

Protection of Personal and Property Rights Amendment Bill

Government Bill

As reported from the Social Services Committee

Commentary

Recommendation

The Social Services Committee has examined the Protection of Personal and Property Rights Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The bill amends part 9 of the Protection of Personal and Property Rights Act 1988 (No 4), which relates to enduring powers of attorney. These amendments are in part a result of recommendations made in the Law Commission's 2001 report published as *Misuse of Enduring Powers of Attorney*. The bill will increase the safeguards against abuse of elderly and disabled people. This commentary focuses on recommendations for significant changes, and does not cover minor changes of a technical nature.

Witnessing enduring power of attorney

Clause 7 replaces section 94 of the principal Act with sections 94 and 94A. Proposed section 94A lists those who may witness a donor's signature. We recommend changes to new section 94A(4) to allow legal executives to witness a donor's signature. Legal executives would have to be registered with the New Zealand Institute for Legal Executives, have at least 12 months' experience, and be

employed and supervised by a lawyer, to be eligible to undertake this work.

We agree with submitters who suggested that the inclusion of legal executives among permitted witnesses would make enduring powers of attorney less expensive; it would also meet the objective of tightening witnessing provisions to limit abuse of enduring powers of attorney.

Independence of witnesses

We recommend that section 94A as introduced in clause 7 be amended to specify that an authorised officer or employee of a trustee corporation can witness a donor's signature to an enduring power of attorney when a donor appoints the trustee corporation as his or her attorney. The amendment to section 94A would also specify that a lawyer, or a legal executive in the firm of a lawyer who has been appointed as attorney, can witness the donor's signature to the enduring power of attorney. Section 94A(4) in the bill is not clear on this matter and the amendment will clarify the status of these particular witnesses. The bill proposes stronger criteria for ensuring that witnesses are independent, appropriately trained, and authorised to certify enduring powers of attorney.

Certification of medical incapacity

Proposed amendments to sections 98 and 99 of the Act in clauses 11 to 14 prescribe how and when enduring powers of attorney are to be activated in relation to personal care and welfare, and define what steps attorneys may take to obtain assistance from a health professional to certify a donor's mental incapacity. Attorneys would not need a medical certificate of incapacity to make decisions for a donor on matters of personal care and welfare that were not considered significant.

Decisions made by attorney on reasonable grounds

We recommend proposed section 98(3)(b) in clause 11 be amended to prevent an attorney acting in relation to personal care and welfare matters that are not significant matters, unless he or she believes on reasonable grounds that the donor is mentally incapable.

The current wording of this provision in the bill requires that the attorney be satisfied that the donor is mentally incapable. The proposed amendment would provide a more objective test for attorneys making such decisions.

The ability of the donor to express preferences when of sound mind is an important aspect of the enduring power of attorney, and an attorney should take the clearly expressed views of the donor when of sound mind into account when deciding the best course of action.

Limit on medical examinations

To limit the medical examinations that an attorney can charge against the donor's property, we recommend an amendment to section 99C(3) in clause 14. New section 99C(3) would require the donor to pay only for medical examinations that are reasonably required for the purposes of certifying the donor's mental incapacity. This amendment would deter an attorney from approaching multiple health practitioners in search of one who would certify that the donor is mentally incapable. However, an attorney would still be able to obtain a second opinion.

Continuing incapacity

In the case of donors who are suffering from long-term medical conditions, and who are unlikely to regain mental capacity, we recommend that provision be made in proposed section 98(3B) of the Act (as set out in clause 11) for a medical certificate to remain valid indefinitely. This would mean that donors would not be subjected to unnecessary examinations and charges on their property.

Attorney to keep financial records

We recommend that new section 99BA in clause 14 be inserted to require attorneys who are appointed to manage a donor's property to keep records of financial transactions while the donor is mentally incapable. The attorney must provide this information on request to persons specified by the donor in the enduring power of attorney as set out in new section 99B. It would be an offence not to comply with this requirement.

This amendment would protect the attorney's fiduciary duty, make the attorney's actions when managing property more transparent, and facilitate the provision of financial records to family members, courts, and other interested parties.

Revocation of appointment of attorney

We recommend that section 106(1)(a) of the Act in clause 19A be amended to enable a donor to revoke an enduring power of attorney by giving notice in writing to the attorney.

This would allow the replacement of an existing attorney if a donor authorises a new enduring power of attorney which specifies a different attorney. A system of automatic revocation would not work, as a donor may appoint more than one attorney.

Appendix

Committee process

The Protection of Personal and Property Rights Amendment Bill was referred to the committee on 7 December 2006. The closing date for submissions was 1 March 2007. We received and considered 38 submissions from interested groups and individuals. We heard 15 submissions.

We received advice from the Office for Senior Citizens.

Committee membership

Russell Fairbrother (Chairperson)

Judith Collins (Deputy Chairperson)

Sue Bradford

Steve Chadwick

Bob Clarkson

Hon Harry Duynhoven

Dr Paul Hutchison

Lynne Pillay

Heather Roy

Katrina Shanks

Judy Turner

Katrina Shanks replaced Anne Tolley as a permanent member of the committee on 21 February 2007.

Lynne Pillay replaced Georgina Beyer as a permanent member of the committee on 27 February 2007.

Hon Harry Duynhoven replaced Taito Phillip Field as a permanent member of the committee on 6 March 2007.

Protection of Personal and
Property Rights Amendment

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

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.

3 Principal Act amended

This Act amends the Protection of Personal and Property Rights Act 1988. 10

Part 1
Miscellaneous amendments

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

Section 7 is amended by repealing paragraph (f) and substituting the following paragraph: 15

“(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:” 20

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

Section 26 is amended by repealing paragraph (g) and substituting the following paragraph: 25

“(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:” 30

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 grant to another person an enduring power of attorney 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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Struck out (unanimous)

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

New (unanimous)

“(b) grant to another person or persons enduring powers of attorney to act in relation to the donor’s property affairs—

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“(i) if the donor becomes mentally incapable; or

“(ii) while the donor is mentally capable and if the donor becomes mentally incapable:

“(c) grant to another person an enduring power of attorney to act in both capacities.

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“(2) Accordingly, this Part—

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

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

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“(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:

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“(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.

“93B Presumption of competence

Struck out (unanimous)

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

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“(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

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

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New (unanimous)

“(1) For the purposes of this Part, every person is presumed, until the contrary is shown,—

“(a) to be competent to manage his or her own affairs in relation to his or her property:

“(b) to have the capacity—

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“(i) to understand the nature of decisions about matters relating to his or her personal care and welfare; and

“(ii) 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; and

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“(iii) to communicate decisions about those matters.

“(2) A person must not be presumed to lack the competence described in **subsection (1)(a)** just because the person manages or intends to manage his or her own affairs in relation to his or her property in a manner that a person exercising ordinary prudence would not adopt in the same circumstances.

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“(3) A person must not be presumed to lack the capacity described in **subsection (1)(b)** just because the person makes or intends to make a decision in relation to his or her personal care and

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New (unanimous)

welfare that a person exercising ordinary prudence would not make in the same circumstances.

- “(4) A person must not be presumed to lack the competence described in **subsection (1)(a)** or, as the case may be, the capacity described in **subsection (1)(b)**, just because the person is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.” 5

7 New sections 94 and 94A substituted

Section 94 is repealed and the following sections are substituted: 10

“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. 15
- “(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— 20
- “(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 25
- “(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
- “(b) (*wholly*) lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare. 30
- “(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:
 - “(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
 - “**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—
 - “(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
 - “(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.
 - “(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—
 - “(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, subject to **subsection (8)**, is independent of the attorney (or of each attorney) and who is—
 - “(a) a lawyer; or

“(b) an officer or employee of a trustee corporation authorised by the corporation for the purposes of this subsection; or

New (unanimous)

“(c) a legal executive who meets the requirements of subsection (9) .	5
“(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—	10
“(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:	15
“(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, how the attorney’s dealings with the donor’s property are to be monitored.	20
“(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	25
“(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) <u>or that subsection (8)(a) or (b) applies.</u>	30

New (unanimous)

- “(8) Despite **subsection (4)**,—
- “(a) if the attorney is a trustee corporation, an officer or employee of that corporation authorised by the corporation for the purposes of this subsection may witness the donor’s signature: 5
 - “(b) if the attorney is appointed in his or her capacity as a lawyer, another lawyer in the attorney’s firm or a legal executive in that firm who meets the requirements of **subsection (9)** may witness the donor’s signature.
- “(9) A legal executive who witnesses the donor’s signature— 10
- “(a) must be a member of the body that, immediately before the commencement of **section 7** of the Protection of Personal and Property Rights Amendment Act **2006**, was known as the New Zealand Institute of Legal Executives Inc; and 15
 - “(b) must hold a current annual registration certificate issued by that body; and
 - “(c) must have at least 12 months’ experience as a legal executive; and
 - “(d) must be employed by, and under the direct supervision of, a lawyer.” 20

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: 25

Struck out (unanimous)

- “(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.

New (unanimous)

- “(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—
- “(a) no prescribed provision is substantially omitted; and
- “(b) the differences are immaterial.”

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9 Enduring power of attorney in relation to property

Section 97 is amended by adding the following subsections:

- “(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.
- “(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, or the Court has determined, that the donor is mentally incapable.”

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10 New section 97A inserted

The following section is inserted after section 97:

- “97A Exercise of enduring power of attorney in relation to property**
- “(1) This section applies to an attorney acting under an enduring power of attorney in relation to the donor’s property if the donor of the power becomes mentally incapable.
- “(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.
- “(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)**.”

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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:

- “(3) The attorney— 5
- “(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, or the Court has determined, that the donor is mentally incapable; and
 - “(b) must not act in respect of any other matter relating to the donor’s personal care and welfare unless the attorney *(is satisfied)* believes on reasonable grounds that the donor is mentally incapable. 10
- “(3A) For the purposes of **subsection (3)**, a donor’s mental capacity is determined— 15
- “(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. 20

New (unanimous)

- “(3B) Despite **subsection (3A)**,—
- “(a) if the donor is certified as mentally incapable because of a health condition that is likely to continue indefinitely, no further certificates are required under **subsection (3)(a)** in relation to any further personal care and welfare matters: 25
 - “(b) if the donor is certified as mentally incapable because of a health condition that is likely to continue for a period specified in the certificate, no further certificates are required under **subsection (3)(a)** in relation to any further personal care and welfare matters that arise during the specified period.” 30

(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 35

permanent change in the donor’s residence, entering residential care, or undergoing a major medical procedure).”

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 5

- “(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—
 - “(a) understand the nature and foresee the consequences of decisions relating to his or her personal care and welfare; and 15
 - “(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 20
 - “(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.” 25

13 Both kinds of power may be given

Section 99 is amended by repealing subsection (2) and substituting the following subsections: 30

- “(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. 35
- “(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.”

14 New sections 99A to 99C inserted

The following sections are inserted after section 99:

“99A Attorney’s duty to consult

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“(1) When acting under an enduring power of attorney, the attorney must, as far as is practicable, consult—

“(a) the donor; and

Struck out (unanimous)

“(b) any other person specified in the enduring power of attorney to be consulted, whether in respect of a particular matter or generally.

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New (unanimous)

“(b) in relation to any particular matter, any person specified in the enduring power of attorney to be consulted, generally, in respect of matters of that kind, or in respect of that matter.

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“(1A) An attorney acting under an enduring power of attorney in relation to the donor’s personal care and welfare may, subject to any consultation under **subsection (1)**, have regard to any advance directive given by the donor except to the extent that the directive would require the attorney to act in a manner contrary to section 98(4).

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“(2) The attorney may follow any advice given under **subsection (1)**, or any advance directive given by the donor, and is not liable for anything done or omitted in following that advice or directive, unless done or omitted in bad faith or without reasonable care.

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Struck out (unanimous)

“(3) The attorney may apply to a Court for directions if the attorney considers that the advice given under **subsection (1)**—

Struck out (unanimous)

- “(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.

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New (unanimous)

“(3) The attorney may apply to a Court for directions under section 101 in respect of any advice given under **subsection (1)** or any advance directive given by the donor.

“(4) The attorney is not liable in respect of anything done or omitted to be done in accordance with the Court’s directions.

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Struck out (unanimous)

“(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.

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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—

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- “(a) the person requesting the information is specified in the enduring power of attorney as a person to be provided with such information(; *and*) and the information requested is the kind of information specified in the

enduring power of attorney to be provided to that person:

Struck out (unanimous)

“(b) the information requested is the kind of information specified in the enduring power of attorney to be provided to that person.

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New (unanimous)

“(b) the person requesting the information is a barrister or solicitor appointed under section 65 and the information requested is records of financial transactions that the attorney must keep under **section 99BA**.

“99BA Attorney as to property must keep records

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“(1) An attorney under an enduring power of attorney in relation to a donor’s property must keep records of each financial transaction entered into by the attorney under the enduring power of attorney while the donor is mentally incapable.

“(2) An attorney who fails without reasonable excuse to comply with **subsection (1)** commits an offence and is liable on summary conviction to a fine not exceeding \$1,000.

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“99C Medical certification of incapacity

“(1) A certificate of the donor’s mental incapacity under this Part must be—

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“(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 specified includes the assessment of a person’s mental capacity.

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

15 New section 100A inserted

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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.

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“(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.

“(3) The suspension does not revoke the enduring power of attorney.

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“(4) Nothing in this section affects the donor’s right to revoke the enduring power of attorney while the donor is mentally capable.”

16 Court’s jurisdiction in respect of (*an*) enduring power of attorney

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

Struck out (unanimous)

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

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New (unanimous)

“(ga) authorise the attorney to make any loan or advance of the donor’s property subject to—

“(i) any conditions that the Court considers appropriate; and

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New (unanimous)

- “(i) any conditions or restrictions contained in the instrument:”.
- (2) Section 102(2) is amended by adding the following paragraph:
- “(j) authorise an attorney acting under an enduring power of attorney in relation to a donor’s property to execute a will for and on behalf of the donor if the Court is satisfied that—
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- “(i) the donor lacks testamentary capacity; and
- “(ii) there is no express provision to the contrary in the enduring power of attorney.”
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- (3) Section 102 is amended by inserting the following subsection after subsection (2):
- “(2A) For the purposes of any application for the exercise of the Court’s jurisdiction under **subsection (2)(j)**, section 55 applies as if every reference to a manager were a reference to the attorney, and every reference to a person subject to a property order were a reference to the donor.”
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- 17 New section 102A inserted**
- The following section is inserted after section 102:
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- “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
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- “(b) any other person with the leave of the Court.”
- 18 New sections 103 (and 103A) to 103C substituted**
- Section 103 is repealed and the following sections are substituted:
- “103 Review of attorney’s decisions**
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- “(1) Any of the following people may at any time apply to a Court to review any decision made by an attorney acting under an enduring power of attorney while the donor is or was mentally incapable:
- “(a) the donor of the enduring power of attorney:
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- “(b) a relative or attorney of the donor (not being the attorney whose decision is sought to be reviewed):
- “(c) a social worker:
- “(d) a medical practitioner:
- “(e) a trustee corporation: 5
- “(f) 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: 10
- “(g) any welfare guardian who has been appointed for the donor:

New (unanimous)

- | |
|---|
| <p>“(h) a person authorised by a body or organisation contracted by the Government to provide elder abuse and neglect prevention services. 15</p> |
|---|

- “(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 made while the enduring power of attorney is in force or after it is revoked by the death of the donor or otherwise. 20
- “(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.
- “**103A Validity of actions under instrument not complying with section 94A or 95** 25
- The fact that an instrument is not an enduring power of attorney because of any failure to comply with **section 94A or 95** does not affect the validity of—
- “(a) any act of the attorney done under the power of attorney in good faith with no knowledge of the failure; or 30
- “(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. 35

New (unanimous)

“103B Effect of attorney’s decision on third parties

A person dealing with an attorney acting under an enduring power of attorney in respect of any matter within the power of attorney—

- “(a) does not have to inquire about the concurrence or otherwise of the donor or any other person; and 5
- “(b) is not affected by notice that the donor or any other person has not concurred.

“103C Effect of attorney’s actions, etc, before notice of revocation or suspension received

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- “(1) This section applies, instead of section 135(1) to (5) of the Property Law Act 1952, to enduring powers of attorney made before or after the commencement of **section 18** of the Protection of Personal and Property Rights Amendment Act **2006**, but subject to **section 135(6)(b)** of the Property Law Act 1952. 15
- “(2) An enduring power of attorney continues in force until notice of an event revoking the power is received by the attorney.
- “(3) The authority of an attorney to act under an enduring power of attorney continues in force until notice suspending that authority is received by the attorney. 20
- “(4) Every act or thing within the scope of the enduring power of attorney done by or to the attorney in good faith before he or she receives notice of any event revoking the power of attorney has effect as if the event had not occurred.
- “(5) Every act or thing within the scope of an enduring power of attorney done by or to the attorney in good faith before he or she receives notice that his or her authority to act under the power of attorney is suspended has effect as if the authority were not suspended. 25
- “(6) A person dealing with the attorney may rely on a certificate of non-revocation and non-suspension of the enduring power of attorney in the prescribed form as conclusive proof of the non-revocation and non-suspension of the power of attorney as at the date of the certificate if— 30
 - “(a) the person— 35
 - “(i) is dealing with the attorney in good faith; and

New (unanimous)

- “(ii) does not have actual knowledge that an event revoking the power of attorney has occurred, or that the attorney’s authority to act under it has been suspended; and
- “(b) the certificate— 5
- “(i) is signed by the attorney or, if the attorney is a corporation, an officer or employee of the corporation authorised by the corporation for the purposes of this subsection; and
- “(ii) is given immediately before, or any time after, the doing of a thing by the attorney. 10
- “(7) A person who knowingly gives a false certificate commits an offence and is liable on summary conviction to a fine not exceeding \$5,000.
- “(8) **An event revoking the power of attorney** means any event described in section 106(1) in which the enduring power of attorney ceases to have effect.” 15

18A Disclaimer by attorney

- (1) Section 104 is amended by repealing subsection (2) and substituting the following subsection: 20
- “(2) If the donor is mentally incapable, the attorney must file with the notice a report stating—
- “(a) that the attorney considers it is in the interests of the donor that a welfare guardian be appointed in relation to the donor’s personal care and welfare, or a property manager be appointed in relation to the donor’s property; or 25
- “(b) that the attorney considers it is not necessary that a welfare guardian or property manager be appointed, and why the attorney considers it not necessary.” 30
- (2) Section 104(3) is amended by omitting “section 7 or section 26 of this Act” and substituting “**section 103**”.

19 Court may revoke appointment of attorney

- Section 105 is amended by repealing subsection (1) and substituting the following subsections: 35

- “(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
 - “(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.”

New (unanimous)

19A Circumstances in which enduring power of attorney shall cease to have effect 15

Section 106(1)(a) is amended by inserting “, by notice in writing to the attorney,” after “donor”.

20 New section 107 substituted

Section 107 is repealed and the following section substituted:

“107 Attorney’s power to benefit self and others 20

“(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)**; or

New (unanimous)

“(c) the attorney’s actions relate to one or more of the following matters and the enduring power of attorney does not expressly provide otherwise: 30

New (unanimous)

- “(i) if the attorney and donor are married to, or in a civil union or de facto relationship with, each other, and are living together and sharing their incomes, any action taken by the attorney in respect of real or personal property that the donor and the attorney own jointly and not as tenants in common: 5
- “(ii) any payments of a kind described in **subsection (2)**:
- “(iii) if acting under an enduring power of attorney in relation to the donor’s property, any loan or advance or other investment of the donor’s property that a trustee could make of trust funds under section 13A of the Trustee Act 1956. 10

Struck out (unanimous)

- “(2) **Subsection (1)** does not apply if the donor is the spouse, civil union partner, or de facto partner of the attorney and— 15
 - “(a) the donor and attorney share their incomes; and
 - “(b) the donor does not own significant property or assets separately from the attorney.
- “(3) **Subsection (1)** does not apply to any professional fees and expenses reasonably incurred by an attorney who— 20
 - “(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. 25
- “(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. 30

New (unanimous)

- “(2) The payments referred to in **subsection (1)(c)(ii)** are payments (being payments for which receipts or other evidence are provided by the attorney) of—
- “(a) out-of-pocket expenses (other than lost wages or remuneration) reasonably incurred by an attorney; or 5
 - “(b) professional fees and expenses reasonably incurred by an attorney who—
 - “(i) has accepted appointment in a professional capacity; or
 - “(ii) has undertaken work in any professional capacity to give effect to the decisions taken under the enduring power of attorney.” 10

21 New (section) sections 108AA and 108AAB inserted

The following (*section is*) sections are inserted after section 108: 15

“108AA Enduring powers of attorney created before Protection of Personal and Property Rights Amendment Act 2006

Struck out (unanimous)

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**— 20

- “(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. 25

New (unanimous)

“(1) In this section, **commencement date** means the commencement date of **section 21** of the Protection of Personal and Property Rights Amendment Act **2006**.

New (unanimous)

- “(2) If an enduring power of attorney is made but not effective before the commencement date,—
- “(a) **section 94A** does not apply to it; and
- “(b) sections 95(1) and (2) (as they read before the commencement date) continue to apply to the enduring power of attorney. 5
- “(3) If the enduring power of attorney is effective before the commencement date,—
- “(a) **sections 94A and 107** do not apply to it; and
- “(b) sections 95(1), (2), and 107 (as they read before the commencement date) continue to apply to the enduring power of attorney. 10

“**108AAB Review of Protection of Personal and Property Rights Amendment Act 2006**

- “(1) The Minister of State for the time being responsible for senior citizens must, as soon as practicable, 5 years after the commencement of **section 21** of the Protection of Personal and Property Rights Amendment Act **2006**,— 15
- “(a) review the effectiveness of the amendments to this Act made by the Protection of Personal and Property Rights Amendment Act **2006**; and 20
- “(b) consider whether any amendments to this Act are necessary or desirable; and
- “(c) prepare a report on the findings.
- “(2) The Minister must present a copy of the report to the House of Representatives no later than 6 years after the commencement of **section 21** of the Protection of Personal and Property Rights Amendment Act **2006**.” 25

22 Regulations

Section 112 is amended by inserting the following paragraphs after paragraph (b): 30

- “(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)**: 35

“(bc) prescribing forms for certificates for the purposes of any medical examination or assessment under Part 9:

New (unanimous)

“(bd) prescribing forms that may be used for the suspension and revocation of enduring powers of attorney for the purposes of Part 9: 5

“(be) prescribing the form for the certificate of non-revocation and non-suspension of the enduring power of attorney for the purposes of **section 103C(6)**.”

23 Schedule 3 repealed
Schedule 3 is repealed. 10

New (unanimous)

24 Consequential amendment to section 135 of Property Law Act 1952

Section 135 of the Property Law Act 1952 is amended by adding the following subsection:

“(6) If the power of attorney is an enduring power of attorney, within the meaning of Part 9 of the Protection of Personal and Property Rights Act 1988— 15

“(a) section **103C** of that Act applies to it instead of subsections (1) to (5); but

“(b) if a certificate of non-revocation of the power of attorney was given in respect of the enduring power of attorney before the commencement of **section 18** of the Protection of Personal and Property Rights Amendment Act **2006**, subsections (1) to (5) of this section apply to the certificate instead of **section 103C** of the Protection of Personal and Property Rights Act 1988.” 20 25

**Protection of Personal and Property
Rights Amendment**

Legislative history

21 November 2006

Introduction (Bill 94-1)

7 December 2006

First reading and referral to Social Services
Committee
