.⁴⁶ Input and advice from people with this lived experience would help ensure the functions of an oversight body are accessible and meet the needs of disabled people. It would also promote disabled people’s confidence and trust in an oversight body. Submitters highlighted how important it is for disabled people to be able to see themselves reflected in government bodies that they must engage with.

24.99 Second, it would be helpful for an advisory committee to have membership with experience as a representative. Many of the agency’s functions will be used by representatives, so it would be useful for the advisory committee to give input from this perspective. Such input would be particularly useful in developing information, guidance and training for representatives.⁴⁷

24.100 Third, we envisage an advisory committee should have expertise in the legal areas of human rights and representative decision making. Many of the agency’s functions will have an impact on the human rights of people in representative arrangements. The functions will need to be undertaken consistently with a new Act and with the requirements of the Disability Convention. Legal expertise within the advisory committee would help to ensure the committee’s advice is informed of these matters.

⁴³ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [20.1].

⁴⁴ Te Kawa Mataaho | Public Service Commission “Guidance: Advising on organisational form” (1 August 2022) <www.publicservice.govt.nz>.

⁴⁵ A similar arrangement exists in Québec. See Public Curator Act CQLR 1989 c C-81 (Québec), s 17.1.

⁴⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 4(3).

⁴⁷ Eventually, membership with experience of being a formal supporter would likely also be useful, for similar reasons.

- 24.101 Fourth, we consider an advisory committee should have knowledge of te ao Māori and tikanga. With such knowledge, the committee could potentially undertake research, and provide education and guidance, on tikanga, mātauranga Māori and te ao Māori, including on how tikanga may operate in the context of adult decision making. The committee could also help to develop guidance to assist whānau to use the different arrangements offered in a new Act and to research and develop effective tools for whānau, hapū, iwi and other hāpori Māori (Māori communities) to provide support for people with affected decision making. This work could inform the development of practice over time.
- 24.102 We do not consider *expertise* in te ao Māori and tikanga would be required in an advisory committee. The committee or consolidated agency could seek specialist advice on tikanga when needed. What is important is working knowledge to be able to provide meaningful input and to identify areas where further expertise might be required.
- 24.103 Finally, we consider that an advisory committee could benefit from Māori membership because it could “support a partnership approach to oversight”⁴⁸ and help build the trust and confidence of Māori in an oversight body. This is particularly important because, as we note in Chapter 4, Māori simultaneously experience higher rates of affected decision making and use representative arrangements less than the general population.

PUBLIC WELFARE REPRESENTATIVES

- 24.104 In this section, we discuss whether Aotearoa New Zealand should have publicly available welfare representatives. By public welfare representatives, we mean representatives that are provided by, or funded by, the government.

Current approach

- 24.105 There is no public body in Aotearoa New Zealand that provides welfare representatives for people who need them. In some parts of the country, there are non-profit welfare guardian trusts that recruit and train volunteers to act as welfare guardians when no-one else is available.⁴⁹
- 24.106 Public Trust is a Crown entity and can currently act as a property manager.⁵⁰ However, corporations are prohibited from acting as welfare guardians.⁵¹ In Chapter 16, we recommend that this position continue. Corporations are also prohibited from being appointed as welfare attorneys. We do not recommend this position be changed.

⁴⁸ Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC R144, 2020) at [5.92].

⁴⁹ See Welfare Guardians “Welfare Guardians Trusts NZ” <welfareguardians.nz>.

⁵⁰ The definition of “trustee corporation” in s 2 of the PPPR Act includes Public Trust. Trustee corporations can act as property managers and be appointed as attorneys for property matters under an enduring power of attorney: ss 31(3) and 97.

⁵¹ Protection of Personal and Property Rights Act 1988, ss 12(4), 31(3) and 98(2).

Overseas approaches

24.107 In all Australian jurisdictions, the relevant oversight body has a statutory function of providing welfare representation.⁵² In these jurisdictions, the statutory body can be appointed as a representative by the relevant court or tribunal and has the power to delegate its functions to employees.⁵³ The statutory threshold for appointing the relevant oversight body as a representative is expressed slightly differently in different jurisdictions. For example:

- (a) in New South Wales, the Public Guardian is unable to be appointed if “such an order can be made appointing some other person as the guardian”;⁵⁴
- (b) in Victoria, the Public Advocate can only be appointed if there is no other eligible person to fulfil the role;⁵⁵
- (c) in Queensland, the Public Guardian can only be appointed “if there is no other appropriate person available for appointment”;⁵⁶ and
- (d) in Australian Capital Territory, the Public Trustee and Guardian must not be appointed “if an individual who is otherwise suitable has consented to be appointed”.⁵⁷

24.108 In England and Wales, the Court of Protection can appoint a specialist deputy (called a panel deputy) from a list of approved law firms and charities if no-one else is available.⁵⁸

24.109 In Scotland, the Chief Social Work Officer of the local authority may be appointed as a personal care guardian.⁵⁹ The local authority has a duty to apply to appoint the Chief Social Worker where it appears that:⁶⁰

- (a) the relevant person lacks decision-making capacity; and
- (b) no application has been made or is likely to be made for guardianship; and
- (c) guardianship is necessary for the protection of the property, financial affairs or personal welfare of the person.

⁵² Public Trustee and Guardian Act 1985 (ACT), s 13(e)–(f); Guardianship Act 1987 (NSW), ss 17 and 22A; Guardianship of Adults Act 2016 (NT), s 61(1)(a); Public Guardian Act 2014 (Qld), s 12(1)(f); Guardianship and Administration Act 1995 (Tas), s 15(1)(h); Guardianship and Administration Act 2019 (Vic), s 16(1)(a); and Guardianship and Administration Act 1990 (WA), s 97(1)(aa).

⁵³ Public Trustee and Guardian Act 1985 (ACT), s 9A; Guardianship Act 1987 (NSW), s 78; Guardianship of Adults Act 2016 (NT), s 72; Public Guardian Act 2014 (Qld), s 146; Guardianship and Administration Act 1995 (Tas), s 18; Guardianship and Administration Act 2019 (Vic), s 19; and Guardianship and Administration Act 1990 (WA), s 95.

⁵⁴ Guardianship Act 1987 (NSW), s 15(3).

⁵⁵ Guardianship and Administration Act 2019 (Vic), s 33(1).

⁵⁶ Guardianship and Administration Act 2000 (Qld), s 14(2).

⁵⁷ Guardianship and Management of Property Act 1991 (ACT), s 9(5).

⁵⁸ “Deputies: make decisions for someone who lacks capacity – Who can apply to be a deputy” GOV.UK <www.gov.uk>. The Mental Capacity Act Code of Practice is unclear about whether this can be for all matters or just property matters: Department for Constitutional Affairs *Mental Capacity Act 2005: Code of Practice* (April 2007) at [8.33].

⁵⁹ Adults with Incapacity (Scotland) Act 2000, s 59(1)(b).

⁶⁰ Adults with Incapacity (Scotland) Act 2000, s 57(2).

- 24.110 In Canada, most provinces and territories offer public welfare representatives for people who need them.⁶¹ Similar approaches are taken to those in Australia. For example, in Ontario, the Public Guardian and Trustee can only be appointed if there is no other suitable person who is available and willing to be appointed.⁶² It may delegate its powers to its employees.⁶³ Similarly, in Alberta the Public Guardian can be appointed but only if “no other individual is willing, able and suitable to act as a guardian”.⁶⁴
- 24.111 In Ireland, a statutory oversight body known as Decision Support Service (“DSS”) is required to establish a panel of suitable people willing and able to act as decision-making representatives.⁶⁵ If no suitable representative is available in a case, the relevant court can request that two panel members be nominated by the DSS for consideration by the court.⁶⁶

Issue

- 24.112 Over the course of this review we have heard that there are many people who have no-one in their life who is willing and suitable to act as a representative. This can lead to a range of issues, including:
- (a) delays in the person’s access to appropriate care;
 - (b) court-ordered decisions being reactively sought when there is a crisis;
 - (c) people being kept in care facilities without a clear legal basis; and
 - (d) unauthorised legal decisions being made by organisations or family and whānau members.
- 24.113 Welfare guardian trusts are unable to provide a total solution to this problem. We have heard (including from such trusts) that volunteers cannot meet existing demand, are not available in certain parts of the country and may not be appropriate for people with complex needs. Even with appropriate resourcing, welfare guardian trusts are unable to provide the legal and resourcing infrastructure required to respond to the problem at scale because they are private and voluntary organisations. Of necessity, they have rules concerning when they will provide a welfare guardian. For example, we understand that some organisations will not provide a volunteer welfare guardian in cases where there is family or whānau conflict.
- 24.114 The lack of an available welfare representative can have a significant impact on a person’s human rights. If a person needs a representative but does not get one, their ability to exercise their legal capacity can be even further restricted because decisions may simply not get made. This outcome is inconsistent with the emphasis in the Disability Convention

⁶¹ Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 29; Public Trustee Act SNB 2005 c P-26.5 (New Brunswick), s 6(2); Guardianship and Trusteeship Act SNWT 1994 c 29 (Northwest Territories), s 8(1)(b); Adult Capacity and Decision-making Act SNS 2017 c 4 (Nova Scotia), s 21(c); Guardianship and Trusteeship Act SNWT (Nu) 1994 c 29 (Nunavut), s 8(1)(b); Substitute Decisions Act SO 1992 c 30 (Ontario), ss 57(2.2) and 62(3.1); Public Curator Act CQLR 1989 c C-81 (Québec), s 12(2); Public Guardian and Trustee Act SS 1983 c P-36.3 (Saskatchewan), ss 6.1, 29 and 40.1; and Public Guardian and Trustee Act SY 2003 c-21 Sch C (Yukon), s 4(2)(a).

⁶² Substitute Decisions Act SO 1992 c 30 (Ontario), s 57(2.2)(c).

⁶³ Public Guardian and Trustee Act RSO 1990 c P.51 (Ontario), s 2(4).

⁶⁴ Adult Guardianship and Trusteeship Act SA 2008 c A-4.2 (Alberta), s 29(1)(c)(i).

⁶⁵ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 101.

⁶⁶ Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 38(7).

on protecting and promoting a person's dignity, equality and autonomy. It may also result in the breach of a number of rights in the New Zealand Bill of Rights Act 1990, including the right to freedom from discrimination and the right not to be arbitrarily detained.

Consultation

- 24.115 We asked submitters how the law should increase the availability of people who can act as representatives. Forty-nine submitters gave feedback on this issue.
- 24.116 Just under half of these submitters emphasised that people sometimes have no-one willing or suitable to act as a representative. Many of these submitters mentioned people they knew who lacked anybody who could act as a representative. Relatedly, Te Rōpū Tauwhiro i Aotearoa | Aotearoa New Zealand Association of Social Workers said it is increasingly common for adults with affected decision making to be socially isolated.
- 24.117 Approximately a quarter of submitters that gave feedback said there is insufficient volunteer capacity to address the demand for representatives. Some of these submitters addressed particular aspects of the volunteer system:
- (a) McWilliam Tyree Lawyers submitted that the availability of volunteer agencies around the country is uneven.
 - (b) Ben Gray said that welfare guardian trusts are only a partial solution and that there needs to be something more comprehensive when no volunteer is available. He also said it would be hard for paid officials to replace the qualities that volunteer representatives bring to the role.
 - (c) Another submitter said that welfare guardianship trusts primarily focus on older people with dementia *mate wareware* and, in particular, on trying to appoint a voluntary welfare guardian to facilitate discharge from hospital into an aged care facility.
 - (d) Spectrum Foundation said finding volunteers to be welfare guardians is very difficult, particularly where a person has complex needs such as foetal alcohol syndrome or dementia *mate wareware* and therefore requires a very skilled person to be appointed.
 - (e) Te Tāhū Hauora | Health Quality and Safety Commission National Mortality Review Committee was concerned that some organisations will not provide a volunteer welfare guardian in cases where there is family or *whānau* conflict. It said these situations are when an outside representative is most needed to provide independent advice and support.
- 24.118 Approximately three-quarters of submitters that gave feedback on this issue supported some type of state-funded welfare representation. The majority of these submitters supported the state directly paying for or providing professional welfare representatives as a last resort. A minority said the state should fund existing private organisations to provide representatives.
- 24.119 Of the submitters that supported the state paying for or providing professional welfare representatives, submitters were split on whether public welfare representatives should be independent professional representatives paid by the state or provided through a government body.

Relevant considerations if public welfare representative system implemented

- 24.120 Limited availability of representatives is a significant issue. If a person needs a representative but does not have anyone suitable to perform the role for them, this can create a number of practical and human rights issues. The provision of public welfare representatives is an effective response to this issue adopted in virtually all overseas jurisdictions that we have considered.
- 24.121 In our view, however, the provision of public welfare representatives is not primarily a law reform issue. Although there are legal and policy questions about *how* this may be done (which we discuss below), the extent to which any system responds to the issues we have identified will largely depend on the government's ability and willingness to resource this.
- 24.122 Providing an analogous public welfare representative system to those in other jurisdictions would require significant public resources. For example, Adult Guardianship Services Trust noted in its submission that, in New South Wales, which has a population of approximately 8 million people, there are approximately 100 paid welfare representative who provide services to some 4,500 people.⁶⁷ It suggested that, applied to Aotearoa New Zealand, this ratio would mean there would need to be 63 paid welfare representatives.
- 24.123 We are not in a position to form a view and make recommendations about whether this is fiscally feasible in Aotearoa New Zealand. We note, however, that a public welfare representative system would alleviate the issues caused when a person who needs a representative cannot access one (noted above). These issues have associated costs that would be mitigated by public welfare representatives.
- 24.124 We now go on to consider matters that will need to be addressed if the Government decides to implement a public welfare representative system.

Relationship with voluntary welfare representatives

- 24.125 If the Government implements a public welfare representative system, it will be important to minimise its impact on existing welfare guardian trusts that provide volunteer representatives. There are advantages to the work carried out by volunteers, many of which may be hard for state-funded representatives to replicate.
- 24.126 For example, existing volunteer initiatives may create deeper relationships of trust with the represented person, particularly for people who are mistrustful of the state. They may also provide volunteer welfare representatives in situations where a person does not strictly meet any applicable threshold for the provision of a public representative but nevertheless would benefit from a volunteer representative. Volunteer organisations should be supported in the work they do alongside any public welfare representative system.

⁶⁷ Feedback from members of our Professional Expert Advisory Group indicates that, while Australia has these systems, they can be criticised for being underfunded and public welfare representatives will often represent upwards of 40 people each.

Threshold for appointment

24.127 In our view, public welfare representatives should only be available for those who have no-one else suitable to perform the role for them. In broad terms, this is the approach every other jurisdiction we have considered. It provides a threshold for the appointment of a public representative that would help to limit the scope of the system and associated costs.

Two approaches to a public welfare representative system

24.128 There are two models for providing public welfare representatives adopted in the overseas jurisdictions we have considered: a panel approach and a delegation approach. We discuss below the key features, advantages and disadvantages of both approaches but do not make any recommendations about which is preferable. The appropriate model would largely depend on the extent of resources available to fund public welfare representatives.

Panel approach

24.129 The key feature of a panel approach is that the oversight body is not appointed as the representative. Instead, a member from a panel of representatives is directly appointed. Of the jurisdictions we have investigated, only England and Wales and Ireland use this approach.

24.130 In both England and Wales and Ireland, the relevant oversight body has responsibility for appointing members to the panel.⁶⁸ There are certain requirements that a person must meet to be appointed. In England and Wales, applicants must “demonstrate their understanding of, and adherence to” the Mental Capacity Act 2005, the accompanying Code of Practice and associated instruments.⁶⁹ In Ireland, the requirements include having an appropriate qualification and completing specialised training.⁷⁰ The court is then able to request panel members to be appointed who are nominated by the oversight body.⁷¹ Panel members are subject to various annual reporting and disclosure obligations in order to remain on the panel.⁷²

24.131 There are some advantages to a panel approach. A panel is easily scalable in the sense that members can be appointed to the panel, but do not have to be appointed as a representative. This might be important initially while the exact level of demand for public representatives is being established. Also, the pool of members appointed to the panel could be larger than the number of public representatives an oversight body could employ, creating more choice for appointment. This might be particularly useful when matching a panel member to a person with complex needs. It could also be useful to

⁶⁸ “Guidance – Panel guardians: a list of court-approved professionals” (31 March 2021) <www.gov.uk>; and Assisted Decision-Making (Capacity) Act 2015 (Ireland), s 101(a).

⁶⁹ Office of the Public Guardian “Application to join the panel of deputies appointed by the Office of the Public Guardian” (February 2025) <www.assets.publishing.service.gov.uk>; and “Panel Deputy Commitment” (February 2025) <www.assets.publishing.service.gov.uk>.

⁷⁰ Decision Support Service *Candidate Information Booklet* (October 2024) <www.decisionsupportservice.ie> at 3–7; and “Decision-making representatives recruitment” (23 September 2024) <www.decisionsupportservice.ie>.

⁷¹ Assisted Decision-Making (Capacity) Act 2015 (Ireland), ss 38(7) and 101(a).

⁷² Decision Support Service *Candidate Information Booklet* (October 2024) <www.decisionsupportservice.ie> at 3–7.

match people who need a representative with a panel member who can meet their cultural needs. Lastly, the panel approach is consistent with the safeguarding role of the Court in assessing the suitability of representatives because individual panel members can be assessed by the Court.

24.132 However, there are also some disadvantages to the panel approach. The primary disadvantage is that a panel cannot benefit from institutional efficiencies or economies of scale. Panel members would be contracted by an oversight body on an individual basis with associated administration and other related costs borne by the individual members and charged to the responsible body. The more panel members that are acting as a representative, the higher these costs would be relative to a delegation approach. Another disadvantage is that, if the panel were limited to licensed professionals (as is the case overseas), this may prevent otherwise suitable people from being appointed.

Delegation approach

24.133 The key feature of the delegation approach is that a public body or official is appointed as the representative, with the power to delegate powers to public employees. Other than England and Wales and Ireland, every overseas jurisdiction we have investigated that provides public welfare representatives takes this approach.

24.134 This approach has some advantages. It can ensure legal continuity where a representative resigns or is unable to continue acting for a person. An application to the Family Court for a new representative would therefore not be required. In contrast with a panel approach, representatives who are employees of a public body can benefit from centralised support and administrative staff within the body. We anticipate that, over time, this approach would scale more efficiently than a panel approach.

24.135 However, the delegation approach also has some disadvantages. As noted above, it could initially be difficult to determine how many public representatives would be required. Further, because individual employees would be delegated the powers necessary to perform the role but would not actually be the representative, the Family Court could not assess their suitability. While thorough hiring practices and requirements could be expected, the absence of court oversight might still create some safeguarding concerns.

Remuneration

24.136 In Chapter 17, we recommend that welfare representatives continue to be prohibited from receiving remuneration. Should public welfare representatives be available, there would need to be an exception to this general rule for such representatives.

24.137 In our view, this is appropriate for three reasons. First, the principal reason for prohibiting remuneration for welfare representatives is that it creates an inherent conflict within the role.⁷³ This concern would only arise if a panel approach were taken to providing public welfare representatives. If employees of a public body were undertaking this work, they would be salaried and their remuneration would not be tied to the representation of a particular person.

⁷³ See Chapter 17.

24.138 Second, should a panel approach be taken, steps could be taken to manage the potential effects of remuneration on the role. For example, in Ireland, there are strict requirements to be appointed to the panel and panel members are subject to comprehensive professional requirements and monitoring.

24.139 Third, most jurisdictions we have examined have a public welfare representative system and also prohibit remuneration for welfare representatives.⁷⁴ This has been the case in these jurisdictions for some time and we are not aware of it having caused any significant issues.

⁷⁴ See our comparative analysis of remuneration for welfare representatives in Chapter 17.

CHAPTER 25

Improving court processes

IN THIS CHAPTER, WE CONSIDER:

- whether a specialist court or tribunal should be established to have jurisdiction under a new Act instead of te Kōti Whānau | Family Court;
- how the current Family Court processes could be improved; and
- whether a new Act should provide for alternative dispute resolution mechanisms.

INTRODUCTION

- 25.1 Court processes would remain necessary under a new Act for a range of matters. This would include applications to appoint a representative, review court-ordered arrangements, challenge the actions of an attorney or terminate a formal support arrangement.
- 25.2 The United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) requires effective and equal access to justice for persons with disabilities.¹ However, submitters have told us there are accessibility issues with te Kōti Whānau | Family Court processes.
- 25.3 Many of these issues are systemic in nature. They are not unique to processes in the Family Court under the Protection of Personal and Property Rights Act 1988 (PPPR Act) but relate to the justice system more broadly. Some work is already underway to improve the accessibility of the court system.² We do not consider ways to address general

¹ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), arts 12(3) and 13(1).

² See for example Te Komiti Mō Ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022); Te Kāhui Ture o Aotearoa | New Zealand Law Society *Access to Justice: Stocktake of initiatives* (Research report, December 2020); and Te Tāhū o te Ture | Ministry of Justice “Te Ao Mārama — Enhancing Justice for All” (12 March 2025) <www.justice.govt.nz>. An area of focus for the judiciary over the next five years is to make information on court websites available in te reo Māori, New Zealand Sign Language and accessible formats, as far as practicable, as well as other improvements in availability of information about court processes: Te Tumu Whakawā o Aotearoa | Chief Justice of New Zealand *Digital Strategy for Courts and Tribunals* (Te Tari Toko i te Tumu Whakawā | Office of the Chief Justice, March 2023) at 26.

accessibility concerns in this review. Rather, we focus on matters specific to the PPPR Act.

- 25.4 In this chapter, we discuss whether the Family Court or a new specialised court or tribunal should exercise jurisdiction under a new Act. We conclude that the Family Court should continue to have jurisdiction, because the main issues with the current law and practice can be addressed without establishing a new decision-making body. Given the rights-sensitive nature of proceedings under a new Act, a court is the most appropriate decision-making body. Maintaining the Family Court’s jurisdiction also ensures that its institutional knowledge and experience are preserved.
- 25.5 We make some recommendations to improve court 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.

BACKGROUND

Access to justice in the Disability Convention

- 25.6 Article 13 of the Disability Convention concerns access to justice. It provides:³
1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.
- 25.7 As we address in Chapter 6, article 12(3) of the Disability Convention requires states to take appropriate measures to provide disabled people with access to the support they may require in exercising their legal capacity. The United Nations Committee on the Rights of Persons with Disabilities (Disability Committee) has observed that article 12 guarantees various forms of support, including diverse communication methods, the possibility of video testimony in certain situations and professional sign language interpretation.⁴ These matters are relevant beyond court processes but can be particularly relevant in a court setting.
- 25.8 The Disability Committee has observed that articles 12 and 13 also guarantee “access to legal representation on an equal basis with others”.⁵

³ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 13(1).

⁴ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [39].

⁵ United Nations Committee on the Rights of Persons with Disabilities *General Comment No 1 – Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [38].

25.9 Article 9 of the Disability Convention, which deals with accessibility in general, is relevant to physical access to hearings held in court buildings. As the Disability Committee has explained:

There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities

...

Current law and practice

Jurisdiction

25.10 The Family Court has exclusive jurisdiction over almost all matters under the PPPR Act. This is why we focus on the procedure of the Family Court in this chapter.

25.11 Te Kōti Matua | High Court has jurisdiction in relation to “mentally impaired persons who, in the opinion of the court, lack wholly or partly the competence to manage their own affairs” and “the property and managers of those persons”.⁶ This jurisdiction is referred to as the “parens patriae jurisdiction”.⁷ It originates from the common law and has been affirmed in statutory law in Aotearoa New Zealand.⁸

25.12 The High Court’s parens patriae jurisdiction is “subject to other enactments making provision in relation to those persons or their property or managers”.⁹ It only applies to matters not covered by the PPPR Act or where the remedy sought is not available under the PPPR Act.¹⁰ In practice, almost all relevant applications are made to the Family Court under the PPPR Act, with the High Court performing an appellate function.

Applications

25.13 The PPPR Act specifies categories of people who may apply to the Family Court for the exercise of its jurisdiction without leave.¹¹ They include relatives of the person in respect of whom the application is made, social workers and medical practitioners. People not specified in the PPPR Act may apply with the Court’s leave.¹²

25.14 An application must be served on certain people specified by the Act, including, generally, the person in respect of whom the application is made.¹³ However, the Family Court can dispense with service on the person in respect of whom the application is made if they “wholly lack” capacity to understand the nature and purpose of the proceedings or if other exceptional circumstances justify not serving the application on them.¹⁴

⁶ Senior Courts Act 2016, s 14(1).

⁷ See generally *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [10]–[11]; and *Re W* [1994] 3 NZLR 600.

⁸ Section 14 of the Senior Courts Act 2016, which replaced s 17 of the Judicature Act 1908.

⁹ Senior Courts Act 2016, s 14(2).

¹⁰ *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [45]–[60]. See also *A v HA [inherent jurisdiction - appointment of manager]* [2016] NZHC 1690, [2016] NZFLR 598; *JMG v CCS Disability Action (Wellington Branch Inc)* [2012] NZFLR 369 (HC) at [41]; and *Re W* [1994] 3 NZLR 600, (1994) 12 FRNZ (HC) at 605.

¹¹ Protection of Personal and Property Rights Act 1988, ss 7(a)–(g), 26(a)–(h), 102A(a) and 103(1).

¹² Protection of Personal and Property Rights Act 1988, ss 7(h), 26(i), 102A(b) and 103(2).

¹³ Protection of Personal and Property Rights Act 1988, s 63(1).

¹⁴ Protection of Personal and Property Rights Act 1988, s 63(2).

Legal representation

- 25.15 When an application is made under the PPPR Act, the Family Court must appoint a lawyer to represent the person who is the subject of the application unless the person already has, or will have, a lawyer.¹⁵ This role — usually referred to as “lawyer for subject person” — is vital for adequate legal representation in PPPR Act cases.
- 25.16 The Family Court has issued guidelines for court-appointed lawyers.¹⁶ According to these guidelines, “[t]he court must, so far as practicable, appoint a lawyer who is, by reason of personality, cultural background, training and experience, suitably qualified to represent the subject person”.¹⁷
- 25.17 The lawyer for subject person must, as far as practicable, explain the application to the person and give effect to the person’s wishes in respect of the application.¹⁸

Hearings

- 25.18 Usually, applications under the PPPR Act are dealt with at one or multiple Family Court hearings. Only in cases where no party opposes the application and all matters are in order can the Court make an order “on the papers” — that is, without holding a hearing.¹⁹
- 25.19 The PPPR Act requires the person in respect of whom an application is made to be present throughout the hearing unless they are excused or excluded from attendance.²⁰ The person can be *excused* if they “wholly lack” the capacity to understand the nature and purpose of the proceeding or attending will likely cause them “serious mental, emotional or physical harm”.²¹ The person may be *excluded* if the Court “is satisfied that the person is causing such a disturbance that it is not practicable to continue with the hearing in the presence of that person”.²²
- 25.20 Any party to a proceeding and the person in respect of whom an application is made (if they are not a party) may bring a support person to a hearing unless the judge considers there is a good reason to refuse permission.²³ Any witness is entitled to communication assistance if needed to give evidence.²⁴

¹⁵ Protection of Personal and Property Rights Act 1988, s 65(1).

¹⁶ Jacquelyn Moran *Family Court Practice Note — Lawyer for subject person: selection, appointment and other matters* (Principal Family Court Judge’s Chambers, 19 November 2024). See also Lauren Pegg *Lawyer for the subject person — Best Practice Guidelines: Acting for a subject person under the Protection of Personal and Property Rights Act 1988* (Ngā Rōia Ture Whānau | Family Law Section of the New Zealand Law Society, 23 August 2024).

¹⁷ Jacquelyn Moran *Family Court Practice Note — Lawyer for subject person: selection, appointment and other matters* (Principal Family Court Judge’s Chambers, 19 November 2024) at [6.4].

¹⁸ Protection of Personal and Property Rights Act 1988, s 65(2)(a).

¹⁹ Jacquelyn Moran *Family Court Practice Note — Applications under the Protection of Personal and Property Rights Act 1988* (Principal Family Court Judge’s Chambers, 17 July 2024) at [7.7].

²⁰ Protection of Personal and Property Rights Act 1988, s 74(1).

²¹ Protection of Personal and Property Rights Act 1988, s 74(2).

²² Protection of Personal and Property Rights Act 1988, s 74(3).

²³ Protection of Personal and Property Rights Act 1988, s 79(1)(i) and (2).

²⁴ Evidence Act 2006, s 80(3)–(4). See also s 4 of that Act for the definition of “communication assistance”. The Evidence Act 2006 applies to PPPR Act proceedings: Family Court Act 1980, s 12A(4).

- 25.21 The Family Court may conduct hearings remotely in accordance with the Courts (Remote Participation) Act 2010.²⁵ A judicial officer or registrar must decide whether to allow the use of remote participation via “audio-visual link” or “audio link”.²⁶
- 25.22 Sessions of the Family Court may be held at a time and place the relevant judge thinks fit, subject to any direction by the Chief District Court Judge.²⁷ Nothing in the current law prevents hearings under the PPPR Act from being held in a place other than a court building.²⁸

Alternative dispute resolution

- 25.23 The PPPR Act does not expressly refer to alternative dispute resolution mechanisms. It does, however, provide for a pre-hearing conference, which is intended for a similar purpose. The objectives of a pre-hearing conference are to identify the problem at hand and “to reach agreement between the parties and the person in respect of whom the application is made on a solution for the problem”.²⁹
- 25.24 The applicant, the person in respect of whom the application is made, the lawyer for subject person and other people on whom the application has been served may request a pre-hearing conference.³⁰ A Judge of the Family Court may also direct the registrar to convene a pre-hearing conference when an application has been filed.³¹
- 25.25 Although nothing in the current law prevents parties from seeking alternative dispute resolution outside of court, Family Court Judges have no power to formally refer parties to alternative dispute resolution or mandate it. However, we understand from engagement with the judiciary’s Legislation and Law Reform Committee that judges do, in practice, informally encourage alternative dispute resolution outside of court where appropriate.

ISSUES

- 25.26 We have identified four key issues relating to court processes under the PPPR Act. They relate to the Family Court’s workload, difficulties in finding legal representation, the lack of active participation in hearings of people in respect of whom an application is made and accessibility problems in relation to applications and hearings.

²⁵ References to “court” in that Act include the Family Court: s 3 definitions of “court”, “District Court” and “New Zealand Court”.

²⁶ Courts (Remote Participation) Act 2010, s 5.

²⁷ District Court Act 2016, s 72(1). The Family Court is a division of the District Court: s 9(b).

²⁸ See Courts Security Act 1999, s 3(2)(b). See also Helen Winkelmann and Andrew Kibblewhite *Memorandum of Understanding between the Ministry of Justice and the judiciary for health, safety and security in the courts* (March 2025) at [1], n 1. However, practical challenges may arise if proceedings are conducted outside court buildings. For example, in some cases, it may be difficult to ensure a judge’s security or that every party can be present.

²⁹ Protection of Personal and Property Rights Act 1988, s 67.

³⁰ Protection of Personal and Property Rights Act 1988, s 66(1).

³¹ Protection of Personal and Property Rights Act 1988, s 66(2).

The Family Court's workload is high

- 25.27 The number of new Family Court cases under the PPPR Act per year has more than doubled over the past 10 years — from 1,026 cases in 2014 to 2,279 in 2024.³² In the past five years, the average resolution time of PPPR Act cases at the Family Court has been consistently around 100 days.³³ This is much faster than other types of proceedings before the Family Court. The average resolution time for Family Court cases overall is 160 days.³⁴
- 25.28 To lighten the burden on Family Court Judges, Parliament introduced the role of Family Court Associates in 2023.³⁵ The powers of Family Court Associates would be expanded significantly if Parliament enacts the Regulatory Systems (Courts) Amendment Bill.³⁶ It would allow Family Court Associates to make personal orders under the PPPR Act if the application is undefended and some additional requirements are met.³⁷ These requirements include that all views expressed to the Court are consistent with the order sought. However, a Family Court Associate would not be authorised to make a personal order authorising any medical treatment or procedure that would have a “significant impact” on the person.³⁸

Submitters report a lack of available lawyers

- 25.29 Parties sometimes struggle to find available legal aid lawyers for family law matters, which can result in more self-represented litigants. This may cause delays, because it is usually harder to conduct proceedings efficiently when a litigant does not have professional representation.³⁹ The availability of legal aid lawyers significantly impacts people involved in proceedings under the PPPR Act. However, this issue is not confined to the PPPR Act but relates to the justice system of Aotearoa New Zealand as a whole.⁴⁰ It would not be appropriate for us to make recommendations related to legal representation generally in the context of our review, which focuses on PPPR Act matters.

³² E-mail from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding number of new PPPR Act cases commenced (26 October 2023); and E-mail from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission) regarding PPPR Act data (5 September 2025).

³³ E-mail from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding PPPR Act data (5 September 2025).

³⁴ E-mail from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding PPPR Act data (5 September 2025).

³⁵ Family Court (Family Court Associates) Legislation Act 2023, s 4.

³⁶ Regulatory Systems (Courts) Amendment Bill 2024 (117-2). At the time of writing this Report, the Bill has been reported back from the Justice Select Committee and is awaiting its second reading in the House.

³⁷ Regulatory Systems (Courts) Amendment Bill 2024 (117-2), cl 20. The Justice Select Committee also recommended amending the PPPR Act so that Family Court Associates can dispense with service of applications for orders they are authorised to make: Regulatory Systems (Courts) Amendment Bill 2024 (117-2) (select committee report) at 4 and cl 18A.

³⁸ Protection of Personal and Property Rights Act 1988, s 79A(3)(c), as proposed by cl 20 of the Regulatory Systems (Courts) Amendment Bill 2024 (117-2).

³⁹ See Te Aka Matua o te Ture | Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at [915]–[921]; and Krystal Gibbens “Courts clogged by self-represented litigants, lawyers say; solutions proposed” *Radio New Zealand* (Aotearoa New Zealand, 22 September 2023) <www.rnz.co.nz>.

⁴⁰ Te Tāhū o te Ture | Ministry of Justice is currently undertaking a review of the legal aid scheme: “Key initiatives — Legal aid scheme review” (2 July 2025) <www.justice.govt.nz>.

- 25.30 We also heard that there are some regional shortages of lawyers for subject persons, particularly in larger metropolitan areas. A lack of availability of appropriate lawyers to be appointed by the Court as lawyers for subject persons is problematic, because the proceeding cannot commence until someone is found.
- 25.31 This problem may be exacerbated by the rates of remuneration for lawyers for subject persons. Other than for goods and services tax (GST) adjustments, the hourly rates of remuneration for lawyers for subject persons have not increased since at least 1998.⁴¹ We understand from engagement with practitioners that the current rate risks making the role of lawyer for subject person increasingly unattractive.

Active participation of people with affected decision making in hearings is rare

- 25.32 As we outline above, a person in respect of whom an application is made must attend hearings unless they are excused (or excluded). There are two reasons why someone may be excused from a hearing: where they would be unable to understand the proceeding and where attending a hearing might cause harm.
- 25.33 This presumption of attendance is “not generally adhered to” in practice.⁴² The Family Court hears applications in the absence of the person with affected decision making “in the vast majority of cases”.⁴³

Making applications and attending hearings is inaccessible for some

- 25.34 As we set out below, submitters have told us that the current application forms for proceedings under the PPPR Act are confusing and repetitive. We have also heard that people find participating in Family Court proceedings intimidating and too rigid and formal.
- 25.35 Another theme that emerged from consultation is that there is much work to be done to improve the physical accessibility of court buildings in Aotearoa New Zealand. However, as this issue relates to the wider New Zealand court system rather than procedural problems with the PPPR Act, we consider it is out of scope of our review.

SHOULD A SPECIALIST COURT OR TRIBUNAL BE ESTABLISHED?

Consultation

- 25.36 In our Second Issues Paper, we raised the option of establishing a specialist court or tribunal to deal with matters under a new Act. We expressed a preliminary view that it was unnecessary because the potential benefits of this option could be achieved through changes to Family Court processes.⁴⁴ We asked submitters if improvements should be

⁴¹ E-mail from Te Tāhū o te Ture | Ministry of Justice to Te Aka Matua o te Ture | Law Commission regarding PPPR Act data (5 September 2025). The Ministry of Justice holds no records for the rate prior to 1998. However, practitioners have told us that the rate has not been increased since the introduction of the Protection of Personal and Property Rights Act in 1988.

⁴² Iris Reuecamp *Protection of Personal and Property Rights: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2023) at 153.

⁴³ Greg Kelly and Kimberly Lawrence “Participation in Litigation” in Iris Reuecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 361 at 372, citing Alison Douglass *Mental Capacity: Updating New Zealand’s Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) Appendix A at [19].

⁴⁴ Te Aka Matua o te Ture | Law Commission *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke | Review of Adult Decision-Making Capacity Law: Second Issues Paper* (NZLC IP52, 2024) at [17.43].

sought through changes to current Family Court processes or if they favoured the establishment of a specialist court or tribunal.

- 25.37 The 38 submitters that responded to this question were divided. Approximately half favoured improving the existing system. The judiciary’s Legislation and Law Reform Committee also favoured this option in its feedback to us. However, almost as many submitters preferred a new specialist court or tribunal. A small number of submitters supported either option or a combination of the two.
- 25.38 The main reasons given by submitters that preferred maintaining the Family Court’s jurisdiction were that the Family Court has institutional experience and that improving the oversight and accessibility of its processes would sufficiently address current concerns. Submitters also said it would be more cost-efficient to improve Family Court processes rather than establish a new body. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) was, on balance, opposed to establishing a new tribunal to deal with matters under a new Act. It submitted that, despite concerns relating to delays, costs and resourcing pressures in the Family Court, the sensitive nature of decision-making capacity matters in relation to restricting people’s human rights required judicial involvement.
- 25.39 Submitters in favour of establishing a new specialist court or tribunal submitted that the Family Court is too overworked or too slow to meaningfully improve its processes. Several submitters said the procedure for a specialist body could allow for more flexible, faster and less adversarial processes than is possible in the Family Court. Submitters also told us that establishing a specialised tribunal or court would allow for the appointment of members with a range of relevant expertise. Two submitters noted that a specialist body would be better placed to build specialist subject-matter expertise.

Recommendation

R170

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

- 25.40 Continuing the Family Court’s jurisdiction under a new Act has several advantages over establishing a specialist court or tribunal.
- 25.41 First, we agree with submitters that considered that making targeted improvements to the Family Court processes rather than removing its jurisdiction over adult decision-making matters better preserves the institutional expertise that the Family Court has built in this area of law.
- 25.42 Second, maintaining the Family Court’s jurisdiction will save resources. Establishing a new decision-making body would be costly. The funds required to do so would be more effectively invested in improvements to Family Court processes. In addition, a new decision-making body may face the same challenges of delays and resourcing constraints that the Family Court is currently facing.
- 25.43 The Legislation Design and Advisory Committee guidelines reinforce these points. They are clear that a new public body should only be established where an existing public body cannot fulfil the relevant functions.⁴⁵ The guidelines note that, in most cases, it is “more

⁴⁵ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [20.1].

efficient to give new powers to an existing public body”.⁴⁶ They make clear that establishing a new tribunal should be “a last resort”. It should only be done “if it is inappropriate to give new powers to an existing tribunal and no other court, tribunal, or other specialist body is better placed to exercise the power”.⁴⁷

- 25.44 Third, we consider the main benefits (or perceived benefits) that some submitters expect from a new specialist body — faster and more flexible processes — could be achieved by making changes to the Family Court processes. We explain later in this chapter what changes we think are required to improve Family Court processes.
- 25.45 Our recommendation that the Family Court continue to have first instance jurisdiction under a new Act is consistent with the approach taken in most overseas jurisdictions we have considered. There, the courts or tribunals primarily responsible for adult decision-making matters have broad jurisdictions. All Australian states and territories, for example, provide that adult decision-making processes are dealt with by tribunals with jurisdictions over various civil and administrative matters. In some Australian jurisdictions, former specialist tribunals for adult decision-making matters have been integrated into tribunals with broader jurisdictions.⁴⁸
- 25.46 There is one jurisdiction with a specialised court that only has jurisdiction in relation to adult decision-making legislation. In England and Wales, the Court of Protection, formerly an office of the Senior Courts of England and Wales, was reconstituted as a separate court by the Mental Capacity Act 2005.⁴⁹

IMPROVING FAMILY COURT PROCESSES

- 25.47 Although we recommend the Family Court continue to have jurisdiction under a new Act, we agree with submitters that the existing processes for matters under the PPPR Act could be made more accessible for people with affected decision making and other parties.
- 25.48 Again, we note that many of the issues raised by submitters are systemic and relate to the court system in general. We focus here on improvements specific to Family Court processes in relation to adult decision-making matters.

Consultation

- 25.49 We asked submitters several questions about measures that might better support a person with affected decision making to participate in the court process, focusing on the specific areas of:
- (a) legal representation;
 - (b) attending Family Court hearings; and
 - (c) making applications to the Family Court.

⁴⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [20.1].

⁴⁷ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at [20.4].

⁴⁸ Civil and Administrative Legislation (Repeal and Amendment) Act 2013 (NSW); Statutes Amendment (SACAT) Act 2014 (SA); and Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act 2021.

⁴⁹ Mental Capacity Act 2005 (UK), s 45 (as enacted). See also Law Commission (England and Wales) *Mental Incapacity* (Law Com No 231, 1995) at [10.9].

25.50 We also asked submitters what changes they think would make court processes more socially and culturally responsive.

General themes of submissions

25.51 Between 25 and 45 submitters responded to each of the questions we asked and made suggestions. The main themes in feedback were that court processes should be less formal and more flexible and that communication assistance should be available to those who require it to express their views in court.

Legal representation

25.52 In relation to legal representation, the most common suggestion was compulsory training for lawyers for subject persons. Submitters emphasised it is important for these lawyers to have a good understanding of disability and how to support and communicate with people with affected decision making. Some submitters thought compulsory disability awareness training should not be confined to lawyers for subject persons but be required for “staff” more generally.

25.53 NZLS submitted that “[d]elays, funding and costs are key concerns”. They noted that remuneration for lawyers for subject persons “does not appear to have been increased” since 1988 (other than adjustments for GST). As a result, it is difficult to find lawyers who are willing to be added to the list of lawyers who can be appointed as lawyers for subject persons. NZLS also said legal aid for PPPR Act matters (and family legal aid work more generally) needs to be significantly increased to “address the continued decline in numbers of experienced legal aid providers”.

25.54 Submitters thought the role of lawyer for subject person should be maintained and that measures for improvement should focus on how that lawyer ensures that the represented person’s views are communicated to the court.

Hearings

25.55 The most common suggestion for improving the accessibility of hearings was to “bring the court to the person”. This included allowing for hearings to be held outside court (for example, at the relevant person’s residence) or virtually. Some submitters suggested that people may benefit from transport assistance to attend a hearing.

25.56 One submitter proposed that there should be a presumption against in-person participation at a hearing for a person with affected decision making, because hearings are inherently distressing for them. NZLS stated that many people do not want to attend court or are not physically well enough to attend. Some submitters emphasised the importance of face-to-face contact between the relevant person and the judge. Iris Reuvecamp submitted that, presently, it is “not unusual for a person to be excused because they may be considered to be confused or upset if they attend a hearing”, which, in her view, may be considered an insufficient reason to excuse the person.

25.57 Some submitters suggested changes to the court environment such as improving physical accessibility but also creating a less intimidating layout of courtrooms.

Applications

25.58 In relation to applications, the main response from submitters that gave feedback was that the processes and forms for proceedings under the PPPR Act should be simplified.

Several submitters said there should be “less paperwork” and that online forms with illustrations would make the process easier for people with affected decision making. Current forms were described as “repetitive” or “duplicative”, “complex” and “overwhelming”. Submitters also stated the application process should be faster.

25.59 The judiciary’s Legislation and Law Reform Committee noted that Te Au Reka, a new digital portal and case management system, is being developed and that it will be rolled out for the Family Court first. The new system will allow parties to make applications online and will “step applicants through the information and documents needed”. The Committee pointed to the *Digital Strategy for Courts and Tribunals* as identifying ways in which digital technology can improve access to the courts and facilitate meaningful participation in court processes.⁵⁰

25.60 Lastly, some submitters (Iris Reuvecamp, Te Whatu Ora | Health New Zealand and NZLS) suggested we should consider whether “provider organisations”, in addition to individuals, should be allowed to make applications without the Court’s leave under a new Act.

Social and cultural responsiveness

25.61 Some submitters said the role of kaiārahi (court navigators who provide support to people interacting with the Family Court) or other kinds of support people in the court process should be encouraged and expanded.

25.62 Submitters also said that tikanga should be incorporated into the court process.

25.63 Lastly, a few submitters suggested looking to the processes of te Kooti Whenua Māori | Māori Land Court to improve cultural responsiveness. Two submitters suggested making use of the expertise of Māori Land Court Judges.

Recommendations

Remuneration for lawyer for subject person should be reviewed

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.

25.64 We have heard in consultation and through engagement with practitioners that the role of lawyer for subject person is vital to ensuring that the wishes and values of people with affected decision making are communicated to the Family Court.

25.65 However, the importance of the role may not be sufficiently reflected in the current hourly rate of lawyers for subject persons. As outlined above, the lawyer for subject person reimbursement rate has not been increased since at least 1998 (and quite possibly since 1988). The rates are between \$115 and \$152, depending on the level of experience. From engagement with practitioners, we understand this is significantly below average market rates for family lawyers in these proceedings.

⁵⁰ Te Tari Toko i te Tumu Whakawā | Office of the Chief Justice *Digital Strategy for Courts and Tribunals* (March 2023).

- 25.66 If reimbursement for the role of lawyer for subject person is perceived to be inadequate, lawyers may be reluctant to make themselves available for the role. This may lead to inferior legal representation for disabled people and longer delays in hearings being commenced.
- 25.67 The rate of reimbursement is agreed upon by Te Tāhū o te Ture | Ministry of Justice and NZLS.⁵¹ We recommend that the Ministry initiate a review with NZLS.

Applications

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.

- 25.68 The current Family Court forms for applications under the PPPR Act could be simplified and better explained. We agree with submitters that additional guidance about how to fill them out, and even which application form to use, would be beneficial.
- 25.69 Relatedly, in Chapter 14, we recommend revising the forms for creating an enduring power of attorney (EPOA) to improve accessibility.
- 25.70 Rules regulating the practice and procedure of the Family Court may be made only with the concurrence of the Chief District Court Judge and two or more members of the Rules Committee.⁵² We therefore recommend that, when the relevant Family Court forms are amended in connection with the coming into effect of a New Act, the Rules Committee consider ways in which those forms can be made more accessible than they currently are.

Threshold for excusing a person from attending a hearing

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.

- 25.71 We recommend that the current legal threshold for excusing a person in respect of whom an application is made from attending a hearing should be adjusted to be consistent with

⁵¹ Jacquelyn Moran *Family Court Practice Note – Lawyer for subject person: selection, appointment and other matters* (Principal Family Court Judge's Chambers, 19 November 2024) at [12.1].

⁵² District Court Act 2016, s 228, in connection with s 9(b). The Rules Committee is provided for under s 155 of the Senior Courts Act 2016.

a new Act's focus. It should facilitate the participation of people with affected decision making in decision-making processes while protecting them from harm.

- 25.72 Although we did not ask a consultation question about when a person may be excused from attending a hearing, many submitters commented on the subject. Some submitters suggested raising or lowering the threshold. Submitters that suggested lowering the threshold said attendance at court hearings is inherently distressing and people in respect of whom an application is made often do not want to attend. Submitters in favour of a higher threshold emphasised the importance of face-to-face contact between a judge and the relevant person. A discernible theme throughout these submissions was that decisions about people with affected decision making should not be made without them.
- 25.73 In “the vast majority of cases”, the Family Court hears an application under the PPPR Act in the absence of the person to whom the application relates.⁵³ In our view, it is problematic that hearings on fundamentally important decisions about the lives of people with affected decision making are so often held in their absence.⁵⁴
- 25.74 As mentioned above, the current test contains two reasons for someone to be excused from a hearing — they are unable to understand the proceeding or they may experience serious harm from attending a hearing. We recommend changes to both limbs of the test. Our recommendations are to raise the threshold for excusing people based on their ability to participate while slightly lowering the threshold for excusing people based on likely harm resulting from the hearing. We consider these changes would strike an appropriate balance between encouraging the person's participation and avoiding harm.

The first limb

- 25.75 We recommend adjusting the focus of the first limb of the test, which concerns the person's understanding of the proceedings. The current wording of that limb allows a person to be excused if they “wholly [lack] the capacity to understand the nature and purpose of the proceedings”.⁵⁵ We recommend this is amended to focus on whether the person is unable (with the support available to them) to express their wishes and values in relation to matters that may arise during the course of a court hearing.
- 25.76 In our view, a person's inability to understand the nature and purpose of the proceeding does not necessarily mean their attendance at the hearing would be without purpose. The person may still be able to answer questions in relation to their wishes and values.⁵⁶ These wishes and values may be critical to the hearing. While the court-appointed counsel for the person would be responsible for identifying the person's wishes and values on relevant issues prior to the hearing, additional issues may arise during the hearing itself.

⁵³ Greg Kelly and Kimberly Lawrence “Participation in Litigation” in Iris Reuevecamp and John Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) 361 at 372, citing Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, Dunedin, July 2016) Appendix A at [19].

⁵⁴ See for example János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 23.

⁵⁵ Protection of Personal and Property Rights Act 1988, s 74(2)(a).

⁵⁶ János Fiala-Butora *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury Publishing, Oxford, 2025) at 24.

The person's attendance at a hearing is a key safeguard to ensure that Family Court decisions protect and promote the person's equality, dignity and autonomy.

- 25.77 Our recommendation would effectively raise the threshold for excusing a person based on the first limb of the test. This is because people who are unable to understand the nature and purpose of the proceeding may, with support, still be able to express their wishes and values in relation to matters that arise during the court hearing. Conversely, few people who are able to understand the nature and purpose of the proceeding would be unable (with support) to express their relevant wishes and values.

The second limb

- 25.78 We also recommend a slight change to the second limb of the test, which concerns potential serious harm resulting from attending a hearing. The current wording of that part of the test allows a person to be excused if "attendance or continued attendance is likely to cause the person serious mental, emotional, or physical harm".⁵⁷ We think "serious" harm is not an appropriate threshold for excusing attendance at a hearing. In our view, all reasonable efforts should be made to create an environment for a person with affected decision making that does not cause them any harm, for example, through support people and communication assistance. That most cases are currently heard without the person concerned indicates that there may be room for improvement in this regard.
- 25.79 Instead, we recommend the threshold should be that a person may be excused if attendance or continued attendance is likely to cause the person mental, emotional, or physical harm. This would likely allow a person to be excused if attending a hearing would be distressing to the point of suffering harm. At the same time, we do not think that temporary discomfort or anxiety about being in an unfamiliar environment alone would meet the threshold we recommend.

Dispensing with service of application

- 25.80 We do not recommend amending the current statutory test for dispensing with service of a copy of the application on the person in respect of whom the application is made.
- 25.81 The Family Court may dispense with service if the person wholly lacks the capacity to understand the nature and purpose of the proceedings.⁵⁸ In this context, we consider it is appropriate to focus on the relevant person's understanding of the nature and purpose of the proceeding. Serving court documents on a person who cannot comprehend them may have an exclusionary and alienating effect. We consider it is preferable that the content of the application is simply explained to them by their counsel in such cases.

Legal reform not necessary or desirable in other areas

No recommendation to add to list of people who can make applications as of right

- 25.82 Some submitters suggested the list of applicants who do not require the Family Court's leave to make an application should also include "provider organisations".

⁵⁷ Protection of Personal and Property Rights Act 1988, s 74(2)(b).

⁵⁸ Protection of Personal and Property Rights Act 1988, s 63(2)(a).

- 25.83 The current law already allows some provider organisations to bring applications without leave on behalf of certain organisations. In relation to all court-ordered decisions and arrangements, a representative of a non-commercial group engaged in providing services and facilities for the welfare of relevant people may apply to the Court without leave.⁵⁹ In addition, for care and welfare matters, the manager of the relevant person's place of residence that provides hospital care, rest home care or residential disability care may also apply without leave.⁶⁰ In property rights matters, a trustee corporation may apply without leave.⁶¹
- 25.84 In relation to EPOAs, "a person authorised by a body or organisation contracted by the Government to provide elder abuse and neglect prevention services" may apply without leave to the Court.
- 25.85 Submitters did not identify specific gaps in the current law that are causing problems. Nor have we heard that the need to apply for leave is cumbersome. We therefore do not make any recommendation to change the list of applicants who can make applications as of right.

No changes necessary to law regarding form of hearings or communication assistance

- 25.86 Many submitters said that the formalities of the courtroom can make hearings under the PPPR Act an intimidating experience for some people required to participate in them.
- 25.87 The current law requires Family Court proceedings (including those under the PPPR Act) to "avoid unnecessary formality".⁶² Examples are Family Court Judges not wearing wigs, lawyers not wearing wigs or gowns and smaller courtrooms.⁶³ We consider that any further decisions on how to make court proceedings less formal should be left to Family Court Judges.
- 25.88 Submitters also noted the importance of communication assistance but did not raise any issues with the current law on the provision of communication assistance. We therefore make no recommendations on this topic.

No changes to law necessary regarding place of hearings

- 25.89 We have repeatedly heard from submitters that there is inherent value in face-to-face contact between the judge and the person in respect of whom an application is made. Submitters suggested more efforts should be made to "bring the court to the people".
- 25.90 This point has also been emphasised in other jurisdictions. In its review of guardianship laws, the Victorian Law Reform Commission stressed the importance of holding hearings outside court buildings.⁶⁴ The New South Wales Guardianship Tribunal went so far as

⁵⁹ Protection of Personal and Property Rights Act 1988, ss 7(e) and 26(f).

⁶⁰ Protection of Personal and Property Rights Act 1988, s 7(f).

⁶¹ Protection of Personal and Property Rights Act 1988, s 26(e).

⁶² Family Court Act 1980, s 10(1).

⁶³ See Family Court Act 1980, s 10; and Anna Chapman "Practice and Procedure" in Mark Henaghan and others (eds) *Family Law in New Zealand: Volume 2* (20th ed, LexisNexis, Wellington, 2021) 1515 at 1517.

⁶⁴ Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [21.129]–[21.132].

“choosing not to conduct proceedings in court-like rooms other than in exceptional circumstances”.⁶⁵

- 25.91 The Family Court may wish to explore ways to hold a hearing at a residential care facility or hospital where the relevant person resides if:
- (a) the person is not excused from attending the hearing;
 - (b) the person would otherwise not be able to attend the hearing;
 - (c) remote participation is not allowed; and
 - (d) the security of staff and all participants involved in a hearing can be ensured.
- 25.92 We do not consider that any changes to the law are necessary to hold hearings in locations other than court buildings.⁶⁶
- 25.93 We acknowledge that holding hearings in residential care facilities or hospitals would likely be resource intensive. Extra care would need to be taken to ensure the safety of all participants.⁶⁷ The travelling time required for judges and staff would need to be factored in. Such resource demands might affect the overall productivity of the Court. In the light of these considerations, we cannot comment on whether holding hearings at residential care facilities or hospitals will often be viable in practice.

Current criteria for allowing remote participation are appropriate

- 25.94 We consider that the criteria in the Courts (Remote Participation) Act 2010 for determining whether remote participation via audio-visual link or audio link should be permitted in civil proceedings are adequate for proceedings under a new Act. They expressly refer to the “nature of the proceeding” as a relevant consideration.⁶⁸
- 25.95 We anticipate that key issues for the Family Court to interrogate closely when considering whether to allow the person about whom an application has been made to participate remotely would include:
- (a) whether the person would understand and be able to participate in the proceedings as well if participating remotely; and
 - (b) whether the person’s remote participation would affect the Court’s ability to understand their views and to make factual determinations.

Additional mandatory training for lawyers for subject persons not necessary

- 25.96 Some submitters suggested there should be additional compulsory training for lawyers for subject persons.
- 25.97 The practice guidelines for lawyers for subject persons outline criteria for assessing whether a person is qualified to be a lawyer for subject person. They include:⁶⁹

⁶⁵ Victorian Law Reform Commission *Guardianship: Final Report* (VLRC R24, 2012) at [21.130]. This Tribunal has since been integrated into the Civil and Administrative Tribunal.

⁶⁶ District Court Act 2016, s 72(1).

⁶⁷ See Helen Winkelmann and Andrew Kibblewhite *Memorandum of Understanding between the Ministry of Justice and the judiciary for health, safety and security in the courts* (March 2025) at [26].

⁶⁸ Courts (Remote Participation) Act 2010, s 5(a).

⁶⁹ Jacquelyn Moran *Family Court Practice Note – Lawyer for subject person: selection, appointment and other matters* (Principal Family Court Judge’s Chambers, 19 November 2024) at [8.11].

...

- (c) A general understanding of age-related illnesses and disabilities.
- (d) Experience in working with vulnerable adults.
- (e) Good people skills and an ability to communicate with people with disabilities.
- (f) An awareness of community groups and the role of rest homes and hospitals in the care of the elderly or with people with disabilities.
- (g) Sensitivity and awareness of different world views including gender, ethnicity, sexuality, cultural and religious issues.
- (h) Any other relevant cultural issues, including Te Tiriti o Waitangi (Treaty of Waitangi).
- (i) Relevant qualifications, training, and attendance at courses relevant to the role (including continuing professional development).
- (j) Independence and strong advocacy.

25.98 The guidelines also make clear that continuous professional supervision and development is expected from lawyers for subject persons.⁷⁰ In our view, these guidelines are sufficient to ensure that lawyers for subject persons are suitable to perform the role.

ALTERNATIVE DISPUTE RESOLUTION

25.99 In this section, we discuss alternative dispute resolution options for proceedings under a new Act.

Consultation

Whether a new Act should provide for alternative dispute resolution options

25.100 We asked submitters whether they thought a new Act should provide for dispute resolution options other than court. Forty-four submitters gave feedback on this issue.

25.101 Almost all of these submitters supported the availability of dispute resolution options outside court. Submitters suggested that a new Act should provide for some form of mediation or resolution out of court by consent. Some submitters said it was important to have a “less formal” complaint or dispute resolution process available than the Family Court process.

What would make alternative dispute resolution work well

25.102 We also asked submitters what would make alternative dispute resolution work well. Twenty-two submitters shared their views on this issue.

25.103 The most common themes were that accessibility, informal processes and well-suited mediators would be important. A few submitters said “clear rules” would be needed.

When alternative dispute resolution may not be appropriate

25.104 We asked submitters when alternative dispute resolution may not be appropriate. Twenty-four submitters gave feedback on this issue.

⁷⁰ Jacquelyn Moran *Family Court Practice Note – Lawyer for subject person: selection, appointment and other matters* (Principal Family Court Judge’s Chambers, 19 November 2024) at [10.1]–[10.2].

- 25.105 Some of these submitters suggested that alternative dispute resolution options should not be available where there is a (suspected) abuse of power, where criminal offences are alleged or where there is a safety risk to any person concerned. Two submitters said alternative dispute resolution options should not be available in property matters.
- 25.106 The Family Dispute Resolution Centre said alternative dispute resolution options might not be appropriate where:
- (a) the remedy sought can only be realised through a court order;
 - (b) the relevant matters are questions of law; or
 - (c) the relevant matters require fact finding.

Recommendations

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.

Why a new Act should expressly provide for a pathway to alternative dispute resolution

- 25.107 In our view, a Family Court Judge or Associate should have a formal power to refer parties to alternative dispute resolution at any point before an application is determined. An example of a situation that might be resolved through alternative dispute resolution is a dispute among siblings as to who should be appointed as a welfare guardian for their parent.
- 25.108 As noted above, the PPPR Act already provides for pre-hearing conferences. These conferences can achieve similar results to alternative dispute resolution outside of court. However, alternative dispute resolution outside of court, led by a person other than a judge or associate, will sometimes be more appropriate than a pre-hearing conference.
- 25.109 We understand from engagement with the judiciary's Legislation and Law Reform Committee that judges already informally encourage alternative dispute resolution where appropriate. In our view, a formal power to refer parties to alternative dispute resolution would help to give further weight to alternative dispute resolution outside of court as a pathway in adult decision-making matters. It would also remove any doubt as to the Family Court's power to refer parties to alternative dispute resolution and may facilitate its effective use.
- 25.110 We recommend that a new Act specify that a judge or associate should only refer parties to alternative dispute resolution where they consider it is reasonable to expect a

- resolution of the dispute and that there is no significant power imbalance or material risk of significant harm.
- 25.111 In accordance with these conditions, we anticipate a judge or associate would not refer parties in situations where the relevant matters are only questions of law or where substantial fact finding is necessary. Submitters raised these situations as unsuitable for alternative dispute resolution and we agree. However, we disagree with the suggestion made by two submitters that property matters should be generally excluded from the scope of alternative dispute resolution. We also disagree with one submitter's suggestion that alternative dispute resolution might not be appropriate where the remedy sought can only be realised through a court order. As we note above, a disagreement among family members (such as who should be appointed as representative) might usefully be resolved through alternative dispute resolution notwithstanding that a court order would still be required.
- 25.112 There are several reasons for a new Act to expressly provide for a Family Court Judge or Associate to refer parties to alternative dispute resolution in some proceedings under a new Act.
- 25.113 First, submitters were strongly in favour of alternative dispute resolution being available under a new Act. We have heard from many submitters that they find the Family Court process too rigid and formal. Given the gravity of some of the orders the Court can make under the PPPR Act — and would be able to make under a new Act — there are limits to how flexible and informal a court process can and should be. An express power to refer parties to alternative dispute resolution may help parties who struggle with the procedural rules of the Family Court to attempt to resolve their dispute in a less formal setting out of court.
- 25.114 As noted above, the PPPR Act already provides for pre-hearing conferences. These conferences can achieve similar results to alternative dispute resolution outside of Court such as mediation. However, alternative dispute resolution outside of Court will sometimes be more fitting than a pre-hearing conference.
- 25.115 Second, and relatedly, referring parties to alternative dispute resolution may also help with resolving conflicts in line with the tikanga of the people concerned if they wish to do so. External dispute resolution providers would likely be able to facilitate a process that is more closely aligned with relevant tikanga, because it would not be constrained by the rules of procedure that the Family Court must work within.
- 25.116 Third, most jurisdictions we have examined provide in legislation for some form of alternative dispute resolution process that is available in adult decision-making capacity matters. In Australian jurisdictions, mediation is usually available for any disputes before the relevant civil and administrative tribunal, including proceedings in matters of adult decision-making capacity.
- 25.117 Te Aka Matua o te Ture | Law Commission recommended in its 2003 report *Dispute Resolution in the Family Court* that the government contract “trained mediators to offer mediation to Family Court clients”.⁷¹ The Commission listed the matters that would primarily benefit from mediation and noted that parties involved in the appointment of a

⁷¹ Te Aka Matua o te Ture | Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at [336].

welfare guardian under the PPPR Act “could also use mediation”.⁷² We continue to hold that view.

- 25.118 The details about alternative dispute resolution for disputes arising in relation to adult decision making would need to be determined, including who the providers of such services would be and who would pay for them. We consider the Government is best placed to liaise with potential alternative dispute resolution providers and to appreciate the resourcing implications of different types of funding models.
- 25.119 Our recommendation also intentionally leaves open what type of alternative dispute resolution the Family Court may refer parties to. The most suitable mode of alternative dispute resolution may vary from case to case. In Chapter 24, we recommend that the Government consider whether an appropriate agency responsible for oversight and support under a new Act should provide for a dispute resolution service, in addition to existing providers.

Why alternative dispute resolution should not be mandated

- 25.120 We recommend that Family Court Judges and Associates have the power to refer parties to alternative dispute resolution only with their consent.
- 25.121 In Aotearoa New Zealand, alternative dispute resolution is mandatory — or can be mandated by courts — in some contexts. In family law, the Care of Children Act 2004 permits Family Court Associates and Judges to direct parties to attend family dispute resolution in relation to disputes between guardians of a child and applications for parenting orders.⁷³ Mandatory alternative dispute resolution is also provided for in the Trusts Act 2019 and the Resource Management Act 2011.⁷⁴ The Commission previously recommended that there be a presumption that all cases filed in the “proposed Primary Civil Court and the High Court” will go to mandatory mediation first — subject to the courts’ discretion to make exceptions.⁷⁵
- 25.122 Similar examples are found in overseas jurisdictions. In most Australian jurisdictions, the tribunal responsible for adult decision-making matters can mandate parties’ attendance at alternative dispute resolution.⁷⁶ In Victoria, if multiple people are appointed as representatives, they must “seek to resolve the disagreement by informal means or by mediation” before seeking advice from the relevant tribunal.⁷⁷

⁷² Te Aka Matua o te Ture | Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at [337].

⁷³ Care of Children Act 2004, s 46F. The appointment of family dispute resolution providers is provided for under ss 9–11 of the Family Dispute Resolution Act 2013.

⁷⁴ Under s 145 of the Trusts Act 2019, the court may mandate alternative dispute resolution whereas, under s 268A of the Resource Management Act 1991, the alternative dispute resolution is mandated by law, and the court may grant leave for a party not to participate. Te Kōti Matua | High Court made the first mandatory alternative dispute resolution order under the Trust Act 2019 in *Gatfield v Hinton* [2024] NZHC 1712. The decision has been appealed to te Kōti Pira | Court of Appeal. At the time of writing this Report, the Court of Appeal’s decision is pending.

⁷⁵ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004), R38–R39.

⁷⁶ ACT Civil and Administrative Tribunal Act 2008, s 35(2)(b); Civil and Administrative Tribunal Act 2013 (NSW), s 37; Northern Territory Civil and Administrative Tribunal Act 2014, s 118(1)–(2); Queensland Civil and Administrative Tribunal Act 2009, s 75(1)–(2); South Australian Civil and Administrative Tribunal Act 2013, s 51(3); Tasmanian Civil and Administrative Tribunal Act 2020, s 102(3); and State Administrative Tribunal Act 2004 (WA), s 54(3).

⁷⁷ Guardianship and Administration Act 2019 (Vic), s 177(3)(a).

- 25.123 There are also examples of statutory provisions that only allow voluntary referrals to alternative dispute resolution. An example of such legislation in Aotearoa New Zealand is Te Ture Whenua Maori Act 1993.⁷⁸ Again, similar examples are found in overseas jurisdictions.⁷⁹
- 25.124 In our view, voluntary dispute resolution is preferable under a new Act on adult decision-making capacity. There are good reasons for adopting a cautious approach. Determining whether a person has decision-making capacity itself is not a matter suitable for alternative dispute resolution. Further, the person in respect of whom an application is made is usually vulnerable vis-à-vis other involved parties — there will almost always be some degree of power imbalance. Lastly, court involvement will often still be necessary even after successful dispute resolution (for example, to appoint someone as a representative).
- 25.125 An appropriate first step, in our view, is to allow a judge or associate to formally refer parties to alternative dispute resolution if they consent. Should the mechanism prove successful, the government may wish to consider whether judges and associates should have the power to mandate alternative dispute resolution for appropriate proceedings in relation to adult decision making.
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⁷⁸ Te Ture Whenua Maori Act 1993, pt 3A.

⁷⁹ Mediation Act 2017 (Ireland), ss 6 and 16, in connection with Circuit Court Rules (Ireland), order 33A(II)–(III); and Nova Scotia Civil Procedure Rules, r 59.18.

APPENDIX 1

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:

- 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 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:

- the relevant person's wishes and values indicate tikanga is important to them;
- the relevant person has whakapapa Māori; or
- 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:
- a. are under the age of 18;
 - b. have a representative appointed by te Kōti Whānau | Family Court acting on their behalf;
 - c. have an attorney under an enduring power of attorney acting on their behalf;
 - d. are subject to compulsory treatment or are a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
 - e. 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:
- a. The appointment should be made in a prescribed form developed for this purpose.
 - b. The person and the formal supporter should sign the appointment.
 - c. 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:
- a. Any action taken by the formal supporter under the appointment is valid if:
 - i. the formal supporter does not know of the failure and acts in good faith; or
 - ii. the failure is not material.
 - b. A third party dealing with the formal supporter may treat any action of the supporter under the appointment as valid if:
 - i. the third party does not know of the failure and acts in good faith; or
 - ii. 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 1988Act, 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.
-

APPENDIX 2

List of submitters

Listed below are the organisations from which we received submissions during this review. Individual submitters are not listed.

IN RESPONSE TO THE PRELIMINARY ISSUES PAPER

- Adult Guardianship & Advocacy Services Trust
- Age Concern Auckland
- Age Concern Whanganui
- Alzheimers New Zealand
- Alzheimers New Zealand Advisory Group
- Auckland District Law Society
- Australasia College for Emergency Medicine
- Australian and New Zealand Society for Geriatric Medicine — NZ Division
- Avonside House Trust
- Awareness
- Basilisk Social Services Limited
- Bay of Plenty Mental Health & Addiction Services Consumer Consultant Group — Te Whatu Ora Hauora a Toi
- Brackenridge
- Changing Minds
- Chapman Tripp
- Chief Ombudsman
- Citizens Commission on Human Rights
- Community Law Centres Aotearoa
- Community Living Limited
- Disability Connect
- Disabled Persons Assembly
- Donald Beasley Institute

- Duncan Cotterill
- End-of-Life Choice Society
- Family Planning New Zealand
- Family Violence Death Review Committee
- Fetal Alcohol Spectrum Disorder Care Action Network
- Gawith Burridge Lawyers
- He Manaakitanga Kaumātua Aotearoa | Age Concern NZ
- Health New Zealand Te Whatu Ora MidCentral Supportlinks Needs Assessment Service Coordination Team
- Healthcare Compliance Solutions Limited
- IHC New Zealand and Idea Services (joint submission)
- Insurance Council of New Zealand
- Mental Health Foundation
- Mental Health, Addiction and Intellectual Disability Service (MHAIDS) Capital, Coast, Hutt Valley and Wairarapa Districts — Te-Upoko-me-Te-Karu-o-Te-Ika
- Ministry of Social Development Policy Group
- National Ethics Advisory Committee
- New Zealand Aged Care Association (ACA)
- New Zealand College of Clinical Psychologists
- New Zealand College of Mental Health Nurses — Te Ao Māramatanga
- New Zealand College of Mental Health Nurses National Disability Nurses Branch — Te Ao Māramatanga
- New Zealand Council of Christian Social Services
- New Zealand Disability Support Network
- New Zealand Down Syndrome Association
- New Zealand Speech-Language Therapists' Association
- Parents of Vision Impaired (NZ) Inc
- Personal Advocacy and Safeguarding Adults Trust
- Platform Trust — Atamira
- Prader-Willi Syndrome Association
- Public Trust
- Royal Australian and New Zealand College of Psychiatrists
- Spectrum Foundation
- Te Aka Whai Ora | Māori Health Authority
- Te Ara Ahunga Ora | Retirement Commission
- Te Hiringa Mahara | Mental Health and Wellbeing Commission

- Te Kāhui Tika Tangata | Human Rights Commission
- Te Kāhui Ture o Aotearoa | New Zealand Law Society
- Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand
- Te Roopu Taurima
- Te Rōpū Tauwhiro i Aotearoa | Aotearoa New Zealand Association of Social Workers
- Te Tari Kaumātua | Office for Seniors
- Te Toihau Hauora, Hauātanga | Health and Disability Commissioner
- Te Whatu Ora MidCentral
- Thomson Wilson
- Waikato Welfare Guardianship Trust
- Whanganui Welfare Guardian Trust

IN RESPONSE TO THE SECOND ISSUES PAPER

- Adult Guardianship Services Trust
- Age Concern Auckland
- Alzheimers New Zealand
- Aotearoa New Zealand Adult Safeguarding Alliance
- Auckland Disability Law
- Australian and New Zealand Society for Geriatric Medicine
- Bank of New Zealand
- BPW New Zealand
- Canterbury West Coast Welfare Guardians Trust
- Changing Minds
- Community Law Centres Aotearoa
- Cooper Legal
- Dementia New Zealand
- Disabled Persons Assembly NZ
- Donald Beasley Institute and Ngā Tāngata Tuatahi | People First NZ (joint submission)
- DPO Coalition
- Eating Disorders Carer Support NZ
- Family Dispute Resolution Centre
- Gawith Burrridge Lawyers
- Greg Kelly Trust Law
- He Manaakitanga Kaumātua Aotearoa | Age Concern NZ
- Health New Zealand Te Whatu Ora Waitematā social workers

- IHC New Zealand
- Legislation and Law Reform Committee
- McWilliam Tyree Lawyers
- Medical Protection Society
- Mental Health Foundation of New Zealand
- MidCentral Te Whatu Ora – Palmerston North Hospital social workers
- National Ethics Advisory Committee
- New Zealand Aged Care Association (ACA)
- New Zealand Council of Christian Social Services
- New Zealand Down Syndrome Association (NZDSA)
- Older Persons Health Burwood Hospital Te Whatu Ora Waitaha
- Prader-Willi Syndrome Association
- Public Trust
- Royal New Zealand College of General Practitioners
- Social Workers Registration Board
- Spectrum Foundation Te Hiringa Mahara
- Te Hunga Rōia Māori o Aotearoa | Māori Law Society (Te Hunga Rōia)
- Te Kāhui Tika Tangata | Human Rights Commission
- Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS)
- Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand
- Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand Auckland Branch
- Te Roopu Taurima
- Te Rōpū Tauwhiro i Aotearoa | Aotearoa New Zealand Association of Social Workers
- Te Tāhū Hauora | Health Quality and Safety Commission National Mortality Review Committee
- Te Tari Kaumātua | Office for Seniors
- Te Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman
- Te Toihau Hauora, Hauātanga | Health and Disability Commissioner
- Te Whatu Ora | Health New Zealand
- Te Whatu Ora Advance Care Planning Group Waitaha Canterbury
- TGT Legal
- The Law Association of New Zealand
- The Royal Australian and New Zealand College of Psychiatrists
- Third Age Health
- Vicki Amundsen Trust Law

- VisAble
 - Volition
 - Whaikaha | Ministry of Disabled People
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