



**MINISTRY OF SOCIAL
DEVELOPMENT**

TE MANATŪ WHAKAHIATO ORA

17 AUG 2021

Tena koe

On 4 August 2021, you emailed the Ministry of Social Development (the Ministry) requesting, under the Official Information Act 1982 (the Act), a copy of the following information:

- *A copy of: Protection of Personal and Property Rights Act 1988: Report of the Minister for Senior Citizens on the review of the amendments to the said act made by the Protection of Personal and Property Rights Amendment Act 2007, Ministry of Social Development, June 2014*

On 5 August 2021, you refined your request to the following:

- *I'm requesting the report by the then Minister for Senior Citizens (Jo Goodhew) on the amendments made to the main Act by an amending Act in 2007*
 - *Jo Goodhew, Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007 (June 2014)*

Please find enclosed the requested report "*Approval of final report: Review of the 2007 Amendments to the Protection of Personal and Property Rights Act 1988*".

You will note that the contact details of some individuals are withheld under section 9(2)(a) of the Act in order to protect the privacy of natural persons. The need to protect the privacy of these individuals outweighs any public interest in this information.

The Ministry has also withheld the names of individuals as they do not fall within the scope of your request.

The principles and purposes of the Act under which you made your request are:

- to create greater openness and transparency about the plans, work and activities of the Government
- to increase the ability of the public to participate in the making and administration of our laws and policies
- to lead to greater accountability in the conduct of public affairs.

This Ministry fully supports those principles and purposes. The Ministry therefore intends to make the information contained in this letter and any attached documents

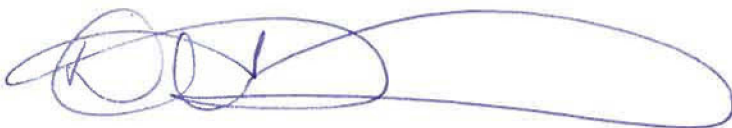
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available to the wider public. The Ministry will do this by publishing this letter and attachments on the Ministry of Social Development's website. Your personal details will be deleted and the Ministry will not publish any information that would identify you as the person who requested the information.

If you wish to discuss this response with us, please feel free to contact OIA_Requests@msd.govt.nz.

If you are not satisfied with this response regarding the report by the Minister for Senior Citizens (Jo Goodhew) on the amendments made to Protection of Personal and Property Rights Act 1988 by an amending Act in 2007, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at www.ombudsman.parliament.nz or 0800 802 602.

Yours sincerely



Diane Turner
Director Office for Seniors
Disability, Seniors and International Policy



MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

**Approval of final report: Review of the 2007
Amendments to the Protection of Personal and
Property Rights Act 1988**

Date: 28 May 2014

Report no.: REP/14/05/441

Security level: IN CONFIDENCE

Priority: Medium

Action Sought

Hon Jo Goodhew
Minister for Senior Citizens

agree to proposed editorial changes to your
report to the House of Representatives

30 May 2014

Contact for telephone discussion

Name	Position	Telephone	1st Contact
Out of Scope	General Manager, Older People's and International Policy,	§ 9(2)(a)	<input checked="" type="checkbox"/>
Out of Scope	Team Manager, Older People's Policy,	§ 9(2)(a)	

Report prepared by: Out of Scope, Graduate Policy Analyst, Older People's Policy

Minister's office comments

- ☐ Noted
- ☐ Seen
- ☐ Approved
- ☐ Needs change
- ☐ Withdrawn
- ☐ Not seen by Minister
- ☐ Overtaken by events
- ☐ Referred to (specify)

Comments

Date received from MSD

Date returned to MSD

report



MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

Date: 27 May 2014

Security Level: IN CONFIDENCE

To: Hon Jo Goodhew, Minister for Senior Citizens

Approval of final report: Review of the 2007 Amendments to the Protection of Personal and Property Rights Act 1988

Purpose

- 1 We are seeking your approval of editorial changes to the *Report of the Minister for Senior Citizens on the Review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007*.
- 2 On 15 May 2014 the Cabinet Social Policy Committee (SOC) authorised you to make editorial changes to your report prior to presenting it to the House of Representatives. SOC also agreed that the report should be presented to the House on 12 June 2014.
- 3 In order to meet deadlines for printing and the presentation of the report in the House of Representatives we recommend that you notify us of your approval of the final report by 30 May 2014.

We propose a number of editorial changes to your report

- 4 We propose a number of editorial changes to your report prior to its presentation in the House. A table detailing the changes is attached. The changes do not alter the effect or operation of the report's recommendations.

- 5 We have consulted with the Ministries of Justice and Health and the Office for Disability Issues on the editorial changes.

Recommended actions

It is recommended that you:

agree to the proposed editorial changes to your report to the House of Representatives.

Agree / Disagree

Out of Scope

28/5/14

Out of Scope

Date

General Manager, Older People's and International Policy

Hon Jo Goodhew

Minister for Senior Citizens

Date

Appendix One: editorial changes to the report

Page number	Change	Suggested by	Reason for change
Throughout	Minor changes to use of plurals and punctuation, and minor technical corrections (for example, using the correct title for the 2007 amendment act).	Ministry of Social Development / external proof-reader	Amended for grammatical and technical correctness and consistency.
Cover	Shoulder number removed. Subtitle amended from "For presentation to Parliament in accordance with..." to "Presented to the House of Representatives pursuant to..."	Bills Office	Shoulder number not required (based on Bills Office advice that the report is a non-Parliamentary paper). Subtitle amended in line with Bills Office guidance.
Inside cover	Publication details including ISBN inserted.	Ministry of Social Development	As an official publication it is appropriate to include these details. The Ministry will assign the ISBN and provide copies to the National Librarian.
2	Amended from "The review found..." to "I found..."	Ministry of Social Development	Acknowledging that this was the Minister's review.
3	Amended "the process for applying for a Family Court review of attorney decisions" to "the process for applying to the Family Court for a review of attorney decisions".	Ministry of Social Development	Clarifies that review applications are made to the Family Court.
3	Added a footnote specifying the regulations referred to.	Ministry of Social Development	This citation will be useful to some readers.
4	In recommendation 2, amended "Explore service delivery options..." to "Explore options..."	Ministry of Social Development	Removed "service delivery" as it may be seen as unnecessary jargon.
	In the second bullet point under recommendation 3, amended "easy to follow" to "easy to comply with"	Ministry of Social Development	The proposed wording is more precise (compliance is not just about understanding requirements, but acting on them)

Page number	Change	Suggested by	Reason for change
5	<p>Under "EPAs protect people who lose the capacity to make decisions":</p> <ul style="list-style-type: none"> - amended "...the options for people wishing to choose who will make decisions..." to "... the options for a person wanting to choose someone to make decisions..." - amended "...in the event of their losing..." to "...should they lose..." - amended "...often a spouse or a child of the donor..." to "...often a spouse or an adult child..." 	Ministry of Social Development	<p>We suggest that this slight re-wording is more consistent with the tone of the rest of the report.</p> <p>"Should they lose" is more concise.</p> <p>Avoids any suggestion that the attorney could be a child.</p>
6	Under "There are two types of EPA", amended "...if they lose the mental capacity to make such decisions..." to "...should they lose the mental capacity..."	Ministry of Social Development	Use of "should" instead of "if" reflects the fact that the care and welfare attorney will not be able to make decisions unless <i>and until</i> mental capacity is lost.
7	Amended the heading "The 2007 amendments to the PPPR Act" to "The 2007 amendments provided better protection for donors", and added reference to the PPPR Act to the first line of text.	Ministry of Social Development	The proposed wording aims to be more informative and avoid using an acronym in the heading.
7	Amended "welfare and rights of incapacitated people" to "welfare and rights of vulnerable people".	Ministry of Social Development	The protections begin at the time of setting up the EPA, before losing mental capacity.
7	Under "The review findings are based on extensive consultation", amended "...and attracted 437 usable responses (incomplete submissions were not considered)" to "...and attracted 437 responses that could be analysed".	Ministry of Social Development	The proposed new wording is more concise and better reflects the purpose of omitting some submissions from the analysis.

Page number	Change	Suggested by	Reason for change
8	<p>Removed footnote 6: "Email sent to the Ministry of Social Development on behalf of the Principal Family Court Judge, 9 May 2013."</p> <p>Deleted "However, 23 percent reported that the requirement for donor witnesses to be independent of attorneys is "not satisfactory".</p>	Ministry of Social Development	<p>The footnote is not necessary for the purposes of the report.</p> <p>This point is made again on page 12, under "Witnessing requirements for mutual attorneys need to be simpler".</p>
8	In last paragraph, amended "...and also identified service delivery initiatives that would help the legislation to work as intended" to "...along with other initiatives that would help the legislation to work as intended".	Ministry of Social Development	The proposed new wording avoids the potential jargon of "service delivery initiatives".
9	In second paragraph, amended "the amendments" to "what had changed".	Ministry of Social Development	The proposed new wording avoids repetition of "amendments" and focuses on the important point.
9	In the last dot-point before the recommendations, amended "including correcting perceptions that it is a costly process" to "including correcting perceptions that it is costly to seek a review by the Family Court".	Ministry of Social Development	The proposed new wording is more informative and precise.
9	In the first recommendation, amended "for example, general practitioners" to "for example, health professionals".	Ministry of Social Development	It is useful for people to inform any health professional they are seeing about their EPA – not just their general practitioner.
10	In the recommendations, amended "encourage health professionals" to "encourage general practitioners"	Ministry of Social Development	The focus of this part of the campaign is on general practitioners, as patients generally see them most often.

Page number	Change	Suggested by	Reason for change
	Amended "improve health professionals' access to information about patient EPAs by encouraging them to ask patients about EPAs and record them in patient information systems..." to "encourage health professionals to talk with their patients about EPAs and record EPA details in their patient information systems..."	Ministry of Social Development	The proposed new wording is more concise.
11	Under "What people said" added specific reference to "forms and processes". Replaced a quotation from a submitter with a bracketed comment that "one lawyer said the cost had tripled"	Ministry of Social Development	The proposed wording is more precise about the source of complexity. The deleted quotation was the only one in the report, giving it undue prominence.
11	Inserted the footnote "Public Trust is a trustee corporation and legal service provider". In relation to set-up costs, added "depending on the choice of legal provider, the complexity of the EPA, and the level of preparation by those setting up the EPA"	Ministry of Social Development	Explains what Public Trust is and therefore why their views may be relevant. The additional text on set-up costs explains the wide variation.
11	Under "Recommendations", removed "service delivery" from "exploring service delivery options".	Ministry of Social Development	This removes unnecessary jargon.
12	Under "What people said", amended "They say this is largely due to the complexity and length of the forms" to "They say this is largely because the complexity and length of the new forms has increased the cost of setting up an EPA."	Ministry of Social Development	The proposed new wording is intended to more fully explain the point made by Public Trust, which linked the complexity of the forms and processes to the cost for donors.

Page number	Change	Suggested by	Reason for change
12	<p>Amended the second paragraph under "Other matters considered in the review" from</p> <p>"An alternative, plain English form with clearer explanations would enable more donors to understand and consider their options"</p> <p>to</p> <p>"An alternative, plain English form with clearer explanations would enable more people to understand and consider their options before incurring legal costs. Standardising most of the information that donors and attorneys need would promote consistency and save time for legal providers. Witnesses would still need to provide additional information in some cases."</p>	Ministry of Social Development	The proposed new wording explains the recommendation more fully, and highlights that the amended requirement should help witnesses and attorneys as well as donors.
12	Deleted the words ", that is easier to understand" from the first recommendation under "The prescribed forms need to be simpler", and deleted the word "written" from "standardised written explanation" in the second recommendation.		The proposed wording is more concise and leaves more room to refine the details of the recommended amendments.
12	Amended the heading "Witnessing requirements for mutual attorneys need to be simpler" to "Witnessing requirements for mutual attorneys need to be reconsidered"	Ministry of Social Development	"Reconsidered" better reflects this finding of the review and leads into the recommendation for a balanced approach.
13	Amended "reduce these undue costs..." to "...reduce these costs..."	Ministry of Social Development	Removing "undue" as some submitters might debate this point.

Page number	Change	Suggested by	Reason for change
13	In second paragraph under "Other matters considered in this review" amended "Reduced cost would make it more likely that EPAs are established before..." to "Reduced cost would make it likely that more people would establish EPAs before..."	Ministry of Social Development	The proposed new wording is clearer.
13	In the Recommendations, replaced "revisited" with "reconsidered" and replaced "The Ministry for Social Development will lead further work with key stakeholders..." with "The Ministry of Social Development will work with the Ministry of Justice and key stakeholders..."	Ministry of Social Development	The proposed wording more accurately describes what is proposed.
13	Under "What people said", replaced "Couples who go through separations do not always remember to revoke the appointment of their former spouses or partners as attorneys, or they may wrongly assume that their separations revoke the appointment of a former spouse or partner as attorney"	Ministry of Social Development	The proposed new wording is clearer and more concise.
	with		
	"People do not always remember to update their EPA when a relationship ends, or they may wrongly assume that their separation or divorce revokes the appointment of a former spouse or partner as attorney."		
14	Deleted "Other matters considered in the review" and the paragraph that followed it.	Ministry of Social Development	The deleted material duplicated points made in the discussion of "What people said".

Page number	Change	Suggested by	Reason for change
14 - 15	Replaced a footnote detailing the views of the Medical Council with the words "While the Medical Council indicated that all doctors should be able to assess mental capacity, the information campaign will provide more resources to support general practitioners to carry out these assessments with confidence."	Ministry of Social Development	The proposed wording is more concise, focusing on the relevant aspect of the Medical Council's submission on this point.
15	<p>Under "Other matters considered in the review":</p> <ul style="list-style-type: none"> - Added the condition "if they appoint lawyers to represent them" to the point that "[The complaints] process can be costly for complainants and attorneys". - Added the point that "Abuse of EPAs can affect donors of any age". - Removed a comment that the Family Court can arrange mediation in relation to EPA matters. - Added reference to Elder Abuse and Neglect Prevention Services. Also inserted a footnote referring readers to these services. 	<p>Ministry of Social Development</p> <p>Ministry of Social Development, after further discussion with Ministry of Justice (in relation to mediation).</p>	<p>We understand that the complaints process is not necessarily costly if it is well understood and complainants and attorneys feel confident that they can act without the use of a lawyer.</p> <p>The new wording relating to the age of donors highlights that an Aged Care Commissioner may not be the appropriate response to this issue.</p> <p>It appears that the mediation service is currently focused on the care of children.</p> <p>Elder Abuse and Neglect Prevention services can be helpful if people are unhappy with the actions of an attorney.</p>
15	Amended text to reflect the fact that only "some" District Health Boards made a submission in favour of a national EPA register.	Ministry of Social Development	To more accurately reflect the extent of DHB concern about this matter.

Page number	Change	Suggested by	Reason for change
16	Under "Other matters considered in the review" amended "While noting these submissions, it is also relevant to consider that patient information systems can be used by health professionals to record the details about EPAs" to "While a number of submitters saw a national register as a useful way to record and access the details of EPAs, it is also relevant to consider that health professionals can use patient information systems for this purpose."	Ministry of Social Development	Revised wording clarifies why a register of EPAs is not being considered at this stage.
18	Deleted the final sentence – "At that stage, there will be further information for everyone affected".	Ministry of Social Development	We suggest that it would be preferable to defer decisions about future publicity for the amendments until we have a clearer idea of their timing and content.
20	Added to the glossary entry on witnesses, the paragraph: "A lawyer may witness a donor's signature even if the lawyer is in the same firm as another lawyer who will be the attorney. An officer or employee of a trustee corporation may witness a donor's signature even if the corporation will be the attorney."	Ministry of Social Development	To more fully describe the witnessing requirements.
Appendix one	Minor editorial amendments	Ministry of Social Development	To make the text more concise and present the bullet points in a consistent manner.
Appendix two	Minor wording changes to the first two paragraphs.	Ministry of Social Development	To improve the flow of the text and reduce jargon (eg "library online networks").
Appendix two	Under "Detailed written submissions" amended "...received through the questionnaires and public meetings." to "...considered in the review." Under "Public meetings", ordered the locations from north to south and removed repetition of "disability sector".	Ministry of Social Development	Revised wording is more concise and provides a more natural ordering of the public meeting locations.

Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007

Presented to the House of Representatives pursuant to section
108AAB of the Protection of Personal and Property Rights Act 1988.

Reprint
as at 31 March 2014

Protection of Personal and
Property Rights Act 1988
Public Act 1988 No 4
Date of assent 12 March 1988
Commencement see section 4

Kind of order
Order to administer property

Note
Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made
in this official reprint.
Note 4 at the end of this reprint provides a list of the amendments incorporated.
This Act is administered by the Ministry of Justice.

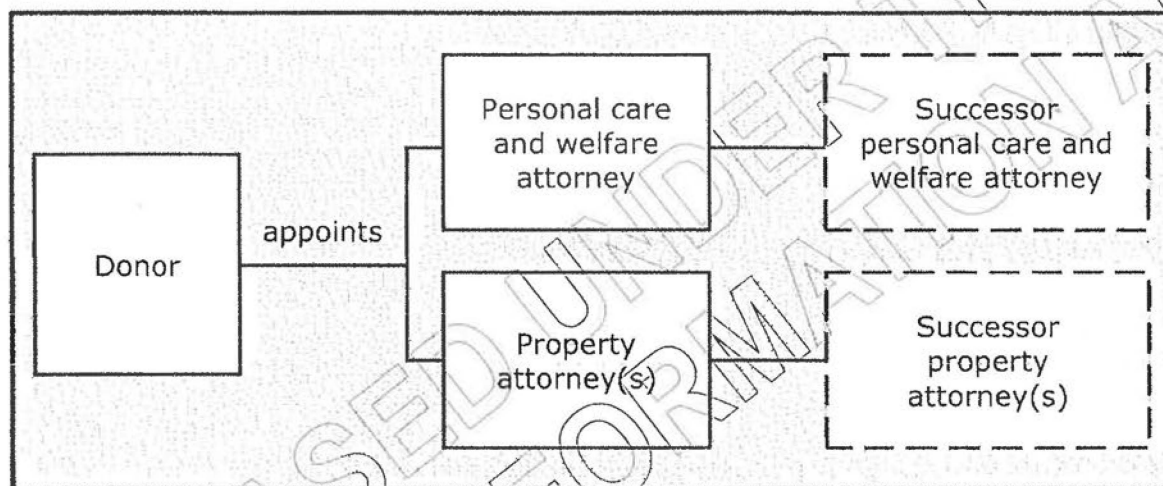
June 2014

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Preface

Enduring powers of attorney (EPAs) were established in New Zealand law under Part 9 of the Protection of Personal and Property Rights Act 1988 (the PPPR Act). Under an EPA an individual (referred to as a donor) grants another person (referred to as an attorney) the power to act in relation to their care and welfare, property, or both. An EPA comes into effect if the donor loses the mental capacity to make their own decisions about personal care and welfare or property.¹



In 2007, following a review by the New Zealand Law Commission,² the PPPR Act was amended to address the abuse and misuse of EPAs by some attorneys.³

As Minister for Senior Citizens, I was required to review the effectiveness of the 2007 amendments five years after their commencement, and to consider whether any further amendments to the PPPR Act are necessary or desirable. This report sets out the findings of my review and my recommendations.

My findings are based on extensive consultation from 1 March to 30 June 2013. This was publicised widely in print and online media, and through community and professional groups. Feedback was gathered from 437 usable questionnaire responses, public meetings in 15 locations, and detailed written submissions. Many submitters had professional experience with EPAs.

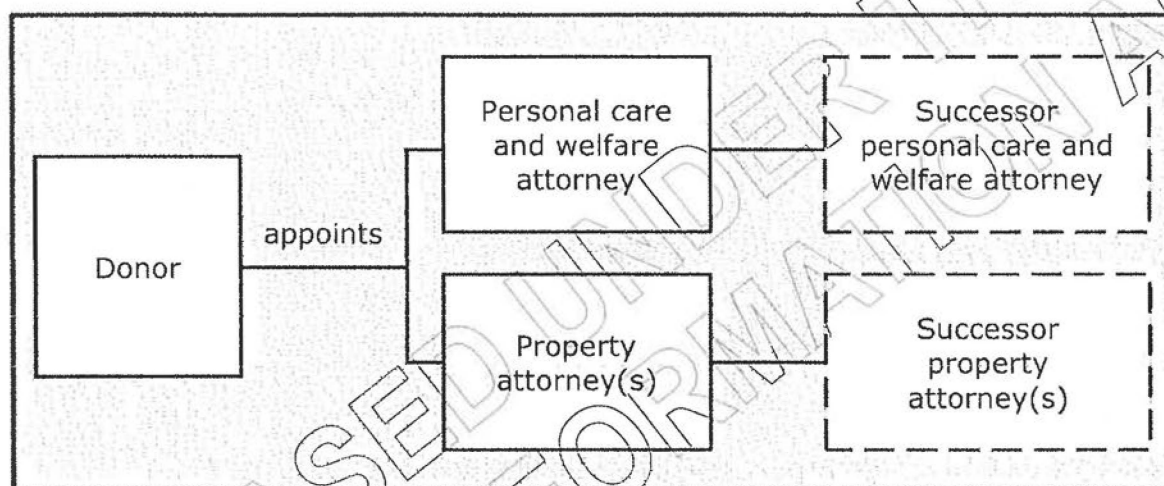
¹ A donor may put a property EPA into effect before losing mental capacity.

² *Report 71: Misuse of Enduring Powers of Attorney*, New Zealand Law Commission, April 2001.

³ The PPPR Act was amended by the Protection of Personal and Property Rights Amendment Act 2007.

Preface

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¹ A donor may put a property EPA into effect before losing mental capacity.

² *Report 71: Misuse of Enduring Powers of Attorney*, New Zealand Law Commission, April 2001.

³ The PPPR Act was amended by the Protection of Personal and Property Rights Amendment Act 2007.

I found that the legislation is generally effective in protecting people with EPAs. However, further changes are needed to achieve the right balance between protecting people and making EPAs accessible to everyone. There is also a need for clearer, more easily understandable information.

My recommendations in this report aim to encourage people to make informed decisions so that they create EPAs that will meet their needs should they lose mental capacity, and to set up EPAs while they have the ability to do so.

Hon Jo Goodhew

Minister for Senior Citizens

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Summary of findings

My review found that the 2007 amendments are mostly effective in providing better protections for people setting up EPAs. Most submitters were happy with the amendments and with their own EPAs. However, further changes are needed to achieve the right balance between protecting people and making EPAs accessible to everyone. There is a need to clarify and simplify some of the legislative requirements and to improve access to information about EPAs.

While some submitters reported knowing of attorneys misusing EPAs, many felt that the 2007 amendments had gone too far in some areas, creating barriers for some people to set up EPAs and thereby undermining the purpose of the reforms.

Submitters cited many examples of confusion and misinformation about EPAs. Donors, attorneys, health and legal professionals and the general public need better access to clear information about why people need EPAs, how to set them up, and how they operate once donors have lost the capacity to make their own decisions.

Summary of recommendations

To address these issues I am recommending amendments to Part 9 of the PPPR Act and the EPA regulations,⁴ along with a campaign to raise awareness of the protection that EPAs provide and to improve access to key information about how they work. I will consult further with key stakeholders to make sure we get the details of these changes right.

My recommendations are to:

1. Develop and deliver an information campaign to:
 - increase the public's understanding of:
 - the importance of setting up an EPA before losing mental capacity
 - how EPAs work
 - how to set up an EPA that expresses their wishes and will protect their interests
 - the need to review EPAs periodically, including when a relationship ends
 - the process for applying to the Family Court for a review of attorney decisions

⁴ The Protection of Personal and Property Rights (Enduring Powers of Attorney) Regulations 2008.

- increase attorneys' understanding of their role and obligations
 - improve health professionals' access to information about patient EPAs by encouraging them to ask patients about EPAs and record them in patient information systems
 - improve health and legal professionals' access to information about their responsibilities and where to go for more information and support.
2. Explore options to help reduce the cost of setting up an EPA.
 3. Amend the PPPR Act and amend the EPA forms regulations so that:
 - forms and processes are simpler and easier to follow
 - witnessing requirements for mutual attorneys achieve the right balance between protecting donors and being easy to comply with
 - an EPA defaults to a successor attorney (when one is named) if a donor who has capacity revokes the current attorney's appointment
 - it is clear that an earlier EPA ceases to have effect if a later EPA grants the same powers over the donor's personal care and welfare or property
 - it is clear to attorneys that they cannot act contrary to a donor's advance directive
 - the prescribed EPA form does not include an option for a donor to nominate the scope of practice of the health professional who will assess their mental capacity.
 4. Amend the PPPR Act and the EPA forms regulations and provide clearer information to increase the accountability and monitoring of attorneys.

Introduction

The purpose of this report

Section 108AAB of Part 9 of the PPPR Act requires me, as the Minister for Senior Citizens, to:

- carry out a review of the effectiveness of amendments made to the PPPR Act in 2007, five years after their commencement in 2008 (that is, 26 September 2013)
- consider whether any further amendments to the PPPR Act are necessary or desirable
- prepare a report (this report) on the findings of the review, and present it to the House of Representatives no later than six years after commencement (that is, 26 September 2014).

My review identified a number of legislative changes that are needed to improve the effectiveness of the EPA provisions in Part 9 and to encourage more people to set up EPAs. I will consult further with stakeholders to make sure we get the details right, but this report outlines whether any amendments are necessary or desirable.

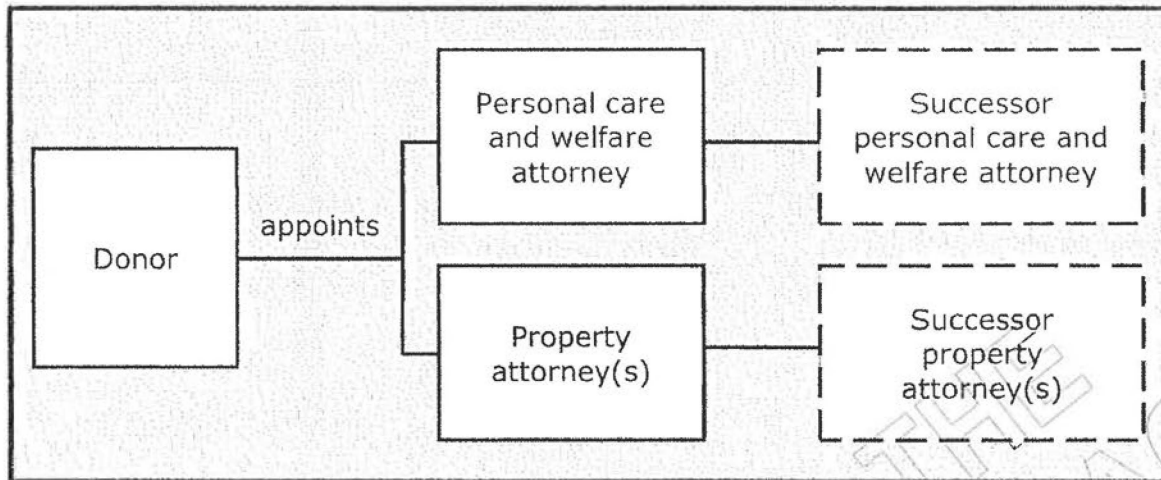
Legislative change is not the only or best answer to all policy problems. In this report I also outline practical measures that I am taking to address the concerns raised by my review.

EPAs protect people who lose the capacity to make decisions

Historically, the options for a person wanting to choose someone to make decisions for them should they lose the capacity to do so were limited, costly and cumbersome.⁵ EPAs, established under Part 9 of the PPPR Act, were intended to give anyone this choice and to protect their interests once the powers were activated.

An individual who grants an EPA is called a donor, and the person authorised to act – often a spouse or an adult child of the donor – is called an attorney.

⁵ *Report 71: Misuse of Enduring Powers of Attorney*, New Zealand Law Commission, April 2001.



There are two types of EPA:

- A property EPA allows one or more attorneys to act in relation to a person's (the donor's) property affairs. The donor may authorise the property attorney(s) to act while they still have mental capacity. A trustee corporation or a lawyer may be appointed as a property attorney.
- A personal care and welfare ERA allows one attorney to act in relation to a donor's personal care and welfare, on that person's behalf, should they lose the mental capacity to make such decisions.

A person may also appoint successor attorneys, whose authority to act arises when the previous attorney's appointment comes to an end.

The key provisions of Part 9 of the PPPR Act include:

- the EPA document must be in a standard form prescribed by regulations under the PPPR Act
- the document must be signed by the donor and the attorney, and the donor's signature must be witnessed by a lawyer or another authorised person who is independent of the attorney (section 95)
- the witness must certify that they have explained the document to the donor and that they have no reason to believe the donor lacks the mental capacity to make the decision to set up an EPA (section 94A)
- an EPA is not revoked by a donor's subsequent mental incapacity (section 96)
- the Family Court (or a higher court) can override the terms of an EPA in some cases (sections 101 to 105).

The 2007 amendments provided better protection for donors

The 2007 amendments to the PPPR Act were made in response to a 2001 Law Commission report⁶, which highlighted:

- abuses in setting up EPAs, eg pressure by attorneys
- problems with assessments of 'mental capacity'
- neglect, high-handedness, bullying, failure to consult, embezzlement of money and theft of goods by people who had been acting as attorney under an EPA.

This led to the Minister for Senior Citizens proposing amendments to the PPPR Act in a Bill introduced in 2006. The Bill was passed as the Protection of Personal and Property Rights Amendment Act 2007 and came into force on 26 September 2008.

The 2007 amendments (listed in Appendix One of this report) were made to provide better protection for the welfare and rights of vulnerable people by:

- strengthening witnessing requirements
- providing a clearer definition of mental incapacity in relation to personal care and welfare
- requiring attorneys to consult and keep records of financial dealings
- requiring attorneys to exercise their powers in the incapacitated person's best interests
- restricting the ability of an attorney to benefit themselves or others.

The review findings are based on extensive consultation

The review was publicised widely in print and online media, as well as through relevant stakeholder networks.

A questionnaire was used to seek feedback, and attracted 437 responses that could be analysed. Public meetings were held in 15 locations around the country.

Detailed written submissions from a range of stakeholders with an interest in EPAs added depth to the review. These stakeholders included advocacy organisations, professional groups, legal service providers and health providers. Appendix Two of this report provides further details of the review process.

⁶ Report 71: *Misuse of Enduring Powers of Attorney*, April 2001.

Findings and recommendations

The current legislation can be used effectively to protect the interests of people with EPAs. People who made submissions to the review were generally satisfied with the level of protection provided by their own EPAs, and believed their nominated attorneys were aware of their roles and responsibilities. The Family Court reported no issues with the 2007 amendments.

Submitters with experience of working with EPAs on a day-to-day basis raised a number of issues with the way the legislation is working. There are still examples of abuse, but a wider problem is that too many people do not set up EPAs due to the cost and complexity of doing so. Of those who responded to the questionnaire, 153 agreed that further amendments are required, while 74 respondents said that no further amendments are necessary.

Submitters who answered a detailed question about the 2007 amendments generally reported the amendments to have been "satisfactory" or "mostly satisfactory".

There is a real need for people to be aware of their options when setting up their EPAs. If people make good choices, it will minimise issues later on. For example, people can require attorneys to consult and to report decisions to third parties. They can also appoint more than one property attorney and require them to reach consensual decisions.

Based on these findings, I have identified a number of necessary and desirable amendments to the legislation and the EPA regulations, along with other initiatives that would help the legislation to work as intended. These changes should help to achieve the following outcomes:

- More people set up EPAs and understand their options when doing so.
- It is easier and more affordable to set up an EPA.
- People understand their roles and responsibilities.
- EPAs enable people's wishes to be followed, and protect their interests.

There is a need for more information and education about EPAs

What people said

There is much confusion and misinformation about EPAs. Donors, attorneys, health and legal professionals and the general public need more information about why people need EPAs, how to set them up, and how an EPA operates once the donor has lost the mental capacity to make their own decisions. Many respondents did not realise there had been changes. Some suggested a public education campaign. Lawyers, health professionals and advocacy groups said that people appointed as attorneys under EPAs are often unaware of the extent and limits of their roles and responsibilities.

An information campaign that was planned to follow the 2007 amendments never went ahead. This left gaps in the public's understanding of what had changed. Consultation found that the public, donors, attorneys, and health and legal professionals need more information that is easy to understand, about:

- the importance of having an EPA in place earlier rather than later (like an insurance policy)
- how to set up an EPA and who to involve in the process
- the relationship between EPAs and advance directives
- the roles and responsibilities of attorneys, as some are confused about the purpose and scope of their roles
- what legal and health professionals need to know to fulfil their responsibilities and where they can go for more information and support
- what to do if an attorney is suspected of misusing or abusing their position
- how the complaints process works, including correcting perceptions that it is costly to seek a review by the Family Court.

Submitters said this information needs to be targeted to its audiences and readily available in hard copy and online.

Recommendations

I recommend developing and delivering an information campaign to:

- increase the public's understanding of:
 - the importance of setting up EPAs before losing mental capacity
 - how EPAs work
 - how to set up EPAs that express their wishes and will protect their interests, and whom it may be useful to inform (for example, health professionals)

- the need to review EPAs periodically, including when a relationship ends
 - the process for reviewing attorney decisions in the Family Court
- increase attorneys' understanding of their roles and obligations
- encourage general practitioners to talk with their patients about EPAs and record EPA details in their patient information systems, for example when undertaking standard health risk assessments
- work with the appropriate professional bodies to improve health and legal professionals' access to information about their responsibilities and where they can go for more information and support.

Work already underway

I have been developing an information campaign targeting donors, attorneys, health and legal professionals and the general public. The campaign will aim to make key information accessible, when people need it.

The campaign will help to meet the information needs identified by submitters, and will go some way to addressing concerns about costs by allowing donors to consider their options before seeking formal legal advice.

The campaign will encourage people to tell their general practice teams that they have an EPA. It will also encourage general practitioners to discuss EPAs with patients and record EPA details in patient information systems so they are available to other medical professionals.

The Office for Senior Citizens is leading the campaign. The Office will work with other agencies and organisations that share the campaign's goals to make the most of this investment.

Cost is the main barrier to setting up or amending an EPA and could be reduced

What people said

Most submitters identified cost and complexity as barriers to setting up EPAs and updating them as situations change. Public Trust and some lawyers and legal executives said that complex forms and processes resulting from the 2007 amendments increased the cost of setting up an EPA (one lawyer said the cost had tripled).⁷ Public Trust considered this to be the main reason for a one-third drop in the number of EPAs it set up annually, after the amendments came into force.

Set-up costs currently range from approximately \$195 to \$1,300, depending on the choice of legal provider, the complexity of the EPA, and the level of preparation by those setting up the EPA.⁸ These costs can be a deterrent when there is no urgent need for an EPA, yet if the need arises it will then be too late.

Recommendations

I recommend exploring options to reduce the cost of setting up and amending EPAs. These options include encouraging more legal service providers to offer SuperGold Card discounts for people setting up EPAs, and working with community organisations to help people understand their options before approaching legal service providers.

I note that the information campaign and legislative amendments to simplify the EPA process (outlined in other sections of this report) will also help to reduce costs.

Work already underway

The EPA information campaign includes information about:

- setting up an EPA while you are still working and when setting up a will
- shopping around and knowing that the cost may vary
- asking for a SuperGold Card discount (if applicable)
- asking to spread the payments over time (eg 12 months).

⁷ Public Trust is a trustee corporation and legal service provider.

⁸ People setting up EPAs should also consider subsequent administration costs.

The prescribed forms need to be simpler

What people said

People considered the current prescribed forms for EPAs and witness certificates too complex and confusing. Public Trust and some law firms have noticed a significant decrease in the establishment of EPAs since the 2007 amendments took effect. They say this is largely because the complexity and length of the new forms has increased the cost of setting up an EPA.

Other matters considered in the review

The layout, language and content of the prescribed forms need to be reviewed to ensure that donors can understand them and can clearly express their wishes.

An alternative, plain English form with clearer explanations would enable more people to understand and consider their options before incurring legal costs. Standardising most of the information that donors and attorneys need would promote consistency and save time for legal providers. Witnesses would still need to provide additional information in some cases.

Recommendations

I recommend that the PPPR Act and EPA forms regulations be amended so that:

- there is an alternative prescribed form for setting up an EPA, written in plain English (and other languages)
- a witness must give a donor a standardised explanation of the effects and implications of entering into an EPA (and additional information as required)
- attorneys signing EPAs must certify that they have read and understood standard guidance on their roles, set out in the regulations.

Witnessing requirements for mutual attorneys need to be reconsidered

What people said

The requirement for donors' witnesses to be independent from their attorneys was considered "not satisfactory" by 23 per cent of respondents who answered a question on this topic.

Submitters including the New Zealand Law Society said that the requirement for people appointing each other as their mutual attorneys to have independent legal witnesses adds undue costs for some couples, and should be reconsidered. Not only is there the extra cost of hiring two witnesses, but submitters told of communities with only one lawyer where couples had to travel to other towns to complete their EPAs. A 2010 amendment to enable lawyers from the same firm

to witness the EPAs of mutual attorneys has not gone far enough to reduce these costs and simplify the witnessing requirements.

Other matters considered in the review

The requirement for independent legal witnesses for mutual attorneys, introduced by the 2007 amendments, was intended to avoid any conflicts of interest for witnesses and to protect donors in the case of subsequent estrangements.

Feedback suggests that this requirement may have been over-cautious. Mutual attorneys usually have each other's best interests at heart. Lawyers are trained and professionally obliged to identify and avoid or at least manage properly any conflict of interest and to make them clear to clients. Reduced cost would make it likely that more people would establish EPAs before any decline in mental capacity.

Recommendations

I recommend that the witnessing requirements for people appointing each other as mutual attorneys be reconsidered, with the aim of achieving the right balance between protecting donors and making it easier to set up EPAs. The Ministry of Social Development will work with the Ministry of Justice and key stakeholders on the detail of this proposed legislative change in the next six months.

The 2007 amendments had unintended consequences and could be more effective

What people said

People identified the following problem areas as undermining the effectiveness of the amended legislation:

- People do not always remember to update their EPA when a relationship ends, or they may wrongly assume that their separation or divorce revokes the appointment of a former spouse or partner as attorney.
- Currently, a person setting up an EPA is asked whether they want their mental capacity to be assessed by a health practitioner with a specified scope of practice (a specialist). Geriatricians said this is not usually a good use of specialists' time and that, in most cases, general practitioners can carry out the assessments. If a person's situation is complex or the general practitioner is unsure, they refer them to a specialist. In practical terms, the requirement can add undue cost and delay important decisions. The Medical Council advised that all doctors should be competent to assess mental capacity.
- The relationship between care and welfare EPAs and advance directives (by which a patient consents to or refuses specified medical treatments or

procedures) is not clear and can cause confusion. People said that care and welfare attorneys sometimes believe they are entitled to override advance directives.

People also raised other issues with the PPPR Act that were not the result of the 2007 amendments:

- When a donor revokes the appointment of a particular attorney the entire EPA is revoked and the donor has to draw up a new EPA, even where the EPA specifies a successor attorney. This defeats the purpose of appointing a successor attorney. The cost of the new EPA can be prohibitive, and some donors incorrectly (but understandably) assume that their successor attorney will automatically take the place of the first attorney.
- There have been problems with more than one family member claiming to be a donor's attorney, with uncertainty about whether an EPA ceases to have effect if a later EPA grants the same powers over the donor's personal care and welfare or property.

Recommendations

I recommend that the PPPR Act and the EPA forms regulations be amended so that:

- the prescribed EPA form does not include an option for a donor to nominate the scope of practice of the health professional who will assess their mental capacity (the donor could still request a specialist assessment if they wished)
- it is clear to attorneys that they cannot act contrary to donors' advance directives
- when a person revokes the appointment of their current attorney, the EPA automatically defaults to a successor attorney (when one is named). This will reduce confusion and avoid the cost of a new EPA
- it is clear that an earlier EPA ceases to have effect when a later EPA grants the same powers over the donor's personal care and welfare or property.

I also recommend that the information campaign encourage people with EPAs to review their arrangements periodically, and particularly when there are major changes in their lives such as the end of a relationship. It will also include information about the relationship between care and welfare EPAs and advance directives, and the revocation and suspension of EPAs.

While the Medical Council indicated that all doctors should be able to assess mental capacity, general practitioners need more support to carry out these assessments with confidence.

Attorneys need to be more accountable for their actions

What people said

Consultation showed that, despite stronger protections, some attorneys still fail to act in the best interests of donors. Contributing factors include:

- attorneys not always fully understanding their rights and obligations
- people not nominating third parties to monitor their attorneys' decisions
- the process for reviewing attorney decisions (the complaints process) being seen as too onerous and costly.

Other matters considered in the review

The review/complaints process is conducted by the Family Court. The public need clear information about this process and how to lodge complaints when they consider that EPAs have been misused. This process can be costly for complainants and attorneys if they appoint lawyers to represent them.

I am not recommending establishing an Aged Care Commissioner to investigate allegations of abuse, as proposed by the New Zealand Aged Care Association and GreyPower. I consider the Family Court process to be the appropriate vehicle to deal with allegations of abuse of EPAs by attorneys. Abuse of EPAs can affect donors of any age. It is my view that establishing an Aged Care Commissioner would have significant set up and running costs and overlap with existing services and processes. In more extreme cases and where there is criminal behaviour by an attorney, including criminal negligence, the Police may investigate and prosecute.

These are 'last resort' options. It is far better to have the right attorney or attorneys in the first place, with appropriate consultation and reporting requirements involving a person or people nominated by the donor. Elder Abuse and Neglect Prevention Services provide support and advice to people who are concerned about the actions of attorneys.⁹

Recommendations

I recommend that the PPPR Act and the forms set out in the regulations be amended to require attorneys to certify that they have read and understood standard, plain English guidance on their roles before signing EPAs.

I recommend that the information campaign encourage people setting up EPAs to nominate third parties to be consulted by attorneys and who have the right to obtain information about the attorney's decisions. Clear information about the review process will encourage the use of this process when needed.

⁹ Details on local services can be found at www.ageconcern.org.nz/safety/elder-abuse/elder-abuse-and-neglect-prevention-service-0

Submitters supported the idea of a national register of EPAs

What people said

Some district health boards, health professionals, social workers and organisations such as Age Concern New Zealand supported a national register of EPAs. Their view was that this would help health, legal and banking professionals to determine whether patients or clients have EPAs and who the current attorneys are.

Issues raised include:

- health professionals cannot be sure whether patients have EPAs, and cannot easily identify attorneys if they are not specified in medical records – this can delay treatment or placement in long-term care, or can result in attorneys not being consulted
- sometimes more than one person identifies themselves as an attorney – conflict between family members, or practical considerations such as when a care and welfare attorney is living overseas, can cause confusion as to who the current attorney is.

If the correct attorney cannot be identified to make decisions on behalf of the donor, the effectiveness of the EPA is reduced or negated.

Other matters considered in the review

While a number of submitters saw a national register as a useful way to record and access the details of EPAs, it is also relevant to consider that health professionals can use patient information systems for this purpose. People can also carry these details with them, for example by recording information about EPAs and advance directives in Health Passports (downloadable from the Health and Disability Commissioner's website). Furthermore, treatment providers have a duty of care to ask patients about EPAs as part of admission processes when it may be relevant.

Recommendations

At this stage I am not recommending, as some submitters suggested, the development of a centralised national register of EPAs. Such a register would increase set-up and administration costs, and deter some people from setting up EPAs. For the time being, I recommend focusing on encouraging the full use of existing patient information systems.

I recommend that the EPA information campaign encourage general practitioners to discuss EPAs with patients and record their attorneys on patient information systems. Hospitals can access these systems, and should ask patients about EPAs if there is a risk that they may lose mental capacity during treatment.

Shared care plans for patients with chronic conditions are another tool for recording information about EPAs. These plans are accessible to all health professionals involved in each patient's care, as well as to the patient.

I recommend that the information campaign also encourage people to advise their banks and legal professionals of their property attorneys, and encourage the recording of property attorney details as part of client information.

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Next steps

In this report I have recommended a number of measures to help more people to access and benefit from the protection of EPAs. This is an important goal. If a person loses the mental capacity to make decisions about their care and welfare and their property and does not have an EPA, a suitable guardian must be appointed by the courts. This can create unnecessary delays and stress for the person and their family at a difficult time, and the court appointment may not reflect the person's wishes.

The Office for Senior Citizens has begun work on an EPA information campaign that I plan to launch later this month with the release of the first of a series of accessible resources.

Developing high-quality information on all of the topics highlighted in this report will take time, and needs to be done in co-operation with organisations that can represent the views of the various target audiences. The resulting information will therefore roll out over a number of months.

I am recommending a number of amendments to the PPPR Act and regulations. The amendments are in keeping with the overall policy intent of the legislation, but I want to work with key stakeholders to make sure we get the details right. I anticipate that these amendments will be introduced in 2015.

Glossary of terms

Advance directive

Under common law a patient may, when they have the mental capacity, consent to or refuse a possible medical treatment or procedure in advance. The Code of Health and Disability Services Consumers' Rights acknowledges the right to make an advance directive. A personal care and welfare attorney may take account of the advance directives of the donor subject to certain restrictions.

Attorney

An attorney is an individual whom a donor appoints under an EPA to act in relation to the donor's personal care and welfare, or an individual or a legal person the donor appoints under an EPA to act in relation to the donor's property (including cash assets). The attorney is 'in waiting' until the EPA comes into effect.

Donor

A donor is a person who sets up an EPA appointing an attorney and for whom the attorney can act under the EPA.

Enduring power of attorney (EPA)

An EPA is a legal instrument that gives an attorney the ability to act on behalf of another person, once that person has lost the capacity to manage their own affairs.

There are two types of EPA:

- A property EPA allows one or more attorneys to act in relation to a person's property affairs. The donor may authorise the property attorney(s) to act while the donor still has mental capacity.
- A personal care and welfare EPA allows one attorney to act in relation to a donor's personal care and welfare, on that person's behalf, if they lose the mental capacity to make such decisions.

Successor attorney

A successor attorney is a person whom a donor appoints to take the place of an attorney should the attorney's appointment cease.

Witnesses to enduring power of attorney

The signature of a donor must be witnessed by a person who is independent of the attorney – that is, who has no personal or professional relationship with the attorney, and who is:

- a lawyer, or
- an authorised officer or employee of a trustee corporation, or
- a registered legal executive who meets certain requirements.

A lawyer may witness a donor's signature even if the lawyer is in the same firm as another lawyer who will be the attorney. An officer or employee of a trustee corporation may witness a donor's signature even if the corporation will be the attorney.

If people (for example, a couple) appoint each other as attorney, their EPAs must have different witnesses – although the witnesses may belong to the same firm or trustee corporation. If an attorney is a lawyer or a trustee company the donor's signature can be witnessed by someone else in the law firm or company. Each attorney signature must be witnessed by a person who is not the donor or the donor's witness.

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Appendix One: The 2007 amendments

The Protection of Personal and Property Rights Amendment Act 2007 came into force on 26 September 2008. Its main purpose was to give people setting up enduring powers of attorney (EPAs) greater protection against abuse should they lose the mental capacity to make decisions for themselves.

In terms of setting up EPAs, the 2007 amendments were as follows:

- An EPA must be written in the prescribed form and have a signed certificate from the donor's witness attached to say the required witnessing procedures have been followed.
- The witness – lawyer, legal executive or employee of a trustee corporation – must explain the effects and implications of the EPA to the donor before the donor signs it.
- The witness for the donor must be independent from the person(s) appointed as attorney(s).

In terms of when the EPA comes into effect, the amendments were as follows:

- Until proven otherwise, every person is presumed to be competent to manage their own affairs.
- There is a clearer definition of 'mentally incapable' in relation to personal care and welfare.
- Medical certification of a donor's mental incapacity is required before the attorney(s) can act in relation to significant matters under a personal care and welfare EPA and/or under a property EPA, except where the property EPA authorises the attorney to act earlier.

The other amendments, relating to attorneys, were as follows:

- A property attorney is required to use the donor's property in the best interests of the donor, while seeking to encourage the donor to manage their own affairs.
- A personal care and welfare attorney is required to promote and protect the welfare of the donor. They must encourage the donor to develop and exercise their capacity and act on their own behalf, and seek to integrate the donor into the community.
- If a donor has appointed separate personal care and welfare and property attorneys, they must regularly consult each other to ensure there is no breakdown in communication.
- A property attorney is required to provide a personal care and welfare attorney with the financial support required to perform that attorney's responsibilities.
- An attorney is required to consult the donor and any others specified by the donor in the EPA before acting under it.

- An attorney is required on request to supply information specified in an EPA on actions taken on behalf of the donor to those specified in the EPA.
- A property attorney is required to keep financial records of transactions of the donor's property and it is a criminal offence not to do so. They must also supply the records to a lawyer appointed by the Court to represent the donor in any proceedings under the PPPR Act.
- A personal care and welfare attorney has the authority to take into account the advance directives of the donor subject to certain restrictions.
- A donor of an EPA who has been, but is no longer, mentally incapable is enabled to suspend the attorney's authority to act without revoking the EPA, until the donor is certified again as mentally incapable.
- An attorney's power to benefit the attorney or others is restricted to the extent (if any) specified in the EPA.
- The Court is allowed to authorise a property attorney to execute a will for the donor unless the donor has expressly specified otherwise in the EPA.
- A wider range of people may apply to the Court for reviews of attorneys' actions under EPAs without leave of the Court, and it is clear that an application for review may be made while the EPA is in force or after it is revoked by the death of the donor or otherwise.
- An attorney under an EPA may act if they certify that they have not received any notification that the EPA has been suspended or revoked.
- An attorney who disclaims their right to act under an EPA must file a report in the Court setting out why a property manager or a welfare guardian should or should not be appointed under the PPPR Act for the donor.
- The Court may revoke the appointment of an EPA attorney if the attorney is not complying with the obligations to consult or not acting in the interests of the donor.

Appendix Two: Details of the review process

Publicity

The review was publicised widely in print and online media, as well as through relevant stakeholder, local government, and public libraries. The Office for Senior Citizens' Volunteer Community Co-ordinators discussed the review with their communities and used their networks to advertise the consultation.

Questionnaire

A questionnaire available on the Ministry of Social Development website and also in hardcopy was one tool for seeking feedback. The Ministry of Social Development received around 500 responses, with 437 being usable (responses that were largely incomplete were not analysed). Half the respondents were aged over 65, 100 were health professionals and 63 were legal professionals. Sixty per cent had EPAs and over a third had acted as attorneys.

Public meetings

Public meetings provided a forum for officials to discuss the importance of EPAs and encourage submissions. They were held in central Auckland (one with the Chinese community), North Shore, Otahuhu (with TOA Pacific), Onehunga (with Shanti Niwas), Tauranga, Rotorua, New Plymouth, Napier, Lower Hutt, Wellington, Nelson, Blenheim, Christchurch, Timaru, and Dunedin. Meetings were also held with the Ministry of Health, Capital & Coast District Health Board, Age Concern New Zealand, Public Trust, representatives of the disability sector, the New Zealand Law Society and Claro Law.

The meetings were well attended by members of the public as well as representatives of a range of stakeholder organisations and groups including GreyPower, Age Concern New Zealand, Public Trust, Community Law Centres, lawyers, Citizens Advice Bureau, Alzheimers New Zealand, and social workers from district health boards and other social services.

Detailed written submissions

Written submissions from a wide range of stakeholders with an interest in EPAs added depth to the information considered in the review. These were received from advocacy organisations such as Age Concern New Zealand, Age Concern Manukau, and Alzheimers New Zealand. Professional groups that made detailed written submissions included the New Zealand Law Society, the Medical Council of New Zealand, the New Zealand Nurses Organisation and the Aotearoa New Zealand Association of Social Workers. Legal service providers included Public Trust, Tripe Matthews Feist Lawyers, TGT Legal, the South Canterbury Property Lawyers Group and Preston Russell Law. Other submitters with experience with EPAs included the Bank of New Zealand, ACC and the Mid Central, Taranaki and Counties Manukau District Health Boards.

