



REVIEW OF THE ADULT DECISIONS-
MAKING CAPACITY LAW - Second Issues
Paper

SUBMISSIONS FROM THE LAW ASSOCIATION

21 JUNE 2024

INTRODUCTION

The Law Association (TLA) is an independent membership organisation for the NZ legal profession that has around 6,500 members. TLA maintains a number of expert committees that support legal review and policy advocacy on legal issues. We appreciate the opportunity to submit our views on the Privacy Amendment Bill. This submission has been prepared by TLA's **Family Law Committee** (FLC) along with the **Mental Health and Disability Committee** (MH&D). TLA welcomes the opportunity to submit on the review.

EXECUTIVE SUMMARY

The Protection of Personal and Property Rights Act 1988 (PPPR Act) should be considered alongside the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHA) as they are often used together to manage individuals with significant cognitive impairments or mental health issues. This review comes at a time of government retrenchment, with the most pressing concern being the chronic under-resourcing of both the Mental Health Act and the PPPR Act, making the implementation of their high ideals challenging.

Court-appointed representatives are essential for individuals who lack capacity due to conditions such as advanced dementia, debilitating strokes, or intellectual disabilities. However, the current process lacks sufficient quality control, particularly when relatives are appointed as welfare guardians or property managers, which increases the risk of abuse and mismanagement. Barriers to effective decision-making support include the lack of recognition for informal supporters, insufficient access to private information, and a shortage of suitable supporters with necessary skills and resources. The processes for welfare guardians or property managers to have assistance with decision-making are cumbersome, requiring applications to the Family Court.

The process of setting up an Enduring Power of Attorney (EPOA) is complex and intimidating, deterring many from completing it. Once in place, there are insufficient protections to prevent abuse and ensure that attorneys perform their roles responsibly. Moreover, the current court processes are cumbersome and inaccessible for many individuals, particularly those with disabilities. There is a need for better information, guidance, and complaint mechanisms.

The PPPR Act and MHA are often used together, particularly for individuals who need to be detained under the MHA while suitable PPPR placements are arranged. The current legal tests and procedural requirements make the PPPR process slower and less efficient. Additionally, both statutes are chronically under-resourced, making it difficult to achieve their intended outcomes.

Recommendations:

Court-Appointed Representatives:

- Consider incapacity extent, risk of harm, and less restrictive measures.
- Prioritise understanding and documenting the individual's preferences.
- Implement regular monitoring and oversight.
- Provide comprehensive support and training for representatives.
- Simplify and streamline the process for appointing court representatives.
- Enhance quality control measures post-appointment, particularly for family members acting as guardians or managers.
- Establish regular oversight and audits to prevent abuse.
- Develop professional welfare guardianship services to support individuals without suitable family members.
- Implement legal aid categories for individuals seeking to review or vary PPPR orders.

Decision-Making Support:

- Introduce formal supporter arrangements to enhance legitimacy and cooperation from institutions.
- Improve accessibility of information through various formats.
- Develop training programs for supporters on legal, ethical, and communication aspects.
- Create community support networks for primary supporters.
- Use technological solutions like decision-making apps.
- Establish a framework for regular monitoring and evaluation of decision-making support arrangements.

Enduring Powers of Attorney (EPOA):

- Simplify EPOA forms in plain language.
- Require mandatory record-keeping and audits of attorneys' actions.
- Create a national EPOA register.
- Provide support and training for attorneys.
- Implement clear guidelines for when attorneys can act and mandatory record-keeping with regular audits.
- Develop comprehensive training programs for attorneys to understand their responsibilities and the donor's preferences.

Court Process Improvements:

- Simplify court forms and processes for better participation.
- Enhance support for hearing participation with communication assistance.
- Ensure cultural responsiveness, including hearings at marae and using Kaiārahi.
- Update PPPR forms in Family Court Rules.
- Implement formal communication assistance procedures.
- Implement an alternative dispute resolution process similar to the Care of Children Act (COCA) model for addressing concerns and establishing an independent oversight body for complaints and disputes outside of the Family Court for matters which do not warrant a court application.
- Provide comprehensive training for legal professionals and court staff on disability awareness and capacity assessment.

- Establish a well-resourced Adult Protective Service and a statutory complaint service for those subject to the PPPR Act to facilitate mediation and support parties in making applications to the Court to revoke misused powers.
- Simplify court forms and processes and improve support for participation in hearings.
- Ensure cultural responsiveness and accessibility in court proceedings.
- Update by significantly increasing the thresholds applying to property managers to avoid unnecessary expense and Court engagement as addressed in recent correspondence with the Minister.

Additional Recommendations:

- Increase public awareness about available support and legal options.
- Align the legal tests and procedural requirements of the PPPR Act with those of the MHA to streamline processes.
- Address the chronic under-resourcing of both the Mental Health Act and PPPR Act to ensure that the intended outcomes can be achieved.
- Consider the timing of law reforms to avoid implementing new regimes without adequate resources, which could lead to unintended consequences and inefficiencies.

The TLA’s recommendations aim to improve the functionality and accessibility of the PPPR Act and its interaction with the MHA. By simplifying processes, enhancing training, and ensuring robust oversight and resources, we can better support and protect individuals with disabilities and cognitive impairments, promoting their rights, dignity, and autonomy.

SUBMISSIONS

TOPIC 1: COURT-APPOINTED REPRESENTATIVES

Q1.1 In what kinds of situations might a representative be needed?

In circumstances where individuals lack the capacity or have disabilities that prevent them from managing their affairs (property, income, welfare), such as those with dementia, mental disorders, or intellectual disabilities (whether from birth or due to an accident), the appointment of court representatives is essential.

These representatives play a critical role when cognitive impairments, including advanced dementia, debilitating strokes, acquired brain injuries, or other mental health disorders, hinder individuals from making informed decisions about their personal care, medical treatment, or finances. For example, a person with severe dementia may not grasp the implications of financial transactions or medical procedures, necessitating a representative to act on their behalf. Similarly, those with intellectual disabilities, whether congenital or acquired through accidents, require representation to safeguard their well-being and ensure proper management of their property and income.

Q1.2 What factors should a court consider in deciding whether to appoint a representative?

When deciding whether to appoint a representative, the court must consider multiple factors. Firstly, a medical assessment should be conducted to determine whether the subject person lacks capacity. This assessment should establish whether the incapacity is total or partial, as total incapacity will necessitate a court-appointed representative, while partial incapacity might be better managed with a support person.

The court should also evaluate the potential risk of harm to the individual if a representative is not appointed, considering whether the current decision-making process endangers their well-being or that of others. Additionally, the court should examine the availability of less restrictive measures, such as informal support networks or assistive technologies, before resorting to the appointment of a representative.

The Court should also consider whether the person lacks the capacity to make decisions generally or only in respect of some matters. This may enable the scope of the powers to be granted to be restricted to only those matters that are necessary.

The individual's previous expressions of will and preference are crucial considerations. If the person has articulated their wishes regarding their care and decision-making in the past, these should be honoured to the greatest extent possible. The presence of conflicts of interest or the potential for abuse must also be scrutinized, ensuring that the appointed representative will act in the best interests of the individual and not for personal gain.

Q1.3 What should a representative consider when working out a represented person's will and preferences?

When assessing a subject person's will and preferences, a representative should first and foremost look at the letter of their Will. They should ask what the subject person wanted as stated in their Will and evaluate if these preferences are safe in terms of the person's well-being and safeguarding their property. It may also be wise to consult family members or professionals who have interacted with the subject person both now and in the past.

A representative should prioritize understanding the represented person's preferences by considering their current and past statements, values, likes, and dislikes. This involves engaging with the individual as much as possible, even if their cognitive abilities are impaired. Representatives should seek input from family members, friends, and other significant individuals who have a close relationship with the person and can provide valuable insights into their values and preferences. It is essential to consider the cultural and social context, including tikanga Māori, to ensure that decisions are culturally appropriate and respectful of the individual's heritage.

The representative must also be mindful of undue influence or duress affecting the expressed will and preferences of the represented person.

Q1.4 When might it be impossible or inappropriate to make a decision based only on a person's will and preferences?

In certain situations, it may be impossible or inappropriate to base decisions solely on a person's will and preferences. This is particularly true when there is total incapacity and no Will, leaving no way of knowing what the subject person wanted when they were not incapacitated. Additionally, if the subject person lacks insight due to their disability and their preferences would lead to outcomes that put them at greater risk, it is necessary to consider alternative approaches to decision-making.

For example, an individual with severe dementia may insist on living independently despite the significant risks to their safety. In such cases, it becomes necessary to deviate from their expressed wishes to ensure their well-being. Similarly, if a person cannot effectively communicate their preferences due to their condition, determining their will becomes challenging, and decisions must be made with their best interests as the primary consideration.

Conflicting preferences further complicate the decision-making process, especially when the individual has expressed different desires at different times. Family and friends may also have conflicting beliefs about what the person's true wishes might be, adding another layer of complexity. In these instances, a balanced approach that considers all relevant factors is essential to ensure the person's safety and well-being.

Moreover, there may be no reliable evidence, such as an advance directive, to base decisions on. Even if an advance directive exists, it might be outdated, and the person's circumstances may have changed significantly since it was written. In such scenarios, it is crucial to carefully evaluate the current situation and make decisions that prioritize the individual's overall health, safety, and quality of life.

Q1.5 How should representatives make decisions in these circumstances?

When it is impossible or inappropriate to follow the subject person's will and preferences, representatives must prioritize the best interests of the individual, ensuring they are supported and cared for. Regular contact, ideally daily, with the subject person is crucial to understanding their evolving needs and providing appropriate care.

In such circumstances, representatives should focus on the individual's human rights and overall well-being. This requires consulting with relevant stakeholders, including healthcare professionals, family members, and other supporters, to gather comprehensive information and perspectives. The decision-making process should be transparent, with detailed documentation of the rationale behind each decision. This approach ensures accountability and provides a clear record for future reference.

Representatives should aim to choose the least restrictive option, promoting the individual's autonomy and dignity within the constraints of their capacity. By considering the best interests of the subject person and maintaining regular contact, representatives

can ensure that their actions are informed, respectful, and in line with the individual's needs and rights.

Q1.6 What steps should a representative take when making a decision for a represented person?

Representatives must consider the immediate needs of the subject person and adopt a least restrictive approach in decision-making if the subject person has expressed a preference that does not place them at risk. In managing income, representatives must exercise their duty solely for the benefit of the subject person.

In circumstances where it is impossible or inappropriate to follow the person's subjective wishes, representatives should prioritize the individual's human rights and overall well-being. This involves consulting with relevant stakeholders, including healthcare professionals, family members, and other supporters, to gather comprehensive information and perspectives. The decision-making process should be transparent, with detailed documentation of the rationale behind each decision. This ensures accountability and provides a clear record for future reference. Representatives should aim to choose the least restrictive option, promoting the individual's autonomy and dignity within the constraints of their capacity.

To ensure informed and appropriate decision-making, representatives should:

- Access medical and legal records.
- Consult people with whom the person had a close relationship, such as family/whānau, friends, church members, or club associates.
- Seek directions from the Court if the decision entails a significant impact on the person's health, quality of life, or longevity (welfare guardian) or involves amounts over a specified sum (property).
- Try to mediate in case of conflicts of interest or family disputes.

By following these steps, representatives can make well-informed decisions that respect the subject person's values, culture, and preferences while ensuring their safety and well-being.

Q1.7 How should representative arrangements be monitored to make sure they're working well?

Effective monitoring of representative arrangements is crucial to ensure they are working well and protecting the interests of the represented person. Regular court reviews, ideally every two years, should be mandated to assess the representative's performance and the continued appropriateness of the arrangement. These reviews provide an opportunity to address any issues and make necessary adjustments. There should also be accessible mechanisms for stakeholders to raise concerns or complaints about the representative's conduct. This could be facilitated through an oversight body or existing roles such as the Public Guardian.

Representatives should be required to submit regular reports on their activities and decisions, ensuring transparency and accountability. In cases where there are concerns about potential abuse or conflicts of interest, establishing an independent oversight body specifically tasked with monitoring representative arrangements could be beneficial. This body could conduct audits, investigate complaints, and ensure that representatives act in the best interests of the individuals they serve.

Q1.8 Is there anything else you would like to tell us about the role of court-appointed representatives?

The role of court-appointed representatives is both demanding and crucial, requiring a high level of commitment and responsibility. Most court-appointed representatives accept this role out of a sense of duty and care for the individual they represent. However, the demands can be substantial, particularly for family members who must balance their own lives and responsibilities with the needs of the represented person.

Quality control after appointment needs to be strengthened, especially when relatives are appointed as welfare guardians. There must be robust safeguards against abuse. For instance, there have been cases where a relative appointed as a property manager for their sibling, who believes them to be an imposter, delays payments of personal allowances, causing significant distress. The bank's refusal to provide the subject person with a bank statement complicates oversight, preventing caregivers from verifying whether funds are properly managed.

Additionally, there is no preset family legal aid category for a subject person to apply for variation or review of current PPPR orders, despite s86 PPPR granting them the right to apply. This process should be as straightforward as a section 16 application in the MHA jurisdiction, enabling swift resolution of concerns. The current legal aid process envisages an applicant seeking an order in respect of someone else, not for personal matters such as pocket money or bus fares, which are vital for the subject person.

The issue of whether professional welfare guardianship services should be formalized requires exploration. In the US, professional services exist, and experience with the MHA shows that trained social workers can effectively act as key workers. A specialized profession with training modules on assisted decision-making could be beneficial. While the Public Trustee has faced criticism for inefficiencies and charging protocols, it does have organized processes for handling funds, suggesting that professional oversight in caring roles could be advantageous for those without family support.

Courts often circumvent the unavailability of a welfare guardian by making an order under s10(1)(d) for the person to enter or leave an institution. However, if these orders expire, the individual may be left in limbo. For example, a mental health client with learning difficulties was directed to live at a supported residence for three years. When the order expired, he became homeless, ended up in prison, and then in ICU awaiting suitable placement due to AWOL risk.

In conclusion, court-appointed representatives play an essential role in safeguarding the rights and well-being of individuals who lack decision-making capacity. By ensuring rigorous oversight, providing adequate support, and maintaining a focus on the individual's best interests, we can enhance the effectiveness of these arrangements and protect some of the most vulnerable members of our society.

Another option for avoiding protracted and expensive litigation is to consider the Family Dispute Resolution (FDR) model used for COCA matters as a prerequisite gateway to any Court proceedings, with an independent 'Voice of Subject Person' role being subsidized through the Ministry. As with COCA matters, where there is an expectation that the parties will attend a Parenting Through Separation course prior to filing any proceedings, concerned parties in this context, as well as any donor or court-appointed representative, could be required to attend a fully subsidized decision-making capacity course covering processes under the Mental Health Act and PPPRA.

TOPIC 2: DECISION-MAKING SUPPORT

Q2.1 What barriers prevent people from getting good decision-making support?

There are numerous barriers that prevent individuals from receiving effective decision-making support. One of the primary barriers is the lack of recognition of informal supporters by third parties, such as financial institutions, healthcare providers, and government agencies. Informal supporters often face significant challenges in gaining the authority and cooperation necessary to assist the individual they support effectively.

Another significant barrier is the insufficient access to accessible information and communication aids. Many individuals who require decision-making support have disabilities that affect their ability to understand complex information or communicate their preferences. Without accessible formats, such as plain language documents, Braille, large print, or electronic communication aids, these individuals are at a considerable disadvantage.

The absence of suitable supporters for some individuals also presents a major challenge. Not everyone has family members or friends who are willing and able to take on the role of a decision-making supporter. This is particularly problematic for individuals who are socially isolated or whose relationships are characterized by conflict or abuse.

Additionally, supporters often lack the necessary skills, knowledge, and resources to provide effective decision-making support. They may not fully understand the legal and ethical implications of their role, nor have access to the training and resources that would enable them to support the individual adequately. This lack of preparation can lead to suboptimal decision-making and even unintentional harm.

Financial literacy cannot be assumed across the whole population and this impacts on the decision making made by representatives with direct consequences for the person being supported.

Q2.2 What do you think of the options we have identified for improving decision-making support?

The options identified for improving decision-making support are promising and address several key barriers. The introduction of formal supporter arrangements could significantly enhance the legitimacy and effectiveness of the support provided. Legal recognition of supporters would ensure better cooperation from institutions and service providers, facilitating smoother interactions and more effective decision-making processes.

Improving the accessibility of information is another critical step. By providing information in various accessible formats, individuals who require decision-making support can better understand their options and communicate their preferences. This approach aligns with the principles of the United Nations Convention on the Rights of Persons with Disabilities, which emphasizes the importance of accessibility and reasonable accommodations.

Formal training programs for supporters are also a valuable option. These programs could equip supporters with the necessary skills and knowledge to perform their roles effectively. Training should cover legal and ethical considerations, communication strategies, and the specific needs and preferences of the individuals they support. By enhancing the capabilities of supporters, we can ensure that individuals receive higher quality and more consistent decision-making support.

However, there is a downside to formalizing decision-making support. It could discourage those who wish to assist in good faith without the burden of legal ramifications, potentially reducing the willingness of potential supporters to act as volunteers. Informal support remains valuable, and attorneys and court-appointed representatives can help regulate undue influence or abuse by those with ulterior motives.

We agree that:

- People should be able to access decision-making support for the purpose of a decision-making capacity assessment (Ch 7).
- The court should consider least restrictive measures, such as appointing a decision-making support person rather than a representative where appropriate (Ch 10).
- Court-appointed representatives and attorneys should properly acknowledge the significance of decision-making support (Ch 10 and Ch 13).
- This concept should be incorporated throughout the Act to counteract representation when support arrangements would suffice.

Q2.3 Is there anything else you would like to tell us about how decision-making support could be improved?

In addition to the proposed options, there are several other measures that could improve decision-making support. Developing community support networks could provide backup and respite for primary supporters. These networks would ensure that supporters are not overburdened and can share the responsibility of decision-making support. Community networks could also offer a pool of trained volunteers who can step in when primary supporters are unavailable.

Implementing technological solutions to assist with communication and decision-making is another avenue worth exploring. Tools such as decision-making apps, online resources, and digital communication aids can significantly enhance the ability of individuals to express their preferences and make informed decisions. These technologies should be designed to be user-friendly and accessible to individuals with various types of disabilities.

Establishing a formal framework for monitoring and evaluating decision-making support arrangements is crucial. This framework should include regular reviews of the effectiveness of support provided, mechanisms for individuals to raise concerns or complaints, and oversight by an independent body. Such measures would ensure that decision-making support arrangements are working as intended and that any issues are promptly addressed. The decision-making support could also address financial literacy.

TOPIC 3: ENDURING POWERS OF ATTORNEY

Q3.1 How could the law make it easier to set up an EPOA, while still providing enough protection for people?

Most members of the FLC are uncertain that the law can be amended to make it easier to set up an EPOA while still providing adequate protection for donors. While others along with the member of the MH&D committee are concerned about the length and complexity of the forms and the certification process, believing that these factors discourage individuals of modest means from appointing attorneys due to the associated costs as well as being less accessible to the general public due to its complexity. They advocate for a shorter, more streamlined form.

All members agree that it is imperative to promote and protect the rights of individuals when they become incapacitated. When appointing an attorney, the donor must be a free agent who fully understands the implications of their decision and is not being coerced or pressured. The donor must be able to comprehend the effects and consequences of the appointment.

1) The EPOA should be created on a prescribed form. It should be signed by the donor and the attorney. The donor's signature should be witnessed by at least one person who is a lawyer and independent of the attorney. The attorney's signature should be witnessed by

a person who is not the donor or the witness to the donor's signature to the form, except for those situations currently addressed in s 94A(4A) of the PPPR Act.

2) The donor's witness should certify that they:

- a) Believe the donor understands the nature, risks, and consequences of the EPOA.
- b) Believe the donor is not making the appointment under coercion or duress.
- c) Has no reason to suspect the donor does not have decision making capacity to sign the EPOA.

3) The form needs to be written in plain language.

4) The form should be in one language only. Different forms should be used for different languages—each language should have a discrete form. The forms need to be accessible (in alternate format).

5) Forms should be available in hard copy and downloadable online or in accessible alternate formats.

6) As a donor is in effect passing to the attorney the power to make decisions on the donor's behalf, every safeguard reasonably possible should be in place to ensure the conferring of such power is the intention of the donor. If the donor is physically in the presence of the witness the witness has opportunity to observe and interact with the donor and thereby ensure the donor has the mental capacity to make such a decision and is making the decision of their own free will.

7) Remote witnessing should not be permitted. The risk of coercion or duress is a real issue. If the witness is required to be physically present with the donor there is limited opportunity for someone to put the donor under irresistible pressure to execute the document.

8) The witness to the donor's signature should be a lawyer, an officer or employee of a trustee corporation or a legal executive. We are not in favour of allowing other people such as Justices of the Peace to witness an EPOA. The experience of some members is that Justices of the Peace rarely properly attend to the steps required to make an affidavit. Often straight forward details are not completed, such as ensuring the deponent and the witness have actually signed the affidavit and initialled all pages and amendments, or entering in a jurat the date and place of swearing/affirming. Accordingly members have real reservations many Justices of the Peace will not properly attend to all the steps required to complete the formalities to appoint EPOA documentation, especially ensuring the donor has the required capacity to be making the appointment of an attorney and considering whether the donor understands the effect and consequences of making the appointment.

9) While the forms are lengthy and can be off-putting, reducing their length could compromise the seriousness and clarity of intention required for appointing an attorney,

especially since the donor may not be able to revoke the appointment if it proves inappropriate.

10) There is no merit in splitting the explanatory part of the form into separate documents. The substance of the material must be read and considered, regardless of the format.

11) Completing the form online should not be allowed due to the risk of someone other than the donor controlling the process. We consider there is unacceptable scope for someone other than the donor having command of the on-line process. We endorse the process adopted by some overseas' jurisdictions (e.g. UK) which permit forms to be filled-in online but required to be printed off and the hardcopy signed.

12) We acknowledge combining the prescribed forms for property and personal EPOAs avoids duplication canvassing various matters, however it is more likely that specific issues concerning personal, or property matters will be given adequate consideration if they are separated out.

13) Having separate documents also clearly delineates the different roles of the attorneys.

14) It is imperative that signatures are witnessed to ensure the donor is indeed the signatory, as a safeguard against duress, fraud, and forgery.

15) Our preference is that the attorney's signature should be witnessed by someone who is not the donor or the donor's witness. We acknowledge the convenience and economy of having the same witness witnessing both the donor's and the attorney's signatures, however if that is to be permitted there should be more than one witness. One (at least) of the witnesses should be a lawyer. The signing of the document by the donor should be witnessed in the same manner required for signing a will (altogether in the sight and presence of each other) and the attorney must not be present when the donor is taken through the document for the formal explanation before signing it, and at the time when the donor signs it. Where a couple are appointing each other their attorney, we are aware of the convenience of the couple both being present during the formal explanation, but we consider it imperative that each person be dealt with separately to ensure a submissive spouse/partner is a free agent in making the appointment. We say "submissive" because so often one partner in a relationship, to varying degrees, follows the lead of the other, or sometimes is even overborne by the other. Often the difference in the relationship is not obvious to others, and sometimes not even recognized by the parties themselves. Article 12 of the Disability Convention is grounded in the concepts of individual dignity, autonomy and equality. Article 12(4) of the Disability Convention requires all measures relating to the exercise of a person's legal capacity to "respect the rights, will and preferences of the person". We consider dealing with each spouse/partner separately goes some way to comply with the Disability Convention to ensure each party's individual agency in their decision making. Dealing with them separately will ensure the protection of each party's rights and their dignity and autonomy underlying those rights

16) If more than one person witnesses the donor's signature, at least one witness should be independent of the attorney. The new Act should explain what being independent means. There should be no connection with the donor's family or with the attorney's family, they cannot be someone who is caring for the donor or provides accommodation to the donor and cannot be an employee or agent of the attorney.

17) The certification requirements for creating an EPOA set out in the current Act should be replicated in any new Act. This is because once the situation develops where the EPOA is activated the donor has no opportunity to revoke. However, while we endorse the essence of s49A(4A)(b) of the PPR Act we consider the section needs to be redrafted to make it easier to understand.

18) To ensure the donor understands the nature of an EPOA that donor should be required to read and confirm that they have read the prescribed explanatory information and the witness certify that they believe the donor understood the purpose of the EPOA and the extent of the authority granted to the attorney.

In conclusion, we note that while the forms are lengthy, the witnessing and certification process provides the necessary checks and balances against undue influence and risks arising from conflicts of interest. It is our view that it is not the forms themselves that are at issue but rather section 94A(4A), which should be reviewed due to its difficult and unclear wording. A statutory amendment should be made to s94A(4A) regarding exceptions for witnessing for mutual donors where there is minimal risk of conflict of interest. While we agree with the exception, the wording needs improvement.

Q3.2 What protections are needed once an EPOA is in place to prevent abuse and ensure the attorney performs their role well?

Once an EPOA is in place, robust protections are necessary to prevent abuse and ensure that the attorney performs their role responsibly and ethically. Clear guidelines on when attorneys can act are crucial. These guidelines should stipulate the specific circumstances under which the attorney's powers come into effect, ensuring that they cannot act prematurely or without just cause.

Overall, it is our view that that the current protections do not adequately scrutinize attorneys' actions. Ideally, there would be a state-funded office to audit or monitor attorneys' actions. In the absence of such state funding, increased accountability and sanctions for abuse of the power entrusted to the attorney should be introduced. Record-keeping should be monitored, and records should be liable for inspection.

All attorneys should be required to collect and keep safe, legible bank statements, invoices, and receipts (primary documentation) for inspection. As paper invoices and receipts are still usually available, attorneys who prefer hard copies should be required to keep all invoices and receipts for expenditure for a donor and all bank statements together. Even if kept in a shoebox, the retention of all documents should be expected

and not onerous. Alternatively, attorneys should be required to download and file in an electronic folder all electronic bank statement, together with electronic invoices and receipts.

Ideally, attorneys would maintain a hard-copy or electronic 'cashbook' recording all the donor's income and all payments made from the donor's funds monthly. While the requirement to maintain such a record may be unduly onerous in many cases, having the primary documentation available provides a reasonable opportunity to examine how the attorney has managed the donor's financial affairs. Failure to maintain this collection of primary documentation should be grounds to apply for the appointment to be revoked. Attorneys should be strictly liable to personally account to the donor or the donor's deceased estate for expenditures not supported by the primary documentation.

Mandatory record-keeping by attorneys is another vital protection. Attorneys should be required to keep detailed records of all decisions made and actions taken on behalf of the donor, including financial transactions, medical decisions, and any other significant actions. Regular audits of these records by an independent body can help detect and prevent misuse of power. These audits should be conducted at regular intervals and whenever there is a reason to suspect abuse.

Wrongful expenditure for the attorney's personal benefit should be grounds for criminal prosecution and sanctions. It is a breach of trust and should expose the wrongdoer to harsh penalties. An attorney for health and welfare should be required to keep a record of the reasons for making a substantial change in the donor's life and care, such as a change of doctor, lawyer, accommodation, or support for the donor, along with the date the decision was made and the date the change was implemented.

The collection of primary documents and records made by attorneys should be kept by them and made available for inspection by any or all of the persons whom the donor nominated to receive information from the attorney. The inspection should occur each year on the anniversary of the appointment and at shorter intervals if ordered by a court, if necessary, or if the donor requested this and the attorney agreed at the time of the appointment. Copies of documents should be provided to donors upon request.

The collection of primary documents and records made by attorneys should be kept by them and not disposed of until the expiration of two years from the date of the final distribution of the donor's deceased estate. This period allows for the expiration of a life interest and the concluding administration of the donor's estate, which is when questions frequently arise about an attorney's conduct.

There needs to be regular oversight and periodic reviews by the court, or an independent oversight body are critical to ensure ongoing compliance and effectiveness. These reviews should assess the attorney's performance, the appropriateness of the decisions made, and the overall well-being of the donor. This process provides an additional layer of protection and helps to identify and address any issues promptly.

Further, there also needs to be mechanisms for stakeholders, such as family members and healthcare providers, to request information and raise concerns are also essential. These mechanisms should be easily accessible and allow for the confidential reporting of suspected abuse or mismanagement. An independent oversight body should be established to investigate complaints and take appropriate action.¹

Q3.3 What should an attorney consider when working out a donor's will and preferences?

Attorneys must prioritise understanding and respecting the donor's will and preferences when making decisions on their behalf. This requires a comprehensive approach that considers the donor's current and past expressions, values, and preferences. Attorneys should engage with the donor as much as possible, even if the donor's cognitive abilities are impaired, to understand their desires and preferences.

Consulting with family members, friends, and other significant individuals who have a close relationship with the donor is also essential. These individuals can provide valuable insights into the donor's values and preferences, helping the attorney make decisions that align with the donor's wishes. Additionally, attorneys must respect the donor's cultural and social context, including tikanga Māori where applicable. This ensures that decisions are culturally appropriate and aligned with the donor's background and heritage.

The representative must be mindful of matters such as undue influence or duress affecting the expressed will and preferences on the part of the represented person.

3.4 When might it be impossible or inappropriate to make a decision based only on a person's will and preferences?

There are situations where it may be impossible or inappropriate to base decisions solely on the donor's will and preferences. For instance, if the donor's expressed preferences would result in significant risk or significant harm to themselves or other, or it is completely untenable, then it becomes necessary to deviate from their stated wishes. An example could be a donor insisting on living independently despite severe cognitive impairments that make it unsafe for them to do so.

Similarly, if the donor cannot communicate their preferences effectively due to their condition, it becomes challenging to determine their will. In such cases, the attorney must rely on other sources of information to make the best possible decision. Conflicting preferences, where the donor has expressed different desires at different times, also complicate the decision-making process. The attorney must carefully weigh all factors to arrive at a decision that best serves the donor's interests.

Also, if there is uncertainty that the donor had capacity at the time the person's will and

¹ In matters of abuse which requires revocation of an EPOA, this should be by Court order only. Refer comments for 1.8 above re FDR model as a proposed way of managing concerns/ disputes.

preferences were expressed, it becomes inappropriate to rely solely on those preferences. Reasonable grounds to believe that the donor was coerced into expressing their will and preferences also necessitate a departure from their stated wishes.

If there are well-founded grounds to believe that the donor was not reasonably well informed at the time their will and preferences were expressed, or did not understand the consequences, the attorney must make a decision in the donor's best interests that might differ from their expressed preferences. Similarly, if it is impossible to discern the donor's will and preferences with a reasonable degree of certainty, attempts to interpret ambiguous or unintelligible expressions of will should be avoided to prevent speculative decisions.

Finally, if the person's current will and preferences are markedly different from those expressed on earlier occasions, and following the latest preferences would not be in the person's best interests and could cause irreparable harm, the attorney must consider overriding these preferences to protect the donor. In all these cases, the focus should always be on the donor's overall well-being and best interests, even if it means deviating from their expressed wishes.

Q3.5 How should attorneys make decisions in these circumstances?

In circumstances where it is impossible or inappropriate to follow the donor's will and preferences, attorneys should prioritize the donor's human rights and overall well-being. This involves consulting with relevant stakeholders, including healthcare professionals, family members, and other supporters, to gather comprehensive information and perspectives. The decision-making process should be transparent, with detailed documentation of the rationale behind each decision, ensuring accountability and providing a clear record for future reference.

Attorneys should aim to choose the least restrictive option, promoting the donor's autonomy and dignity within the constraints of their capacity. This means making decisions that allow the donor as much freedom and independence as possible while ensuring their safety and well-being. Regular communication with the donor and stakeholders is essential to keep them informed and involved in the decision-making process.

If the attorney has no knowledge of the donor's will and preferences because none can be discerned, the attorney should consider what course of action promotes the donor's welfare and best interests. This includes considering any available medical advice from healthcare professionals and any relevant legal advice.

The new Act should not include a blanket provision requiring the attorney to follow the donor's advance directions expressed before losing capacity. According to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, schedule clause 2, right 7, healthcare professionals must make care choices for the donor in accordance with their wishes. Since the donor would presumably

have expressed their wishes to healthcare professionals with the benefit of clinical advice and explanations of the consequences, these wishes should prevail. This ensures that any change of mind by the donor since expressing their will and preferences to the attorney is respected.

Attorneys should adhere to the safeguards currently in section 18(1) of the PPPR Act, which outlines the limitations on the powers of welfare guardians. Specifically, attorneys should not have the power to:

18 Powers and duties of welfare guardian

- (1) No court shall empower a welfare guardian, and no welfare guardian shall have power,—
 - (a) to make any decision relating to the entering into marriage or civil union by the person for whom the welfare guardian is acting, or to the dissolution of that person’s marriage or civil union; or
 - (b) to make any decision relating to the adoption of any child of that person; or
 - (c) to refuse consent to the administering to that person of any standard medical treatment or procedure intended to save that person’s life or to prevent serious damage to that person’s health; or
 - (d) to consent to the administering to that person of electro-convulsive treatment; or
 - (e) to consent to the performance on that person of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person’s behaviour; or
 - (f) to consent to that person’s taking part in any medical experiment other than one to be conducted for the purpose of saving that person’s life or of preventing serious damage to that person’s health; or
 - (g) to request, on behalf of the person, the option of receiving assisted dying under the [End of Life Choice Act 2019](#).

Further, advance directives can shed light on the donor’s will and preferences. If attorneys focus on what the donor has said when capable, it facilitates the donor’s continuing autonomy and dignity by ensuring that their views are at the centre of any decision. This approach upholds the donor’s autonomy and dignity while ensuring that decisions are made in their best interests.

Q3.6 What steps should an attorney take when making a decision for a donor?

When making a decision for a donor, an attorney should take several steps to ensure the decision is well-informed and aligned with the donor’s best interests. Firstly, the attorney should consult the donor to understand their preferences and desires as much as possible. This involves direct communication with the donor, using accessible formats and communication aids if necessary. If the donor is capable of engaging in dialogue, the attorney should discuss with the donor to see if they can express their views and preferences. If the donor cannot spontaneously express their will and preferences, the attorney should explore if the donor can respond to the attorney’s proposal. The attorney

should then make a decision that gives weight to what the donor has communicated and is in the donor's best interests or welfare.

If the donor is incapable of meaningful communication, the attorney should investigate if the donor, at a time when they had capacity, expressed their will and preferences in a document. If so, the attorney should consider what has been expressed and strive to make a decision that aligns with those expressed wishes. These documents can provide valuable guidance on the donor's wishes and help inform the attorney's decisions. The term "document" should have the meaning as defined in the Wills Act 2007 and include video recordings of the donor. Concurrently with seeking to align with the donor's will and preferences, the attorney should also consider the donor's best interests and welfare.

The attorney may also consult with family members, friends, and other significant individuals who know the donor well. These individuals can offer insights into the donor's values and preferences, helping the attorney make decisions that align with the donor's wishes. However, while consulting family and friends can be helpful, there are potential issues to consider. If family members and friends unanimously report what the donor said, especially if the donor expressed their will and preferences consistently over several years and to various individuals, the attorney should be able to take into account and give weight to that hearsay when making a decision on behalf of a donor. However, caution is advised to ensure the accuracy and consistency of such reports.

The attorney should then consider the immediate needs of the donor and adopt a least restrictive approach in decision-making. This means making decisions that allow the donor as much independence and freedom as possible while still ensuring their safety and well-being. Finally, the attorney should document the decision-making process and rationale thoroughly. This includes keeping detailed records of all decisions made, the information consulted, and the reasons for each decision. This documentation provides accountability and a clear record for future reference.

Q3.7 Is there anything else you would like to tell us about EPOAs?

We recognize that the role of an attorney under an EPOA is both demanding and crucial, requiring a high level of commitment and responsibility. Although it is the collective view by the member of the committees that most attorneys take on this role out of a sense of duty and care for the donor, however, the demands can be substantial, especially for family members who must balance their own lives and responsibilities with the needs of the donor.

Quality control and oversight after the appointment of an attorney are essential to ensure the role is performed effectively and ethically. This includes robust safeguards against abuse and regular monitoring of the attorney's actions. Establishing professional EPOA services, similar to those in the US, could provide a viable option for individuals without suitable family members or friends to take on the role. These professional services could offer specialized training and oversight, ensuring that attorneys are well-prepared and capable of performing their duties effectively.

Ideally, there should be a national register for storing and accessing EPOAs. While there may be challenges in ensuring that the last registered EPOA is indeed the latest, making the registration process simple and online could encourage widespread adoption. If attorneys are required to register EPOAs and donors can easily register revocations, it would help identify the valid EPOA when needed. A national register of EPOAs for Health and Welfare, along with advance directives and advance care plans, should be established and reasonably accessible by health professionals throughout the country.

We acknowledge the complexity and length of the current documents and process for appointing an attorney, but the previous, simpler process was insufficient. Both donors and attorneys need to understand the seriousness of appointing an attorney and its consequences. There should be certainty that the appointment was willingly made by the donor. Attorneys should be informed of their powers, the limits on their powers, and the serious consequences of any abuse. Detailed documents and a solemn execution process are necessary to ensure this understanding.

In conclusion, improving the EPOA process involves simplifying the setup, ensuring robust protections, and providing comprehensive support and oversight for attorneys. By adopting these measures, we can enhance the effectiveness of EPOAs and ensure that individuals receive the support they need to manage their affairs with dignity and respect.

TOPIC 4: PRACTICAL IMPROVEMENTS AND COURT PROCESSES

Q4.1 What information and guidance would be helpful?

To enhance the functioning of the Protection of Personal and Property Rights Act (PPPR Act) and ensure effective decision-making for adults with disabilities, comprehensive training for legal professionals and court staff is essential. Many people subject to the PPPR Act have various disabilities, and legal professionals often lack the requisite knowledge to provide optimal service. Training should encompass disability awareness, detailing what disabilities are, how they manifest, and the best means of communication. Importantly, this training should be delivered by and with disabled people, focusing on best practices for making concrete accommodations. The training must be rights and strengths-based, covering diverse impairments such as sensory (vision/hearing), physical, mental, neurological, intellectual, and neurodiverse conditions, including autism, ADHD, and foetal alcohol syndrome.

Training should also include relevant domestic and international laws, such as the United Nations Convention on the Rights of Persons with Disabilities. One valuable resource for such training is the “Benchmark: Best practice-best evidence with vulnerable people” guidelines, funded by the New Zealand Law Foundation and the IHC Foundation (Donald Beasley Institute, 2018). These guidelines provide evidence-based practices, case law, and resources for working with vulnerable people, addressing best practices related to children, adults with intellectual disabilities, older persons, and communication assistance.

The Benchmark Guidelines are designed to be accessible to people with diverse disabilities and conditions, promoting established human rights principles. Access to justice is an inherent and inalienable right for all people, including those with disabilities, and support must be provided through universal design and reasonable accommodations. Training should ideally be designed as workshops, incorporating “train the trainer” strategies to maximize impact. Additionally, future funding to sustain and update Benchmark should be provided, ensuring ongoing relevance and effectiveness (Diesfeld, 2023). Other recent New Zealand publications, such as the responsive practice guidelines for older persons (Diesfeld and Fisher, 2019), offer concrete strategies for legal professionals.

Furthermore, capacity assessment training for health and legal professionals is crucial. Expertise in capacity assessment is detailed and justified in Issues Paper 1 at 16.14. Training for potential and existing clients is also needed, providing information and guidance in simple English, Sign/video, and sound recordings. This content should include rights, options for decision-making arrangements, and legal processes, provided in multiple forms and ensure people know who they can safely contact to complain about a welfare guardian, an attorney, abuse, and/or neglect. Capacity assessment is a significant issue in PPPR work and currently the Act allows a wide spread of doctors to undertake such assessments but sensibly a large number of them refuse. It follows that capacity assessments are often hard to get in a timely fashion and expensive. As capacity assessments are mandatory under certain applications, this is a roadblock to accessing the necessary orders.

Mandatory training for people assuming roles under the PPPR Act is essential, focusing on how to carry out their roles and provide good decision-making support. This training should be rights-based, emphasizing relevant law and the United Nations Convention on the Rights of Persons with Disabilities. Establishing guidance for those appointed in decision-making roles is also necessary, creating a rights-promoting Code of Practice based on consultation with disabled and older people.

Q4.2 What options should there be for people to make complaints or raise concerns if things aren’t going well?

Establishing a well-resourced Adult Protective Service is essential. Current services like Age Concern are not statutory bodies, have limited scope, and their Elder Abuse Response Service is under-resourced (Diesfeld, 2023). Therefore, a statutory, well-resourced complaint service for people subject to the PPPR Act should be established. This free service should respond to concerns and complaints regarding the performance, misconduct, abuse, or neglect of a court-ordered representative or an attorney under an Enduring Power of Attorney (EPOA). With greater powers than the Health and Disability Commissioner, this service should swiftly investigate and respond while safeguarding the individual. Legal aid lawyers or a free legal service should be provided to challenge the continuing role of the court-ordered representative or attorney under an EPOA when relevant.

Additionally, considering the Family Dispute Resolution (FDR) model used in Care of

Children Act (COCA) matters could be beneficial. Implementing a similar model for EPOAs could provide a structured and effective way to manage concerns and disputes without immediate court intervention. This model could include an independent 'Voice of Subject Person' role, subsidized through the Ministry, ensuring that the donor's perspective is central to the resolution process. This approach would help manage conflicts and ensure that decisions are made in the best interest of the donor, while providing an accessible and efficient resolution pathway.

Q4.3 How do you think we can improve the way the system works?

Improving the system requires legislative changes to place the onus on those seeking decision-making powers to demonstrate how they determined the proposed arrangement was the least restrictive option. When an application to appoint an alternative decision-maker is filed, the court should probe what alternatives were explored and rejected. Detailed efforts to support the person's decision-making, restore their capacity, and promote their liberty should be documented. This process can be supported by the report of a court investigator on every case.

Providing a free service for establishing arrangements like enduring powers of attorney, staffed by well-trained, rights-promoting personnel, is crucial. Additionally, legal protections for people who decline residential care but are admitted to such facilities under Rights 7 of the Code of Health and Disability Services Consumers' Rights should be established. These individuals are effectively detained without the protections offered under the Mental Health (Compulsory Assessment and Treatment) Act. Safeguards should include routine review of their legal status, access to a free lawyer, and a District Inspector, as thoroughly analysed and recommended by Fisher and Anderson Bidis (2018).

Establishing an Office of the Public Advocate (OPA) is necessary to monitor and improve decision-making arrangements and safeguards. Within the OPA, the statutory role of an independent court investigator should be established to evaluate and report to the court regarding the necessity of alternative decision-making arrangements. These reports would inform the court's decision, provided by a court-appointed expert educated, experienced, and trained to make evaluations, similar to Alaska's court investigator (Donald Beasley Institute, 2018).

Q4.4 What would help make court processes around decision-making arrangements easier to participate in?

Simplifying court forms and processes would significantly improve participation in decision-making arrangements. By making forms easier to understand and fill out, individuals can more effectively engage with the court system. Additionally, providing better support for individuals to participate in hearings is crucial. This includes offering communication assistants and flexibility regarding the timing and location of proceedings. For example, proceedings could be scheduled at times that accommodate the needs of all parties involved, and in locations that are accessible to those with

mobility issues or other constraints.

Ensuring cultural responsiveness and accessibility in court proceedings is also essential. This means incorporating procedures that respect and acknowledge the cultural backgrounds of participants. For instance, holding hearings at a marae can provide a familiar and comfortable setting for Māori individuals, facilitating better participation. Expanding the role of Kaiārahi (Māori cultural advisors) can further support culturally responsive hearings by ensuring that the cultural context is properly understood and respected throughout the process.

Furthermore, updating the PPPR forms in the FCR to align better with statutory provisions is necessary. Currently, these forms do not sync well with the statutory requirements, creating confusion and barriers for those seeking to navigate the legal process. Streamlined and clearly written forms would make the process more accessible and user-friendly, ensuring that individuals can effectively exercise their legal rights and protections.

Additionally, a formal communication assistance procedure similar to that used in the criminal jurisdiction would be helpful. This would ensure that all parties can fully understand and participate in proceedings, leading to fairer outcomes. By implementing these changes, the court system can become more inclusive and responsive to the needs of all individuals involved in decision-making cases.

Q4.5 Is there anything you else you would like to tell us about how systems and court processes could be improved?

Improving systems and court processes requires making them accessible for people with diverse disabilities. Following the Benchmark guidance on increasing people's understanding and engagement in legal processes is essential. This includes simplifying forms and information, providing communication assistants, and ensuring flexibility in proceedings (Donald Beasley Institute, 2018). Disability-awareness training for legal professionals and staff is crucial to create an inclusive and supportive legal environment.

Increasing public awareness about available support and legal options is also important. Developing community-based support services can reduce reliance on court interventions and provide more accessible and immediate assistance. Regular training for professionals involved in the decision-making process is necessary to enhance their understanding and responsiveness. By adopting these measures, we can create a more effective and inclusive system that better serves the needs of all individuals, particularly those with disabilities. Also training and awareness through mandatory pre court course attendance as for FDR process

In conclusion, improving the practical aspects and court processes of the PPPR Act involves implementing comprehensive training, robust complaint mechanisms, and legislative changes to promote the least restrictive decision-making options. Establishing an Office of the Public Advocate and simplifying court processes are critical steps toward a more inclusive and supportive legal framework. By adopting these measures, we can better support

and protect individuals with disabilities, promoting their rights, dignity, and autonomy.

Implementing these comprehensive measures can improve the practical aspects and court processes of the PPPR Act, ensuring that the system better supports and protects individuals with disabilities, promoting their rights, dignity, and autonomy.

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- Pat Scriven

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- Stuart Cummings
- Cushla Webster
- Sonja Clapham
- John Hicks

CONCLUSION

Thank you for the opportunity to make submissions in respect of the Review of Adult Decision-Making Capacity Law – Second Issues Paper. We are available to discuss our submissions via Teams if required. Should clarification be required with regards to any matters raised, please contact Moira McFarland, the TLA Committee Executive at moira.mcfarland@thelawassociation.nz, if you have any questions.

Ngā mihi,



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