



Queensland

Guardianship and Administration and Other Legislation Amendment Act 2019

Act No. 9 of 2019

An Act to amend the Government Owned Corporations Act 1993, the Guardianship and Administration Act 2000, the Integrity Act 2009, the Powers of Attorney Act 1998, the Public Guardian Act 2014 and the Public Interest Disclosure Act 2010 for particular purposes

[Assented to 11 April 2019]



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The Parliament of Queensland enacts—

Part 1 Preliminary

1 Short title

This Act may be cited as the *Guardianship and Administration and Other Legislation Amendment Act 2019*.

2 Commencement

Parts 3, 5, 6 and 8 and schedule 1 commence on a day to be fixed by proclamation.

Part 2 Amendment of Government Owned Corporations Act 1993

3 Act amended

This part amends the *Government Owned Corporations Act 1993*.

4 Amendment of s 156 (Application of Crime and Corruption Act)

(1) Section 156—

insert—

(7A) This section is declared to be a Corporations legislation displacement provision for the purposes of the Corporations Act, section 5G, in relation to section 1317AE of that Act.

[s 5]

Note—

The Corporations Act, section 5G, provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

- (2) Section 156(7A) and (8)—
renumber as section 156(8) and (9).

Part 3

Amendment of Guardianship and Administration Act 2000

5 Act amended

This part amends the *Guardianship and Administration Act 2000*.

Note—

See also the amendments in schedule 1.

6 Amendment of s 5 (Acknowledgements)

- (1) Section 5(c), ‘with impaired capacity’—
omit.
- (2) Section 5(c)(i)—
omit.

7 Replacement of s 11 (Principles for adults with impaired capacity)

Section 11—
omit, insert—

11 Application of presumption of capacity

- (1) If, in performing a function or exercising a power under this Act, the tribunal or the court is required to make a decision about an adult's capacity for a matter, the tribunal or the court is to presume the adult has capacity for the matter until the contrary is proven.
- (2) If the tribunal or the court has appointed a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to presume the adult has capacity for the matter.
- (3) If a declaration by the tribunal or the court that an adult has impaired capacity for a matter is in force, a person or other entity that performs a function or exercises a power under this Act is entitled to rely on the declaration to presume that the adult does not have capacity for the matter.

8 Insertion of new ch 2A

After section 11A—

insert—

Chapter 2A Principles

11B General principles

- (1) The principles (the *general principles*) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act.
- (2) Also, a person making a decision for an adult on an informal basis must apply the general principles in making the decision.
- (3) The community is encouraged to apply and promote the general principles.

General principles

1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights and fundamental freedoms

- (1) An adult's inherent dignity and worth, and equal and inalienable rights, must be recognised and taken into account.
- (2) The rights of all adults to the same human rights and fundamental freedoms, regardless of a particular adult's capacity, must be recognised and taken into account.
- (3) The principles on which an adult's human rights and fundamental freedoms are based, and that should inform the way those rights and freedoms are taken into account, include—
 - (a) respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons; and
 - (b) non-discrimination; and
 - (c) full and effective participation and inclusion in society, including performing roles valued by society; and
 - (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity; and

- (e) equality of opportunity; and
- (f) accessibility; and
- (g) equality between all persons regardless of gender.

3 Empowering adult to exercise human rights and fundamental freedoms

The importance of the following matters must be taken into account—

- (a) empowering an adult to exercise the adult's human rights and fundamental freedoms;
- (b) encouraging and supporting an adult—
 - (i) to perform social roles valued in society; and
 - (ii) to live a life in the general community and to take part in activities enjoyed by the community; and
 - (iii) to achieve maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable;
- (c) an adult's right to participate to the greatest extent practicable in the development of policies, programs and services for people with impaired capacity for a matter.

4 Maintenance of adult's existing supportive relationships

- (1) The importance of maintaining an adult's existing supportive relationships must be taken into account.

[s 8]

- (2) Maintaining an adult's existing supportive relationships may, for example, involve consultation with—
 - (a) the adult, to find out who are the members of the adult's support network; and
 - (b) any persons who have an existing supportive relationship with the adult; and
 - (c) any members of the adult's support network who are making decisions for the adult on an informal basis.
- (3) The role of families, carers and other significant persons in an adult's life to support the adult to make decisions should be acknowledged and respected.

5 Maintenance of adult's cultural and linguistic environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs, must be taken into account.
- (2) Without limiting subsection (1), for an adult who is an Aboriginal person or a Torres Strait Islander, the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment and set of values, including Aboriginal tradition or Island custom, must be taken into account.

6 Respect for privacy

- (1) An adult's privacy must be taken into account and respected.

- (2) An adult's personal information, including health information, must be protected on the same basis as other people's personal information is protected.

7 Liberty and security

- (1) An adult's right to liberty and security on an equal basis with others must be taken into account.
- (2) An adult should not be deprived of the adult's liberty except in accordance with the law.

8 Maximising an adult's participation in decision-making

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
- (2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life.
- (3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.
- (4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.
- (5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.

[s 8]

- (6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.

9 **Performance of functions and exercise of powers**

A person or other entity, in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for an adult on an informal basis, must do so—

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
- (b) in the way that is least restrictive of the adult's rights, interests and opportunities.

10 **Structured decision-making**

- (1) In applying general principle 9, a person or other entity in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for an adult on an informal basis, must adopt the approach set out in subsections (2) to (5).
- (2) First, the person or other entity must—
 - (a) recognise and preserve, to the greatest extent practicable, the adult's right to make the adult's own decision; and
 - (b) if possible, support the adult to make a decision.

- (3) Second, the person or other entity must recognise and take into account any views, wishes and preferences expressed or demonstrated by the adult.
- (4) Third, if the adult's views, wishes and preferences can not be determined, the person or other entity must use the principle of substituted judgement so that if, from the adult's views, wishes and preferences, expressed or demonstrated when the adult had capacity, it is reasonably practicable to work out what the adult's views, wishes and preferences would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views, wishes and preferences would be.
- (5) Fourth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (4), the person or other entity may perform the function, exercise the power or make the decision.

11C Health care principles

- (1) The principles (the *health care principles*) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act for a health matter or a special health matter.
- (2) Also, an entity authorised by an Act to make a decision for an adult about prescribed special health care must apply the health care principles.
- (3) For subsection (2), the health care principles and the general principles apply as if a reference in the

[s 8]

principles to performing a function or exercising a power under this Act were a reference to making a decision about prescribed special health care under the Act under which the decision is to be made.

Health care principles

1 Application of general principles

A person or other entity that performs a function or exercises a power under this Act, for a health matter or a special health matter in relation to an adult, must also apply the general principles.

2 Same human rights and fundamental freedoms

In applying general principle 2 to a health matter or special health matter—

- (a) the principle of non-discrimination requires that all adults be offered appropriate health care, including preventative care, without regard to a particular adult's capacity; and
- (b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons.

3 Performance of functions and exercise of powers

In applying general principles 9 and 10 to a health matter or special health matter, a person or other entity, in performing a function or exercising a power under this Act in relation to an adult, must take into account—

- (a) information given by the adult's health provider; and
- (b) if the adult has a medical condition—
 - (i) the nature of the adult's medical condition; and
 - (ii) the adult's prognosis; and
- (c) if particular health care is proposed, any alternative health care that is available; and
- (d) the nature and degree of any significant risks associated with the proposed health care or any alternative health care; and
- (e) whether the proposed health care can be postponed because a better health care option may become available within a reasonable time or the adult is likely to become capable of making the adult's own decision about the health care; and
- (f) the consequences for the adult if the proposed health care is not carried out; and
- (g) a consideration of the benefits versus the burdens of the proposed health care; and
- (h) the effect of the proposed health care on the adult's dignity and autonomy.

4 **Substituted judgement**

For applying general principle 10(4) to a health matter or special health matter, the views and wishes of an adult expressed when the adult had capacity may also be expressed—

[s 9]

- (a) in an advance health directive; or
- (b) by a consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the health care.

9 Insertion of new ss 12A and 12B

After section 12—

insert—

12A Appointment—missing person

- (1) The tribunal may, by order, appoint an administrator for a financial matter for an adult if the tribunal is satisfied—
 - (a) the adult is a missing person; and
 - (b) the adult usually resides in the State; and
 - (c) there is, or is likely to be, a need for a decision in relation to the matter; and
 - (d) without an appointment the adult's interests in the matter would be adversely affected.
- (2) The tribunal may be satisfied an adult is a missing person only if the tribunal is satisfied that—
 - (a) it is not known if the adult is alive; and
 - (b) reasonable efforts have been made to locate the adult; and
 - (c) for at least 90 days the adult has not contacted—
 - (i) anyone who lives at the adult's last-known home address; or
 - (ii) any relative or friend of the adult with whom the adult is likely to communicate.
- (3) This Act applies, with necessary changes, to an

appointment under this section.

- (4) The appointment may be on terms considered appropriate by the tribunal.
- (5) An application for the appointment of an administrator under subsection (1) may be made by—
 - (a) the adult's spouse; or
 - (b) a relative of the adult; or
 - (c) the public trustee; or
 - (d) an interested person for the adult.

12B Relationship with Public Trustee Act 1978

- (1) The tribunal may not appoint an administrator under section 12A for a financial matter for an adult if the public trustee is the administrator under the *Public Trustee Act 1978*, section 104(1) of the property to which the financial matter relates.
- (2) The tribunal may appoint an administrator under section 12A for a financial matter for an adult relating to property of which the public trustee is the administrator under the *Public Trustee Act 1978*, section 104(2).
- (3) On the making of an appointment of an administrator as mentioned in subsection (2), the public trustee ceases to be the administrator of the property under the *Public Trustee Act 1978*, section 104(2).

10 Amendment of s 14 (Appointment of 1 or more eligible guardians and administrators)

- (1) Section 14—

insert—

[s 11]

(3A) The tribunal may appoint a person as guardian or administrator for a matter for an adult on the application of the adult's parent only if the tribunal has informed the parent of the tribunal's power under subsection (6)(e) to appoint successive appointees for the matter.

(3B) A failure by the tribunal to comply with subsection (4) does not affect an appointment made by the tribunal.

(2) Section 14(3A) to (5)—
renumber as section 14(4) to (7).

11 Amendment of s 15 (Appropriateness considerations)

(1) Section 15(1)(b)—

omit, insert—

(b) if the appointment is for a health matter—
the health care principles and whether the person is likely to apply the principles;

(2) Section 15(1)(g), after 'order'—

insert—

, including whether the person has ever been a paid carer for the adult

12 Amendment of s 16 (Advice from proposed appointee about appropriateness and competence)

(1) Section 16(1)(b)—

omit, insert—

(b) is, or has ever been, a paid carer for the adult; or

(ba) is a health provider for the adult; or

(2) Section 16(1)(ba) to (e)—

renumber as section 16(1)(c) to (f).

13 Amendment of s 21 (Advice to registrar of titles if appointment concerns land)

Section 21(2), from ‘enter’ to ‘purpose’—

omit, insert—

keep the information contained in the advice in a way that ensures a search of the relevant title reveals the order making the appointment has been made

14 Amendment of s 26 (Automatic revocation)

Section 26(2)—

omit, insert—

- (2) Also, an appointment as an administrator ends if—
 - (a) the administrator becomes bankrupt or insolvent; or
 - (b) for an appointment made under section 12A for an adult—
 - (i) a coroner makes a finding under the *Coroners Act 2003* that the adult has died; or
 - (ii) the court makes a declaration of death for the adult or grants a person leave to swear the death of the adult; or
 - (iii) the adult’s death is registered under the *Births, Deaths and Marriages Registration Act 2003*.
- (2A) If more than 1 event mentioned in subsection (2)(b) applies for the adult, the appointment ends on the happening of the earliest event for the adult.

[s 15]

15 Amendment of s 27 (Withdrawal with tribunal's leave)

Section 27(3), from 'enter' to 'purpose'—

omit, insert—

keep the information contained in the advice in a way that ensures a search of the relevant title reveals the withdrawal of the administrator

16 Insertion of new ch 3, pt 3, div 1A

Chapter 3, part 3—

insert—

**Division 1A Provisions about
appointment for adult who
is missing person**

**27A Obligation to notify tribunal of particular
circumstances**

- (1) This section applies to an administrator appointed for an adult under section 12A if, during the term of the appointment, the administrator becomes aware—
 - (a) the adult is alive; or
 - (b) the adult has died.
- (2) The administrator must, as soon as practicable after becoming aware a circumstance mentioned in subsection (1)(a) or (b) exists, notify the tribunal in writing of the circumstance.

**27B Tribunal must revoke order making
appointment**

- (1) This section applies in relation to an order appointing an administrator for an adult under section 12A.

-
- (2) The tribunal must revoke the order if the tribunal is satisfied—
 - (a) the adult is alive; or
 - (b) the adult has died; or
 - (c) the adult may be presumed to be dead.
 - (3) The order may be revoked by the tribunal on its own initiative or on the application of the administrator or an interested person.

17 Amendment of s 31 (Appointment review process)

- (1) Section 31(4), after ‘an appointee’—

insert—

, other than the public guardian,
- (2) Section 31—

insert—

(5A) The tribunal may make an order removing the public guardian as an appointee if there is an appropriate person mentioned in section 14(1) available for appointment.
- (3) Section 31(5A) and (6)—

renumber as section 31(6) and (7).

18 Amendment of s 32A (Additional requirements if change, revocation or ending of appointment and interest in land involved)

Section 32A(3), from ‘enter’ to ‘purpose’—
omit, insert—

keep the information contained in the advice in a way that ensures a search of the relevant title reveals the order changing or revoking the appointment has been made or the advice

[s 19]

mentioned in subsection (1)(b)(ii) has been given

19 Amendment of s 34 (Apply principles)

(1) Section 34(1), note—

omit, insert—

Note—

See section 11B.

(2) Section 34—

insert—

(1A) However, an administrator appointed under section 12A is not required to apply general principles 1, 3, 4, 7, 8 and 10(1) to (3) and (5).

(3) Section 34(2), ‘principle’—

omit, insert—

principles

(4) Section 34(1A) and (2)—

renumber as section 34(2) and (3).

20 Amendment of s 37 (Avoid conflict transaction)

(1) Section 37(1), ‘authorises’—

omit, insert—

has authorised

(2) Section 37(1)—

insert—

Note—

See section 152 for the authorisation of conflict transactions by the tribunal.

(3) Section 37(2), examples—

omit, insert—

- 1 A conflict transaction happens if an adult's administrator buys the adult's car.
- 2 A conflict transaction happens if an adult's administrator lends the adult's money to a close friend of the administrator.
- 3 A conflict transaction happens if an adult's administrator rents the adult's residential property to the administrator or a relative of the administrator.
- 4 A conflict transaction happens if an adult's administrator uses the adult's money to pay the personal expenses of the administrator, including, for example, the administrator's personal travel expenses.
- 5 A conflict transaction happens if an adult's administrator buys the adult's house.
- 6 A conflict transaction does not happen if an adult's administrator is acting under section 55 to maintain the adult's dependants.

(4) Section 37(3)—
omit, insert—

- (3) However, a transaction is not a conflict transaction merely because—
 - (a) the administrator is related to the adult; or
 - (b) the administrator may be a beneficiary of the adult's estate on the adult's death; or
 - (c) by the transaction the administrator in the administrator's own right and on behalf of the adult—
 - (i) deals with an interest in property jointly held; or
 - (ii) acquires a joint interest in property; or
 - (iii) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in subparagraph (i) or (ii).

(3A) Also, to remove any doubt, it is declared that the

[s 21]

making of a gift or donation under section 54 is not a conflict transaction.

- (5) Section 37(3A) to (5)—
renumber as section 37(4) to (6).

21 Amendment of s 43 (Acting contrary to health care principle)

- (1) Section 43, heading, ‘health care principle’—
omit, insert—
general principles or health care principles
- (2) Section 43, ‘health care principle’—
omit, insert—
general principles or the health care principles

22 Amendment of s 48 (Remuneration of professional administrators)

- (1) Section 48(1)—
omit, insert—
- (1) An administrator for an adult is entitled to remuneration from the adult if the tribunal makes an order that the administrator is to be remunerated by the adult.
- (1A) The tribunal may make an order under subsection (1) only if the administrator carries on a business providing professional services.
- (2) Section 48(1A) to (3)—
renumber as section 48(2) to (4).

23 Amendment of s 54 (Gifts)

- (1) Section 54, heading—

omit, insert—

54 Gifts and donations

- (2) Section 54(1), after ‘give away’—

insert—

or donate

- (3) Section 54(1)(a), after ‘the gift’—

insert—

or donation

- (4) Section 54(1)(b), ‘gift’s value’—

omit, insert—

value of the gift or donation

- (5) Section 54(2), after ‘a gift’—

insert—

or donation

24 Replacement of s 58 (Power to excuse failure)

Section 58—

omit, insert—

58 Relief from personal liability

- (1) This section applies if the court considers—

- (a) a guardian or administrator is, or may be, personally liable for a contravention of this Act; and
- (b) the guardian or administrator has acted honestly and reasonably and ought fairly to be excused for the contravention.

- (2) The court may relieve the guardian or administrator of all or part of the guardian’s or administrator’s personal liability for the contravention.

[s 25]

25 Amendment of s 59 (Compensation for failure to comply)

(1) Section 59, all words before subsection (2)—

omit, insert—

59 Compensation and accounting for profits for failure to comply

(1) The tribunal or a court may order a guardian or administrator for an adult (an *appointee*) to pay an amount to the adult or, if the adult has died, the adult's estate—

(a) to compensate for a loss caused by the appointee's failure to comply with this Act in the exercise of a power; or

(b) to account for any profits the appointee has accrued as a result of the appointee's failure to comply with this Act in the exercise of a power.

(1A) However, the tribunal or court may not order the appointee to make a payment under both subsection (1)(a) and (b) in relation to the same exercise of power.

(2) Section 59—

insert—

(2A) Also, subsection (1) applies even if the appointee's appointment has ended.

(3) Section 59(3) and (4), 'the application for compensation'—

omit, insert—

an application for an order under subsection (1)

(4) Section 59(6), from 'for compensation under'—

omit, insert—

under subsection (1), the tribunal or court may also order that the security be applied in satisfaction of the order.

- (5) Section 59(7), ‘Compensation paid under a tribunal or court order’—

omit, insert—

An amount paid under a tribunal or court order under subsection (1)

- (6) Section 59(1A) to (8)—

renumber as section 59(2) to (10).

26 Insertion of new ss 60A–60C

Chapter 4, part 3—

insert—

60A Effect on beneficiary’s interest if property dealt with by administrator

- (1) This section applies to a person who is a beneficiary (*the beneficiary*) under a deceased adult’s will.
- (2) The beneficiary has the same interest in any surplus money or other property (*the proceeds*) arising from a sale, mortgage, charge, disposition of, or other dealing with, property under the powers given to an administrator as the beneficiary would have had in the property sold, mortgaged, charged, disposed of or otherwise dealt with, if the sale, mortgage, charge, disposition or other dealing had not happened.
- (3) The beneficiary is also entitled to—
 - (a) any money or other property that is able to be traced as income generated by the proceeds; and
 - (b) any capital gain that is generated from the proceeds.
- (4) This section applies even if the beneficiary is the administrator who sold, mortgaged, charged,

[s 26]

disposed of or otherwise dealt with the property.

- (5) This section applies subject to any order made by the court under section 60C(1).

60B Administrator not required to keep proceeds and property separate

Section 60A does not require an administrator for an adult who has sold, mortgaged, charged, disposed of, or otherwise dealt with, the adult's property under the powers given to the administrator, to keep any surplus money or other property arising from the sale, mortgage, charge, disposition or other dealing separate from other property of the adult.

60C Application to court to confirm or vary operation of s 60A

- (1) An application may be made to the court for—
- (a) an order, including an order to direct a conveyance, deed or other thing to be executed or done, to give effect to section 60A; or
 - (b) an order to ensure a beneficiary under the adult's will does not gain an unjust and disproportionate advantage or suffer an unjust and disproportionate disadvantage of a kind not contemplated by the will because of the operation of section 60A.
- (2) An application may be made by—
- (a) a beneficiary under the adult's will; or
 - (b) the personal representative of a deceased beneficiary under the adult's will; or
 - (c) the personal representative of the adult.
- (3) An order made under subsection (1)(b)—

-
- (a) has effect as if it had been made as a codicil to the adult's will executed immediately before the adult's death; and
 - (b) applies despite any contrary operation of section 60A.
- (4) An application under this section must be made to the court within 6 months after the adult's death.
 - (5) The court may extend the application time.
 - (6) The *Succession Act 1981*, section 44(1) to (4) applies to an application and an order made on it as if the application were an application under part 4 of that Act by a person entitled to make an application.

27 Amendment of s 61 (Purpose to achieve balance for health care)

- (1) Section 61(b)—

omit, insert—

- (b) ensuring health care is given to the adult only if it is appropriate in all the circumstances.

- (2) Section 61, note—

omit, insert—

Note—

See also the general principles and health care principles set out in sections 11B and 11C.

28 Insertion of new s 68A

After section 68—

insert—

[s 29]

68A Tribunal to consult in making decision about special health care

In deciding whether to consent to special health care for an adult, the tribunal must, to the greatest extent practicable, seek and take into account the views of—

- (a) a guardian appointed by the tribunal for the adult; or
- (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult; or
- (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

29 Insertion of new ch 5, pt 3A

Chapter 5—

insert—

Part 3A Clinical research

74A What is *clinical research*

- (1) *Clinical research* is—
 - (a) medical research intended to diagnose, maintain or treat a condition affecting the participants in the research; or
 - (b) a trial of drugs, devices, biologicals or techniques involving the carrying out of health care that may include giving placebos to some of the participants in the trial.
- (2) However, a comparative assessment of health care already proven to be beneficial is not medical research.

Examples—

- a comparative assessment of the effects of different forms of administration of a drug proven to be beneficial in the treatment of a condition, for example, a continuous infusion, as opposed to a once-a-day administration of the drug
- a comparative assessment of the angle at which to set a tilt-bed to best assist an adult's breathing

74B What is *approved clinical research*

Approved clinical research is clinical research approved by the tribunal.

74C Approval of clinical research

- (1) The tribunal may approve clinical research only if the tribunal is satisfied—
 - (a) the clinical research is approved by an ethics committee; and
 - (b) any drugs, devices, biologicals or techniques to be trialled in the clinical research are intended to diagnose, maintain or treat a condition affecting the participants in the research; and
 - (c) the clinical research will not involve any known substantial risk to participants or, if there is existing health care for the particular condition, the research will not involve known material risk to the participants greater than the risk associated with the existing health care; and
 - (d) the development of any drugs, devices, biologicals or techniques to be trialled in the clinical research has reached a stage at which safety and ethical considerations make it appropriate for the drugs, devices, biologicals or techniques to be made

[s 30]

available to participants in the research despite the participants being unable to consent to participation; and

- (e) having regard to the potential benefits and risks of participation in the clinical research, on balance it is not adverse to the interests of participants in the research to participate.
- (2) The fact the drugs, devices, biologicals or techniques to be trialled in the clinical research will or may involve giving placebos to some of the participants in the research does not prevent the tribunal being satisfied it is, on balance, not adverse to the interests of the participants to participate.
- (3) The tribunal's approval of clinical research does not operate as a consent to the participation in the clinical research of any particular person.

30 Amendment of s 81 (Tribunal's functions for this Act)

(1) Section 81—

insert—

- (1A) In performing its functions or exercising its powers under this Act in relation to an adult, the tribunal must, to the greatest extent practicable, seek and take account of—
 - (a) the views, wishes and preferences expressed or demonstrated by the adult; and
 - (b) the views of any member of the adult's support network.

(2) Section 81(1A) and (2)—

renumber as section 81(2) and (3).

31 Amendment of s 101 (Relationship with the QCAT Act)

(1) Section 101(c)—

omit.

(2) Section 101(d) to (g)—

renumber as section 101(c) to (f).

(3) Section 101—

insert—

- (2) The QCAT Act, section 99 does not apply in relation to a proceeding under this chapter if the tribunal is considering whether to make an order under section 106(1) or 107(1).

32 Amendment of s 118 (Tribunal advises persons concerned of hearing)

(1) Section 118(1)(b)—

omit, insert—

- (b) a spouse of the adult who is in a close and continuing relationship with the adult;
- (ba) any child of the adult who is at least 18 years and who is in a close and continuing relationship with the adult;
- (bb) any parent of the adult who is in a close and continuing relationship with the adult;
- (bc) any sibling of the adult who is in a close and continuing relationship with the adult;
- (bd) if the adult is an Aboriginal person or a Torres Strait Islander—any person who is regarded under Aboriginal tradition or Island custom as a child, parent or sibling of the adult, and who is in a close and continuing relationship with the adult;

(2) Section 118(1)(ba) to (h)—

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renumber as section 118(1)(c) to (l).

(3) Section 118—

insert—

(1A) If there is no person mentioned in subsection (1)(b) to (f) in existence or able to be located for the adult, the tribunal must give notice of the hearing, as far as practicable, to—

- (a) a member of the adult's extended family who is in a close and continuing relationship with the adult; or
- (b) a person from the adult's household who is in a close and continuing relationship with the adult.

(4) Section 118(5)(a) and (7), '(g)'—

omit, insert—

(k)

(5) Section 118(6), 'subsection (2)'—

omit, insert—

subsection (3)

(6) Section 118(9)—

insert—

child includes a stepchild, an adopted child and a person for whom the adult was a foster-parent or guardian when the person was a child.

parent includes a step-parent, an adoptive parent, a foster-parent and a guardian.

sibling includes a step-sibling, an adopted sibling and a foster-sibling.

(7) Section 118(1A) to (9)—

renumber as section 118(2) to (10).

33 Amendment of s 125 (Representative may be appointed)

- (1) Section 125(1)(b), ‘president or presiding member’—
omit, insert—
tribunal
- (2) Section 125(1), ‘president or the presiding member’—
omit, insert—
tribunal
- (3) Section 125—
insert—
- (3) A representative appointed under subsection (1) must—
- (a) have regard to any expressed or demonstrated views, wishes and preferences of the adult; and
 - (b) to the greatest extent practicable, present the adult’s views, wishes and preferences to the tribunal; and
 - (c) promote and safeguard the adult’s rights, interests and opportunities.

34 Amendment of s 129 (Interim order)

Section 129(1)—

omit, insert—

- (1) This section applies if the tribunal is satisfied, on reasonable grounds—
- (a) the adult concerned in an application has, or may have, impaired capacity for a matter; and
 - (b) there is an immediate risk of harm to the health, welfare or property of the adult, including because of the risk of abuse,

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exploitation or neglect of, or self-neglect by,
the adult.

35 Replacement of s 152 (Tribunal authorisation or approval)

Section 152—

omit, insert—

152 Tribunal authorisation or approval

- (1) The tribunal may, before an administrator enters into a conflict transaction, authorise the administrator to enter into—
 - (a) the conflict transaction; or
 - (b) conflict transactions of that type; or
 - (c) conflict transactions generally.

Note—

Under section 37 an administrator for an adult may enter into a conflict transaction only if the tribunal has authorised the conflict transaction.

- (2) Despite subsection (1), if an administrator enters into a conflict transaction that has not been authorised under subsection (1), the tribunal may retrospectively authorise the transaction.
- (3) A conflict transaction authorised under subsection (2) is taken to be, and always to have been, as valid as if it had been entered into under an authorisation given by the tribunal before the administrator entered into the transaction.
- (4) To remove any doubt, it is declared that, until the tribunal retrospectively authorises a conflict transaction under subsection (2), an administrator who entered into the conflict transaction without the tribunal's authorisation under subsection (1) has acted contrary to section 37(1).
- (5) The tribunal may approve an investment as an authorised investment.

36 Amendment of s 153 (Records and audit)

(1) Section 153—

insert—

(3A) This section applies even if—

- (a) the administrator's appointment has ended;
or
- (b) the enduring power of attorney has been
revoked; or
- (c) the adult has died.

(2) Section 153(3A) and (4)—

renumber as section 153(4) and (5).

37 Amendment of s 213 (Appointment)

Section 213—

insert—

- (5) The public advocate is appointed under this Act
and not under the *Public Service Act 2008*.

38 Insertion of new s 217A

After section 217—

insert—

217A Preservation of rights of public advocate

- (1) This section applies if a public service officer is
appointed as the public advocate.
- (2) The person keeps all rights accrued or accruing to
the person as a public service officer as if service
as the public advocate were a continuation of
service as a public service officer.
- (3) At the end of the person's term of office or on
resignation as the public advocate, the person's
service as the public advocate is taken to be

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service of a like nature in the public service for deciding the person's rights as a public service officer.

39 Amendment of s 247 (Whistleblowers' protection)

(1) Section 247(1)—

omit, insert—

(1) A person is not liable, civilly, criminally or under an administrative process, for disclosing information to an official if the person honestly believes, on reasonable grounds—

(a) the information tends to show—

(i) another person has contravened this Act, the *Powers of Attorney Act 1998* or the *Public Guardian Act 2014*; or

(ii) an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse; or

(b) the information would help in the assessment or investigation of a complaint that—

(i) another person has contravened this Act, the *Powers of Attorney Act 1998* or the *Public Guardian Act 2014*; or

(ii) an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse.

(2) Section 247(4), definition *official*, paragraph (d)—

omit, insert—

(d) a person appointed under the *Public Guardian Act 2014*, section 109 as—

(i) a community visitor (adult); or

-
- (ii) a community visitor (adult) and a community visitor (child).

40 Insertion of new ss 247A–247C

After section 247—

insert—

247A Reprisal and grounds for reprisal

- (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, the other person or someone else has disclosed or intends to disclose information under section 247(1).
- (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.
- (3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.
- (4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.
- (5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

247B Offence of taking reprisal

- (1) A person must not take a reprisal.
Maximum penalty—167 penalty units or 2 years imprisonment.
- (2) An offence against subsection (1) is an indictable offence that is a misdemeanour.

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247C Damages for reprisal

- (1) A reprisal is a tort and a person who takes a reprisal is liable in damages to any person who suffers detriment as a result.
- (2) Any appropriate remedy that may be granted by a court for a tort, including exemplary damages, may be granted by a court for the taking of a reprisal.
- (3) If the claim for damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.
- (4) The right of a person to bring proceedings for damages under this section does not affect any other right or remedy available to the person arising from the reprisal.
- (5) Proceedings for damages may be brought under this section even if a prosecution in relation to the reprisal has not been brought, or can not be brought, for the offence under section 247B.
- (6) The *Workers' Compensation and Rehabilitation Act 2003* does not apply to proceedings for damages brought under this section.
- (7) In this section—
court means any court.

41 Insertion of new ch 11, pt 4A

Chapter 11—

insert—

Part 4A Miscellaneous

250 Guidelines to assist in assessments of capacity

- (1) The Minister is to prepare guidelines to assist

persons required to make assessments about the capacity of adults to make decisions about matters to make the assessments.

- (2) The guidelines are to include—
 - (a) principles to be applied in making assessments about the capacity of adults to make decisions about matters; and
 - (b) information and advice that will give practicable guidance for making the assessments.
- (3) In preparing the guidelines the Minister must consult with persons who have qualifications relevant to, or experience in, making assessments about the capacity of adults to make decisions about matters.
- (4) The guidelines are to be published on the department's website.
- (5) The Minister is to review the guidelines at least every 5 years.

250A Delegation of public trustee's powers under this Act

- (1) If the public trustee has power under this Act for a financial matter for an adult, the public trustee may delegate the power to—
 - (a) an appropriately qualified member of the public trustee's staff; or
 - (b) for day-to-day decisions about the matter—
 - (i) an appropriately qualified carer of the adult; or
 - (ii) an attorney under an enduring document; or
 - (iii) a person who would be eligible to be the adult's statutory health attorney; or

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- (iv) another person the public trustee considers appropriately qualified to exercise the power.
- (2) However, the public trustee may not delegate the public trustee's powers mentioned in subsection (1)(b) to—
 - (a) the public guardian; or
 - (b) a paid carer for the adult.
- (3) In this section—
day-to-day decisions, for a financial matter for an adult, means minor, uncontroversial decisions about day-to-day issues that involve no more than a low risk to the adult.

250B Proceedings for indictable offences

- (1) Subject to subsection (2), a charge of an indictable offence against this Act must be heard and decided summarily.
- (2) A Magistrates Court must abstain from dealing summarily with a charge mentioned in subsection (1) if satisfied, on an application made by the prosecution or the defence, that because of exceptional circumstances the charge should not be heard and decided summarily.
- (3) If subsection (2) applies to a Magistrates Court—
 - (a) the court must stop treating the proceeding as a proceeding to hear and decide the charge summarily and start treating the proceeding as a committal proceeding; and
 - (b) the defendant's plea at the start of the hearing must be disregarded; and
 - (c) the evidence already heard by the court must be taken to be evidence in the committal proceeding; and

- (d) to avoid any doubt, it is declared that the *Justices Act 1886*, section 104 must be complied with for the committal proceeding.

42 Insertion of new ch 12, pt 12

Chapter 12—

insert—

Part 12 **Transitional and validation provisions for Guardianship and Administration and Other Legislation Amendment Act 2019**

270 Definition for part

In this part—

amendment Act means the *Guardianship and Administration and Other Legislation Amendment Act 2019*.

271 Obligation of registrar of titles

Sections 21(2), 27(3) and 32A(3), as amended by the amendment Act, apply only in relation to an advice received by the registrar after the commencement.

272 Application of ss 60A–60C

Sections 60A to 60C apply—

- (a) in relation to the will of an adult who dies after the commencement; and

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- (b) regardless of whether the sale, mortgage, charge, disposition of, or other dealing with, property by the administrator happened before or after the commencement.

273 Validation of delegation

- (1) This section applies to a delegation by the public trustee of a power of a type described in, and to a person mentioned in, section 250A before the commencement.
- (2) The delegation is taken to be, and always to have been, as valid and effective as it would have been if it were made after the commencement of section 250A.

274 Existing proceedings

- (1) This section applies if, immediately before the commencement, a proceeding under this Act had been started but not finished.
- (2) The proceeding is to continue as if the amendment Act had not been enacted.

43 Omission of sch 1 (Principles)

Schedule 1—

omit.

44 Amendment of sch 2, s 2 (Personal matter)

Schedule 2, section 2—

insert—

- (l) who may have access visits to, or other contact with, the adult;

-
- (m) advocacy relating to the care and welfare of the adult.

45 Amendment of sch 2, s 3 (Special personal matter)

Schedule 2, section 3—

insert—

- (j) entering a plea on a criminal charge for the adult.

46 Omission of sch 2, s 13 (Approved clinical research)

Schedule 2, section 13—

omit.

47 Amendment of sch 4 (Dictionary)

- (1) Schedule 4, definitions *community visitor*, *health care principle* and *interested person*—

omit.

- (2) Schedule 4—

insert—

health care principles see section 11C.

interested person, for another person, means a person who has a sufficient and genuine concern for the rights and interests of the other person.

- (3) Schedule 4, definition *approved clinical research*, ‘schedule 2, section 13’—

omit, insert—

section 74B

- (4) Schedule 4, definition *capacity*—

insert—

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Note—

Under section 146(3) in deciding whether an individual is capable of communicating decisions in some way the tribunal must investigate the use of all reasonable ways of facilitating communication, which may include symbol boards or signing.

- (5) Schedule 4, definition *clinical research*, ‘schedule 2, section 13(1)’—

omit, insert—

section 74A

- (6) Schedule 4, definition *general principles*, ‘schedule 1, part 1’—

omit, insert—

section 11B

Part 4 **Amendment of Integrity Act 2009**

48 Act amended

This part amends the *Integrity Act 2009*.

49 Amendment of s 7 (Functions of integrity commissioner)

Section 7(1)(a), after ‘designated person’—

insert—

or former designated person

50 Amendment of s 15 (Request for advice)

- (1) Section 15(2), after ‘designated person’—

insert—

or former designated person

-
- (2) Section 15(2), ‘to 20’—
omit, insert—
to 20A
 - (3) Section 15(3)—
omit.
 - (4) Section 15(6), ‘section 16’—
omit, insert—
sections 16 and 20A
 - (5) Section 15(7)—
omit.
 - (6) Section 15(4) to (6)—
renumber as section 15(3) to (5).

51 Insertion of new s 20A

After section 20—

insert—

20A Request by former designated person

- (1) Within 2 years after ceasing to be a designated person, a person may ask for the integrity commissioner’s advice on an ethics or integrity issue involving the person that arises from a post-separation obligation.
- (2) In this section—
post-separation obligation means—
 - (a) an obligation (including an obligation under an Act, contract of employment, directive, policy or code of conduct) that—
 - (i) applies to the person because the person was, but is no longer, a designated person; and

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- (ii) relates to contact with a government representative or Opposition representative; or
- (b) an obligation applying to the person under section 70.

52 Amendment of s 21 (Advice)

Section 21—

insert—

- (5) In this section—

designated person includes a person who may ask for the integrity commissioner’s advice under section 20A.

53 Amendment of s 25 (Definitions for division)

Section 25, definition *relevant document*, paragraph (a), ‘and any authority under section 15(3)’—

omit.

54 Amendment of s 26 (Disclosure)

Section 26(1), after ‘designated person’—

insert—

or former designated person

Part 5 Amendment of Powers of Attorney Act 1998

55 Act amended

This part amends the *Powers of Attorney Act 1998*.

Note—

See also the amendment in schedule 1.

56 Insertion of new ch 1A

After section 6B—

insert—

Chapter 1A Principles

6C General principles

The principles (the *general principles*) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act or an enduring document—

General principles

1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights and fundamental freedoms

- (1) An adult's inherent dignity and worth, and equal and inalienable rights, must be recognised and taken into account.
- (2) The rights of all adults to the same human rights and fundamental freedoms, regardless of a particular adult's capacity, must be recognised and taken into account.
- (3) The principles on which an adult's human rights and fundamental freedoms are based, and that should inform the way those rights and

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freedoms are taken into account, include—

- (a) respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons; and
- (b) non-discrimination; and
- (c) full and effective participation and inclusion in society, including performing roles valued by society; and
- (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity; and
- (e) equality of opportunity; and
- (f) accessibility; and
- (g) equality between all persons regardless of gender.

3 Empowering adult to exercise human rights and fundamental freedoms

The importance of the following matters must be taken into account—

- (a) empowering an adult to exercise the adult's human rights and fundamental freedoms;
- (b) encouraging and supporting an adult—
 - (i) to perform social roles valued in society; and
 - (ii) to live a life in the general community and to take part in

activities enjoyed by the community; and

(iii) to achieve maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable;

(c) an adult's right to participate to the greatest extent practicable in the development of policies, programs and services for people with impaired capacity for a matter.

4 Maintenance of adult's existing supportive relationships

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

(2) Maintaining an adult's existing supportive relationships may, for example, involve consultation with—

(a) the adult, to find out who are the members of the adult's support network; and

(b) any persons who have an existing supportive relationship with the adult; and

(c) any members of the adult's support network who are making decisions for the adult on an informal basis.

(3) The role of families, carers and other significant persons in an adult's life to support the adult to make decisions should be acknowledged and respected.

5 Maintenance of adult's cultural and linguistic environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs, must be taken into account.
- (2) Without limiting subsection (1), for an adult who is an Aboriginal person or a Torres Strait Islander, the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment and set of values, including Aboriginal tradition or Island custom, must be taken into account.

6 Respect for privacy

- (1) An adult's privacy must be taken into account and respected.
- (2) An adult's personal information, including health information, must be protected on the same basis as other people's personal information is protected.

7 Liberty and security

- (1) An adult's right to liberty and security on an equal basis with others must be taken into account.
- (2) An adult should not be deprived of the adult's liberty except in accordance with the law.

8 Maximising an adult's participation in decision-making

- (1) An adult's right to participate, to the greatest extent practicable, in decisions

affecting the adult's life must be recognised and taken into account.

- (2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life.
- (3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.
- (4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.
- (5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.
- (6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.

9 Performance of functions and exercise of powers

A person or other entity in performing a function or exercising a power under this Act in relation to an adult, or under an enduring document for an adult, must do so—

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and

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- (b) in the way that is least restrictive of the adult's rights, interests and opportunities.

10 Structured decision-making

- (1) In applying general principle 9, a person or other entity in performing a function or exercising a power under this Act in relation to an adult, or under an enduring document for an adult, must adopt the approach set out in subsections (2) to (5).
- (2) First, the person or other entity must—
 - (a) recognise and preserve, to the greatest extent practicable, the adult's right to make the adult's own decision; and
 - (b) if possible, support the adult to make a decision.
- (3) Second, the person or other entity must recognise and take into account any views, wishes and preferences expressed or demonstrated by the adult.
- (4) Third, if the adult's views, wishes and preferences can not be determined, the person or other entity must use the principle of substituted judgement so that if, from the adult's views, wishes and preferences, expressed or demonstrated when the adult had capacity, it is reasonably practicable to work out what the adult's views, wishes and preferences would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views, wishes and preferences would be.

- (5) Fourth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (4), the person or other entity may perform the function or exercise the power.

6D Health care principles

The principles (the *health care principles*) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act or an enduring document for a health matter—

Health care principles

1 Application of general principles

A person or other entity that performs a function or exercises a power under this Act, or an enduring document, for a health matter in relation to an adult, must also apply the general principles.

2 Same human rights and fundamental freedoms

In applying general principle 2 to a health matter—

- (a) the principle of non-discrimination requires that all adults be offered appropriate health care, including preventative care, without regard to a particular adult's capacity; and
- (b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity and worth, individual autonomy (including the freedom to

[s 56]

make one's own choices) and independence of persons.

3 **Performance of functions and exercise of powers**

In applying general principles 9 and 10 to a health matter, a person or other entity, in performing a function or exercising a power under this Act in relation to an adult, or under an enduring document for an adult, must take into account—

- (a) information given by the adult's health provider; and
- (b) if the adult has a medical condition—
 - (i) the nature of the adult's medical condition; and
 - (ii) the adult's prognosis; and
- (c) if particular health care is proposed, any alternative health care that is available; and
- (d) the nature and degree of any significant risks associated with the proposed health care or any alternative health care; and
- (e) whether the proposed health care can be postponed because a better health care option may become available within a reasonable time or the adult is likely to become capable of making the adult's own decision about the health care; and
- (f) the consequences for the adult if the proposed health care is not carried out; and

- (g) a consideration of the benefits versus the burdens of the proposed health care; and
- (h) the effect of the proposed health care on the adult's dignity and autonomy.

4 **Substituted judgement**

For applying general principle 10(4) to a health matter, the views and wishes of an adult expressed when the adult had capacity may also be expressed—

- (a) in an advance health directive; or
- (b) by a consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the health care.

57 **Amendment of s 29 (Meaning of *eligible attorney*)**

(1) Section 29(1)(a) to (d)—

omit, insert—

- (a) a person who—
 - (i) has capacity for the matter and is at least 18 years; and
 - (ii) is not, and has not been within the previous 3 years, a paid carer for the principal; and

Note—

See schedule 3 for the definition *paid carer*.

- (iii) is not a health provider for the principal; and

Note—

See schedule 3 for the definition *health provider*.

[s 58]

- (iv) is not a service provider for a residential service where the principal is a resident; and
 - (v) if the person would be given power for a financial matter—is 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) for a financial matter only—
 - (i) the public trustee; or
 - (ii) a trustee company under the *Trustee Companies Act 1968*; or
 - (c) for a personal matter only—the public guardian.
- (2) Section 29(2)(a) to (c)—
omit, insert—
- (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; and
- Note—*
See schedule 3 for the definitions *paid carer* and *health provider*.
- (iii) not a service provider for a residential service where the principal is a resident; or
 - (b) the public guardian.

58 Amendment of s 31 (Meaning of *eligible witness*)

Section 31(1)(f), ‘at least 21 years and’—

omit.

59 Amendment of s 32 (Enduring powers of attorney)

Section 32—

insert—

- (3) To remove any doubt, it is declared that an enduring power of attorney may be made by an adult principal who is outside the State.

60 Amendment of s 34 (Recognition of enduring power of attorney made in other States)

- (1) Section 34, heading, ‘States’—

omit, insert—

jurisdictions

- (2) Section 34, ‘State’—

omit, insert—

jurisdiction

61 Amendment of s 35 (Advance health directives)

Section 35—

insert—

- (5) To remove any doubt, it is declared that an advance health directive may be made by an adult principal who is outside the State.

62 Amendment of s 41 (Principal’s capacity to make an enduring power of attorney)

- (1) Section 41(1)—

omit, insert—

- (1) A principal has capacity to make an enduring

[s 63]

power of attorney only if the principal—

- (a) is capable of making the enduring power of attorney freely and voluntarily; and
- (b) understands the nature and effect of the enduring power of attorney.

Note—

Under the general principles, an adult is presumed to have capacity. See section 6C, general principle 1.

(2) Section 41—

insert—

- (3) For this section, schedule 3, definition *capacity* does not apply.

63 Replacement of s 42 (Principal's capacity to make an advance health directive)

Section 42—

omit, insert—

42 Principal's capacity to make an advance health directive

- (1) A principal has capacity to make an advance health directive, to the extent it does not give power to an attorney, only if the principal—
 - (a) understands the nature and effect of the advance health directive; and
 - (b) is capable of making the advance health directive freely and voluntarily.

Note—

Under the general principles, an adult is presumed to have capacity. See section 6C, general principle 1.

- (2) Understanding the nature and effect of the advance health directive includes understanding the following matters—

-
- (a) the nature and 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.

Note—

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 the principal understood these matters.

- (3) A principal has capacity to make an advance health directive, to the extent it gives power to an attorney, only if the principal has the capacity necessary to make an enduring power of attorney giving the same power.

Note—

See section 41 in relation to the capacity of a principal to make an enduring power of attorney.

- (4) For this section, schedule 3, definition *capacity* does not apply.

64 Amendment of s 43 (Appointment of 1 or more eligible attorneys)

Section 43—

insert—

- (3) However, a principal may not appoint more than 4 joint attorneys for a matter under an enduring power of attorney.

[s 65]

65 Amendment of s 45 (Proof of enduring document)

(1) Section 45(2) and (3)—

omit, insert—

(2) The copy must be certified to the effect that it is a true and complete copy of the original.

(2) Section 45(4) to (6)—

renumber as section 45(3) to (5).

66 Insertion of new ss 61A–61D

Chapter 3, part 6—

insert—

61A Application of ss 61B–61D

Sections 61B to 61D apply only in relation to an enduring power of attorney.

61B Effect on beneficiary's interest if property dealt with by attorney

(1) This section applies to a person who is a beneficiary (*the beneficiary*) under a deceased principal's will.

(2) The beneficiary has the same interest in any surplus money or other property (*the proceeds*) arising from a sale, mortgage, charge, disposition of, or other dealing with, property under the powers given to an attorney under an enduring power of attorney as the beneficiary would have had in the property sold, mortgaged, charged, disposed of or otherwise dealt with, if the sale, mortgage, charge, disposition or other dealing had not happened.

(3) The beneficiary is also entitled to—

- (a) any money or other property that is able to be traced as income generated by the proceeds; and
 - (b) any capital gain that is generated from the proceeds.
- (4) This section applies even if the beneficiary is the attorney who sold, mortgaged, charged, disposed of or otherwise dealt with the property.
- (5) This section applies subject to any order made by the court under section 61D(1).

61C Attorney not required to keep proceeds and property separate

Section 61B does not require an attorney for a principal who has sold, mortgaged, charged, disposed of, or otherwise dealt with, the principal's property under the powers given to the attorney, to keep any surplus money or other property arising from the sale, mortgage, charge, disposition or other dealing separate from other property of the principal.

61D Application to court to confirm or vary operation of s 61B

- (1) An application may be made to the court for—
- (a) an order, including an order to direct a conveyance, deed or other thing to be executed or done, to give effect to section 61B; or
 - (b) an order to ensure a beneficiary under the principal's will does not gain an unjust and disproportionate advantage or suffer an unjust and disproportionate disadvantage of a kind not contemplated by the will because of the operation of section 61B.

[s 67]

- (2) An application may be made by—
 - (a) a beneficiary under the principal’s will; or
 - (b) the personal representative of a deceased beneficiary under the principal’s will; or
 - (c) the personal representative of the principal.
- (3) An order made under subsection (1)(b)—
 - (a) has effect as if it had been made as a codicil to the principal’s will executed immediately before the principal’s death; and
 - (b) applies despite any contrary operation of section 61B.
- (4) An application under this section must be made to the court within 6 months after the principal’s death.
- (5) The court may extend the application time.
- (6) The *Succession Act 1981*, section 44(1) to (4) applies to an application and an order made on it as if the application were an application under part 4 of that Act by a person entitled to make an application.
- (7) Despite section 109A, a reference in this section to the court does not include a reference to the tribunal.

67 Amendment of s 63 (Who is the statutory health attorney)

- (1) Section 63(1)(a), before ‘a spouse’—

insert—

a person who is 18 years or more and who is
- (2) Section 63(1)(a)—

insert—

Note—

See the *Acts Interpretation Act 1954*, schedule 1 for the definition *spouse*.

- (3) Section 63(1)(b) and (c), ‘and is not a paid carer for the adult’—

omit, insert—

and is not—

- (i) a paid carer for the adult; or
- (ii) a health provider for the adult; or
- (iii) a service provider for a residential service where the adult is a resident

- (4) Section 63—

insert—

- (5) For subsection (1)(c), a **relation** of the adult is a person, other than a person mentioned in subsection (1)(a) or (b)—

- (a) who has a close personal relationship with the adult and a personal interest in the adult’s welfare; and
- (b) who—
 - (i) is related to the adult by blood, spousal relationship, adoption or a foster relationship; or
 - (ii) for an Aboriginal person—is a person who, under Aboriginal tradition, is regarded as a relative of the adult; or
 - (iii) for a Torres Strait Islander—is a person who, under Island custom, is regarded as a relative of the adult.

68 Amendment of s 73 (Avoid conflict transaction)

- (1) Section 73(1), ‘authorises’—

[s 68]

omit, insert—

, or the court under section 118(2), has authorised

(2) Section 73—

insert—

(1A) Despite subsection (1), if an attorney enters into a conflict transaction without obtaining an authorisation mentioned in subsection (1) for the transaction, a conflict transaction of that type or conflict transactions generally, the principal may retrospectively authorise the transaction if the principal has capacity to do so.

(1B) A conflict transaction authorised under subsection (2) is taken to be, and to have always been, as valid as if it had been entered into under an authorisation given by the principal before the attorney entered into the transaction.

Note—

See also section 118(3) in relation to the retrospective authorisation of particular transactions by the court.

(1C) Subsection (5) applies if an attorney enters into a conflict transaction without obtaining an authorisation mentioned in subsection (1).

(1D) To remove any doubt, it is declared that, until the conflict transaction is authorised under subsection (2) or section 118(3), the attorney has acted contrary to subsection (1).

(3) Section 73(2), example 2—

renumber as example 6.

(4) Section 73(2), examples—

insert—

2 A conflict transaction happens if an attorney for a financial matter lends the principal's money to a close friend of the attorney.

-
- 3 A conflict transaction happens if an attorney for a financial matter rents the principal's residential property to the attorney or a relative of the attorney.
 - 4 A conflict transaction happens if an attorney for a financial matter uses the principal's money to pay the personal expenses of the attorney, including, for example, the attorney's personal travel expenses.
 - 5 A conflict transaction happens if an attorney for a financial matter buys the principal's house.

(5) Section 73(3)—

omit, insert—

(3) However, a transaction is not a conflict transaction merely because—

- (a) the attorney is related to the principal; or
- (b) the attorney may be a beneficiary of the principal's estate on the principal's death; or
- (c) by the transaction the attorney, in the attorney's own right and on behalf of the principal—
 - (i) deals with an interest in property jointly held; or
 - (ii) acquires a joint interest in property; or
 - (iii) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in subparagraph (i) or (ii).

(3A) Also, to remove any doubt, it is declared that the making of a gift or donation under section 88 is not a conflict transaction.

(3B) A conflict transaction between an attorney and a person who does not know, or have reason to believe, the transaction is a conflict transaction is, in favour of the person, as valid as if the transaction were not a conflict transaction.

(6) Section 73(1A) to (4)—

[s 69]

renumber as section 73(2) to (10).

69 Omission of s 76 (General principles for adults with impaired capacity)

Section 76—

omit.

70 Replacement of s 88 (Gifts)

Section 88—

omit, insert—

88 Gifts and donations

- (1) Unless otherwise authorised under this Act, an attorney for a principal may give away or donate the principal's property only if—
 - (a) the gift or donation is—
 - (i) of the nature the principal made when the principal had capacity; or
 - (ii) of the nature the principal might reasonably be expected to make; and
 - (b) the value of the gift or donation 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 or donation under subsection (1).

71 Replacement of s 96 (Interpretation)

Section 96—

omit, insert—

96 Definitions for part

In this part—

invalidity—

- (a) in relation to an advance health directive, means invalidity because—
 - (i) the advance health directive was made in another State in purported compliance with the requirements of the law of that other State but does not comply with that State’s requirements; or
 - (ii) the advance health directive has been revoked; or
- (b) in relation to a power under a document, means invalidity because—
 - (i) the document was made in another jurisdiction in purported compliance with the requirements of the law of that other jurisdiction but does not comply with that jurisdiction’s requirements; or
 - (ii) the document has been revoked wholly or to the extent it gives the power; or
 - (iii) the power is not exercisable at the time it is purportedly exercised.

know—

- (a) in relation to the invalidity of an advance health directive, includes—
 - (i) know of the happening of an event that invalidates the directive; or
 - (ii) have reason to believe the directive is invalid; or
- (b) in relation to the invalidity of a power under a document, includes—

[s 72]

- (i) know of the happening of an event that invalidates the power; or
- (ii) have reason to believe the power is invalid.

72 Replacement of s 100 (Additional protection if unaware of invalidity in health context)

Section 100—

omit, insert—

100 Additional protection if unaware of invalidity in health context

- (1) This section applies if a person, other than an attorney, in good faith and without knowing that an advance health directive or a power for a health matter under an enduring document is invalid or a direction in an advance health directive does not operate, acts in reliance on the advance health directive, power or direction.

Note—

See section 36 in relation to the operation of a direction in an advance health directive.

- (2) The person does not incur any liability, either to the adult or anyone else, because of the invalidity of the advance health directive or power or the inoperative direction.

73 Amendment of s 102 (Protection of health provider unaware of advance health directive)

Section 102, after ‘the health provider’—

insert—

, acting in good faith,

74 Replacement of s 106 (Compensation for failure to comply)

Section 106—

omit, insert—

106 Compensation and accounting for profits for failure to comply

- (1) The court or tribunal may order an attorney for a principal to pay an amount to the principal or, if the principal has died, the principal's estate—
 - (a) to compensate for a loss caused by the attorney's failure to comply with this Act in the exercise of a power; or
 - (b) to account for any profits the attorney has accrued as a result of the attorney's failure to comply with this Act in the exercise of a power.
- (2) However, the court or tribunal may not order the attorney to make a payment under both subsection (1)(a) and (b) in relation to the same exercise of power.
- (3) Subsection (1) applies even if the attorney is convicted of an offence in relation to the attorney's failure.
- (4) Also, subsection (1) applies even if the attorney's appointment has ended.
- (5) If the principal or attorney has died, an application for an order under subsection (1) must be made to the court or tribunal within 6 months after the death.
- (6) If the principal and attorney have died, an application for an order under subsection (1) must be made to the court or tribunal within 6 months after the first death.
- (7) The court or tribunal may extend the application time.

[s 75]

- (8) An amount paid under an order under subsection (1) must be taken into account in assessing damages in a later civil proceeding in relation to the attorney's exercise of the power.
- (9) 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.

75 Insertion of new s 111A

After section 111—

insert—

111A Application of presumption of capacity

- (1) If, in performing a function or exercising a power under this Act, the court or tribunal is required to make a decision about an adult's capacity for a matter, the court or tribunal is to presume the adult has capacity for the matter until the contrary is proven.
- (2) If a declaration by the court or tribunal that an adult has impaired capacity for a matter is in force, a person or other entity that performs a function or exercises a power under this Act is entitled to rely on the declaration to presume that the adult does not have capacity for the matter.

76 Amendment of s 118 (Advice, directions and recommendations etc.)

- (1) Section 118(2), ‘if the court considers it in the best interests of the principal,’—

omit.

- (2) Section 118(2), after ‘be authorised to undertake’—

insert—

, if the court is satisfied the transaction would be in accordance with the general principles

- (3) Section 118—

insert—

- (3) Also, if an attorney undertakes a transaction mentioned in subsection (2) that has not been authorised under that subsection, the court may retrospectively authorise the transaction.

- (4) A transaction authorised under subsection (3) is taken to be, and to have always been, as valid as if it had been undertaken under an authorisation given by the court before the attorney undertook the transaction.

77 Amendment of s 122 (Records and audit)

- (1) Section 122, after ‘court’—

insert—

or the tribunal

- (2) Section 122—

insert—

- (4) This section applies even if—

(a) the enduring power of attorney has been revoked; or

(b) the principal has died.

[s 78]

78 Insertion of new s 160

Chapter 8—

insert—

160 Delegation of public trustee's powers under this Act

- (1) If the public trustee has power under this Act for a financial matter for an adult, the public trustee may delegate the power to—
 - (a) an appropriately qualified member of the public trustee's staff; or
 - (b) for day-to-day decisions about the matter—
 - (i) an appropriately qualified carer of the adult; or
 - (ii) an attorney under an enduring document; or
 - (iii) a person who would be eligible to be the adult's statutory health attorney; or
 - (iv) another person the public trustee considers appropriately qualified to exercise the power.
- (2) However, the public trustee may not delegate the public trustee's powers mentioned in subsection (1)(b) to—
 - (a) the public guardian; or
 - (b) a paid carer for the adult.
- (3) In this section—

day-to-day decisions, for a financial matter for an adult, means minor, uncontroversial decisions about day-to-day issues that involve no more than a low risk to the adult.

79 Insertion of new ch 9, pt 4

Chapter 9—

insert—

**Part 4 Transitional and
validation provisions
for Guardianship and
Administration and
Other Legislation
Amendment Act 2019**

167 Definitions for part

In this part—

amended, for a provision of this Act, means the provision as amended by the amendment Act.

amendment Act means the *Guardianship and Administration and Other Legislation Amendment Act 2019*.

**168 Existing appointment—eligible attorney
(enduring power of attorney)**

- (1) This section applies in relation to a person who, immediately before the commencement, held an appointment as an attorney for a matter under an enduring power of attorney if—
 - (a) the person was an eligible attorney for the matter under section 29(1) as in force when the person was appointed; but
 - (b) the person would not be an eligible attorney for the matter under amended section 29(1).
- (2) To remove any doubt, it is declared that amended section 29(1) does not affect the person's appointment.

[s 79]

169 Existing appointment—eligible attorney (advance health directive)

- (1) This section applies in relation to a person who, immediately before the commencement, held an appointment as an attorney for a matter under an advance health directive if—
 - (a) the person was an eligible attorney for the matter under section 29(2) as in force when the person was appointed; but
 - (b) the person would not be an eligible attorney for the matter under amended section 29(2).
- (2) On the commencement, the advance health directive is revoked to the extent it gives power to the attorney.

170 Existing appointment—more than 4 joint attorneys (enduring power of attorney)

- (1) This section applies if, immediately before the commencement, more than 4 persons were joint attorneys for a matter under an enduring power of attorney.
- (2) Section 43(3), as inserted by the amendment Act, does not apply to the enduring power of attorney in relation to that matter.

171 Existing certified copy of enduring document

- (1) This section applies to a copy of an enduring document certified under section 45 before the commencement as a copy of the enduring document.
- (2) Section 45 as in force immediately before the commencement continues to apply to the copy.

172 Application of ss 61A–61D

Sections 61A to 61D apply—

- (a) in relation to the will of a principal who dies after the commencement; and
- (b) regardless of whether the sale, mortgage, charge, disposition of, or other dealing with, property by the attorney happened before or after the commencement.

173 Validation of delegation

- (1) This section applies to a delegation of a power by the public trustee of a type described in, and to a person mentioned in, section 160 before the commencement.
- (2) The delegation is taken to be, and always to have been, as valid and effective as it would have been if it were made after the commencement of section 160.

174 Enduring documents started

- (1) This section applies if, immediately before the commencement, the preparation of an enduring document had been started but not finished.
- (2) This Act, as amended by the amendment Act, applies to the preparation of the enduring document.

175 Existing proceedings

- (1) This section applies if, immediately before the commencement, a proceeding under this Act had been started but not finished.
- (2) The proceeding is to continue as if the amendment Act had not been enacted.

[s 80]

80 Omission of sch 1 (Principles)

Schedule 1—

omit.

81 Amendment of sch 2, s 2 (Personal matter)

Schedule 2, section 2—

insert—

- (j) who may have access visits to, or other contact with, the principal;
- (k) advocacy relating to the care and welfare of the principal.

82 Amendment of sch 2, s 3 (Special personal matter)

Schedule 2, section 3—

insert—

- (j) entering a plea on a criminal charge for the principal.

83 Amendment of sch 2, s 13 (Approved clinical research)

(1) Schedule 2, section 13(1)(b), ‘drugs’—

omit, insert—

drugs, devices, biologicals

(2) Schedule 2, section 13(2), ‘schedule 2, section 13’—

omit, insert—

section 74C

84 Amendment of sch 3 (Dictionary)

(1) Schedule 3, definitions *health care principle* and *interested person*—

omit.

(2) Schedule 3—

insert—

health care principles see section 6D.

interested person, for another person, means a person who has a sufficient and genuine concern for the rights and interests of the other person.

jurisdiction means—

- (a) another State; or
- (b) New Zealand.

support network, for an adult, consists of the following people—

- (a) members of the adult's family;
- (b) close friends of the adult;
- (c) other people the tribunal decides provide support to the adult.

(3) Schedule 3, definition *capacity*—

insert—

Note—

Under the *Guardianship and Administration Act 2000*, section 146(3), in deciding whether an individual is capable of communicating decisions in some way, the tribunal must investigate the use of all reasonable ways of facilitating communication, which may include symbol boards or signing.

(4) Schedule 3, definition *general principles*, 'schedule 1, part 1'—

omit, insert—

section 6C

[s 85]

Part 6 Amendment of Public Guardian Act 2014

85 Act amended

This part amends the *Public Guardian Act 2014*.

Note—

See also the amendments in schedule 1.

86 Amendment of s 6 (Principles for adults with impaired capacity for a matter)

Section 6(1)—

omit, insert—

- (1) The principles to be applied by persons performing functions or exercising powers under this Act for a matter in relation to an adult with impaired capacity for the matter are—
 - (a) the general principles stated in the Guardianship Act, section 11B (the *general principles*); and
 - (b) for a health matter—the general principles and the health care principles stated in the Guardianship Act, section 11C (the *health care principles*).

87 Amendment of s 19 (Investigate complaints)

Section 19—

insert—

- (2) The public guardian may investigate a complaint or allegation even after an adult's death.

88 Amendment of s 21 (Records and audit)

(1) Section 21—

insert—

(4A) This section applies even after an adult’s death.

(2) Section 21(4A) and (5)—

renumber as section 21(5) and (6).

89 Amendment of s 22 (Right to information)

(1) Section 22(5)(a), after ‘information’—

insert—

, including a person’s personal information

(2) Section 22(6)—

insert—

personal information see the *Information Privacy Act 2009*, section 12.

90 Replacement of s 31 (Report after investigation or audit)

Section 31—

omit, insert—

31 Report and information after investigation or audit

(1) After the public guardian has carried out an investigation or audit in relation to an adult, the public guardian—

(a) must make a written report; and

(b) must inform each of the following persons, in a way the public guardian considers appropriate, of the results of the investigation or audit—

[s 91]

- (i) the person at whose request the investigation or audit was carried out;
 - (ii) every attorney, guardian or administrator for the adult;
 - (iii) if the adult has died—the adult’s personal representative; and
- (c) may give a copy of the report to a person mentioned in paragraph (b).
- (2) It is a lawful excuse for the publication of a defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for this Act.
- (3) If an interested person asks to be informed of the results of the investigation or audit, the public guardian must inform the interested person in a way the public guardian considers appropriate.
- (4) If a report made by the public guardian contains information about a person and the public guardian considers it appropriate to protect the person’s identity, the public guardian may remove, from the copy of the report given under subsection (1), information likely to result in the person’s identification.
- (5) In this section—
- attorney*** means—
- (a) an attorney under a power of attorney; or
 - (b) an attorney under an advance health directive.

91 Amendment of s 34 (Suspension of attorney’s power)

(1) Section 34—

insert—

(3A) The public guardian may not—

-
- (a) extend the suspension; or
 - (b) suspend the attorney more than once on the same ground arising from the same circumstances.
- (2) Section 34(3A) to (6)—
renumber as section 34(4) to (7).

92 Amendment of s 43 (Requirement to visit visitable site if asked)

- (1) Section 43—
insert—
- (1A) The following entities may also make a request under subsection (1)(a) or (b)—
 - (a) a consumer’s administrator;
 - (b) a consumer’s attorney under an enduring power of attorney;
 - (c) a consumer’s attorney under an advance health directive;
 - (d) a consumer’s statutory health attorney;
 - (e) a consumer’s guardian;
 - (f) an interested person for the consumer;
 - (g) an organisation that provides advocacy for consumers.
- (2) Section 43(1A) to (3)—
renumber as section 43(2) to (4).

93 Amendment of s 47 (Reports by community visitors (adult))

- Section 47(4)—
insert—

[s 94]

- (f) an interested person for the consumer;
- (g) if the report relates to a visit requested by a person mentioned in section 43(2)(a), (b), (c), (d), (e) or (g)—the person who made the request.

94 Amendment of s 146 (Delegation)

- (1) Section 146—

insert—

- (1A) The public guardian may delegate the public guardian’s powers under section 29 or 106 to a senior executive or a senior officer.
- (1B) The public guardian may delegate the public guardian’s powers under section 25(1) to a senior executive.

- (2) Section 146(4)—

insert—

senior officer see the *Public Service Act 2008*, schedule 4.

- (3) Section 146(1A) to (4)—

renumber as section 146(2) to (6).

95 Amendment of sch 1 (Dictionary)

- (1) Schedule 1, definitions *health care principle* and *interested person*—

omit.

- (2) Schedule 1—

insert—

health care principles see the Guardianship Act, section 11C.

interested person, for another person, means a

person who has a sufficient and genuine concern for the rights and interests of the other person.

- (3) Schedule 1, definition *general principles*, ‘schedule 1, part 1’—

omit, insert—

section 11B

Part 7 **Amendment of Public Interest Disclosure Act 2010**

96 Act amended

This part amends the *Public Interest Disclosure Act 2010*.

97 Amendment of s 19 (Disclosure concerning GOC or rail government entity)

Section 19—

insert—

- (10) This section is declared to be a Corporations legislation displacement provision for the purposes of the Corporations Act, section 5G, in relation to section 1317AE of that Act.

Note—

The Corporations Act, section 5G, provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

[s 98]

Part 8

Consequential and minor amendments

98 Acts amended

Schedule 1 amends the Acts it mentions.

Schedule 1 Consequential and minor amendments

section 98

Guardianship and Administration Act 2000

1 Section 68(2), note—

omit, insert—

Note—

For the application of the general principles and the health care principles to the tribunal and to an entity authorised by an Act to make a decision for an adult about prescribed special health care, see sections 11B and 11C.

2 Section 74(4), ‘principle’—

omit, insert—

principles

Powers of Attorney Act 1998

1 Section 79(1), note, ‘health care principle’—

omit, insert—

general principles or health care principles

Public Guardian Act 2014

- 1 **Section 107(2), ‘*Crime and Misconduct Act 2001*’—**
omit, insert—
Crime and Corruption Act 2001

- 2 **Section 126(2)(b), ‘section 230A’—**
omit, insert—
section 231

- 3 **Section 144(5), definition *complaints agency*, paragraph (b)—**
omit, insert—
(b) the Crime and Corruption Commission under the *Crime and Corruption Act 2001*;

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