

HE AROTAKE I TE TURE MŌ NGĀ HUARAHĪ WHAKATAU A NGĀ PAKEKE REVIEW OF ADULT DECISION-MAKING CAPACITY LAW

Key Topic 3: Enduring powers of attorney

In this Key Topic, we ask questions about how enduring power of attorney arrangements (EPOAs) could be improved.

Our full analysis on this topic is covered in Chapter 13 of our Second Issues Paper. If you would like to answer the more detailed questions in our Second Issues Paper, you can find information about how to do this on [our website](#).

How to make a submission

You can tell us what you think by sending us a submission. Submissions close at **5pm on Friday 21 June 2024**.

You can send us a submission on the Key Topics by:

- Emailing us at: huarahi.whakatau@lawcom.govt.nz.
- Writing to us at: Review of Adult Decision-making Capacity Law, Law Commission, PO Box 2590, Wellington 6140.

Your submission can respond to the questions in the Key Topics, or you can tell us your thoughts generally. You are welcome to make an individual submission, or to work with others and send us a group submission.

If you would like to make a submission, but these options are not accessible to you, please get in touch with us in one of the following ways:

- Email us at: huarahi.whakatau@lawcom.govt.nz.
- Call us at: 0800 832 526.
- If you are Deaf, hard of hearing, deafblind, speech impaired or find it hard to talk, you can use [the New Zealand Relay Service](#).

Some people may find it emotional or distressing to make a submission. If you want to make a submission, you may want to arrange to have a support person ready to help. If you are upset or distressed you can also call or text 1737. This is a free helpline service that is available 24 hours a day. You'll get to talk or text with a trained counsellor. The service is provided by Whakarongorau Aotearoa | New Zealand Telehealth Services.

Further information about privacy and how we will use the information you share with us is set out in Key Topics: Information sheet, as well as on [our website](#).

What is an enduring power of attorney (EPOA)?

An enduring power of attorney (EPOA) is a type of legal arrangement. It allows someone (a donor) to choose another person (an attorney) to make decisions for them if their decision-making becomes affected in the future. A person's decision-making can be affected by many things, such as dementia, acquired brain injuries, learning disabilities or experiences of mental distress.

There are two types of EPOAs:

- Property EPOAs cover decisions about a person's property, like their money or a house they own.
- Personal care and welfare EPOAs cover decisions about things like where the person lives and some medical treatment decisions.

People usually make both types of EPOA. They often choose family or close friends to be their attorney.

The purpose of EPOAs

EPOAs are important because they allow people to make their own choices about what they want to happen in the future and how they want important decisions to be made.

The law about EPOAS has two aims that need to be balanced:

- To enable people to easily delegate decision-making powers and avoid the need to go to court.
- To protect people, by making sure the donor understands the powers they are delegating and the attorney is not misusing their powers.

We want to know how to find the best balance between having good processes and scrutiny to protect people, while keeping EPOAs as simple and inexpensive as possible.

Setting up an EPOA

The process of making an EPOA involves filling out prescribed forms and signing them in the presence of a witness, who is usually a lawyer. The witness must certify that:

- They believe the donor understands the effects and consequences of the EPOA.
- They believe the donor is not acting under pressure or duress.

- They have no reason to suspect that the donor is 'mentally incapable'.

We have heard that some people find the process for setting up an EPOA too complex and expensive. Some of the reasons for this are:

- The forms are long, complicated and hard to understand and fill out.
- Paying for a lawyer to act as a witness can be expensive.
- The witness is required to certify a lot of different things. It's not clear whether all of these are needed, or need to be done by a lawyer specifically.

Some ideas we are considering are:

- Updating the forms so they are written in plain language, available in accessible formats and easier to use.
- Allowing remote witnessing.
- Allowing other people, such as Justices of the Peace, to witness an EPOA.
- Changing or removing some of the matters that the witness is required to certify.

Consultation question: How could the law make it easier to set up an EPOA, while still providing enough protection for people?

Protections once an EPOA is in place

The law sets out some protections that apply once an EPOA is in place. Examples are:

- Usually, the attorney is only permitted to make decisions if the donor is assessed as no longer having 'decision-making capacity'.
- The EPOA can state that certain people are able to request information from the attorney about how they are carrying out their role.
- The court can review an attorney's decision, require them to produce information, or revoke their appointment if they are not acting properly.
- Property attorneys must keep financial records.

The purpose of these protections is to make sure the attorney is only making decisions when they are legally authorised to do so, and to protect the donor against abuse, neglect or exploitation. There is a focus on preventing financial abuse.

The current protections may not place enough scrutiny on attorney actions:

- People don't always understand when the attorney is allowed to act. We have heard of cases where an attorney starts making decisions as soon as the EPOA is signed, even though the donor is still capable of making decisions.

- The current record-keeping requirements may not be effective at ensuring transparency. Some people think the requirements are too onerous. It's not clear how often records of attorney actions are actually kept and reviewed.
- There is no regular oversight of how well the attorney is performing their role, unless this is specifically set out in the EPOA.
- The only way to challenge the actions of attorneys is through the court, but this can be an expensive, slow and stressful process. In practice, there are only a small number of cases each year.

The lack of scrutiny makes it easier for attorneys to abuse their powers. However, if there are too many obligations, people may be less willing to act as attorneys.

Consultation question: What protections are needed once an EPOA is in place to prevent abuse and ensure the attorney performs their role well?

Reforming the role of attorneys

Please note that this section covers similar content and questions to the section "Reforming the role of court-appointed representatives" in Key Topic 1. This is because we think the decision-making role should be the same for both court-appointed representatives and attorneys.

The current law says that, when making decisions, attorneys must act in the best interests of the donor, while supporting them to exercise their own capacity as much as possible. Attorneys must consult the donor and any people named in the EPOA.

We think the attorney's decision-making role should be changed so that it is more focused on what the donor wants. Sometimes this is called making a decision based on a person's 'will and preferences'. We want to know how an attorney should work out what the donor's will and preferences are.

For example, we think the attorney should consider what the donor says about a particular decision. It might also be relevant to think about what the person has said in the past, what things they like, and what is important to them.

Consultation question: What should an attorney consider when working out a donor's will and preferences?

Sometimes it might not be possible or appropriate to make a decision based only on the donor person's will and preferences. This might be because their will and preferences in relation to a particular decision is unclear, for example if they are unable to communicate their views. It might be because the decision the donor wants to make will lead to a serious risk of harm.

We are interested in when you think it would not be possible or appropriate to make a decision based only on a person's will and preferences. We want to know what should happen in these circumstances. Some ways an attorney could make decisions in these circumstances might be:

- Consistently with the person's human rights.
- Consistently with the person's personal and social wellbeing.

Consultation questions:

- **When might it be impossible or inappropriate to make a decision based only on a person's will and preferences?**
- **How should attorneys make decisions in these circumstances?**

It is also important for the attorney to have a clear process to follow when making decisions for a donor. This could involve talking to the donor or other important people in their life, and considering what support the represented person might need to participate in the decision. The donor might have made earlier statements about how they want particular decisions to be made, or who they want to be consulted.

Consultation question: What steps should an attorney take when making a decision for a donor?

Is there anything else you would like to tell us?

Consultation question: Is there anything else you would like to tell us about EPOAs?