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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 80

Protections Some Disadvantaged People May Need

April 2002
Wellington, New Zealand

The 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 New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

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9 April 2002

Dear Minister

I am pleased to present to you Report 80 of the Law Commission *Protections Some Disadvantaged People May Need*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

J Bruce Robertson
President

The Hon Margaret Wilson
Minister Responsible for the
Law Commission
Parliament Buildings
Wellington

Introduction

THE METHOD OF CONSULTATION adopted by the Law Commission in relation to this project was (after referring what we proposed to the Ministries of Health and Justice) to circulate on 11 February 2002 a draft of the present report under cover of the letter (a copy of which is set out as appendix A) to the recipients described in that letter. Subsequently, we received requests from others for copies of the draft and these were duly furnished. We received submissions from the persons and organisations listed as appendix B. The number of such submissions and the eminence in their various fields of many of those who made them demonstrate the effectiveness in this case of the consultative process adopted. The Law Commission is grateful for the help so readily provided.

In paragraphs 2, 3 and 4 of the report we sketch the recent history that forms the backdrop to the request to the Law Commission to embark upon the present project. It is plain from the submissions we have received that the polarisation in viewpoints that this history illustrates still exists. The essentials of the solution that we propose were strongly supported by most of those from whom we received submissions. But there are those who are and will doubtless continue to be unhappy with our proposals. Such dissent reflects (to oversimplify issues that we accept are more finely nuanced than our brief description conveys) two main areas of disagreement. One is concerned with the basic ethical question of how challenging behaviour should be viewed and responded to. To take a concrete example with which the Family Court regularly has to deal, is compelling an aged person to transfer from his or her own familiar home to some sort of residential care on the ground that the individual concerned is as a result of a physical or mental decline living in dangerous squalor, justifiable benevolence or insufferable governmental bossiness? There is no one right answer to such questions.

The other is the profound distrust some people have of the institutions charged with responsibilities in relation to disadvantaged people, including in particular those providing residential care and not excluding the Family Court. On this point it needs to be remembered that while in framing its recommendations the Law

Commission must take into account the possibility of the existence of institutional imperfections, there are limits to what can be achieved by passing Acts of Parliament. The most that a law commission can hope to do is to propose a suitably robust legal foundation on which others can and should erect appropriate professional practices.

The Commissioner having the carriage of this project was DF Dugdale and the researcher was Helen Colebrook.

Protections some disadvantaged people may need

TERMS OF REFERENCE

1 THIS REPORT RESPONDS to a request dated 20 December 2001 to the Law Commission from the Minister responsible for the Law Commission. By that request the Commission is to asked to respond to the following terms of reference:

> To consider, having regard to the [Protection of Personal and Property Rights] Act's aim to promote and protect the rights of those to whom it applies and the underlying presumption of competence:
>
> - whether there is a need for clarifying or extending the power of the Family Court to require a person to whom Part I of the Act applies to live in accordance with specified living arrangements (including in long stay residential care) and to impose other conditions relating to that person's safety or welfare (including in appropriate cases provisions for restraint or seclusion) and whether if there is a need for legislation it should be:
>   - by way of amendment to Parts I and II of the Protection of Personal and Property Rights Act 1988; or
>   - using some other statutory vehicle;
> - and whether if Parts I or II of the Protection of Personal and Property Rights Act 1988 are to be amended:
>   - safeguards additional to the ones that the Act already provides (e.g mandatory periodic review of its order by the Family Court) should be enacted in order to protect the person to whom the Act applies and to ensure that the primary objectives described in section 8 of the Act are not defeated;
>   - provisions should be enacted to make it clear which if any of the existing powers specified in section 10 and any new powers may be delegated by the Family Court to a welfare guardian of such person and what safeguards in the event of such a delegation are necessary for the protection of such person.

It should be noted that these terms of reference are concerned not with the harm that affected persons may inflict on others (a question we return to in paragraph 8), but solely with their own safety and welfare. While such persons may be harmed by others, the primary concern of this paper is self-harm.

BACKGROUND

2 This request was triggered in this way. The law, in making special provision for the protection of those lacking normal intellectual competence, used once not to distinguish between congenital retardation and other conditions. So, in New Zealand, the Mental Health Act 1969 defined the "Mentally disordered" to whom the provisions of that statute applied in the following terms:

> "Mentally disordered", in relation to any person, means suffering from a psychiatric or other disorder, whether continuous or episodic, that substantially impairs mental health, so that the person belongs to one or more of the following classes, namely:
> (a) Mentally ill—that is, requiring care and treatment for a mental illness:
> (b) Mentally infirm—that is, requiring care and treatment by reason of mental infirmity arising from age or deterioration of or injury to the brain:
> (c) Mentally subnormal—that is, suffering from subnormality of intelligence as a result of arrested or incomplete development of mind.[1]

But the Mental Health (Compulsory Assessment and Treatment) Act 1992 adopted a new philosophy. The definition of mental disorder in that statute is in these terms:

> **mental disorder**, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—
> (a) Poses a serious danger to the health or safety of that person or of others; or
> (b) Seriously diminishes the capacity of that person to take care of himself or herself;—
> and **mentally disordered**, in relation to any such person, has a corresponding meaning.[2]

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1 Mental Health Act 1969 s 2.

2 Mental Health (Compulsory Assessment and Treatment) Act 1992 s 2(1).

Section 4 of the Act expressly provides:

> **4 General rules relating to liability to assessment or treatment**
> The procedures prescribed by Parts 1 and 2 of this Act shall not be invoked in respect of any person by reason only of—
> (a) That person's political, religious, or cultural beliefs; or
> (b) That person's sexual preferences; or
> (c) That person's criminal or delinquent behaviour; or
> (d) Substance abuse; or
> (e) Intellectual handicap.

By an amendment of 1999, section 4(e) was altered by the substitution of "intellectual disability" for "intellectual handicap".[3]

3 The impetus for the 1992 change seems to have been a desire to distinguish between mental impairment that was treatable (hence the short title's reference to "Assessment and Treatment") on the one hand and such other conditions as personality disorders and congenital disability on the other hand which are not. But insufficient consideration seems to have been given to the gap left by the new provision. The consequence of the alteration to the law effected by the 1992 statute was that except for the Protection of Personal and Property Rights Act 1988, there was no statutory provision for the imposition on the intellectually disabled of restraints to avoid self-harm. Nor was there provision for restraining such persons from harming others. To fill this gap the then Minister of Health, Wyatt Creech, on 5 October 1999 introduced the Intellectual Disability (Compulsory Care) Bill which made provision both for intellectually disabled persons charged with imprisonable offences and found guilty or unfit to stand trial or acquitted on the grounds of insanity (the offender group), *and* for intellectually disabled persons not in that category but whose behaviour poses a serious risk of danger to themselves and others. This lumping together of offenders and non-offenders was opposed by members of the administration that took office following the 1999 General Election and provoked 36 submissions opposing the inclusion in the Bill of non-offenders to the select committee considering the Bill. The Health Committee reported on 30 April 2001 that a majority of its members preferred the Bill to be redrafted to exclude non-offenders. Parliament, at the time of writing, has not considered that report but it is understood that the present administration intends that the Bill should proceed to enactment broadly in the shape recommended by the select committee, that is with non-offenders excluded. The non-offenders will remain unprovided for.

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[3] Mental Health (Compulsory Assessment and Treatment) Amendment Act 1999 s 4.

4 These events took place against the background of the deinstitutionalisation of the Templeton Centre near Christchurch and the downsizing, pending deinstitutionalisation, of the Kimberley Centre near Levin, each of which had large numbers of informal patients, some of whom had lived and been cared for at the centres for most of their lives. Most of these people were believed to require some degree of supervision. Because, with the commencement of the new mental health legislation in late 1992, there were concerns as to the legal position of the Kimberley care providers, some hundreds of applications were made to the Family Court at Levin either for the appointment of welfare guardians or for personal orders under the Protection of Personal and Property Rights Act 1988 section 10. A number of decisions of Judge Inglis QC on these applications were reported in the two series of family law reports. A similar situation arose at Templeton, with applications mainly to the Family Court at Christchurch, though it seems that the primary stimulus for the South Island applications may have been not worries by staff as to their powers, but the concern of residents' families that local health authorities were making inadequate arrangements for residents' care.[4] The Family Court decisions have not escaped criticism,[5] but it needs to be remembered in considering such criticism that the tidal wave of applications by which that Court was engulfed left little scope for the luxury of over-nice rigour. Whether the Protection of Personal and Property Rights Act 1988 provides appropriate provision is the issue underlying our terms of reference.

WHO ARE THE PEOPLE AFFECTED?

5 Although, as explained, the present project arose out of concerns for the position of those with congenital disabilities, the terms of reference are wider than this. They extend to all those in respect of whom an order may be made under the Protection of Personal and Property Rights Act 1988 Part I. Those affected most commonly fall into one of the following three classes:

- people with congenital intellectual disabilities;
- people (usually elderly) suffering some form of dementia; and
- people whose intellect is unimpaired but who are in the tragic position of being unable to communicate as a consequence of

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[4] This is the view of A Bray and J Dawson (with J van Winden) *Who Benefits from Welfare Guardianship?* (Donald Beasley Institute Incorporated, Dunedin, 2000) 5.

[5] Anne Bray *The Protection of Personal Property Rights Act 1988: Progress for People with Intellectual Disabilities* (1996) 2 BFLJ 51, 64.

brain damage resulting from a stroke, accident or criminal assault.

It is of course important that any solution proposed by this report fits all three of these classes.

6 The other matter not to be lost sight of is that a person suffering from a "mental disorder" as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992 is likely also, if no compulsory treatment order has been made under that statute, to be a person in respect of whom an order might be made under Part I of the Protection of Personal and Property Rights Act 1988. This latter course is indeed often preferred by those connected with the patient because of the stigma still thought in some circles to attach to mental health problems. The protections for the patient under the 1992 statute are elaborate and it is important not to confer coercive powers under the 1988 statute that enable those protections to be by-passed.

COERCION

7 In the previous paragraph and in the balance of this report we use the word *coercion* and its adjective *coercive* to convey something that is being imposed on a person against that person's will. One submitter suggested that the term was inappropriate to describe limiting a person's choice without that person's consent when such person has no or only limited capacity either to choose or consent. "It is rather like saying that a baby is 'coerced' into having an immunisation injection." We think that *coercion* is as good a word as any. It conveys control by greater strength and is applicable equally to the locked in resident of an institution and to the injected baby.

8 There is a down-to-earth statement as to the coercion imposed in practice in the submission on the Intellectual Disability (Compulsory Care) Bill by Dr Stephanie du Fresne, Consultant Psychiatrist with Intellectual Disability Services and Director of Forensic Psychiatry, Healthcare Otago:

> Secondly a concern was raised that people employed to work with people with an intellectual disability are often in the position of coercing them or imposing restrictions on them. This involves a wide range of coercive and restrictive practices from insisting that people wear adequate clothing or take medication for epilepsy or other serious medical or psychiatric conditions whether they want to or not, through locking external doors or gates to techniques of personal and mechanical restraint and seclusion. Generally the coercion or restriction is imposed because the disabled person does not understand

> the need for whatever is being insisted on, or has transiently lost self-control, rather than because the person actively, persistently, and with a good understanding of the issues, refuses to cooperate, but the practices are nonetheless coercive and/or restrictive. People employed to work with people with an intellectual disability were concerned that they were not legally authorised in such coercive and/or restrictive practices by any clear legislative mandate. Families and informal carers of course also use such practices, but are generally more secure in their 'right' to do so in the best interests of the person with an intellectual disability.

Later in her submission Dr du Fresne refers to:

> … the full range of coercive and restrictive intervention, from insisting that someone wear adequate clothing (for example to avoid hypothermia) before they are allowed to leave the home where they live, through to placing someone in a seclusion room …

Dr Donald Beasley said this to us:

> Environmental restriction, physical restraint and verbal coercion have always been applied to intellectually disadvantaged persons, mostly in a kindly or protective fashion by parents or family members, or by those caring for them; occasionally insensitively or even brutally in hospitals, community houses and other residential, educational or workplace settings; but probably much less frequently in recent years. Some measure of physical restraint for some will continue to be required, perhaps less frequent and gentler as experience grows … . Any restraint must be minimal, authorised for a specific time, renewable on fresh application and independently monitored.

COMMON LAW COERCIVE POWERS

9 Later in this report we will need to consider what coercive powers, if any, are conferred by the Protection of Personal and Property Rights Act 1988. At this stage we note the extent to which, quite apart from that statute, the law confers coercive powers on caregivers. It is clear from the majority House of Lords judgments in *Gillick v West Norfolk and Wisbech Area Health Authority*[6] that parents have such powers, but that they exist for the benefit of the child and are justifiable only so far as they enable the performance of the duties of the parent to the child. The parents' right has been described as a dwindling right (dwindling, that is, as the child grows older) that "starts with the right of control and ends with little more than advice".[7] Members of the English Court of Appeal

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6 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

7 *Hewer v Bryant* [1970] 1 QB 357, 369 Lord Denning MR.

in *Re K (a child) (Secure Accommodation: Right to Liberty)*[8] refer to such restrictions by parents of their children's movements as "putting young children into bed when they would rather be up, or 'grounding' teenagers when they would prefer to be partying with their friends, or sending children to boarding schools, entrusting the schools with authority to restrict their movements".[9]

10 A distinct and separate line of authority establishes that necessity is available as a possible defence to claims in tort based on unlawful imprisonment or trespass to the person where the claim is brought by one who was, at the material time, a danger or potential danger to himself or herself or to others, provided that the detention or other interference was necessary.[10]

11 What these two lines of authority have in common is the fact that the coercive powers exist in the case of those identified in *Gillick* only for the benefit of the child, and in the case of those referred to in the previous paragraph only (where the protection of a third party is not involved) in order to confer on the individual the benefit of being protected from self-harm. Having, as the reason for their existence the benefit of the affected party is a characteristic that these powers share with the protective powers conferred by the Protection of Personal and Property Rights Act 1988 which we will shortly come to discuss.

HARM TO OTHERS

12 Finally, in this introductory background we mention that even assuming that:

- the Intellectual Disability (Compulsory Care) Bill is enacted in the form now proposed; and
- the Protection of Personal and Property Rights Act 1988 powers are strengthened in the way we propose;

one part of the gap in the statutory scheme created by the limited definition of "mental disorder" in the Mental Health (Compulsory Assessment and Treatment) Act 1992 will remain unplugged. There will still be no provision for the coercion of those who are not offenders and so outside the Intellectual Disability (Compulsory Care) Bill and in relation to whom the risk is that

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8 *Re K (a child) (Secure Accommodation: Right to Liberty)* [2001] Fam 377.

9 Above n 8, 407 Judge LJ.

10 *Reg v Bournewood Community and Mental Health NHS Trust ex parte* L [1999] 1 AC 458, especially 490 Lord Goff of Chieveley; and see John Dawson "The Law of Emergency Psychiatric Detention" [1999] NZ Law Rev 275.

they may harm not themselves but others.[11] We understand that at present the gap has been cobbled shut in the case of persons under 20 years of age by use of the Children, Young Persons, and Their Families Act 1989 and in the case of others by various de facto means unlikely to survive scrutiny (on a habeas corpus application, for example). This aspect of the matter, as already noted, is outside our terms of reference and we mention it only to ensure that there is no confusion as to the boundaries of this report. The exclusion from our terms of reference of harm to others was criticised by a number of those who made submissions. Of the three classes that we identified in paragraph 5, only a very small proportion of those in the first class are likely to be affected. If it is indeed correct, as was suggested to us, that in the management of intellectually disabled persons whose behaviour can become uncontrolled, the distinction between the risk of self-harm and that of harm to others is not a realistic one, then what we propose in relation to self-harm may solve the problems in relation to harm to others.

THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988 POWERS

13 Part I of the Protection of Personal and Property Rights Act 1988, which is headed "Personal Rights", empowers the Family Court to make three classes of order. The jurisdiction does not extend to those under 20 years of age who have never married,[12] and exists only in respect of one who:

(a) 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

(b) Has 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, but wholly lacks the capacity to communicate decisions in respect of such matters.[13]

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[11] The *parens patriae* jurisdiction preserved by the Judicature Act 1908 s 17 for example, must be exercised for the benefit of the particular person and not of others (*Re Eve* (1986) 31 DLR (4th) 1, 29 La Forest J). The Health Act 1956 s 126 is confined in its effect to the neglected. Various criminal law provisions, in particular the Crimes Act 1961 ss 41 and 48, relate to crisis intervention rather than long-term solutions.

[12] Protection of Personal and Property Rights Act 1988 s 6(2).

[13] Above n 12, s 6(1).

In deciding whether jurisdiction exists, the presumption is in favour of competency.[14] In other words the onus is on the applicant for an order to demonstrate that jurisdiction on one or other of the two possible grounds exists.

Section 8 (referred to in our terms of reference) reads:

> The primary objectives of a Court on an application for the exercise of its jurisdiction under this Part of this Act shall be as follows:
> (a) To make the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of that person's incapacity:
> (b) To enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible.

14 The three classes of possible order that the Family Court may make are:

- a specific order under section 10;
- a property order under section 11; or
- an order appointing a welfare guardian under section 12.

This paper is not concerned with property orders, or with all the types of order that might be made under section 10. The concern of this paper is with orders appointing a welfare guardian under section 12, and the following classes of section 10 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.

15 The statute makes it clear that the appointment of a welfare guardian is very much a last resort. The statute provides that the Court may make an order appointing a welfare guardian "in relation to such respect or aspects of the personal care and welfare of that person as the Court specifies in the order",[15] but that:

> (2) A Court shall not make an order under subsection (1) of this section unless it is satisfied—

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[14] Above n 12, s 5.

[15] Above n 12, s 12(1).

(a) That the person in respect of whom the application is made 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
(b) That the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made relating to that particular aspect or those particular aspects of the personal care and welfare of that person.[16]

The use of the adverb "wholly" in the foregoing passage contrasts with "wholly or partly" in section 6(1)(a) quoted in paragraph 10.

16 A welfare guardian with certain infrequently encountered exceptions (making a decision in relation to dissolution of marriage, or the adoption of a child of the person, or refusing consent to medical treatment, or consenting to electro-convulsive treatment or lobotomy, or to the person acting as a guinea pig in relation to medical experiments) has by section 18(2):

> … 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.

Subsections (3) and (4) of section 18 provide as follows:

(3) In exercising those powers, the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and best interests of the person for whom the welfare guardian is acting, while seeking at all times to encourage that 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.

(4) Without limiting the generality of subsection (3) of this section, a welfare guardian shall—
  (a) Encourage the person for whom the welfare guardian is acting to act on his or her own behalf to the greatest extent possible; and
  (b) Seek to facilitate the integration of the person for whom the welfare guardian is acting into the community to the greatest extent possible; and
  (c) Consult, so far as may be practicable,—
    (i) The person for whom the welfare guardian is acting; and

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[16] Above n 12, s 12(2).

(ii) Such other persons, as are, in the opinion of the welfare guardian, interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person; and

(iii) A representative of any group that is engaged, otherwise than for commercial gain, in the provision of services and facilities for the welfare of persons in respect of whom the Court has jurisdiction in accordance with section 6 of this Act, and that, in the opinion of the welfare guardian, is interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person.

17 Section 12(8) requires a welfare guardian to apply for review by a specified date not more than three years ahead. In the case of section 10 orders section 7 contemplates expiry not more than 12 months ahead unless an extension has been sought.

DOES THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988 CONFER COERCIVE POWERS?

18 Do the Protection of Personal and Property Rights Act 1988, sections 10 and 18(2), quoted in paragraphs 14 and 16 respectively, confer coercive powers? The question is one of statutory interpretation. What we are asked in the first bullet point of our terms of reference is "whether there is a need for clarifying or extending the power of the Family Court" in relation to the matters specified. It is a well-settled rule of interpretation that physical restrictions should not be placed on any person except under clear authority of law, and that statutes should be construed on this basis.[17]

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common-law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.[18]

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[17] Francis Bennion *Statutory Interpretation* (3 ed, Butterworths, London, 1997) 645.

[18] *Reg v Home Secretary ex parte Pierson* [1998] AC 539, 587 Lord Steyn. The whole of Lord Steyn's judgment between pages 587–591 is relevant to the topic discussed in the text.

Lord Hoffman has observed that:

> … the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[19]

We very much doubt whether, in the statute we are discussing, any of the statutory powers are clear enough to justify physical restriction. Provision of living arrangements, for example, as provided by section 10(1)(e) falls a long way short of compelling their use, and the same is true of the general powers conferred on welfare guardians by section 18(2).

19 Orders have in fact been made by the Family Court authorising coercion. The standard form of appointment of a welfare guardian of a Kimberley patient authorised the guardian to place the patient at the Kimberley Centre and delegate patients' day-to-day care to the Centre, "including the use by the Centre of such reasonable restraints on the patient as are necessary in the patient's welfare and interests, and for the safety of others, both within and outside the Kimberley Centre complex".[20]

20 The high water mark of reliance on the statute's powers is probably the decision of Judge Inglis in *Re B (seclusion)*.[21] The medical evidence in relation to the individual in question was that:

> Episodes still occur on an average of once per week, which require a variable period of seclusion. Skills of the staff and other environmental and peer group factors influence the frequency, but these remain something that we cannot entirely eliminate.

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[19] *Reg v Home Secretary ex parte Simms* [2000] 2 AC 115–131. We add, for the sake of completeness, that there is no usefully relevant provision in the New Zealand Bill of Rights Act 1990. There is in the current context no *arbitrary* detention within the meaning of s 22 and it is doubtful whether the rather vacuous references to "freedom of movement and residence in New Zealand" in s 18(1) have any relevance. It is better to rely on well-established common-law principles than generalisations filched from the manifestos of other people proclaimed in other times and other circumstances.

[20] *Re A, B and C (Personal Protection)* [1996] 2 NZLR 354, 360–361.

[21] *Re B (seclusion)* (1993) 11 FRNZ 174.

> Her outbursts are usually quite physically demanding of staff, and she has to be forcibly put in an appropriate seclusion room and locked in for a time period depending on her response.
>
> The process is done in complete accordance with the official Health Department guidelines used in psychiatric and forensic services. The consistent application and availability of this management is most beneficial, but her life history and our current experience indicate that we will need to be able to practise the procedure in the foreseeable future.[22]

Judge Inglis was faced with the situation in which there was no express statutory provision for seclusion. The only statutory justification for therapeutic seclusion is to be found in section 71 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 that the Judge correctly held had no application to the position in the case before him. In those circumstances he applied the provisions of the Protection of Personal and Property Rights Act. He said:

> Accordingly I rule as a matter of law that in principle seclusion may be authorised in one way or the other under the 1988 Act in cases, as here, where it is needed from time to time to ensure the patient's own safety and welfare and the safety and welfare of others. There is power to make a personal order to that effect in terms of s 10(f), for example. In principle a welfare guardian may be empowered to consent to the institution in which the patient is cared for providing seclusion for the patient as and when needed, in which case the welfare guardian's consent becomes in the law the patient's consent.[23]

But, power to make an order that "the person be provided with medical advice or treatment" (which is what section 10(f) provides for) does not amount to an authority to compel submission to the treatment, and we doubt whether, in light of the rule of interpretation referred to in paragraph 18, a power expressed in such general terms comes anywhere near furnishing clear authority for physical restraint. Moreover, seclusion is not therapeutic, and so not "treatment".[24]

21 So, while all kinds of kindly coercion may be exercised as part of the robust commonsense of everyday care (as does any parent with a young child), and while such coercion finds its legal justification in the common-law rules referred to in paragraphs 9 and 10, in

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[22] Above n 21, 181.

[23] Above n 21, 179.

[24] See New Zealand Standard NZS 8141:2001 *Restraint Minimisation and Safe Practice* (referred to in paragraph 37 of this report), para 1.3.4.

relation to more serious physical constraints (which are the ones likely to be challenged and of which restraint and seclusion are very strong examples) serious doubt exists as to whether, because of the absence of clear and specific provisions to that effect, the Protection of Personal and Property Rights Act 1988 in fact confers coercive powers or whether any other legal justification for such coercion exists.

22 The view of the legal position that we have expressed in the previous paragraph was accepted by the overwhelming majority of those whom we consulted and who in their submissions addressed the subject. Particularly concerned with the present state of the law were Family Court judges who find themselves urged to exercise powers that they are not entirely certain that they possess.

23 An opposing view was expressed to us by Judge Inglis in these terms:

> … I find nothing ambiguous in the way in which the Court's powers to make personal orders, or the effect of personal orders, are expressed in s 10. Take, for example, s 10(1)(d) (to which, by subs (2) the 'institution' must be made a party) is quite pointless unless it is read with the necessary implication that the patient is bound to enter the institution and the institution is bound to receive and keep him or her there, if necessary by preventing him or her leaving. Section 18 quite clearly confers upon a welfare guardian 'all such powers as may reasonably be required to enable the welfare guardian to make and implement decisions for the person for whom the welfare guardian is acting' and s 19 quite clearly states that the welfare guardian's decisions and actions are to be treated as though they were the decisions and actions of the patient. I would have thought that ss 18 and 19, read together, clearly provided a welfare guardian with power, if so authorised on appointment, to place the disabled person in an appropriate facility subject to the management rules of that facility which might reasonably impose limits on the patient's freedom to wander within the facility or outside its boundaries. If such limitation has been consented to by the welfare guardian on the patient's behalf it is treated as the patient's own consent. Protection against abuse comes from the right of any interested person to apply to the Court.

A not dissimilar view was expressed to us by WR Atkin of the Victoria University of Wellington, whose writings on family law issues command respect.

24 The 1988 statute dates from a period when the practice of enacting generalised statements of rights had only recently come into vogue. The terms of sections 10(1)(d), (e), (f) and (g) suggest that while the statute's framers must have known *au fond* that in some cases there would be a need for compulsion, they shrank, in a statute which from its long title onward is expressed in terms of rights,

from any adequately forthright acknowledgement of the existence of this need. There is an absence of the clear and specific provision that must be there if physical restraint is to be authorised.

25 What is accepted virtually unanimously is that, however the issue of interpretation might ultimately be resolved if the statute were left untouched, the very fact that there is uncertainty is a reason for prompt amendment to put an end to doubts.

26 There is a further point to be noted that arises out of this disagreement as to the effect of the statute in its present wording. The fact that it can be cogently (but, in the Commission's view, mistakenly) argued that the powers that we will be recommending should be spelled out in the statute are, in fact, already implied suggests that it cannot be said that the amendments we propose do violence to the spirit and purpose of the 1988 statute. If the correct analysis is that all we are proposing is that there should be expressed what is already implicit, then it cannot sensibly be argued that our proposals in any way violate the principles on which the statute was based.

ARE COERCIVE POWERS NEEDED?

27 We have discussed in paragraph 20 the facts of the case of *Re B (seclusion)*. If we are right in the view we have expressed, that the Family Court had no power to make the entirely sensible order in fact made, then the conclusion that there is a gap in the legislative scheme is clearly warranted. The matter was put to us by a lawyer experienced in the field in these terms:

> In many of the cases that come before the Court the subject persons have evidenced some reluctance towards the course proposed by the health professionals and proposed caregivers. Probably more often than not people are reluctant to be forced out of the home that they have lived in for many years even if they have been living in squalor and quite unable to look after themselves properly. In many cases where medical treatment is considered necessary by the medical professionals but for one reason or another the subject persons are unable or unwilling to see the necessity for the proposed treatment resort has to be made to the Court for an order under section 10 (1)(f). … [I]t seems pointless the Court making an order as to the provision of medical treatment or placement in a resthome (which of course it can only do after following the rigorous rights protection course prescribed by the Act) but with there being no explicit power to ensure that the treatment is in fact provided or that a person is placed and remains in a resthome.[25]

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[25] Submission by Alan J Gluestein.

IF COERCIVE POWERS ARE NEEDED IS THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988 THE BEST PLACE FOR THEM?

28 The Protection of Personal and Property Rights Act 1988 is an enlightened charter designed to improve the lot of a section of the populace that in past received less than justice. It provides a machinery for substituted decision making to the extent that this is necessary to protect the personal and property rights of those not fully able to manage their own affairs. There was general agreement that this statute was the obvious and sensible place in which to include the coercive powers that it lacks as it now stands.[26] If the coercive powers are included in the 1988 statute, they would be subject to the admirable protections already provided by that statute, including:

- the principal of least restrictive intervention;
- the obligation to encourage the individual to develop that individual's capacity to the extent possible; and
- the mandatory requirement of legal representation contained in section 65.

Coupled with this is the role of the Family Court under the statute, a role that we have no doubt it conscientiously and unreservedly accepts, as "the bulwark of the protection of the individuals in respect of whom applications are made".[27] There seems no point in spelling out these matters in some other statute when the necessary powers of compulsion can be inserted neatly enough in the Protection of Personal and Property Rights Act 1988. Whatever statutory vehicle is employed the same men and women (the Family Court judges) are likely to end up making the decisions and, that being so, it seems simplest to stick with the obvious solution. We note the view of the Royal Australian and New Zealand College of Psychiatrists in its submission to the select committee considering the Intellectual Disability (Compulsory Care) Bill.

---

[26] It is suggested by AIF Simpson and WJ Brookbanks "Directing the place of residence as a feature of a community treatment order" (2001) BFLJ 226 that there is a comparable need for coercive powers in the community treatment order provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992. So there is a case for a stand-alone statute covering various statutory (and for that matter common law) situations, but we prefer the solution proposed in the text.

[27] *In the matter of A* [1996] NZFLR 359, 372 HC.

> For those who are incompetent to keep themselves safe, because of a lack of comprehension of the common dangers of the world around them, the appropriate response is the use of guardianship legislation. The Protection of Personal and Property Rights Act would seem to be the most appropriate vehicle, though [it] would appear [to] require some amendment for this purpose.

We entirely agree.

THE SOLUTION PROPOSED

29 Coercions, in the sense that we are using that word, can range from minor coercions of the sort that parents exercise daily that we discuss in paragraph 9, to major coercions of which forced removal to residential care, forced medical treatment, locking up and seclusion are examples. In drawing this distinction between minor and major we do not overlook Dr Anne Bray's submission made to us on behalf of the Donald Beasley Institute to the effect that petty day-to-day compulsions can be the ones that have the most detrimental effect on the quality of life of those who are subjected to them. Even so, the practicalities of the matter are that only in the case of major coercion are caregivers likely to seek the comfort of a court order. In other cases caregivers can be expected to rely on the common law powers that we discuss in paragraphs 9–11.

30 Our recommendation then is that there is a need for clarifying or extending the power of the Family Court to impose coercive physical restrictions. In the draft of this report that we circulated we proposed that this should be done by way of new subsections to be tacked on to the end of the existing section 10 of the Protection of Personal and Property Rights Act 1988. On further reflection, it seems to us that it is better that there should be inserted into the statute a new and separate section along the following lines:

> **Coercion**
>
> (1) An order made under any of paragraphs (d)–(g) in subsection (1) of section 10 of this Act may direct that the person be subjected to physical restrictions if in the view of the Court such restrictions are necessary to avoid such person endangering such person's health or safety.
>
> (2) A direction authorised by subsection (1):
>
> (i) must be expressed with such particularity as the circumstances permit and must record the purpose for which the direction is given; and

(ii) notwithstanding its terms may not be construed to justify use of a greater degree of force or a more lengthy period of restraint than is required to achieve the purpose for which the direction is given.

In the succeeding paragraphs of this report we indicate certain safeguards that should be inserted in further subsections to be included in the proposed new section.

WHY ARE ADDITIONAL SAFEGUARDS NEEDED?

31 It is a weakness of the Protection of Personal and Property Rights Act 1988 that it lacks policing mechanisms. Although, by section 86, it confers strong powers on the Family Court to vary or discharge orders, and in particular to replace a welfare guardian, in practice the vulnerable people whom the Act is designed to protect may be in no position to set an application to the Family Court in train. Not all such people have friends or family watching their interests. As one submitter put it "People with intellectual disability are often not in a situation to complain about factors involved in their support, so such matters are not challenged from a legal perspective".[28] We disagree with the view expressed by Judge Inglis at the end of the excerpt from his submission that we set out in paragraph 23 that "Protection against abuse comes from the right of any interested person to apply to the Court" if it is intended by these words to suggest that this protection is a complete or adequate one.

32 So experienced and level-headed an observer as Robert Ludbrook has said to us:

> The danger with giving people and institutions greater coercive powers over people who are placed in their care is that the powers intended to deal with unusual situations easily become part of standard practice. Powers intended to protect vulnerable people end up being used to control, punish and restrict the liberty of such people. Instead of being exercised for the protection of vulnerable people they often become routinised and applied for the convenience of the carers.
>
> New Zealand has an unenviable record of harsh treatment of people in institutional care. I personally have been involved in advocating for the rights of (a) malpractice and torture of young patients in the adolescent unit at Lake Alice psychiatric hospital (1973) (b) illegal and abusive treatment of young people in Auckland Social Welfare Homes including locking up of children in shocking conditions (1978)

[28] Submission by Martin Anderson.

(c) routine breaches of legal rules relating to secure care and strip searching of children and young people in Child, Youth and Family residences (1980s and 1990s). The phenomenon of institutional abuse of people in institutions in which they are placed for their care and protection has been experienced also in Australia and the United Kingdom and has been fully documented.

We need to sit up and take seriously the risk of abuse when Philip Recordon, with more than 15 years of experience as a District Inspector of Mental Health, tells a New Zealand Law Society seminar, as he did in August 2001, that, in relation to one hospital:

> More than 30 people live behind locked doors. One of those people is under the Mental Health Act. A handful are subject to either welfare guardian orders or s 10 personal orders – under the PPPR Act. The doors are locked to protect these people from wandering on to the busy road adjoining the hospital. The one soul under the Mental Health Act has the "luxury" of my visiting and monitoring on a six monthly basis to ensure that she is reviewed properly in terms of what the Act requires (ie a clinical review). … This is one of the better homes. There are many where the rights of the individual are trampled on and a purely custodial situation imposed without reviews and without monitoring. Improvement in the mental state of many of these people goes unnoticed or is ignored as irrelevant. … [I]n many other places a "quiet resident is a good resident" and whether this is achieved by medication, by locking up, or some other method is neither here nor there to the owners/managers/staff.[29]

WHAT SHOULD THE SAFEGUARDS BE?

33 The first set of safeguards are those that shape the terms of the recommendation that we express in paragraph 30. There is the jurisdictional requirement of a need to avoid the affected person endangering his or her health or safety. Any direction must be expressed precisely, the purpose for it must be set out in the order and it may not be so construed as to justify a greater degree of force or a longer period of restraint than is necessary to achieve that purpose.

34 The second safeguard should be periodic review by the Family Court. In our draft report we suggested review at 90-day intervals. There was considerable opposition to this proposal on the basis of cost and court congestion. If the recommendations as to the role of District Inspectors and of lawyers appointed under section 65 that we set out in the two succeeding paragraphs are adopted so that the absence from the Protection of Personal and Property

[29] New Zealand Law Society *Disability and the Law* (Wellington, 2001) 74–75.

Rights Act 1988 of a triggering mechanism is dealt with, then it will be sufficient that there be a review at 90 days with any order then made to remain in force for a period to be determined by the Family Court not exceeding 12 months.[30] The answer to any suggestion that 90 days is too short to enable the effectiveness of any treatment to be gauged is simply that few coercive powers (and in particular restraint and seclusion) have a therapeutic purpose.

35 Thirdly, we recommend that the powers and obligations of District Inspectors appointed under the Mental Health (Compulsory Assessment and Treatment) Act 1992 section 94 be extended to include hospitals and "services" (a defined term) where persons in respect of whom coercive orders are made reside or are treated. If we correctly understand the view expressed to us by the Ministry of Health it would favour such a proposal, though it would prefer it as merely one part of a wider proposal to strengthen monitoring and accountability. The proposal is also supported by the Mental Health Commission. It seems clear that there would have to be additional training of inspectors in relation to their proposed new duties. There would need to be a number of consequential statutory changes. In lieu of the reporting obligations under sections 98 and 98A of the Mental Health (Compulsory Assessment and Treatment) Act 1992 there would need to be substituted an obligation on the inspector to apply within a limited time to the Family Court under the Protection of Personal and Property Rights Act 1988 section 86 in appropriate cases. There will need to be an amendment to section 86(1) to give inspectors (who must be lawyers) standing to bring applications for the review of personal orders to the Family Court, and it may be that special provision will need to be made as to the cost of this.

36 Fourthly, section 65 should be amended to make it clear that the obligation of a barrister or solicitor, appointed under that section to represent a person in respect of whom such a coercive order as we propose is sought, is a continuing one that remains in existence so long as the order is in force or until the barrister or solicitor is earlier released by the Family Court, in which event a substituted barrister or solicitor must be appointed. This obligation, which will necessitate regular visiting, will involve cost.

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[30] It may be thought that the provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 s 34(4) relating to compulsory treatment orders provides an analogy.

37 Fifthly, the new provision should make it clear that the Family Court, in giving a direction authorising coercion, may impose conditions. We would expect, that in the case of seclusion, conditions would be imposed that were no less protective than those under section 71(2) of the Mental Health (Compulsory Assessment and Treatment) Act 1992, which is in the following terms:

> A patient may be placed in seclusion in accordance with the following provisions:
> (a) Seclusion shall be used only where, and for as long as, it is necessary for the care or treatment of the patient, or the protection of other patients:
> (b) A patient shall be placed in seclusion only in a room or other area that is designated for the purposes by or with the approval of the Director of Area Mental Health Services:
> (c) Except as provided in paragraph (d) of this subsection, seclusion shall be used only with the authority of the responsible clinician:
> (d) In an emergency, a nurse or other health professional having immediate responsibility for a patient may place the patient in seclusion, but shall forthwith bring the case to the attention of the responsible clinician:
> (e) The duration and circumstances of each episode of seclusion shall be recorded in the register kept in accordance with section 129(1)(b) of this Act.

Where appropriate, there should be a requirement of compliance with New Zealand Standard 8141:2001 *Restraint Minimisation and Safe Practice*. This standard was promulgated by the Director-General of Health under the Mental Health (Compulsory Assessment and Treatment) Act 1992 section 130.

38 Finally, the new provision should spell out that coercive powers must be exercised so as not to compromise unnecessarily the dignity, privacy or self-respect of the person concerned.

WELFARE GUARDIANS

39 For the avoidance of doubt there should be added to the end of section 18(2) (which defines the powers of a welfare guardian) some such words as:

> … but a welfare guardian shall have power to subject the person, for whom the welfare guardian is acting, to physical restriction only to the extent that a direction authorising such restriction has been given under [the proposed new section].

COST

40 The Law Commission is not in a position to give anything approaching a precise estimate of the cost of the proposals of this report. However, we did make certain inquiries of the Department for Courts and in appendix C we reproduce the response from its Chief Executive dated 20 March 2002. The information contained in this letter must necessarily provide the basis from which any attempt to calculate the likely cost of our recommendations is extrapolated.

APPENDIX A

Letter to recipients enclosing draft report

11 February 2002

PROTECTING THE INTELLECTUALLY DISADVANTAGED FROM SELF-HARM

The Law Commission has been asked by its Minister for a report, the essential concern of which is whether the Protection of Personal and Property Rights Act 1988 needs to be strengthened following the changes to the Intellectual Disability (Compulsory Care) Bill recommended by the parliamentary select committee, the Health Committee, which considered that Bill.

The document enclosed sets out the precise wording of our terms of reference and the reasons why attention to this matter has been thought necessary.

The Commission has decided to go about this job in this way. Following a certain amount of initial research, the team working on this project has arrived at certain conclusions which I must stress are no more than *tentative* conclusions. These views are embodied in a draft report a copy of which is enclosed.

The Commission is anxious that before it reaches any *final* conclusions there should be consultation with those engaged in this field. The basic function of the enclosed document is to focus discussion, and it needs to be clearly understood that the Commission is entirely open to being persuaded that the draft needs changing.

We are sending copies of our draft to those who made submissions on the Intellectual Disability (Compulsory Care) Bill, to people and organisations who we know are concerned with the welfare of senior citizens, to all the Family Court Judges, and to various other people and organisations who we think may be able to help us in our task.

We would very grateful for any help you may be able to give us. The most useful thing would be for you to send us a letter or email us at *com@lawcom.govt.nz*, but if this is not something you can manage you should feel free to telephone Commissioner Donald Dugdale or Legal Research Officer Helen Colebrook at (04) 473 3453.

We are up against certain time constraints in this matter that compel us to say that if you intend to respond to this letter, we need to have heard from you by **22 March**.

For the Law Commission

DF Dugdale
Commissioner

Enc

APPENDIX B

List of submitters

Judge Adams
Martin Anderson
WR Atkin
Coral Beadle
Dr Donald Beasley
Donald Beasley Institute (Dr Anne Bray, Director)
Judge Bisphan
Judge Boshier
Associate Professor WJ Brookbanks
Judge DR Brown
Chief District Court Judge DJ Carruthers
Judge P von Dadelszen
Associate Professor John Dawson
Department for Courts
Verity Doak
DPA (New Zealand) Incorporated
John Eagles
Alan J Gluestein
Judge PR Grace
Judy Greer
Health and Disability Commissioner
IHC New Zealand Incorporated
Judge BD Inglis QC
Justice Action Group Incorporated
Eugénie Laracy
Janice Lowe
Robert Ludbrook
Principal Family Court Judge PD Mahony
Graham McKinstry
Mental Health Commission
Judith Miller
Ministry of Health
Ministry of Justice
Ministry of Social Development Senior Citizens Unit
Chris S Moult

The New Zealand Council for Civil Liberties
New Zealand Law Society, Biological and Medical Issues Committee
New Zealand Law Society, Family Law Section
Phillip Recordon
Arthur Sandston (for himself and Alzheimers NZ Incorporated)
Tautoko Services

APPENDIX C

Letter from the Department for Courts

20 March 2002

Donald Dugdale
Commissioner
Law Commission
PO Box 2590
WELLINGTON

Dear Mr Dugdale

Protecting the Intellectually Disadvantaged from Self-Harm

We refer to your letter dated 18 February 2002, which seeks the Department's comments on this issue. The Department for Courts broadly supports the proposed amendments to section 10 and section 18 of the Protection of Personal and Property Rights Act 1988. This Act is an appropriate statutory vehicle to implement explicit coercive powers protecting the intellectually disadvantaged from self-harm.

However, while supporting the policy behind regular reviews of Court orders authorised by the proposed section 10 (5), the Department queries whether the 90-day expiration period for orders should be increased, or amended to allow the Court to have the discretion to make these orders for longer time periods.

Compulsory Treatment Orders imposed under the Mental Health (Compulsory Assessment and Treatment) Act 1992 have similar coercive powers and have a review period of six months.

We anticipate that there may be some implications for the Department as a result of the proposed amendments.

Potential increase to workload of Family Court

The number of applications for orders under this Act may increase for two reasons. Firstly, applicants who have not obtained orders in the past may now seek the comfort of a Court order. Secondly, the proposed change to the expiration date (from 12 months to 90 days) for orders authorised by s10 (5) will require orders to be reviewed by the Court more frequently.

According to the Family Court Database, in the financial year 2000–2001, there were a total of 120 applications[31] made under section 10 of the Protection of Personal and Property Rights Act 1988. This is an increase of 28 applications from the previous year. The Department does not anticipate a significant increase in the workload of the Family Court. However, more work may be required to estimate the potential increase if these options were pursued.

Section 65: Potential increase to counsel appointments

Judicially ordered costs are the reports and services which a judicial officer may order to support the judicial determination of a case, or entitlements for certain court users to professional services. The authority for these services is set out in legislation, and provision of services is mandatory in response to judicial orders. These services are funded primarily through Vote Courts as Other Expenses to be incurred by the Crown.

Where the Court directs the appointment of counsel to represent the person in respect of whom the application for an order under s10 or 12 is made, the payment for those services is paid by the Crown. In some cases, costs can be recovered from the subject person. Any increase to the number of applications may impact on this expenditure. Similarly, if there are to be more frequent reviews, this may impact on the number of appointments made.

In the financial year 2000–2001, appointments for counsel for the subject person under the Protection of Personal and Property Rights Act 1988 cost $1,074,217.48 (incl. GST). In the previous year, this amount was $860,767.88 (incl. GST).

Section 76: Potential increase to number of reports provided to the Court

The Act makes provisions for the Court to order medical, psychiatric, psychological and any other reports for the Court in respect of whom the application for the order is made.

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[31] This is information from 21 courts in the country and represents 80% of the Family Court's workload.

In the financial year 2000–2001, specialist reports directed under the Protection of Personal and Property Rights Act 1988 cost $28,348.75 (incl. GST). In the financial year 1999–2000, this amount was $20,433.06 (incl. GST). An increase in the number of reports sought, combined with the nature of the proposed changes concerning coercive powers may require a greater number of these reports to be provided to the Court.

Thank you for the opportunity to provide comments on these proposed legislative changes. Should you have any queries concerning these comments please contact Charlotte Story, Policy Analyst, Strategic Policy Unit at DDI (04) 918–8904.

Yours sincerely
J J W Bailey
Chief Executive

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