New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

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Review of Adult Decision-Making Capacity Law | Ngā Huarahi Whakatau
Law Commission | Te Aka Matua o te Ture
Wellington

By email: huarahi.whakatau@lawcom.govt.nz

RE: Review of Adult Decision-Making Capacity Law | Ngā Huarahi Whakatau, Preliminary Issues Paper

1. Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) recognises the need for reform of the law relating to adult decision-making capacity and welcomes the opportunity to provide comments on the Law Commission's (**Commission**) Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper | He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke (**paper**).

1.2 This submission has been prepared with input from a Law Society Family Law Section |Ngā Rōia Ture Whānau and Property Law section| Ngā Rōia Ture Rawa working group (**working group**), together with contributions from members of the Law Society's Health Law Committee.[1]

1.3 This submission comments on several aspects of the paper, including:

(a) General comments

(b) Te ao Māori me ōna tikanga and collective decision-making

(c) Principles

(d) Decision-making arrangements

(e) Enduring Powers of Attorney (EPOA)

(f) Testamentary capacity and making a will

(g) Advance Directives

(h) Court processes and safeguards

(i) Additional proposed targeted amendments

1.4 While the Law Society broadly agrees with many of the ideas discussed in the paper, it is unclear at this stage how these will work in practice. We acknowledge a more detailed issues paper setting out proposed reform options is still forthcoming, and as part of that piece of work invite the Commission to consider whether it needs to propose some targeted

[1] For more information on the Law Society's sections and committees, please visit our website: https://www.lawsociety.org.nz/branches-sections-and-groups/

amendments to the Protection of Personal and Property Rights Act 1988 (PPPR Act) pending any substantive reform. These amendments would help to make proceedings under that Act more efficient and address some of the concerns around accessibility of the court and delay of proceedings. They could include the ability to apply to the court on a without notice basis, increasing financial thresholds and specified funds, the ability to enforce orders and to appoint counsel for the subject person prior to orders expiring. We have discussed these in more detail below under the sections on court processes and safeguards.

1.5 We look forward to the opportunity to provide further input during the later stages of the Commission's work on this project when a further issues paper setting out proposed solutions is publicly available.

2. General comments

Language

2.1 The Law Society agrees with the Commission that the language used in the review is important and that some language can be stigmatising or perpetuate negative stereotypes.[2] We comment on some of this language below.

Affected decision-making

2.2 The phrase "person with affected decision-making" is used throughout the paper. If something is "affected", it can mean there is an element of pretence or unnecessary embellishment. Alternatively, it could be used to imply the person has been unduly influenced by another person: improperly affected.

2.3 In our view, the word is vague. The law as it stands focuses on whether or not a person has decision-making capacity to make a particular decision.

2.4 The Irish Assisted Decision-Making (Capacity) Act 2015 which came into force in 2022, may be of assistance. It uses the phrase "relevant person":

"relevant person" means –

(a) A person whose [decision-making] capacity is in question or may shortly be in question in respect of one or more than one matter,

(b) A person who lacks [decision-making] capacity in respect of one or more than one matter, or

(c) A person who falls within paragraphs (a) and (b) at the same time but in respect of different matters

2.5 In the Law Society's view, the phrase "relevant person" is more neutral than "affected person" or "person with affected decision-making" and we have chosen to use this phrase throughout this submission.

Mental, cognitive, or sensory impairment

2.6 Paragraph 2.4 of the paper states the Commission intends to take a "broad and inclusive approach to defining disability to include disability resulting from any "mental, cognitive, or

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[2] Law Commission Issues Paper 49, *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke|Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper*, at paragraph 2.1.

sensory impairments”.” This may run the risk of covering an unintended range of individuals and we invite the Commission to consider whether this approach is appropriate.

United Nations Convention on the Rights of Persons with Disabilities

2.7 New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) in 2008. We acknowledge its fundamental importance in recognising the rights of persons with disabilities. Article 12, which relates to equal recognition before the law with respect to persons with disabilities, is particularly relevant for the purposes of the Commission’s review of adult decision-making capacity law. State parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law and recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. It requires State parties to undertake appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity, and to 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. State Parties are also required to 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 to ensure that persons with disabilities are not arbitrarily deprived of their property. In our view, Article 12 should be a touchstone for the Commission’s review.

2.8 The United Nations CRPD Committee (**Committee**) has offered its interpretation of the CRPD including Article 12. The Committee advocates for supported decision-making and emphasises “the rights, will and preferences” of the person concerned, a phrase found in Article 12(4) of the CRPD. However, it also says that respect for “the rights, will and preferences” of the person “should never amount to substitute decision-making”.[3] It calls for the abolition of substituted decision-making, which is not something the Law Society supports.

2.9 We note New Zealand is bound by the CRPD but not by the committee’s comments. The Law Society supports a focus, first and foremost, on supported decision-making, with a view to enabling and empowering a person to exercise their own autonomy. However, we consider there still remains a need for a substitute decision-making mechanism in certain circumstances. We also note the committee’s views have been criticised.[4] Indeed, the United Nations Human Rights Committee in a General Comment on Article 9 of the International Covenant on Civil and Political Rights (which is about the liberty and security of the person) accepts the need for deprivation of liberty so long as it is necessary and proportionate.[5]

3 Te ao Māori me ōna tikanga and collective decision-making

3.1 Chapter 5 of the paper discusses some tikanga Māori and Māori concepts that might be relevant to decision-making capacity. Tikanga, as law, is a part of the common law of

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[3] 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 paragraph [17].

[4] For example, John Dawson “The CRPD and Mental Capacity Law” in I Reuvecamp and J Dawson (eds) *Mental Capacity Law in New Zealand* (Thomson Reuters, Wellington, 2019) and K Fredwell “Legal Capacity in Family Law Matters Implementing Article 12 of the CRPD in Norway” in R Wilson and J Carbone (eds) *International Survey of Family Law 2022* (Intersentia, Cambridge, 2022).

[5] See discussion of this and European sources in Fredwell, above.

Aotearoa/New Zealand.[6]

3.2 Both Māori and non-Māori need a reasonably predictable framework of what will happen to a relevant person who loses decision-making capacity and how decisions for that person will be made.

3.3 Māori who are involved in this process and who want it resolved in accordance with Te ao Māori me ōna tikanga should be able to do so. However, there will need to be adequate and appropriate resourcing to ensure this is available for those who request it. Situations involving a person whose decision-making capacity is in question can often involve multiple people, some of whom might be non-Māori, some of whom might be Māori but not connected with their cultural heritage, and those who might be non-Māori but wish to see the matter dealt with in a Māori way. Members of a culturally blended family might also have competing views. There are also tribal differences and differences in the practice of tikanga between the various whānau, iwi and hapū throughout the country.

3.4 In the Law Society's view, there is no difficulty with incorporating some aspects of Te ao Māori me ōna tikanga in the general law applying to everyone, provided there is a judicial gateway for those who prefer the process to be governed by strict determination under Te ao Māori me ōna tikanga.

3.5 However, it is unclear from the paper how a tikanga approach may be triggered. In addition to the suggestion of a judicial gateway, consideration may be given to including provision in any new legislation to "opt in or "opt out" of a tikanga approach. For example, if everyone involved agrees to a tikanga approach (or not), that approach should be available. If agreement cannot be reached on the approach to take, the judicial gateway path would be open for the court to determine what approach should be followed.

4 Principles for our review

4.1 The Law Society considers the proposed guiding principles in paragraph 6.3 of the paper are appropriate. However, in our view the guiding principles must also:

a) Ensure the presumption of decision-making capacity that is currently contained in section 5 of the PPPR Act continues and is referenced in any new legislation. This should follow directly after principle (a) in paragraph 6.3.

b) Refer to the CRPD, in particular, Article 12.

c) Include supported decision-making as a key concept (currently incorporated to some extent in the primary objectives of a court as set out in section 8 of the PPPR Act i.e. to enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible).

d) Include the concept of least restrictive intervention as currently found in sections 8(a) and 26(a) of the PPPR Act.

e) Recognise the multicultural nature and diversity of New Zealanders and be respectful of cultural and religious identity in its fullest sense.

f) Consider the rights of third parties dealing with persons with decision making issues. For example, any future law should be slow to remove long-standing laws of contract.

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[6] *Peter Hugh McGregor Ellis v the King* [2022] NZSC 114 at para 116.

g) Refer to the way in which the resolution of issues is handled. Processes should respect the rights of the individuals concerned and issues "should be resolved as inexpensively, simply, and speedily as is consistent with justice".[7] These rights must include such things as legal representation, attendance in court or at out-of-court processes where possible, review of decisions, for example, by an attorney under an enduring power and review of court orders. See also our discussion below under court processes.

Best interests

4.2 The Law Society supports a continued focus of a presumption of decision-making capacity, supported decision-making, and a shift away from a "best interests" approach (as a starting point) to one which incorporates the "rights, will and preferences" of the relevant person, as well as an approach which continues to apply the principle of least restrictive intervention. In addition, the Law Society notes the need for the law to provide appropriate and effective safeguards to prevent abuse in accordance with international human rights law. However, this cannot be at the expense of substituted decision-making, which, as discussed further below, we consider still needs to be incorporated into our legal framework.

Use of the word "individuals" rather than "people"

4.3 We suggest the guiding principles use the word "individuals" rather than "people" in proposed principles 6.3(a), (d) and (f) to ensure the focus is on the rights of the relevant individual as opposed to others.

Principles to accommodate other issues

4.4 The Law Society considers it is also important that the principles accommodate other important issues and legal tenets such as testamentary capacity and the capacity to marry.

Guiding principles of the Mental Capacity Act 2005 (England and Wales)

4.5 The Commission may also wish to consider the following guiding principles of the Mental Capacity Act 2005 (England and Wales):

a) Presumption of decision-making capacity.

b) Supported decision making – emphasising empowerment and participation.

c) Upholding respect and dignity for the relevant individual.

d) Maximising independence.

e) Least restrictive option.

A proposed Code of Practice

4.6 Finally, we draw the Commission's attention to the prospect of a Code of Practice, similar to the 2007 Code used in England and Wales which provides statutory guidance to the Mental Capacity Act. The courts in the United Kingdom have said such a code gives useful guidance and can provide the standards which should permeate and influence good practice.[8] It can be

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[7] See similar provisions in section 1N(d) of the Property (Relationships) Act 1976 and rule 3 of the Family Court Rules 2002.

[8] See for example *G v E* [2010] EWHC2512 (COP) per Baker J.

used as evidence of good practice in the court and to assist the court with interpretation of the legislation. It could also support New Zealand's commitment to Article 12(3) of the CRPD.[9]

5 Decision-making arrangements

Overview

5.1 The Law Society acknowledges there are many informal arrangements for a relevant person involving family, whānau, friends, staff from organisations providing support, and caregivers. We also note it may be more difficult for a relevant person to make complaints or seek redress when decisions are made through these informal processes where there are no checks and balances. In addition, those involved in assisting the person with decision-making may have their own agenda or vested interest, so that a conflict of interest exists. The Law Society cautions against the use of informal arrangements in a way that does not properly safeguard the relevant person's interests. We agree with the Commission's view that any new law should not undermine any decision-making arrangements that are already working well.[10] We also agree that any new law should address a range of decision-making arrangements and that a "one size fits all" approach is unlikely to be appropriate.[11]

Supported vs substituted decision-making

The current law (primarily the PPPR Act)

5.2 The PPPR Act replaced the Aged and Inform Person Protection Act 1912 and Part 7 of the Mental Health Act 1969. At the time the legislative reform was far-reaching. Aside from the High Court's inherent jurisdiction (which still exists), the law did not provide for the personal matters of people lacking capacity. Enduring powers of attorney also did not exist.

5.3 The 1988 legislation was largely in response to the advocacy of IHC and allied community organisations. It had a rights-based focus that was absent from the previous law. This rights-based focus is captured in principles such as the presumption of decision-making capacity, least restrictive intervention, the objective of encouragement/empowerment, and safeguards such as lawyer to represent the subject person.

5.4 As noted above, the PPPR Act provides for a presumption of decision-making capacity.[12] The fact a person has made, or is intending to make, a decision that a person exercising ordinary prudence would not have made or would not have made given the same circumstances is not, in itself, sufficient ground for the exercise of jurisdiction by the court under the PPPR Act.[13]

5.5 The primary objectives in exercising jurisdiction under the PPPR Act are to make the least restrictive intervention in the life of the relevant person having regard to the degree of that person's incapacity and to enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible.[14]

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9 As Alison Douglass noted in *Mental Capacity: Updating New Zealand's Law and Practice* (Report for the New Zealand Law Foundation, Dunedin, July 2016) Part 7B, at [7.29].
10 Above n 2, at paragraph 7.3.
11 Ibid, at paragraph 6.23 and 7.7.
12 Protection of Personal and Property Rights Act 1988, section 5.
13 Ibid, section 6.
14 Ibid, section 8.

5.6 When considering whether to make a welfare guardianship order, the court shall, so far as is practicable in the circumstances, ascertain the wishes of the person in respect of whom the application is made when determining who to appoint as welfare guardian.[15]

5.7 The PPPR Act also has a mechanism that instead of making orders the court may make recommendations as it thinks fit relating to the course of action that it considers should be followed in relation to personal orders, administration of property orders and appointment of welfare guardians. It is clear that since the PPPR Act was enacted, empowerment is a fundamental plank of the law in the area of decision-making for a relevant person.

Supported decision-making

5.8 The Law Society considers that supported decision-making needs to be incorporated as a fundamental principle in our law. We agree with the guiding principle that the law should "empower a relevant person to lead a flourishing life".[16] The PPPR Act currently provides that, except as provided by or under the PPPR Act or any other enactment, the rights, privileges, powers, capacities, duties and liabilities of any person subject to an order under the PPPR Act are for all the purposes of the law of New Zealand the same as those of any other person.[17] We also note that, as set out in the primary objectives of the PPPR Act, the concept of supported decision-making is incorporated to some extent in the primary objectives of a court, see section 8 i.e. to enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible. Finally, we note the PPPR Act recognises fluctuating decision-making capacity, and also that decision-making capacity is decision-specific.

An ongoing need for substituted decision-making

5.9 The Law Society is of the view there may be circumstances where a person is not able to be supported in their decision-making to the extent they are able to make the decision in question themselves. If there is no mechanism for substituted decision-making in relevant circumstances, a large lacuna will exist in the law, not unlike the one that existed before the PPPR Act was enacted. The High Court's inherent powers may be all that is left in these situations and in our view, this would be a retrograde step.

5.10 As noted above, we support continuing a legal mechanism for the appointment of substituted decision-makers. Our reasons include:

a) Attorneys appointed under enduring powers are the most common form of substituted decision-making. While the donor chooses the attorney, which is an exercise of a person's autonomy in and of itself, it is nevertheless a form of substituted decision-making. It has supportive elements, but the attorney's powers are substantive. We discuss enduring powers of attorney (**EPOA**) in more detail in section 7 below.

b) There are people who are simply not capable of making a decision in relation to their personal care and welfare or property, with or without a supporter. Clear examples include a person in a coma, those who suffer from advanced dementia or someone who is experiencing the consequences of a severe stroke.

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[15] Ibid, section 12(7).

[16] Above n 2, at paragraph 6.3(d).

[17] Above n 12, at section 4.

c) Outside of these clear examples, there may be situations where decision-making capacity can fluctuate (as noted above). There needs to be an effective process for safeguarding the rights of a person who lacks decision-making capacity, and protecting them from abuse and neglect. For example, where a person is detained in secure care, there must be a mechanism for ensuring that detention is lawful, and not arbitrary.

d) Third parties need to know there is a process to ensure that decisions can be made in situations where a person has lost decision-making capacity to make the decision(s) in question, and that those decisions are legally-binding.

e) A person may have a complex financial and property set-up. A clear, legal process is required so that the business, the farm and/or the enterprise can continue to function.

5.11 The court also needs the power to approve a will when a person has lost capacity and has no will, or a will is out of date. For example, a will may be many years old and impossible to administer.[18]

5.12 In light of the debate around decision-making arrangements the paper states that "We need to consider whether the law should ever permit someone to make a decision for a person with affected decision-making, including without that person's consent."[19] For the reasons outlined above, the Law Society is of the view the law should continue to provide for a person to be appointed to act on behalf of a relevant person in certain circumstances. This includes those appointed under an EPOA. Any future legal test could also look to consider wider factors such as social and cultural circumstances.

5.13 The paper then goes on to consider several issues that may arise from that overarching question, including whether the law should permit someone to make a decision when the relevant person is at risk of immediate harm.[20] In our view the test of immediate harm is too narrow. Property management for example, may have to continue for some time. Many decisions about residence, health, contact and the like are not unnecessarily urgent, but may nevertheless need to be made, and depending on the circumstances, on more than one occasion.

5.14 The paper also queries whether a decision should be made based on the relevant person's best interests.[21] As noted above, at paragraph 5.2, the Law Society supports a shift away from a "best interests" approach to one which incorporates the "rights, will and preferences" of the relevant person. The current least restrictive intervention objective as contained in sections 8(a) and 28(a) of the PPPR Act should continue to apply, and any order made should encourage the person to exercise and develop capacity where possible.

5.15 Finally, Article 12 of the CRPD states any legal measures should be for the shortest time possible. However, we note this will be situation specific. For example, the "shortest time possible" will look different for a person suffering from a recoverable brain injury in comparison to someone with advanced dementia where the trajectory of that condition is likely that they will not regain decision-making capacity. A person who has appointed someone their attorney under an enduring power would expect that appointment to last as long as needed – not ceasing prematurely.

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[18] Above n 12, section 54.
[19] Above n 2, at paragraph 7.38.
[20] Ibid, at paragraph 7.39(a).
[21] Above n 2, at paragraph 7.39(b).

Decision-Making Supporter

5.16 While we acknowledge that an individual may call on those close to them to assist with decision-making, we are concerned that elevating this informal process to something more formal like a decision-making supporter may inappropriately empower the supporter in an unfettered and unregulated manner, with no ability to review or remove a supporter. In our view, to have a hybrid situation where someone is not quite appointed into a legal guardianship or EPOA role for example, but has some sort of step-down quasi role that is recognised by the courts in some way, leaves a relevant person vulnerable to abuse or exploitation.

5.17 With an informal process where there is potentially more than one decision-making supporter, there appear to be few safeguards to protect a relevant person. With respect to the example given at paragraph 7.10 regarding Hēmi, there is no way to externally monitor how someone may use personal information once they have obtained that information in the informal role as supporter. It is the experience of some members of the working group practising the mental health area, that many who experience mental health issues vehemently do not want their whānau members to have access to their personal mental health treatment information and see that as a violation of their privacy and their rights.

5.18 It is also important that a relevant person is fully protected in terms of any contractual rights and obligations. They and third parties contracting with them need to have certainty that any agreements entered into, are legal and binding. We consider that a semi-formal type role may leave a relevant person vulnerable to undue pressure where there is the potential for a conflict of interest, for example, where an elderly parent with deteriorating health is talked out of going into rest home care because family members do not want the parent's funds, that they will ultimately inherit, to be spent on rest home fees.

7. Enduring Powers of Attorney

Accessibility

7.1 At paragraph 7.24(a), the paper asks how the law can ensure EPOAs are accessible and states it is difficult for service providers and professionals to find out whether an EPOA exists, who they are, and how to contact them.

7.2 The format of EPOAs was changed in 2017 so that EPOAs are now produced on plain language forms. These forms were designed to be easier to understand and:

a) are in a writeable PDF style;

b) have tick box options;

c) are in an on-line format;

d) include a notes section and glossary;

e) have information sections along the left-hand side; and

f) include option sections.

7.3 These changes were positive, and some have considered it has made the creation of EPOAs more efficient. However, the Law Society agrees there is an issue with the accessibility of EPOAs and access to information for not only professionals and service providers, but also for those who may be supporting a relevant person.

7.4 We are also aware that copies of the EPOA are often lost or misplaced. Further, some donors execute multiple sets of an EPOA without revoking previous EPOAs as the donors do not remember the existence of the previous EPOA.

7.5 In addition, it is common for clients to seek advice from several different lawyers and interact with different law firms during their lifetime. This reflects a move away from "lifetime loyalty" to a more transactional approach towards legal representation. Changes of legal representation can also impact the ability to determine if EPOAs are in place and where they may be located.

Establishment of a register

7.6 One way to resolve the issues of accessibility could be the establishment of a register of EPOAs.[22] We acknowledge the paper does not provide any detail on what that register may look like, however we have included some preliminary views for the Commission's consideration.

7.7 In our view, a register would assist in determining if an EPOA is in place and to identify the attorneys when the donor cannot provide the information themselves. This would benefit professionals and service providers as well as other third parties. Support people, often family or friends, can be the first to recognise when someone has diminished capacity. If a support person does not know if an EPOA is in place, they may struggle to help the person they care for to access assistance and to understand how professionals and service providers will engage with them.

7.8 Information that we consider to be useful on the register includes:

a) If an EPOA is in place;

b) Identification of the attorney(s);

c) Contact details for the attorney(s); and

d) If the EPOA is currently in effect or "activated.

7.9 The benefits of a register must also be balanced against the difficulties in maintaining such a register, some of which are discussed below, and protecting the privacy of the donor and attorney(s). We acknowledge that a register would have to have appropriate measures in place for data protection.

Data protection and access to information

7.10 EPOAs contain personal information of the donor and attorney(s) including full names and contact details. The donor and attorney may not want certain people to have access to their contact details. The donor themselves may not want other family members to know who has been selected as the attorney(s) if this would cause upset within the family. An EPOA registry would require certain protections to ensure the personal information was stored securely, and that the database could not be hacked, copied or corrupted. Measures would also need to be put into place to monitor access to the data for proper purposes.

7.11 Access to EPOA information is often needed at short notice or under "emergency" conditions. The register would need to be able to be accessed within short time frames to determine if EPOAs are in place and the identities of the attorney(s). Application processes would need to

[22] Above n 2, at paragraph 7.24(a).

support this requirement whilst also having appropriate screening measures to limit any inappropriate access. The application process should also be cost effective. Currently if EPOAs cannot be located an application is made to the Court for orders for the appointment of a Property Manager or a Welfare Guardian. These processes can be expensive and lengthy and, in some cases, unnecessary where there are already EPOAs in place.

7.11 A current example that may be useful to consider is the individual and third-party criminal record application processes administered by the Ministry of Justice. This type of system allows an individual to access their own information and provides a means of access by third parties.

7.12 For individuals, the process entails an online application where they upload a copy of their identification and an authority and release form. For third party users, the system requires registration and acceptance of a contract governing proper use of the information, an application process and a fee payable per data request.

7.13 Finally, if a registry only permitted access by the relevant person, their EPOA and approved registered professional users, we suggest this also includes lawyers. Lawyers are well qualified to take instructions from their clients and determine if their requirements for data from the EPOA registry were for proper purposes.

Cost and effect of non-registration

7.14 The issues of cost and the effect of non-registration would also need to be considered. A reasonably straight forward mechanism for registration for EPOAs created from a particular date moving forward would be for the lawyer, legal executive or public trustee who witnessed the EPOA(s) to register this. We consider there should be no cost attached to registration, given the initial cost associated with creating EPOAs, and the growing importance of EPOAs in an ageing society. For that reason, and given the importance of EPOAs and the potential financial and other consequences of an EPOA being invalid or invalidated after a donor has lost capacity, the Law Society does not consider that registration should be a condition of validity for EPOAs.

7.15 Consideration would also need to be given to the interaction between any register and the revocation (or variation) of EPOAs, as well as any disclaimer by an attorney. Any system of registration should not alter the current ease of revocation of EPOAs.

7.16 Finally, there is a question as to the form any register would take. For example, a register which contained historical records of all prior (revoked) EPOAs, variations and records of "activation" could be of some utility, but there would also need to be a system in place to minimise confusion and errors. The current status of an EPOA and associated information (as set out above) would need to be easily and accurately accessible without the need to review multiple documents.

Current issues with EPOAs

7.17 Alongside concerns around accessibility, the paper, at paragraph 7.24, sets out some further issues being considered by the Commission regarding EPOAs. We discuss each of those in turn.

Process for creating an EPOA

7.18 The paper asks whether the process for creating an EPOA can be improved acknowledging it is considered overly formal and prescriptive, as well as being too expensive and inaccessible for

many people. While the paper does not propose any suggested improvements, we wish to record our view at the outset that that we do not consider it necessary to change the overall process for creating an EPOA, or to remove the requirement of receiving legal advice and certification. This is discussed in more detail below.

Formal and prescriptive

7.19 Members of the working group indicated it is common practice for the EPOA to be signed along with the person's will and during a time other legal work is being undertaken, such as a conveyancing transaction or entering into an Occupation Rights Agreement for a retirement village unit. This in itself, will likely be a stressful time for the donor.

7.20 The lawyer will have spent some time explaining the terms of the EPOA, the options available to the donor and the benefits and risks of making certain selections, prior to them signing the document. This must occur for the lawyer to be able to certify that the document, its effect and implications have been explained and understood by the donor prior to execution. While this may be seen as overly formal and prescriptive, an EPOA is an extremely important document. It gives the donor the ability to select people to manage their personal and property affairs at a time in their lives when they may be the most vulnerable. Once activated, the attorney can manage their personal and/or property affairs often without restriction. The ability for the donor to select their own attorneys is an existing element in our law that promotes and supports people to make their own decisions. If the court appoints a property manager or welfare guardian to manage a person's affairs, the manager or guardian may not be the person that the relevant person would have chosen themselves. Therefore, who the attorney is, is an important decision in and of itself. It is essential steps are taken to ensure a donor understand these risks and the powers being given to someone else to manage their affairs.

7.21 Without such advice, and certification the lawyer has given that advice, the importance of EPOAs would be undermined and risks a "casual" approach being taken to their creation. This was seen prior to the 2007 amendments to EPOAs, when EPOAs where often one-page documents signed with little or no advice prior regarding their implications. In our view, the current requirement for legal advice is an essential safeguard.

Cost and time

7.22 We acknowledge that many may view the process to create an EPOA as expensive. Often a fee is charged for drafting the EPOA and attending to the client for execution. However, the time spent to complete the EPOA is likely to greatly exceed the fee charged as it is a lengthy process to take instructions, discuss the various options and selections in appropriate language, attend the client for execution and then certify the document. We acknowledge a large proportion of the public do not routinely see lawyers, and that one of the key barriers to accessing the appointment of an EPOA is cost. Accordingly, we suggest consideration is given to funding the appointment of EPOAs. There may also be some benefit in providing the public with more information and education on the importance of an EPOA.

Variation and review

7.23 We acknowledge that EPOAs can be revoked easily but they cannot be easily changed. Different procedures are needed to replace, revoke or vary the EPOA. Changes to an EPOA must be completed in writing, in a document that is signed and witnessed in the same way

that the original EPOA was witnessed. In most instances, to facilitate a change, the EPOA will be revoked and a new EPOA created. This creates expense plus complexity and is prohibitive to making simple changes. The Law Society would support in principle a change to the process which would facilitate simple variations to existing EPOAs. However, ease of variation must be weighed against the risk of losing the benefits of the current system, which require a person to take legal advice before changes are made. It is essential to ensure that the current safeguards are not lost.

7.24 Paragraph 7.24(c) of the paper also asks whether there is a way to ensure that EPOAs remain up-to-date and accurate. The Commission has heard they are not often regularly reviewed by donors.

7.25 As EPOAs cannot be easily changed, this often means donors are disinclined to make changes. The most effective way to ensure that EPOAs remain up to date and accurate would be to have a system that permitted variations to existing EPOAs that was simple and cost effective, whilst retaining the benefit of current safeguards.

When should an EPOA be activated

7.26 The paper queries whether an EPOA should come into effect when a person is assessed not to have decision-making capacity or whether there should be some other threshold used. The Law Society supports the retention of the current thresholds regarding decision-making capacity and EPOAs coming into effect. While it has not been proposed, we would be concerned to see a time limit placed on the validity of EPOAs, due to the significant difficulties and cost pressures that would result.

After activation, how should the attorney make decisions

7.27 Paragraph 7.24(e) of the paper asks how an attorney should make decisions for the donor when an EPOA is activated. It goes on to state that, currently, the paramount consideration of the attorney is the promotion and protection of the welfare and best interests of the donor or the best interests of their property. We support retaining this as the paramount consideration but with some modification to incorporate the concept of "rights, will and preferences" versus best interests (as previously noted above).

Other issues - banking

7.28 The Law Society is aware of instances where banks are changing bank accounts held in a donor's name alone into the joint names of a donor and their attorney(s), when the bank is supplied a copy of the EPOA.

7.29 We understand the banks are doing so as an "easy" way to permit the attorney to operate the bank account rather than updating the mandate for the operation of the account under attorney. However, if the donor passes away and the account is held jointly with the attorney, the legal presumption is that the account ownership will pass directly to the attorney by survivorship and will not fall into the estate. On production of a death certificate, the bank, without notice to any other party, will update the account into the name of the attorney alone. This is causing issues during estate administration if the attorney fails to disclose the account to the executors or refuses to remit the account proceeds to the estate.

7.30 We invite the Commission to consider whether guidance should be provided to banks and financial service providers warning against this practice and explaining the consequences of it.

The EPOA document itself could include notes regarding the issue to further educate donors and attorneys.

8. Testamentary capacity and making a will

8.1 The Law Society is surprised that the decision to make or not make a will has not been included in the review. The PPPR Act has specific provisions about wills: Part 5, sections 54 to 56 in particular and we suggest the Commission ought to incorporate a review of these particular provisions.

9. Advance directives

9.1 The Law Society agrees it is important this review consider the issues discussed at paragraphs 7.19 and 7.20 of the paper. The PPPR Act does not currently provide a framework for the use of advance directives. The only mention in the PPPR Act to advance directives is section 99A(2), (3) and (4) which states:

> (2) An attorney acting under an enduring power of attorney in relation to the donor's personal care and welfare may, subject to any consultation under subsection (1), have regard to any advance directive given by the donor except to the extent that the directive would require the attorney to act in a manner contrary to section 98(4).
>
> (3) The attorney may follow any advice given under subsection (1), or any advance directive given by the donor, and is not liable for anything done or omitted in following that advice or directive, unless done or omitted in bad faith or without reasonable care.
>
> (4) The attorney may apply to a court for directions under section 101 in respect of any advice given under subsection (1) or any advance directive given by the donor.

9.2 An advance directive in those circumstances is therefore restricted to an EPOA for personal care and welfare, and does not apply to a welfare guardian. This is not reflective of other aspects of the law as it relates to advance directives. For example, there is specific recognition of the right to give, withdraw or refuse consent, not just to the imminent provision of health and disability services,[23] but also to future healthcare procedures[24] which are intended to be effective only when a person is no longer competent.[25] It is also well-established that, provided the advance directive is validly given, and applies to the circumstances at hand, the person's advance directive must be respected.[26]

9.3 We agree with the Commission that this leads to a lack of clarity around the status and scope of advance directives in New Zealand which should be clarified in law.[27] The above provision should also be reviewed for consistency with the New Zealand Bill of Rights Act 1990.

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[23] Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, reg 2 right 7(1).

[24] Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, reg 4 definition of "Advance directive", para (a). The definition of "healthcare procedure" in s 2 of the Health and Disability Commissioner Act 1994 is broad and extends to a wide range of health services, including treatment services, nursing services and rehabilitative services (also see the definition of "health services").

[25] Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, reg 2 right 7(5) and reg 4.

[26] *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433, [2014] 3 NZLR 404.

[27] Above n 2, at paragraph 7.17.

Consideration also needs to be given to the release of health professionals from liability when following an advance directive.

9.4 It would be appropriate for the Commission to consider whether a more detailed legal framework ought to be in place in relation to advance directives. Members of the working group suggested this could be in the form of a standalone piece of legislation. We note that the common law in so far as it relates to advance directives has been largely (but not completely) codified in England and Wales by the Mental Capacity Act 2005 (UK), sections 24–26. That Act uses the phrase 'advance decision' which the Commission may wish to consider. Section 25 of that Act specifically addresses the validity and applicability of advance decisions. It provides that an advance decision is not valid if:

a) it was withdrawn while the person had capacity;

b) a lasting power of attorney was created after the advance decision was made, conferring authority on the attorney to give or refuse consent to the same kind of treatment; or

c) the person has done anything else clearly inconsistent with it.

9.5 That section also states that an advance decision is also not applicable to treatment not covered by it; where any circumstances specified in it are absent; or there are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of their advance decision that would have affected their decision had they anticipated them.

9.6 Finally, we consider it would be useful for any legal framework to address the form an advance directive ought to take (if any), including whether it should be in writing. We note that, if changes were made in this regard, Right 7(5) of the Code of Health and Disability Services Consumers Right would also need amending. We also suggest consideration of a register for advance directives may be useful.

10. <u>Court processes and safeguards</u>

<u>Safeguards</u>

10.1 It is important to bear in mind that in the previous reviews of the PPPR Act undertaken by both the Commission and the Office for Senior Citizens, a consistent theme has been the risk of abuse, both personal and financial, perpetrated on vulnerable adults who lack decision-making capacity by the very whānau members who have been tasked with protecting their interests. While we agree that the law should recognise and facilitate relationships built on trust so that a relevant person has those they most closely align with, and who have a proven track record of support to be able to assist with decision-making, those positive relationships do not always exist, and there needs to be sufficient checks and balances in place to protect a vulnerable person from abuse.

10.2 Any new legislation, or amendments to existing legislation, in respect of adult decision-making capacity must therefore incorporate safeguards for the relevant person. Safeguards already in the current legislation, which in our view should be retained, include:

a) The oversight of the Family Court and its protective jurisdiction;

b) Reviews of orders;

c) Appointment of lawyer for subject person and their role; and

d) Presumption of decision making-capacity of an individual.

10.3 Potential additional safeguards, discussed in more detail below, could include:

a) A register for EPOAs (and potentially court orders);

b) A specific legal mechanism for enforceability of orders to avoid reliance on section 10(4) of the PPPR Act by way of Police involvement and/or use of reasonable force;

c) The ability to obtain without notice orders in cases of urgency;

d) A more streamlined process for engagement of various external agencies in the areas of health, housing and financial management;

e) Greater sanctions for not following reporting requirements to promote compliance; and

f) The appointment of lawyer for subject person prior to the expiry of orders.

Family Court

10.4 The Family Court is a specialist court which has expertise in dealing with vulnerable adults under multiple pieces of legislation, including the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act), the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, (IDCCR Act), the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (SACAT Act), and the PPPR Act.

10.5 The Family Court also deals with cases under other legislation involving vulnerable adults where capacity issues arise, such as the Oranga Tamariki Act 1989, the Care of Children Act 2004, and the Property (Relationships) Act 1976. Mechanisms for addressing vulnerable adults in a more general sense are also contained within the Family Court Rules 2002. We consider the Family Court has the resources and appropriate level of skill to provide oversight into the challenging array of legal and other issues that can emerge in respect of vulnerable adults.

10.6 At paragraph 8.8, the paper states that "applications to the Family Court can be expensive, time consuming, and are not always able to be heard promptly".

10.7 We note the total applications made to the Family Court in 2020/21 was 61,000. Information obtained via an Official Information Act request, show that in 2021, the total applications under the PPPR Act were 5,191. This shows that applications under the PPPR Act make up approximately 8.5% of the total applications made to the Family Court.[28]

10.8 Further, Family Court processes themselves have evolved in recent times, including a return to individual case managers to manage files. PPPR Act applications are treated as priority proceedings because of the very nature of the applications.[29] In addition, many matters are dealt with on the papers by a judge and few require hearings. Those that do require hearings usually involve a dispute between family members over the appointment of a property manager or welfare guardian or over the actions of an attorney appointed by an EPOA.

10.9 The Law Society has also successfully advocated for increased accessibility to legal aid grants for PPPR Act matters, resulting in greater accessibility to the Court.

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[28] Information obtained via the Official Information Act, is available on request, as well as specific information on the number of PPPR Act applications by type provided by the Judiciary.

[29] During covid, PPPR Act matters were classed as a priority proceeding by the Chief District Court Judge in the court protocols established for the various alert levels.

Specialist tribunal

10.10 Paragraphs 7.39(c) and 8.12 of the paper suggests a specialist tribunal may be a feasible option to authorise decisions made in this area of law, which are currently made in the Family Court.

10.11 Although it is acknowledged that delays have been a feature of the Family Court over recent years, such delays are also prevalent (if not worse) in various existing tribunals. An example of this is the delay in the Human Rights Review Tribunal. It is presumed that there will be an ability to appeal a Tribunal decision to a Court which in itself could potentially lead to further delay.

10.12 The existing Family Court process provides for legal representation of parties in proceedings under the PPPR Act. It also allows for the court to appoint a lawyer for the relevant person. It is unclear from the paper whether the right to legal representative would be lost in the event that a tribunal replaced the Family Court within the legal framework.

10.13 Retention of Family Court oversight would also ensure a more appropriate pathway for the making of important decisions which impact on fundamental human rights (such as the right to liberty). At this stage of the review, we would not support the removal of these decisions from the Family Court to a tribunal.

Reviews

10.14 One of the benefits of the existing process is the review mechanisms for:

a) welfare guardians

b) property managers

c) personal orders

d) the actions of enduring power of attorney holders

e) the review of financial statements filed by property managers

10.15 These review mechanisms provide an important check and balance on those appointed under the PPPR Act. However, the three-year review period (with a potential for five-year reviews) could be considered somewhat onerous in respect of someone who is unlikely to regain decision-making capacity, for example an elderly person with advanced dementia.

10.16 Repeated reviews at three or five-year intervals can be an unnecessary stress and cost for family members in respect of such a relevant person. One potential option could be to have orders last for longer periods of time but then have a lawyer for the relevant person appointed again after three and five years' to enable the lawyer to report any concerns to the court and to avoid a property manager or welfare guardian from having to make another application to the court at the review time.

10.17 Reviews themselves are an important aspect of protection for the relevant person, more so if that person has fluctuating decision-making capacity or a degree of recovery in decision-making capacity over time. These people may require orders of shorter duration but the options in the PPPR Act to allow interim orders for welfare guardian and personal orders (six months' duration) and temporary orders (three months' duration in respect of property) together with final orders for periods less than three years', does already provide a degree of flexibility. In our view any new or amended legislation must retain this flexibility.

Lawyer for subject person

10.18 In our view, the role of lawyer for subject person is a vital part of ensuring the protection of the rights of a relevant person. Evidence put to the court is unlikely to be tested in the same way in the absence of an independent court-appointed lawyer for the relevant person, more so if there are one or more litigants in person in the proceedings.

10.19 The role of lawyer for subject person is governed by a practice note and best practice guidelines which are in the process of being updated. It is not uncommon for the lawyer for the subject person to be the only independent source of information to the court and the role is often critical in terms of uncovering potential abuse of any kind including physical, psychological and financial abuse.

10.20 Those who are estranged from family for whatever reason are particularly at risk of exploitation and the role of lawyer for subject person can be a powerful advocate for protection and promotion of that person's interests.

Enforceability of orders

10.21 Enforceability of orders under the existing legislation is a significant issue, as there is no explicit power available in the PPPR Act. By comparison, the MHCAT Act, the SACAT Act, and the IDDCR Act all contain mechanisms for police assistance and/or enforceability of orders.

10.22 The absence of an explicit clause in respect of enforceability of orders (such as a warrant or use of reasonable force to enforce orders) frequently leads to reliance on an ancillary provision in the PPPR Act: section 10(4). That section states:

> *"Where a court makes any personal order, it may also make such other orders and give such directions as may be necessary or expedient to give effect, or better effect, to the personal order."*

10.23 It is of critical importance that any new or amended legislation in this area has a mechanism for enforcement of orders and we invite the Commission to address this in the review.

Mandatory reporting

10.24 Mandatory reporting of potential abuse concerns by health professionals and/or banks could provide further safeguards in respect of a relevant person.

Annual reporting requirements

10.25 There is a requirement for filing of annual reports in respect of property and the courts monitor the filing of such reports. We note the apparently increasing frequency of failure to file property manager statements in accordance with the PPPR Act following appointment. The process for review of statements by the Public Trust and the consequences of not filing statements needs addressing. In our view, the legislation should provide for stronger sanctions for non-filing of such reports to ensure better compliance.

Without notice orders

10.26 Although the Family Court can provide truncated progression of proceedings, such as urgent triaging, reduction in time for filing defences and reductions in reporting time for lawyer for subject person, we believe the ability to obtain without notice orders in some circumstances is

warranted. Any new or amended legislation could in our view provide such a mechanism as a protective measure for a relevant person at imminent risk.

Streamlined processes

10.27 There are many potential stakeholders involved in respect of disabled persons including in the health sector, education sector, social services such as social workers including Age Concern, Public Trust and others. A less siloed approach by those interested in the welfare of disabled persons would be a positive development.

11. Additional proposed targeted amendments

Existing definition of "social worker"

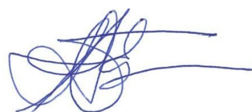
11.1 The existing definition of "social worker" under the PPPR Act may need to be amended to provide automatic standing for a health sector social worker to bring proceedings under the Act. Further discussion on who may be eligible to bring particular proceedings under the PPPR Act, may be discussed during the later stages of the Commission's review.

Monetary thresholds and specified sums in the PPPR Act

11.2 The monetary thresholds and specified sums in the PPPR Act require amendment. These can be amended by Order in Council, the last amendment being in 2007. For example, section 11(2)(a) and (b) contain thresholds of $5,000 for an item of property and $20,000 for an income or benefit. The low thresholds mean that if an item of property is over $5,000 or a relevant person's income is greater than $20,000 an application for the appointment of a property manager is required. Currently this captures a wide pool of people that are currently on a benefit. In addition, if a property manager needs to buy a home for the relevant person, they must get consent of the court if the cost of that home exceeds the specified sum of $120,000.[30] These sums have clearly not kept in pace with inflation, benefit increases and the current value of property in New Zealand.

12. Conclusion

12.1 We hope these comments are helpful, and we are available to discuss in further detail, if that would assist. Contact can be made in the first instance through Amanda Frank, Senior Law Reform and Advocacy Advisor (Amanda.frank@lawsociety.org.nz).



Ataga'i Esera
Vice President

[30] Above n 12, Schedule 1, paragraph 3.