



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 71

Misuse of Enduring Powers of
Attorney

April 2001
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

At the time of approval of this Report, the members of the Commission were:

The Honourable Justice Baragwanath – President
Judge Margaret Lee
DF Dugdale
Timothy Brewer ED
Paul Heath QC

The Executive Manager of the Law Commission is Bala Benjamin
The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

Report/Law Commission, Wellington, 2001
ISSN 0113–2334 ISBN 1–877187–71–2
This report may be cited as: NZLC R71
Also published as Parliamentary Paper E 3171

This report is also available on the Internet at the Commission's website: <http://www.lawcom.govt.nz>

Contents

	<i>Para</i>	<i>Page</i>
Letter of transmittal		v
MISUSE OF ENDURING POWERS OF ATTORNEY		1
Introduction	1	1
History	2	1
Part IX	6	2
The absence of effective safeguards	7	3
The extent of the problem	10	4
The approach to reform	12	6
The grant of the power of attorney	19	9
The “mentally incapable” test in section 98(3)	28	13
High-handedness and failure to consult	32	14
Theft	37	16
Neglect	39	17
Registration	40	18
A Commissioner for the Aged	41	18
Summary of recommendations	45	20
APPENDICES		
A	Part IX and the Third Schedule of the Protection of Personal and Property Rights Act 1988	23
B	Some examples of misuse reported by submitters	34
C	List of persons and organisations making submissions	35

27 March 2001

Dear Minister

I am pleased to submit to you Report 71 of the Law Commission,
Misuse of Enduring Powers of Attorney.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

Misuse of enduring powers of attorney

INTRODUCTION

- 1 **I**N MAY 2000 the Law Commission published a discussion paper *Misuse of Enduring Powers of Attorney* (NZLC PP40). The paper discussed the absence of adequate safeguards for the protection of donors of enduring powers of attorney under the provisions of Part IX of the Protection of Personal Property Rights Act 1988 (the 1988 Act). This statute, since it came into force on 1 October 1988, has provided the legal machinery to allow decisions to be made on behalf of those unable to manage their own financial affairs or properly look after themselves.

HISTORY

- 2 Part IX was an afterthought.¹ It was inserted into the 1988 Act at select committee stage. An opportunity for public submissions on the proposed addition to the Bill was provided.
- 3 It has always been possible for elderly (or any other) persons, while they still have the capacity (meaning the mental capacity) to do so, to give powers of attorney authorising the attorney to exercise powers over their financial affairs. A power of attorney can give powers that are unlimited (lawyers, in their cheerful way, used to call this a “cut-throat power of attorney”).² It can be of a fixed or unlimited duration. Except in the small class of cases where an irrevocable power of attorney is possible, the power can be revoked by the donor of the power at any time extremely informally and

¹ A submission made by Janice Lowe who was at the material time an officer of the Justice Department with responsibilities in relation to the Bill, disputes the appropriateness of the word “afterthought”. She says “The policy work and decisions simply caught up enabling the existing bill to be used as a convenient vehicle for reform”. This sounds very much like an afterthought within the *New Shorter Oxford English Dictionary* definition of that word as something that is added later.

² Powers of attorney are interpreted strictly and the advantage of unlimited powers is that disputes founded on accidental omissions or drafting inadequacies are avoided.

without prior notice. Sometimes a person giving a power of attorney is called the donor and the person authorised to act a donee. We prefer in this report to use the terms “donor” and “attorney” because that is the language of the 1988 Act.

- 4 A power of attorney is simply a formal type of agency under which the donor appoints the attorney as agent, to do certain things that the donor himself or herself has the legal right to do. The general law of agency provides that an agent may not have powers greater than those of the agent’s principal (in the case of a power of attorney, the donor) which is logical enough. The difficulty in this context was, however, that if the donor’s loss of mental ability was so severe that the donor ceased to possess the capacity to perform the delegated acts, the attorney’s powers to do those acts also came to an end. Often in the cases of powers of attorney granted by the elderly this meant that the power ceased to be effective in the very situation where it was most needed. If the attorney continued to act as if he or she still had those powers, the attorney ran the risk that the attorney’s actions could, if there were a dispute, be declared void, in which case the attorney would be personally liable for resultant loss.³ Even so, the literature suggests that many attorneys were prepared, both in New Zealand and in other jurisdictions, to take this risk, reasoning that in a family situation if no one was prejudiced no one was likely to complain.
- 5 The solution to this problem, which has been adopted in most of North America, in all Australian states, in England,⁴ and in New Zealand by Part IX of the 1988 Act, was to provide by legislation a type of power of attorney which would continue in effect despite the donor’s supervening incapacity.⁵ In England and Australasia such documents are called *enduring powers of attorney*. The equivalent term in the United States of America is *durable powers of attorney*.

PART IX

- 6 Part IX and the Third Schedule of the 1988 Act are reproduced in Appendix A.⁶ An enduring power of attorney must be substantially

³ *Yonge v Toynbee* [1910] 1 KB 215.

⁴ Enduring Powers of Attorney Act 1985 (UK).

⁵ There is a useful list of publications on the subject by law reform agencies in R Creyke “Privatising Guardianship – The EPA Alternative” (1993) 15 *Adel LR* 79, 86.

⁶ There is a helpful account of Part IX by WR Atkin at [1988] NZLJ 368. His article “The Courts, Family Control and Disability – Aspects of New Zealand’s

in the form provided by the Third Schedule. It must be signed by both the donor and the attorney. The signature of each must be witnessed (section 95). It seems probable that in practice the attorney is a relative of the donor in most cases. An enduring power of attorney is not revoked by the donor's subsequent mental incapacity (section 96). The enduring power of attorney may relate to property (section 97), to the donor's personal care and welfare (an innovation) (section 98), or to both (section 99). Where the enduring power of attorney relates to the donor's personal care and welfare, it is what the New York statute calls (reviving an archaism) a "springing" power. It does not come into effect "unless the donor is mentally incapable" (section 98(3)), a term that is defined in section 94. Sections 101–105 confer jurisdiction on the Family Court to interfere in certain circumstances.

THE ABSENCE OF EFFECTIVE SAFEGUARDS

7 We list some of the problems:

- There is no monitoring of whether, on signing the power, the donor had the capacity to understand the effect of what was being signed.
- Although the prescribed forms warn donors about the need to obtain legal advice, there is no requirement for independent legal advice, or for the discussion of questions with the donor such as how wide should the powers conferred on the attorney be.
- There is no machinery to ensure that the donor is informed of the donor's right of revocation.
- There is no requirement to file accounts and no independent monitoring of the acts of the attorney.
- There is no monitoring of the classification of a donor as mentally incapable which triggers the personal care and welfare powers.
- The powers of the Family Court to intervene are in practice largely ineffectual because nothing happens unless someone sets proceedings in train.
- There is understandable reluctance by donors to take court proceedings against children or other family members who have misused powers.

Personal and Property Rights Act 1988" (1988) 18 VUWLR 345 discusses, in relation to the entirety of the Act, the tension between the interests of the person with a disability and the members of that person's family.

- The donor may be prevented from invoking Family Court assistance by ignorance, lack of funds, or social isolation.

8 In the version of the previous paragraph published as paragraph 10 of the discussion paper we referred to:

. . . donors who, in many (perhaps most) cases, will have signed an enduring power of attorney only because of an awareness of deteriorating capacity . . .

Submissions pointed out that this is not correct. We did not know at the time of the discussion paper being published that it is now common for people on the advice of their solicitors (or of the Public Trustee) to sign enduring powers of attorney when they sign their wills as part of estate planning processes. This point will be important when we come to discuss whether protection of donors requires regulation of the procedure by which enduring powers of attorney are granted. This practice also, we think, necessitates a new provision (comparable provisions are the Wills Amendment Act 1977 section 2 and the Family Proceedings Act 1980 section 26) that the appointment as attorney of a spouse (using that term in the extended sense suggested in paragraph 19) is revoked if the parties separate.

9 At the time of preparing the discussion paper we were not fully persuaded (as that paper makes clear) that the extent of the difficulties caused in practice by Part IX's lack of protections justified change. So we defined the issues on which we sought help:

- Is there a sufficient problem to warrant a recommendation to change Part IX?
- If yes, what should that change be?

In response to our discussion paper we received a substantial number of submissions, all of them thoughtful and many of them lengthy (a list of individuals and organisations making submissions is to be found in Appendix C). The Commission was, of necessity, heavily reliant on the experience and expertise of others. We are grateful for the help we have received. In the rest of this report we answer the questions formulated in our discussion paper which are set out above.

THE EXTENT OF THE PROBLEM

10 In paragraphs 17 and 18 of our discussion paper we said this:

17 The Law Commission does *not* believe that every child appointed an attorney is a potential Goneril or Regan. No

doubt there is a very large number of cases in which Part IX functions precisely as its authors intended. Because as already mentioned no one knows the total of enduring powers of attorney and also because it is likely that there is hidden misuse, it is not possible to tell in what proportion of cases things go wrong.

18 What we do know is that:

- The enduring power of attorney system with its lack of safeguards provides opportunity for misuse.
- Experience both overseas and in New Zealand points to the frequency of the economic exploitation of the aged.
- Social workers and others concerned with the welfare of the aged are convinced of the occurrence of misuse and provide anecdotes as to its occurrence.
- An examination of 130 case studies of elder abuse compiled by Age Concern Auckland in respect of a two year period showed 40 attributable to misuse of an enduring power of attorney.

11 The numbers of enduring powers of attorney in existence remains unknown and unascertainable. Likewise, the number of occasions in which misuse occurs remains untold. But legislation that permits such occurrences, as the five examples taken from submissions that are set out in Appendix B, warrants close scrutiny. The clear view expressed in the overwhelming majority of submissions by those with expertise in this area was that there was a need for additional safeguards to curb abuse (a view supported in a substantial number of cases by specific case histories or offers to provide them). That was the view of all the voluntary organisations that made submissions, of all the health professionals and of all the lawyers bar one. The concern of that one lawyer and of the other opponent of change, a district public trustee, was that there should be no discouragement of what is seen as the valuable practice of routinely granting enduring powers of attorney, usually at the same time as a will is executed and as part of overall estate planning arrangements. Those supporting reform were not of one mind as to just what changes should be introduced, but it seems to us that this near-unanimity of informed opinion as to the need for additional safeguards takes us over the threshold, and that there is now a clear enough picture to warrant our proceeding to the next point, which is to discuss and make specific recommendations for possible reform.

THE APPROACH TO REFORM

12 In paragraph 20 of our discussion paper we said:

Any changes should be devised with a view to interfering as little as possible with the great virtues of the Part IX procedures, which are their cheapness and the fact that they enable the donor to make his or her own decision as to who should be the donor's substituted decision-maker.

We remain of that view, which received express support in some submissions, and which is of course implicit in the views of the two dissentients referred to in the previous paragraph.

13 Secondly, we think that any changes proposed should endeavour to lessen the striking philosophic difference between Part IX and the balance of the 1988 Act. Such difference should not exist. This entire statute has as its object, in the words of its long title,

. . . to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs.

As observed by one law reform body:

It is important to realise that the enduring power of attorney is only one legal niche in the larger structure of legal tools and institutions, often compendiously referred to as “guardianship”, which serve the needs of the disabled.⁷

The approach of the earlier parts of the statute, as we endeavour in the next two paragraphs to show, is to carefully restrict the interference with the individual's autonomy as much as possible. This is not the approach of Part IX.⁸ The difference may be accidental and result from the fact that Part IX was an afterthought (see paragraph 2).

14 Section 8 of the 1988 Act defines the primary objectives of the Family Court when asked to appoint a welfare guardian as follows:

8 Primary objectives of court in exercise of jurisdiction under this part—

The primary objectives of a Court on an application for the exercise of its jurisdiction under this Part of this Act shall be as follows:

⁷ Law Reform Commission of British Columbia “Report on Enduring Power of Attorney: Fine-Tuning the Concept” (1990) 110 LRC 2.

⁸ This point was cogently made to us by Mr AJ Gluestein, an Auckland solicitor experienced in this area.

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

Section 28 relating to the appointment of a property manager is in comparable terms.

The principle of least restrictive intervention is one of the hallmarks of modern-day law reform in this area and is a significant element in the process of balancing civil rights for people with incapacity.⁹

In marked contrast the statutory forms of enduring powers of attorney provided by the Third Schedule permit the grant of all-embracing general powers, and while there is provision for such general powers to be limited, in practice this rarely happens (partly, no doubt, to avoid the problems of interpretation touched on in footnote 2 and partly as a consequence of the practice mentioned in paragraph 8 of documents being prepared and executed long before they are likely to be needed). We have the clear impression from the material put before us that much of the unhappiness with enduring powers of attorney results from attorneys assuming full command over the donor's affairs without any effort to enable the donor to exercise such capacity as remains to him or her.

15 Similarly section 18(3), in relation to the exercise of the powers of a welfare guardian, expressly provides as follows:

- (3) In exercising those powers, the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and best interests of the person for whom the welfare guardian is acting, while seeking at all times to encourage that person to develop and exercise such capacity as that person has to understand the nature and foresee the consequences of decisions relating to the personal care and welfare of that person, and to communicate such decisions.

There is a comparable provision relating to the exercise of the powers of a manager (section 36(2)). A welfare guardian and a manager are required to consult the affected person and others interested in that person's welfare (section 18(4)(c); section 43). There is no corresponding provision in relation to an attorney.¹⁰

⁹ WR Atkin "The Courts, Family Control and Disability – Aspects of New Zealand's Personal and Property Rights Act 1988" above n 6, 349.

¹⁰ We assume that the reference to s 18 in s 98(4) is directed to s 18(1).

- 16 It is of course the case that an attorney is (theoretically at least) chosen by the donor, of the donor's own free will and with the powers that the donor selects, while the welfare guardians and managers provided for under the earlier parts of the statute are, by contrast, imposed by the Family Court (though not, let it be remembered, without hearing a lawyer representing the person affected (section 65)). We will need to consider the extent to which this distinction justifies the differences between Part IX and the rest of the Act.
- 17 Thirdly, we need to keep in mind the needs of those asked to act on documents submitted to them as valid powers of attorney. This was the concern of the Bank of New Zealand in its submission to us. The scheme would cease to be workable if we were to hedge about the exercise of powers in ways which made it difficult or impossible for third parties to know whether they could act on directions given by the attorney as being lawful exercises of a valid power.
- 18 The types of misuse which we referred to in our discussion paper or which were drawn to our attention in submissions can, we think, be roughly categorised as follows (we have adopted a sequence that proceeds in broadly chronological order through the various steps):
- abuses in relation to the initial granting of the power, including failures to explain and explore options alternative to a grant of general and unqualified powers to a single attorney, and the procuring of execution of powers of attorney in situations where the donor is unduly influenced by the attorney or where the donor lacks capacity;
 - problems with the “mentally incapable” test in section 98(3) which needs to be satisfied before a power in relation to personal care and welfare can come into effect;
 - high-handedness, bullying and failure to consult (selling the home of an institutionalised donor, for example, without the donor's knowledge);
 - embezzlement of moneys and theft of goods; and
 - neglect of the donor by the attorney (failure, for example, to institutionalise the donor where this is warranted because of the anxiety of the attorney as an ultimate beneficiary of the donor's estate not to see the estate whittled away).

The discussion that follows adopts this categorisation.

THE GRANT OF THE POWER OF ATTORNEY

- 19 A deed granting an enduring power of attorney is valid only if the donor understands what he or she is signing. It seems on the authorities that it is sufficient that the donor understands broadly the powers that are being conferred and upon whom. An understanding of the precise managerial steps that the attorney is likely to take is not needed.¹¹ But the fact that the donor lacked capacity is unlikely to be apparent from the face of the document to third parties called upon to act in reliance on it. Similar considerations apply where the circumstances of the signing of the document are such that, were the matter to be litigated, the Court would invalidate the document as one executed by a donor unable to resist pressure from the attorney amounting to undue influence. Neither of these problems is likely to arise where the power is executed while the donor is still hale, as will usually be the case where the power is executed (as we are told is now common practice) along with a will as part of an orderly arranging of the donor's affairs. Nor in practice do problems seem to arise at all frequently where the attorney is the donor's spouse (using that term to include a de facto partner as defined in what it is proposed should be rechristened the Property (Relationships) Act 1976).
- 20 Problems do arise where execution of a power of attorney is left until after the effects of senility have begun to become apparent, and a power of attorney is obtained to avoid the expense, or the judicial scrutiny, involved in obtaining orders under the earlier parts of the statute. In our discussion paper we referred to the case of *Re EW*¹² where a power of attorney was obtained from a donor after the solicitor who witnessed the donor's signature had contact with the donor for only 15 minutes, and where the view of all the health professionals concerned was that at the relevant time the donor suffered from "senile dementia of the Alzheimer type". It seems clear from the material provided to us that this is by no means an isolated case.
- 21 A further set of complaints in relation to the grant stage relates to the contents of the deed creating the power. There is said commonly to be a failure to advise donors of the various possibilities other than

¹¹ *Re K* [1988] Ch 310; *Re "Tony"* (1990) 5 NZFLR 609; *Re EW* (1993) 11 FRNZ 118. For discussions of the test of capacity and how it should be applied see R Munday "The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight" (1989) 13 NZULR 253 and RM Smith "Evaluating the Donor's Competence to Sign an Enduring Power of Attorney" (1996) 4 Journal of Law and Medicine 82.

¹² Above n 11.

a bald general power in favour of a single individual available under the scheme for enduring powers of attorney. Section 97 makes express provision for limited powers under an enduring power of attorney in relation to property, and section 98(1) similarly provides for the limiting of an enduring power of attorney in relation to personal care and welfare. It is possible to appoint more than one attorney or a trust corporation under a power relating to property (though under section 98(2) only a single individual may be appointed where the power is in relation to personal care and welfare). Problems in relation to the lack of monitoring of the financial dealings of attorneys could, it was submitted to us, be dealt with by making provision for this in the deed itself. It is a reasonable surmise that in practice as a rule none of these possibilities are spelled out to the donor. The notes on the two Third Schedule forms are unlikely to provide donors with an adequate warning. There is complaint too that not all donors are advised that so long as they have the appropriate mental capacity they have the right to revoke an enduring power of attorney, and how they should go about this.

22 In the Commission's view Part IX should be amended to address some of the concerns raised in the last three paragraphs. But the proposed new rules should apply only if:

- the attorney is a person other than the donor's spouse (in the extended sense suggested in paragraph 19); and
- the donor, at the time of executing the deed creating the power, was either over a certain age or a patient or resident in any hospital, home or like institution.¹³

Limiting the circumstances in which the procedure will be required should catch most donors needing the protections that we propose, while avoiding such expense as would otherwise be incurred were the protection to be imposed in situations not in the defined class. What then should the age be? Various proposals were made in submissions. Whatever age we propose is likely to attract taunts that we are purporting to impose an age of statutory senility, but under our proposed regime there does need to be certainty. We think that 68 years is an appropriate age. Speaking generally most people at this age still retain their mental faculties but by that age are likely

¹³ These words to denote residence in an institution are those employed in a comparable context in the balance of the statute (ss 7(f), 26(9), 27(1)(a)). We were assisted in arriving at this recommendation by a number of submissions of which the fullest were those of Mr Norman Elliott, an Auckland solicitor experienced in this field.

to have been led, as a result of such lifestyle changes as retirement and of the intimations of mortality inseparable from the ageing process, to make testamentary and other arrangements including, under the current practice, the grant of enduring powers of attorney.

- 23 Where the new procedure applies the signature of the donor should be witnessed by a solicitor retained independently of the attorney. The solicitor will be required to certify that the solicitor has advised the donor in relation to various matters. Something more will be required of the certifying solicitor than merely perfunctory advice, for donors will not be adequately protected:

if lawyers do not take the time to explain, if they do not understand the full range of older adults' needs and interests (and how they might differ from those of family), or if they already carry ageist assumptions about older adults.¹⁴

The donor will be “entitled to an informed professional opinion as to the wisdom of entering into [a deed] in those terms”.¹⁵ We know that the Public Trustee, who is able to provide a cheap and swift service in this area by the use of employees who are not qualified as solicitors, will be disappointed by the proposal to require a solicitor's certificate, but we think that the proposal is appropriate for that small (we assume) proportion of the total number of deeds executed to which the new procedure would apply.

- 24 We do not think that the question of who is a solicitor retained independently of the attorney will cause difficulty in practice. There is no property in a solicitor. A solicitor is not debarred from certifying that he or she is advising the donor independently of the attorney by the fact that in other matters the solicitor has acted for the attorney. This will be a common situation, particularly in provincial practices where it is usual for the same legal firm to act for successive generations of family members. In relation to such important documents as wills this situation rarely leads to difficulty. We think that it can safely be left to legal practitioners to decide for themselves whether they are able to certify that they have given the

¹⁴ M Beaulieu and C Spencer *Older Adults' Personal Relationships and the Law in Canada: Legal, Psycho-Social and Ethical Aspects*, a report commissioned and published by the Law Commission of Canada (1999), 50 at <<http://www.lcc.ca.calen/themes/pr/oa/spences/index.htm/>> (last accessed on 23 March 2001).

¹⁵ *Coxhead v Coxhead* [1993] 2 NZLR 397 (CA), 403 discussing the comparable provisions of the Matrimonial Property Act 1976 s 21(5).

¹⁶ Assistance is available from such authorities on the Matrimonial Property Act 1976 s 21(5) as *Edmond v Edmond* (1992) 9 FRNZ 180.

independent advice that we propose that the statute should require.¹⁶

25 We considered whether we should, in addition, recommend a certificate of capacity by a medical practitioner, but decided against this, even though the health professionals who made submissions did not have a high opinion of the ability of lawyers to assess mental capacity, and even though the case of *Re EW* already cited¹⁷ does not inspire confidence. The fact is, however, that solicitors regularly make the same sorts of judgment as to capacity in relation to the execution of wills, and in practice consult with appropriately qualified medical practitioners if in doubt. They may be expected to approach the execution of enduring powers of attorney with the same caution, and of course they will be financially liable if any negligent breach of their professional obligations in this respect is causative of loss.

26 This is true of all the matters discussed in paragraph 21. In other words, if the solicitor negligently fails to advise in relation to these matters the solicitor may be under a liability in damages. As far as the legislation is concerned we believe it is not necessary to go further than to stipulate for legal advice.

27 Our recommendation then is that the signature of the donor to a deed creating an enduring power of attorney of either class must be witnessed by a solicitor if :

- the attorney is not the donor's spouse or de facto partner; and
- the donor is either aged 68 years or over, or a patient or a resident in any hospital, home or other institution.

The solicitor must sign a certificate endorsed on the deed stating:

- that he or she has been retained independently of the attorney; and
- that he or she advised the donor:
 - as to the matters referred to in the note to the forms in the Third Schedule;
 - as to the donor's rights to revoke the power of attorney;
 - as to the donor's right, in the case of a power of attorney relating to property, to appoint more than one attorney or a trust corporation; and
 - as to the donor's right, in the case of a power of attorney relating to property, to stipulate whether and how the

¹⁷ Above n 11.

attorney's dealings with the donor's property should be monitored.

THE “MENTALLY INCAPABLE” TEST IN SECTION 98(3)

28 In respect of enduring powers of attorney in relation to personal care and welfare, section 98(3) provides:

The attorney shall not act in relation to the donor's personal care and welfare unless the donor is mentally incapable.

There is a definition of “mentally incapable” in relation to personal care and welfare in section 94(1)(b). The test in relation to mental capacity in section 12(2)(a) differs in substance from that in section 94(1)(b)(i). Section 94(1)(b)(i) mirrors the basic jurisdictional test for Family Court intervention to be found in section 6(1) rather than the more demanding requirement for appointment of a welfare guardian to be found in section 12(2)(a). Section 12(2) reads as follows:

- (2) A Court shall not make an order under subsection (1) of this section unless it is satisfied—
 - (a) That the person in respect of whom the application is made wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person; and
 - (b) That the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made relating to that particular aspect or those particular aspects of the personal care and welfare of that person.

While it is correct that as Part IX is framed, its definition of “mentally incapable” applies to section 96, preserving the effectiveness of an enduring power of attorney, it would be more logical if the section 12(2)(a) test were substituted for the section 94(1)(b) test. The point is a small one, but if Part IX is to be amended it would be sensible to tidy this point at the same time.

29 In relation to the Part I test there is a presumption of competence (section 5), but there is no such presumption in relation to the section 98(3) requirement. There should be.

30 In our discussion paper we sought opinion “on whether there is need for the safeguard of an objective independent certification that the state of ‘mentally incapable’ has been reached”. Our impression from the submissions received is that many hospitals, rest homes and like establishments require, as a matter of policy, either an order appointing a welfare guardian, or an enduring power of attorney to

enable them to be confident that the person with whom they are dealing with has the appropriate authority on behalf of the patient. Presumably in those cases there would be no difficulty in procuring such a certificate. The overwhelming majority of those who made submissions supported such a requirement and we agree that it is appropriate. Some submitters urged that the certificate should be by a qualified psycho-geriatrician. But there will be cases (such as that of a stroke victim unable to communicate) where the position will be obvious. We think that it will be sufficient to require a certificate from a registered medical practitioner. Presumably if a practitioner who has been asked to issue a certificate believes that it would be more appropriate that a specialist certify (and in cases of dementia it can be difficult to gauge whether the borderline between capable and incapable has been crossed) he or she will say so. We recommend therefore that there be added to section 98(3) the words “and a registered medical practitioner has certified in writing that the donor is mentally incapable”.

- 31 As well as being a protection for the donor, such a certificate will of course protect the attorney and third parties asked to act on the instructions of the attorney by establishing the attorney’s authority to act. The wording of section 98(3) suggests that the attorney’s powers cease if the donor should recover capacity, so that a relapse will require a new certificate. It will be necessary to protect innocent third parties who rely on a certificate unaware of a subsequent recovery of capacity.

HIGH-HANDEDNESS AND FAILURE TO CONSULT

- 32 Analysis of individual case histories suggests two themes common to many of them. One is of high-handedness, an unnecessarily overbearing bossiness and a failure by the attorney to ascertain the wishes of the donor, for example selling the home of an institutionalised donor against the wishes of and sometimes without even the knowledge of the donor. While some donors, by the stage that the powers come to be exercised, are old and weary and only too glad to delegate all decision-making to a trusted family member or other attorney, others want to retain some control over their own affairs. As already mentioned it is possible to deal with this problem by limiting the powers granted, but this is unlikely to prove a practical solution in every case, particularly where, as is now common, the deeds creating the powers are executed many years in advance of need, with a corresponding inability on the part of donors to foresee what lies ahead.

- 33 The second common problem is that of disputes between a child appointed as attorney and siblings of that child who are not. Enduring powers of attorney (like wills) do not always bring out the best in people.¹⁸ In our discussion paper we floated the possibility of a requirement that “near relatives” (to be appropriately defined) be formally notified of the grant of an enduring power of attorney and of the stage at which it was claimed that the donor had become “mentally incapable” (paragraph 22). This proposal received little support. Donors are sometimes estranged from near relatives and may not wish that their relatives should be informed of their affairs in advance of any need to do so.
- 34 We have already referred to the contrast in philosophy between Part IX and the preceding parts of the Act. The earlier parts of the statute are based on the premise that the desirable social objective is that contained in section 8 (set out in paragraph 14 of this report). We think that that social objective should apply to enduring powers of attorney as well, and that the best way of solving the problems discussed in the two previous paragraphs is to apply to the exercise of their powers by attorneys obligations analogous to those imposed in Parts II and IV of this statute on welfare, guardians and property managers. Section 18(3) and (4) provide as follows:
- (3) In exercising those powers, the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and best interests of the person for whom the welfare guardian is acting, while seeking at all times to encourage that person to develop and exercise such capacity as that person has to understand the nature and foresee the consequences of decisions relating to the personal care and welfare of that person, and to communicate such decisions.
 - (4) Without limiting the generality of subsection (3) of this section, a welfare guardian shall—
 - (a) Encourage the person for whom the welfare guardian is acting to act on his or her own behalf to the greatest extent possible; and
 - (b) Seek to facilitate the integration of the person for whom the welfare guardian is acting into the community to the greatest extent possible; and
 - (c) Consult, so far as may be practicable,—
 - (i) The person for whom the welfare guardian is acting; and

¹⁸ Such sibling hostility is well illustrated by recent cases under the English legislation, in *Re W (Enduring Power of Attorney)* [2000] Ch 343 and in *Re E (Enduring Power of Attorney)* [2000] 3 WLR 1974. *Re Tindall* [2000] NZFLR 373 is a case where the rivalry was between grandchildren.

- (ii) Such other persons, as are, in the opinion of the welfare guardian, interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person; and
- (iii) A representative of any group that is engaged, otherwise than for commercial gain, in the provision of services and facilities for the welfare of persons in respect of whom the Court has jurisdiction in accordance with section 6 of this Act, and that, in the opinion of the welfare guardian, is interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person.

There are comparable provisions relating to property managers in sections 36 and 43.

35 We recommend therefore that, notwithstanding any provision to the contrary in a deed creating an enduring power of attorney, the attorney should be under an obligation:

- to encourage the donor to exercise such competence as the donor has to manage his or her own affairs in relation to the donor's personal care and welfare and the donor's property; and
- in the exercise of the attorney's powers, to consult the donor and such other persons as the attorney knows or ought to know are interested in the donor's welfare and competent to advise the attorney in relation to the proposed exercise of power.

36 We think that the practical effect of this change would be that were an attorney to keep the donor and near relatives in the dark this would be a clear ground for the Family Court to revoke the attorney's appointment under section 105. That section should be amended to put this beyond doubt. To satisfy the dictates of practicality there would need to be a provision absolving third parties dealing with the attorney from inquiring into compliance with the new obligation proposed.

THEFT

37 In listing types of misuse in paragraph 15 of our discussion paper we included:

- Outright embezzlement, often rationalised by the attorney as "borrowing" or as a reasonable anticipation of entitlement on succession, or "I am sure if Mum could understand she wouldn't mind". It may be thought that the door to such behaviour is unwisely opened by the terms of s 107(1) entitling the attorney to act for his or her own benefit:

but only if, and only to the extent that, the donor might be expected to provide for the needs of the attorney . . .

- The attorney helping himself or herself to the donor's belongings including consumer durables and decorative items. These actions may be motivated by greed or by a desire to get in ahead of siblings.

An attorney, like any other agent, has obligations to keep accurate accounts and to keep the donor's property separate. Although the dishonest attorney is subject to criminal sanctions and although theft would be a ground for revocation under section 105, this is of little consolation to a donor or the beneficiaries of a donor's estate who find that as a result of the attorney's peculations the cupboard is bare, and that the losses cannot be recovered from the attorney because the attorney is by then not worth powder and shot. Sections 45 and 46 require property managers to file annual financial statements which are then audited by the Public Trustee. Some submitters were of the view that comparable obligations should be imposed on attorneys. But in the great majority of cases where the attorney is honest and the amounts involved small, this would be an unwarranted expense. Rather than imposing such a blanket requirement, we think that the better course is for donors who are concerned that their attorney should be supervised, to spell out the appropriate mechanics in the deed creating the power. Any failure by solicitors or others advising donors to discuss this possibility would, if causative of loss, result in a liability in negligence.

38 There was however a general view held by submitters that section 107 could create a mindset leading on to theft. The solution favoured by a majority of submitters who dealt with the problem was repeal. The alternative that we prefer is the addition of a subsection to the effect that the powers conferred by the section may be exercised only if:

- the attorney is a trust corporation; or
- there are joint attorneys who are not spouses and not more than one of them benefits.

NEGLECT

39 We are told by submitters that there are occasions on which an attorney in relation to personal care and welfare neglects the best interests of the donor. The most common situation is where the attorney (usually a child) expects to be a beneficiary of the donor's estate and delays the transfer of the donor to an institution to avoid the estate being diminished or entirely gobbled up by the cost of

institutional care. While it is not a perfect answer, we think that the obligation to consult persons interested in and competent to advise on the donor's welfare that we propose should be imposed on the attorney (paragraph 35 of this report), would clearly require the attorney to consult the appropriate health and welfare agencies. We think that to round out this reform section 105 should be further amended to give to the Commissioner (who we propose in paragraph 41), a social worker, a medical practitioner, a representative of a voluntary welfare agency or any other person with leave of the Court, a right (analogous to that conferred by section 26(c), (d), (e) and (i)) to apply to the Family Court for revocation of the appointment of the attorney.

REGISTRATION

- 40 As we pointed out in paragraph 24 of our discussion paper, in some jurisdictions there is a requirement that enduring powers of attorney be registered, the rationale being that removal of the existence of powers from the private domain discourages their abuse. Registration (particularly as a condition precedent to activation) received some support from submitters, most enthusiastically on the basis not that registration would discourage misbehaviour but because of the practical difficulty that institutions can encounter in discovering whether or not an enduring power of attorney exists in circumstances where if it does not it will be necessary for a welfare guardian to be appointed under the earlier provisions of the statute (the institution has standing to seek such an order under section 7(f)). While we can see that registration would be useful for this purpose, and also for avoiding the not entirely uncommon situation in which a mentally impaired donor visits a succession of solicitors and creates a sequence of incompatible powers, we are not convinced that the benefits of registration would outweigh the resultant expense (there would need to be some sort of nominally indexed central register) and loss of privacy.

A COMMISSIONER FOR THE AGED

- 41 In paragraph 26 of our discussion paper we floated the proposal for a Commissioner for the Aged to act as a champion for older people, and pointed by way of analogy to the provisions for an Adult Guardian to protect the rights and interests of adults who have impaired capacity contained in Chapter 7 of the Queensland Powers of Attorney Act 1998. This proposal was generally supported.¹⁹

¹⁹ Although the comment on the proposal of one lawyer submitter was "God forbid".

There was agreement too (including from the Commissioner himself) that a suggestion that had been made that this was a role for the Health and Disability Commissioner was misconceived. A formal application to the Family Court may well be beyond a bedridden and socially isolated donor worried about what his or her attorney is up to; a telephone call or other informal approach to an official champion would be less likely to be so. We recommend that consideration be given to this proposal. Our recommendations on this point do not purport to define the functions of such a Commissioner with any completeness, because the totality of the powers of such a Commissioner should go beyond those of protecting the donors of enduring powers of attorney, and to that extent is beyond the scope of this inquiry.

- 42 The word “champion” in the previous paragraph is carefully chosen. It is not proposed to interfere with the jurisdiction of the Family Court to determine specific issues. What is lacking is someone to take up the cudgels on behalf of aged persons, either in specific cases or generally. The Queensland Adult Guardian’s role is “to protect the rights and interests of adults who have impaired capacity” (section 127(1)), and the guardian has functions which include “protecting adults who have impaired capacity from neglect, exploitation and abuse” (section 127(2)(a)) and investigating complaints about the actions of attorneys (section 127(2)(b)). That is one model, but the Queensland Guardian has powers to make decisions which go much further than the power to invoke the assistance of the Family Court which we contemplate for the Commissioner for the Aged.
- 43 A different model is the Commissioner for Children, whose functions embrace both the investigation of specific cases (Children, Young Persons, and Their Families Act 1989 section 411(1)(a)) and a concern with the welfare of children and young persons generally (for example, section 411(1)(e)).
- 44 We recommend that the role and functions of the Commissioner for the Aged include both general and specific powers. The *general* powers must be to inquire into and report on any matter relating to the welfare of the aged. *Specific* powers in relation to enduring powers of attorney would include making on behalf of the donor application to the Family Court for the exercise of that Court’s various supervisory powers under Part IX, and to any other Court for such relief under the general law as may be available to any donor. We do not spell out what we think should be the Commissioner’s specific powers in other contexts for the reasons already indicated in the concluding sentence of paragraph 41.

SUMMARY OF RECOMMENDATIONS

45 We recommend that Part IX of the Protection of Personal and Property Rights Act 1988 be so amended as to affect the following changes:

- (1) If the attorney is a person other than the donor's spouse or de facto partner and if the donor at the time of executing is either aged 68 years or over or a patient at or a resident in any hospital, home or other institution, valid execution of an enduring power of attorney will require compliance with the procedures listed below in subparagraphs (2) and (3).
- (2) The donor's signature must be witnessed by a solicitor who must certify in writing on the document:
 - (a) that he or she has been retained independently of the attorney;
 - (b) that he or she has advised the donor:
 - (i) that in the case of an enduring power of attorney, in relation to property, the donor has a choice as to whether the attorney is authorised to act as to all or part only of the donor's property;
 - (ii) that in the case of an enduring power of attorney, in relation to personal care and welfare, the donor has a choice as to whether the attorney is authorised to act in relation to the donor's personal care and welfare generally, or only in relation to specific matters;
 - (iii) that in the case of an enduring power, in relation to property, the donor may appoint joint attorneys or may appoint a trustee corporation as attorney;
 - (iv) that in the case of an enduring power of attorney, in relation to property, conditions to which the exercise of the attorney's powers will be subject can be imposed and that among other things such conditions may determine whether the document becomes effective immediately, or on the donor becoming mentally incapable, or at a time defined in some other way, may impose requirements as to the monitoring of the actions of an attorney and may precisely define the powers of the attorney to make gifts on behalf of the donor; and
 - (v) that the donor has the right at any time to revoke the power of attorney and the ways in which such right may be exercised.
- (3) If subparagraph (2) is complied with there may be omitted from the forms prescribed in the Third Schedule the notes except for

the first note numbered 3 in the form of enduring powers of attorney in relation to personal care and welfare.

- (4) Section 94 should be amended to incorporate the presumption of competence contained in section 5 and section 94(1)(b) should be replaced by a provision worded along the lines of section 12(2)(a).
- (5) Section 98(3) should be further amended to provide that its requirement is satisfied only if a registered medical practitioner has certified in writing that the donor is mentally incapable.
- (6) There should be inserted a provision to the effect that notwithstanding any provision to the contrary in a deed creating an enduring power of attorney, the attorney is under an obligation:
 - (a) to encourage the donor to exercise such competence as the donor has to manage his or her own affairs in relation to the donor's personal care and welfare and the donor's property; and
 - (b) in the exercise of the attorney's powers, to consult the donor and such other persons as the attorney knows or ought to know are interested in the donor's welfare and competent to advise the attorney.
- (7) That there be added to section 107 a subsection to the effect that the powers conferred by the section may be exercised only if:
 - (a) the attorney is a trust corporation; or
 - (b) there are joint attorneys who are not spouses and not more than one of them benefits.
- (8) That section 105 be amended to provide:
 - (a) that a breach of the obligations referred to in subparagraph 6 is a ground for revocation;
 - (b) that the Commissioner for the Aged, a social worker, a medical practitioner, a representative of a voluntary welfare agency or (with the leave of the court) any other person has standing to apply under section 105 for revocation.
- (9) That a third party dealing with an attorney is under no obligation to satisfy such third party as to compliance with the obligations referred to in subparagraph (6) and is entitled to assume that there has been such compliance and a third party dealing with an attorney may rely on the certificate we propose in subparagraph (5) even if the donor has subsequently regained capacity, unless the third party has knowledge of such recovery of capacity.

(10) That an enduring power of attorney granted in favour of a spouse or de facto partner ceases to have effect if the parties separate with the intention of terminating their relationship.

46 We further recommend that consideration be given to the creation of the position of Commissioner for the Aged, the holder of such position to have the responsibility of acting as a champion for older people.

APPENDIX A

Part IX and the Third Schedule of the Protection of Personal and Property Rights Act 1988

PART IX — ENDURING POWERS OF ATTORNEY

94 Interpretation—

- (1) For the purposes of this Part of this Act, the donor of an enduring power of attorney is mentally incapable,—
 - (a) In relation to property, if the donor is not wholly competent to manage his or her own affairs in relation to his or her property; or
 - (b) In relation to personal care and welfare, if the donor—
 - (i) 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
 - (ii) 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.
- (2) Nothing in subsection (1) of this section shall affect any rule of law relating to capacity to give or to revoke a power of attorney.

95 When power of attorney is enduring power of attorney—

- (1) Subject to the provisions of this section, a power of attorney is an enduring power of attorney if the instrument that creates the power—
 - (a) Is in a form set out in the Third Schedule to this Act; and
 - (b) Is signed by the donor [, or by some other person in the presence of the donor and by the direction of the donor,] whose signature is attested by a witness to the signing, not being the attorney; and
 - (c) Is signed by the attorney (or, if more than one, each attorney) whose signature is attested by a witness to the signing, not being the donor.

- (2) A power of attorney purporting to be an enduring power of attorney shall have effect notwithstanding that it is in a form different from a form set out in the Third Schedule to this Act, if, but only if, the differences are immaterial.
- (3) A power of attorney shall not have effect as an enduring power of attorney unless the attorney, when signing the instrument creating it, is—
 - (a) An individual who is not less than 20 years of age, is not bankrupt, and is not subject to a personal order or a property order; or
 - (b) A trustee corporation.
- (4) A power of attorney delegating trustee powers, authorities, and discretions under section 31 of the Trustee Act 1956 shall not have effect as an enduring power of attorney.
- (5) A power of attorney that gives the attorney the right to appoint a substitute or a successor shall not have effect as an enduring power of attorney; but an enduring power of attorney may provide for successive attorneys, the appointment of one being conditional upon the cessation of the appointment of another.
- (6) A power of attorney executed before the commencement of this Act shall not have effect as an enduring power of attorney.

96 Enduring power of attorney not revoked by donor's subsequent mental incapacity—

An enduring power of attorney shall not be revoked by the donor's subsequent mental incapacity, but shall continue to have effect according to its tenor.

97 Enduring power of attorney in relation to property—

- (1) A donor of an enduring power of attorney may authorise the attorney to act generally in relation to the whole or a specified part of the donor's affairs in relation to his or her property, or to act in relation to specified things on the donor's behalf, and in either case such authorisation may be given subject to conditions and restrictions.
- (2) Where a donor of an enduring power of attorney authorises the attorney to act generally in relation to the whole or a specified part of the donor's affairs in relation to the donor's property, the attorney shall have authority to do anything on behalf of the donor that the donor can lawfully do by an attorney, but subject to sections 100 and 107 of this Act and to any conditions or restrictions contained in the enduring power of attorney.
- [(3) Where a donor of an enduring power of attorney has become mentally incapable, the attorney shall be authorised to make an application under section 122 of the Land Transfer Act 1952 to have a transmission registered where the attorney believes that the donor is entitled to any estate or interest in land by virtue of that transmission, and a District Land Registrar is authorised to accept such an application notwithstanding the fact that the attorney is

not the person claiming to be entitled to the estate or interest in land.]

98 Enduring power of attorney in relation to personal care and welfare—

- (1) Subject to subsections (3) and (4) of this section, a donor of an enduring power of attorney may authorise the attorney to act in relation to the donor's personal care and welfare, either generally or in relation to specific matters, and in either case such authorisation may be given subject to conditions and restrictions.
- (2) Notwithstanding section 95(3) of this Act, an enduring power of attorney may not appoint a trustee corporation to be an attorney, nor may it appoint more than one individual to be attorneys, to act in relation to the donor's personal care and welfare.
- (3) The attorney shall not act in relation to the donor's personal care and welfare unless the donor is mentally incapable.
- (4) The attorney shall not act in respect of any matter relating to the donor's personal care and welfare where, if the attorney were the welfare guardian of the donor, the attorney would be denied the power to act by section 18 of this Act.
- (5) Subject to subsections (3) and (4) of this section, any action taken by the attorney in relation to the donor's personal care and welfare shall have the same effect as it would have had if it had been taken by the donor and the donor had had full capacity to take it.

99 Both kinds of powers may be given—

- (1) Nothing in section 95 or section 97(1) or section 98(1) of this Act shall prevent a donor from—
 - (a) Authorising the attorney, whether in the same or in a separate document, to act both—
 - (i) In relation to the whole or a specified part of the donor's affairs in relation to his or her property, or to act in relation to specified things on the donor's behalf; and
 - (ii) In relation to the donor's personal care and welfare, either generally or in relation to specific matters; or
 - (b) Giving an enduring power of attorney to any person or persons for the purposes described in subparagraph (i) of paragraph (a) of this subsection, and, whether in the same or in a separate document, to another person for the purposes described in subparagraph (ii) of that paragraph.
- (2) In any case to which subsection (1)(b) of this section applies, in the event of any conflict arising between the exercise of the powers of the attorney appointed for the purposes described in subparagraph (i) of paragraph (a) of subsection (1) of this section and the exercise of the powers of the attorney appointed for the purposes of subparagraph (ii) of that paragraph, the latter shall prevail unless a Court, on the application of either attorney, otherwise directs in any particular case.

100 Enduring powers of attorney subject to personal order and property order—

Where an enduring power of attorney is given by a person who is or who subsequently becomes subject to a personal order or a property order, the order shall be binding on the attorney; and, in the event of any conflict arising between the powers and duties of the attorney and the terms of the order, the order shall prevail.

101 Attorney may seek directions from court—

- (1) The attorney under an enduring power of attorney may apply to a Court for directions relating to the exercise of the attorney's powers.
- (2) Nothing in subsection (1) of this section shall limit or affect the jurisdiction of any other court.

102 Court's jurisdiction in respect of an enduring power of attorney—

- (1) A Court shall have jurisdiction to determine—
 - (a) Whether or not any instrument is an enduring power of attorney; or
 - (b) Whether or not the donor of an enduring power of attorney is mentally incapable.
- (2) A Court shall have jurisdiction to do all or any of the following things in respect of an enduring power of attorney where the donor has become mentally incapable:
 - (a) Determine any question as to the meaning or effect of the instrument by which the power is given:
 - (b) Determine whether or not any such instrument has ceased to have effect:
 - (c) Give directions with respect to—
 - (i) The management or disposal by the attorney of the property and affairs of the donor; or
 - (ii) The rendering of accounts by the attorney and the production of the records kept by the attorney for the purpose; or
 - (iii) The remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration; or
 - (iv) Any matter relating to the personal care and welfare of the donor:
 - (v) Any other matter on which the directions of the Court are sought under section 99(2) or section 101 of this Act:
 - (d) Modify the scope of the enduring power of attorney by including or excluding—
 - (i) Part of the donor's affairs in relation to his or her property, or any powers relating to any such affairs; or
 - (ii) Any specific matters in relation to the donor's personal care and welfare, or any powers relating to any such matters, not being a matter referred to in section 98(4) of this Act:

- (e) Require the attorney to furnish information or produce documents or things in his or her possession as attorney;
 - (f) Give any consent or authorisation to act that the attorney would have to obtain from the donor if the donor were mentally capable;
 - (g) Authorise the attorney to act, otherwise than in accordance with section 107 of this Act, to the benefit of the attorney or persons other than the donor, but subject to any conditions or restrictions contained in the instrument;
 - (h) Determine whether the donor of the power was induced by undue influence or fraud to create the power;
 - (i) Determine whether, having regard to all the circumstances and, in particular, the attorney's relationship with the donor, the attorney is suitable to be the donor's attorney.
- (3) Nothing in the foregoing provisions of this section shall limit or affect the jurisdiction of any other court.

103 Review of attorney's decisions—

- (1) The donor of an enduring power of attorney, and any other person with leave of the Court, may at any time apply to a Court to review any decision made by the attorney while the donor is or was mentally incapable, and the Court may, if it thinks it reasonable to do so in all the circumstances, review the decision and make such order as it thinks fit.
- (2) An order made under subsection (1) of this section shall have effect according to its tenor.

104 Disclaimer by attorney—

- (1) An attorney under an enduring power of attorney may not disclaim that power otherwise than by notice given as follows:
- (a) Where the donor is not mentally incapable, by written notice to the donor;
 - (b) Where the donor is mentally incapable, by filing a notice in a Court.
- (2) If, in any case to which subsection (1)(b) of this section applies, the attorney considers that it may be desirable in the interests of the donor that a welfare guardian be appointed under Part I of this Act in respect of the donor's personal care and welfare, or that a manager be appointed under Part III of this Act in respect of any property owned by the donor, the attorney may attach a report to that effect to the notice filed in the Court.
- (3) On receiving a report under subsection (2) of this section, the Registrar shall refer the matter to a Judge who may give to the Registrar all such directions as the Judge considers appropriate to have the matter drawn to the attention of such person or persons described in section 7 or section 26 of this Act as the Judge thinks fit.

105 Court may revoke appointment of attorney—

- (1) Where a Court is satisfied that an attorney appointed under an enduring power of attorney has not acted, is not acting, or proposes not to act in the best interests of the donor of that power, the Court may revoke the appointment of the attorney.
- (2) Where a Court under paragraph (h) or paragraph (i) of section 102(2) of this Act determines that the donor of an enduring power of attorney was induced by undue influence or fraud to create the power or that the attorney is not suitable to be the donor's attorney, the Court shall revoke the appointment of the attorney.

106 Circumstances in which enduring power of attorney shall cease to have effect—

- (1) An enduring power of attorney shall cease to have effect when—
 - (a) The donor revokes the power while mentally capable of doing so; or
 - (b) The donor dies; or
 - (c) The attorney gives notice of disclaimer in accordance with section 104 of this Act; or
 - (d) The attorney dies, or is adjudged bankrupt, or becomes a special or committed patient under the Mental Health Act 1969, or becomes subject to a personal order or a property order, or otherwise becomes incapable of acting; or
 - (e) In the case of an enduring power of attorney that appoints more than one attorney with joint but not several authority, one of the attorneys dies, or is adjudged bankrupt, or becomes a special or committed patient under the Mental Health Act 1969, or becomes subject to a personal order or a property order, or otherwise becomes incapable of acting; or
 - (f) A Court revokes the appointment of the attorney pursuant to section 105 of this Act.
- (2) In any case where the enduring power of attorney provides for successive attorneys, the appointment of one being conditional upon the cessation of the appointment of another, the provisions of paragraphs (c) to (f) of subsection (1) of this section shall apply only in respect of the last such attorney.

107 Attorney's power to benefit self and others—

- (1) Subject to the terms of, and any conditions or restrictions in, an enduring power of attorney, at any time while the donor is mentally incapable the attorney may act to the benefit of the attorney or persons other than the donor if, but only if, and only to the extent that, the donor might be expected to provide for the needs of the attorney or those other persons.
- (2) Without limiting the generality of subsection (1) of this section, but subject to the terms of, and any conditions or restrictions in, the enduring power of attorney, the attorney may dispose of the property of the donor by way of gift if, but only if, the gift is—

- (a) Of a seasonal nature or at a time or an anniversary of a birth or marriage to a person (including the attorney) who is a relative of the donor; or
 - (b) To a charity to which the donor made or might be expected to make gifts,—
- and the value of the gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

108 Procedure—

For the purpose of proceedings under this Part of this Act, the provisions of Part VI (except section 64), and sections 83 to 85 of this Act, so far as they are applicable and with any necessary modifications, shall apply as if the donor were a person in respect of whom an application for a personal order or a property order was being sought or in respect of whom such an order had been made, subject to the following provisions:

- (a) Where the application for the exercise of the Court's jurisdiction is made by any person other than the attorney, a copy of the application shall be served on the attorney (as well as the persons listed in section 63(1) of this Act):
- (b) Where a donor has given 2 or more enduring powers of attorney and it is intended to apply to the Court under this Part of this Act in respect of any 2 or more of those powers, the applications may be joined, and, subject to any rules of procedure made under this Act, it shall not be necessary to file separate applications:
- (c) A Court may hear and determine any proceedings before it under this Part of this Act in conjunction with any other proceedings under this or any other Part of this Act in any case where both proceedings are in respect of the same person, whether or not the parties to the proceedings are the same.

THIRD SCHEDULE

Section 95

FORM OF ENDURING POWER OF ATTORNEY IN
RELATION TO PROPERTY

THIS ENDURING POWER OF ATTORNEY is made this day
of 19 by (Full name, address, and occupation of donor).

1. I hereby appoint (Full name, address, and occupation of attorney) to
be my attorney for the purpose of Part IX of the Protection of Personal
and Property Rights Act 1988 with * general authority to act on my
behalf

or

* authority to act on my behalf in the following respects only:

.....

* in relation to the whole of my property

or

* in relation to the following property only:

.....

* subject to the following conditions and restrictions:

.....

2. * I intend that the authority in paragraph 1 of this instrument shall
not be revoked if I become mentally incapable.

or

* I intend that the authority in paragraph 1 of this instrument shall
have effect only if I become mentally incapable.

Signed by (Name of Donor)

in the presence of

Signed by (Name of Attorney)

in the presence of

* Delete where not applicable

NOTES ON THE ABOVE FORM

1. The effect of this document is to authorise the person you have named as your attorney to act on your behalf in respect of your affairs in relation to your property. As you will see from the form, you can authorise your attorney to act in respect of all your property affairs, or only some of them. If you want the attorney to act in respect of some of them only, you must specify which they are.
 2. You must also indicate whether you wish this document to be effective even while you are mentally capable and to continue if you become mentally incapable, or whether you want it to have effect only if you become mentally incapable.
 3. You should consider very carefully what conditions you may wish to impose on the attorney's right to act to his or her own benefit or to the benefit of other persons. Subject to anything you may state in this document, the attorney may act in such a way as to benefit the attorney or other persons if you might be expected to provide for the needs of the attorney or those other persons. The attorney will also be able to make seasonal gifts and charitable donations on your behalf.
 4. Before signing this document, you should seek legal advice.
-

FORM OF ENDURING POWER OF ATTORNEY IN
RELATION TO PERSONAL CARE AND WELFARE

THIS ENDURING POWER OF ATTORNEY is made this day
of 19 by (Full name, address, and occupation of donor).

1. I hereby appoint (Full name, address, and occupation of attorney) to
be my attorney for the purpose of Part IX of the Protection of Personal
and Property Rights Act 1988 to act on my behalf, if I become
mentally incapable,

* in relation to my personal care and welfare generally or

* in relation to the following specific matters relating to my personal
care and welfare

.....

* subject to the following conditions and restrictions:

.....

Signed by (Name of Donor)

in the presence of

Signed by (Name of Attorney)

in the presence of

*Delete where not applicable

NOTES TO THE ABOVE FORM

1. The effect of this document is to authorise the person you have named as your attorney to act on your behalf in relation to your personal care and welfare. As you will see from this form, you can authorise your attorney to act in relation to your personal care and welfare generally, or only in relation to specific matters. If you want the attorney to act in respect of specific matters only, you must specify what they are.
 2. You can appoint only 1 person to act as your attorney at any one time. A trustee company cannot act as an attorney under this form.
 3. The attorney cannot act for you on certain matters. These are—
 - (a) To make any decisions relating to your entering into marriage, or the dissolution of your marriage; or
 - (b) To make any decision relating to the adoption of a child of yours; or
 - (c) The refusal of consent to any standard medical treatment or procedure intended to save your life or to prevent serious damage to your health; or
 - (d) The giving of consent to the administering of electro-convulsive treatment; or
 - (e) The giving of consent to the performance on you of any surgery or other treatment designed to destroy any part of your brain or any of your brain functions for the purposes of changing your behaviour; or
 - (f) The giving of consent to your taking part in any medical experiment (except for the purpose of saving your life or of preventing serious damage to your health).
 4. Before signing this document, you should seek legal advice.
-

APPENDIX B

Some examples of misuse reported by submitters

- An elderly woman appointed her neighbour as attorney. The neighbour embezzled \$40,000 from her bank account.
- An elderly woman appointed a family friend as attorney. The family friend persuaded the donor to gift a holiday home to him which was subsequently sold for in excess of \$200,000. The donor's bonus bonds were cashed and no explanation was given for the removal of the funds. Trespass orders were issued in respect of the donor's nephew and his wife. The donor made a will in favour of her attorney, leaving him almost \$1 million.
- An elderly woman appointed a daughter as an attorney. The daughter misappropriated \$200,000 which she spent on her husband's business, new cars, household expenses, and to fund casino visits.
- An elderly woman, recently released from hospital was induced by a son (with a solicitor in attendance) to grant an enduring power of attorney in favour of the son. The attorney placed the donor in a rest home and sold the donor's property without informing the donor or other close relatives. The attorney left New Zealand with the proceeds of the sale. The donor was alarmed that her house had been sold and had no recollection of granting an enduring power of attorney.
- An elderly couple suffering from cognitive impairment and Alzheimers disease appointed one of their children as an attorney. The attorney did not pay the couple's bills, but would write cheques from the donors' accounts for the attorney's own use. In total \$18,000 of the donors' money was used for the attorney's own purposes.

APPENDIX C

List of persons and organisations making submissions

Age Concern New Zealand Inc

Sue Martin, Age Concern, Auckland

Age Concern Auckland Elder Abuse and Neglect Service

Age Concern Otago Elder Abuse and Neglect Panel

Age Concern, Wanganui Elder Abuse and Neglect Prevention
and Intervention Service

Alzheimers Society New Zealand

Bank of New Zealand

NW Bennett

John Campion, Tanner Fitzgerald Getty, Barristers and Solicitors

Eleanor Coronno

Shirley A Crisp

John Eagles, Govett Quilliam Barristers and Solicitors

Norman Elliot, Penney Patel Law Barristers and Solicitors

MJ Fore

JD Gillard, Wynn Williams & Co, Barristers and Solicitors

Alan Gluestein, Barrister and Solicitor

Warwick Goold

Grey Power

Alistaire Hall, Duthie Whyte Barristers and Solicitors

Health and Disability Commissioner

Michael Kelliher
Judge B Kendall, Family Court Judge
Eugénie Laracy, Barrister
Joy Lovegrove
Janice Lowe
Graeme MacCormick (Retired Family Court Judge)
John McMillan, Clare Cottage, Mental Health Services for
Older People, Waitakere Hospital
Principal Family Court Judge PD Mahony
JB Morrison, Morrison Kent Barristers and Solicitors
Chris Moult
National Council of Women of New Zealand
New Zealand Law Society
David Oldershaw
Presbyterian Support Elder Care, Elder Abuse and Neglect
Prevention Service, Tauranga.
Public Trust Office
Ian Boyd-Bell, District Public Trustee, Takapuna
Vivien Quinn
Jan Radomske
L Samways
Eileen Smith
Ivy Schulz
GR Streeter
Te Puna Hauora o te Raki Paewhenua
Anne Todd-Lambie, McFadden McKeeken Phillips, Barristers
and Solicitors
Dawn Underwood
Noeline Whitehead
And some anonymous correspondents.

OTHER LAW COMMISSION PUBLICATIONS

Report series

- NZLC R1 Imperial Legislation in Force in New Zealand (1987)
- NZLC R2 Annual Reports for the years ended 31 March 1986 and 31 March 1987 (1987)
- NZLC R3 The Accident Compensation Scheme (Interim Report on Aspects of Funding) (1987)
- NZLC R4 Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988)
- NZLC R5 Annual Report 1988 (1988)
- NZLC R6 Limitation Defences in Civil Proceedings (1988)
- NZLC R7 The Structure of the Courts (1989)
- NZLC R8 A Personal Property Securities Act for New Zealand (1989)
- NZLC R9 Company Law: Reform and Restatement (1989)
- NZLC R10 Annual Report 1989 (1989)
- NZLC R11 Legislation and its Interpretation: Statutory Publications Bill (1989)
- NZLC R12 First Report on Emergencies: Use of the Armed Forces (1990)
- NZLC R13 Intellectual Property: The Context for Reform (1990)
- NZLC R14 Criminal Procedure: Part One: Disclosure and Committal (1990)
- NZLC R15 Annual Report 1990 (1990)
- NZLC R16 Company Law Reform: Transition and Revision (1990)
- NZLC R17(S) A New Interpretation Act: To Avoid “Prolixity and Tautology” (1990) (and Summary Version)
- NZLC R18 Aspects of Damages: Employment Contracts and the Rule in *Addis v Gramophone Co* (1991)
- NZLC R19 Aspects of Damages: The Rules in *Bain v Fothergill* and *Joyner v Weeks* (1991)
- NZLC R20 Arbitration (1991)
- NZLC R21 Annual Report 1991 (1991)
- NZLC R22 Final Report on Emergencies (1991)
- NZLC R23 The United Nations Convention on Contracts for the International Sale of Goods: New Zealand’s Proposed Acceptance (1992)
- NZLC R24 Report for the period 1 April 1991 to 30 June 1992 (1992)
- NZLC R25 Contract Statutes Review (1993)
- NZLC R26 Report for the year ended 30 June 1993 (1993)
- NZLC R27 The Format of Legislation (1993)
- NZLC R28 Aspects of Damages: The Award of Interest on Money Claims (1994)
- NZLC R29 A New Property Law Act (1994)
- NZLC R30 Community Safety: Mental Health and Criminal Justice Issues (1994)
- NZLC R31 Police Questioning (1994)
- NZLC R32 Annual Report 1994 (1994)
- NZLC R33 Annual Report 1995 (1995)
- NZLC R34 A New Zealand Guide to International Law and its Sources (1996)
- NZLC R35 Legislation Manual: Structure and Style (1996)
- NZLC R36 Annual Report 1996 (1996)
- NZLC R37 Crown Liability and Judicial Immunity: A response to *Baigent’s* case and *Harvey v Derrick* (1997)

NZLC R38	Succession Law: Homicidal Heirs (1997)
NZLC R39	Succession Law: A Succession (Adjustment) Act (1997)
NZLC R40	Review of the Official Information Act 1982 (1997)
NZLC R41	Succession Law: A Succession (Wills) Act (1997)
NZLC R42	Evidence Law: Witness Anonymity (1997)
NZLC R43	Annual Report 1997 (1997)
NZLC R44	Habeas Corpus: Procedure (1997)
NZLC R45	The Treaty Making Process: Reform and the Role of Parliament (1997)
NZLC R46	Some Insurance Law Problems (1998)
NZLC R47	Apportionment of Civil Liability (1998)
NZLC R48	Annual Report 1998 (1998)
NZLC R49	Compensating the Wrongly Convicted (1998)
NZLC R50	Electronic Commerce Part One: A Guide for the Legal and Business Community (1998)
NZLC R51	Dishonestly Procuring Valuable Benefits (1998)
NZLC R52	Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency? (1999)
NZLC R53	Justice: The Experiences of Māori Women: Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei (1999)
NZLC R54	Computer Misuse (1999)
NZLC R55	Evidence (1999)
NZLC R56	Annual Report 1999 (1999)
NZLC R57	Retirement Villages (1999)
NZLC R58	Electronic Commerce Part Two: A Basic Legal Framework (1999)
NZLC R59	Shared Ownership of Land (1999)
NZLC R60	Costs in Criminal Cases (2000)
NZLC R61	Tidying the Limitation Act (2000)
NZLC R62	Coroners (2000)
NZLC R63	Annual Report 2000 (2000)
NZLC R64	Defaming Politicians: A Response to <i>Lange v Atkinson</i> (2000)
NZLC R65	Adoption and Its Alternatives: A Different Approach and a New Framework (2000)
NZLC R66	Criminal Prosecution (2000)
NZLC R67	Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information (2000)
NZLC R68	Electronic Commerce Part Three: Remaining Issues (2000)
NZLC R69	Juries in Criminal Trials (2001)
NZLC R70	Acquittal Following Perversion of the Course of Justice (2001)

Study Paper series

NZLC SP1	Women's Access to Legal Services (1999)
NZLC SP2	Priority Debts in the Distribution of Insolvent Estates: An Advisory Report to the Ministry of Commerce (1999)
NZLC SP3	Protecting Construction Contractors (1999)
NZLC SP4	Recognising Same-Sex Relationships (1999)
NZLC SP5	International Trade Conventions (2000)

- NZLC SP6 To Bind their Kings in Chains: An Advisory Report to the Ministry of Justice (2000)
- NZLC SP7 Simplification of Criminal Procedure Legislation: An Advisory Report to the Ministry of Justice (2001)
- NZLC SP8 Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri (2001)
- NZLC SP9 Māori Custom and Values in New Zealand Law (2001)
- NZLC SP10 Mandatory Orders Against the Crown and Tidying Judicial Review (2001)

Preliminary Paper series

- NZLC PP1 Legislation and its Interpretation: The Acts Interpretation Act 1924 and Related Legislation (discussion paper and questionnaire) (1987)
- NZLC PP2 The Accident Compensation Scheme (discussion paper) (1987)
- NZLC PP3 The Limitation Act 1950 (discussion paper) (1987)
- NZLC PP4 The Structure of the Courts (discussion paper) (1987)
- NZLC PP5 Company Law (discussion paper) (1987)
- NZLC PP6 Reform of Personal Property Security Law (report by Prof JH Farrar and MA O'Regan) (1988)
- NZLC PP7 Arbitration (discussion paper) (1988)
- NZLC PP8 Legislation and its Interpretation (discussion and seminar papers) (1988)
- NZLC PP9 The Treaty of Waitangi and Māori Fisheries – Mataitai: Nga Tikanga Māori me te Tiriti o Waitangi (background paper) (1989)
- NZLC PP10 Hearsay Evidence (options paper) (1989)
- NZLC PP11 “Unfair” Contracts (discussion paper) (1990)
- NZLC PP12 The Prosecution of Offences (issues paper) (1990)
- NZLC PP13 Evidence Law: Principles for Reform (discussion paper) (1991)
- NZLC PP14 Evidence Law: Codification (discussion paper) (1991)
- NZLC PP15 Evidence Law: Hearsay (discussion paper) (1991)
- NZLC PP16 The Property Law Act 1952 (discussion paper) (1991)
- NZLC PP17 Aspects of Damages: Interest on Debt and Damages (discussion paper) (1991)
- NZLC PP18 Evidence Law: Expert Evidence and Opinion Evidence (discussion paper) (1991)
- NZLC PP19 Apportionment of Civil Liability (discussion paper) (1992)
- NZLC PP20 Tenure and Estates in Land (discussion paper) (1992)
- NZLC PP21 Criminal Evidence: Police Questioning (discussion paper) (1992)
- NZLC PP22 Evidence Law: Documentary Evidence and Judicial Notice (discussion paper) (1994)
- NZLC PP23 Evidence Law: Privilege (discussion paper) (1994)
- NZLC PP24 Succession Law: Testamentary Claims (discussion paper) (1996)
- NZLC PP25 The Privilege Against Self-Incrimination (discussion paper) (1996)
- NZLC PP26 The Evidence of Children and Other Vulnerable Witnesses (discussion paper) (1996)
- NZLC PP27 Evidence Law: Character and Credibility (discussion paper) (1997)
- NZLC PP28 Criminal Prosecution (discussion paper) (1997)
- NZLC PP29 Witness Anonymity (discussion paper) (1997)
- NZLC PP30 Repeal of the Contracts Enforcement Act 1956 (discussion paper) (1997)

- NZLC PP31 Compensation for Wrongful Conviction or Prosecution (discussion paper) (1998)
- NZLC PP32 Juries in Criminal Trials: Part One (discussion paper) (1998)
- NZLC PP33 Defaming Politicians: A Response to *Lange v Atkinson* (discussion paper) (1998)
- NZLC PP34 Retirement Villages (discussion paper) (1998)
- NZLC PP35 Shared Ownership of Land (discussion paper) (1999)
- NZLC PP36 Coroners: A Review (discussion paper) (1999)
- NZLC PP37 Juries in Criminal Trials: Part Two (discussion paper) (1999)
- NZLC PP38 Adoption: Options for Reform (discussion paper) (1999)
- NZLC PP39 Limitation of Civil Actions (discussion paper) (2000)
- NZLC PP40 Misuse of Enduring Powers of Attorney (discussion paper) (2000)
- NZLC PP41 Battered Defendants: Victims of Domestic Violence Who Offend (discussion paper) (2000)
- NZLC PP42 Acquittal Following Perversion of the Course of Justice: A Response to *R v Moore* (discussion paper) (2000)
- NZLC PP43 Subsidising Litigation (discussion paper) (2000)
-