

# **Protection of Personal and Property Rights Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

This Bill amends the enduring powers of attorney (EPA) provisions in Part 9 and Schedule 3 of the Protection of Personal and Property Rights Act 1988 (the principal Act). These amendments are based on recommendations of the Law Commission in its report *Misuse of Enduring Powers of Attorney* (2001) modified following wide consultation with older people and their organisations, and on the principle that the welfare and interests of donors should be the paramount consideration.

The purpose of the Bill is to—

- strengthen the legislation (consistent with the drafting of other Parts of the principal Act) so that the welfare and rights of vulnerable people are better protected;
- replace the EPA forms and notes in Schedule 3 of the principal Act with prescribed forms in regulations.

### **Summary of key measures**

The key measures in the Bill include—

- inserting a purpose statement into Part 9 of the principal Act describing the role of the attorney under an EPA;
- a legislative presumption as to donors' competence;
- changing part of the definition of mentally incapable in relation to personal care and welfare from “lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating

to his or her personal care and welfare” to the donor lacking the capacity to make a decision as to his or her personal care and welfare, or to foresee the consequences of such a decision or failure to make such decisions:

- strengthening witnessing requirements for all new EPAs so that the donor’s signature must be witnessed by a lawyer or authorised officer of a trustee corporation engaged independently of the attorney:
- requiring certification by the witness at the time the EPA is created that certain matters have been explained to the donor before the donor signed the EPA:
- making explicit the obligation of the attorney to act in the best interests of the donor:
- requirements on attorneys to consult with the donor and with persons specified by the donor on creation of the EPA, and to encourage donors to exercise such competence as the donor has in relation to his or her personal care and welfare or financial affairs:
- requiring certification by a relevant health practitioner as to the donor’s lack of mental capacity before an attorney may act for the donor (except in relation to personal care and welfare matters that are not significant personal care and welfare matters):
- enabling a donor who has regained mental capacity to suspend the attorney’s powers to act under an EPA until a relevant health practitioner again certifies the donor’s mental incapacity:
- limiting the powers of an attorney under a property EPA to make gifts and loans and recover costs from a donor’s estate:
- making explicit that an attorney under a property EPA must financially support personal care and welfare decisions made where there are separate attorneys:
- extending the list of people who may apply to the Family Court without leave, for review of an attorney’s actions or for revocation of the attorney’s appointment:
- providing for the placement of the current EPA forms and notes set out in Schedule 3 of the principal Act in regulations so that changes can be made as required without further legislative amendment.

## Clause by clause analysis

*Clause 1* is the title clause.

*Clause 2* provides for the commencement date. This Act (other than *clause 22*) comes into force 1 year after the date on which it receives the Royal assent unless it is earlier brought into force by Order in Council. *Clause 22* comes into force on the day after the date on which the Act receives the Royal assent to enable the necessary forms to be prepared for the commencement of the Act.

*Clause 3* provides that this Act amends the Protection of Personal and Property Rights Act 1988.

### Part 1

#### Miscellaneous amendments

*Clauses 4 and 5* make minor amendments to sections 7 and 26 respectively. The references to hospitals, homes, and other institutions are updated for consistency with the Health and Disability Services (Safety) Act 2001.

### Part 2

#### Amendments to enduring powers of attorney

*Clause 6* inserts *new sections 93A and 93B* into Part 9.

*Section 93A* describes the purpose of Part 9.

*Section 93B* establishes a presumption of competence for the purposes of Part 9. Every person is presumed, until the contrary is shown, to be able to—

- understand decisions in respect of matters relating to his or her property affairs or personal care and welfare; and
- communicate decisions in respect of those matters.

*Clause 7* repeals section 94 (interpretation) and substitutes *new sections 94 and 94A*.

Section 94 defines when a donor of an enduring power of attorney is mentally incapable. *New section 94* continues to define mental incapacity and also provides definitions of health practitioner, lawyer, prescribed form, and relevant health practitioner.

The principal change made by *new section 94* relates to the definition of a donor's mental incapacity in relation to personal care and welfare.

The current definition in section 94(1)(b) provides that a donor is mentally incapable if he or she—

- lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
- has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.

*New section 94(2)* provides that a donor is mentally incapable if he or she—

- lacks the capacity—
  - to make a decision about a matter relating to his or her personal care and welfare; or
  - to understand the nature of decisions about matters relating to his or her personal care and welfare; or
  - to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or
- wholly lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare.

*New section 94A* sets out new procedural requirements for creating an enduring power of attorney.

The procedural requirements set out in section 95(1) are moved into *new section 94A* with the following changes—

- the person who witnesses the donor's signature in the instrument creating the power of attorney must be independent of the attorney and must either be a lawyer, or an officer or employee of a trustee corporation:
- before the donor signs the instrument, the witness must explain to the donor the effects and implications of the enduring power attorney as well as the other matters referred to in *new subsection (6)*:
- the witness to the donor's signature must certify that—
  - the requirements of *new subsection (6)* have been met;
  - the witness has no reason to suspect that the donor was or may have been mentally incapable when the donor signed the instrument;
  - the witness is independent of the attorney:

- the instrument creating the power of attorney must be in the prescribed form with the certificate of the witness to the donor's signature attached.

*Clause 8* amends section 95(2) to reflect that the form of enduring power of attorney will now be prescribed by regulations.

*Clause 9* amends section 97 by adding *new subsections (4) and (5)*. Section 97 relates to enduring powers of attorney in relation to property.

*New subsection (4)* is based on paragraph 2 of the form of enduring power of attorney in relation to property set out in Schedule 3.

*New subsection (4)* provides that the donor may authorise the enduring power of attorney to have effect—

- while the donor is mentally capable and to continue to have effect if the donor becomes mentally incapable; or
- only if the donor becomes mentally incapable.

The principal change to section 97 is made by *new subsection (5)*. If a donor authorises the enduring power of attorney to have effect only if the donor becomes mentally incapable, the attorney must not act in relation to the donor's property unless a relevant health practitioner has certified that the donor is mentally incapable.

*Clause 10* inserts *new section 97A*.

*New section 97A* describes how an attorney under an enduring power of attorney in relation to a donor's property is to exercise that power if the donor becomes mentally incapable. The attorney's paramount consideration is the promotion and protection of the donor's best interests while seeking at all times to encourage the donor to develop his or her competence to look after his or her property affairs.

*Clause 11* amends section 98, which relates to enduring powers of attorney in relation to personal care and welfare.

The principal change is made by *new section 98(3)*, which prohibits an attorney from acting on any significant matter relating to the donor's personal care and welfare unless the donor is certified as being mentally incapable by a relevant health practitioner. However, if the matter is not significant, the attorney may not act on it unless satisfied that the donor is mentally incapable.

*Clause 12* inserts *new section 98A*, which relates to the exercise of an enduring power of attorney in relation to a donor's personal care and welfare.

The attorney's paramount consideration is the promotion and protection of the welfare and best interests of the donor, while seeking at all times to encourage the donor to develop and exercise his or her capacity to understand decisions in respect of matters relating to his or her personal care and welfare, and to communicate those decisions.

The attorney must also—

- encourage the donor to act independently as much as possible; and
- seek to facilitate the donor's integration into the community as much as possible; and
- consider the financial implications for the donor's property when deciding any matter relating to the donor's personal care and welfare.

*Clause 13* amends *section 99* by replacing subsection (2) with *new subsections (2) and (3)*.

Section 99(2) currently provides that in any conflict between an attorney responsible for a donor's personal care and welfare and an attorney responsible for the donor's property, the attorney responsible for the donor's personal care and welfare prevails unless the Court directs otherwise.

*New subsection (2)* now requires the attorney responsible for the donor's property to provide any financial support required by the attorney responsible for the donor's personal care and welfare in order to carry out his or her duties as attorney.

*New subsection (3)* states that *subsection (2)* is subject to the enduring power of attorney and any direction of the Court.

*Clause 14* inserts *new sections 99A to 99C*.

*New section 99A* requires an attorney acting under an enduring power of attorney to consult with the donor, and any other person the donor has specified to be consulted.

*New section 99B* requires an attorney to comply with requests for information on the exercise of the attorney's powers from individuals specified in the enduring power of attorney.

*New section 99C* provides for matters relating to the assessment and examination of the donor's mental capacity. The donor may specify that his or her medical assessment must be undertaken by a specialist. The cost of a medical assessment or examination for the purpose of certifying whether the donor is mentally incapable may be recovered from the donor's estate.

*Clause 15* inserts *new section 100A*. *New section 100A* enables a donor of an enduring power of attorney who has been, but is no longer, mentally incapable to suspend the attorney's authority to act.

*Clause 16* amends section 102(2). Section 102(2) describes the Court's jurisdiction in respect of an enduring power of attorney where the donor is mentally incapable.

The amendment to section 102(2) inserts *new paragraph (ga)*, which enables the Court to authorise the attorney to make a loan or advance of the donor's property subject to any conditions that the Court thinks appropriate.

*Clause 17* inserts *new section 102A*, which enables a person to apply for the exercise of the Court's jurisdiction under section 102 or 105. Applications may be made by any person listed in *new section 103* or any other person with the leave of the Court.

*Clause 18* repeals section 103 and substitutes *new sections 103 and 103A*.

Current section 103 enables a donor, or any other person with the leave of the Court, to seek a review of a decision of the attorney made while the donor was mentally incapable.

*New section 103* provides that the following people may automatically apply to the Court for a review of the attorney's decision:

- the donor;
- a relative or attorney of the donor (not being the attorney whose decision is sought to be reviewed);
- a social worker;
- a medical practitioner;
- a trustee corporation;
- if the donor is a patient or a resident in any place that provides hospital care, rest home care, or residential disability care within the meaning of the Health and Disability Services (Safety) Act 2001, the principal manager of that place;
- any welfare guardian who has been appointed for the donor.

*New section 103A* provides that despite the failure of an enduring power of attorney to comply with *section 94A or 95*—

- an act of an attorney under the power of attorney is valid if the attorney acted in good faith with no knowledge of the failure;
- a transaction between another party and an attorney under the power of attorney is valid if the other party entered into it in good faith with no knowledge of the failure.

*Clause 19* amends section 105, which relates to the revocation of an attorney's appointment under an enduring power of attorney. The amendment repeals subsection (1) and substitutes *new subsections (1) and (1A)*.

Subsection (1) of section 105 currently enables the Court to revoke an attorney's appointment if satisfied that the attorney has not acted, is not acting, or proposes not to act in the donor's best interests.

*New subsection (1)* is to the same effect as the current subsection except that—

- it specifies the proceedings in which the Court may revoke an attorney's appointment (namely those proceedings commenced under section 101, 102A, or 103); and
- it includes as a ground of revocation, the attorney's failure to comply with *new section 99A* (consultation requirement) or *new section 99B* (requirement to provide information on exercise of powers).

*New subsection (1A)* limits the Court's power to revoke an attorney's appointment on its own motion.

*Clause 20* replaces section 107. Section 107 describes when an attorney may act to the benefit of himself or herself, or of any other person (other than the donor), while the donor is mentally incapable.

Currently, an attorney may act to the benefit of himself or herself or of another person, if and only to the extent that the donor might be expected to provide for the needs of the attorney or those other persons (for example, seasonal gifts). This rule does not apply if the enduring power of attorney provides otherwise, or the Court gives authorisation under section 102(g).

*New section 107(1)* provides that an attorney must not act to the benefit of himself or herself, or of any person (other than the donor), or recover any expenses from the donor's property, unless—

- the attorney is authorised under the enduring power of attorney; or



- the attorney is authorised by the Court under paragraph (g) or *new paragraph (ga)* of section 102(2).

*New section 107(1)* does not apply if—

- the donor and the attorney are married to, or in a civil union or de facto relationship with, each other, and they share their incomes and jointly own property and assets; or
- the attorney is recovering professional fees and expenses for work done by the attorney in a professional capacity; or
- the attorney is making an investment that he or she is authorised to make under section 13A of the Trustee Act 1956.

*Clause 21* inserts *new section 108AA*.

*New section 108AA* provides that the following sections do not apply to enduring powers of attorney made before the commencement of *clause 21* of this Bill:

- *new section 94A* (creation of enduring power of attorney);
- *new section 107* (attorney's power to benefit self and others).

Sections 95(1), 95(2), and 107 (as they read before the commencement of this Bill) continue to apply to enduring powers of attorney made before the commencement of this Bill.

*Clause 22* amends section 112, which relates to the making of regulations. The amendment enables forms for enduring powers of attorney, witnessing requirements, and medical certificates to be prescribed by regulation.

*Clause 23* repeals Schedule 3. Schedule 3 currently contains the forms for enduring powers of attorney.

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*Hon Ruth Dyson*

# **Protection of Personal and Property Rights Amendment Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Protection of Personal and Property Rights Amendment Act **2006**.

**2 Commencement**

- (1) This Act (except **section 22**) comes into force 1 year after the date on which it receives the Royal assent unless it is earlier brought into force on a date appointed by the Governor-General by Order in Council. 5
- (2) **Section 22** comes into force on the day after the date on which this Act receives the Royal assent. 10

**3 Principal Act amended**

This Act amends the Protection of Personal and Property Rights Act 1988.

**Part 1**

**Miscellaneous amendments**

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**4 Persons who may apply for exercise of Court’s jurisdiction**

Section 7 is amended by repealing paragraph (f) and substituting the following paragraph:

“(f) where the exercise of the Court’s jurisdiction is sought in respect of any person who is a patient or a resident in any place that provides hospital care, rest home care, or residential disability care within the meaning of the Health and Disability Services (Safety) Act 2001, the principal manager of that place:”

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**5 Persons who may apply for exercise of Court’s jurisdiction**

Section 26 is amended by repealing paragraph (g) and substituting the following paragraph:

“(g) where the exercise of the Court’s jurisdiction is sought in respect of any person who is a patient or a resident in any place that provides hospital care, rest home care, or residential disability care within the meaning of the Health and Disability Services (Safety) Act 2001, the principal manager of that place:”

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**Part 2**

**Amendments relating to enduring powers of attorney**

**6 New sections 93A and 93B inserted**

The following sections are inserted after the Part 9 heading:

**“93A Purpose of this Part**

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“(1) The purpose of this Part is to enable a person (the **donor**) to grant an enduring power of attorney to another person—

“(a) to act in relation to the donor’s personal care and welfare, property affairs, or both, if the donor becomes mentally incapable:

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“(b) to act in relation to the donor’s property affairs despite the donor becoming mentally incapable.

“(2) Accordingly, this Part—

“(a) states the requirements for creating an enduring power of attorney: 5

“(b) defines when a donor is mentally incapable for the purposes of this Part:

“(c) states the duties of an attorney (in addition to those set out in the enduring power of attorney):

“(d) sets out the Court’s jurisdiction in respect of an enduring power of attorney: 10

“(e) provides for the review by the Court of any decision of an attorney:

“(f) establishes the circumstances in which an enduring power of attorney may be suspended or revoked. 15

**“93B Presumption of competence**

For the purposes of this Part, every person is presumed, until the contrary is shown, to have the capacity—

“(a) to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her property affairs or personal care and welfare; and 20

“(b) to communicate decisions in respect of those matters.”

**7 New sections 94 and 94A substituted**

Section 94 is repealed and the following sections are substituted: 25

**“94 Interpretation**

“(1) For the purposes of this Part, the donor of an enduring power of attorney is mentally incapable in relation to property if the donor is not wholly competent to manage his or her own affairs in relation to his or her own property. 30

“(2) For the purposes of this Part, the donor of an enduring power of attorney is mentally incapable in relation to personal care and welfare if the donor—

“(a) lacks the capacity— 35

“(i) to make a decision about a matter relating to his or her personal care and welfare; or

- “(ii) to understand the nature of decisions about matters relating to his or her personal care and welfare; or
- “(iii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or 5
- “(b) wholly lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare. 10
- “(3) Nothing in **subsection (1) or (2)** affects any rule of law relating to capacity to give or to revoke a power of attorney.
- “(4) In this Part—
- “**health practitioner**—
- “(a) has the meaning given to it by section 5(1) of the Health Practitioners Competence Assurance Act 2003: 15
- “(b) in the case of a certificate of mental incapacity issued outside New Zealand, means a person registered as a medical practitioner by the competent authority of the State concerned 20
- “**lawyer** has the meaning given to it by section 6 of the Lawyers and Conveyancers Act 2006
- “**prescribed form** means a form prescribed by regulations under this Act
- “**relevant health practitioner** means a health practitioner— 25
- “(a) whose scope of practice includes the assessment of a person’s mental capacity; or
- “(b) whose scope of practice—
- “(i) includes the assessment of a person’s mental capacity; and 30
- “(ii) is specified in the enduring power of attorney (for example, a specialist).
- “**94A Creation of enduring power of attorney**
- “(1) An enduring power of attorney made after the commencement of **section 7 of the Protection of Personal and Property Rights Amendment Act 2006** does not have effect unless it complies with the requirements of this section and section 95. 35

- “(2) The instrument creating an enduring power of attorney—  
 “(a) must be in the prescribed form; and  
 “(b) must have attached to it the certificate referred to in **subsection (7)**.”
- “(3) The instrument must be signed— 5  
 “(a) by the donor, or by some other person in the presence of the donor and by the direction of the donor; and  
 “(b) by the attorney (or if more than one, by each attorney).”
- “(4) The signature of the donor must be witnessed by a person who is independent of the attorney (or of each attorney) and who is— 10  
 “(a) a lawyer; or  
 “(b) an officer or employee of a trustee corporation authorised by the corporation for the purposes of this subsection. 15
- “(5) The signature of an attorney must be witnessed by a person other than the donor or the donor’s witness.
- “(6) Before the donor signs the instrument, the witness to the donor’s signature must explain the effects and implications of the enduring power of attorney to the donor, and advise the donor of— 20  
 “(a) the matters referred to in the notes to the prescribed form of power of attorney:  
 “(b) the donor’s right to suspend or revoke the power of attorney: 25  
 “(c) in the case of a power of attorney in relation to property,—  
 “(i) the donor’s right to appoint more than one attorney, or a trustee corporation, as attorney; and  
 “(ii) the donor’s right to stipulate whether and, if so, 30  
 how the attorney’s dealings with the donor’s property are to be monitored.
- “(7) The witness to the donor’s signature must certify on the prescribed form that—  
 “(a) the requirements of **subsection (6)** have been met; and 35  
 “(b) the witness has no reason to suspect that the donor was or may have been mentally incapable at the time the donor signed the instrument; and  
 “(c) the witness is independent of the attorney (or of each attorney).” 40

- 8 When power of attorney is an enduring power of attorney**
- (1) Section 95(1) is repealed.
- (2) Section 95 is amended by repealing subsection (2) and substituting the following subsection: 5
- “(2) A power of attorney purporting to be an enduring power of attorney has effect even though it is not in the prescribed form, but only if the differences are immaterial.”
- 9 Enduring power of attorney in relation to property**
- Section 97 is amended by adding the following subsections: 10
- “(4) A donor of an enduring power of attorney may—
- “(a) authorise the enduring power of attorney to have effect while the donor is mentally capable and to continue to have effect if the donor becomes mentally incapable; or
- “(b) authorise the enduring power of attorney to have effect only if the donor becomes mentally incapable. 15
- “(5) If **subsection (4)(b)** applies, the attorney must not act in relation to the donor’s property unless a relevant health practitioner has certified that the donor is mentally incapable.”
- 10 New section 97A inserted** 20
- The following section is inserted after section 97:
- 97A Exercise of power of attorney in relation to property**
- “(1) This section applies to an attorney under an enduring power of attorney in relation to the donor’s property if the donor of the power becomes mentally incapable. 25
- “(2) The paramount consideration of the attorney is to use the donor’s property in the promotion and protection of the donor’s best interests, while seeking at all times to encourage the donor to develop the donor’s competence to manage his or her own affairs in relation to his or her property. 30
- “(3) This section applies regardless of whether the enduring power of attorney is of the type referred to in **section 97(4)(a) or (b)**.”
- 11 Enduring power of attorney in relation to personal care and welfare**
- (1) Section 98 is amended by repealing subsection (3) and substituting the following subsections: 35



- “(3) The attorney—
- “(a) must not act in respect of a significant matter relating to the donor’s personal care and welfare unless a relevant health practitioner has certified that the donor is mentally incapable; and 5
  - “(b) must not act in respect of any other matter relating to the donor’s personal care and welfare unless the attorney is satisfied that the donor is mentally incapable.
- “(3A) For the purposes of **subsection (3)**, a donor’s mental capacity is determined— 10
- “(a) at the time a decision about the matter relating to the donor’s personal care and welfare is being made or is proposed to be made; and
  - “(b) in relation to the personal care and welfare matter concerned.” 15
- (2) Section 98 is amended by adding the following subsection:
- “(6) In **subsection (3)(a)**, 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).” 20
- 12 New section 98A inserted**
- The following section is inserted after section 98:
- “98A Exercise of enduring power of attorney in relation to personal care and welfare” 25**
- “(1) This section applies to an attorney acting under an enduring power of attorney in relation to the donor’s personal care and welfare.
  - “(2) The paramount consideration of the attorney is the promotion and protection of the welfare and best interests of the donor, while seeking at all times to encourage the donor to develop and exercise his or her capacity to— 30
    - “(a) understand the nature and foresee the consequences of decisions relating to his or her personal care and welfare; and 35
    - “(b) communicate such decisions.
  - “(3) Without limiting the generality of **subsection (2)**, the attorney must—

- “(a) encourage the donor to act on his or her own behalf to the greatest extent possible; and  
“(b) seek to facilitate the integration of the donor into the community to the greatest extent possible.
- “(4) When deciding any matter relating to the donor’s personal care and welfare, the attorney must give due consideration to the financial implications of that decision in respect of the donor’s property.” 5
- 13 Both kinds of power may be given** 10  
Section 99 is amended by repealing subsection (2) and substituting the following subsections:
- “(2) If subsection (1)(b) applies, the attorney responsible for the donor’s property must give the attorney responsible for the donor’s personal care and welfare any financial support required by that attorney to carry out his or her duties in relation to the donor’s personal care and welfare. 15
- “(3) **Subsection (2)** is subject to—  
“(a) the enduring power of attorney; and  
“(b) any direction of the Court under section 101 made on the application of either attorney.” 20
- 14 New sections 99A to 99C inserted**  
The following sections are inserted after section 99:
- “99A Attorney’s duty to consult**
- “(1) When acting under an enduring power of attorney, the attorney must, as far as is practicable, consult— 25  
“(a) the donor; and  
“(b) any other person specified in the enduring power of attorney to be consulted, whether in respect of a particular matter or generally.
- “(2) The attorney may follow any advice given under **subsection (1)**, and is not liable for anything done or omitted in following that advice, unless done or omitted in bad faith or without reasonable care. 30
- “(3) The attorney may apply to a Court for directions if the attorney considers that the advice given under **subsection (1)**— 35  
“(a) conflicts with his or her duty as attorney or with any rule of law; or

- “(b) would or may expose the attorney to liability; or  
“(c) is otherwise objectionable; or  
“(d) is conflicting.
- “(4) The attorney is not liable in respect of anything done or omitted to be done in accordance with the Court’s directions. 5
- “(5) The Court may, in giving any direction, make any order as to costs it thinks fit.
- “(6) Nothing in **subsection (3)** obliges the attorney to apply to a Court for directions.
- “(7) If a donor has, under an enduring power of attorney, appointed one attorney in relation to his or her property and another attorney in relation to his or her personal care and welfare, both attorneys must consult each other regularly to ensure that the donor’s interests are not prejudiced through any breakdown in communication between them. 10  
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- “99B Attorney must provide information on exercise of powers**  
An attorney must promptly comply with any request for information relating to the exercise of the attorney’s powers under the enduring power of attorney if— 20
- “(a) the person requesting the information is specified in the enduring power of attorney as a person to be provided with such information; and  
“(b) the information requested is the kind of information specified in the enduring power of attorney to be provided to that person. 25
- “99C Medical certification of incapacity**
- “(1) A certificate of the donor’s mental incapacity under this Part must be— 30
- “(a) in the prescribed form; or  
“(b) if the certificate is issued outside New Zealand, in a form acceptable to the competent authority of the State concerned.
- “(2) The donor may specify in an enduring power of attorney that the assessment of his or her mental capacity for the purposes of this Part be undertaken by a health practitioner with a specified scope of practice, but only if the scope of practice 35

specified includes the assessment of a person's mental capacity.

- “(3) The cost of any medical assessment or examination for the purpose of certifying whether the donor is mentally incapable under this Part is recoverable as a debt from the donor's estate.” 5

**15 New section 100A inserted**

The following section is inserted after section 100:

**“100A Suspension of attorney's power to act**

- “(1) A donor of an enduring power of attorney who has been, but is no longer, mentally incapable may suspend the attorney's authority to act under the enduring power of attorney by giving written notice to the attorney. 10
- “(2) An attorney whose authority is suspended may not act under the enduring power of attorney unless a relevant health practitioner certifies that the donor is mentally incapable. 15
- “(3) The suspension does not revoke the enduring power of attorney.
- “(4) Nothing in this section affects the donor's right to revoke the enduring power of attorney while the donor is mentally capable.” 20

**16 Court's jurisdiction in respect of an enduring power of attorney**

Section 102(2) is amended by inserting the following paragraph after paragraph (g): 25

“(ga) authorise the attorney to make any loan or advance of the donor's property subject to any conditions that the Court considers appropriate:”.

**17 New section 102A inserted**

The following section is inserted after section 102: 30

**“102A Persons who may apply for exercise of Court's jurisdiction**

An application to a Court for the exercise of its jurisdiction under **section 102 or 105** may be made by—

- “(a) any person listed in **section 103(1)**; or 35
- “(b) any other person with the leave of the Court.”

**18 New sections 103 and 103A substituted**

Section 103 is repealed and the following sections are substituted:

**“103 Review of attorney’s decisions**

- “(1) Any of the following people may at any time apply to a Court 5  
to review any decision made by an attorney under an enduring  
power of attorney while the donor is or was mentally  
incapable:
- “(a) the donor of the enduring power of attorney:
  - “(b) a relative or attorney of the donor (not being the attor- 10  
ney whose decision is sought to be reviewed):
  - “(c) a social worker:
  - “(d) a medical practitioner:
  - “(e) a trustee corporation:
  - “(f) if the donor is a patient or a resident in any place that 15  
provides hospital care, rest home care, or residential  
disability care within the meaning of the Health and  
Disability Services (Safety) Act 2001, the principal  
manager of that place:
  - “(g) any welfare guardian who has been appointed for the 20  
donor.
- “(2) Any other person may apply for a review if the Court gives  
leave to do so.
- “(3) For the avoidance of doubt, an application for review may be 25  
made while the enduring power of attorney is in force or after  
it is revoked by the death of the donor or otherwise.
- “(4) The Court may, if it thinks it reasonable to do so in all the  
circumstances, review the decision and make any order it  
thinks fit.
- “(5) An order under **subsection (4)** has effect according to its tenor. 30

**“103A Validity of actions under instrument not complying  
with section 94A or 95**

The fact that an instrument is not an enduring power of attor-  
ney because of any failure to comply with **section 94A or 95** does  
not affect the validity of— 35

- “(a) any act of the attorney done under the power of attorney  
in good faith with no knowledge of the failure; or
- “(b) any transaction entered into by the attorney under the  
power of attorney if the other party to the transaction

entered into it in good faith and with no knowledge of the failure.”

**19 Court may revoke appointment of attorney**

Section 105 is amended by repealing subsection (1) and substituting the following subsections: 5

“(1) The Court may, in any proceeding commenced under section 101, **102A, or 103**, revoke the appointment of an attorney under an enduring power of attorney if it is satisfied that the attorney—

“(a) is not acting, or proposes not to act, in the best interests of the donor; or 10

“(b) is failing, or has failed, to comply with any of the attorney’s obligations under **section 99A or 99B**, or proposes not to comply with any of those obligations.

“(1A) In any proceedings commenced under section 101 or **102**, the Court may revoke the appointment of an attorney under an enduring power of attorney only on the motion of the donor or a party to the proceeding other than the attorney.” 15

**20 New section 107 substituted**

Section 107 is repealed and the following section substituted: 20

**“107 Attorney’s power to benefit self and others**

“(1) An attorney under an enduring power of attorney must not, at any time while the donor is mentally incapable, act to the benefit of the attorney or of a person other than the donor, or recover any expenses from the donor’s property, unless and only to the extent that— 25

“(a) the donor has specified a power to so act in the enduring power of attorney; or

“(b) the Court authorises the attorney to so act in an order under section 102(2)(g) or **(ga)**. 30

“(2) **Subsection (1)** does not apply if the donor is the spouse, civil union partner, or de facto partner of the attorney and—

“(a) the donor and attorney share their incomes; and

“(b) the donor does not own significant property or assets separately from the attorney. 35

“(3) **Subsection (1)** does not apply to any professional fees and expenses reasonably incurred by an attorney who—

- “(a) has accepted that appointment in a professional capacity; or  
“(b) has undertaken work in any professional capacity to give effect to the decisions taken under the enduring power of attorney. 5
- “(4) **Subsection (1)** does not prevent an attorney acting under an enduring power of attorney in relation to a donor’s property from making a loan or advance of the donor’s property as an investment that a trustee could make of trust funds under section 13A of the Trustee Act 1956.” 10
- 21 New section 108AA inserted**  
The following section is inserted after section 108:
- “108AA Enduring powers of attorney created before  
Protection of Personal and Property Rights Amendment  
Act 2006”** 15
- If an enduring power of attorney was made before the commencement of **section 21** of the Protection of Personal and Property Rights Amendment Act **2006**—
- “(a) **sections 94A and 107** do not apply to it; and  
“(b) sections 95(1), 95(2), and 107 (as they read before the commencement of **section 21** of the Protection of Personal and Property Rights Amendment Act **2006**) continue to apply to the enduring power of attorney.” 20
- 22 Regulations**  
Section 112 is amended by inserting the following paragraphs after paragraph (b): 25
- “(ba) prescribing forms for enduring powers of attorney for the purposes of Part 9:  
“(bb) prescribing forms for certificates for the purposes of the witnessing requirements in **section 94A(7)**: 30  
“(bc) prescribing forms for certificates for the purposes of any medical examination or assessment under Part 9:”.
- 23 Schedule 3 repealed**  
Schedule 3 is repealed.

