



**National Council of
Women of New Zealand**

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Wahine O Aotearoa

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**Submission to the Law Commission on the Misuse of Enduring Powers of Attorney
Preliminary Paper 40**

Introduction

The National Council of Women of New Zealand (NCWNZ) is an umbrella organization representing 46 nationally organized societies. It has 35 branches spread throughout the country to which women of some 150 societies are affiliated. NCWNZ works to improve the quality of life for women, families and society.

This submission is prepared by members of the Family Affairs Standing Committee. Whilst there is no specific policy on enduring powers of attorney, policy developed by its membership over the course of 104 years of working to advance the interests of women, their children, and society as a whole has provided a sound basis for this submission.

General Comments

The absence of effective safeguards as outlined in the Law Commission's Preliminary Paper 40 'Misuse of Enduring Powers of Attorney' are acknowledged, and anecdotal evidence of these has been provided by members of NCWNZ.

The extent of misuse by attorneys of powers, exercisable under Part 1X of the 1988 Act, has not yet been fully canvassed by this organisation. However there is enough evidence to suggest that it is sufficiently extensive to warrant statutory change. Whilst NCWNZ recognises that the majority of families are very caring of their parent or elderly relative and that legal impediments should not make the care of the elderly more difficult for their family members, some controls to protect the vulnerable should be put in place.

REMEDIES

It is imperative that any remedies put in place do not make the process of giving Enduring Powers of Attorney to family members so cumbersome that people will avoid them and therefore the benefits they do provide. It is also important that they are cheap, both in their instigation, and in any monitoring that may be put in place by statutory change.

1. *The donor's mental capacity at the time of the first signing of the power.*

NCWNZ agrees that there should be a solicitor who is independent of the attorney and that this is certified. NCWNZ also believes it should be mandatory that a certificate of capacity should be provided by a medical practitioner - not just certified by the attorney. People in early stages of dementia in particular can appear to understand what they are signing but many are unable to think through the consequences of their action, let alone remember it a day later.





NCWNZ agrees therefore with your “tentative view” that there should be a solicitor charged with the responsibility of giving the appropriate advice and warnings and a medical practitioner to assess capacity.

It is possible that a person may hold both the enduring power of attorney for property and enduring power of attorney for personal care and welfare. A further safeguard may be that the one person may not act in both capacities.

2. Formal notification of appropriate family members.

NCWNZ sees problems with this suggestion. Who will deem which family members as appropriate? If capacity has been assessed, then the person signing over the power should be able to indicate family members who are to be notified. However in dysfunctional families, of which there are many, such notification may cause more problems than non-notification. The certifying solicitor may be able to make the judgement as to whether other family members should be notified.

3. “Mentally incapable”

NCWNZ believes that it is possible to determine the state of mental capacity even although there may not be a particular moment when mental incapability has occurred. NCWNZ believes that there is a need for objective independent evaluation of that state.

4. Registration of Powers of Attorney.

NCWNZ believes this would be feasible only if a person was resident in a resthome or such institution where there may be some informal monitoring of a person’s affairs.

5. Determination of a supervisory agency

NCWNZ believes that the formation of a tribunal would add to the costs of monitoring such a system. The Health and Disability Commissioner is already overworked and is inappropriate. Tribunals and Family Courts require someone to lay a complaint and donors and/or family members may be unwilling or unable to take such a step.

NCWNZ agrees that a Commissioner, with a role specifically for the oversight of the protection of the mentally incapable, would be the ideal. Whilst the provisions for the Adult Guardian of the Queensland Powers of Attorney Act are perhaps unnecessarily detailed, NCWNZ likes this concept.

6. Attorney acting for the Attorney’s own benefit.

NCWNZ believes this section of the present law needs to be changed. If there is valid reason for an attorney to benefit, then this should be with the certification of an independent solicitor (or the Commissioner) and with the agreement of other interested parties such as other family members. To prevent this from becoming unwieldy, a minimum value of the benefit, e.g. a percentage of the value of the estate, could be set. Use of the benefit could also trigger the necessity for filing an account.

Even if further evidence shows that misuse of the enduring powers of attorney is not widespread, the fact that there is the *potential* for widespread misuse should cause concern. On these grounds alone statutory changes should be made.



CONCLUSION

NCWNZ congratulates the Law Commission for this Discussion Paper's attempt to address what may be a widespread misuse of an instrument that could be an abuse of the rights of the elderly. All of our anecdotal evidence has concerned elderly women at the mercy of family members who do not have the care and welfare of the donor of the enduring power of attorney at heart. Whilst there are men who may suffer this type of abuse, it is likely that women are in the majority because of their statistical majority in the elderly age groups and life expectancy.

NCWNZ thanks the Commission for this opportunity to comment at this early stage of statutory change.

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