

1st October 2021

s9(2)(a)

Dear s9(2)(a)

Official Information Act Request for – EPoA Process

I write in response to your Official Information Act request received by us 24th August 2021, you requested the following information:

1. I am requesting information on the number of activations for Enduring Power of Attorney (EPA) at the CMDHB in the last 3 years, or in the last 12 months if that is all you can provide: the total number, and the break down of whether they were 'specific purpose' activations or general.
2. In this time period - how many beds would have been held for patients while an EPA has been sought, a welfare guardian, or personal order has been processed through the Family Court?
3. I would also be interested in finding the longest duration a hospital bed has been held for over this 3 year time period for a person going through this process?
4. What is the process the DHB uses for the procedure for relying on an EPA?

On the 24th August 2021 you clarified that you are seeking this information of CMDHB.

Counties Manukau Health Response:

For context Counties Manukau Health (CM Health) employs over 8,500 staff and provides health and support services to people living in the Counties Manukau region (approx. 601,490 people). We see over 118,000 people in our Emergency Department each year, and over 2,000 visitors come through Middlemore Hospital daily.

Our services are delivered via hospital, outpatient, ambulatory and community-based models of care. We provide regional and supra-regional specialist services i.e. for orthopaedics, plastics, burns and spinal services. There are also several specialist services provided including tertiary surgical services, medical services, mental health and addiction services.

1. I am requesting information on the number of activations for Enduring Power of Attorney (EPA) at the CMDHB in the last 3 years, or in the last 12 months if that is all you can provide: the total number, and the breakdown of whether they were 'specific purpose' activations or general.
2. In this time period - how many beds would have been held for patients while an EPA has been sought, a welfare guardian, or personal order has been processed through the Family Court?

3. I would also be interested in finding the longest duration a hospital bed has been held for over this 3 year time period for a person going through this process?

We are unable to provide the information requested as we do not centrally collect it. Please note that applications for the appointment of a WG or EPOA are not applications that involve the DHB and are often made at a time that does not coincide with a hospital stay (or the provision health more generally). If an EPOA is to be activated following an assessment of capacity, this can be done promptly in a hospital setting.

Please also note that we do not 'hold' patients in hospital, pending the making of orders by the Family Court. Once a patient has been medically cleared for discharge, an appropriate discharge destination is identified. If it is necessary for the DHB to make an application for a placement order, such an application, once filed, is the basis upon which a residential care facility will accept a patient. Residential care is then provided, presumably in accordance with Right 7(4), pending the making of orders.

We have therefore, determined to decline this element of your request under Section 18(e) as the information does not exist.

4. What is the process the DHB uses for the procedure for relying on an EPA?

CM Health has an EPoA guideline which we have attached as appendix 1.

I trust this information answers your request. You are entitled to seek a review of the response by the Ombudsman under section 28(3) of the Official Information Act. Information about how to make a complaint is available at www.ombudsman.parliament.nz or Freephone 0800 802 602.

Please note that this response or an edited version of this may be published on the Counties Manukau Health website. If you consider there are good reasons why this response should not be made publicly available, we will be happy to consider this.

Yours sincerely



Dr Peter Watson
Acting Chief Executive Officer
Counties Manukau Health

Guideline: Enduring Powers of Attorney (EPOAs)

Purpose

This guideline briefly describes Enduring Powers of Attorney (EPOA) and their use within a healthcare setting.

Responsibility

This guideline is applicable to all CMDHB employees (full-time, part-time and casual) including contractors, visiting health professionals and students working in any CMDHB facility.

Guideline

Enduring Powers of Attorney

An EPOA gives a person (*the attorney*) the authority to act on behalf of the person appointing them (*the donor*) when the donor becomes mentally incapable. Usually the patient will be the donor of the power and another person, such as a relative, will act as their attorney.

The EPOA must be arranged *before* the donor becomes mentally incapable.

If a person is already mentally incapable, then he/she will not be able to grant a valid EPOA.

An EPOA usually only comes into effect when the donor becomes mentally incapable.¹

There are two types of EPOA:

1. *EPOA for property (EPOA-P)* - allows the attorney to manage the donor's financial affairs and property.
2. *EPOA for personal care and welfare (EPOA-PCW)* - allows the attorney to make decisions about the donor's personal care and welfare, such as where to live and to consent to treatment of the donor.

Presumption of competence

People are presumed competent (i.e. mentally capable) until the contrary is shown: section 93B of the Protection of Personal and Property Rights Act 1988 (PPPR Act).

¹ Sometimes the donor will give the attorney the power to act in relation to their property interests at the time the EPOA is drafted. The EPOA-P will stipulate when the donor intends it to take effect.

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Enduring Powers of Attorney

A person must not be presumed to lack competence just because they make decisions that an ordinary person might not make in the same circumstances: s 93B(2) and (3) of the PPPR Act.

Similarly a person who is subject to compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act must not be presumed to lack competence: s93B(4).

“Mentally incapable”

"Mentally incapable" is defined in section 94 of the PPPR Act.

In relation to **care and welfare**, the person will be considered mentally incapable if they lack capacity to:

- **Make a decision** about a matter relating to their personal welfare; or
- **Understand** the nature of decisions about matters relating to their personal care and welfare; or
- **Foresee the consequences** of decisions about matters relating to their personal care and welfare or of any failure to make such decisions;

OR

- To **communicate** decisions about matters relating to their personal care and welfare.

In relation to **property**, the person will be considered mentally incapable if they are not **wholly competent** to manage their own affairs in relation to their property.

People may be mentally incapable for a number of reasons, including because of serious illness or accident, or advanced dementia. And their incapacity may fluctuate due to delirium or other factors.

Activating an EPOA

Attorneys appointed with enduring powers for care and welfare can only act in reliance on the EPOA when:

- A **relevant health practitioner** has **certified** that the donor is mentally incapable, if the matter is **significant**; or
- The attorney believes on reasonable grounds that the donor is mentally incapable, if the matter is not significant.

A **relevant health practitioner** is a health practitioner registered with an authority under the Health Practitioners Competence Assurance Act,

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Enduring Powers of Attorney

whose scope of practice includes the assessment of a person's mental capacity. Depending on the situation, this may be a psychiatrist, a geriatrician, another doctor who has had training in assessing mental capacity, or a nurse who has had such training.

A **significant matter** is one which is likely to have a significant effect on the health, wellbeing or enjoyment of life of the donor. Examples include a permanent change in the donor's address, entering residential care, or undergoing a major medical procedure.

If a relevant health practitioner certifies that the donor is mentally incapable because of a health condition that is likely to continue indefinitely or for a particular period specified in the certificate, then no further certificates are needed for that time period.

Any decision about whether someone is mentally incapable must be made at the time a decision is being made.

Certification of mental incapacity for activating EPOAs

Information required

The certificate of mental incapacity doesn't have to be in a particular format but must contain the following information:²

- full name, address, and registration number of the certifying health practitioner
- the health profession in which the practitioner is registered under the Health Practitioners Competence Assurance Act 2003 and the name of the responsible registration authority
- that the certifying practitioner's scope of practice includes assessment of mental capacity
- if the EPOA to which the certificate relates requires that the donor's mental capacity be addressed by a health practitioner with a specified scope of practice, that the certifying practitioner's scope of practice includes the one specified
- that the certifying practitioner examined the donor for the purpose of assessing the donor's mental capacity and the date of that examination
- the full name of the donor, and the date of the EPOA
- the certifying practitioner's opinion as to capacity (see below)
- the reasons for that opinion

² Clause 5(1) of the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Amendment Regulations 2017.

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Enduring Powers of Attorney

- the certifying practitioner's signature
- the date of the certificate.

Opinion as to capacity

The certificate of mental incapacity must include the following opinion as to capacity:

- *EPOA for property* - donor is mentally incapable because they are not wholly competent to manage their own affairs in relation to their property
- *EPOA for personal care and welfare* – donor lacks capacity to:
 - make a decision; or
 - understand the nature of decisions; or
 - foresee consequences of decisions or of not making decisions; or
 - communicate decisions.

Decisions an attorney may not make

An attorney for care and welfare may not:

- Consent to:
 - the donor taking part in any medical experiment, other than one conducted for the purpose of saving the donor's life or preventing serious damage to the donor's health; or
 - surgery or treatment that would destroy any part of the donor's brain or any brain function, for the purpose of changing the donor's behaviour; or
 - electro-convulsive treatment.
- Refuse consent to a standard medical treatment or procedure intended to save the donor's life or prevent serious damage to the donor's health.

When making decisions on behalf of the donor, the attorney must consult the donor to the greatest extent possible and encourage the donor to act on his or her own behalf as much as possible.

Exercising the EPOA

When a person wants to exercise the power stipulated in the EPOA it is important to ensure that the:

- attorney is the attorney designated by the donor (the patient);

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Enduring Powers of Attorney

- patient is incompetent;
- EPOA has been activated; and
- Attorney is acting within the parameters of their powers set out in the EPOA.

Check the following:

- Ask the person who holds the EPOA (the Attorney) to:
 - Present a copy of the EPOA; and
 - Provide personal photo identification (e.g. driver's licence or passport).
- Make a photocopy of the EPOA and the attorney's identification, and add them to the clinical record.
- Ensure that the information provided by the person holding the EPOA matches what is written on the EPOA.
- It may be necessary for a relevant health professional to assess the patient and certify that they are mentally incapable (see above) if the EPOA has not been activated (unless the health practitioner has previously certified that the patient's mental incapacity is likely to continue indefinitely).
- Read the EPOA to check that the decisions being made by the person holding the EPOA are not outside the powers granted under the appointment.
- Document the above steps in the Clinical Record.

Associated Documents

Other documents relevant to this guideline are listed below:

NZ Legislation	Protection of Personal and Property Rights Act 1988 Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Amendment Regulations 2017
NZ Standards	None
Organisational Procedures or Policies	None
Other related documents	Guideline – Applications under the Protection of Personal and Property Rights Act 1988 Guideline – Informed consent Guideline – Capacity Assessments

Resources

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Templates:

- [certificate of incapacity – Care and Welfare](#)
- [certificate of incapacity - Property](#)

The information in these guidance notes was compiled from the New Zealand Law Society as well as the Protection of Personal and Property Rights Act 1988. For further information refer to:

www.msd.govt.nz/epa

<http://www.justice.govt.nz/family-justice/about-us/documents/publications/brochure-and-pamphlets/pdf/moj0585-powers-to-act-on-behalf-of-others.pdf>

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