



## Reply to questionnaire for the country reports – New Zealand



Bill Atkin<sup>1</sup>

### 1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

The relevant New Zealand legislation on adult guardianship is the Protection of Personal and Property Rights Act 1988 (PPRA). New Zealand is not a federation, so the issue of federal state jurisdictions does not apply.

The High Court has residual inherent jurisdiction over persons with disabilities (s 16, Judicature Act 1908). That Act also gives the High Court some residual jurisdiction over “mentally disordered persons, and person of unsound mind”. These powers are very rarely resorted to, and can largely be ignored.

### 2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority)

The four principal measures to support people with intellectual disabilities are:

- The appointment of a welfare guardian;
- The appointment of a property manager;
- The making of personal orders by the Court on specific matters such as health, residence, etc.
- The creation of an enduring power of attorney (EPA) at a time when the donor of the power has capacity. These powers come in two forms: property powers and personal welfare powers.

In deciding what measure to take, the Family Court is governed by two “primary objectives” (s 8 with a similar provision for property orders in s 28, PPRA):

“(a) to make the least restrictive intervention possible in the life of the person in respect of whom the application is made, having regard to the degree of that person’s incapacity; [and]

(b) to enable or encourage that person to exercise and develop such capacity as he or she has to the greatest extent possible”.

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There is no over-arching “best interests” principle but there is a presumption that the person concerned has capacity (ss 5, 24 and 93B). This means that the onus is on the party claiming a lack of capacity to prove it on the balance of probabilities.

### **3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?**

(i) The Family Court appoints welfare guardians and property managers. With respect to the former, the subject person must wholly lack capacity “to make to communicate decisions” relating to the particular personal aspects of life that are the subject of the application (s 12). This means that the person may lack capacity in relation to the particular aspect but have capacity in others. Further there must be no other satisfactory way of dealing with the person’s personal care and welfare.

The appointee must be aged 20 or more and cannot be a corporate body. The Court has to be satisfied that the appointee can fulfil the role in a satisfactory manner, will act in the person’s best interests, and has no conflict of interest.

(ii) With respect to property managers, the test is whether the person lacks capacity, wholly or partly, to manage property affairs (s 25). In deciding this, it is not enough that the person has not been acting in the way that “people of ordinary prudence” would act. However, the Court will take undue influence into account.

A person must be 20 or over to be appointed a manager, and, while a corporate body may be appointed, it must be a “trustee corporations” (falling within the Trustee Companies Act 1967). The Court has to be satisfied that the person who is appointed can fulfil the role in a satisfactory manner, will act in the person’s best interests, and consents to the appointment, while also taking into account any conflict of interest.

(iii) Anybody may create an EPA, so long as they have the legal capacity to do so. People will often grant an EPA at the same time as making a will. Since the Protection of Personal and Property Rights Amendment Act 2007, the grant of an EPA must be witnessed by a lawyer, authorised officer or employee of a trustee corporation, or a legal executive (s 94A, PPPRA). The witness must explain what an EPA involves and certify that this explanation has been given. The certification must also state that the witness had no reason to suspect that the donor lacked mental capacity at the time of the creation of the EPA.

### **4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?**

When an application is made under the PPPRA, the Court must appoint a lawyer to represent the person who is the subject of the application (s 65). The State pays the costs of this lawyer. The Court may also appoint a “lawyer to assist” the Court, if this is thought desirable, for example because of some difficult legal issue, but it is not regularly done.

When a person who lacks capacity wants to sue or make a claim to a Court, a guardian ad litem or “litigation guardian” will be necessary to act for the person. Under the District Court Rules 2014, Part 4, Subpart 7, rule 4.29, an “incapacitated person” is defined as:

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“a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—

(a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or

(b) unable to give sufficient instructions to issue, defend, or compromise proceedings”.

A litigation guardian, who need not be a lawyer, is a person authorised “to conduct proceedings in the name of, or on behalf of, an incapacitated person”. A litigation guardian is essential in any proceeding (whether the person is claimant or defendant) unless the Court orders otherwise, and, if the person does not already have one, the Court may appoint a litigation guardian. Similar rules to those just outlined apply under the High Court Rules (found in Schedule 2, Subpart 7 of the Judicature Act 1908).

### **5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?**

The question of legal capacity can arise in different contexts. When a case is brought under the PPPRA, the Court may obtain an expert report from a medical, psychiatric, psychological or other person who is suitably qualified (s 76) and this report will be influential with the Court. The report writer’s reasonable expenses are paid for by the State. The expert can be called as a witness and can be questioned in court. There is no separate process for determining capacity. The Court hearing the application will make a decision on capacity at the same time as determining what, if any, order should be made.

As mentioned above, the question of capacity under the PPPRA may depend on the particular issue. Thus, a person may be able to handle simple financial matters but not more complex ones. An order can be tailored to meet differing capacities.

Questions of capacity can also arise in other contexts: for example, does a person have capacity to marry or enter a civil union (civil partnership)? To engage in sexual relations? To make a will (testamentary capacity)? These issues may arise in separate proceedings. The High Court is from time to time called upon to decide whether a testator had testamentary capacity at the time of making a will.

In regard to EPAs, a property power may apply whether or not the donor is mentally capable, depending on the terms of the power. A power relating to personal affairs can be activated only when the donor is mentally incapable.

### **6. What are the responsibilities of a supporter/representative and what are the obligations and principles he/she must comply with?**

#### **(i) Welfare guardians**

Welfare guardians appointed by the Court have all powers reasonably required to act for the subject person in relation to the aspects of the person’s life that are specified in the order (s 18, PPPRA). Those aspects may be spelt out in general or more specific terms. The guardian’s paramount consideration is the promotion and protection of the person’s welfare and best interests as well as encouraging the person to develop capacities and to make decisions if at all possible. The guardian

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must facilitate integration into the community, and consult the person, others who have an interest in the person's welfare, voluntary groups that support people with disabilities, and the property manager if there is one. Directions may be sought from the Court when uncertainty arises.

The welfare guardian cannot do the following (s 18(1):

“(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”.

#### (ii) Property managers

A manager has all rights and powers as conferred by the Court (s 38, PPPRA). The manager's paramount consideration is the promotion and protection of the person's best interests as well as encouraging the person to develop and exercise such competence as exists. As part of this, the manager may allow the person to control any part of the property, so far as that is practicable (s 36, PPPRA). Directions may be sought from the Court.

The manager must consult the person, others who have an interest in the person's welfare, voluntary groups that support people with disabilities, and the welfare guardian if there is one. The manager may follow advice given by the subject person. If there is a personal order in place, the manager's actions are subject to the terms of that order. Every year, the manager must file in Court a “statement” of the management of the person's property.

#### (iii) Attorneys under a property EPA

Property attorneys must act in accordance with the power given to them. This power may be general or relate to specific matters. It may apply while the donor is still competent, depending on the terms of the EPA. However if the donor is not competent and the power is used, the attorney's paramount consideration is the promotion and protection of the donor's best interests as well as encouraging the donor to develop competence. The attorney can do anything that the donor could otherwise lawfully do with respect to the property.

An attorney, in acting under the power, must consult the donor and any other persons mentioned in the EPA, and must keep records of transactions. Directions may be sought from the Court.

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#### (iv) Attorneys under a personal EPA

A personal attorney can act only in accordance with the terms of the power, which may be general or relate to specific matters. Unlike a property power, a personal power can be exercised only when the donor is mentally incapable. If the matter is a “significant” one, then the attorney cannot act unless a health practitioner has certified or a Court has determined that the donor is mentally incapable. A “significant matter” is defined 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)” (s 98, PPPRA). The attorney’s paramount consideration is the promotion and protection of the donor’s welfare and best interests as well as encouraging the donor to develop capacities. Unlike the property attorney, the personal attorney must “encourage the donor to act on his or her own behalf to the greatest extent possible; and seek to facilitate the integration of the donor into the community to the greatest extent possible” (s 98A, PPPRA). A personal attorney is prevented from making the same decisions that are denied a welfare guardian (see the list above under (i)) (ss 98(4) and 18, PPPRA).

An attorney, when acting under a power, must consult the donor and any other persons mentioned in the EPA. The attorney may take into account any advance directive that the donor has made. Directions may be sought from the Court.

### **7. What role do family members play and what are the requirements imposed on them?**

The PPPRA does not contain any principles about consultation with or involvement of the subject person’s family. This is in contrast to the mental health legislation, the Mental Health (Compulsory Assessment and Treatment Act 1992 (MHA), which requires “proper recognition of the importance and significance to the person of the person’s ties with his or her family, whanau, hapu, iwi, and family group” (s 5, MHA). The words “whanau, hapu, iwi” refer to the indigenous Maori concepts of family, sub-tribe and tribe. Section 5 also refers to “respect for the person’s cultural and ethnic identity, language, and religious or ethical beliefs”. Particularly in relation to Maori and Pacific Island peoples’ perspectives, family links and genealogy are integral to such things as culture and ethnicity.

Despite the lack of any overall family focus, a relative has a right to apply for an order under the Act and often this happens. The Court can appoint a family member as a welfare guardian or property manager, so long as it takes into account any potential conflict of interest. As noted above, welfare guardians and property managers must consult people who are interested in the subject person’s welfare. In many situations, these people will include family members

Consistent with the above, family members have no special requirements imposed upon them unless they happen to be appointed to a particular role by the Court or have been chosen to be a donor’s attorney (which is often the situation).

### **8. What role do volunteers play and what are the requirements imposed on them?**

Volunteers are often appointed as welfare guardians, managers and attorneys. No specific requirements are imposed on volunteers who do not fulfil one of these roles.

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## **9. Are there professional supporters/legal representatives and what requirements/ qualifications do they have to satisfy?**

As noted above, a lawyer must be appointed to represent the subject person in Court. They come from a panel considered qualified to act in this role. Also noted above is the position of trustee corporations, which can be chosen as property managers. People such as accountants can also be appointed as managers.

## **10. Who bears the costs for procedures and the supporter/legal representative?**

(i) The State pays for the lawyer appointed to represent the subject person. This is according to a standard rate of fees. Expert reports are similarly paid for.

(ii) Welfare guardians are often volunteers but, under s 21, PPPRA, reasonable expenses can be claimed from the subject person's property. In rare cases, the Court can order the State to cover the welfare guardian's expenses.

(iii) Property managers are entitled to be paid for "properly incurred" expenses, which are paid out of the person's property (s 50, PPPRA). Unless the Court orders otherwise, the manager is not entitled remuneration.

(iv) An attorney acting under an EPA may not benefit or recover expenses from the person's property unless specified by the EPA, a Court so orders, or they fall within some residual categories, including "out-of-pocket expenses ... reasonably incurred" and reasonably incurred professional fees and expenses (s 107, PPPRA).

## **11. How are supporters/legal representatives supervised and what is done to ensure that the rights, the will, and the preferences of the adult concerned are respected? (cf. Art. 12 section 4 UN CRPD)**

(i) Welfare guardians: A welfare guardian is in general not liable unless a lack of bona fides or lack of reasonable care can be shown (s 20, PPPRA). However, a welfare guardian who enters into a contract or arrangement with a third party must disclose that they are acting in the capacity of welfare guardian. An application to the Court to review a personal order can be made under s 86. This can include the appointment of a new welfare guardian. The individual decisions of the welfare guardian can be the subject of a review by the Court if an application is made under s 89. The Court has a wide power to decide whether to conduct a review and then what order should be made.

(ii) Property managers: A manager is in general not liable unless a lack of bona fides or lack of reasonable care can be shown (s 49, PPPRA). However, a manager who enters into a contract or arrangement with a third party must disclose that they are acting as manager. An application to the Court to review a property order can be made under s 87. This could include the appointment of a new manager. The individual decisions of the manager can be the subject of a review by the Court if an application is made under s 89. The Court has a wide power to decide whether to conduct a review and then what order should be made.

(iii) Attorneys: A donor can revoke an EPA while mentally capable. If not mentally capable, the donor can still suspend the power and the suspension lasts until a medical practitioner or a Court has determined that the person is indeed mentally incapable (s 102A, PPPRA). Under s 102, the Court has wide powers in respect of EPAs, for example to modify the terms of the EPA or to decide that the

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attorney is not suitable for the role. Under s 103 a range of people including relatives, a social workers, medical practitioners and the manager of a rest home may apply for a review of the attorney's decisions. Under s 105 a Court may revoke the appointment of an attorney where the attorney has not acted in the donor's best interests, or is not complying with any of the attorney's obligations under the Act.

(iv) The views of the person: The person can initiate the review procedures just outlined. Obviously in some instances they will need help in doing so.

The Act does not contain an overall principle that the person who is the subject of an application must be given the opportunity to express their views and to have such views taken into account (contrast s 6 of the Care of Children Act 2004, which has such a requirement for children). However, when it comes to the choice of welfare guardian or property manager, the person's wishes are to be obtained in so far as this is practicable (ss 12(7) and 31(7), PPPRA). In reality, the lawyer appointed to represent the person is the most likely means of obtaining the person's views and conveying them to the Court.

## **12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?**

New Zealand does not use the phrase "deprivation of liberty" as such. A decision that involves a loss of liberty such as one in relation to medical treatment or institutionalisation will be made by the Family Court in accordance with the procedures and tests outlined above. Typically this will be a personal order under s 10 PPPRA, but it could be combined with the appointment of a welfare guardian, who, for example, could be empowered to give consent to a particular medical procedure when the time arrives. Under the PPPRA no express reference is made to endangerment, but in weighing up whether to make an order and in determining what is the least restrictive intervention, questions of safety may arise.

Endangerment (of self and others) is relevant under the mental health legislation when assessing whether a person has a "mental disorder". The definition in s 2, MHA, reads as follows:

"in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—

- (a) poses a serious danger to the health or safety of that person or of others; or
- (b) seriously diminishes the capacity of that person to take care of himself or herself".

If a person falls within this definition, compulsory assessment and treatment can ensue. Initially this is the decision of mental health professionals but, after a maximum of a month, a Court must make a compulsory treatment order if further treatment is thought to be required. Such orders can be either "community treatment orders", ie where people are outpatients living in the community, or "inpatient orders" where people are institutionalised. An inpatient order can be made only if a community treatment order does not permit the patient to be treated adequately (s 28, MHA).

### **13. Additional comments (elements of your country's system that may be of interest and are not covered above)**

#### **(1) Change in use of the legislation**

The driving force behind the PPPRA was groups that looked after the interests of persons with congenital intellectual handicaps. It was recognised at the time that others such as accident victims who suffer head injuries and those who have debilitating strokes would also fall under the jurisdiction of the Act. Mental health patients represented another category, but it was understood that simply because a person was compulsorily being assessed and treated under the MHA did not mean that they necessarily lacked capacity in the PPPRA sense.

The reality is that the PPPRA is now used to a much greater extent than originally expected by elderly persons. This reflects the ageing population. Where possible, people are advised to create EPAs and thus take the initiative themselves. This makes it much easier for institutional carers ("rest homes") looking after elderly persons, but, if no EPA is in place, one will be sought if the person still has capacity to grant one, or else an application to the Court will likely be made.

#### **(2) Proceedings**

Court procedures under the PPPRA are private and are reported (for example in professional law reports or in the media) on an anonymised basis. The person who is subject to the application is to be present during the Court hearing unless that person would not be able to understand what is going on or "serious mental, emotional, or physical harm" would be caused by attendance (s 74, PPPRA).

#### **(3) Testamentary capacity, wills, settlements, and gifts**

Simply because a property order has been made against a person does not mean that that person lacks testamentary capacity (s 54, PPPRA). Such capacity is a different issue. The Court may however direct that no will is to be made without the leave of the Court. Where the person does lack testamentary, where appropriate, the Court may authorise the manager to make a will on the terms that the Court approves (s 55; a similar power exists with respect to EPA attorneys under s 102(2)(j)). These terms are likely to reflect what is known of the person's wishes and idiosyncrasies. In some cases it may be to fill a gap, for example to extend the beneficiaries from children to also include grandchildren. When enacted, this power was novel. The Court also has power to settle property on trust and can direct the gifting of property for the maintenance and benefit of family members and other persons whom the subject person would be expected to assist (s 62, PPPRA).

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