



Powers of Attorney Act 1998

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Queensland

Powers of Attorney Act 1998

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Powers of Attorney Act 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

Chapter 1 Preliminary

1 Short title

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

2 Commencement

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

3 Dictionary

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

4 Act binds all persons

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.

5 General overview

- (1) An *attorney* is a person who is authorised to make particular decisions and do particular 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, this Act introduces advance health directives and statutory health attorneys.

Note—

The *Property Law Act 1974*, part 9 (Powers of attorney) was repealed by section 182.

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

- (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 particular things for the principal in relation to health care.

Note—

Advance health directives are dealt with in chapter 3.

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

Note—

See section 62 (Statutory health attorney).

Also, see the *Guardianship and Administration Act 2000*, section 66(5) (Adult with impaired capacity—order of priority in dealing with health matter).

6 Scope of Act

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

Note—

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.

6A Relationship with Guardianship and Administration Act 2000

(1) This Act is to be read in conjunction with the *Guardianship and Administration Act 2000* which provides a scheme by which—

- (a) the tribunal may appoint a guardian for an adult with impaired capacity for personal matters to make particular decisions and do particular other things for the adult in relation to the matters; and

Note—

Personal matters do not include special personal matters or special health matters—schedule 2, section 2.

- (b) the tribunal may appoint an administrator for an adult with impaired capacity for financial matters to make particular decisions and do particular other things for the adult in relation to the matters; and

- (c) the tribunal may consent to the withholding or withdrawal of a life-sustaining measure and to particular special health care.

Note—

However, the tribunal may not consent to electroconvulsive therapy or a non-ablative neurosurgical procedure—*Guardianship and Administration Act 2000*, section 68(1).

(2) The *Guardianship and Administration Act 2000* also provides a scheme for health care and special health care for adults with impaired capacity for the matter concerned, including an order of priority for dealing with health care and special health care.

Note—

See the *Guardianship and Administration Act 2000*, sections 65 and 66.

- (3) The *Guardianship and Administration Act 2000* also provides for the public advocate.
- (4) If there is an inconsistency between this Act and the *Guardianship and Administration Act 2000*, the *Guardianship and Administration Act 2000* prevails.

6B Relationship with Public Guardian Act 2014

This Act is to be read in conjunction with the *Public Guardian Act 2014* which provides for the public guardian and the community visitor (adult) program.

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 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
- (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 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.

Chapter 2 Powers of attorney other than enduring powers of attorney

Part 1 Introduction

7 Application of ch 2

- (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 Act or otherwise, after the commencement of this Act.

Note—

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.

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

8 Powers of attorney

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 matter) that the principal can lawfully do by an attorney; and

Note—

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

- (b) provide terms or information about exercising the power.

9 When attorney's power exercisable

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

10 Powers of attorney given as security

- (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.

Note—

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.

- (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, by reference to the title of the office concerned.

Note—

office includes position—see the *Acts Interpretation Act 1954*, schedule 1.

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

11 Form of general power of attorney made under Act

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

Note—

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 48A (Compliance with forms).

12 Execution of powers of attorney

- (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.

13 Appointment of 1 or more attorneys

- (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, by reference to the title of the office concerned.

Note—

office includes position—see the *Acts Interpretation Act 1954*, schedule 1.

- (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.

14 Proof of power of attorney

- (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;
 - (b) a justice;
Note—
justice means a justice of the peace—see the *Acts Interpretation Act 1954*, schedule 1.
 - (c) a commissioner for declarations;
 - (d) a notary public;
 - (e) a lawyer;
Note—
lawyer means an Australian lawyer within the meaning of the *Legal Profession Act 2007*—see the *Acts Interpretation Act 1954*, schedule 1.
 - (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.

Note—

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

15 Relationship with other law

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

16 Advice of revocation

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.

17 Written revocation

- (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.

Note—

See also section 7 (Application of ch 2).

18 Impaired capacity

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

Note—

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

- (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.

19 Death

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

Division 3 Revocation according to terms

20 According to terms

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.

Division 4 Revocation by attorney

21 Resignation

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

Note—

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

22 Impaired capacity

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.

Note—

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

23 Bankruptcy or insolvency

- (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.

Note—

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

- (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 59A.

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.

24 Death

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

Note—

See section 59A (Effect of power ending).

Part 4 Other provisions

25 Registration of powers of attorney and instruments revoking powers

- (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.

Note—

See also section 7 (Application of ch 2).

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

- (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.

Note—

See also section 7 (Application of ch 2).

Chapter 3 Enduring documents

Part 1 Application and interpretation

27 Application of ch 3

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

28 Meaning of *enduring document*

An *enduring document* is an enduring power of attorney or an advance health directive.

Note—

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.

29 Meaning of *eligible attorney*

- (1) An *eligible attorney*, for a matter under an enduring power of attorney, means—

-
- (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*.
- (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) 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; 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.

30 Meaning of *eligible signer*

- (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—

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.

31 Meaning of *eligible witness*

- (1) An *eligible witness*, for a document, is a person who—
 - (a) except for a document revoking an advance health directive—is a justice, commissioner for declarations, notary public or lawyer; and

Note—

justice means a justice of the peace—see the *Acts Interpretation Act 1954*, schedule 1.

lawyer means an Australian lawyer within the meaning of the *Legal Profession Act 2007*—see the *Acts Interpretation Act 1954*, schedule 1.

- (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 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—
- (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**

32 **Enduring powers of attorney**

- (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

[s 33]

more financial matters or personal matters 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

Note—

personal matters includes health matters but does not include special personal matters or special health matters—schedule 2, section 2.

- (b) provide terms or information about exercising the power.
- (2) An enduring power of attorney giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter.

Note—

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) 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.

33 When attorney's power exercisable

- (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.
- (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.

Note—

However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(4).

(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.

34 Recognition of enduring power of attorney made in other jurisdictions

If an enduring power of attorney is made in another jurisdiction and complies with the requirements in the other jurisdiction, 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.

Part 3 Advance health directive provisions

35 Advance health directives

(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 matter for the principal in the event the directions prove inadequate; and

Note—

Note this does not include a special health matter.

- (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, a life-sustaining measure 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.
- (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.

36 Operation of advance health directive

- (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.

Note—

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

- (2) A direction to withhold or withdraw a life-sustaining measure 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;

Note—

This is sometimes referred to as 'a coma'.

- (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

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

Note—

life-sustaining measure is defined in schedule 2, section 5A.

- (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.

Note—

However, the priority of an attorney's power for a health matter is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(4).

- (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.

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

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

- (a) authorises, justifies or excuses killing a person; or

- (b) affects the Criminal Code, section 284 or chapter 28.

Note—

Criminal Code—

284 Consent to death immaterial

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—

296 Acceleration of death

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.

311 Aiding suicide

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.

37A Act's relationship with Forensic Disability Act

- (1) For a forensic disability client under the *Forensic Disability Act 2011* 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 *Forensic Disability Act 2011* prevails in the case of inconsistency.

38 Act's relationship with Mental Health Act

- (1) For an involuntary patient under the *Mental Health Act 2016* 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 2016* prevails in the case of inconsistency.

39 Common law not affected

This Act does not affect common law recognition of instructions about health care given by an adult that are not given in an advance health directive.

40 Recognition of enduring health care document made in other States

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

41 Principal's capacity to make an enduring power of attorney

- (1) A principal has capacity to make an enduring 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) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—
- (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 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.

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 that the principal understood these matters.

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

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.

43 Appointment of 1 or more eligible attorneys

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

Note—

See section 29 (Meaning of *eligible attorney*).

- (2) A principal may appoint 1 or more of the following—
- (a) a single attorney for a matter or all matters;
 - (b) different attorneys for different matters;
 - (c) a person to act as an attorney for a matter or all matters in a circumstance stated in the enduring document;
 - (d) alternative attorneys for a matter or all matters so power is given to a particular attorney only in a circumstance stated in the enduring document;
 - (e) successive attorneys for a matter or all matters so power is given to a particular attorney only when power given to a previous attorney ends;
 - (f) joint or several, or joint and several, attorneys for a matter or all matters;
 - (g) 2 or more joint attorneys for a matter or all matters, being a number less than the total number of attorneys for the matter or all matters.
- (3) However, a principal may not appoint more than 4 joint attorneys for a matter under an enduring power of attorney.

44 Formal requirements

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

Note—

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

- (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; and

Note—

See section 30 (Meaning of *eligible signer*).

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

Note—

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.

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

45 Proof of enduring document

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

Note—

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) The copy must be certified to the effect that it is a true and complete copy of the original.
- (3) Certification must be by 1 of the following persons—

- (a) the principal;
- (b) a justice;

Note—

justice means a justice of the peace—see the *Acts Interpretation Act 1954*, schedule 1.

- (c) a commissioner for declarations;
- (d) a notary public;

- (e) a lawyer;

Note—

lawyer means an Australian lawyer within the meaning of the *Legal Profession Act 2007*—see the *Acts Interpretation Act 1954*, schedule 1.

- (f) a trustee company under the *Trustee Companies Act 1968*;
- (g) a stockbroker.
- (4) 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.
- (5) This section does not prevent an enduring document being proved in another way.

Part 5 Revoking an enduring document

Division 1 Revocation by principal

46 Advice of revocation

If an enduring document 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.

Note—

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.

47 Principal's capacity for written revocation of power of attorney

- (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.

Note—

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

- (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.

48 Principal's capacity for written revocation of advance health directive

- (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.

49 Formal requirements for written revocation of enduring document

- (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; and

Note—

See section 30 (Meaning of *eligible signer*).

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

Note—

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.

- (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 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.

50 Later enduring document

- (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.

Note—

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 the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter).

51 Death

When a principal dies, the enduring document is revoked.

52 Marriage

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 husband or wife.

52A Civil partnership

Unless there is a contrary intention expressed in the enduring document, if a principal enters into a civil partnership after making an enduring document, the enduring document is revoked to the extent it gives power to someone other than the principal's civil partner.

53 Divorce

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

53A Termination of civil partnership

- (1) This section applies if—
 - (a) a principal makes an enduring document; and
 - (b) after making the enduring document, the principal's civil partnership is terminated under the *Civil Partnerships Act 2011*, section 18.
- (2) The enduring document is revoked to the extent it gives power to the principal's previous civil partner.

Division 2 Revocation according to terms

54 According to terms

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

55 Resignation

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

Note—

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)).

56 Impaired capacity

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.

57 Bankruptcy or insolvency

- (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 59A.

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.

Note—

Section 59A (Effect of power ending) allows the remaining joint attorney to exercise a power another joint attorney is unable to exercise.

58 Death

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

59 Paid carer or health provider

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.

59AA Service provider

If the attorney becomes the service provider for a residential service where the principal is a resident, the enduring document is revoked to the extent it gives power to the attorney.

59A Effect of power ending

If an attorney's power for a matter ends and the attorney was a joint attorney for the matter—

- (a) if, of the joint attorneys, there is 1 remaining attorney, the remaining attorney may exercise power for the matter; and
- (b) if, of the joint attorneys, there are 2 or more remaining attorneys, the remaining attorneys may exercise power for the matter and, if exercising power, must exercise power jointly.

Part 6 Other provisions

60 Registration of powers of attorney and instruments revoking powers

- (1) An enduring power of attorney may be registered.

Note—

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) 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.

61 Offence to dishonestly induce the making or revocation of enduring document

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

Maximum penalty—200 penalty units.

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.

- (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.

Chapter 4 Statutory health attorneys

62 Statutory health attorney

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

Note—

Note this does not include a special health 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.

Note—

However, the priority of an attorney's power is decided by the *Guardianship and Administration Act 2000*, section 66 (Adult with impaired capacity—order of priority in dealing with health matter). See, in particular, section 66(5).

63 Who is the statutory health attorney

- (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 person who is 18 years or more and who is a spouse of the adult if the relationship between the adult and the spouse is close and continuing;

Note—

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

- (b) a person who is 18 years or more and who has the care of the adult 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;
- (c) a person who is 18 years or more and who is a close friend or relation of the adult 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.

Note—

If there is a disagreement about which of 2 or more eligible people should be the statutory health attorney or how the power should be exercised, see the *Guardianship and Administration Act 2000*, section 42 (Disagreement about health matter).

- (2) If no-one listed in subsection (1) is readily available and culturally appropriate to exercise power for a matter, the public 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.
- (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.

Chapter 5 Exercising power for a principal

Part 1 Provisions applying to attorneys

65 Application of pt 1

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

- (a) a general power of attorney made under this Act; or

Note—

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.

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

66 Act honestly and with reasonable diligence

- (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).

67 Subject to terms of document

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

69 Execution of instrument etc.

- (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.

Note—

This section deals with the execution of documents by corporations.

70 Subject to guardian or administrator

- (1) If a person is appointed under the *Guardianship and Administration Act 2000* as guardian or administrator for a principal, an attorney for the principal may exercise power only to the extent authorised by the tribunal.
- (2) In this section—
attorney includes a statutory health attorney.

71 Not exercise revoked power

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.

72 Resignation of attorney

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

Note—

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

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

Note—

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

73 Avoid conflict transaction

- (1) An attorney for a financial matter may enter into a conflict transaction only if the principal, or the court under section 118(2), has authorised the transaction, conflict transactions of that type or conflict transactions generally.

Note—

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

-
- (2) 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.
- (3) 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.

- (4) Subsection (5) applies if an attorney enters into a conflict transaction without obtaining an authorisation mentioned in subsection (1).
- (5) 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).
- (6) 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
 - (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 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.

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- 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.
 - 6 A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.
- (7) 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).
- (8) Also, to remove any doubt, it is declared that the making of a gift or donation under section 88 is not a conflict transaction.
- (9) 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.
- (10) In this section—
- joint interest*** includes an interest as a joint tenant or tenant in common.

74 Protected use of confidential information

- (1) Despite section 74A, an attorney, including a statutory health attorney, may disclose confidential information that relates only to a particular person to the particular person.
- (2) If an attorney, including a statutory health attorney, gains confidential information because of being an attorney, or because of an opportunity given by being an attorney, the person may use the information for the purposes of this Act or as provided under subsection (3).
- (3) Confidential information may be used—
 - (a) if authorised or required under a regulation or another law; or
 - (b) for a proceeding arising out of or in connection with this Act; or
 - (c) if authorised by the person to whom the information relates; or
 - (d) if authorised by the court or the tribunal in the interests of justice; or
 - (e) if necessary to prevent a serious risk to a person's life, health or safety; or
 - (f) for the purpose of obtaining legal or financial advice; or
 - (g) if reasonably necessary to obtain counselling, advice or other treatment; or
 - (h) in reporting a suspected offence to a police officer or assisting a police officer in the investigation of a suspected offence; or
 - (i) in assisting the public guardian, the public advocate or a public service officer in the performance of functions under this Act, the *Guardianship and Administration Act 2000* or the *Public Guardian Act 2014*.
- (4) In this section—

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

[s 74A]

- (a) information within the public domain 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; or
- (c) information about a guardianship proceeding.

guardianship proceeding see *Guardianship and Administration Act 2000*, schedule 4.

use, confidential information, includes disclose or publish.

74A Prohibited use of confidential information

- (1) An attorney, including a statutory health attorney, must not use confidential information gained because of being an attorney, or because of an opportunity given by being an attorney, other than as provided under section 74, unless the person has a reasonable excuse.

Maximum penalty—200 penalty units.

- (2) In this section—

confidential information see section 74.

use, confidential information, see section 74.

Part 2 Provisions applying to attorneys under enduring documents and statutory health attorneys

75 Application of pt 2

Except where otherwise provided, this part applies to—

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

77 Attorney has maximum power if not otherwise stated

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.

78 Multiple attorneys are joint if not otherwise stated

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.

79 Consult with principal's other appointees or attorneys

- (1) If there are 2 or more persons who are guardian, administrator or attorney for a principal, the persons 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.

Note—

Note the *Guardianship and Administration Act 2000*, sections 41 (Disagreement about matter other than health matter), 42 (Disagreement about health matter) and 43 (Acting contrary to general principles or health care principles).

- (2) However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney.

80 Act together with joint attorneys

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

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

81 Right of attorney to information

- (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.

82 Resignation of attorney while principal has impaired capacity

- (1) Despite section 72, 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 attorney to replace the attorney for the matter.

Note—

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

Part 3 Provisions about financial matters

83 Application

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

Note—

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.

84 Power to invest

- (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 may invest only in authorised investments.
- (3) However, if, when the power became exercisable, the principal had investments that were not authorised investments, an attorney for financial matters may continue the investments, including by taking rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding.
- (4) In this section—

authorised investment means—

 - (a) an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973*, part 3; or
 - (b) an investment approved by the tribunal.

85 Keep records

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

Note—

Under the *Public Guardian Act 2014*, section 21, the public guardian may have the accounts audited.

86 Keep property separate

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

Maximum penalty—300 penalty units.

- (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.

87 Presumption of undue influence

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.

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).

89 Maintain principal's dependants

- (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 5 Protection and relief from liability

96 Definitions for part

In this part—
invalidity—

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

97 Protection if court advice, directions or recommendations

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.

98 Protection for attorney if unaware of invalidity

- (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, purports to exercise the power does not incur any liability, either to the principal or anyone else, because of the invalidity.

Note—

See section 113 (Declaration about validity).

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

- (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*); and

Note—

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.

- (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 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.

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.

101 No less protection than if adult gave health consent

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.

102 Protection of health provider unaware of advance health directive

A health provider is not affected by an adult's advance health directive to the extent the health provider, acting in good faith, does not know the adult has an advance health directive.

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

- (1) This section applies if a health provider has reasonable grounds to believe that a direction in an advance health directive is uncertain or inconsistent with 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.

104 Protection for person carrying out forensic examination with consent

- (1) A person carrying out a forensic examination of a principal to which an attorney for the principal has consented 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.
- (2) A forensic examination, to which the attorney has consented, is not unlawful.

105 Relief from personal liability

- (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

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.
- (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.

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

- (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.
- (1A) This section applies even if the person whose benefit is lost is the attorney by whose dealing the benefit is lost.
- (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 Act 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.

Chapter 6 Supreme Court

Part 1 General

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

- (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.

109 Inherent jurisdiction and litigation guardian process not affected

- (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.

Note—

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.

- (2) This Act does not affect rules of court of the Supreme Court, District Court or Magistrates Courts about a litigation guardian for a person under a legal incapacity.

109A Queensland Civil and Administrative Tribunal also has jurisdiction and powers about enduring documents

- (1) The tribunal is given the same jurisdiction and powers for enduring documents as the Supreme Court.

- (2) For subsection (1), this Act applies, with necessary changes, as if references to the Supreme Court were references to the tribunal.

Part 2 Court's powers

110 Application and participation

- (1) An application may be made to the court for a declaration, order, direction, recommendation or advice about something in, or related to, this Act.
- (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 public guardian or public trustee;
 - (e) if the document is an advance health directive or the application involves power for a health matter—the public 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).

111 Determination of capacity

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

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.

112 Effect of declaration about capacity to enter contract

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.

113 Declaration about validity

- (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; or

Note—

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

- (b) it does not comply with the other requirements of this Act; or

Note—

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).

- (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 attorneys for the principal.

Note—

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

114 Effect of invalidity

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

115 Declaration about commencement of power

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.

116 Order removing attorney or changing or revoking document

The court may, by order—

- (a) remove an attorney and appoint a new attorney to replace the removed attorney; or

Note—

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

- (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).

117 Changed circumstances as basis for change or revocation

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.

118 Advice, directions and recommendations etc.

- (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—

- (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), 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, if the court is satisfied the transaction would be in accordance with the general principles.
 - (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.

120 Court may proceed without all relevant material

- (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.
- (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.

121 Report by public guardian or public trustee

- (1) The court may—
 - (a) receive in evidence in a proceeding a written report by the public 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.

122 Records and audit

- (1) For an attorney for a financial matter under an enduring power of attorney, the court or the tribunal may make an order that—
 - (a) the attorney files in the court or the tribunal, 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 or the tribunal, 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 or the tribunal and that a copy of the auditor's report be given to the court or the tribunal and the applicant; or
 - (d) the attorney present a plan of management for approval.
- (2) The court or the tribunal may make the order on its own initiative or on the application of the principal or another interested person.
- (3) The court or the tribunal may make an order about payment of the auditor's costs, including security for the costs.
- (4) This section applies even if—
 - (a) the enduring power of attorney has been revoked; or
 - (b) the principal has died.

123 Court may dismiss frivolous etc. applications

- (1) The court may dismiss an application if the court is satisfied the application is—
 - (a) frivolous, trivial 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).

124 Written reasons for decision

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.

125 Costs

- (1) The costs of a proceeding are within the court's discretion.
- (2) However, unless the court otherwise orders, costs follow the event.

Chapter 8 Other

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.

161 Chief executive may approve forms

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

162 Regulation-making power

The Governor in Council may make regulations under this Act.

Chapter 9 Transitional provisions

Part 1 Transitional provision for Act No. 22 of 1998

163 Powers of attorney under Property Law Act 1974

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 Transitional provision for Guardianship and Administration Act 2000

164 Subject to committee or manager

- (1) If a person, other than an attorney, is committee or manager of a principal, or all or part of a principal's estate, the attorney may exercise power for the principal only to the extent authorised by the committee or manager.
- (2) In this section—
attorney includes a statutory health attorney.

Part 3 **Transitional provisions for Guardianship and Administration and Other Acts Amendment Act 2001**

165 **References to special life-sustaining measures**

A reference in an enduring document of force and effect immediately before the commencement of this section to special life-sustaining measures or a special life-sustaining measure, however described, is, from the commencement of this section, taken to be a reference to life-sustaining measures or a life-sustaining measure.

166 **Power for health matters excludes power for withholding or withdrawal of life-sustaining measure**

An enduring document of force and effect immediately before the commencement of this section that authorises an attorney to exercise power for health matters does not, from the commencement of this section, authorise the attorney to exercise power for the withholding or withdrawal of a life-sustaining measure.

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.

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.

Schedule 2 Types of matters

schedule 3

Part 1 Financial matter

1 Financial matter

A *financial matter*, for a principal, is a matter relating to the principal's financial or property matters, 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 administrator 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 a 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 in authorised investments;
- (k) continuing investments of the principal, including 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;

- (l) undertaking a real estate transaction for the principal;
- (m) dealing with land for the principal 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 relating to the principal's financial or property matters;
- (p) withdrawing money from, or depositing money into, the principal's account with a financial institution.

Part 2 Personal matter

2 Personal matter

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 the principal's health care, or welfare, including, for example, a matter relating to 1 or more of the following—

- (a) where the principal lives;
- (b) with whom the principal lives;
- (ba) services provided to the principal;
- (c) whether the principal works and, if so, the kind and place of work and the employer;
- (d) what education or training the principal undertakes;
- (e) whether the principal applies for a licence or permit;
- (f) day-to-day issues, including, for example, diet and dress;

- (g) whether to consent to a forensic examination of the principal;

Note—

See also section 104 (Protection for person carrying out forensic examination with consent).

- (h) health care of the principal;
- (i) a legal matter not relating to the principal's financial or property matters;
- (j) who may have access visits to, or other contact with, the principal;
- (k) advocacy relating to the care and welfare of the principal.

3 Special personal matter

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;
- (f) consenting to the principal entering into a civil partnership;
- (g) consenting to the principal terminating a civil partnership;
- (h) entering into, or agreeing to enter into, a surrogacy arrangement under the *Surrogacy Act 2010*;
- (i) consenting to the making or discharge of a parentage order under the *Surrogacy Act 2010*;

- (j) entering a plea on a criminal charge for the principal;
- (k) applying, or consenting to an application, for a cultural recognition order or applying for a discharge order under the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020*.

4 Health matter

A **health matter**, for a principal, is a matter relating to health care, other than special health care, of the principal.

5 Health care

- (1) **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 direction or supervision of, a health provider.
- (2) **Health care**, of a principal, includes withholding or withdrawal of a life-sustaining measure for the principal if the commencement or continuation of the measure for the principal would be inconsistent with good medical practice.
- (3) **Health care**, of a principal, does not include—
 - (a) first aid treatment; or
 - (b) a non-intrusive examination made for diagnostic purposes; or
 - (c) 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; or
 - (d) psychosurgery for the principal.

Example of paragraph (b)—

a visual examination of a principal's mouth, throat, nasal cavity, eyes or ears

5A Life-sustaining measure

- (1) A *life-sustaining measure* is health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation.
- (2) Without limiting subsection (1), each of the following is a *life-sustaining measure*—
 - (a) cardiopulmonary resuscitation;
 - (b) assisted ventilation;
 - (c) artificial nutrition and hydration.
- (3) A blood transfusion is not a *life-sustaining measure*.

5B Good medical practice

Good medical practice is good medical practice for the medical profession in Australia having regard to—

- (a) the recognised medical standards, practices and procedures of the medical profession in Australia; and
- (b) the recognised ethical standards of the medical profession in Australia.

6 Special health matter

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

Note—

An attorney or guardian 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. Alternatively, in particular circumstances the tribunal may consent to special health care. See the

Guardianship and Administration Act 2000, section 68 (Special health care).

7 Special health care

Special health care, of a principal, is health care of the following types—

- (a) removal of tissue from the principal while alive for donation to someone else;

Note—

For the situation after the principal has died, see the *Transplantation and Anatomy Act 1979*, particularly section 22.

- (b) sterilisation of the principal;
- (c) termination of a pregnancy of the principal;
- (d) participation by the principal in special medical research or experimental health care;
- (e) electroconvulsive therapy or a non-ablative neurosurgical procedure for the principal;
- (f) prescribed special health care of the principal.

8 Removal of tissue for donation

- (1) For an adult, ***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.

9 Sterilisation

- (1) ***Sterilisation*** is health care of a principal who is, or is reasonably likely to be, fertile that is intended, or reasonably

likely, to make the principal, or ensure the principal is, permanently infertile.

Examples of sterilisation—

endometrial ablation, hysterectomy, tubal ligation and vasectomy

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

10 Termination

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

11 Primary reason for treatment

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.

12 Special medical research or experimental health care

- (1) *Special medical research or experimental health care*, for a principal, means—
- (a) medical research or experimental health care relating to a condition the principal has or to which the principal has a significant risk of being exposed; or
 - (b) medical research or experimental health care intended to gain knowledge that can be used in the diagnosis,

maintenance or treatment of a condition the principal has or has had.

- (2) *Special medical research or experimental health care* does not include—
- (a) psychological research; or
 - (b) an approved clinical research.

13 Approved 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 the giving of placebos to some of the participants in the trial.
- (1A) 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 a principal's breathing.
- (2) *Approved clinical research* is clinical research approved by the tribunal under the *Guardianship and Administration Act 2000*, section 74C.

14 Electroconvulsive therapy

Electroconvulsive therapy is the application of electric current to specific areas of the head to produce a generalised seizure that is modified by general anaesthesia and the administration of a muscle relaxing agent.

15 Psychosurgery

Psychosurgery is a procedure on the brain, that involves deliberate damage to or removal of brain tissue, for the treatment of a mental illness.

15A Non-ablative neurosurgical procedure

A *non-ablative neurosurgical procedure* is a procedure on the brain, that does not involve deliberate damage to or removal of brain tissue, for the treatment of a mental illness.

17 Prescribed special health care

Prescribed special health care means health care prescribed under the *Guardianship and Administration Act 2000*.

Part 3 Legal matter**18 Legal matter**

A *legal matter*, for a principal, includes 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 4 or an application for compensation arising from a compulsory acquisition; and

Note—

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.

- (d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.

Schedule 3 Dictionary

section 3

administrator means an administrator appointed under the *Guardianship and Administration Act 2000*.

advance health directive see section 35.

approved clinical research see schedule 2, section 13.

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) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

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.

clinical research see schedule 2, section 13(1).

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.

court means the Supreme Court.

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

electroconvulsive therapy see schedule 2, section 14.

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.

forensic examination of a principal means a medical or dental procedure for the principal that is carried out for forensic purposes, other than because the principal is suspected of having committed a criminal offence.

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

general principles see section 6C.

good medical practice see schedule 2, section 5B.

guardian means a guardian appointed under the *Guardianship and Administration Act 2000*.

health care see schedule 2, section 5.

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

health care principles see section 6D.

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 have capacity for the matter.

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

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.

legal matter see schedule 2, section 18.

life-sustaining measure see schedule 2, section 5A.

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, particular, but not all, financial matters).

non-ablative neurosurgical procedure see schedule 2, section 15A.

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 principle that damages may be awarded by a court for voluntary services performed for the principal's care.

Note—

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.

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.

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

prescribed special health care see schedule 2, section 17.

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.

psychosurgery see schedule 2, section 15.

public guardian means the public guardian under the *Public Guardian Act 2014*.

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).

resident has the meaning given by the *Residential Services (Accreditation) Act 2002*.

residential service has the meaning given by the *Residential Services (Accreditation) Act 2002*.

service provider has the meaning given by the *Residential Services (Accreditation) Act 2002*.

special health care see schedule 2, section 7.

special health matter see schedule 2, section 6.

special medical research or experimental health care see schedule 2, section 12.

special personal matter see schedule 2, section 3.

statutory health attorney see section 63.

sterilisation see schedule 2, section 9.

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.

term includes condition, limitation and instruction.

termination see schedule 2, section 10.

tissue see schedule 2, section 8(2).

tribunal means QCAT.