

Queensland



POWERS OF ATTORNEY ACT 1998

Act No. 22 of 1998

Queensland



POWERS OF ATTORNEY ACT 1998

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Queensland



Powers of Attorney Act 1998

Act No. 22 of 1998

An Act consolidating, amending and reforming the law about general powers of attorney and enduring powers of attorney and providing for advance health directives, and for other purposes

[Assented to 14 May 1998]

The Parliament of Queensland enacts—

CHAPTER 1—PRELIMINARY

Short title

1. This Act may be cited as the *Powers of Attorney Act 1998*.

Commencement

2. This Act commences on a day to be fixed by proclamation.

Dictionary

3. The dictionary in schedule 3 defines particular words used in this Act.¹

Act binds all persons

4. This Act binds all persons, including the State, and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.

General overview

- 5.(1) An “**attorney**” is a person who is authorised to make certain

¹ In some Acts, definitions are contained in a dictionary that appears as the last schedule and forms part of the Act—*Acts Interpretation Act 1954*, section 14(4).

Words defined elsewhere are generally signposted by entries in the dictionary. However, if a section has a definition applying only to the section, or a part of the section, it is generally not signposted by an entry in the dictionary and is generally set out in the last subsection of the section.

Signpost definitions in the dictionary alert the reader to the terms defined elsewhere in the Act and tell the reader where the definitions can be found. For example, the definition ‘ “**eligible attorney**” see section 29.’ tells the reader there is a definition of eligible attorney in the section.

decisions and do certain other things for another person (the “**principal**”).

(2) After the commencement of this Act, principals may authorise attorneys by—

- (a) general powers of attorney, enduring powers of attorney or advance health directives; or
- (b) powers of attorney under the common law.

(3) In addition to replacing the statutory provisions for powers of attorney and enduring powers of attorney,² this Act introduces advance health directives and statutory health attorneys.

(4) An advance health directive is a document containing directions for a principal’s future health care and special health care and may authorise an attorney to do certain things for the principal in relation to health care.³

(5) A statutory health attorney is the person authorised by this Act⁴ to do certain things for a principal in certain circumstances in relation to health care.⁵

Scope of Act

6. Except where otherwise provided, this Act applies only to documents made, whether under this Act⁶ or otherwise, after the commencement of this Act.

² The *Property Law Act 1974*, part 9 (Powers of attorney) is repealed by section 182.

However, see section 163 (Powers of attorney under Property Law Act 1974) for a transitional provision.

³ Advance health directives are dealt with in chapter 3.

⁴ See section 62 (Statutory health attorney).

⁵ See section 90(5) (Principal with impaired capacity—order of priority in dealing with special health or health matter).

⁶ A general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney, or enduring power of attorney, made under this Act—section 163.

CHAPTER 2—POWERS OF ATTORNEY OTHER THAN ENDURING POWERS OF ATTORNEY

PART 1—INTRODUCTION

Application of ch 2

7.(1) This chapter does not apply to enduring powers of attorney.

(2) Except where otherwise provided, this chapter applies to all other powers of attorney made, whether under this Act⁷ or otherwise, after the commencement of this Act.⁸

Powers of attorney

8. By a “**general power of attorney made under this Act**”, a person (“**principal**”) may—

- (a) authorise 1 or more other persons (“**attorneys**”) to do for the principal anything (other than exercise power for a personal matter⁹) that the principal can lawfully do by an attorney; and
- (b) provide terms or information about exercising the power.

When attorney’s power exercisable

9.(1) A principal may specify in a power of attorney a time when, circumstance in which, or occasion on which, the power is exercisable.

(2) However, if the power of attorney does not specify a time when,

⁷ A general power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney made under this Act—section 163.

⁸ For provisions applying to attorneys, see chapter 5 (Exercising power for a principal), part 1 (Provisions applying to attorneys).

⁹ Only an attorney under an enduring power of attorney may exercise power for a personal matter for a principal.

circumstance in which, or occasion on which, the power is exercisable, the power becomes exercisable once the power of attorney is made.

Powers of attorney given as security

10.(1) A “**power of attorney given as security**” is a power of attorney (other than an enduring power of attorney)—

- (a) whether made under this Act or otherwise and whether made before or after the commencement of this Act; and
- (b) given by a principal as security for a proprietary interest of the attorney or the performance of an obligation owed to the attorney; and
- (c) that states it is irrevocable.

(2) Despite chapter 2, part 3, a power of attorney given as security is incapable of revocation except with the consent of the attorney while—

- (a) the attorney has the proprietary interest, or persons deriving title to the interest under the attorney have the proprietary interest, secured by the power of attorney; or
- (b) the obligation, the performance of which is secured by the power of attorney, remains undischarged.¹⁰

(3) A power of attorney given as security for a proprietary interest may be given to—

- (a) the person entitled to the interest and the persons deriving title under the person to the interest; or
- (b) a representative of a person mentioned in paragraph (a) who may be a specified officer, or the holder of a specified office,¹¹ by reference to the title of the office concerned.

(4) The persons deriving title are taken to be attorneys of the power of attorney for all purposes.

¹⁰ Also, revocation by attorney provisions dealing with revocation because of impaired capacity, bankruptcy or insolvency or death of an attorney (sections 22 to 24) do not apply to powers of attorney given as security.

¹¹ “**Office**” includes position—see *Acts Interpretation Act 1954*, section 36.

(5) Subsection (4) does not affect a right in the power of attorney to appoint substitute attorneys.

(6) The power of a registered proprietor under the *Land Title Act 1994* to revoke a power of attorney is subject to this section.

PART 2—MAKING A POWER OF ATTORNEY OTHER THAN AN ENDURING POWER OF ATTORNEY

Form of general power of attorney made under Act

11. A general power of attorney made under this Act must be in the approved form.¹²

Execution of powers of attorney

12.(1) This section does not apply to a power of attorney created by and contained in another instrument, for example, a mortgage or lease, that is signed by, or by direction of, the principal.

(2) An instrument creating a power of attorney must be signed by, or by direction and in the presence of, the principal.

(3) This section does not affect—

- (a) a requirement in or having effect under another Act about witnessing of instruments creating powers of attorney; or
- (b) the rules about the execution of instruments by corporations.

¹² An approved form is a form approved by the chief executive under section 161—schedule 3 (Dictionary). Strict compliance with the form is not necessary and substantial compliance is sufficient—*Acts Interpretation Act 1954*, section 49 (Forms).

Appointment of 1 or more attorneys

13.(1) By a general power of attorney made under this Act, a principal may—

- (a) appoint 1 attorney, or more than 1 attorney, being joint or several, or joint and several, attorneys; and
- (b) appoint as attorney—
 - (i) a person by name; or
 - (ii) a specified officer, or the holder of a specified office,¹³ by reference to the title of the office concerned.

(2) If a specified officer or the holder of a specified office is appointed as an attorney—

- (a) the appointment does not cease to have effect merely because the person who was the specified officer or the holder of the specified office when the appointment was made ceases to be the officer or the holder of the office; and
- (b) the power may be exercised by the person for the time being occupying or acting in the office concerned.

Proof of power of attorney

14.(1) A power of attorney may be proved by a copy of the power of attorney certified under this section.

(2) Each page, other than the last page, of the copy must be certified to the effect that the copy is a true and complete copy of the corresponding page of the original.

(3) The last page of the copy must be certified to the effect that the copy is a true and complete copy of the original.

(4) Certification must be by 1 of the following persons—

- (a) the principal;

¹³ “Office” includes position—see *Acts Interpretation Act 1954*, section 36.

- (b) a justice;¹⁴
- (c) a commissioner for declarations;
- (d) a notary public;
- (e) a lawyer;¹⁵
- (f) a trustee company under the *Trustee Companies Act 1968*;
- (g) a stockbroker.

(5) If a copy of a power of attorney has been certified under this section, the power of attorney may also be proved by a copy, certified under this section, of the certified copy.

(6) This section does not prevent a power of attorney being proved in another way.

(7) This section also applies to a power of attorney made before the commencement of this Act.¹⁶

¹⁴ “**Justice**” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

¹⁵ “**Lawyer**” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

¹⁶ See also section 7 (Application of ch 2).

PART 3—REVOKING A POWER OF ATTORNEY OTHER THAN AN ENDURING POWER OF ATTORNEY

Division 1—Introduction

Relationship with other law

15. This part does not limit the events by which, or circumstances in which, a power of attorney is revoked orally or in another way or terminated by implication or operation of law.

Division 2—Revocation by principal

Advice of revocation

16. If a power of attorney is revoked under this division, the principal must take reasonable steps—

- (a) to advise all attorneys affected by the revocation; and
- (b) for a power of attorney registered in the power of attorney register—to deregister it.

Written revocation

17.(1) If a power of attorney is or becomes revocable, it may be revoked by an instrument in the approved form executed in the same way as the power of attorney.

(2) Subsection (1) does not affect the rules about the execution of instruments by corporations.

(3) This section also applies to a power of attorney made before the commencement of this Act.¹⁷

¹⁷ See also section 7 (Application of ch 2).

Impaired capacity

18.(1) If a principal becomes a person who has impaired capacity, the power of attorney is revoked.¹⁸

(2) However, if a principal becomes incommunicate, the court may by order confirm that, from the date of the order, all or part of the power of attorney remains in full force and effect if the court is satisfied that the confirmation is for the benefit of the principal.

(3) For this section, a person becomes “**incommunicate**” if the person becomes incapable of communicating decisions about the person’s financial, property or legal affairs in some way.

Death

19. When a principal dies, the power of attorney is revoked.

Division 3—Revocation according to terms**According to terms**

20. A power of attorney is revoked according to its terms.

Examples—

1. If a power of attorney is expressed to operate for or during a specified period, it is revoked at the end of the period.

2. If a power of attorney is expressed to operate for a specific purpose, it is revoked when the purpose is achieved.

¹⁸ However, for a power of attorney given as security, see section 10.

Division 4—Revocation by attorney

Resignation

21. If an attorney resigns,¹⁹ the power of attorney is revoked to the extent it gives power to the attorney.

Impaired capacity

22. If an attorney becomes a person who has impaired capacity, the power of attorney is revoked to the extent it gives power to the attorney.²⁰

Bankruptcy or insolvency

23.(1) If an individual attorney becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction, the power of attorney is revoked to the extent it gives power to the attorney.²¹

(2) If a corporate attorney is wound up or dissolved or a receiver (other than a receiver for a limited purpose) or administrator is appointed of the attorney, the power of attorney is revoked to the extent it gives power to the attorney.

Example—

X is an attorney under a power of attorney that is not given as security. X becomes bankrupt. Therefore, the power of attorney is revoked to the extent it gives power to X.

If X was a joint and several attorney with Y, the power of attorney is only revoked to the extent it gives power to X. Y can continue to exercise the power.

The same applies if X was a joint attorney with Y because of section 68.²²

¹⁹ An attorney may resign by signed notice to the principal—section 72(1).

²⁰ However, for a power of attorney given as security, see section 10.

²¹ However, for a power of attorney given as security, see section 10.

²² Section 68 (Effect of disqualification of 1 joint attorney) allows the remaining joint attorney to exercise a power that another joint attorney is unable to exercise.

If X was not a joint and several attorney and the power of attorney gives power to an alternative or successive attorney, the alternative or next attorney may then exercise power.

If none of these apply, no one is able to exercise power under the power of attorney.

Death

24. When an attorney dies, the power of attorney is revoked to the extent it gives power to the attorney.²³

PART 4—OTHER PROVISIONS

Registration of powers of attorney and instruments revoking powers

25.(1) A power of attorney may be registered.

(2) An instrument revoking a power of attorney may be registered.

(3) Subject to another Act or a contrary intention in the power of attorney, if the power of attorney has been registered under an Act, it does not cease to authorise the attorney to do for the principal anything relevant to the purpose for which it was registered until an instrument revoking the power of attorney has been registered.

(4) This section also applies to a power of attorney made before the commencement of this Act.²⁴

²³ If the deceased was a joint attorney, section 68 (Effect of disqualification of 1 joint attorney) allows the remaining joint attorney or attorneys to exercise the power.

However, for a power of attorney given as security, see section 10.

²⁴ See also section 7 (Application of ch 2).

Offence to dishonestly induce the making or revocation of power of attorney

26.(1) A person must not dishonestly induce a person to make or revoke a power of attorney.

Maximum penalty—200 penalty units.

(2) This section also applies to a power of attorney made before the commencement of this Act.²⁵

CHAPTER 3—ENDURING DOCUMENTS**PART 1—APPLICATION AND INTERPRETATION****Application of ch 3**

27. Except where otherwise provided, this chapter applies only to enduring documents.

Meaning of “enduring document”

28. An “**enduring document**” is an enduring power of attorney²⁶ or an advance health directive.

Meaning of “eligible attorney”

29.(1) An “**eligible attorney**”, for a matter under an enduring power of attorney, means—

- (a) a person who is—
 - (i) at least 18 years; and

²⁵ See also section 7 (Application of ch 2).

²⁶ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

- (ii) not a paid carer, or health provider, for the principal;²⁷ and
 - (iii) if the person would be given power for a financial matter—not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
- (b) the public trustee; or
 - (c) a trustee company under the *Trustee Companies Act 1968*; or
 - (d) for a personal matter only—the adult guardian.

(2) An “**eligible attorney**”, for a matter under an advance health directive, means—

- (a) a person who has capacity for the matter who is—
 - (i) at least 18 years; and
 - (ii) not a paid carer, or health provider, for the principal;²⁸ or
- (b) the public trustee; or
- (c) the adult guardian.

Meaning of “eligible signer”

30.(1) An “**eligible signer**”, to sign a document for a principal, is a person who—

- (a) is at least 18 years; and
- (b) is not the witness for the document; and
- (c) is not an attorney of the principal.

(2) To avoid any doubt, it is declared that a person is not excluded from being an eligible signer merely because the person is an attorney’s employee who signs the document while acting in the ordinary course of employment.

(3) In this section—

²⁷ “**Paid carer**” and “**health provider**” are defined in schedule 3 (Dictionary).

²⁸ “**Paid carer**” and “**health provider**” are defined in schedule 3 (Dictionary).

“attorney”, for a document, means—

- (a) a person who is an attorney of the principal whether under the document or otherwise; or
- (b) if the document is all or part of an enduring document—a person who will be an attorney of the principal under the enduring document.

Meaning of “eligible witness”

31.(1) An **“eligible witness”**, for a document, is a person who—

- (a) except for a document revoking an advance health directive—is a justice,²⁹ commissioner for declarations, notary public or lawyer;³⁰ and
- (b) is not the person signing the document for the principal; and
- (c) is not an attorney of the principal; and
- (d) is not a relation of the principal or a relation of an attorney of the principal; and
- (e) if the document gives power for a personal matter—is not a paid carer or health provider of the principal; and
- (f) for an advance health directive—is at least 21 years and not a beneficiary under the principal’s will.

(2) To avoid any doubt, it is declared that a person is not excluded from being an eligible witness merely because the person is an attorney’s employee who is the witness for the document while acting in the ordinary course of employment.

(3) In this section—

“attorney”, for a document, means—

²⁹ **“Justice”** means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

³⁰ **“Lawyer”** means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

- (a) a person who is an attorney of the principal whether under the document or otherwise; or
- (b) if the document is all or part of an enduring document—a person who will be an attorney of the principal under the enduring document.

PART 2—ENDURING POWER OF ATTORNEY PROVISIONS

Enduring powers of attorney

32.(1) By an “**enduring power of attorney**”, an adult (“**principal**”) may—

- (a) authorise 1 or more other persons who are eligible attorneys (“**attorneys**”) to do anything in relation to 1 or more financial matters or personal matters³¹ for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and
- (b) provide terms or information about exercising the power.

(2) An enduring power of attorney³² giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter.

When attorney’s power exercisable

33.(1) A principal may specify in an enduring power of attorney a time when, circumstance in which, or occasion on which, a power for a financial matter is exercisable.

³¹ “**Personal matters**” includes health matters but does not include special personal matters or special health matters—schedule 2, section 2.

³² An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

(2) However, if the enduring power of attorney does not specify a time when, circumstance in which, or occasion on which, power for a financial matter becomes exercisable, the power becomes exercisable once the enduring power of attorney is made.

(3) Also, if—

- (a) a time when, circumstance in which, or occasion on which, power for a financial matter is exercisable is specified; and
- (b) before the specified time, circumstance or occasion, the principal has impaired capacity for the matter;

power for the matter is exercisable during any or every period the principal has the impaired capacity.

(4) Power for a personal matter under the enduring power of attorney is exercisable during any or every period the principal has impaired capacity for the matter and not otherwise.³³

(5) If an attorney's power for a matter depends on the principal having impaired capacity for a matter, a person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has the impaired capacity.

Recognition of enduring power of attorney made in other States

34. If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.

³³ However, the priority of an attorney's power for a health matter is decided by section 90 (Principal with impaired capacity—order of priority in dealing with special health or health matter)—see, in particular, section 90(4).

PART 3—ADVANCE HEALTH DIRECTIVE PROVISIONS

Advance health directives

35.(1) By an “**advance health directive**”, an adult principal may—

- (a) give directions, about health matters and special health matters, for his or her future health care; and
- (b) give information about his or her directions; and
- (c) appoint 1 or more persons who are eligible attorneys to exercise power for a health matter³⁴ for the principal in the event the directions prove inadequate; and
- (d) provide terms or information about exercising the power.

(2) Without limiting subsection (1), by an advance health directive the principal may give a direction—

- (a) consenting, in the circumstances specified, to particular future health care of the principal when necessary and despite objection by the principal when the health care is provided; and
- (b) requiring, in the circumstances specified, particular life-sustaining measures to be withheld or withdrawn; and
- (c) authorising an attorney to physically restrain, move or manage the principal, or have the principal physically restrained, moved or managed, for the purpose of health care when necessary and despite objection by the principal when the restraint, movement or management is provided.

(3) A direction in an advance health directive has priority over a general or specific power for health matters given to any attorney.

(4) An advance health directive is not revoked by the principal becoming a person with impaired capacity.

³⁴ Note this does not include a special health matter.

Operation of advance health directive

36.(1) A direction in an advance health directive—

- (a) operates only while the principal has impaired capacity for the matter covered by the direction; and
- (b) is as effective as if—
 - (i) the principal gave the direction when decisions about the matter needed to be made; and
 - (ii) the principal then had capacity for the matter.³⁵

(2) A direction to withhold or withdraw a life-sustaining measure³⁶ can not operate unless—

- (a) 1 of the following applies—
 - (i) the principal has a terminal illness or condition that is incurable or irreversible and as a result of which, in the opinion of a doctor treating the principal and another doctor, the principal may reasonably be expected to die within 1 year;
 - (ii) the principal is in a persistent vegetative state, that is, the principal has a condition involving severe and irreversible brain damage which, however, allows some or all of the principal's vital bodily functions to continue, including, for example, heart beat or breathing;
 - (iii) the principal is permanently unconscious, that is, the principal has a condition involving brain damage so severe that there is no reasonable prospect of the principal regaining consciousness;³⁷
 - (iv) the principal has an illness or injury of such severity that there is no reasonable prospect that the principal will recover to the extent that the principal's life can be sustained without the continued application of life-sustaining measures; and

³⁵ See also section 101 (No less protection than if adult gave health consent).

³⁶ Defined in schedule 2, section 12.

³⁷ This is sometimes referred to as 'a coma'.

- (b) for a direction to withhold or withdraw artificial nutrition or artificial hydration—the life-sustaining measure would be contrary to good medical practice; and
- (c) the principal has no reasonable prospect of regaining capacity for health matters.

(3) An attorney's power for a health matter under an advance health directive is exercisable during any or every period the principal has impaired capacity for the matter and not otherwise.³⁸

(4) While power for a health matter is exercisable under an advance health directive, the directive gives the attorney for the matter power to do, for the principal, anything in relation to the matter the principal could lawfully do if the principal had capacity for the matter.

(5) However, the power given is subject to the terms of the advance health directive and this Act.

(6) A person dealing with the attorney may ask for evidence, for example, a medical certificate, to establish that the principal has impaired capacity for the matter.

Act does not authorise euthanasia or affect particular provisions of Criminal Code

37. To avoid any doubt, it is declared that nothing in this Act—

³⁸ However, the priority of an attorney's power is decided by section 90 (Principal with impaired capacity—order of priority in dealing with special health or health matter)—see, in particular, section 90(4).

- (a) authorises, justifies or excuses killing a person; or
- (b) affects the Criminal Code, section 284 or chapter 28.³⁹

Act's relationship with Mental Health Act

38.(1) For a person liable to be detained under the *Mental Health Act 1974* who has given a direction about the person's health care or special health care, whether by giving a direction in an advance health directive or otherwise, an interpretation of that Act that is consistent with this Act and the direction is to be preferred to any other meaning.

(2) However, the *Mental Health Act 1974* prevails in the case of inconsistency.

Common law not affected

39. This Act does not affect common law recognition of instructions

³⁹ Criminal Code—

'Consent to death immaterial

'**284.** Consent by a person to the causing of the person's own death does not affect the criminal responsibility of any person by whom such death is caused.'

Chapter 28 (Homicide—suicide—concealment of birth), including—

'Acceleration of death

'**296.** A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.'

'Aiding suicide

'**311.** Any person who—

- (a) procures another to kill himself or herself; or
- (b) counsels another to kill himself or herself and thereby induces the other person to do so; or
- (c) aids another in killing himself or herself;

is guilty of a crime, and is liable to imprisonment for life.'

about health care given by an adult that are not given in an advance health directive.

Recognition of enduring health care document made in other States

40. If a document prescribed by regulation is made in another State and complies with the requirements for the document in the other State, then, to the extent the document's provisions could have been validly included in an advance health directive made under this Act, the document must be treated as if it were an advance health directive made under, and in compliance with, this Act.

PART 4—MAKING AN ENDURING DOCUMENT

Principal's capacity to make an enduring power of attorney

41.(1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.⁴⁰

(2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters⁴¹—

- (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
- (b) when the power begins;
- (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the

⁴⁰ However, under the general principles, a person is presumed to have capacity—schedule 1, section 1.

⁴¹ If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

enduring power of attorney;

- (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
- (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
- (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

Principal's capacity to make an advance health directive

42.(1) A principal may make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the following matters⁴²—

- (a) the nature and the likely effects of each direction in the advance health directive;
- (b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;
- (c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;
- (d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

(2) A principal may make an advance health directive, to the extent it gives power to an attorney, only if the principal also understands the matters necessary to make an enduring power of attorney giving the same power.⁴³

⁴² If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

⁴³ See section 41 (Principal's capacity to make an enduring power of attorney).

Appointment of 1 or more eligible attorneys

43.(1) Only a person who is an eligible attorney⁴⁴ may be appointed as an attorney by an enduring document.

(2) A principal may appoint 1 or more of the following—

- (a) 1 attorney for 1 or more, or all, matters;
- (b) different attorneys for different matters;
- (c) a person to act as an attorney for a matter in a circumstance stated in the enduring document;
- (d) alternative attorneys for a matter so power is given to a particular attorney only in a circumstance stated in the enduring document;
- (e) successive attorneys for a matter so power is given to a particular attorney only when power given to another attorney ends;
- (f) joint or several, or joint and several, attorneys for a matter;
- (g) 2 or more joint attorneys for a matter (being a number less than the total number of attorneys for the matter).

Formal requirements

44.(1) An enduring power of attorney must be in an approved form.⁴⁵

(2) An advance health directive must be written and may be in the approved form.

(3) An enduring document must—

- (a) be signed—
 - (i) by the principal; or
 - (ii) if the principal instructs—for the principal and in the principal’s presence, by an eligible signer;⁴⁶ and

⁴⁴ See section 29 (Meaning of “eligible attorney”).

⁴⁵ An approved form is a form approved by the chief executive under section 161—schedule 3 (Dictionary).

⁴⁶ See section 30 (Meaning of “eligible signer”).

(b) be signed and dated by an eligible witness.⁴⁷

(4) If an enduring document is signed by the principal, it must include a certificate signed by the witness stating the principal—

- (a) signed the enduring document in the witness's presence; and
- (b) at the time, appeared to the witness to have the capacity necessary to make the enduring document.

(5) If an enduring document is signed by a person for the principal, it must include a certificate signed by the witness stating—

- (a) the principal, in the witness's presence, instructed the person to sign the enduring document for the principal; and
- (b) the person signed it in the presence of the principal and witness; and
- (c) the principal, at the time, appeared to the witness to have the capacity necessary to make the enduring document.

(6) An advance health directive must also include a certificate signed and dated by a doctor mentioned in subsection (7) stating the principal, at the time of making the advance health directive, appeared to the doctor to have the capacity necessary to make it.

(7) The doctor must not be—

- (a) the person witnessing the advance health directive; or
- (b) the person signing the advance health directive for the principal; or
- (c) an attorney of the principal; or
- (d) a relation of the principal or a relation of an attorney of the principal; or
- (e) a beneficiary under the principal's will.

(8) An enduring document is effective in relation to an attorney only if

⁴⁷ See section 31 (Meaning of "eligible witness").

It is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood the necessary matters. For a power of attorney—see section 41 and for an advance health directive—see section 42.

the attorney has accepted the appointment by signing the enduring document.

Proof of enduring document

45.(1) An enduring document⁴⁸ may be proved by a copy of the enduring document certified under this section.

(2) Each page, other than the last page, of the copy must be certified to the effect that the copy is a true and complete copy of the corresponding page of the original.

(3) The last page of the copy must be certified to the effect that the copy is a true and complete copy of the original.

(4) Certification must be by 1 of the following persons—

- (a) the principal;
- (b) a justice;⁴⁹
- (c) a commissioner for declarations;
- (d) a notary public;
- (e) a lawyer;⁵⁰
- (f) a trustee company under the *Trustee Companies Act 1968*;
- (g) a stockbroker.

(5) If a copy of an enduring document has been certified under this section, the enduring document may also be proved by a copy, certified under this section, of the certified copy.

⁴⁸ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

⁴⁹ “**Justice**” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

⁵⁰ “**Lawyer**” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

(6) This section does not prevent an enduring document being proved in another way.

PART 5—REVOKING AN ENDURING DOCUMENT

Division 1—Revocation by principal

Advice of revocation

46. If an enduring document⁵¹ is revoked under this division, the principal must take reasonable steps—

- (a) to advise all attorneys under the enduring document of its revocation; and
- (b) for an enduring power of attorney registered under the *Land Title Act 1994*—to deregister it.

Principal's capacity for written revocation of power of attorney

47.(1) A principal may revoke an enduring power of attorney in writing only if the principal has the capacity necessary to make an enduring power of attorney giving the same power.⁵²

(2) However, a principal may revoke an enduring power of attorney in writing, to the extent it gives power for a health matter, if the principal has the capacity necessary to make an enduring power of attorney giving the same power for the health matter.

⁵¹ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

⁵² See section 41 (Principal's capacity to make an enduring power of attorney).

Principal's capacity for written revocation of advance health directive

48.(1) A principal may revoke an advance health directive in writing, to the extent it includes a direction about a health matter or special health matter, only if the principal has capacity for the matter.

(2) A principal may revoke an advance health directive in writing, to the extent it gives power to an attorney, only if the principal has the capacity necessary to make an advance health directive giving the same power.

Formal requirements for written revocation of enduring document

49.(1) A written revocation of an enduring power of attorney must be in the approved form.

(2) However, a written revocation of an enduring power of attorney, to the extent it gives power for a health matter, or a written revocation of an advance health directive need not be in the approved form.

(3) The revocation of an enduring power of attorney must—

(a) be signed—

(i) by the principal; or

(ii) if the principal revoking it instructs—for the principal and in the principal's presence, by an eligible signer;⁵³ and

(b) be signed and dated by an eligible witness.⁵⁴

(4) If the revocation is signed by the principal, it may include a certificate signed by the witness stating the principal—

(a) signed the revocation in the witness's presence; and

(b) at the time, appeared to the witness to have the capacity necessary for the revocation.

(5) If the revocation is signed by a person for the principal, it must

⁵³ See section 30 (Meaning of "eligible signer").

⁵⁴ See section 31 (Meaning of "eligible witness").

It is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood the necessary matters. For a power of attorney—see section 47 and for an advance health directive—see section 48.

include a certificate signed by the witness stating—

- (a) the principal, in the witness's presence, instructed the person to sign the revocation on the principal's behalf; and
- (b) the person signed it in the presence of the principal and witness; and
- (c) the principal, at the time, appeared to the witness to have the capacity necessary for the revocation.

Later enduring document

50.(1) A principal's enduring power of attorney is revoked, to the extent of an inconsistency, by a later enduring document of the principal.

Example—

If a principal gives—

- (a) power for a matter to an attorney by an enduring power of attorney; and
- (b) either—
 - (i) power for the matter to a different attorney by a later enduring power of attorney; or
 - (ii) a direction about the matter in a later advance health directive;

the earlier enduring power of attorney is revoked to the extent it gives power for the matter.

(2) A principal's advance health directive is revoked, to the extent of an inconsistency, by a later advance health directive.⁵⁵

Death

51. When a principal dies, the enduring document is revoked.

⁵⁵ If there is a direction about a health matter in an advance health directive and a later enduring power of attorney giving an attorney power for the health matter, the direction prevails. See section 90 (Principal with impaired capacity—order of priority in dealing with special health or health matter).

Marriage

52. Unless there is a contrary intention expressed in the enduring document, if a principal marries after making an enduring document, the enduring document is revoked to the extent it gives power to someone other than the principal's spouse.

Divorce

53. If a principal divorces after making an enduring document, the enduring document is revoked to the extent it gives power to the divorced spouse.

Division 2—Revocation according to terms**According to terms**

54. An enduring document is revoked according to its terms.

Examples—

1. If an enduring power of attorney is expressed to operate for or during a specified period, it is revoked at the end of the period.
2. If an enduring power of attorney is expressed to operate for a specific purpose, it is revoked when the purpose is achieved.

Division 3—Revocation by attorney**Resignation**

55. If an attorney resigns⁵⁶ as attorney for a matter, the enduring document is revoked to the extent it gives power to the attorney for the matter.

⁵⁶ An attorney may resign by signed notice to the principal if the principal has capacity for the matter (section 72 (Resignation of attorney)) or otherwise with the court's leave (section 82 (Resignation of attorney while principal has impaired capacity)).

Impaired capacity

56. If an attorney for a matter becomes a person who has impaired capacity for the matter, the enduring document is revoked to the extent it gives power to the attorney for the matter.

Bankruptcy or insolvency

57.(1) This section applies only to enduring powers of attorney.

(2) If an individual attorney for a financial matter becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction, the power of attorney is revoked to the extent it gives power for financial matters to the attorney.

(3) If a corporate attorney is wound up or dissolved or a receiver (other than a receiver for a limited purpose) or administrator is appointed of the attorney, the power of attorney is revoked to the extent it gives power to the attorney.

Example—

Under an enduring power of attorney, X, an individual, exercises power for financial matters generally. X becomes bankrupt. Therefore, the enduring power of attorney is revoked to the extent it gives power for financial matters to X.

If X was a joint and several attorney with Y, the enduring power of attorney is only revoked to the extent it gives power to X. Y can continue to exercise the power.

The same applies if X was a joint attorney with Y because of section 68.⁵⁷

If X was not a joint and several attorney and the enduring power of attorney gives an alternative or successive attorney power for financial matters, the alternative or next attorney then has power for financial matters.

If none of these apply, no one is able to exercise power for financial matters under the enduring power of attorney.

⁵⁷ Section 68 (Effect of disqualification of 1 joint attorney) allows the remaining joint attorney to exercise a power that another joint attorney is unable to exercise.

Death

58. When an attorney dies, the enduring document is revoked to the extent it gives power to the attorney.⁵⁸

Paid carer or health provider

59. If an attorney becomes a paid carer, or health provider, for the principal, the enduring document is revoked to the extent it gives power for a personal matter to the attorney.⁵⁹

PART 6—OTHER PROVISIONS**Registration of powers of attorney and instruments revoking powers**

60.(1) An enduring power of attorney⁶⁰ may be registered.

(2) An instrument revoking an enduring power of attorney may be registered.

(3) Subject to another Act, if an enduring power of attorney has been registered, it may not, unless a different intention appears from the enduring power of attorney, cease to authorise the attorney to deal with land for the principal until an instrument revoking the enduring power of attorney has been registered.

⁵⁸ If the deceased was a joint attorney, section 68 (Effect of disqualification of 1 joint attorney) allows the remaining joint attorney or attorneys to exercise the power.

⁵⁹ If the paid carer, or health provider, was a joint attorney, section 68 (Effect of disqualification of 1 joint attorney) allows the remaining joint attorney or attorneys to exercise the power.

⁶⁰ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

Offence to dishonestly induce the making or revocation of enduring document

61. A person must not dishonestly induce a person to make or revoke an enduring document.

Maximum penalty—200 penalty units.

CHAPTER 4—STATUTORY HEALTH ATTORNEYS

Statutory health attorney

62.(1) This Act authorises a statutory health attorney for an adult’s health matter⁶¹ to make any decision about the health matter that the adult could lawfully make if the adult had capacity for the matter.

(2) A statutory health attorney’s power for a health matter is exercisable during any or every period the adult has impaired capacity for the matter.⁶²

Who is the statutory health attorney

63.(1) For a health matter, an adult’s “**statutory health attorney**” is the first, in listed order, of the following people who is readily available and culturally appropriate to exercise power for the matter—

- (a) a spouse⁶³ of the adult if the relationship between the adult and the spouse is close and continuing;
- (b) a person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult;
- (c) a person who is 18 years or more and who is a close friend or

⁶¹ Note this does not include a special health matter.

⁶² However, the priority of an attorney’s power is decided by section 90 (Principal with impaired capacity—order of priority in dealing with special health or health matter)—see, in particular, section 90(5).

⁶³ “**Spouse**” includes a de facto spouse—schedule 3 (Dictionary).

relation of the adult and is not a paid carer for the adult.

(2) If no-one listed in subsection (1) is readily available and culturally appropriate to exercise power for a matter, the adult guardian is the adult's "**statutory health attorney**" for the matter.

(3) Without limiting who is a "**person who has the care of the adult**", for this section, a person has the care of an adult if the person—

- (a) provides domestic services and support to the adult; or
- (b) arranges for the adult to be provided with domestic services and support.

(4) If an adult resides in an institution (for example, a hospital, nursing home, group home, boarding-house or hostel) at which the adult is cared for by another person, the adult—

- (a) is not, merely because of this fact, to be regarded as being in the care of the other person; and
- (b) remains in the care of the person in whose care the adult was immediately before residing in the institution.

Intervention by adult guardian if dispute or contrary to health care principle

64.(1) If—

- (a) there is more than 1 person eligible to be the statutory health attorney under a paragraph of subsection 63(1) to exercise power for a matter; and
- (b) the eligible people disagree about which of them should be the statutory health attorney or how the power should be exercised; and
- (c) the disagreement cannot be resolved by mediation by the adult guardian;

the adult guardian may exercise the power.

(2) Also, if the statutory health attorney for a matter—

- (a) refuses to make a decision in a situation where the refusal is contrary to the health care principle; or

(b) makes a decision that is contrary to the health care principle;
the adult guardian may exercise power for the matter.

CHAPTER 5—EXERCISING POWER FOR A PRINCIPAL

PART 1—PROVISIONS APPLYING TO ATTORNEYS

Application of pt 1

65. Except where otherwise provided, this part applies to an attorney under—

- (a) a general power of attorney made under this Act;⁶⁴ or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

Act honestly and with reasonable diligence

66.(1) An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.

Maximum penalty—200 penalty units.

(2) In addition to any other liability the attorney may incur, the court may order the attorney to compensate the principal for a loss caused by the attorney's failure to comply with subsection (1).

⁶⁴ A general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney, or enduring power of attorney, made under this Act—section 163.

Subject to terms of document

67. An attorney who may exercise a power under a document must, when exercising the power, exercise it subject to the terms of the document.

Effect of disqualification of 1 joint attorney

68. If 1 or more joint attorneys is disqualified from exercising a power given to them—

- (a) the remaining attorney may exercise the power; and
- (b) if 2 or more joint attorneys remain—the remaining attorneys must exercise the power jointly.

Execution of instrument etc.

69.(1) If necessary or convenient for the exercise of power given to an attorney, the attorney may—

- (a) execute an instrument with the attorney's own signature and, despite the fact that the power of attorney was given under hand, if sealing is required or used, with the attorney's own seal; and
- (b) do any other thing in the attorney's own name.

(2) An instrument executed by an attorney must be executed in a way showing that the attorney executes it as attorney for the principal.

(3) An instrument executed, or thing done, in the way specified in this section is as effective as if executed or done by the principal—

- (a) with the principal's signature; or
- (b) with the principal's signature and seal; or
- (c) in the principal's name.

(4) This section applies subject to the *Property Law Act 1974*, section 46.⁶⁵

⁶⁵ This section deals with the execution of documents by corporations.

Subject to committee or manager

70.(1) If a person, other than an attorney, becomes committee or manager of the principal, or all or part of a principal's estate, the attorney may exercise the power only to the extent authorised by the committee or manager.

(2) In this section—

“**attorney**” includes a statutory health attorney.

Not exercise revoked power

71. An attorney, who knows a power given to the attorney has been revoked, must not exercise, or purport to exercise, the power.

Maximum penalty— 200 penalty units.

Resignation of attorney

72.(1) An attorney may resign as attorney for a matter by signed notice given to the principal.⁶⁶

(2) This section does not affect another way an attorney may resign allowed by law.⁶⁷

Avoid conflict transaction

73.(1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.⁶⁸

(2) A “**conflict transaction**” is a transaction in which there may be conflict, or which results in conflict, between—

(a) the duty of an attorney towards the principal; and

⁶⁶ However, for an enduring document, see also section 82 (Resignation of attorney while principal has impaired capacity).

⁶⁷ For example, an attorney under a power of attorney made under the common law or the *Property Law Act 1974*, may resign orally.

⁶⁸ However, see section 105 (Relief from personal liability).

- (b) either—
- (i) the interests of the attorney, or a relation, business associate or close friend of the attorney; or
 - (ii) another duty of the attorney.

Examples—

1. A conflict transaction happens if an attorney for a financial matter buys the principal's car.

2. A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.

(3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—

- (a) deals with an interest in property jointly held; or
- (b) acquires a joint interest in property; or
- (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

(4) In this section—

“joint interest” includes an interest as a joint tenant or tenant in common.

Preservation of confidentiality

74.(1) If a person gains confidential information because of being, or an opportunity given by being, an attorney, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (2).

Maximum penalty—200 penalty units.

(2) A person may make a record of confidential information, or disclose it to someone else—

- (a) to discharge a function under this Act or another law; or
- (b) for a proceeding in a court or relevant tribunal; or
- (c) if authorised under a regulation or another law; or
- (d) if authorised by the person to whom the information relates; or

- (e) if authorised by the court in the public interest because a person’s life or physical safety could otherwise reasonably be expected to be endangered.

(3) This section also applies to a statutory health attorney.

(4) In this section—

“confidential information” includes information about a person’s affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

PART 2—PROVISIONS APPLYING TO ATTORNEYS UNDER ENDURING DOCUMENTS AND STATUTORY HEALTH ATTORNEYS

Application of pt 2

75. Except where otherwise provided, this part applies to—

- (a) an attorney under an enduring document; and
- (b) a statutory health attorney.

General principles for adults with impaired capacity

76. The principles set out in schedule 1 (the **“general principles”** and, for a health matter, the **“health care principle”**) must be complied with by a person or other entity who performs a function⁶⁹ or exercises a power⁷⁰ under this Act, or an enduring document, for a matter in relation to an adult

⁶⁹ **“Function”** includes duty—see *Acts Interpretation Act 1954*, section 36.

⁷⁰ **“Power”** includes authority—see *Acts Interpretation Act 1954*, section 36.

who has impaired capacity.

Example—

If a principal of an enduring power of attorney or advance health directive has impaired capacity for a matter, an attorney who may exercise power for the matter must—

- (a) comply with the general principles; and
- (b) if the matter is a health matter, also comply with the health care principle.

Attorney has maximum power if not otherwise stated

77. To the extent an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to the attorney by the enduring document.

Example—

If an adult's enduring power of attorney merely states that 'I appoint [full name] as my attorney', the appointee is taken to have power for all financial matters and all personal matters for the adult.

Multiple attorneys are joint if not otherwise stated

78. Two or more attorneys for a matter are appointed as joint attorneys for the matter if the enduring document does not state how they are to share the power given to them.

Consult with principal's other attorneys

79.(1) If there are 2 or more attorneys, the attorneys must consult with one another on a regular basis to ensure the principal's interests are not prejudiced by a breakdown in communication between them.

(2) However, failure to comply with subsection (1) does not affect the validity of an attorney's exercise of power.

(3) If 2 or more of the attorneys disagree about the way a power for a matter should be exercised, 1 or more of the attorneys, or another interested person, may apply for directions to the court.

Example—

An adult chooses 1 attorney for all financial matters and another for all personal matters. The attorney for personal matters considers the adult should remain at home with in-house support rather than move to a residential care facility. However, the attorney for financial matters does not want to authorise expenditure for in-house support and considers it unreasonable. Either of the attorneys may apply to the court for directions.

Act together with joint attorneys

80.(1) Attorneys who may exercise power for a matter jointly must exercise the power unanimously unless the enduring document provides otherwise.

(2) If it is impracticable or impossible to exercise the power unanimously, 1 or more of the attorneys, or another interested person, may apply for directions to the court.

Right of attorney to information

81.(1) An attorney has a right to all the information that the principal would have been entitled to if the principal had capacity and that is necessary to make, for the principal, informed decisions about anything the attorney is authorised to do.

(2) A person who has custody or control of the information must disclose the information to the attorney on request.

(3) This section overrides—

- (a)** any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
- (b)** for an attorney under an enduring power of attorney—any claim of confidentiality or privilege, including a claim based on legal professional privilege; and
- (c)** for another attorney—any claim of confidentiality or privilege, excluding a claim based on legal professional privilege.

Resignation of attorney while principal has impaired capacity

82.(1) Despite section 72,⁷¹ while a principal has impaired capacity for a matter, an attorney under an enduring document may only resign as attorney for the matter with the court's leave.

(2) If the court gives leave for an attorney to resign for a matter, the court may appoint a new attorney⁷² to replace the attorney for the matter.

PART 3—PROVISIONS ABOUT FINANCIAL MATTERS**Application**

83. Except where otherwise provided, this part applies only to enduring powers of attorney.⁷³

Power to invest

84.(1) This section does not apply to an enduring power of attorney made under the *Property Law Act 1974*.

(2) An attorney for financial matters—

- (a) may invest in authorised investments; and
- (b) if when the power became exercisable the principal had investments that were not authorised investments—may continue the investments, including by taking up rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding.

⁷¹ Section 72 (Resignation of attorney)

⁷² The court is not limited to appointing an "eligible attorney" (defined in section 29) as the new attorney.

⁷³ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

(3) In this section—

“**authorised investments**” means investments authorised or permitted by the *Trusts Act 1973*, or approved by the court, for the investment of trust funds.⁷⁴

Keep records

85. An attorney for a financial matter must keep and preserve accurate records and accounts of all dealings and transactions made under the power.⁷⁵

Keep property separate

86.(1) An attorney for a financial matter must keep the attorney’s property separate from the principal’s property.

(2) Subsection (1) does not apply to—

- (a) property owned jointly by the principal and attorney; or
- (b) property acquired jointly by the principal and attorney in place of property owned jointly by the principal and attorney.

(3) Subsection (1) does not affect another obligation imposed by law.

Presumption of undue influence

87. The fact that a transaction is between a principal and 1 or more of the following—

- (a) an attorney under an enduring power of attorney or advance health directive;
- (b) a relation, business associate or close friend of the attorney;

gives rise to a presumption in the principal’s favour that the principal was induced to enter the transaction by the attorney’s undue influence.

⁷⁴ See *Trusts Act 1973*, section 21 (Authorised investments).

⁷⁵ See also sections 135 (Records and audit) and 137 (Power to summon).

Gifts

88.(1) Unless there is a contrary intention expressed in the enduring power of attorney, an attorney for financial matters for an individual may give away the principal's property only if—

- (a) the gift is—
 - (i) to a relation or close friend of the principal; and
 - (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or
- (b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make;

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.

(2) The attorney or a charity with which the attorney has a connection is not precluded from receiving a gift under subsection (1).

Maintain principal's dependants

89.(1) An attorney for financial matters for an individual may provide from the principal's estate for the needs of a dependant of the principal.

(2) However, unless there is a contrary intention expressed in the enduring power of attorney, what is provided must not be more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.

PART 4—PROVISIONS ABOUT HEALTH MATTERS**Principal with impaired capacity—order of priority in dealing with special health or health matter**

90.(1) If an adult has impaired capacity for a special health matter and the adult has made an advance health directive giving a direction about the

matter, the matter may be dealt with under the direction.

(2) If an adult has impaired capacity for a health matter, the matter may be dealt with under the first of the following subsections to apply.

(3) If the adult has made an advance health directive giving a direction about the matter, the matter may be dealt with under the direction.

(4) If subsection (3) does not apply and the adult has made 1 or more enduring documents appointing 1 or more attorneys for the matter, the matter may be dealt with by the attorney or attorneys appointed by the most recent enduring document.

(5) If subsections (3) and (4) do not apply, the matter may be dealt with by the statutory health attorney.⁷⁶

Minor, uncontroversial health care without consent

91.(1) Health care (other than special consent health care) of an adult may be carried out without consent if—

- (a) a health provider considers the adult has impaired capacity for a decision about the health care; and
- (b) the health provider considers there is no statutory health attorney for the adult; and
- (c) the health provider considers the health care is—
 - (i) necessary to promote the adult's health and wellbeing; and
 - (ii) of the type that will best promote the adult's health and wellbeing; and
 - (iii) minor and uncontroversial; and
- (d) the health provider does not know, and can not reasonably be expected to know, of any dispute among interested parties about—
 - (i) the carrying out of the health care; or
 - (ii) the adult's capacity for a decision about the health care; and

⁷⁶ See section 62 (Statutory health attorney).

(e) the adult does not object to the health care.

(2) The health provider must certify in the adult's clinical records as to the various things enabling the health care to be carried out because of this section.

Effect of adult's objection to health care

92.(1) Generally, the exercise of power for a health matter or a direction in an advance health directive is ineffective to give consent to particular health care of an adult if the health provider is aware, or ought reasonably to be aware, the adult objects to the health care.

(2) However, the exercise of power for a health matter or a direction in an advance health directive (other than a direction consenting to removal of tissue for donation or consenting to research or experimental health care) is effective to give consent to the health care despite an objection by the adult to the health care if—

- (a) for a direction—the direction specifies that it operates despite objection; or
- (b) the adult has minimal or no understanding of 1 or both of the following—
 - (i) what the health care involves;
 - (ii) why the health care is required; andthe health care is likely to cause the adult—
 - (iii) no distress; or
 - (iv) temporary distress that is outweighed by the benefit to the adult of the health care.

(3) In this section—

“object”, by an adult, to health care means—

- (a) the adult indicates the adult does not wish to have the health care; or
- (b) the adult previously indicated, in similar circumstances, the adult did not then wish to have the health care and since then the adult has not indicated otherwise.

Example—

An indication may be given in an enduring power of attorney or advance health directive or in another way, including, for example, orally or by conduct.

Use of force

93. A health provider and a person acting under the health provider's direction may use the minimum force that is necessary and reasonable to carry out health care authorised under this Act.

Offence to make decision for adult if no right to do so

94. It is an offence for a person who knows the person has no right to exercise power for a health matter for an adult, or who is recklessly indifferent about whether the person has a right to exercise power for a health matter for the adult, to—

- (a) purport to exercise power for the health matter; or
- (b) represent to a health provider for the adult that the person has a right to exercise power for the health matter.

Maximum penalty—200 penalty units.

Intervention by adult guardian if dispute or contrary to health care principle

95.(1) If—

- (a) attorneys disagree about how power for a health matter should be exercised; and
- (b) the disagreement cannot be resolved by mediation by the adult guardian;

the adult guardian may exercise the power.

(2) Also, if an attorney for a health matter—

- (a) refuses to make a decision in a situation where the refusal is contrary to the health care principle; or

(b) makes a decision that is contrary to the health care principle;
the adult guardian may exercise power for the health matter.

PART 5—PROTECTION AND RELIEF FROM LIABILITY

Interpretation

96. In this part—

“**invalidity**”, of a power under a document, means invalidity because—

- (a) the document was made in another State and does not comply with the other State’s requirements; or
- (b) the power is not exercisable at the time it is purportedly exercised;
or
- (c) the document has been revoked.

“**know**”, of a power’s invalidity, includes—

- (a) know of the happening of an event⁷⁷ that invalidates the power; or
- (b) have reason to believe the power is invalid.

Protection if court advice, directions or recommendations

97. An attorney who acts in compliance with the court’s advice, directions or recommendations is taken to have complied with this Act unless the attorney knowingly gave the court false or misleading information relevant to the court’s advice, directions or recommendations.

⁷⁷ For example, a principal’s enduring power of attorney is revoked if the principal dies (section 24) or, to the extent an attorney was given power, if the attorney becomes a health provider for the principal (section 59).

Protection for attorney if unaware of invalidity

98.(1) This section applies to an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

(2) An attorney who, without knowing a power is invalid,⁷⁸ purports to exercise the power does not incur any liability, either to the principal or anyone else, because of the invalidity.

Protection for person dealing with attorney and next person if unaware of invalidity

99.(1) A person who—

- (a) deals with an attorney under a general power of attorney made under this Act, or an enduring document, (the “**document**”);⁷⁹ and
- (b) does not know, or have reason to believe, the principal did not have capacity to make the document;

is entitled to rely on the certificate of the witness to the document as evidence of the principal’s capacity to make the document.

(2) A transaction between—

- (a) an attorney purporting to use a power that is invalid; and
- (b) someone else (the “**third person**”) who does not know of the invalidity;

is, in favour of the third person, as valid as if the power were not invalid.

(3) If the interest of a purchaser depends on whether a transaction

⁷⁸ See section 113 (Declaration about validity).

⁷⁹ A general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be a general power of attorney, or enduring power of attorney, made under this Act—section 163.

between an attorney and a third person was valid because of subsection (2), it is conclusively presumed in favour of the purchaser that the third person did not at the material time know of the invalidity of the attorney's power if—

- (a) the third person makes a statutory declaration before or within 3 months after the completion of the purchase that the third person did not at the material time know of the invalidity of the attorney's power; or
- (b) the transaction between the attorney and the third person was completed within 1 year after the power of attorney was made.

(4) In subsections (2) and (3)—

“attorney” means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

Additional protection if unaware of invalidity in health context

100. A person, other than an attorney, who, without knowing an advance health directive or a power for a health matter under an enduring document is invalid, acts in reliance on the directive or purported exercise of the power, does not incur any liability, either to the adult or anyone else, because of the invalidity.

No less protection than if adult gave health consent

101. A person, other than an attorney, acting in accordance with a direction in an advance health directive, or a decision of an attorney for a health matter, is not liable for an act or omission to any greater extent than if the act or omission happened with the principal's consent and the principal had capacity to consent.

Protection of health provider unaware of advance health directive

102. A health provider is not affected by an adult's advance health directive to the extent the health provider does not know the adult has an advance health directive.

Protection of health provider for non-compliance with advance health directive

103.(1) This section applies if a health provider has reasonable grounds to believe that a direction in an advance health directive is uncertain or contrary to good medical practice or that circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate.

(2) The health provider does not incur any liability, either to the adult or anyone else, if the health provider does not act in accordance with the direction.

(3) However, if an attorney is appointed under the advance health directive, the health provider has reasonable grounds to believe that a direction in the advance health directive is uncertain only if, among other things, the health provider has consulted the attorney about the direction.

Protection of health provider acting in reliance on purported exercise of attorney's power

104.(1) To the extent a health provider giving health care to an adult complies with a purported exercise of power for a health matter by a person who represented to the health provider that the person had the right to exercise the power for the adult, the health provider is taken to have the adult's consent to the health care.

(2) Subsection (1) does not apply if the health provider knew, or could reasonably be expected to have known, the person did not have the right to exercise the power.

Relief from personal liability

105.(1) If the court considers—

- (a) an attorney is, or may be, personally liable for a breach of this Act; and
- (b) the attorney has acted honestly and reasonably and ought fairly to be excused for the breach;

the court may relieve the attorney from all or part of the attorney's personal liability for the breach.

(2) In this section—

“attorney” means—

- (a) an attorney under a general power of attorney made under this Act; or
- (b) an attorney under an enduring document; or
- (c) an attorney under a power of attorney made otherwise than under this Act, whether before or after its commencement; or
- (d) a statutory health attorney.

PART 6—COMPENSATION

Compensation for failure to comply

106.(1) An attorney may be required by a court to compensate the principal, or the principal's estate, for a loss caused by the attorney's failure to comply with this Act in the exercise of a power.

(2) If either or both of the principal or attorney has died, the application for compensation must be made to a court within 6 months after the first happening.

(3) A court may extend the application time.

(4) Compensation paid under a court order must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.

(5) In this section—

“**attorney**” means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

“**court**” means any court.

Power to apply to court for compensation for loss of benefit in estate

107.(1) This section applies if a person’s benefit in a principal’s estate under the principal’s will, on intestacy, or by another disposition taking effect on the principal’s death, is lost because of a sale or other dealing with the principal’s property by an attorney of the principal.

(2) The person, or the person’s personal representative, may apply to the Supreme Court for compensation out of the principal’s estate.

(3) The court may order that the person, or the person’s estate, be compensated out of the principal’s estate as the court considers appropriate but the compensation must not exceed the value of the lost benefit.

(4) The *Succession Act 1981*, sections 41(2) to (8), (10) and (11) and 44 apply to an application and an order made on it as if the application was an application under part 4 of that Act⁸⁰ by a person entitled to make an application.

(5) In this section—

“**attorney**” means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

⁸⁰ *Succession Act 1981*, part 4 (Family provision)

CHAPTER 6—SUPREME COURT

PART 1—GENERAL

Powers extend to powers of attorney made otherwise than under this Act

108.(1) The court's powers under this Act are not limited to general powers of attorney made under this Act and enduring documents.

(2) The court's powers under this Act extend to powers of attorney made otherwise than under this Act, whether made before or after its commencement.

Inherent jurisdiction and next friend and guardian ad litem process not affected

109.(1) This Act does not affect the court's inherent jurisdiction, including its *parens patriae* jurisdiction, or the powers the court has other than under this Act.⁸¹

(2) This Act also does not affect rules of court of the Supreme Court, District Courts or Magistrates Courts about a person who has impaired capacity suing by a 'next friend', or defending proceedings by a 'guardian ad litem', appointed by the relevant court.

PART 2—COURT'S POWERS

Application and participation

110.(1) An application may be made to the court for—

⁸¹ This jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint attorneys for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

- (a) a declaration, order, direction, recommendation or advice about something in, or related to, this Act; or
- (b) consent to a special health matter.

(2) The application may be by the principal concerned or another interested person unless this Act states otherwise.

(3) Each of the following persons may apply to the court for it to do something under this chapter about a power of attorney, enduring power of attorney or advance health directive, or the exercise of an attorney's power—

- (a) the principal;
- (b) a member of the principal's family;
- (c) an attorney;
- (d) the adult guardian or public trustee;
- (e) if the document is an advance health directive or the application involves power for a health matter—the adult guardian or a health provider of the principal;
- (f) an interested person.

(4) A person joined as a party to a proceeding under this Act or a person the court considers an interested person may participate in the proceeding.

(5) In this section—

“family”, of a principal, consists of the following members—

- (a) the principal's spouse;
- (b) each of the principal's children who is 18 years or more (including a stepchild, an adopted child, and a person for whom the principal was foster-parent or guardian when the person was a child);
- (c) each of the principal's parents (including a step-parent, adoptive parent, foster-parent and guardian);
- (d) if there is no person mentioned in paragraph (a), (b) or (c) who is reasonably available—each of the principal's siblings who is 18 years or more (including a step-sibling, adopted sibling, and foster-sibling).

Determination of capacity

111. The court may make a declaration about a person's capacity.

Effect of declaration about capacity to enter contract

112. A declaration about whether a person had capacity to enter a contract is binding in a subsequent proceeding in which the validity of the contract is in issue.

Declaration about validity

113.(1) The court may decide the validity of a power of attorney, enduring power of attorney or advance health directive.

(2) The court may declare a document mentioned in subsection (1) invalid if the court is satisfied—

- (a) the principal did not have the capacity necessary to make it;⁸² or
- (b) it does not comply with the other requirements of this Act;⁸³ or
- (c) it is invalid for another reason, for example, the principal was induced to make it by dishonesty or undue influence.

(3) If the court declares the document invalid, the court may, at the same time, appoint 1 or more attorneys⁸⁴ for the principal.

Effect of invalidity

114. If the court declares a document invalid under section 113, the document is void from the start.

⁸² See sections 41 (Principal's capacity to make an enduring power of attorney) and 42 (Principal's capacity to make an advance health directive).

⁸³ See chapter 2, part 2 (Making a power of attorney other than an enduring power of attorney) and chapter 3, part 4 (Making an enduring document), particularly section 44 (Formal requirements).

⁸⁴ The court is not limited to appointing an "eligible attorney" (defined in section 29).

Declaration about commencement of power

115. The court may make a declaration that—

- (a) a power, under a power of attorney, enduring power of attorney or advance health directive, has begun; or
- (b) the principal has impaired capacity for a matter or all matters.

Order removing attorney or changing or revoking document

116. The court may, by order—

- (a) remove an attorney and appoint a new attorney⁸⁵ to replace the removed attorney; or
- (b) remove a power from an attorney and give the removed power to another attorney or to a new attorney; or
- (c) change the terms of a power of attorney, enduring power of attorney or advance health directive; or
- (d) revoke all or part of a document mentioned in paragraph (c).

Changed circumstances as basis for change or revocation

117. Without limiting the grounds on which the court may make an order changing the terms of a power of attorney, enduring power of attorney or advance health directive, or revoking all or part of 1 of these documents, the court may make the order if the court considers the principal's circumstances or other circumstances (including, for a health power, advances in medical science) have changed to the extent that 1 or more terms of the document are inappropriate.

Advice, directions and recommendations etc.

118.(1) On an application about a matter, the court may give directions or advice or make a recommendation, order or declaration about the matter or another matter related to this Act, including about—

⁸⁵ The court is not limited to appointing an “eligible attorney” (defined in section 29).

- (a) the interpretation of the terms of, or another issue involving, a power of attorney, enduring power of attorney or advance health directive; or
- (b) the exercise of an attorney's power or another issue involving an attorney's power.

(2) Without limiting subsection (1), if the court considers it in the best interests of the principal, the court may, by order and subject to the terms the court considers appropriate, authorise an attorney, either generally or in a specific case, to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake.

Example—

Despite section 84 which limits the investments an attorney for financial matters under an enduring power of attorney⁸⁶ may make, the court may, by order, authorise the attorney to invest in investments that are not authorised or permitted by the *Trusts Act 1973* for the investment of trust funds.

Consent to special health care

119.(1) The court may give consent to special health care of an adult.

(2) To avoid any doubt, it is declared that the court's power is in addition to, and not in derogation of, the adult guardian's power under the *Intellectually Disabled Citizens Act 1985*, section 26A.⁸⁷

Court may proceed without all relevant material

120.(1) If the court considers urgent or special circumstances justify it doing so, the court may proceed to decide a matter on the information before it without receiving all relevant material.

⁸⁶ Section 84 does not apply to an enduring power of attorney made under the *Property Law Act 1974*.

⁸⁷ The *Intellectually Disabled Citizens Act 1985*, section 26A(1)—

'If the council authorises the adult guardian to act for an assisted citizen, the adult guardian may give consent for the citizen to medical, dental, surgical or other professional treatment or care ... being carried out on or provided to the citizen for the citizen's benefit by a person professionally qualified to carry it out or provide it.'

(2) If all the participants in a proceeding agree, the court may also proceed to decide a matter in the proceeding on the information before it when the agreement was reached without receiving all relevant material.

(3) Before the participants agree, the court must ensure they are aware of the material on which the matter will be decided.

Report by adult guardian or public trustee

121.(1) The court may—

- (a) receive in evidence in a proceeding a written report by the adult guardian or public trustee on a matter in the proceeding; and
- (b) have regard to the matter contained in the report.

(2) If the court receives a report in evidence in a proceeding, the principal concerned in the proceeding and each participant in the proceeding must be given a copy of the report unless the court directs otherwise.

Records and audit

122.(1) For an attorney for a financial matter under an enduring power of attorney, the court may make an order that—

- (a) the attorney files in the court, and serves on the applicant, a summary of receipts and expenditure under the power for a specified period; or
- (b) the attorney files in the court, and serves on the applicant, more detailed accounts of dealings and transactions under the power for a specified period; or
- (c) the accounts be audited by an auditor appointed by the court and that a copy of the auditor's report be given to the court and the applicant; or⁸⁸
- (d) the attorney present a plan of management for approval.

(2) The court may make the order on its own initiative or on the application of the principal or another interested person.

⁸⁸ See section 135(b) which gives the adult guardian similar power.

(3) The court may make an order about payment of the auditor's costs, including security for the costs.

Court may dismiss frivolous etc. applications

123.(1) The court may dismiss an application if the court is satisfied the application is—

- (a) frivolous or vexatious; or
- (b) misconceived or lacking in substance.

(2) If the court considers it appropriate, the court may also—

- (a) order that the applicant pay the costs of another participant in the proceeding; and
- (b) direct that the applicant must not, without the court's leave, make a subsequent application to the court of a type stated in the direction.

(3) The court may discharge or change a direction under subsection (2).

Written reasons for decision

124. On application by a person the court considers has a sufficient interest in obtaining reasons for its decision, the court must give written reasons for the decision within 28 days after the application.

Costs

125.(1) The costs of a proceeding are within the court's discretion.

(2) However, unless the court otherwise orders, costs follow the event.

CHAPTER 7—ADULT GUARDIAN

PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS

Adult guardian

126. There must be an Adult Guardian.⁸⁹

Functions

127.(1) The adult guardian's role is to protect the rights and interests of adults who have impaired capacity.

(2) The adult guardian has the functions given to the adult guardian by this Act or another Act, including the following functions—

- (a) protecting adults who have impaired capacity from neglect, exploitation or abuse;
- (b) investigating complaints and allegations about actions by an attorney or person acting or purporting to act under—
 - (i) a general power of attorney made under this Act; or
 - (ii) an enduring document; or
 - (iii) a power of attorney made otherwise than under this Act, whether before or after its commencement;
- (c) mediating and conciliating between attorneys or between attorneys and others, for example, health providers, if the adult guardian considers this appropriate to resolve a dispute;
- (d) acting as attorney—
 - (i) for a personal matter under an enduring power of attorney; or
 - (ii) under an advance health directive; or

⁸⁹ See part 4 (Administrative provisions), particularly section 150 (Appointment).

- (iii) for a health matter under chapter 4;⁹⁰ or
- (iv) if appointed by the court;
- (e) seeking assistance (including assistance from a government department, or other institution, welfare organisation or provider of a service or facility) for, making representations for, or acting for, an adult who has impaired capacity for a matter;
- (f) educating and advising people about, and conducting research into, the operation of this Act.

(3) In performing a function or exercising a power, the adult guardian must comply with the general principles and the health care principle.⁹¹

Powers

128.(1) The adult guardian has the powers given under this Act or another Act.

(2) Also, the adult guardian may do all things necessary or convenient to be done for performing the adult guardian's functions.

Not under Ministerial control

129. In performing the adult guardian's functions and exercising the adult guardian's powers, the adult guardian is not under the control or direction of the Minister.

Delegation

130.(1) The adult guardian may delegate⁹² the adult guardian's powers to an appropriately qualified member of the adult guardian's staff.

(2) Also, if the adult guardian has power for a personal matter for an adult, the adult guardian may delegate the power to make day-to-day decisions about the matter to 1 of the following—

⁹⁰ Chapter 4 (Statutory health attorneys)

⁹¹ See schedule 1.

⁹² The *Acts Interpretation Act 1954*, section 27A applies to the delegation.

- (a) an appropriately qualified carer of the adult;
- (b) a health provider of the adult;⁹³
- (c) an attorney under—
 - (i) a general power of attorney made under this Act; or
 - (ii) an enduring document; or
 - (iii) a power of attorney made otherwise than under this Act, whether before or after its commencement;
- (d) 1 of the people who could be eligible to be the adult’s statutory health attorney.

(3) In this section—

“appropriately qualified”, for a person to whom a power under an Act may be delegated, includes having the qualifications, experience or standing appropriate to exercise the power.

Example of ‘standing’ for a person working in a hospital or care facility—

A person’s level of authority in the hospital or care facility.

“day-to-day decision” means a minor, uncontroversial decision about day-to-day issues that involves no more than a low risk to the adult.

Example of day-to-day decision—

A decision about podiatry, physiotherapy, non-surgical treatment of pressure sores and health care for colds and influenza.

Consultation and employment of professionals

131.(1) The adult guardian may consult with, employ, and remunerate, the medical, legal, accounting or other professionals the adult guardian considers necessary.

(2) The adult guardian is entitled to reimbursement from an adult for remuneration paid concerning the adult.

⁹³ This is despite an adult’s paid carer or health provider not being eligible to be appointed as the adult’s attorney—see section 29 (Meaning of “eligible attorney”).

Advice and supervision

132. The adult guardian may—

- (a) give advice to an attorney; and
- (b) by written notice, make an attorney under an enduring power of attorney or advance health directive subject to the adult guardian's supervision for a reasonable period if the adult guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney has contravened this Act or the attorney's duties but has not done this wilfully; and
- (c) require an attorney who may exercise power for a financial matter under an enduring power of attorney to present a plan of management for approval.

Whistleblowers' protection

133.(1) A person is not liable, civilly, criminally or under an administrative process, for disclosing to the adult guardian information about a person's conduct that breaches this Act.

(2) Without limiting subsection (1)—

- (a) in a proceeding for defamation the discloser has a defence of absolute privilege for publishing the disclosed information; and
- (b) if the discloser would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice—the discloser—
 - (i) does not contravene the Act, oath, rule of law or practice for disclosing the information; and
 - (ii) is not liable to disciplinary action for disclosing the information.

(3) A person's liability for the person's own conduct is not affected only because the person discloses it to the adult guardian.

PART 2—INVESTIGATIVE POWERS

Investigate complaints

134. The adult guardian may investigate a complaint or allegation that an adult who has impaired capacity—

- (a) is being neglected, exploited or abused; or
- (b) has inappropriate or inadequate decision-making arrangements.

Records and audit

135. If an attorney under an enduring power of attorney⁹⁴ has power for a financial matter, the adult guardian may, by written notice to the attorney, require that—

- (a) the attorney files with the adult guardian a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, under the power for a specified period; or
- (b) the accounts be audited by an auditor appointed by the adult guardian and that a copy of the auditor's report be given to the adult guardian.⁹⁵

Right to information

136.(1) The adult guardian has a right to all the information necessary to investigate a complaint or allegation or to carry out an audit.⁹⁶

(2) On request, a person who has custody or control of the information must—

- (a) disclose the information to the adult guardian; and

⁹⁴ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

⁹⁵ See section 122 which gives the court similar power.

⁹⁶ In addition, section 81 gives the adult guardian a right to information as an attorney.

- (b) if the person is an attorney and the information is contained in a document—give the document to the adult guardian; and
- (c) if the person is not an attorney and the information is contained in a document—allow the adult guardian to inspect the document and take a copy of it.

Maximum penalty—100 penalty units.

(3) This section overrides—

- (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
- (b) any claim of confidentiality or privilege, including a claim based on legal professional privilege.

Power to summon

137.(1) For the performance of the adult guardian's functions, the adult guardian may, by written notice given to a person, require the person—

- (a) to give information by statutory declaration; or
- (b) to attend before the adult guardian at a stated time and place to give information and answer questions, or produce stated documents or things.

(2) The person must comply with the notice.

Maximum penalty—100 penalty units.

(3) The adult guardian may—

- (a) require the person either to take an oath or make an affirmation; and
- (b) administer an oath or affirmation to the person, or, if telephone conferencing, video conferencing or another form of telecommunication is to be used, make arrangements that appear to the adult guardian to be appropriate in the circumstances for administering an oath or affirmation to the person; and
- (c) allow the person to give information by tendering a written statement, verified, if the adult guardian directs, by oath or affirmation.

(4) The person must comply with a requirement under subsection (3)(a).
Maximum penalty—100 penalty units.

(5) The adult guardian must pay or tender to the person an amount equivalent to the fees and expenses allowable to witnesses under the *Magistrates Courts Rules 1960*.

Cost of investigations and audits

138.(1) If—

- (a) the adult guardian undertakes an investigation concerning a financial matter or audit at the request of a person; and
- (b) the adult guardian is satisfied the request is frivolous or vexatious or otherwise without good cause;

the adult guardian may, by written notice, require the person to pay the amount the adult guardian considers appropriate for the cost of the investigation or audit.

(2) The adult guardian may, by written notice, require a person who requests an investigation or audit to pay the amount the adult guardian considers appropriate as security for a payment under subsection (1).

False or misleading statements

139.(1) A person must not—

- (a) state anything to the adult guardian the person knows is false or misleading in a material particular; or
- (b) omit from a statement made to the adult guardian anything without which the statement is, to the person's knowledge, misleading in a material particular.

Maximum penalty—100 penalty units.

(2) It is enough for a complaint against a person for an offence against subsection (1) to state the statement made was 'false or misleading' to the person's knowledge.

False, misleading or incomplete documents

140.(1) A person must not give the adult guardian a document containing information the person knows is false, misleading or incomplete in a material particular.

Maximum penalty—100 penalty units.

(2) Subsection (1) does not apply to a person if the person, when giving the document—

- (a) tells the adult guardian, to the best of the person’s ability, how it is false, misleading or incomplete; and
- (b) if the person has, or can reasonably obtain, the correct information—gives the correct information.

(3) It is enough for a complaint against a person for an offence against subsection (1) to state the document contained information that was ‘false, misleading or incomplete’ to the person’s knowledge.

Obstructing investigation or audit

141.(1) A person must not obstruct or improperly influence the conduct of an investigation or audit.

Maximum penalty—100 penalty units.

(2) In this section—

“**influence**” includes attempt to influence.

“**obstruct**” includes hinder, resist and attempt to obstruct.

Report after investigation or audit

142.(1) After the adult guardian has carried out an investigation or audit, the adult guardian must make a written report and give a copy of the report to any person at whose request the investigation or audit was carried out and to every attorney.

(2) It is a lawful excuse for the publication of any defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for the purposes of this Act.

(3) The adult guardian must allow an interested person to inspect a copy of the report at all reasonable times and, at the person's own expense, to be given a copy of the report.

PART 3—PROTECTIVE POWERS

Proceedings for protection of property

143.(1) If the adult guardian considers that—

- (a) property of an adult who has impaired capacity is wrongfully held, detained, converted or injured; or
- (b) money is payable to the adult;

the adult guardian, either in the name of the adult guardian or the adult, may claim and recover possession of the property, damages for conversion of or injury to the property, or payment of the money, by application to the court by originating summons.

(2) However—

- (a) the adult guardian may proceed in another way; and
- (b) the court may direct that the adult guardian proceed in another way, for example, by bringing an action or other proceeding.

(3) The court may make—

- (a) an order requiring the person proceeded against to give up possession of the property or to pay damages as assessed by the court for the conversion of or injury to the property, or payment of the money; and
- (b) an order about costs it considers appropriate.

(4) An order under this section has the same effect and may be enforced in the same way as a judgment of the court.

Suspension

144.(1) This section applies to an attorney under an enduring document.⁹⁷

(2) The adult guardian may, by written notice to an attorney, suspend the operation of all or some of the attorney's power if the adult guardian suspects, on reasonable grounds, that the attorney is not suitable or competent, for example, because—

- (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
- (b) the attorney has neglected the attorney's duties, or abused the attorney's powers (whether generally or in relation to a specific power); or
- (c) the attorney has otherwise contravened this Act.

(3) The suspension may not be for more than 3 months.⁹⁸

(4) During the suspension—

- (a) the public trustee must exercise suspended power for a financial matter; and
- (b) the adult guardian must exercise suspended power for a personal matter.

(5) The adult guardian may lift the suspension with or without conditions.

(6) The attorney may apply to the court and the court may make the order it considers appropriate.

⁹⁷ An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act—section 163.

⁹⁸ During this period, the adult guardian may carry out an investigation (section 134) or audit (section 135) or apply to the court to remove the attorney's power or revoke the enduring power of attorney (section 116) or to give directions or advice or make a recommendation, order or declaration about a matter (section 118).

Application for entry and removal warrant

145.(1) The adult guardian may apply to a magistrate for a warrant to enter a place and to remove an adult.

(2) The application must be sworn and state the grounds on which the warrant is sought.

(3) The magistrate may refuse to consider the application until the adult guardian gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.

Example—

The magistrate may require additional information supporting the application to be given by statutory declaration.

Issue of entry and removal warrant

146.(1) The magistrate may issue a warrant only if the magistrate is satisfied there are reasonable grounds for suspecting there is an immediate danger, because of neglect, exploitation or abuse, to an adult who has impaired capacity for a matter.

(2) The warrant must state—

- (a) that the adult guardian may, with necessary and reasonable help and force, enter the place and remove the adult; and
- (b) the hours of the day or night when the place may be entered; and
- (c) the date, within 14 days after the warrant's issue, the warrant ends.

Role of occupier if entry and removal warrant

147.(1) The adult guardian may require the occupier of the place or another person at the place to help in the exercise of the adult guardian's powers under the warrant.

(2) When making the requirement, the adult guardian making it must warn that it is an offence to fail to comply with the requirement unless a person has a reasonable excuse.

(3) A person required to give reasonable help must comply with the

requirement, unless the person has a reasonable excuse.

Maximum penalty—100 penalty units.

Role of police officer if entry and removal warrant

148.(1) The adult guardian may ask a police officer to help in the exercise of the adult guardian's powers under the warrant.

(2) The police officer must give the adult guardian the reasonable help the adult guardian requires, if it is practicable to give the help.

Reporting requirement after removal of adult

149. As soon as practicable after the adult has been removed under the warrant, the adult guardian must apply to the court for the orders the adult guardian considers appropriate about the following—

- (a) the adult's personal welfare;
- (b) a power of attorney, enduring power of attorney or advance health directive of the adult;
- (c) an attorney of the adult.

PART 4—ADMINISTRATIVE PROVISIONS

Appointment

150.(1) The adult guardian is to be appointed on a full-time basis by the Governor in Council.

(2) A person may not hold office as adult guardian at the same time as the person holds another office having functions concerning the protection of the rights and interests of, or the provision of services or facilities to, adults who have impaired capacity.

Duration of appointment

151.(1) The adult guardian holds office for a term of not longer than 5 years.⁹⁹

(2) The office of adult guardian becomes vacant if the adult guardian resigns by signed notice of resignation given to the Governor in Council.

(3) The Governor in Council may remove the adult guardian from office for—

- (a) physical or mental incapacity to perform official duties satisfactorily; or
- (b) neglect of duty; or
- (c) dishonourable conduct; or
- (d) being found guilty of an offence that, in the Minister's opinion, makes the person unsuitable to perform official duties.

Terms of appointment

152.(1) The adult guardian is to be paid the remuneration and allowances decided by the Governor in Council.

(2) To the extent this Act does not state the terms on which the adult guardian holds office, the adult guardian holds office on the terms decided by the Governor in Council.

Leave of absence

153. The Minister may give the adult guardian leave of absence on the terms the Minister considers appropriate.

Acting adult guardian

154. The Governor in Council may appoint a person to act as the adult guardian—

⁹⁹ However, the adult guardian may be reappointed—see *Acts Interpretation Act 1954*, section 25(1)(c).

- (a) for any period the office is vacant; or
- (b) for any period, or all periods, when the adult guardian is absent from duty or is, for another reason, unable to perform the duties of the office.

Staff

155.(1) Staff necessary to enable the adult guardian to perform the adult guardian's functions are to be appointed under the *Public Service Act 1996*.

(2) The adult guardian has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit made up of the adult guardian's staff, as if—

- (a) the unit were a department within the meaning of the *Public Service Act 1996*; and
- (b) the adult guardian were the chief executive of the department.

Protection from liability

156.(1) In this section—

“official” means a person who is or has been—

- (a) the adult guardian; or
- (b) a member of the adult guardian's staff; or
- (c) a professional consulted or employed by the adult guardian; or
- (d) an expert adviser to the adult guardian.

(2) The official is not civilly liable for an act done, or omission made, honestly and without negligence under this Act.

(3) If subsection (2) prevents a civil liability attaching to an official, the liability attaches instead to the State.

Preservation of confidentiality

157.(1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the

information to anyone other than under subsection (3).

(2) A person gains information through involvement in the administration of this Act if the person gains the information because of being, or an opportunity given by being—

- (a) the adult guardian; or
- (b) a member of the adult guardian's staff; or
- (c) a professional consulted or employed by the adult guardian; or
- (d) an expert adviser to the adult guardian.

(3) A person may make a record of confidential information, or disclose it to someone else—

- (a) for this Act; or
- (b) to discharge a function under another law; or
- (c) for a proceeding in a court or relevant tribunal; or
- (d) if authorised under a regulation or another law; or
- (e) if authorised by the person to whom the information relates.

(4) In this section—

“confidential information” includes information about a person's affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

Disclosure of information about investigations

158.(1) Section 157¹⁰⁰ does not prevent the adult guardian from disclosing information to a person or to members of the public about an issue the subject of an investigation by the adult guardian if the adult

¹⁰⁰ Section 157 prohibits the improper recording or disclosure of confidential information.

guardian is satisfied the disclosure is necessary and reasonable in the public interest.

(2) However, the adult guardian must not make the disclosure if it is likely to prejudice the investigation.

(3) In a disclosure under subsection (1), the adult guardian—

- (a) may express an opinion expressly or impliedly critical of an entity only if the adult guardian has given the entity an opportunity to answer the criticism; and
- (b) may identify the complainant directly or indirectly, only if it is necessary and reasonable.

Budget

159. The adult guardian must submit for approval of the Minister a budget for each financial year.

Annual report

160.(1) The adult guardian must, as soon as practicable after each financial year—

- (a) prepare a report on the exercise of the adult guardian's functions during the year; and
- (b) give a copy of the report to the Minister.

(2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report.

CHAPTER 8—OTHER

Chief executive may approve forms

161. The chief executive may approve forms for use under this Act.

Regulation-making power

162. The Governor in Council may make regulations under this Act.

CHAPTER 9—TRANSITIONAL AND CONSEQUENTIAL

PART 1—TRANSITIONAL

Powers of attorney under Property Law Act 1974

163. Except where this Act expressly provides otherwise, on the commencement of this section, a general power of attorney, or enduring power of attorney, made under the *Property Law Act 1974* and of force and effect immediately before the commencement of this section is taken to be a general power of attorney, or enduring power of attorney, made under this Act.

PART 2—AMENDMENT OF FREEDOM OF INFORMATION ACT 1992

Act amended in pt 2

164. This part amends the *Freedom of Information Act 1992*.

Amendment of s 11 (Act not to apply to certain bodies etc.)

165. Section 11(1)—

insert—

‘(o) the adult guardian in relation to an investigation or audit; or’.

PART 3—AMENDMENT OF INTELLECTUALLY DISABLED CITIZENS ACT 1985

Act amended in pt 3

166. This part amends the *Intellectually Disabled Citizens Act 1985*.

Amendment of section 4 (Definitions)

167. Section 4—

insert—

‘**“adult guardian”** means the adult guardian established under the *Powers of Attorney Act 1998*.’.

Amendment of section 13A (Allocation of duties to panels)

168.(1) Section 13A(1), ‘determine that the application or review be’—
omit, insert—

‘decide that the application or review is to be’.

(2) Section 13A(2A), (4) and (5)—

renumber as section 13A(5), (6) and (7).

(3) Section 13A(2) and (3)—

omit, insert—

(2) If the chairperson decides that the application or review is to be allocated to a panel, the chairperson may constitute as a panel—

- (a) 3 people who are members or panel members or a combination of both, 1 of whom must be appointed by the chairperson as convener of the panel; or
- (b) for a review, or an application for a review, that the chairperson considers would be appropriately dealt with by a single member panel—1 person who is a member or panel member and who must be appointed by the chairperson as convener of the panel.

(3) If an application or review is allocated to a panel, the panel must—

- (a) proceed on the papers, that is, consider the written material and submissions placed before it, by the chairperson or by persons entitled to be present at the proceedings,¹⁰¹ without an oral hearing unless—
 - (i) the panel considers it inappropriate to do so; or
 - (ii) a person entitled to be present requires an oral hearing; and
- (b) decide the application or review unless the chairperson directs otherwise, for example, by asking the panel to make recommendations only.

‘(4) For this Act, a decision of a panel about an application or review is taken to be a decision of the council.’

Amendment of s 18 (Quorum)

169.(1) Section 18(1), from ‘(other than’ to ‘subsection (2))’—

omit.

(2) Section 18(2)—

omit.

Amendment of s 19 (Meetings)

170.(1) Section 19(3), ‘, at a meeting’ to ‘section 18(2)’—

omit.

(2) Section 19(5)—

omit.

Replacement of pt 2A (Legal friend)

171. Part 2A—

omit, insert—

¹⁰¹ See section 29 (Notice of proceedings etc.) and section 30(3).

‘PART 2A—LEGAL FRIEND AND ADULT GUARDIAN

‘Legal friend

‘26.(1) Subject to the direction of the Minister, the legal friend may do any of the following—

- (a) obtain for or provide to an assisted citizen or the citizen’s relative approved under this Act or, if a relative has not been approved, the citizen’s nearest relative, information about the citizen’s legal rights and legal procedures and specialised services that are available to help the citizen;
- (b) if the legal friend is satisfied that an assisted citizen cannot effectively instruct a lawyer—instruct a lawyer to act for the citizen;
- (c) liaise with government departments, other organisations or persons for an assisted citizen;
- (d) perform the other functions¹⁰² that are prescribed.

‘(2) In acting for an assisted citizen, the legal friend must carry out the citizen’s wishes as expressed to the legal friend, or, if the citizen is unable to express his or her wishes, the legal friend must act in the way the legal friend considers the citizen would wish to act if the citizen were able to express his or her wishes.

‘Adult guardian

‘26A.(1) If the council authorises the adult guardian to act for an assisted citizen, the adult guardian may give consent for the citizen to medical, dental, surgical or other professional treatment or care (whether a single item of treatment or care or a course of treatment or care over a period) being carried out on or provided to the citizen for the citizen’s benefit by a person professionally qualified to carry it out or provide it.

‘(2) However, before deciding whether or not to consent, the adult

¹⁰² **“Function”** includes duty—*Acts Interpretation Act 1954*, section 36.

guardian must—

- (a) take all reasonable steps to consult with relatives of the assisted citizen who are providing ongoing care for the citizen and give proper consideration to their view; and
- (b) take all reasonable steps to become as fully informed as possible on matters requiring consent and the options available; and
- (c) for paragraph (b), consult with—
 - (i) persons who are providing ongoing care for the assisted citizen; and
 - (ii) appropriate professional persons; and
 - (iii) relatives of the assisted citizen or other persons who appear to the adult guardian to have a proper interest in the wellbeing of the assisted citizen; and
- (d) ensure the assisted citizen is informed as fully as possible on matters requiring consent and the options available, consistent with the citizen’s ability to understand the information.

‘(3) If consenting, the adult guardian must ensure that, as far as possible, the consent is for the least restrictive option available, after taking into consideration the health, wellbeing and expressed wishes of the assisted citizen.

‘(4) However, the adult guardian must not consent if to consent would be inconsistent with a direction given by the assisted citizen in an advance health directive under the *Powers of Attorney Act 1998*.¹⁰³

‘(5) Also, if a committee of the person of an assisted citizen is appointed under the *Mental Health Act 1974*, the adult guardian must not consent without the committee’s agreement.

‘(6) Consent by the adult guardian may be given effect to, and, if given effect to, has the same force and effect as if the citizen—

- (a) had given the consent rather than the adult guardian; and
- (b) were of full legal capacity.

¹⁰³ Under section 31A(5), an assisted citizen’s attorney (including a statutory health attorney) is subject to the adult guardian’s control.

‘Acting before assisted citizen status

‘26B.(1) This section applies if the legal friend or adult guardian (the “officer”) considers that—

- (a) a citizen is an intellectually disabled citizen; and
- (b) obtaining the council’s approval under section 31A would cause unreasonable delay.

‘(2) The officer may, with the chairperson’s approval, act under this part for the citizen as if the citizen were an assisted citizen and the officer had been authorised under section 31A(4) to act for the citizen.

‘(3) However, when acting under subsection (2), the adult guardian may consent to treatment or care being carried out only if it is necessary to alleviate or prevent the citizen being subject to significant illness or suffering or to preserve the citizen’s life.

‘(4) As soon as possible after acting under subsection (2), the officer must make or cause to be made an application under section 27.

‘Protection when supplying information

‘26C. Supplying information to the legal friend or adult guardian for a purpose under this Act is not unprofessional conduct or a breach of professional ethics on the part of the person supplying the information.

‘Advice to council

‘26D. If asked, the legal friend or adult guardian must obtain advice for, or give advice to, the council.

‘Independence

‘26E. The legal friend and adult guardian are not accountable in the discharge of their duties under this Act to the council or the chief executive.

‘Powers of Attorney Act principles

‘26F. In performing a function or exercising a power, the legal friend

and adult guardian must comply with the principles in the *Powers of Attorney Act 1998*, schedule 1.’.

Amendment of s 27 (Applications for approvals and reviews)

172.(1) Section 27(2), after ‘appears to’—

insert—

‘any of the following persons’.

(2) Section 27(2)(d) and (e)—

renumber as section 27(2)(e) and (f).

(3) Section 27(2)—

insert—

‘(d) the adult guardian;’.

(4) Section 27(2)(e), as renumbered, ‘any other’—

omit, insert—

‘an’.

(5) Section 27(2), ‘the relative’ to ‘an application’—

omit, insert—

‘the person may apply’.

(6) Section 27(4)(c)—

renumber as section 27(4)(d).

(7) Section 27(4)—

insert—

‘(c) the adult guardian; or’.

(8) Section 27(4)(d), as renumbered, ‘any other’—

omit, insert—

‘an’.

(9) Section 27(5), ‘subsection (2)(e)’—

omit, insert—

‘subsection (2)(f)’.

Amendment of s 28 (Review)

173. Section 28, from ‘thereafter at least once in every 5 years’—

omit, insert—

‘, after that, as the council considers appropriate.’.

Amendment of s 29 (Notice of proceedings etc.)

174.(1) Section 29(2)(a)(iv), (b)(iv) and (c)(iii), ‘exhibited a continuing’—

omit, insert—

‘a proper’.

(2) Section 29(4), ‘subsection (3)(b)’—

omit, insert—

‘subsection (3B)’.

(3) Section 29(5)—

omit.

Replacement of s 30 (Proceedings on applications and reviews)

175. Section 30—

omit, insert—

‘Proceedings on applications and reviews

‘30.(1) In proceedings under section 28 or 29 concerning a citizen, procedure is according to the directions of the chairperson if it is not provided for by this Act.

‘(2) The chairperson may give procedural directions of general or limited application.

‘(3) In proceedings under section 28 or 29 concerning a citizen, the

council or panel may—

- (a) receive in evidence in a proceeding a written report by a person on the citizen's circumstances; and
- (b) have regard to the matter contained in the report.

‘(4) The chairperson or, if the proceedings are before a panel, the convenor may—

- (a) authorise a person to interview the citizen and give the council or panel a written report on the citizen's circumstances; and
- (b) authorise the person to be present and to be heard at the proceedings.

‘(5) If the citizen does not attend the proceedings, the council or panel must receive a written report on the citizen's circumstances before deciding the application or review.

Example—

This may happen if the matter is decided on the papers (section 13A(3)(b)) or if the citizen is unable to attend because of the severity of the citizen's disability.

‘(6) The council or panel is not bound by any rules or practice as to evidence and may inform itself about a matter in the way it considers appropriate.’.

Amendment of s 31A (Consideration of applications etc.)

176.(1) Sections 31A(3)(b)(iii) and 31A(4)(a)(ii), ‘legal friend’—

omit, insert—

‘adult guardian’.

(2) Section 31A(4)(b)—

omit, insert—

- ‘(b) may, if it is of the opinion that the citizen is not competent in law as provided in subsection (3)(b), authorise the legal friend or adult guardian to act under part 2A for the citizen to the least extent required;’.

(3) Section 31A(6)—

renumber as section 31A(7).

(4) Section 31A(5)—

omit, insert—

‘**(5)** If the council authorises the adult guardian to act under part 2A for the citizen, then, in relation to a matter for which the adult guardian may give consent, the citizen’s attorney under the *Powers of Attorney Act 1998* (including a statutory health attorney) may exercise power only to the extent authorised by the adult guardian.

‘**(6)** Subsections (1) to (5) apply to a panel deciding an application or review as if it were the council.¹⁰⁴’

Amendment of s 44 (Access to certain intellectually disabled citizens)

177.(1) Section 44(1)(b)—

omit, insert—

‘(b) the adult guardian; or’.

(2) Section 44(2)—

omit, insert—

‘**(2)** If the occupier or person in charge refuses to allow the legal friend or adult guardian (the “**officer**”) to enter the premises, the officer may require the occupier or person in charge to show cause to the officer why entry should not be allowed.’

(3) Section 44(6)(b)(i), ‘a person referred to in subsection (1)(b)’—

omit, insert—

‘adult guardian’.

(4) Section 44(7), ‘or, as the case’ to ‘(6)(b)(ii)’—

omit, insert—

‘, adult guardian or a person referred to in subsection (6)(b)(ii)’.

¹⁰⁴ Under section 26A(4), the adult guardian must not consent if to consent would be inconsistent with a direction given by the citizen in an advance health directive.

Amendment of s 48 (Protection from liability)

178. Section 48(1)—

insert—

‘(e) the adult guardian.’.

PART 4—AMENDMENT OF LAND ACT 1994**Act amended in pt 4**

179. This part amends the *Land Act 1994*.

Amendment of s 385 (Acts by attorneys)

180.(1) Section 385, heading—

omit, insert—

‘Acts in relation to substitute decision makers’.

(2) Section 385—

insert—

‘(2) If—

- (a) an act is required or permitted to be done in relation to a person under this Act; and
- (b) the person has a power of attorney that gives an attorney power to deal with land;

the act may be done in relation to the attorney.’.

PART 5—AMENDMENT OF PROPERTY LAW ACT 1974

Act amended in pt 5

181. This part amends the *Property Law Act 1974*.

Omission of pt 9 (Powers of attorney)

182. Part 9—

*omit.*¹⁰⁵

PART 6—AMENDMENT OF PUBLIC TRUSTEE ACT 1978

Act amended in pt 6

183. This part amends the *Public Trustee Act 1978*.

Insertion of new s 63A

184. In part 5, after section 63—

insert—

‘Adult guardian resources

‘63A.(1) The public trustee must give the adult guardian,¹⁰⁶ in accordance with the adult guardian’s budget approved by the Minister for the financial year, the financial and other resources (including professional and administrative services and support) necessary or desirable for the performance of the adult guardian’s functions.

¹⁰⁵ See section 163 (Powers of attorney under Property Law Act 1974) for a transitional provision.

¹⁰⁶ The adult guardian is constituted under the *Powers of Attorney Act 1998*.

‘(2) The resources must also include any resources the Minister may specify in writing to the public trustee.’.

SCHEDULE 1

PRINCIPLES

section 76

PART 1—GENERAL PRINCIPLES

Presumption of capacity

1. An adult is presumed to have capacity for a matter.

Same human rights

2.(1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.

(2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

Individual value

3. An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

Valued role as member of society

4.(1) An adult's right to be a valued member of society must be recognised and taken into account.

(2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

Participation in community life

5. The importance of encouraging and supporting an adult to live a life in

SCHEDULE 1 (continued)

the general community, and to take part in activities enjoyed by the general community, must be taken into account.

Encouragement of self-reliance

6. The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

Maximum participation, minimal limitations and substituted judgment

7.(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life (including the development of policies, programs and services for people who have impaired capacity) must be recognised and taken into account.

(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.

(3) So, for example—

- (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
- (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
- (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

(4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act, or an enduring document, must take into account what the person or other entity considers

SCHEDULE 1 (continued)

would be the adult's views and wishes.

(5) However, a person or other entity in performing a function or exercising a power under this Act, or an enduring document, must do so in a way consistent with the adult's proper care and protection.

(6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

Maintenance of existing supportive relationships

8. The importance of maintaining an adult's existing supportive relationships must be taken into account.

Maintenance of environment and values

9.(1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.

(2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition¹⁰⁷ or Island custom¹⁰⁸), must be taken into account.

¹⁰⁷ **“Aboriginal tradition”** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36.

¹⁰⁸ **“Island custom”**, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36.

SCHEDULE 1 (continued)

Appropriate to circumstances

10. Power for a matter should be exercised by an attorney for an adult in a way that is appropriate to the adult’s characteristics and needs.

Confidentiality

11. An adult’s right to confidentiality of information about the adult must be recognised and taken into account.

PART 2—HEALTH CARE PRINCIPLE**Health care principle**

12.(1) The “**health care principle**” means that power for a health matter for an adult should be exercised by an attorney—

- (a) in the way least restrictive of the adult’s rights; and
- (b) only if the exercise of the power is appropriate to promote and maintain the adult’s health and wellbeing.

Example of exercising power in the way least restrictive of the adult’s rights—

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

(2) In deciding whether the exercise of a power is appropriate, the attorney must, to the greatest extent practicable—

- (a) seek the adult’s views and wishes and take them into account; and
- (b) take the information given by the adult’s health provider¹⁰⁹ into account.

(3) Views and wishes may be expressed orally, in writing (for example, in an advance health directive) or in another way, including, for example, by

¹⁰⁹ See section 81 of the Act (Right of attorney to information).

SCHEDULE 1 (continued)

conduct.

(4) The health care principle does not affect any right an adult has to refuse health care.

SCHEDULE 2

TYPES OF MATTERS

schedule 3

PART 1—FINANCIAL MATTERS

Financial matter

1.(1) A “**financial matter**”, for a principal, is a matter relating to the principal’s financial, property or legal affairs, including, for example, a matter relating to 1 or more of the following—

- (a) paying maintenance and accommodation expenses for the principal and the principal’s dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the principal or a dependant of the principal;
- (b) paying the principal’s debts (including any fees and expenses to which an attorney is entitled under a document made by the principal or under a law);
- (c) receiving and recovering money payable to the principal;
- (d) carrying on any trade or business of the principal;
- (e) performing contracts entered into by the principal;
- (f) discharging a mortgage over the principal’s property;
- (g) paying rates, taxes, insurance premiums or other outgoings for the principal’s property;
- (h) insuring the principal or the principal’s property;
- (i) otherwise preserving or improving the principal’s estate;
- (j) investing for the principal;
- (k) continuing investments of the principal, including taking up rights

SCHEDULE 2 (continued)

to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding;

- (l) undertaking a real estate transaction for the principal;
- (m) dealing with land under the *Land Act 1994* or *Land Title Act 1994*;
- (n) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (o) a legal matter involving the principal or the principal's property.

(2) A matter relating to the principal's legal affairs includes, for example, a matter relating to—

- (a) use of legal services to obtain information about the principal's legal rights; and
- (b) use of legal services to undertake a transaction; and
- (c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity (including an application under the *Succession Act 1981*, part 4¹¹⁰ or an application for compensation arising from a compulsory acquisition); and
- (d) bringing or defending a proceeding, including settling a claim (whether before or after the start of the proceeding).

¹¹⁰ This enables the Supreme Court to make provision for a dependant of a deceased person from the deceased person's estate if adequate provision is not made from the estate for the dependant's proper maintenance and support.

SCHEDULE 2 (continued)

PART 2—PERSONAL MATTER**Personal matter**

2. A “**personal matter**”, for a principal, is a matter (other than a special personal matter or special health matter) relating to the principal’s care (including health care) or welfare.

Examples—

A matter relating to 1 or more of the following—

- where the principal lives
- with whom the principal lives
- whether the principal works and, if so, the kind and place of work and the employer
- what education or training the principal undertakes
- whether the principal applies for a licence or permit
- day-to-day issues, including, for example, diet and dress
- health care of the principal.

Special personal matter

3. A “**special personal matter**”, for a principal, is a matter relating to 1 or more of the following—

- (a) making or revoking the principal’s will;
- (b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the principal;
- (c) exercising the principal’s right to vote in a Commonwealth, State or local government election or referendum;
- (d) consenting to adoption of a child of the principal under 18 years;
- (e) consenting to marriage of the principal.¹¹¹

¹¹¹ An attorney may not be given power for a special personal matter.

SCHEDULE 2 (continued)

Health matter

4. A “**health matter**”, for a principal, is a matter relating to health care (other than special health care) of the principal.

Health care

5. “**Health care**”, of a principal, is care or treatment of, or a service or a procedure for, the principal—

- (a) to diagnose, maintain, or treat the principal’s physical or mental condition; and
- (b) carried out by, or under the supervision of, a health provider;

but does not include—

- (c) first aid treatment; or
- (d) a non-intrusive examination made for diagnostic purposes; or
- (e) the administration of a pharmaceutical drug if—
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the drug is normally self-administered; and
 - (iii) the administration is for a recommended purpose and at a recommended dosage level.

Example of paragraph (d)—

A visual examination of a principal’s mouth, throat, nasal cavity, eyes or ears.

Special health matter

6. A “**special health matter**”, for a principal, is a matter relating to special health care of the principal.¹¹²

¹¹² An attorney may not be given power for a special health matter.

However, a principal may give a direction about a special health matter in an advance health directive.

SCHEDULE 2 (continued)

Special health care

7. “**Special health care**”, of a principal, is health care of the following types—

- (a) removal of tissue from the principal while alive¹¹³ for donation to someone else;
- (b) sterilisation of the principal;
- (c) termination of a pregnancy of the principal;
- (d) participation by the principal in research or experimental health care;
- (e) psychiatric health care of the principal prescribed under the regulations;¹¹⁴
- (f) withholding or withdrawal of life-sustaining measures;
- (g) other health care of the principal prescribed under the regulations.

Removal of tissue for donation

8.(1) “**Removal of tissue for donation**” to someone else includes removal of tissue from the principal so laboratory reagents, or reference and control materials, derived completely or partly from pooled human plasma may be given to the other person.

(2) “**Tissue**” is—

- (a) an organ, blood or part of a human body; or
- (b) a substance that may be extracted from an organ, blood or part of a human body.

¹¹³ As an attorney’s power ceases on the principal’s death, an attorney has no power in relation to tissue donation by a deceased principal. Instead, see the *Transplantation and Anatomy Act 1979*, particularly section 22.

¹¹⁴ However, if a principal is a person liable to be detained under the *Mental Health Act 1974*, safeguards apply—see section 38(2) of the Act (Act’s relationship with Mental Health Act).

SCHEDULE 2 (continued)

Sterilisation

9.(1) “Sterilisation” is health care of a principal, who is, or is reasonably likely to be, fertile, intended, or reasonably likely, to make the principal, or ensure the principal is, permanently infertile.

(2) Sterilisation does not include health care primarily to treat organic malfunction or disease of the principal.

Termination

10. “Termination”, of a pregnancy of a principal, does not include health care primarily to treat organic malfunction or disease of the principal.

Primary reason for treatment

11. “Health care primarily to treat organic malfunction or disease”, of a principal, is health care without which an organic malfunction or disease of the principal is likely to cause serious or irreversible damage to the principal’s physical health.

Examples—

1. Health care involving sterilisation may be primarily to treat organic malfunction or disease if the principal has cancer affecting the reproductive system or cryptorchidism.

2. A procedure involving termination of a pregnancy may be primarily to treat organic malfunction if the principal is a pregnant woman requiring abdominal surgery for injuries sustained in an accident.

Life-sustaining measures

12. “Life-sustaining measures” is health care intended to sustain or prolong life and which supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, and includes assisted ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation.

SCHEDULE 3**DICTIONARY**

section 3

“adult guardian” see section 126 and 150.

“advance health directive” see section 35.

“approved form” means a form approved by the chief executive under section 161.

“attorney” means—

- (a) an attorney under a power of attorney, enduring power of attorney or advance health directive; or
- (b) a statutory health attorney.

“capacity”, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) communicating the decisions in some way.¹¹⁵

“close friend”, of a person, means another person who has a close personal relationship with the first person and a personal interest in the first person’s welfare.

“commissioner for declarations” see the *Justices of the Peace and Commissioners for Declarations Act 1991*.

“conflict transaction” see section 73.

¹¹⁵ A person dealing with an attorney may be able to rely on the witness’ certificate on a document as evidence of the principal’s capacity to make the document—section 99(1) (Protection for person dealing with attorney and next person if unaware of invalidity). Also, if an attorney’s power for a matter depends on the principal having impaired capacity for a matter, a person dealing with the attorney may ask for evidence, for example a medical certificate, to establish that the principal has the disability—section 33(5) (When attorney’s power exercisable).

SCHEDULE 3 (continued)

“court” means the Supreme Court.

“de facto spouse”, of a person concerned, means a person who—

- (a) has lived in a connubial relationship with the person concerned for a continuous period of at least 5 years ending at the relevant time; or
- (b) within the period of 6 years ending at the relevant time, has lived in a connubial relationship with the person concerned for periods totalling at least 5 years that include a period ending at the relevant time.

“dependant”, of a principal, means a person who is completely or mainly dependent on the principal.

“eligible attorney” see section 29.

“eligible signer” see section 30.

“eligible witness” see section 31.

“enduring document” see section 28.

“enduring power of attorney” see section 32.

“financial matter” see schedule 2, section 1.

“general power of attorney made under this Act” see section 8.

“general principles” see schedule 1, part 1.

“health care” see schedule 2, section 5.

“health care primarily to treat organic malfunction or disease” see schedule 2, section 11.

“health care principle” see schedule 1, section 12.

“health matter” see schedule 2, section 4.

“health provider” means a person who provides health care in the practice of a profession or the ordinary course of business.

Example—

dentist

“impaired capacity”, for a person for a matter, means the person does not

 SCHEDULE 3 (continued)

have capacity for the matter.

“insolvent” includes external administration (for example, liquidation, receivership or compromise entered into with creditors) under the Corporations Law or a similar law of a foreign jurisdiction.

“interested person” means a person who has an appropriate interest in the principal.

“life-sustaining measures” see schedule 2, section 12.

“matter” includes a type of matter.

Example—

A reference in section 10(1)(a) to a person appointing an attorney to exercise power for a matter includes a reference to a person appointing an attorney to exercise power for a type of matter (for example, certain, but not all, financial matters).

“paid carer”, for a principal, means someone who—

- (a) performs services for the principal’s care; and
- (b) receives remuneration from any source for the services, other than—
 - (i) a carer payment or other benefit received from the Commonwealth or a State for providing home care for the principal; or
 - (ii) remuneration attributable to the principle¹¹⁶ that damages may be awarded by a court for voluntary services performed for the principal’s care.

“personal matter” see schedule 2, section 2.

“power”, for a matter, means power to make all decisions about the matter and otherwise exercise the power.

¹¹⁶ This principle was established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161—see Queensland Law Reform Commission Report No. 45, *The assessment of damages in personal injury and wrongful death litigation, Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867*, October 1993. The *Common Law Practice Act 1867*, section 15C has been relocated to the *Supreme Court Act 1995* as section 23.

SCHEDULE 3 (continued)

“power of attorney given as security” see section 10(1).

“principal” means—

- (a) in the context of a power of attorney, enduring power of attorney or advance health directive or an attorney under 1 of these documents—the person who made the document or appointed the attorney; or
- (b) in the context of a statutory health attorney—the person for whom the statutory health attorney is statutory health attorney.

“relation”, of a person, means—

- (a) a spouse of the first person; or
- (b) a person who is related to the first person by blood, marriage or adoption or because of a de facto relationship, foster relationship or a relationship arising because of a legal arrangement; or

Example of legal arrangement—

- 1. Court order for custody.
- 2. Trust arrangement between trustee and beneficiary.
 - (c) a person on whom the first person is completely or mainly dependent; or
 - (d) a person who is completely or mainly dependent on the first person; or
 - (e) a person who is a member of the same household as the first person.

“removal of tissue for donation” see schedule 2, section 8(1).

“special health care” see schedule 2, section 7.

“special health matter” see schedule 2, section 6.

“special personal matter” see schedule 2, section 3.

“spouse” includes a de facto spouse.

“statutory health attorney” see section 63.

“sterilisation” see schedule 2, section 9.

SCHEDULE 3 (continued)

“**term**” includes condition, limitation and instruction.

“**termination**” see schedule 2, section 10.

“**tissue**” see schedule 2, section 8(2).