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

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Review of Adult Decision-Making Capacity Law | He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke – Second Issues Paper 52

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Law Commission's (**Commission**) *Review of Adult Decision-Making Capacity Law He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke Second Issues Paper* (**Issues Paper**).

1.2 This submission has been prepared with input from the Law Society's Family Law Section Ngā Rōia Ture Whānau, Property Law Section Ngā Rōia Ture Rawa, and Health and Disability Law Committee.[1] As this is a 'first principles' review of the legislative framework,[2] we have conveyed different views held by members of the profession (including some conflicting views). We hope these comments will assist the Commission in developing appropriate and informed recommendations for reform.

1.3 We note the Law Society also prepared a submission on the Commission's Preliminary Issues Paper (**2023 submission**). A copy of the 2023 submission is available on the Law Society's website.[3]

2 General comments

Language

2.1 In our 2023 submission, we agreed with the Commission that the language used in this review is important. We suggested "relevant person" as an alternative to an "affected person" or a "person with affected decision-making".[4] The suggestion was based on the language used in the Irish Assisted Decision-Making (Capacity) Act 2015 to ensure a more neutral and less stigmatising term was used. We have again used the phrase

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/.
2 To be contrasted with a bill, where key policy decisions have already been made, and where the Law Society strives to provide a single view.
3 https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Review-of-Adult-Decision-Making-Capacity-Law.pdf.
4 At [2.1] – [2.5].

"relevant person" in this submission, and we ask the Commission to reconsider using this phrase in its final report.

Testamentary capacity and making a will

2.2 In its 2023 submission, the Law Society expressed its surprise that the decision to make or not make a will was not considered in the Commission's Preliminary Issues Paper,[5] noting the Protection of Personal and Property Rights Act 1988 (**PPPR Act** or **current Act**) contains specific provisions about wills (see Part 5, and sections 54 to 56 in particular). We are concerned this Issues Paper has again excluded testamentary capacity (testamentary freedom) notwithstanding the inclusion of advance directives. We ask the Commission to reconsider this omission and seek views on this aspect of the PPPR Act.

3 Chapter 4: Te Tiriti o Waitangi | Treaty of Waitangi

Q1: Do you agree with our description of the ways in which the Treaty is relevant to this review? Why or why not?

3.1 The Law Society agrees with the Commission's consideration of the three articles of the Treaty and how these are relevant to Māori who may be relevant persons. The current Act makes no reference to the Treaty, or to Treaty obligations, and such references should be included in a new Act.

3.2 We understand Te Hunga Rōia Māori o Aotearoa will also be making a submission which responds to this question in more detail.

4 Chapter 5: Tikanga

Q2: Do you agree that a new Act should include a general provision relating to tikanga requiring (for example) people with relevant roles under the Act to take into account tikanga to the extent that it is relevant in the circumstances? Why or why not?

4.1 The Law Society agrees a new Act should better provide for tikanga. In our 2023 submission, we expressed our view that there is no difficulty with incorporating some aspects of tikanga in the general law applying to everyone, provided there is a gateway for those who prefer the process to be governed by strict determination under Te ao Māori me ōna tikanga.[6]

4.2 We understand Te Hunga Rōia Māori o Aotearoa's submission will also respond to this question in more detail.

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5 At [8].

6 At [3.4].

5 Chapter 6: The Purpose of a New Act

Q3: Do you agree that the purposes of a new Act should include both upholding people's human rights and safeguarding them from significant harm? Why or why not?

5.1 We agree a new Act should clearly articulate its purposes, and those purposes should uphold human rights and also safeguard relevant persons against significant harm. However, the purpose provision should not be limited to these two purposes, which by themselves are general in nature. In our view, any new Act should include a purpose section accompanied by a set of principles to sit alongside the Act's purpose.

5.2 The purpose of the new Act should also reflect Articles 1 and 12 of the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), and the purpose in the (now repealed) Long Title of the PPPR Act.[7]

5.3 It could also be helpful to refer to relevant provisions of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017,[8] the Adults with Incapacity (Scotland) Act 2000[9] and the Mental Capacity Act 2005 (EW)[10] when drafting a purpose provision for the new Act.

5.4 The PPPR Act is limited in its coverage, and so it deals with only some aspects of the law relating to capacity. Therefore, the purpose of the Act should not be to codify or reform *all* the law on capacity but to update or reform existing provisions in the PPPR Act.

Safeguards

5.5 Importantly, the Law Society also supports the inclusion of safeguards in the purpose of the Act. While some may interpret this as being paternalistic,[11] a person's dignity and mana are negatively impacted if the person is taken advantage of or abused. The same is true if the wider community leaves a person in a position of significant harm or exposes them to such harm.

5.6 In addition, safeguards should be part of the Act's purpose for several other reasons:

(a) As the Issues Paper notes,[12] Article 12(4) of the CRPD expressly requires States Parties to "provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law".

(b) Numerous cases come before the courts that involve exploitation and family conflict.

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7 In making this recommendation, we note we agree with the Commission that Article 12 of the CRPD prohibits restrictions on legal capacity that result in unjustified discrimination (see [3.31] – [3.37] and chapter 7 of the Issues Paper). Any limits on a person's right to freedom from discrimination ought to be assessed by considering whether those limits can be demonstrably justified in a free and democratic society, as required by s 5 of the New Zealand Bill of Rights Act 1990.

8 See section 3, which sets out the purpose of this Act, and section 12, which sets out the principles which apply to the exercise of powers over patients.

9 See section 1 (general principles and fundamental definitions).

10 See section 1 (the principles).

11 Issues Paper at [6.17] – [6.18].

12 At [6.19].

(c) In a wider context, we increasingly hear about elder abuse, especially in relation to finances: this phenomenon is not limited to senior citizens.

(d) Many people are especially open to abuse and exploitation because of their circumstances, and are unable to stand up for their rights as easily as others.

5.7 We agree with the Commission that safeguards should also be included in the PPPR Act, at the stages of appointment of attorneys, managers and welfare guardians, and on implementation.

Guiding principles

5.8 It is also essential to list the principles that guide the purpose of the new Act. In its Preliminary Issues Paper, the Commission identified several principles which would guide its review of the PPPR Act.[13] In our 2023 submission,[14] we agreed with those principles, and identified several other principles that should guide the review. We believe those principles should be included in the new Act to assist with interpretation and implementation.

5.9 The following additional principles should be included in the list of guiding principles in the new Act:

Following the relevant person's will and preferences

5.10 As noted in its 2023 submission, the Law Society agrees with the move away from a "best interests" approach.[15] Wherever possible, a court, attorney, manager, welfare guardian and any other person acting with authority under the Act (for example, a supporter, if such arrangements are included in the Act) should follow the will and preferences of the relevant person. However, we acknowledge it may not be easy to know what the relevant person's will and preferences are, and evidence may be conflicting. This could give rise to conflicts, and ultimately, litigation, which should be avoided if at all possible. One approach would therefore be to draft relevant provisions using language in section 1(4) of the Adults with Incapacity (Scotland) Act 2000, which refers to:

> "the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult".

5.11 Even where the relevant person's will and preferences are ascertainable, they may be the result of undue influence, or similar negative pressures. They may also be harmful to the relevant person or others such as whānau. In some situations, no means may exist of discovering the relevant person's will and preferences.

5.12 For these reasons, the guiding principles should be expanded to include the following:

(a) The will and preferences of the relevant person should normally be followed.

(b) In determining whether to follow the relevant person's will and preferences, account must be taken of any conflict of interest, undue influence, damaging

13 At [6.3].
14 At [4].
15 At [4.2].

pressure, or significant harm to the relevant person or a third party, and any other relevant consideration.

(c) Where the relevant person's will and preferences are unascertainable or contradictory, intervention must benefit and not harm the person.

Principles embodied in the PPPR Act

5.13 The guiding principles should also include the following:

(a) Intervention should be the least restrictive.[16]

(b) In so far as it is reasonable and practical to do so, the relevant person should be encouraged to exercise any skills that they have in relation to their property and personal welfare, to develop new skills, and to accept support from other persons.[17]

(c) Where applicable, tikanga and other cultural approaches should be followed and respected wherever possible.

Procedural fairness

5.14 As mentioned in our 2023 submission, procedural fairness is also an important principle.[18] It includes legal representation but is not limited to this. It can be seen as an aspect of the safeguards that protect the relevant person.

6 Chapter 7: Decision-making capacity

Q4: Are there any other issues with decision-making capacity assessments that we should consider?

6.1 We agree with the issues the Commission has identified in respect of assessments.[19]

6.2 Other issues with decision-making capacity assessments include:

(a) Issues with resourcing, including in relation to the provision of support for the relevant person's decision-making;

(b) The lack of one central agency responsible for the provision of guidance to a relevant person, their supporters, health professionals, or others concerned about that person;

(c) A lack of public awareness of what is required to 'get your affairs in order' in advance of events which may impact a person's decision-making;

(d) A lack of health professionals who are suitably qualified and recognised as being qualified to formally assess decision-making capacity; and

(e) Variations in approaches of assessments between the different practitioners who complete assessments, such as psychiatrists, psychologists and GPs, due to these professionals having a different scope of practice.

16 PPPR Act, ss 8 and 28.
17 PPPR Act, ss 8 and 28. Also see ss 18(4)(a) and 36(2)).
18 At [4.1(g)].
19 Issues Paper at [7.53].

Q5: Do you agree that the presumption of decision-making capacity should be maintained? Why or why not?

6.3 The Law Society agrees that the presumption of decision-making capacity should be retained in any new Act. This presumption aligns with preserving a person's human rights and should only be departed from when, and if, there is an assessment that a person either partially or wholly lacks decision-making capacity. The rights, will and preferences of the relevant person are important starting points, and are also consistent with Article 12 of the CRPD.

6.4 This presumption should be accompanied by a statement that the fact that a person wants to make a risky or imprudent decision cannot, by itself, lead the court to determine a person does not have decision-making capacity.[20]

Q6: Do you agree that a new Act should provide a single test for decision-making capacity? Do you agree with the four factors we have identified?

6.5 The current Act uses different terms in respect of decision-making capacity, such as "competence" in respect of property orders, and "capacity" in respect of personal orders, which can cause confusion. While we acknowledge that courts have held these terms to mean the same thing, our preference is to replace these terms with a single term for consistency. We suggest using the term "decision-making capacity".

6.6 The Commission has also suggested that a person should be considered to have decision-making capacity if they are able to do four things:[21]

(a) Understand the information relevant to the decision and the effect of the decision.

(b) Retain that information as necessary to make the decision.

(c) Use or weigh that information as part of the process of making the decision.

(d) Communicate the decision (whether by talking, using sign language or any other means).

6.7 While the Law Society agrees that these four factors provide a good framework for considering whether a person has decision-making capacity, we note that they fail to consider:

(a) The extent to which a lack of insight falls within, or is accommodated by, the four factors (for example, where a person feels that they are not mentally or physically unwell, despite clinical evidence to the contrary, or they believe that there is no ongoing need for medication, despite clinical evidence to the contrary); and

(b) The extent to which compulsion to act in a certain way may impact on decision-making capacity (for example, if a person has a substance addiction,[22] what effect that addiction has on their decision-making capacity).

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20 PPPR Act, ss 6(3), 25(3) and 93B.

21 Issues Paper at [7.56].

22 I.e., a strong physical or psychological need or urge to do something or use something, or a dependence on a substance or activity even if the person understands it causes them harm.

These additional factors should also be incorporated into any test for decision-making capacity.

6.8 Lawyers have differing views on whether there should be a single test for decision-making capacity.

6.9 Some lawyers are of the view that a single test which includes the four factors identified in the Issues Paper, as well as the additional factors we have identified at [6.7] above, is appropriate

6.10 Others, however, do not agree that there should be a single test for decision-making capacity. They believe:

(a) Any legal test in this area of law requires flexibility to allow a relevant person to exercise decision-making that they are capable of. Such flexibility:

(i) Aligns with the principles recognised in sections 8 and 28 of the PPPR Act, which are to make the least restrictive intervention in a relevant person's life, and to enable or encourage that person to exercise decision-making capacity to the greatest extent possible.

(ii) Recognises that there is a continuum on which people will fall in terms of decision-making capacity. While the four criteria provide useful guidance for determining when a person has capacity, there needs to be some ability to evaluate the level to which a person does or does not have decision-making capacity.

(iii) Recognises that decision-making capacity is something that may be intermittent, depending on other issues affecting a person, noting the criteria given do not cover, for example, circumstances where a person may be under duress or undue influence.

(b) The reference to "wholly or partly" in sections 6(1)(a) and 25)(1) and (2) must also be retained to recognise different levels of capacity (for example, where a relevant person has the capacity to purchase a cup of coffee, but not capacity to run a business).

(c) It is important to recognise that the test for capacity is about giving the court the jurisdiction to determine matters relating to the relevant person, or alternatively, giving the welfare guardian, property manager or attorney the power to act. The court's discretion is there to ensure that there is no overreach of that power, as the court can tailor an order in the least restrictive way.

Q7: What considerations should be insufficient, by themselves, to lead to a finding that a person does not have decision-making capacity? Should a new Act specify these factors?

6.11 We agree that a statement in any new Act regarding the presumption of capacity should be accompanied by a statement that the fact that a person wants to make a risky or imprudent decision cannot, by itself, lead the court to determine a person does not have decision-making capacity.

6.12 However, we believe that setting out a list of other factors, that by themselves, are insufficient to find that a person does not have decision-making capacity may be problematic. There is a concern that if a list is included in the new Act, it will become the sole focus and no such lists of factors can ever be exhaustive.

6.13 Health professionals conducting capacity assessments generally follow a standardised assessment tool and framework. That framework will already have included within it, factors, that by themselves, would be insufficient to find that a person lacks decision-making capacity.

6.14 Paragraph 7.61(h) of the Issues Paper sets out the following factor:

> That the person does not have decision-making capacity for another matter or has previously not had decision making capacity.

6.15 This may be a helpful factor to include alongside the statement regarding risky or imprudent decision making not by itself leading to a finding that a person does not have decision-making capacity.

Q8: How can the circumstances of a capacity assessment be improved?

Access to decision-making support

6.16 We agree that given the potential serious outcomes for a person should they be found to lack decision-making capacity that, as a matter of human dignity, they should be supported during the assessment process both personally and in a culturally responsive manner.

6.17 Additional resources would need to be dedicated to the provision of support to the relevant person being assessed, and to enable a socially and culturally acceptable environment.

Capacity assessments

6.18 Frequently capacity assessments are undertaken in crisis situations where a person is in hospital due to an acute medical episode or due to family being unable to cope with providing care for the person at home.

6.19 When a proposed patient is being assessed under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**MHCAT Act**), section 9(2)(d) provides that the purpose of the assessment is to be explained to the proposed patient in the presence of a member of their family, or caregiver or another person concerned with the welfare of the proposed patient. There is no equivalent section that sets out these obligations in the current Act.

6.20 It is of concern that people are the subject of capacity assessments without having a real understanding that an assessment is being undertaken and what the significance of the outcome of that assessment may be to their future ability to make decisions, where there is the potential for them to understand aspects of the assessment. In the Law Society's view, it is essential that these obligations are included in any new Act.

Training and guidance

6.21 We agree further guidance and training for health professionals undertaking assessments would also be helpful, and could lead to greater consistency in the quality and approach taken to assessments.

6.22 If there was to be training and guidance for professionals on how to assess decision-making capacity, especially around unconscious bias, there would need to be adequate resources available to establish and deliver that training to those who required it. Knowledge of tikanga, and giving due weight and regard to that, are important if capacity assessments are to be improved. We also discuss training and guidance for professionals under the questions in Chapter 16.

Health professionals who can undertake assessments

6.23 The Issues Paper notes there are several potential barriers to accessing assessments, including long waitlists, and a lack of assessors in rural locations.[23] We note that a range of registered health practitioners are able to undertake such assessments, including medical practitioners, psychologists, specialist nurses and nurse practitioners. Any new Act ought to allow for assessments to be undertaken by health practitioners who are able to do so within their scope of practice.

Q9: Who should be able to carry out a decision-making capacity assessment?

6.24 It is well-known that the current health workforce is under significant pressure.

6.25 As noted in [6.23] above, any new Act ought to allow for assessments to be undertaken by health practitioners who are able to do so within their scope of practice.

6.26 Currently, the Mental Health Review Tribunal can appoint practitioners to provide second opinions about patient treatment under the Mental Health (Compulsory and Assessment) Act 1992. Consideration could be given to establishing a similar independent body to approve health professionals to carry out decision-making capacity assessments. This will enable the pool of professionals to be expanded to include any professional working in this area of practice who has undertaken suitable training and can meet the approval criteria.

6.27 This may mitigate against the identified barriers to accessing assessments, including long waitlists and the lack of assessors in some regions, particularly in rural areas.

6.28 Some practitioners have also suggested that consideration could be given to making provision for second opinions, should the relevant person request this.

7 Chapter 8: Decision-making support

7.1 The Law Society is pleased to see the way in which the Commission has addressed the question of supporters in the Issues Paper. There is significant merit in encouraging supporters to assist relevant people to make decisions for themselves on personal and property issues. This echoes the rights in Article 12 of the CRPD.

7.2 On the other hand, the question of how to encompass this support into the law is complex, and must ensure that the supported person is not exploited or abused, or their

[23] At [7.53(d)].

privacy rights are not infringed.[24] The law needs clarity but also needs to address a variety of issues and circumstances.

7.3 By incorporating appropriate safeguards, the law may unintentionally make the role of the supporter unattractive. The level of responsibility and accountability may not suit the supported person and may also discourage potential supporters taking up the role. There is also the risk of confusion of various roles. If, for example, an attorney already exists, the supporter must appreciate that it is the attorney who has agency powers in law, and not the supporter. Yet, it is desirable that the two roles interact positively.

7.4 We are also concerned how tikanga applies to the appointment of supporters and how a formal supporter is to engage with whānau.

Q10: Do you think a new Act should include a formal supporter arrangement? Why or why not?

7.5 The Law Society agrees that the law should contain provision for formal support beyond what is already in the current Act. However, this position is cautiously held given the concerns expressed in our 2023 submission, including the lack of safeguards, the lack of ability to review or remove a supporter, and the potential for conflicts of interest.[25] These issues would need to be addressed if the new Act is to provide for formal supporter arrangements.

7.6 The introduction of a formal supporter arrangement would provide a formal mechanism to support a relevant person in their decision-making. This is consistent with the CPRD. In our view, it would be appropriate for a relevant person themselves to appoint a formal supporter (not unlike the appointment of an attorney), so long as they have decision-making capacity to do so. Consideration should be given to the process for such an appointment to ensure it contains appropriate safeguards similar to those found for the appointment of attorneys.

7.7 Alternatively, legislation could give a court the ability to appoint a formal supporter, taking into account the will and preferences of the relevant person, akin to the sections in the current Act that give the court the ability to appoint a welfare guardian and property manager for a subject person.[26] These sections, especially subsection (5) may provide some guidance for the basis of such criteria, noting that the reference to "best interests" should be replaced with "will and preferences".

7.8 A requirement could be included in any new Act that the court must consider whether it is appropriate to appoint a formal supporter as the least restrictive intervention before considering the appointment of a representative. This would depend on the availability of a supporter and the fulfilment of criteria for their appointment, and there may be certain practicalities that may dictate the outcome (for example, where the person is in a coma).

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24 See Article 12(4) of the CRPD.
25 See [5.8] and [5.16] to [5.18].
26 PPPR Act, ss 12 and 31, especially subsection (5).

7.9 Alternatively, a new Act could remove the ability to appoint a representative, replacing it with the concept of a formal supporter arrangement instead (as discussed further at [9.16] below).

Q11: What do you think should be the key features of a formal supporter arrangement?

Requirements for appointment

7.10 The legislation should provide that, for a person to appoint a formal supporter, they ought to have decision-making capacity to do so. If the Court is to have the ability to appoint a formal supporter, the legislation must require the Court to take into account the will and preferences of the relevant person.

Duties and obligations of formal supporter

7.11 It is vital that any legislation clearly specifies all the duties and obligations of a formal supporter in terms of supporting the person in their decision-making and giving effect to their will and preferences.

7.12 The role of a supporter is not to act as the person's agent but to offer advice, obtain information, help the person articulate their views, accompany them to engagements, etc. As such, the supporter would expect to be consulted, for example, by an aged care residence or by a property manager, and more generally be available to assist in dealings with third parties. Duties and obligations in terms of their relationship with any welfare guardian, property manager or attorney should be included, in particular, the limitations of the role of the supporter and how that role might intersect with others. The supporter should also be expected to resign from the role if any conflicts of interest were to arise.

7.13 Ultimately, these duties and obligations should reflect that the supporter's primary focus is to support a relevant person in their decision-making, and that the role of making decisions on behalf of the relevant person is only to be exercised in certain limited situations.

7.14 We would suggest that a formal supporter would be prudent to keep a record of important activities. Consideration should be given to whether any formal reporting should be required.

Effect of decision

7.15 The legislation should also include a provision regarding the effect of a supporter's decision (noting that in the PPPR Act, there are sections that provide that the effect of a decision made by a welfare guardian, property manager or attorney is the same as if the decision was made by the relevant person, and that person had full capacity to make that decision).[27]

Access to private and confidential information

7.16 The Commission notes at [8.53] of the Issues Paper that a formal supporter's access to the supported person's private and confidential information would suggest a need for

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27 PPPR Act, ss19, 44 and 103B.

obligations that address the risk of them inappropriately using or disclosing that information.

7.17 Any person (either with or without impaired decision-making) may consent to another person accessing their personal information (including information about their health), with a consequent risk that the person may inappropriately use or disclose that information.

7.18 The Health Information Privacy Code 2020 defines "representative" as:[28]

> "where that individual …… is unable to give their consent or authority, or exercise their rights, a person appearing to be lawfully acting on the individual's behalf in the individual's interests".

7.19 A person may be "lawfully acting on the individual's behalf in the individual's interests" even where they do not have any formal status as an adult legal guardian. Notwithstanding this, it would enhance the protection of the rights of a relevant person if there is specific reference to the duty on the formal supporter to respect the supported person's privacy and confidentiality by only collecting, using and disclosing that person's personal information to the extent that it is relevant and necessary.

Complaints process and review of decisions

7.20 If there is a concern or complaint about the actions of a supporter, there needs to be a process for dealing with this, as is the case with enduring powers of attorney (**EPOAs**). Under section 103 of the current Act listed people can apply to the court for a review of an attorney's decision. This section might provide some guidance for any new legislative provision in terms of the ability to review a formal supporter's decision.

Termination of support arrangements

7.21 Provision for the termination of a support arrangement also needs to be included in any legislation. That would include if a supporter would like or need to resign from the role or the supported person wishes to end that person's role as their supporter.

Q12: Do you agree that a new Act should not provide for co-decision-making arrangements? Why or why not?

7.22 The Law Society agrees with the Commission that co-decision-making arrangements should not be included in a new Act.

7.23 Paragraph 8.56 of the Issues Paper states:

> "Co-decision-making is usually used in situations where a person's decision-making is impaired to the extent that they do not have decision-making capacity to make certain decisions on their own but can make those decisions with appropriate support".

7.24 In these circumstances it is our view that the relevant person ought simply to be supported to make their own decision, rather than making the decision with the co-decision-maker.

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28 Clause 3(1).

7.25 Co-decision-making as described here sounds as if it has the potential to undermine rather than enhance the autonomy of a relevant person. It also raises complicated questions about the effect on third parties.

8 Chapter 9: Court-ordered arrangements

Q13: Do you agree that court-ordered arrangements should be included in a new Act? Why or why not?

8.1 We agree 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. We agree with the four possible circumstances listed at [9.34] of the Issues Paper. It is vital that any new Act includes the ability for the court to make orders if they are required, as is available under the current Act.

8.2 If there is no mechanism for court orders in relevant circumstances, a large lacuna will exist in the law, not unlike the one that existed before the current Act was enacted. As we have mentioned in our 2023 submission, 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.[29] Access to justice and support and protection for people lacking capacity and in need would be diminished if there was no mechanism for court orders. In the experience of family lawyers, courts are already adapting orders to ensure the least restrictive intervention and supported decision-making.

8.3 Applications to the Family Court under the PPPR Act make up approximately 12 per cent of the court's workload.[30] In our view, this is likely to increase as our population ages. If people have not created EPOAs, when they still retain capacity, and they lose capacity, court orders available to be sought under the Act may be the only option available to make necessary arrangements for these people. These orders will be essential for organisations and others who provide care on a longer-term basis.

8.4 We agree with the Commission at [9.26] of the Issues Paper that the safeguards provided in Article 12, and in particular, Article 12(4) of the CRPD, clearly anticipate that in some circumstances court orders will be required.

Q14: In what circumstances might a court-ordered arrangement be needed?

8.5 A court-ordered arrangement may generally be needed where:

(a) A decision has significant implications;

(b) Where a right is engaged, there is a significant limit on that right, and/or there is a lack of clarity around whether the limit on that right is justified, or

(c) Where there is a medium to long-term engagement of, and limit on, that right, such that the relevant person is entitled to access a right of review (for example, where a person is detained in secure dementia care).

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29 At [5.9].

30 See https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#family.

8.6 As mentioned above at [8.1], we also agree with the four possible circumstances outlined in [9.34] of the Issues Paper. Circumstances for making court orders will vary widely and require a balancing of the obligations in Article 12 of the CRPD, the needs of the person, and appropriate safeguards and accountability. The court's discretion as to when to intervene should be considered in accordance with the principles we have identified that should be included in any new Act (under Chapter 6).

8.7 In addition, section 10 of the PPPR Act sets out the situations when a personal order can be made. This can include important decisions such as residential placement and medical treatment. Section 18 contains the limitations on the powers of welfare guardians (extended to personal attorneys under s 98(4)). Beyond this, we do not see a need to limit the scope of personal orders. The court will be bound by principles such as the least restrictive intervention and encouragement of the relevant person to exercise and develop such capacity as they can to the greatest extent possible. In future, tikanga may also play a role, along with formal supporters. Given that the powers are essentially enabling decision-making, flexibility is needed to meet the range of different circumstances that may be exercised.

8.8 The Issues Paper suggests that any harm-based intervention requires a high threshold, for example the risk of significant harm or a material risk of significant harm.[31] We note that protection from harm will not often be the basis for an order but will most probably always come into the assessment of whether an order is necessary and is the least restrictive pathway.

8.9 The question of harm is not necessarily about the risk of harm in the future but may be about harm that already exists. For example, a case may be about the relevant person's association with a third party who may be out to scam that person, or concern the relevant person living in squalor and unsafe conditions that have health and other consequences. In these kinds of situations, the Law Society agrees that if the harm is significant, the court should be empowered to override the person's will and preferences.

8.10 In relation to property, the court should continue to have power to appoint a manager to administer all or some of the financial affairs of a relevant person. We note schedules 1 and 2 of the current Act set out in detail the powers of a property manager, and indicate the types of situations where a property order may be needed. A new legislative framework should allow for property orders to be made in similar circumstances.

8.11 A new Act should also recognise:

(a) The important power in section 55 of the PPPR Act to authorise a manager to make a testamentary disposition for the relevant person (noting the court can and does approve such testamentary dispositions for adults under the PPPR Act).

(b) That under section 38, the manager has all rights and powers as the court has conferred, subject to any restrictions. Schedules 1 and 2 of the Act are comprehensive, and a manager may be given full powers. However, in practice they are often tailored to the particular circumstances of the person concerned in

31 Issues Paper at [9.41].

each particular case, bearing in mind the principles including the least restrictive intervention.

8.12 We also note there are challenges with the current specified sum and the thresholds in Schedules 1 and 2 of the Act, and suggest these are amended (see our response to Q30 below). We further suggest the need in any new Act for the specified sum and thresholds to be regularly reviewed to ensure they keep pace with inflation.

8.13 The Law Society supports the retention of the existing flexibility in relation to the circumstances when a property order may be made and what form it should take. Any new Act should of course, replace the phrase "best interests" with a person's "will and preferences" and include guidance on the role to be played by tikanga.

8.14 We note the PPPR Act does not set out when a court order is required, and many services are provided to relevant people on different legal grounds. For example, the common law doctrine of necessity, right 7(4) of the Code of Health and Disability Services Consumers' Rights, and section 41 of the Crimes Act 1961 all provide a legal basis for providing health and disability services to a relevant person, or a defence to what might otherwise constitute a breach of the Code or a criminal offence. It is important that providers are able to continue to rely on those grounds in the short to medium term (for example, Emergency Department staff who treat relevant people).

9 Chapter 10: Court-appointed representatives key features

Q15: Do you agree that a person's will and preferences should be considered together as part of an in-the-round assessment?

9.1 We agree the relevant person's will and preferences should be considered first and foremost, and only departed from in limited circumstances. We also agree with the Commission's observations that "proper respect for a person's dignity and autonomy requires proper respect for their right to take risks and make imprudent decisions — even those that might strike others as unreasonable or unconventional" and that the question which must be asked here is "whether the person's dignity and autonomy would be better respected by risking the harm (consistently with their will and preferences) or by not doing so (and thereby departing from their will and preferences)".[32]

9.2 However, the definition of 'harm', and what the threshold of harm may be, will need further consideration. The Issues Paper does not address, for example, how a relevant person's will and preferences are to be respected and upheld in such circumstances where:

(a) The relevant person turns against the only person interested in or available to act as their welfare guardian (for example, due to advanced dementia), for reasons which the relevant person is unable to articulate. It is unclear how the relevant person's will and preferences are to be respected in such circumstances, particularly where:

[32] Issues Paper at [10.32].

(i) The relevant person no longer trusts or likes the appointed representative; or

(ii) The relevant person refuses to consider the appointment of someone to support them with their decision-making, or to make decisions on their behalf, on the basis that they do not consider they need support with decision-making, and/or they forget, or deny, their diagnosis.

(b) A relevant person who has been assessed as requiring rest home or hospital level care expresses their wish to go home, and considers that they are capable of looking after themselves at home, despite significant evidence to the contrary.

(c) The relevant person indicates that they wish to remain living in a particular area of the country, where they have limited or no support, based on reasons which are not reflected in reality (for example, due to a belief their long-deceased husband or father lives with them, and their now grown and adult children go to school near where they live). Does the question of whether the relevant person's dignity and autonomy would be better respected by risking the harm of living in the same area they are currently living in (consistent with their will and preferences), or by not doing so (and thereby departing from their will and preferences), adequately deal with this situation?

9.3 In such circumstances, could the relevant person's will and preferences be taken into consideration, but a decision still be made using what would ultimately be another 'best interests' test? We invite the Commission to consider these matters further in its final report.

Q16: How do you think a person's rights should be taken into account?

9.4 The Issues Paper suggests that "one option is that the representative should act in a way that best promotes and upholds the represented person's human rights … where it is not possible to determine the will and preferences of the person".[33] There is no doubt that the relevant person has rights which must be upheld. The relevant question here is whether or not those rights are engaged by the decision in question, and if so, whether the limits placed on those rights are justified.[34]

9.5 A number of the rights would be engaged where, for example, the relevant person has advanced dementia, and lives in a secure dementia unit – this includes, but is not limited to, the right to freedom of movement, and the right not to be arbitrarily detained. In this example, the question to be posed is not whether detention in a secure dementia unit best promotes and upholds the represented person's human rights (unless this involves a balancing or weighing of different rights); rather, it is a matter of determining which rights are engaged, and whether any limits on those are justified.

9.6 The Issues Paper also suggests that a departure from a person's will and preferences should be no greater than is required to ensure that their dignity, autonomy and equality are upheld and protected to the maximum extent possible[35] – a proposition that, on its face, appears worth supporting. However, it is unclear how this test would be applied,

33 At [10.37].
34 New Zealand Bill of Rights Act 1990, s 5.
35 At [10.38].

for example, with respect to a relevant person who routinely attempts to leave the secure unit where they now live (which is an indication that living there is not consistent with their will and preferences), or who routinely asks staff and visitors for help to leave the unit and go home. In this example, is the departure from the person's will and preferences no greater than what is needed to ensure their dignity, autonomy and equality are upheld and protected to the maximum extent possible? We invite the Commission to consider these matters further in its report.

9.7 It would also be helpful for the representative to consult about making decisions widely, and to the extent it is appropriate to do so, with the relevant person's whānau, and if appropriate, professionals and friends.

Q17: When might it not be appropriate or sufficient for a representative to make a decision based only on a person's will and preferences?

9.8 At [10.29] of the Issues Paper, this question is put another way - in what circumstances might respecting the person's rights, will and preferences mean that their will and preferences alone should not always determine the decision? The Issues Paper proceeds to suggest circumstances where:

(a) The relevant person's will and preferences in relation to a decision are not able to be adequately identified, or are not alone sufficient to determine the decision that should be made;[36] or

(b) Making decisions based only on the relevant person's will and preferences would give rise to a risk of harm (or significant harm) to the person;[37] or

(c) The relevant person has a very clear will and preference (such as where they wish to live) that cannot be implemented (perhaps for financial reasons).[38]

9.9 While these examples are helpful in determining when it may be appropriate to depart from a person's will and preferences, they give rise to the following additional questions:

(a) In relation to the example at [9.8(a)], whether a person whose will and preferences are not consistent over a short period of time, fluctuate, or are based on information that is no longer true, amounts to a situation where their will and preferences are unable to be determined;

(b) In relation to the example at [9.8(b)]:

(i) What the appropriate threshold for harm (or significant harm) should be,

(ii) What types of harm justify a departure from the relevant person's will and preferences, and

(iii) Whether a test which requires there to be a "risk of significant harm or perhaps even a material risk of significant harm" (as suggested in the Issues Paper)[39] could lead to circumstances where, for example, a

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36 Issues Paper at [10.30].
37 Issues Paper at [10.31] – [10.34].
38 Issues Paper at [10.35].
39 At [10.33].

relevant person is left in inappropriate and unfit housing and care where their health and other needs cannot be adequately met.

(c) In relation to the example at [9.8(c)], whether having a clear will and preference that is not possible to implement extends to situations where a person wishes to live at home, but that is not deemed feasible because the amount of care and support required to ensure that a person is able to live at home safely, and with dignity, cannot be provided i.e. there are insufficient resources available to enable this.

9.10 These matters require further thought, alongside the following circumstances which may also justify a departure from the relevant person's will and preferences:

(a) When someone else is placed at risk of harm; and

(b) When the relevant person wants to do something illegal.

Q18: How should a representative make decisions when it is not appropriate or sufficient to make a decision based only on a person's will and preferences? What factors should the representative consider?

9.11 We agree it would be preferable for a new Act to state how decisions should be made in a way that can readily be applied by non-experts.[40] We note some legislation includes flowcharts to assist (non-expert) decision makers to apply the law when making complex decisions (see for example Schedules 1-3 of the Human Tissue Act 2008). The use of similar flowcharts and diagrams could potentially assist representatives with making decisions which do not reflect the relevant person's will or preferences.

9.12 The Issues Paper suggests a new Act might require that decisions reflect the person's will and preferences to the maximum extent possible without giving rise to significant harm (or a material risk of significant harm) to the person.[41] If this approach is to be taken, we reiterate the need to consider the issues we have raised at [9.9(b)] above. We also note the following subparagraphs in the definition of "mental disorder" in the MHCAT Act[42] could be used as a basis for when decisions could be made against the will and preferences of the relevant person:

(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

9.13 Alternatively, the Commission considers the decision-making framework could be described in plain language with a list of factors for the representative to consider.[43] We note that this is, in effect, a different way of framing a best interest test, although it appropriately prioritises the relevant person's will and preferences.

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40 Issues Paper at [10.39].
41 At [10.40].
42 Section 2.
43 Issues Paper at [10.41].

Q19: How should the representative role provide for decision-making support?

9.14 Some lawyers suggested the significance of decision-making support could be emphasised by replacing the representative role with that of a formal supporter. It would mean the primary focus would be supporting a person in their decision-making, with the role of making decisions for the person only to be exercised in certain limited situations. However, this would require the new Act to set out the key features of a formal supporter arrangement (as discussed at [7.10] to [7.21] above), and the circumstances in which the supporter is permitted to make decisions which depart from the relevant person's will and preferences.

9.15 If the representative role is to remain in the new Act, then we agree the role should include support for decision-making as contemplated at [10.45] of the Issues Paper. In addition, the representative could be required to:

(a) Support the represented person to exercise their own decision-making and to act on their own behalf to the extent possible;

(b) Ensure the represented person has access to any additional support they may require;

(c) Consult and communicate with the represented person about decisions in a way they are most likely to understand;

(d) Take reasonable steps to ascertain and give effect to the represented person's will and preferences in relation to each decision; and

(e) Consult the represented person's family and whānau, friends, health professionals or other relevant people.

9.16 The Law Society notes that some relevant people will not be able to make many decisions given the extent of their disabilities. If the new Act is to include guidelines about how a representative role should include support, we believe that these should be general guidelines to be applied on a case-by-case basis, rather than a prescriptive list.

Q20: Who should the representative consult with and how?

9.17 We agree representatives should be required to consult as discussed in [10.46] of the Issues Paper. It may also be appropriate to consult cultural and faith-based leaders and any organisations providing community support to the relevant person. Different decisions will require different levels of consultation, and different relevant people will have different support networks.

9.18 It is important that the legislation should be clear that the purpose of such consultation is to ascertain the relevant person's will and preferences, rather than the preferences of those who are consulted about a decision. Consultation could be particularly helpful in situations where conflicts of interest arise – for example, when a relevant person wishes to remain living at home, yet family and professionals want the person to be safe and secure in a residential unit. If the representative is a family member, they may well want to make decisions on a best interests model and override that person's will and preferences.

Q21: Are there any other steps a representative should be required to take when making a decision?

9.19 In our view, the current requirements to encourage the relevant person to participate as fully as possible in decision-making, and to use the least restrictive intervention in the life of the person should continue.[44]

Q22: Do you agree that the representative should not be able to make a decision unless they consider the represented person does not have decision-making capacity?

9.20 A requirement that the representative may not make a decision where the represented person has capacity, could lead to an unhelpful, and potentially paralysing, lack of clarity for the representative and third parties, and likely result in the consequences noted in [10.53] of the Issues Paper.

9.21 Therefore, it might be helpful for there to be some limited flexibility for representatives to make decisions even where the represented person has some decision-making capacity. In such circumstances, there should be appropriate safeguards to ensure the representative's decision-making powers are appropriately exercised (for example, by requiring representatives to obtain a new certificate of incapacity each time they need to make a 'significant decision',[45] like with EPOAs,[46] with an exception for people who have wholly lost capacity and will not regain it).

9.22 In any case, the representative should use the least restrictive intervention , and encourage the relevant person to make decisions as much as they can. If the relevant person has capacity to make their own decision, the representative should be required to take reasonable steps to give effect to that decision.

Q23: Do you agree the test for a representative should be the same for both welfare and property decisions? Why or why not?

9.23 Some members of the profession agree there should be a single test for both welfare and property decisions, which contains the three elements described in [10.66] of the Issues Paper.

9.24 Others, however, do not agree that the test for a representative should be the same for welfare and property decisions, and support having different tests. They are of the view that, with financial or property matters, a relevant person may be able to make some decisions but not all decisions, so it is appropriate to simply consider whether the relevant person wholly or partly lacks capacity. On the other hand, if a person has partial capacity to make decisions regarding their personal care and welfare, they should be making the decisions they can. Personal orders can be obtained for the remaining decisions.

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44 PPPR, s 8.

45 Here, a 'significant decision' could relate to 'a matter that has, or is likely to have, a significant effect on the health, well-being, or enjoyment of life (for example, a permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure)' (see PPPR Act, s 98(6)).

46 PPPR Act, ss 98(3) and 98(6).

Q24: Do you agree the court should be satisfied that the person does not have decision-making capacity for the decision or decisions at issue before appointing a representative? Why or why not?

9.25 The Law Society agrees that the court should be satisfied that a relevant person does not have decision-making capacity for the decision or decisions at issue before appointing a representative in the case of both welfare and property matters. Such a decision is in line with the principle of least restrictive intervention in the life of a relevant person, as other types of support can be provided for people who have capacity but need assistance in making decisions. As mentioned above at Q14, an order to appoint a representative is often tailored to the particular circumstances of the person concerned in each particular case, bearing in mind this principle.

9.26 We also note this should be the case regardless of whether the role of representative is maintained, or replaced with one of formal supporter (as discussed above at [9.14]).

Q25: Do you agree that the court should be satisfied that the person's circumstances give rise to a need for a representative to be appointed? If so, what factors are relevant to this assessment?

9.27 The relevant person's circumstances must present a need for a representative to be appointed. A person may lack capacity to make certain decisions but be able to function with support to make other decisions. An application should only be made if there is a need, for example, the relevant person is going into a rest home that requires orders to be in place, or requires urgent medical treatment.

9.28 The test for determining whether there is a need should be whether the relevant person requires support to protect their rights, their dignity and autonomy. The factors relevant to this assessment could include those set out in [9.34] of the Issues Paper.

Q26: Do you agree the court should be satisfied that less intrusive or restrictive measures are either not available or not suitable before appointing a representative? Why or why not?

9.29 The least intrusive orders should be made. For example, only having certain powers under the Schedules 1 and 2 of the PPPR Act for property managers, or having a personal order rather than a welfare guardian appointed. This aligns with the principles and proposed purposes of the Act (or any new Act), as well as Article 12 of the CRPD.

Q27: Do you agree that the scope of a representative's decision-making role should be expressly connected to the reason for their appointment? Why or why not?

9.30 Ideally the scope of a representative's powers should only relate to the reasons for the application. Allowing the representative to make decisions beyond the scope of the reason and the need for their appointment risks intruding on the represented person's rights, and is inconsistent with the least intrusive or restrictive approach required under Article 12 of the CPRD.

9.31 However, we acknowledge different decisions inevitably arise, and there are costs and delays associated with making a new application each time, which would make this requirement cumbersome.

Q28: In addition to the current prohibitions, are there any other personal decisions that a representative should be prohibited from making? Should any of the current prohibitions be removed?

9.32 There are differing views on this issue. Some lawyers believe the current prohibitions on a welfare guardian's powers and decisions that require the direction of the court are appropriate and sufficient.

9.33 Others, however, believe the Commission should also consider whether a representative should be prohibited from making decisions about:

(a) Entering into a surrogacy arrangement on behalf of the represented person; or

(b) Undergoing procedures that would result in sterilisation (which would include, for example, hysterectomy) or abortion.

9.34 These lawyers are of the view that there is currently a lack of clarity in the case law about whether a representative is, or should be, empowered to make such decisions, and there are arguments from a rights perspective either way – on one hand, requiring the scrutiny of the Court can be an important safeguard, and on the other hand, it is equally important the legislation does not create unnecessary impediments to reproductive care. They believe prohibited decisions (including those currently listed in section 18(1) of the PPPR Act) should be authorised by the Court, and such authorisation and oversight by the Court is appropriate given the significance, and/or irreversible nature, of those decisions.

9.35 Some lawyers have also noted the following regarding the prohibitions listed at [10.85] and [10.87] of the Issues Paper:

(a) They do not support a prohibition on making decisions to enter or end a sexual relationship.[47] A prohibition would mean that authorisation is required from the Court with respect to these decisions. This may result in an unnecessary incursion into the rights, will and preferences of the relevant person.

(b) Any prohibition on making a decision about the care or wellbeing of a child,[48] or making or discharging a parenting order[49] would need to be considered in the context of the Care of Children Act 2004 and the Oranga Tamariki Act 1989, as well as the Family Court Rules 2002 rules relating to incapacitated persons.

(c) Any prohibition on stopping a person from having contact with the represented person[50] would require a representative to seek authorisation from the Court, which requires time and money, and may involve situations where the represented person themselves does not want contact with a person, or where there is clear evidence of harm resulting from contact with a person. Any such

47 Issues Paper at [10.85(a)].
48 Issues Paper at [10.85(b)].
49 Issues Paper at [10.85(d)].
50 Issues Paper at [10.85(e)].

prohibition should be restricted to situations which fall outside those circumstances.

Q29: Are there any personal decisions that should be expressly authorised by the court? If so, what are they?

9.36 As noted above, the Court would need to expressly authorise any personal decision which a representative is prohibited from making.

9.37 The Issues Paper considers whether a representative should only be able to consent to detention in residential care if they are specifically empowered to do so.[51] We do not think it is practically feasible that every move into residential care needs to be authorized by the Family Court. While we note that this decision often leads to the initial application being required to enable the rest home admission to be processed, requiring authorisation of the Family Court in all instances would add significantly to the Court's workload and would be an unrealistic option. However, this could be a decision that is required to be reported on in a subsequent review.

Q30: Is any reform required to the property decisions that must be expressly authorised by the court? If so, what?

9.38 The current practice of the Court, which requires applications for the appointment of property managers to specify the powers needed, is consistent with the least restrictive intervention principle. A new Act should specify that the Court must grant such powers only as needed (consistent with the least restrictive intervention principle). In such circumstances, we do not believe authorisation is needed for the sale or purchase of a property over the specified sum if the Court has specifically granted the property manager the power to sell and/or purchase a property.

9.39 We also consider that any property decisions which raise an actual or potential conflict of interest (whether due to the potential direct benefit to the representative, or to others with whom the representative has a relationship) ought to require the authorisation of the Court.

9.40 As in our 2023 submission, we also note 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, rather than the less onerous application for an order under section 11. 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.[52] These sums have clearly not kept in pace with inflation, benefit increases and the current value of property in New Zealand. In terms of improving efficiencies in the Family Court and for applicants, this would be relatively easy to address.

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51 Issues Paper at [10.86].

52 PPPR Act, schedule 1, clause 3.

Q31: How frequently should periodic reviews be held?

9.41 There are differing views on this issue. Some lawyers are strongly of the view that five-yearly reviews are appropriate, with an option for a 10-year order in circumstances where a person will not regain capacity. They believe the three-year reviews are onerous, unless there is a specific reason why an earlier review is required (for example where there is a high likelihood a person will regain capacity).

9.42 Others believe reviews by the Court are the only means of overseeing and monitoring the extent to which a legal guardian appointed to act on behalf of a relevant person is meeting their duties and obligations, and of assessing the appointment remains necessary. They believe it would be appropriate for:

(a) A first review to occur within one year (while acknowledging the Court may not have capacity/be sufficiently resourced to accommodate such a timeframe).

(b) Further steps to be taken on a yearly basis to consider the circumstances of the relevant person, and to assess whether their rights, will and preferences are being upheld. However, it is submitted that this role would be better placed with an agency specifically established for this purpose, rather than the Court.

(c) The time period between Court reviews to vary depending on the specific circumstances of the represented person. In circumstances where a person may regain decision-making capacity within a certain period, a review should occur within that period. However, where the person's decision-making is permanently affected and very unlikely to change, a period of five years may be appropriate.

9.43 We also agree a representative should be required to apply for review if the circumstances that gave rise to the arrangements have materially changed, as suggested at [10.110] of the Issues Paper.

Q32: What should the court consider when carrying out a periodic review?

9.44 When carrying out a periodic review, the court should:

(a) Reassess the relevant person's circumstances and capacity;

(b) Consider the relevant person's will and preferences with respect to the arrangement, and decisions made by the representative;

(c) Consider whether there remains a need for the order and related arrangement;

(d) Consider whether a less intrusive option might now be available;

(e) Consider any specific significant decisions for which the representative requires court authorisation or guidance.

9.45 We also note that under the current Act, an application on review, and the evidence required to support the application, is the same as for a new application for the appointment of an adult legal guardian. While such a requirement can be appropriate, and provides useful safeguards, there are other occasions where the process and paperwork can be unnecessarily burdensome, particularly where a person's living and health situation has not, and is not going to change, and all parties are satisfied with the existing arrangements.

9.46 The current Act also typically imposes the requirement to seek a review on the welfare guardian. Lawyers have observed that obligation is not always well understood or actioned, resulting in orders expiring without review, and providers or welfare guardians needing to submit entirely new applications after expiry.

9.47 Consideration should therefore be given to the possibility of a separate and simplified 'fast-track' type pathway for review in cases where a reduced level of scrutiny is appropriate, and/or in interim periods between full Court reviews. In these cases, there may be a role for the Lawyer for the Subject Person to carry out an initial review, and make recommendations to the Court about more a fulsome review if required. Specific guidance on what the Court (or other party) is to consider on review would also be helpful.

9.48 Finally, it would also be helpful for there to be an automated resource/system from the Courts that provides reminders to relevant parties of upcoming reviews, and informs them about the date of expiry of the orders without such review.

Q33: Is there anything else you would like to tell us about the duration of arrangements, reviews of arrangements or rights of appeal?

9.49 We agree a right of appeal should remain alongside the review function. However, we note that for many relevant people, this is not an accessible mechanism. In fact, appeals against decisions under the PPPR Act are rare, and are usually made by the representative rather than the relevant person. Consideration should be given to how a right of appeal could be made more accessible to a relevant person, including the articulation of any circumstances in which a Lawyer for the Subject Person might consider appealing on behalf of the relevant person.

9.50 We also note that, in most cases, PPPR Act applications and reviews are considered on the papers, and the relevant person does not actively participate in the proceedings, except via the Lawyer for the Subject Person. Any new Act and/or practice note should properly address the relevant person's right to participate in proceedings, as well as the role of the Lawyer for the Subject Person in representing the relevant person.

10 Chapter 11: Court-appointed representatives: Other aspects

Q34: Do you think that welfare and property representatives should be separate roles? Why or why not?

10.1 If there are to be different tests for property and welfare guardians (as suggested at [9.24] above), there should be separate roles with the tasks of managing property or making welfare decisions. It should be possible for one person to carry out both roles. Keeping the roles separate also gives the ability for a person who has the appropriate skills to be appointed. For example, a person who may be appropriate to be appointed as a welfare guardian may not possess the skills necessary or conducive to a property manager role.

Q35: Do you think a court should be able to appoint more than one representative? If so, should this be for different decisions and/or the same decisions?

10.2 The Court should be able to appoint more than one representative for both different decisions and/or the same decisions. The Court should generally be able to appoint two representatives, with the discretion to appoint more than two representatives where appropriate (whether for the same or different classes of decisions), having regard to:

(a) The purpose and nature of the decision-making role;

(b) The role the proposed representatives already play in the relevant person's life; and

(c) The social and cultural context.

10.3 This could be useful where, for example, a relevant person's parents have been involved in that person's personal care and welfare their whole lives, and continue to undertake that same, joint role, despite the person now having reached the age of 18. In those circumstances, the relationship the relevant person has with their parents, and the role both parents play in supporting their decision-making, is highly relevant to the Court's consideration of whether they both ought to be appointed, despite a presumption in the current Act that more than one welfare guardian is not appointed for any person unless the Court is satisfied it would be in the best interests of the person to do so.[53]

10.4 The court would also need to be satisfied that the two representatives would be able to cooperate while carrying out the role.

10.5 It would also be useful for one person to have the ability to delegate their role to the other for a period of time, for example while they are overseas.

Q36: If there are two or more representatives, how should they work together? Do you think a new Act should contain statutory obligations for multiple representatives or allow the court to decide what the obligations are?

10.6 Some practitioners are of the view that representatives should be required to act jointly unless the order specifically states they may act severally and on what basis.

10.7 Others, however, believe the extent to which the representatives are required to exercise their decision-making powers jointly or severally should be determined by the Court. If this approach were to be adopted, these practitioners believe the court should be required to specify the details of the order, including the representatives' responsibilities and powers for different matters, and dispute resolution procedures. This would allow for the way in which the representatives work together to be tailored to the circumstances in a way that reflects the relevant person's will and preferences, and the reasons for the appointment of those representatives.

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53 PPPR Act, s 12(6).

Q37: What should the court consider when determining whether a representative is suitable?

10.8 We believe criteria listed at [11.26] of the Issues Paper are appropriate. We also consider there should be a fifth criterion which requires the courts to consider any other relevant matters.

Q38: Should any factors be determinative? If so, what are they?

10.9 The representative's ability to carry out the role should be a determinative factor. However, we do not believe any of the four other factors should be determinative. In particular, we do not consider conflicts of interest should be a determinative factor for the reasons given in the Issues Paper (including because conflicts can be appropriately managed as discussed in other ways).[54]

Q39: Should there be any prohibitions on who can act as a representative? If so, who should be prohibited from acting as a representative?

10.10 A person should be prohibited from acting as a representative:

(a) If there is or has been a protection order (including a temporary protection order) against them in favour of the relevant person.

(b) If they have been convicted of an offence or subject to a restraining order in relation to the relevant person.

(c) In relation to property decisions, if they have been convicted of an offence involving fraud or dishonesty, or if they are a disqualified director.

10.11 We do not consider that corporations should be prevented from acting as a representative, including in relation to personal care and welfare. However, any such corporations ought to be accredited in some way to support relevant people, or to make decisions for them, in order to undertake this role.

Q40: Should there be other matters that do not result in prohibitions on acting but must be drawn to the court's attention (and that mean a representative may not continue acting until the court has considered it)?

10.12 Matters that should be drawn to the court's attention for consideration include:

(a) Whether a person has been under a Compulsory Treatment Order, or an order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, the Mental Health (Compulsory Assessment and Treatment) Act 1992, or the Substance Addiction (Compulsory Assessment and Treatment) Act 2017.

(b) Whether a person has been declared bankrupt.

(c) Concerns that the representative is not acting in accordance with their duties and obligations, including concerns about abuse, neglect or exploitation of the relevant person.

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54 Issues Paper at [11.36] – [11.37].

10.13 If criminal convictions are not classified as a ground for prohibition (as suggested at [10.11] above), it would also be appropriate to draw such convictions to the court's attention.

Q41: Do you agree the age limit for representatives should be lowered to 18? Why or why not?

10.14 We agree the age limit for a representative should be lowered to 18. In Aotearoa New Zealand, 18-year-olds can make almost any other decision, and many 18-year-olds take on a caregiving role for family members. The age of 18 would also be consistent with the age in most family law statutes.

Q42: Should the court ever be able to appoint a person younger than 18 as a representative? Why or why not?

10.15 The age should not be lower than 18 given that there are other significant restrictions on what under 18-year-olds can do (such as voting).

Q43: Are there any issues with the current powers of welfare guardians or property managers that a new Act should address?

10.16 A key issue that arises regarding any order under the PPPR Act is enforcement of welfare guardian orders (noting Police do not currently have any powers under the PPPR Act to ensure compliance with orders).

10.17 There is also a lack of clarity around whether a welfare guardian has the power to authorise the use of restraint and/or detention of a relevant person. Some clarity could be useful, for example, where the relevant person needs to be transported from one place to another in a car with locked doors, or where the relevant person leaves a residential care facility, and attempts are made to return that person to the residential care facility, often with police involvement.

10.18 The Issues Paper also touches on the issue of whether a representative should be able to obtain information about the relevant person.[55] In New Zealand, the status of a welfare guardian or property manager as a representative for the purposes of the Privacy Act 2020 and Health Information Privacy Code,[56] is generally well understood. Representatives also have legal status as a 'consumer' under the Code of Health and Disability Services Consumers' Rights[57] (although some practitioners are of the view that, in practice, only welfare guardians tend to enjoy these rights). These provisions could assist in determining whether any additional statutory provisions are needed to supplement the existing powers.

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55 At [11.57].

56 Privacy Act, s 33 and Health Information Privacy Code, clause 4(1).

57 See clause 4, which defined 'consumer' as "a health consumer or a disability services consumer; and, for the purposes of rights 5, 6, 7(1), 7(7) to 7(10), and 10, includes a person entitled to give consent on behalf of that consumer".

Q44: What duties should a representative have?

10.19 We agree the duties listed in [11.62] of the Issues Paper should be included in a new Act. A new Act should also specify the duties we have discussed at [9.15] above.

Q45: Do you think these duties should be set out in statute?

10.20 Yes, these duties should be set out in the legislation.

Q46: When should financial reports be required?

10.21 We agree with the options identified at [11.69] of the Issues Paper to ease financial reporting burdens. In the Law Society's view, there is an urgent need to amend the monetary reporting thresholds in the PPPR Act. We have recently written to the Ministry of Justice seeking reconsideration of these reporting thresholds, and advocated for an increase to the thresholds in our 2023 submission.[58]

10.22 Some lawyers have also queried whether it is appropriate for financial statements to be filed in the Family Court, and then the Public Trust – they believe it would be more appropriate for those reports to be submitted directly to the Public Trust, and for the Public Trust to then examine and report on those statements to the Court. Others, however, believe financial statements should continue to be filed in the Family Court with those statements then being referred to the Public Trust for audit purposes.

10.23 Alternatively, if a new oversight body is established (as discussed in chapter 16 in the Issues Paper), this body could replace the role of the Public Trust and the Court, and reports could be filed with this new body.

Q47: Are there any non-financial decisions which should be subject to record keeping and reporting requirements? If so, what?

10.24 Significant personal care and welfare decisions like placing a person in a rest home, a move of rest home, consenting to significant health intervention[59] could be part of the review process, with the representative being required to set out significant decisions and the reasons for those decisions.

10.25 Some lawyers have also expressed support for introducing a requirement for representatives to keep records relating to such significant decisions. This could include, for example, records about:

(a) Supporting the represented person to make the decision;

(b) Considering the represented person's will and preferences; and

(c) Consulting others about the represented person's will and preferences.

10.26 However, in passing on this feedback, we draw the Commission's attention to the concerns outlined in [12.29] below.

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58 At [11.2].

59 Also see s 98(6) of the PPPR Act, which states "a significant matter relating to the donor's personal care and welfare means a matter that has, or is likely to have, a significant effect on the health, well-being, or enjoyment of life of the donor (for example, a permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure)".

Q48: In decisions where the representative has a conflict of interest, should they be subject to record-keeping and reporting requirements on how the conflict was managed?

10.27 We believe that all key or significant decisions should be recorded. For example, if the representative is purchasing any property from the relevant person, there should be documentation to illustrate how the conflict of interest has been managed.

Q49: What options should be available if a representative does not act properly or no longer meets suitability requirements?

10.28 A relevant person should be able to apply to the court for oversight and to remove the representative if that person does not act properly or the relevant person no longer wants that person as their representative. However, this will be difficult or impossible if there is a total lack of capacity. In such situations, some lawyers believe certain other parties should also have the ability to apply to the court for a review. This could include a manager of a rest home or care facility, a member of the person's whānau or family, or any of the people included in section 103 of the PPPR Act.

10.29 However, others in the profession believe applications to the court involve a cumbersome process. They have observed that only large public sector organisations are likely to make such applications, and only in circumstances where there are serious concerns. Therefore they support having a separate oversight body (as discussed in chapter 16 of the Issues Paper) which would be able to receive and investigate concerns about representatives, and apply to the Family Court to remove a representative.

10.30 We also consider that there is insufficient information and guidance available to representatives, and to professionals working with represented people. If a stand-alone agency is established, as discussed in chapter 16 of the Issues Paper, this agency could also provide oversight of welfare decisions, and provide guidance and assistance to volunteer representatives who are unable to ascertain the will and preferences of the relevant person.

Q50: When should it be possible to bring a civil claim against a representative?

10.31 We agree representatives should be statutorily protected unless it is shown that they have acted in bad faith or without reasonable care (as currently provided for in sections 20(1) and 49(1) of the PPPR Act). Civil remedies should then be available to a relevant person if a representative's actions are taken in bad faith or without reasonable care.

10.32 However, some lawyers believe it should also be possible to bring civil claims against representatives for wilful non-compliance and recklessness (as suggested at [11.88] of the Issues Paper).

Q51: When courts appoint a representative for care and welfare decisions, should volunteer or independent representatives be appointed only as a last resort?

10.33 While it is preferable not to have volunteer representatives in a 'will and preferences' system, because it is difficult for a stranger to ascertain will and preferences, volunteer representatives can still provide a useful role. This is particularly so in high-conflict situations where a neutral person is more appropriate in a representative role. In many

cases where there is no family to undertake the representative role, appointing a volunteer as the representative is the only option. However, we reiterate this will likely conflict with the 'will and preferences' model as in effect the representative will be acting on a 'rights and best interests' decision-making model.

10.34 In our view, there should be criteria for the vetting of volunteers, and perhaps a different statutory standard to assess their suitability to make decisions in effect for strangers.

Q52: What should happen if a representative stops acting?

10.35 Lawyers have observed that representatives will usually apply to be removed as the welfare guardian or property manager if they wish to stop acting. However, where the welfare guardian or property manager simply stops engaging, it is often the case that an application is made for personal or property orders by a health and disability provider (usually public sector) and/or the Public Trust.

10.36 We believe that there should be an option to appoint successor representatives akin to the appointment of a successor attorney in an EPOA.[60] That would make it easier for a representative to resign and the relevant person to still have representation. If a representative no longer wishes to act, then they should be permitted to disclaim (on the same basis as exists for an EPOA currently).[61] If unavailable or incapacitated themselves, then an approved person should be able to advise the court with the matter being referred to a judge for directions.

Q53: Should representatives acting in relation to welfare matters be entitled to remuneration from the represented person?

10.37 There are different views on this issue. While some lawyers think that welfare guardians should be able to be reimbursed for reasonable expenses, they do not believe that welfare guardians should receive payment for their role. This could lead to the role being abused.

10.38 Other members of the profession very much prefer the view that where there is no suitable person available to act as the representative, and an independent person or corporation is appointed, they ought to be entitled to remuneration. However, this raises the question of who is then responsible for paying the independent representative, particularly in circumstances where the represented person does not have sufficient assets to make the necessary payments themselves. We note the Public Trust receives Government funding to provide services to people who only have a few assets but require a property manager. However, there is no equivalent funding scheme for welfare guardians, because under the current system, welfare guardians are only able to be reimbursed for their expenses.

60 PRRR, s 95(5).
61 PRRR, s 104.

11 Chapter 12: Court-ordered decisions

Q55: Are there any circumstances where you think a court order would be more appropriate than a court-appointed representative?

11.1 In circumstances where there is no one willing, available or suitable to undertake the role of court appointed representative then a court order would be an appropriate alternative for consideration.

11.2 Where a relevant person is unable to make a particular decision, but able to make decisions in the other areas of their lives, a tailored court order may be more appropriate. It may also be consistent with the concept of least restrictive intervention for a court order to be made for a specific issue, such as a medical procedure, rather than more extensive intervention by way of a court-appointed representative.

Q56: Should the law provide that either a court-ordered decision or a court-appointed representative is generally preferred? If so, which type should be preferred?

11.3 The Law Society considers that generally a court-ordered decision should be preferred over the decision of a court appointed representative as it effectively amounts to a narrower intervention into the life of the relevant person. However, whether a decision should be a court-ordered decision, or one made by a court-appointed representative (or both) depends on the particular situation of, and circumstances surrounding, the relevant person.

Q57: Should the court be able to make decisions about both personal and property matters? Why or why not?

11.4 The Law Society considers it to be essential that a court has jurisdiction in respect of both personal and property matters. Relevant persons can face issues with either or both personal and property matters. In such circumstances a broad ability to make orders covering both matters is necessary to ensure that an appropriate framework of orders can be made to address all the situations in which orders are required.

Q58: Are there any other issues with court-ordered decisions we should know about?

11.5 A key difficulty with court-ordered decisions under the current legislation is an absence of enforceability. There is no current mechanism for Police involvement or other enforcement means. We support an enforcement mechanism in any new legislation.

11.6 The pathway to obtaining orders under the current legislation can cause significant delays due to there being no without notice application procedure. We support the availability of a without notice application process, akin to a legal threshold for making a without notice application in, for example, the Care of Children Act, in any new legislation.

12 Chapter 13: Enduring Powers of Attorney

General comments

12.1 The Law Society notes that the emphasis in the paper appears to be on personal care and welfare decision-making and on circumstances where capacity has been lost. Contrary to what appears to be suggested in the paper,[62] many donors of EPOAs in relation to property elect to have EPOAs in relation to property come into effect while they still have mental capacity, to enable another person to sign documents and deal with property in their place in certain situations (such as absences overseas). Lawyers have observed that many clients' EPOAs in relation to property will take immediate effect, because of their inability to interact with certain service providers or institutions. For example, they might have limited computer access or skills, and are not able to use email or online application processes that are preferred by banks, Inland Revenue, and other organisations.

12.2 While the Law Society agrees it is necessary to protect donors who have lost capacity, it is important to bear in mind that EPOAs in relation to property serve a dual, and in some cases highly commercial, purpose. Any reforms must reflect that. In particular, any reforms should not infringe individual property rights (for example, by prioritising family decision-making over the individual), and should provide a consistent, universal and practical framework for how an individual's property is dealt with under an EPOA.

12.3 A collective decision-making model may in many circumstances be inappropriate if applied to an EPOA in relation to property. Time may be of the essence to preserve property that is threatened, or to sell or acquire property on the most favourable terms in the interests of the donor. Uncertainty over who has power to deal with property, particularly real property, may cause significant confusion and an undesirable level of disputes. We agree that the donor should be able to specify attorneys' consultation obligations, and consider that should be sufficient.

Q59: How could EPOA forms be updated to improve their usability?

12.4 Against the backdrop of our general comments above, our view is that the process for the creation of EPOAs should be consistent and universal, and should be as streamlined and accessible as possible while adequately protecting donors. Adding additional complexity and safeguards to those that already exist may add little further protection, and risk making the creation of EPOAs even less accessible than they currently are.

12.5 The Law Society does not support combining the EPOA forms relating to property and personal care and welfare. Those documents are often used in different ways and for different purposes. For example, a copy of an EPOA in relation to personal care and welfare will often need to be provided to a residential care facility and a copy of an EPOA in relation to property will often need to be provided to a bank. It is not necessary and may not be appropriate for the bank also to have the details of the personal care and welfare EPOA and the residential care facility to have the details of the property EPOA.

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62 At [13.1] and [13.14].

Q60: Do you agree EPOAs should continue to be witnessed? If so, who should be able to act as a witness?

12.6 We support the retention of the requirement that the donor's witness must be a lawyer, an officer or employee of a trustee corporation, or a registered legal executive,[63] to ensure that the witness is appropriately qualified to explain the nature, risks and consequences of the instrument to the donor. Retaining this requirement should also mitigate concerns about noted in the Issues Paper[64] about cultural responsivity – professional witnesses as currently required could be expected to understand the need to refer a donor in need of particular language or other accommodations elsewhere if the professional was unable to appropriately discharge the duties of the donor's witness. It may be appropriate to give more latitude to donors' witnesses to determine for themselves whether they can appropriately witness a donor's signature.

Q61: Other than witnessing requirements, what safeguards should accompany the creation of EPOAs?

12.7 The Law Society supports the retention of:

(a) Sections 94A(7)(ab)(i) and (ii) of the PPPR Act which require that the witness certify that the witness believes on reasonable grounds that the donor understands the nature of the instrument and the potential risks and consequences of the instrument.

(b) Section 94A(7)(b) of the PPPR Act, which requires the donor's witness to certify that they have no reason to suspect that the donor was, or may have been, mentally incapable at the time the donor signed the instrument should be retained.

12.8 We consider that the requirement in section 94A(7)(ab)(iii) that the donor's witness certify that the donor is not acting under undue pressure or duress should be revisited because it could have unintended consequences. Undue pressure or duress could happen at any time, and it may be more likely than not to occur out of the presence of the witness. The witness' certification that there was no undue pressure could then later be used as evidence if the matter was later disputed. For the same reasons, we do not support the introduction of a certification regarding fraud. This is distinct from the certification about mental incapacity in section 94A(7)(b), which is phrased in the negative, and based on an assessment by the witness of the donor themselves.

12.9 In our view, further clarification regarding the independence requirements for witnesses is required. Currently the donor's witness must be independent of the attorney.[65] This may not be possible where the lawyer has acted for members of the family and the donor wishes to appoint the relative as an attorney. It is not clear for many lawyers if the restriction applies if they have acted for the attorney on an unrelated and historic matter.

63 PPPR Act, s 94A(4).
64 At [13.67] and [13.69].
65 PPPR Act, s 94A(4).

Q62: Should EPOAs be able to be created remotely by audio-visual link or using other technology?

12.10 The Law Society supports further work on the possibility of the remote creation of EPOAs but agrees with the concern at [13.65] of the Issues Paper that it could undermine the effectiveness of safeguarding requirements. The Commission may wish to consider whether additional safeguards are required where an EPOA is created remotely.

12.11 We agree that more flexible forms and the ability to remove parts of forms would be desirable, and support the potential for digital creation of EPOAs as set out at [13.65] of the Issues Paper. One approach that could assist in streamlining the creation of EPOAs could be to have a "tick the box" style digital document builder publicly available but lacking the certification or signing pages. The document builder could provide a digital copy of the document to the user, with a final page requiring that it be provided to the witness. The witness could then assist the donor in refining the document as necessary, and affix the certification and signing pages. The need to ensure integrity and safeguarding would require the professional witnessing of the donor's signature, as required presently.

Q63: How can the process for making EPOAs be more accessible and culturally responsive?

12.12 We consider there is a need for better provision of information and guidance on EPOAs. There is also a fundamental gap in the absence of an agency that is able to provide such information and guidance. We suggest there be an agency responsible for the development of independent resources regarding EPOAs, and for providing support for decision-making regarding the appointment of EPOAs, which is both disability and culturally responsive.

Q64: Are there any issues with tailoring the scope of an EPOA?

12.13 The current Act prohibits a donor from appointing more than one attorney for personal care and welfare (although a successor attorney may be specified). This is inconsistent with the proposal discussed in Q35 above, to give the court the power to appoint more than one welfare guardian. We invite the Commission to consider whether the two regimes should be consistent in this regard.

Q65: Do you agree that loss of decision-making capacity is a sufficient trigger for an EPOA to come into effect so that the attorney may exercise decision-making powers under an EPOA? Should donors be entitled to specify a different trigger?

12.14 The Law Society considers that it remains appropriate:

(a) For EPOAs to be triggered, in the case of personal care and welfare, when the donor has lost capacity. Donors should not be able to specify that an EPOA for personal care and welfare comes into effect immediately, regardless of whether the donor has decision-making capacity. This would cause significant difficulties in providing health and disability services, as identified in [13.93] of the Issues Paper.

(b) For the donor to remain able to choose whether an EPOA in relation to property can be used while the donor has capacity, or only once the donor has lost capacity.

12.15 We would not support the ability of the donor to specify any other triggering event.

12.16 We also note the comments in the Issues Paper about circumstances where the donor's decision-making capacity fluctuates.[66] While it is true that capacity may fluctuate, the threshold for loss of capacity as currently assessed is high. Once a person has passed that threshold, allowing for fluctuating capacity in some way could lead to errors (including potentially an individual lacking capacity being facilitated to make decisions) and more confusion about when the EPOA is in effect than presently, as well as delay, which may not be in the donor's best interests.

Q66: Once an EPOA comes into effect, should an attorney be able to act on any matter or should the attorney's powers be activated on a case-by-case basis? Why?

12.17 An EPOA should only empower the attorney to make a particular decision, or a group of related decisions only.

Q67: When should a professional be required to determine whether the person does not have decision-making capacity?

12.18 We support retaining the current requirements in section 98(3) of the PPPR Act, which:

(a) Require personal attorneys to obtain a certificate of incapacity from a relevant health practitioner before making decisions about 'significant matters' (as currently defined in section 98(3) of the PPPR Act,[67] as this is an important mechanism which helps ensure the donor's rights are upheld.

(b) Permit personal attorneys to act with respect to all personal care and welfare matters which are not 'significant matters',[68] provided they have a reasonable basis for believing that the donor is mentally incapable.

12.19 We also support giving donors the ability to identify in an EPOA other decisions the donor views as significant (i.e., in addition to those currently identified in section 98(3)) as a further exercise of a donor's autonomy, and to help clarify the donor's will and preferences.

Q68: Do you agree that the decision-making framework for attorneys should be the same as that for court-appointed representatives? Why or why not?

12.20 The Law Society supports the alignment of the decision-making framework between court-appointed representatives and attorneys appointed pursuant to an EPOA. By entering into an EPOA, a person has exercised their will and confirmed their preference for who should represent them when the EPOA is triggered. A court-appointed

66 At [13.76] – [13.80].
67 See PPPR Act, s 98(3).
68 "Significant matter" is defined in section 98(6) as a matter that "has, or is likely to have, a significant effect on the health, well-being or enjoyment of life of the donor (for example, a permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure)".

representative is appointed by order of the court. Aside from the mechanism by which they are appointed, the roles and responsibilities of the court-appointed representatives and attorneys are the same. It would be confusing to have different frameworks, and could give rise to inconsistencies in the approaches to decision-making by adult guardians.

Q69: Should the donor be able to specify the attorney's consultation obligations? Why or why not?

12.21 We believe a donor should be able to tailor an EPOA as they see fit. We also refer the Commission to our general comments under Chapter 13 regarding property EPOAs.

Q70: How could a person's wishes best be captured when creating an EPOA?

12.22 Some lawyers have indicated they do not support having a legislative framework for the creation of a statement of wishes, in addition to an EPOA or advance directive. They believe donors should be made aware of the need to ensure that their attorneys are aware of their wishes and preferences at the time of creation (which the current professional witnessing requirements assist with), and adding an additional document into the legal framework could create confusion and complexity.

12.23 Others believe it would be helpful for the law to formally recognise statements of wishes, as discussed further at [14.15] below. In a health context, they also note that advance care planning, which is a well-established concept akin to a statement of wishes,[69] could be extended, or linked into the process involving the appointment of an EPOA.

Q71: Should donors be able to appoint a monitor? Why or why not? If so, what powers should the monitor have?

12.24 The Law Society does not believe it is necessary for donors to appoint a separate monitor. The PPPR Act already empowers the donor to appoint people who can request information regarding the attorney's dealings in respect of both property and personal care, and use that information to monitor the attorney's actions.[70]

12.25 Current issues around lack of monitoring are often due to a lack of understanding of, and compliance with, the consultation and information sharing obligations of attorneys. We note the PPPR Act provides that a donor of a property EPOA must be advised that they can stipulate how the attorney's dealings are to be monitored,[71] and that an attorney must respond promptly to requests for information.[72] The Law Society supports better education and use of these existing provisions to monitor the actions of attorneys, and we support the inclusion of similar provisions in the new Act.

12.26 Alternatively, some lawyers have suggested the new Act could provide that the reporting obligations of EPOAs are the same, as a matter of law, as those relating to court-appointed representatives.

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69 Advance care planning is a process of thinking about your values and goals and what your preferences are for current and future health care (see https://www.myacp.org.nz/).

70 PPPR Act, s 99B.

71 PPPR Act, s 94A(6)(c)(ii).

72 PPPR Act, s 99B.

Q72: Should financial attorneys be subject to a reporting requirement for financial records? Why or why not?

12.27 The Law Society supports the retention of the requirement that property attorneys keep records (and the ability to review those records) as important safeguards. We do not support the imposition of a requirement that those records be audited or filed by attorneys appointed under an EPOA in relation to property. In many cases, this is likely to add unnecessary expense and complexity in a situation where the donor has a small and dwindling personal asset base, and the person undertaking the role is a family member or friend.

Q73: Should attorneys keep records of some types of personal decisions? If so, which matters should they be required to keep records for and what should be recorded?

12.28 The Law Society is unsure what purpose the imposition of a record keeping requirement on an attorney appointed under an EPOA in relation to personal care and welfare would serve. Not only are such attorneys even more likely than those appointed under an EPOA property to be serving in a personal capacity (spouse, child or other close relative rather than professional) but most decisions made in that capacity, and certainly all major decisions, will already be a matter of medical record. Bearing in mind that attorneys in relation to personal care and welfare are often making decisions for a loved one in highly distressing circumstances, careful thought and justification is required before imposing additional obligations.

13 Chapter 14: An EPOA register and notification requirements

Q75: Do you think there should be a register of EPOAs? Why or why not? Q76: How do you think a register should operate?

13.1 We agree a voluntary register could help address some of the issues identified at [14.3] – [14.10] of the Issues Paper.

13.2 We refer the Commission to the comments set out in our 2023 submission,[73] and reiterate that any cost associated with registration would create an additional barrier to the creation of EPOAs, and should be avoided, as should mandatory registration.

13.3 If a voluntary registration scheme is to be introduced:

(a) We agree the register could include the information listed at [14.37] of the Issues Paper.

(b) We consider that outside the relevant person, their attorney and approved registered professional users (such as lawyers and healthcare professionals) the donor should have control over who is entitled to access the register, and their EPOA documents and related information.

(c) Any concerns about maintaining the privacy of the donor could be addressed by only a limited amount of information being available as specified, to the limited group of people mentioned in (b) above.

73 At [7.6] to [7.16].

(d) It could also be helpful to have the ability to include other relevant instruments such as wills and advance directives in the register (although we note there may be issues of currency around an advance directive, as they are usually drafted either by an individual themselves, or with health professionals, and it is reasonably rare that lawyers are involved in drafting these).

Q77: Do you think a new Act should include notification requirements for EPOAs? Why or why not? Q78: What should the features of a notification requirement be?

13.4 We believe the donor should be able to decide who should be given notice, and the circumstances where notice is appropriate. We do not support mandatory or automatic notification requirements, in part because there may be valid reasons why a donor does not wish to have certain persons automatically notified about changes to their EPOA arrangements.

14 Chapter 15: Documenting wishes about the future

General comments

14.1 In our 2023 submission,[74] we agreed with the Commission that there is a lack of clarity regarding the status and scope of advance directives in New Zealand which should be clarified in law. We suggested that a standalone piece of legislation could provide a more detailed legal framework in relation to advance directives and referred the Commission to the Mental Health Capacity Act 2005 (UK) which provides useful guidance on the validity and applicability of advance directives. We also suggested that consideration should be given to the form an advance directive ought to take (if any), including whether it should be in writing. Finally, we suggested that a register for advance directives may be useful.

14.2 It is disappointing that the current review is only concerned about whether a new Act could clarify how advance directives are considered in decision-making arrangements by representatives and attorneys, rather than addressing the lack of clarity regarding the status and scope of advance directives per se. Including this narrow aspect within this current review puts the cart before the horse so to speak.

Q80: Do you think both court-appointed representatives and attorneys should be able to act on an advance directive? Why or why not?

14.3 The PPPR Act does not currently provide a framework for the use of advance directives although the Law Society notes section 99A of the Act, which gives an attorney the discretion to have regard to an advance directive and to apply to the court for directions, as well as right 7(5) of the Code of Health and Disability Services Consumers' Rights which provides that every consumer may use an advance directive in accordance with the common law.

14.4 Some members of the profession consider that both court-appointed representatives and attorneys should be able to act on an advance directive.

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74 At [9.1] to [9.6].

14.5 Others, however, are of the view that a valid advance directive effectively trumps the role of a representative and attorney because it is a direct expression of a relevant person's consent, or refusal of consent, with respect to a future healthcare procedure, at a time they had decision-making capacity. If this is indeed the case, any analysis in the Issues Paper which focusses on the role of court-appointed representatives and attorneys in acting on advance directives would appear to be flawed, because an advance directive would take precedence over any future decision-making by a court-appointed representative or attorney.

14.6 If so, it would not be up to the court-appointed representative or attorney to decide whether or not they need to act on an advance directive (as contemplated at [15.30] to [15.34] of the Issues Paper); rather, it would be a matter for the health professionals involved in the relevant person's care to determine whether or not the advance directive is valid, and consequently, whether they have a legal obligation to comply with it. If a question arises about the validity of the advance directive, such that health professionals do not consider it appropriate to proceed on the basis of the advance directive alone, the court-appointed representative or attorney should be required to have regard to the advance directive as an indication, perhaps, of the person's will and preferences, noting that, in any event, a court-appointed representative and attorney would not have the power to:

(a) Refuse consent to administering any standard medical treatment or procedure intended to save that person's life or to prevent serious damage to that person's health; or

(b) Make decisions to withhold or withdraw treatment.

Q81: Do you agree that statutory requirements for representatives and attorneys should be the same? Why or why not?

14.7 The Law Society agrees that the statutory requirements for representatives and attorneys should be the same.

Q82: Do you agree that there could be times when a representative or attorney should not follow an advance directive? If so, when do you think not following a directive would be appropriate?

14.8 There may well be situations when a representative or attorney should not follow an advance directive, including situations covered by the examples provided in [15.47] of the Issues Paper.

14.9 However, in providing this feedback, we note the views of some practitioners that it is for the health professionals involved in the relevant person's care, rather than the representative or attorney, to decide if an advance directive should be followed (as discussed at [14.5] and [14.6] above).

Q83: Should a new Act give more guidance on when representatives and attorneys may choose not to follow or must follow an advance directive, such as by setting out examples?

14.10 In the event that a new Act incorporates advance directives, the Law Society considers examples could be useful but notes again the need for the clarification of the legal basis for advance directives.

14.11 We also note the alternative views held by some lawyers, as discussed at [14.5] and [14.6] above. If the Commission agrees with those views, it could also be useful for the new Act to specify that:

(a) Representatives and attorneys cannot make decisions which override a valid advance directive, but

(b) Where there are concerns about the validity of an advance directive, representatives and attorneys may have regard to this as a possible indication of the person's will and preferences.

Q84: Should we be considering any other issues about how advance directives are considered under a decision-making arrangement?

14.12 The Law Society considers it appropriate for there to be a broader review of what advance directives are and are not, and how they should be taken into account in all respects, not just in respect of relevant persons within the context of new legislation to replace the PPPR Act.

14.13 It is appropriate for this review to be conducted before a new Act to replace the PPPR Act is introduced.

Q85: Would it be helpful if a new Act provided for people to make a statement of wishes or referred to these kinds of statements? Why or why not?

14.14 There are significant differences between an advance directive and a statement of wishes. As noted at [12.24] above, some lawyers do not support a legislative framework for the creation of a statement of wishes as in addition to an EPOA or advance directive. They are concerned that incorporating a provision for a statement of wishes into a new Act could cause confusion with respect to the two concepts. In so far as EPOAs are concerned, they also note that, in any event, the current forms provide for the donor to outline their wishes at least to an extent.

14.15 However, some lawyers consider it would be helpful for the law to recognise or provide for statements of wishes by requiring attorneys and representatives to consider them (if they exist). They believe such statements could, and should, extend beyond healthcare decisions.

14.16 Noting that there are differences of opinion amongst the profession, in the event that a statement of wishes is to be permitted under a new Act (either in respect of health care matters or property or both) then the Law Society considers:

(a) It necessary for the Act to provide clear guidance on whether such a statement should or must be considered by an attorney or representative (noting our views on this at [14.17] below).

(b) Such statements should be set out in a different document or form from any advance directives (which are currently based on health care, support and disability services).[75] It is important to recognise the two are fundamentally different, both in their nature, in terms of what they express, and the extent to which they may be legally binding. We also note advance care planning is very much focused on care and support/health and disability service provision. If statements of wishes were to extend to property and finance matters, it would be an odd, and arguably inappropriate, mix to include statements relating to health and disability care and support in the same document or form.

(c) The Act should not prescribe a standardised form for making a statement of wishes. However, guidance and templates outside of a new Act could assist in this regard.

Q86: What safeguards (if any) do you think are needed in making a statement of wishes? Why?

14.17 The Law Society does not consider safeguards are required in making a statement of wishes as it considers that such statements are not binding. The relevance of such a statement, the weight to be placed on it and the extent to which it reflects the will and preferences of the relevant person is a matter for the representative or attorney to consider at the relevant moment in time. In this respect, the extent to which others were involved at the time the statement was drafted (for example, an accountant, lawyer or other professional in respect of property, or a medical professional in respect of healthcare planning) and/or consultation with others (such as family or whānau) would be relevant to the weight that could be placed on such a statement.

Q87: Should a statement of wishes always be followed? If not, in what situations might it be acceptable or appropriate not to do so?

14.18 As noted above, the Law Society considers that a statement of wishes is not binding. Such a statement is an expression of wishes rather than a directive as to what must occur. A statement of this kind may however be a relevant factor for the representative or attorney to consider in respect of the will and preferences of a relevant person.

15 Chapter 16: Practical improvements and oversight

Q88: Do you think the availability and accessibility of information about decision-making arrangements should be improved? If so, how?

15.1 The Law Society believes that there is a clear need for more publicly funded information and education to be provided to the community regarding decision-making arrangements and related processes in respect of any new legislation. There are a range of ways in which this could be achieved, including better use of community law centres, and more engagement or involvement with existing groups and services in the

[75] We also do not agree advance care planning documents presently allow for advance directives and statements of wishes being in one document (as noted at [15.73] of the Issues Paper). The advance directive page/document is in fact separate from the advance care plan page which precedes it.

community, such as the Citizens Advice Bureau and Age Concern. If more information was provided to these and other similar organisations, this could significantly assist with reaching out to the community. The same information could also be provided by any publicly funded agency established under new legislation.

15.2 The information should be:

(a) Conveyed in plain language.

(b) Available in a range of languages, including in te Reo, New Zealand Sign Language and languages of the main recent migrant groups.

(c) Set out in a manner that is concise and easy to follow and understand (for example by using bullet points and short headings).

15.3 The Ministry of Justice website needs significant improvement in respect of the forms and information provided. The provision of better templates (such as for financial reporting) may be of considerable benefit. We discuss below the suggestion of an information pack which includes all the information required under this area of law.

15.4 We note that the forms in respect of EPOAs have been amended in recent years to make these easier for people to use. The forms could be further improved and made more concise (noting our comments under Q59 above). It would also be helpful to have additional information and guidance for representatives and attorneys attached to EPOA forms as explanatory notes.

Q89: Do you think the information and guidance available for people acting as representatives or attorneys should be improved? If so, how?

15.5 The Law Society considers the information and guidance for people acting as representatives or attorneys needs to be significantly improved. More detailed information should be provided to appointees by the court at the time that orders are made. This is particularly relevant given the increasing numbers of self-represented litigants appearing in the Family Court.

15.6 This information could be contained in a detailed information pack, which explains:

(a) How to apply to the court;

(b) The types of orders that can be made;

(c) Reporting requirements;

(d) Guidance on how to prepare reports and statements;

(e) A clear identified pathway as to where and how reports and statements are to be filed;

(f) Guidance and information on the audit process; and

(g) The costs in respect of managers' statements.

15.7 We also agree with the additional options for improving information and guidance available to representatives identified in [16.12] of the Issues Paper. However, we note that any training for representatives and attorneys (as suggested at [16.12(d)] of the Issues Paper) should be voluntary, and not compulsory.

15.8 In addition, any oversight body established under new legislation could also have a role in the provision of services to advise and support representatives and attorneys. Such a service could include a contact centre available to assist and answer questions from representatives or attorneys (similar to that discussed in [16.12(e)] of the Issues Paper.

15.9 Any new legislation could also have more information on the roles of attorneys and representatives set out in the schedules to the Act.

Q90: Do you think the training and guidance for professionals who conduct decision-making capacity assessments should be improved? If so, how?

15.10 The Law Society agrees it could be helpful to have more guidance and training of the type outlined in [16.15] of the Issues Paper. At the same time, we note there is a clear need not to overreach in respect of guidance for professionals who also have their own professional training requirements and guidelines. For example, the legal profession has its own CPD requirements, including those who are acting in court-appointed counsel roles. We are aware that other professionals also have training and guideline requirements specific to their profession. Any additional training and guidance should be provided in a way that does not conflict with or impact existing guidance and training.

Q91: Do you think a new Act should have an accompanying code of practice? If so, how do you think the code of practice should be developed and operate?

15.11 A code of practice, while providing a mechanism to formalise guidance and oversight, carries a risk of overcomplication and the addition of more compliance costs for both professionals and care providers, including the costs of administration.

15.12 The Law Society is concerned about how a code of practice would be monitored and by whom. We agree with the matters the Commission has identified at [16.19] of the Issues Paper that would need to be considered, including the wide range of professions such a code might cover. A code of practice, if implemented, would also be required to be a part of a regulatory process, across a number of different professions. We agree with the Commission that developing a code of practice may be more technical and complicated that some of the other options identified in the Issues Paper.

15.13 Health and legal professionals already have professional guidelines and standards under their governing legislation and organisations. For example, a lawyer is subject to numerous professional duties and obligations, and is regulated by the Law Society. In addition, lawyers appointed by the Family Court as lawyer for subject person have best practice guidelines which require ongoing professional development. Any complaint about a court-appointed lawyer is subject to a complaints process by the Law Society and the Family Court, and any investigation will be guided by the guidelines and standards set by both the Law Society and the Family Court. These matters require further consideration if a code of practice is to be developed and implemented.

Q92: How do you think the law should increase the availability of people who can act as representatives and attorneys?

15.14 The Law Society is aware of the existence of Welfare Guardian Trusts in various parts of the country and agree with the Commission's comments at [16.25] of the Issues Paper.

15.15 Outside of the Welfare Guardian Trusts, there are significant shortages of volunteers to take on roles of representatives such as welfare guardians, property managers and attorneys. The more complicated processes become, the harder it will be to attract and retain such volunteers. Consideration should be given to the potential for appropriately approved community agencies (such as Age Concern) to be funded to take on the role of a representative or an attorney under a new Act.

15.16 Trusts and/or corporations properly accredited under any new Act should be able to act as representatives and attorneys. The Law Society notes the limited number of trustee companies able to be involved under the current Act and the limitations of the Public Trust's social responsibility role. The legislation could be amended to address these issues to meet the significant needs in the community.

15.17 Any oversight body established under the Act could also have an additional function of providing a representative for a person who does not have anyone available.

Q93: What do you think about a complaints function?

15.18 The Law Society notes that there are a range of current avenues for complaints including not just the Family Court but other agencies such as the Human Rights Commission, the Health and Disability Commissioner and the Aged Care Commissioner.[76]

15.19 There is appeal in a new oversight body being responsible to address complaints about decision-making arrangements whilst still retaining the recourse to Police and a court (or tribunal) should that be appropriate or necessary. The Law Society supports a dedicated complaints and investigative function for such an oversight agency as is available in many other jurisdictions. Any agency established could have power to initiate court proceedings in the Family Court in respect of a relevant person.

15.20 We do not believe that a court (or a tribunal) is the appropriate agency to be the sole pathway of complaint, given the current delays and costs involved in the Family Court. However, there is merit in leave being required for some applications to the court.

15.21 In our view, a complaints system operated by an oversight agency under a new Act would provide an easier way for a relevant person to raise a complaint (including about decisions or non-decisions, and actions of a representative or an attorney), especially for less complex complaints. In addition, it is likely to be more time and cost efficient than pursuing a complaint through a court or tribunal. A range of parties should be able to bring a complaint under this system, including people who have concerns about, for example, the care and support provided by a representative or attorney to friends, whānau or family members.

Q94: Do you think there should be a specific oversight body for adult decision-making arrangements? If so, what oversight functions would be most useful?

15.22 The Law Society supports the establishment of an oversight body such as the Office of the Public Guardian in the UK,[77] which it considers to be an appropriate mechanism to protect the rights of relevant persons.

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76 Issues Paper at [16.36].
77 Issues Paper at [16.55].

15.23 An oversight agency could undertake a range of tasks and functions as identified in [16.56] of the Issues Paper including functions such as maintenance of an EOPA register, provision of welfare guardians when needed, and provision of advice and information to the public. An oversight agency would be more efficient and focused on the delivery of these specific services rather than the current situation which involves many agencies and departments carrying out a range of various roles, and is disjointed and difficult for the public to access.

15.24 The establishment of such an agency could be accompanied by better support and funding for the existing agencies in the community such as Age Concern, Community Law Centres and Citizens Advice Bureaux.

Q95: Do you have views on the options we have identified for providing tikanga and Treaty-focused guidance and oversight? Are there other options we should consider?

15.25 Of the three options provided for at [16.65] of the Issues Paper, the Law Society agrees with the Commission that the first of these options, requiring a minimum number of its members to be Māori, is the most preferable. We also agree that the new body should have the ability to seek specialist advice on tikanga when needed. As mentioned above, any new legislation should provide for the acknowledgement of tikanga for Māori who wish tikanga principles to apply.

15.26 The Commission asks whether there are other options it should consider in relation to providing tikanga and Treaty-focussed advice. We suggest the Commission engage specifically with Te Hunga Rōia o Māori Aotearoa who may have knowledge of other specific options that might be already available.

16 Chapter 17: Improving Court processes

Q96: How could the representation of people with affected decision-making in court processes be improved?

16.1 There are already concerns about aspects of the Family Court processes both in terms of the current, specific legislation and in a general sense. Delays, funding and costs are key concerns.

16.2 Section 65 of the PPPR Act gives the court jurisdiction to appoint a lawyer to represent a subject person. The power is mandatory if an application is made where a relevant person is the subject of the application. Section 26(a) allows the relevant person to make their own application to the court, however this seems to be rarely used.

16.3 Any applicant or respondent in proceedings either has to find their own legal representation for which legal aid may be available, or alternatively, self-represent.

16.4 The Law Society supports the continuation of the appointment of a court-appointed lawyer to represent a relevant person. However, such legal representation needs to be adequately funded. The remuneration paid to a lawyer for subject person by the Ministry of Justice does not appear to have increased (other than for adjustments for GST since the PPPR Act came into force (i.e., for 36 years).

16.5 There is a real risk that experienced lawyers in this area of law will elect to withdraw from the role of lawyer for subject person. The Law Society is already seeing a reduction in the number of lawyers on the list of those approved to take on these assignments. At the same time the renumeration is increasingly unattractive and serves as a significant disincentive to other lawyers who may wish to apply for approval to the court-appointed list. The Family Court judiciary has already asked the Law Society's Family Law Section to encourage family lawyers into this area of work as it is difficult to find approved lawyers to be appointed. The situation is likely to get worse as our population ages and the number of people who lose capacity increases.

16.6 The Law Society is also concerned by the increasing shortages of lawyers willing to undertake family legal aid work (including under the PPPR Act) in terms of acting for parties in these proceedings (distinct from acting for a subject person). Legal aid is funded by a different budget than funding for court-appointed counsel. As with the role of lawyer for subject person, any increase in legal aid remuneration would need to be significant to address the continued decline in numbers of experienced legal aid providers over many years.

16.7 Given these current circumstances, any significant additional compliance and training requirements for lawyers acting in this area will further discourage lawyers acting as court-appointed counsel, or as legal aid providers in PPPR Act proceedings.

16.8 Significant challenges also exist for litigants in person which has a detrimental impact on court proceedings. Better information and public education as noted above could assist in addressing these challenges with a flow on benefit for the relevant person.

16.9 Lawyer for subject person's appointment generally ends once a PPPR Act order is made. That means if subsequent issues arise for the relevant person, that person will need to find his or her own lawyer to represent them. The Commission has suggested at [17.14(b)] of the Issues Paper that a publicly available panel of lawyers is established so that it is easier for a relevant person to find a suitable lawyer. While there are merits to this suggestion, there are obvious issues that will need to be addressed:

(a) First is the issue of capacity of the relevant person to enter into a retainer, instruct a lawyer and pay for legal services.

(b) Second, as the Commission has pointed out at [17.13(a)] of the Issues Paper, finding lawyers to act in this area is challenging. As noted above, many lawyers are not continuing to act as court-appointed counsel nor legal aid providers in this area of law as it is uneconomical given the low remuneration rate.

(c) Third, it is highly likely that the same lawyers (either court-appointed or legal aid) will be on the publicly available panel so there will already be significant crossover, and as discussed above, the number of these lawyers is reducing.

16.10 The Law Society considers that any new legislation could give cases greater priority in the Family Court's work. Timelines for disposition of cases could be considered as appropriate to incorporate into any new legislation. Lack of enforceability of orders and the lack of a without notice application pathway for applications are also issues which should be considered as part of any legislation. Relevant persons should also be able to access communication assistance in the courts, as well as support for making decisions

about finding and instructing a lawyer, or participating in court proceedings. In our view, these improvements would have a positive impact on a relevant person.

Q97: What would make it easier for the person with affected decision-making to be present at the hearing?

16.11 While the Law Society understands the importance of a relevant person being present at a hearing in a proceeding that they are the subject of, this question presupposes that attendance at court of the relevant person is almost always warranted. It is not. In most cases if the medical evidence before the court recommends excusing attendance by the relevant person, then that generally happens. However, the Law Society would support more robust medical evidence to underpin decisions to excuse attendance.

16.12 It is the experience of family lawyers working in this area of law that in many cases there would be serious negative effects, for example, confusion, stress, anxiety and significant upset for the relevant person if attendance at court was mandatory. Many people also tend to associate a court with criminal behaviour, and have often had no prior contact with the court system. Therefore, they are unlikely to understand why a matter is being considered by a court, why they are required to be in court, and what processes must be followed.

16.13 The Law Society considers that where a person is *wholly* lacking capacity, they should not be required to attend court.

16.14 That noted, in the Law Society's view, it is appropriate for the court to see a relevant person in certain circumstances. Where there are circumstances where a relevant person is unable to attend court in person, this could be achieved by using alternative hearings and bringing the court to the person (whether at home or in a rest home), subject to issues of court scheduling and security for the judiciary and counsel being addressed. While this alternative could be available in a small number of cases, such arrangements being made on a regular basis within the current Family Court timetable seems unlikely.

16.15 A relevant person can often simply not be in a position to participate in proceedings. Examples include individuals with advanced dementia or severe intellectual disability. In addition, there are relevant persons who also have serious physical impairment who are simply unable to attend court due to frailty, infirmity, or requiring healthcare in a clinical setting. A blanket requirement to physically attend court hearings may well be problematic for older people due to distances, risk of infection and physical mobility issues.

16.16 Better use of AVL and teleconferences in courts could assist with enabling a relevant person to be "present". However the resources for AVL are currently limited and are often allocated to the criminal law jurisdiction as a priority. In addition, appearing via AVL or telephone may still be challenging for a relevant person, and may discourage, rather than encourage, participation.

16.17 If the relevant person is required to attend court, the Law Society considers that increased informality and plain language is essential, together with consideration of the assistance of interpreters and communication assistants to enable the relevant person to feel more comfortable in a 'court' setting, and to participate as much as possible in the proceedings.

16.18 The Law Society notes that many relevant persons, whether excused or not, do not want to attend, or are not physically well enough to attend court. Consideration could be given to increasing the threshold for the legal tests for excusing attendance and dispensing with service on the relevant person to ensure physical attendance at court in more appropriate circumstances.

Q98: What might better ensure that the views of the person with affected decision-making are sought and communicated to the court?

16.19 Paragraph 3 of the *Family Court Practice Note: Guidelines for Counsel for Subject Person*[78] sets out the role of lawyer for subject person. Paragraph 3.4 states that counsel for the subject person has a duty to put before the court the views of the subject person where that person has a view, whether or not counsel considers that is a valid point of view. In addition, paragraph 3.7 states that where a subject person is able to express a clear view, that view should be put before the court.

16.20 Under the current legislation, the views of a subject person are included in a report to the judge if any views are able to be discerned. In most cases, a description of the lawyer's interaction with the relevant person is included in the report together with any attempts made to elicit views.

16.21 It is appropriate for the lawyer for subject person to be required to report the views of the relevant person (or at least attempts to do so). No orders should be made without this report being available to the court. We support including an express requirement to this effect in any new legislation.

16.22 Consideration should be given to a mandatory requirement for a judge to meet with a relevant person prior to orders being made. However, we note that this may be difficult to achieve, due to resourcing, scheduling and security issues, particularly if the relevant person is unable to attend court in person.

Q99: What might better support a person with affected decision-making to participate in the court process?

16.23 The Family Court already has the ability to permit the attendance of support people in court and the Law Society supports this continuing. However, there should be a discretion for the court to elect not to permit people to be present in court, for example, where there is a risk of undue influence or pressure on the relevant person from 'supporters'.

16.24 Communication assistants and cultural support may also be appropriate to enable a relevant person to better participate in the proceedings. The use of a communication assistant is available for PPPR Act cases under the Evidence Act 2006. However, this requires the relevant person to have an assessment to enable the communication assistant to know and understand how to work with that person. Assessments are comprehensive and lengthy. Because of this, it is likely that communication assistants would only be able to assist in a limited number of cases that were going to a hearing of a reasonable length. Consideration could be given to whether a more streamlined

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78 *Family Court Practice Note: Guidelines for Counsel for Subject Person Appointed under the Protection of Personal and Property Rights Act 1988* (March 2011).

assessment process that does not compromise the quality of the assessment might be available to enable more use of communication assistants in proceedings.

16.25 The court can and does provide interpreters where required in these proceedings and this should continue.

16.26 There may be scope for the role of the Family Court kaiārahi to be expanded to provide some support and assistance in these specific cases. We note that the kaiārahi role currently includes working to address any barriers that are preventing a person from participating in the court process. However, kaiārahi may not be appropriately qualified or trained to provide assistance in PPPR Act proceedings and any expansion of their role would require significant training.

16.27 The Commission has suggested at [17.28] of the Issues Paper that "because the PPPR Act jurisdiction is a minor part of the Court's work, court staff may not always be well positioned to assist with PPPR Act matters."

16.28 PPPR Act applications make up approximately 12 per cent of the overall applications filed in the Family Court annually.[79] We do not agree this is a minor part of the court's work and it is the experience of practising family lawyers that these types of applications are increasing both in numbers and complexity. In our view, this percentage is likely to continue to increase as incapacity issues arise due to an aging population.

16.29 In the experience of family lawyers, court staff are already under significant stress with high workloads and cuts to registry staffing numbers being currently proposed due to the Government seeking a 6.5 per cent reduction in costs, not only for this year but for the next three years. Under these circumstances, it is unlikely court staff will be able to provide significant assistance to applicants.

Q100: How could people be better supported to make an application to court?

16.30 The Law Society considers that people could be better supported to make an application to court by more detailed and updated information being provided. As discussed above at [15.6], specific information packages for this area of law in multiple languages could be available online.

16.31 The ability to fill in forms online may also be of assistance. We also suggest simplifying the forms which need to be completed, and reducing duplication across different forms.

16.32 Kaiārahi could also assist. However, their role will be limited to more general guidance of the court system or available community supports, and, as discussed above, specific training would be required in this area of law.

16.33 Consideration could be given to any new Act enabling an organisation such as Health New Zealand | Te Whatu Ora or Oranga Tamariki to apply for orders rather than an individual medical practitioner or social worker. To enable this, the list of people who may apply without leave should be broadened to include provider organisations.

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79 See https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#family.

16.34 Significantly increased funding for legal aid and for agencies such as Community Law Centres and Age Concern is also necessary to ensure members of the community are better supported to bring applications to the Family Court when they are required.

Q101: What changes do you think would make court processes more socially and culturally responsive?

16.35 There are people from a wide range of cultures who seek assistance from the Family Court in respect of the PPPR Act. The Law Society therefore supports the use of cultural advisors to assist participants in the court process. Details of community groups that provide such assistance could be published on the Ministry of Justice website.

16.36 The Law Society also notes the use of the Rangatahi and Pasifika Courts, and the Te Ao Mārama initiative which enables a more culturally responsive court process. Consideration of less formality and other alternative venues for court hearings, including the examples given at [17.36(d)] of the Issues Paper, could also be of considerable benefit.

16.37 We also invite the Commission to seek feedback from Te Hunga Rōia Māori o Aotearoa and the Pacific Lawyers Association on this question.

Q102: Do you agree that improvements should be sought through changes to current court processes, or do you favour the establishment of a specialist court or tribunal? Why?

16.38 There are significant and long-term issues with the Family Court including delays, costs, and resourcing pressures.

16.39 We acknowledge the potential benefits of establishing a specialist tribunal for this area of law in preference to the Family Court holding jurisdiction, including the ability for simpler forms and processes, a less adversarial approach, prompt resolution of issues and the ability to work more flexibly.[80]

16.40 As noted by the Commission however, delays are also prevalent in tribunals, such as in the Human Rights Review Tribunal, and the time and expense required to establish a new tribunal is likely to be prohibitive in the current economic climate.

16.41 While acknowledging that a tribunal is a valid option, our view on balance remains that the Family Court should retain its jurisdiction in this area of law. Decisions on a person's capacity impact on fundamental human rights (such as the right to liberty) and in our view these should not be relegated to a tribunal for determination. The existing Family Court process also provides for legal representation for parties, a court-appointed lawyer for the relevant person and the oversight of the Family Court.

16.42 Throughout this submission we have made suggestions as to how the Family Court processes could be improved, including ways to ensure that a relevant person is able to be supported and participate in proceedings as much as possible.

16.43 In terms of improving delays, the appointment of Family Court Associates may assist with this, although there are currently significant jurisdictional limitations in respect of

80 Issues Paper at [17.42].

Family Court Associates and the PPPR Act. Consideration should be given to specialist judges to preside over all matters in respect of capacity issues and/or increasing the jurisdiction of Family Court Associates for some matters.

16.44 We also consider it would be helpful to expressly provide for an 'urgent' pathway for court orders, in order to assist parties with prioritised and efficient access to the courts in circumstances where treatment or services are urgently required (including in situations where orders are necessary for the preservation of life, or the prevention or mitigation of serious and immediate harm). Currently, there is no such provision for urgent orders and our experience is that ease of access to the Courts in circumstances of urgency can differ, depending on regional resources and approaches. It would be important to ensure that any urgent pathway is appropriately limited and that key safeguards remain in place. However, consideration could be given, for example, to ensuring there is a power to limit the requirements of service, and an ability to shorten the required timeframes for responses.

16.45 Other changes in the legislation that would assist better outcomes include:

(a) Providing timeframes for when things are to be done to ensure that these cases are prioritised in the court system;

(b) Provision for without notice applications;

(c) Changes to the length of orders and in respect of review timeframes; and

(d) The incorporation of enforcement mechanisms for orders.

16.46 Crucially, if the Family Court is to deliver better outcomes for those with capacity issues, then significant investment in the Family Court is required to ensure the delivery of outcomes in a timely and cost-effective manner.

Q103: Do you think a new Act should provide for other dispute resolution options? If so, what are they?

16.47 The Law Society supports the consideration of dispute resolution outside the court process such as Family Dispute Resolution (**FDR**). We agree with the benefits of dispute resolution processes identified in the Issues Paper:[81] they provide a less formal forum, facilitate a prompt resolution, allow relationships between participants to be preserved and provide flexibility in terms of location and process. Within the context of a relevant person the Law Society considers that there should be no cost for such a service.

16.48 There are some cases where mediation is not suitable (for example, cases involving significant safety issues and some family violence cases). However, qualified and experienced mediators are skilled at identifying and screening these situations to assess whether a matter is suitable for a mediation process.

16.49 Any process such as FDR currently used in parenting and guardianship disputes would need to be responsive enough to allocate mediations quickly, both before court proceedings are filed, and after they are filed.

16.50 We are aware that some of the current FDR suppliers that contract with FDR providers in parenting and guardianship disputes under the Care of Children Act, also provide

81 At [17.58].

mediation for relationship property and other disputes. Consideration should be given as to whether the current FDR suppliers would have the ability to expand their services to encompass mediation in this area of law. As an alternative to the current FDR model, an alternative dispute resolution option could be part of the role of a new oversight agency.

16.51 Amendments to the legislation (or a new Act) and Family Court Rules could also provide for better use of settlement and/or mediation conferences in PPPR Act matters. The newly appointed Family Court Associate could be utilised in this respect.

Q104: In what situations do you think other dispute resolution options may not be appropriate?

16.52 The Law Society agrees that there are circumstances where use of alternative dispute resolution is not appropriate. As noted above, such circumstances would include situations involving significant safety concerns, violence and/or abuse of power, significant undue influence, and power imbalances. However, experienced and qualified mediators are skilled at screening for such circumstances as such factors are not uncommon in mediations involving other areas of law, for example, parenting and guardianship disputes under the Care of Children Act.

Q105: What would make other dispute resolution options work well?

16.53 Any alternative dispute resolution process would be best undertaken by a mediator that has skills, expertise and qualifications in the area of incapacity. Such a service should be provided free of cost.

Nāku noa, nā

Frazer Barton
President