

POWERS OF ATTORNEY BILL 1997

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The principal objectives of the Bill are to—

- reform those areas of law which enable a person to appoint a person(s) and to give instructions in relation to future personal, health care and financial matters;
- to enable a person to give directions in relation to their future health care if they are unable to do so for themselves;
- give statutory authority for a spouse, member of a person's family and certain other people to give consent for medical treatment if that person is unable to do so for themselves;
- enhance and create effective mechanisms for the protection of the rights and interests of people who because of a decision making disability are vulnerable to exploitation.

Reasons for the objectives and how they will be achieved

Although powers of attorney have existed for centuries, it has only been since 1975 that general powers of attorney in simplified form were incorporated into a legislative framework in Queensland by the *Property Law Act 1974*.

Powers of attorney depend for their validity on the continued capacity of the principal to manage their affairs. In 1990, to overcome this problem, enduring powers of attorney (EPAs) were created under the *Property Law Act 1974*. This meant that an attorney could continue to act even though the principal had suffered from say a stroke, Alzheimer's disease, head injury or mental illness.

While this was a significant advance in enabling people to plan for the

future management of their affairs, these EPAs had a number of limitations. Since they related only to financial matters, there was no ability to choose someone to make personal decisions (e.g. where the principal is going to live and other day to day decisions) or to make health care decisions if the principal should become unable to do so. This was a significant defect, frequently commented upon by the community.

There were also other issues such as lack of flexibility by not being able to appoint different attorneys for different purposes or alternate or successive attorneys; limit the attorney's powers or give directions or specify when the power will begin.

Supervisory and investigatory powers needed to be strengthened to deal effectively with suspected cases of abuse and exploitation, particularly of elderly vulnerable people.

The lack of a set of statutory principles meant that there was no legislative direction for the guidance of an attorney when making decisions for a principal who is unable to give instructions.

This was despite a number of United National declarations relating to the rights of people with a disability.

For some time there has been growing concern within the community over the lack of legislative authority to make decisions in relation to the nature and extent of future health care that a person may or may not want.

There has also been uncertainty as to who has authority to consent to health care or treatment for a family member such as a spouse or adult child with a disability.

The Queensland Law Reform Commission (QLRC) conducted a comprehensive examination of the law in relation to substitute decision making on behalf of people with a decision making disability and has made recommendations for sweeping reforms to the law. Although a two phase approach has been adopted to address the issues, the QLRC recommendations are reflected in the new legislation. In a few instances where another option has been considered more desirable, the departure is not considered to be significant.

The Bill represents the first of those phases.

The second phase will involve the creation of an accessible, affordable and simplified method for the appointment of a person or persons to make substitute decisions in cases where the person with a decision making

disability has not made or is not able to make their own arrangements or where it is otherwise necessary to do so.

Key reforms in the Bill therefore involve the creation of a comprehensive legislative scheme—

- whereby a person may appoint one or more persons to act as an attorney to make financial and personal and health care decisions on their behalf should they lose the capacity to do so in the future;
- for the creation of an advance health directive enabling a person to give directions for their future health care and treatment.
- for the creation of a statutory health attorney who, without further appointment is able to make health care decisions on behalf of a person who is unable to do so for themselves;
- for the establishment of an adult guardian, a statutory office responsible for the protection of the rights of people with a decision making disability and to act as a health care decision maker of last resort for people with a decision making disability;
- which provides a set of principles required to be observed by attorneys and others dealing with people with a decision making disability.

Administrative cost to Government of implementation

There are no administrative costs to the consolidated fund in phase one of the reforms under the Bill. Consequential amendments to the *Public Trustee Act 1978* will provide for the Public Trustee to give to the adult guardian in accordance with a budget approved by the Minister, for the year, the financial and other resources necessary or desirable for the performance of the adult guardian's functions. The supervision of attorneys under EPAs is being transferred from the Public Trustee to the adult guardian.

Fundamental legislative principles

Clause 91 provides that generally the exercise of power for a health matter or a direction in an advance health directive is ineffective if the health provider knows or ought reasonably to be aware that the adult's objects.

This objection may only be overridden if an advance health directive makes such a provision. In other cases objection may be overridden only if the adult has minimal or no understanding of what the health care involves and why it is required and the health care is such as to cause no distress or temporary distress which is outweighed by the benefit.

This is necessary because otherwise people with certain intellectual disabilities would be deprived of necessary health treatment. The health care principle and *Clause 92* ensures that the minimum amount of force that is reasonable and necessary to carry out health care authorised by the Act continues to apply.

Consultation

Extensive consultation on the issues relating to substitute decision making was conducted over a 4 year period by the Queensland Law Reform Commission.

A consultation draft of the Bill together with explanatory memorandum and draft forms was released for public consultation on 2 June 1997. Specific consultation took place with key community organisations representing people with various decision making disabilities, professional and commercial bodies and the public. Responses to the consultation process resulted in changes to the draft Bill to better reflect community and commercial needs.

NOTES ON PROVISIONS

CHAPTER 1—PRELIMINARY

Short Title

Clause 1 provides the short title for the legislation

Commencement

Clause 2 provides for the legislation to commence on a day to be fixed

by proclamation

Dictionary

Clause 3 establishes a dictionary in schedule 3 which defines particular words as used in the Bill.

Some words in the Bill have the meanings given to them as stated in particular sections or parts of the Bill.

Act Binds all persons

Clause 4 provides that the Bill binds all persons including the State and so far as the legislative power of the Parliament permits, the Commonwealth and other States.

General Overview

Clause 5 gives an explanation of the way and the purposes for which a person may appoint an attorney.

It also explains new concepts which the Bill brings in relating to persons who may consent to health matters

Scope of the Act

Clause 6 provides that except where expressly provided the Bill applies only to documents made after the commencement of the legislation.

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

PART 1- INTRODUCTION

Clause 7 provides for the application of the chapter to all powers of attorney other than enduring powers of attorney.

Powers of attorney

Clause 8 provides that a general power of attorney may be made under the legislation.

When attorney's power is exercisable

Clause 9 allows a principal to specify the time or circumstances when an attorney may exercise power.

Powers of Attorney given as security

Clause 10 applies to a power of attorney which is used as a means of securing the performance of an obligation owed by the principal to the attorney. Special provisions are made relating its irrevocable nature and that it does not lapse through the loss of capacity or death of the principal.

PART 2—MAKING A POWER OF ATTORNEY (OTHER THAN AN ENDURING POWER OF ATTORNEY)**Form of general power of attorney made under the Act**

Clause 11 requires that a general power of attorney made under the Act must be in the approved form.

Execution of Powers of Attorney

Clause 12 deals with the requirements for execution of powers of attorney.

The provision does not apply to powers of attorney contained in instruments such as mortgages or leases nor alters the law in relation to the execution of instruments by corporations.

Appointment of one or more attorneys

Clause 13 makes provision for the number and the way in which an attorney may be appointed under a general power of attorney under the Act.

Proof of power of attorney

Clause 14 provides for the way in which a copy of a power of attorney may be certified by persons specified as a true and correct copy.

PART 3—REVOKING A POWER OF ATTORNEY**Division 1—Introduction****Relationship with other law**

Clause 15 allows for a power of attorney to be revoked in ways other than under the legislation.

Division 2—Revocation by principal**Advice of revocation**

Clause 16 requires that where a power of attorney is revoked under this division, a principal must take reasonable steps to advise all attorneys and deregister any power of attorney which has been registered.

Written revocation

Clause 17 provides that any power of attorney is able to be revoked by using the approved form.

Impaired capacity

Clause 18 specifies that if a principal becomes a person with impaired capacity, a general power of attorney is revoked.

Provision is also made that if the principal is unable to communicate his or her intentions (which may only be temporary, but nevertheless prevent determination of whether the principal has capacity or not), the court may make an order confirming that the power remains in full force and effect.

Death

Clause 19 provides that a power of attorney is revoked on the death of the principal.

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

Clause 20 provides that a power of attorney is revoked according to the intention expressed in the instrument.

Division 4—Revocation by attorney**Resignation**

Clause 21 provides for revocation when the attorney resigns.

Impaired capacity

Clause 22 provides that if the attorney loses capacity the power of attorney is revoked.

Bankruptcy or insolvency

Clause 23 provides that the power of attorney will be revoked if the attorney becomes bankrupt or takes advantage of the laws of bankruptcy as a debtor or, if a corporation, is wound up or dissolved.

Death

Clause 24 provides that the death of an attorney revokes the power.

PART 4—OTHER PROVISIONS**Registration of powers of attorney and instruments revoking powers**

Clause 25 allows a power of attorney whether made under the Act or otherwise (such as at common law) and an instrument revoking such power of attorney to be registered.

If the power of attorney has been registered then it remains in force until the revocation is registered.

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

Clause 26 makes it an offence to induce a person to enter into a power of attorney or the revocation of a power.

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

Clause 27 limits the application of the Chapter to enduring documents

Meaning of “enduring document”

Clause 28 defines enduring documents as enduring powers of attorney and advance health directives.

Meaning of “eligible attorney”

Clause 29 prescribes that a person must be at least 18 years, not a paid carer or health provider for the principal or a bankrupt to be an attorney under an enduring power of attorney.

The public trustee and trustee companies as well as the adult guardian may also be appointed for personal matters. A trustee company cannot be an attorney under an advance health directive.

Meaning of “eligible signer”

Clause 30 prescribes that a person who is at least 18 years and is not a witness or an attorney may sign an enduring document on behalf of a principal (if so instructed).

Meaning of “eligible witness”

Clause 31 prescribes that a justice of the peace, commissioner for declarations, notary public or a lawyer may witness enduring documents.

However they must not be the attorney, person signing for a principal or a relation of the principal or an attorney. A paid carer or health provider for the principal cannot be a witness to an enduring power of attorney for personal matters or an enduring power of attorney or advance health directive.

PART 2—ENDURING POWER OF ATTORNEY PROVISIONS**Enduring powers of attorney**

Clause 32 enables a person to make an enduring power of attorney authorising one or more persons to act in personal and financial matters and may provide terms or information about the exercise of that power.

An enduring power of attorney is not revoked by the loss of capacity of the principal.

When the power is exercisable

Clause 33 enables a principal to specify the time, circumstance or occasion on which a power may be exercised.

If in the meantime the principal has impaired capacity the power is exercisable during any and every period the principal has impaired capacity.

If no provision for commencement is made in the enduring power of attorney, power for a financial matter is exercisable from when the document is made and for a personal matter from when the principal has impaired capacity.

A third party dealing with an attorney may ask for evidence of the principal’s impaired capacity such as a medical certificate.

Recognition of enduring power or attorney made in other States

Clause 34 provides that an enduring power of attorney which is valid in another State is valid in Queensland to the extent that those powers could have been exercised under an enduring power of attorney made in

Queensland.

PART 3—ADVANCE HEALTH DIRECTIVE PROVISIONS

Advance health directives

Clause 35 allows an adult to make an advance health directive giving directions about health matters and special health matters for future health care; information about his or her directions; appointing one or more attorneys to exercise power for a health matter and providing terms or information about that power.

The adult may give directions consenting to particular future health care despite objections; requiring, in specified circumstances, particular life-sustaining measures be withheld or withdrawn; and authorising an attorney to physically restrain, move or manage the principal for the purpose of health care despite objection.

An advance health directive has priority over general health care directions and is not revoked by the principal having impaired capacity.

Operation of advance health directive

Clause 36 provides that an advance health directive only operates when the principal has impaired capacity and is as effective as if the principal gave the direction at the time the matter needed to be done.

Power given to an attorney is subject to the terms of the advance health directive and the Act.

Evidence of the principal having impaired capacity, such as a medical certificate, may be requested by a person dealing with an attorney.

Act's relationship with *Mental Health Act*

Clause 37 provides that for a person liable to be detained under the *Mental Health Act 1974* who has given a direction about health care or special health care, an interpretation of that Act which is consistent with this Act and the direction is to be preferred to any other meaning.

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

Common law not affected

Clause 38 preserves the recognition at common law of directions about health care given otherwise than in an advance health directive.

Recognition of enduring health care document made in other States

Clause 39—provides that a prescribed document which is valid in another State, is valid in Queensland to the extent that the directions in the document could have been validly given in an advance health directive in Queensland.

PART 4—MAKING AN ENDURING DOCUMENT**Principal's capacity to make an enduring power of attorney**

Clause 40 provides that a principal may only make an enduring power of attorney if he or she understands the nature and effect of the power.

The clause sets out the criteria which are to be included in the determination of a person's understanding of the nature and effect of in the power.

Principal's capacity to make an advance health directive

Clause 41 provides that a principal may only make an advance health directive if he or she understands the nature and likely effects of each direction; that a direction operates only while the principal has impaired capacity; that the direction may be revoked at any time; and that if the principal has impaired capacity, he or she will be unable to effectively oversee the implementation of the direction.

If an attorney is appointed in the advance directive, the principal must also understand the things necessary to make an enduring power of attorney.

Appointment of one or more attorneys

Clause 42 provides that only an eligible attorney may be appointed as an attorney under an enduring document.

A principal may appoint one or more attorneys; different attorneys for

different matters; an attorney to act in particular circumstances; alternative attorneys; successive attorneys; joint and several attorneys; two or more attorneys (being less than the total number appointed) to act.

Formal requirements

Clause 43 An enduring power of attorney must be in an approved form.

Proof of enduring document

Clause 44 provides for the way in which a copy of an enduring document is to be certified by persons specified as a true and correct copy.

An enduring document is defined as an enduring power of attorney made before or after this Act or an advance health directive.

PART 5—REVOKING AN ENDURING DOCUMENT

Division 1—Revocation by principal

Advice of revocation

Clause 45 provides that if an enduring document is revoked the principal must take reasonable steps to advise all attorneys and if it is registered, deregister it.

Principal's capacity for written revocation of power of attorney

Clause 46 provides that to revoke an enduring power of attorney, a principal must have the same capacity necessary to make an enduring power of attorney.

Principal's capacity for written revocation of advance health directive

Clause 47 provides that to revoke an advance health directive, a principal must have the same capacity necessary for a decision in a health matter or a special health matter as the case may be.

If it gives power to an attorney, the principal must have the same capacity necessary to make an advance health directive giving that power.

Formal requirements for written revocation of enduring document

Clause 48 requires that revocation of an enduring power of attorney be in the approved form.

A revocation of an advance health directive is required to be in writing, but not required to be in the approved form. There are no witnessing requirements.

The revocation of an enduring power of attorney must be signed by or on behalf of the principal by an eligible signer; signed and dated by an eligible witness; and include a certificate by the witness as to the principal's capacity.

Later enduring document

Clause 49 makes provision that an enduring power of attorney is revoked to the extent of an inconsistency by a later enduring document.

An advance health directive is revoked, to the extent of inconsistency, by a later advance health directive.

Death

Clause 50 provides that an enduring document is revoked by the death of the principal

Marriage

Clause 51 provides that unless there is a contrary intention expressed in the document, an enduring document is revoked to the extent that it gives power to someone other than the principal's spouse.

Divorce

Clause 52 provides that an enduring document is revoked to the extent that it gives power to the principal's divorced spouse.

Division 2—Revocation according to terms

Clause 53 provides that a power of attorney is revoked according to the

intention expressed in the instrument.

Division 3—Revocation by attorney

Resignation

Clause 54 provides that if an attorney resigns the enduring document is revoked to the extent that it gives power to that attorney.

Impaired capacity

Clause 55 provides that if an attorney has impaired capacity the enduring document is revoked to the extent it gives power to that attorney.

Bankruptcy or insolvency

Clause 56 provides that if an attorney under an enduring power of attorney becomes bankrupt or takes advantage of the law of bankruptcy as a debtor or, being a company, is wound up, the power of attorney is revoked to the extent it gives power to that person or company.

Death

Clause 57 provides that if an attorney dies the enduring document is revoked to the extent that it gives power to that attorney.

Paid carer or health provider

Clause 58 provides that if an attorney becomes a paid carer or a health provider for the principal the enduring document is revoked to the extent that it gives power to that attorney.

PART 6—OTHER PROVISIONS

Registration of powers of attorney and instruments revoking powers

Clause 59 allows an enduring power of attorney and an instrument revoking an enduring power of attorney to be registered.

Offence to dishonestly induce the making or revoking of enduring document

Clause 60 makes the dishonest inducement of a person to make or revoke an enduring document an offence with a maximum penalty of 200 penalty units.

CHAPTER 4—STATUTORY HEALTH ATTORNEYS**Statutory Health Attorney**

Clause 61 authorises a statutory health attorney to make the same health care decisions on behalf of another person that that person could have made if he or she had capacity.

The power is exercisable during any and every period the adult has impaired capacity.

Clause 62 defines that a “**statutory health attorney**” is the first in listed order of the following persons who is readily available and culturally appropriate -

a spouse where the relationship is close and continuing;

a person who is 18 yrs or more and who has the care of the adult

;

a person who is 18 yrs or more and who is a close friend or relation of the adult .

If there is no one listed who is readily available and culturally appropriate then the adult guardian is the statutory health attorney.

A person who has the care of an adult is the person who either provides or arranges for domestic services or support for the adult .

If the adult is in a hospital, nursing home or like institution then the person who last provided domestic services or support is the carer.

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

Clause 63 sets out that if there is disagreement between a number of statutory health attorneys which cannot be resolved by mediation or if a health care decision is made which is contrary to the health care principle, the adult guardian may exercise decision-making power.

CHAPTER 5—EXERCISING POWER FOR A PRINCIPAL**PART 1—PROVISIONS APPLYING TO ALL ATTORNEYS****Application of pt 1**

Clause 64 extends the application of part 1 to all powers of attorney whether made before or after the Act and whether made under the legislation or otherwise.

Act honestly and with reasonable diligence

Clause 65 requires attorneys to act honestly and with reasonable diligence. Failure constitutes an offence with a maximum penalty of 200 penalty units.

Subject to terms of empowering document

Clause 66 requires attorneys to act in accordance with the terms of an enduring power of attorney or advance health directive.

Effect of disqualification of one joint attorney

Clause 67 enables the remaining attorney or attorneys to continue to act if one attorney is disqualified.

Execution of instrument

Clause 68 enables an attorney to execute documents under seal.

Subject to committee or manager

Clause 69 provides that if a committee or manager has been appointed to manage the principal's estate or person, then the attorney is subject to the directions of that committee or manager. (This is designed to avoid the conflict which would occur where even though there is an attorney, a committee or manager is appointed by the Court. It also enables the appointed attorney to continue to act)

Not to exercise revoked power

Clause 70 makes it an offence for an attorney to continue to exercise a power which is known to have been revoked. A maximum of 200 penalty units is prescribed.

Resignation of attorney

Clause 71 provides that in addition to any method authorised by law an attorney may resign by signed notice.

Avoid conflict transaction

Clause 72 allows an attorney, if specifically authorised, to enter into a transaction where his or her interests may conflict with the interest of the principal.

The clause provides that the purchase of property between the attorney and the principal jointly is not a conflict transaction.

Preservation of confidentiality

Clause 73 makes it an offence for an attorney to make a record of information or intentionally or recklessly disclose information gained in that capacity otherwise than for the lawful discharge of functions, or for purposes authorised by the Act. This applies also to a statutory health attorney.

Maximum penalty is 200 units.

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

Application of pt 2

Clause 74 provides that the part applies to all enduring documents which include enduring powers of attorney made before the Act. These are taken to be enduring powers of attorney made under the Act by virtue of section 162.

General Principles for adult s with impaired capacity

Clause 75 requires that a person who exercises a power or performs a function under the legislation or an enduring document for a person with impaired capacity must comply with the general principles and health care principles.

Attorney has maximum power if not stated

Clause 76 provides that if a power of attorney, enduring power of attorney or advance health directive does not state otherwise, an attorney has the maximum power that could be given to an attorney under the document.

Multiple attorneys are joint if not otherwise stated

Clause 77 provides that if two or more attorneys are appointed, they act jointly unless otherwise stated.

Consult with principal's other attorneys

Clause 78 provides that two or more attorneys must consult with one another regularly in relation to the exercise of power, although failure to do so does not invalidate to exercise of power.

If there is disagreement one or more may apply to the Court for directions.

Act together with joint attorneys

Clause 79 provides that joint attorneys must exercise power unanimously unless the empowering document provides otherwise.

If it is impracticable or impossible to do so one or more attorneys may apply to the Court for directions.

Right of attorney to information

Clause 80 entitles an attorney to all information about the principal's affairs which is necessary to make informed decisions.

A person having custody or control of information must disclose that information to the attorney.

The provision overrides any restriction at common law or statute about confidentiality or privilege.

Resignation of attorney while principal has impaired capacity

Clause 81 provides that if a principal has impaired capacity, the attorney may only resign with the consent of the Court.

The Court may appoint another attorney.

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

Clause 82 provides that unless otherwise stated the part applies to enduring powers of attorney only, whether made before or after the commencement of the Act.

Power to invest

Clause 83 provides that an attorney under an enduring power of attorney made under the Act, must invest in authorised investments permitted under the *Trusts Act 1973*, or investments approved by the Court.

An attorney is empowered to continue unauthorised investments made before the power commenced and to exercise shareholding rights, such as taking up preference shares or bonus issues.

Keep records

Clause 84 requires an attorney to keep and preserve accurate records and accounts of dealings.

Keep property separate

Clause 85 requires an attorney to keep his or her property separate from the principal's except where they hold property jointly.

Presumption of undue influence

Clause 86 states that in a transaction between a principal and an attorney or a relation, business associate or close friend of an attorney gives rise to a presumption of undue influence.

Gifts

Clause 87 allows an attorney to make seasonal gifts or for special occasions (eg. birthdays) and donations to charities which have been supported by the principal.

Maintain principal's dependants

Clause 88 empowers an attorney to make reasonable maintenance provisions for the principal's dependants.

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

Clause 89 sets out that health matter matters are to be dealt with in order in accordance with an advance health directive, then by an attorney under an enduring power of attorney, then by a statutory health attorney.

Minor uncontroversial health care without consent.

Clause 90 allows minor uncontroversial health care for an adult with impaired capacity to be carried out without consent where there is no statutory attorney if the health provider considers it is necessary and of a type which promotes the adult's health and well being; there is no dispute among interested parties and the adult does not object.

Effect of adult's objection to health care

Clause 91 provides that generally the exercise of power for a health matter or a direction in an advance health directive is ineffective if the health provider knows or ought reasonably to be aware that the adult objects.

This objection may be overridden if an advance health directive makes such a provision. In other cases, objection may be overridden only if the adult has minimal or no understanding of what the health care involves and why it is required and the health care is such as to cause no distress or temporary distress which is outweighed by the benefit.

Use of force

Clause 92 enables a health provider and person acting under the health provider's direction to use the minimum amount of force that is reasonable and necessary to carry out health care authorised by the Act.

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

Clause 93 makes it an offence for a person to exercise power for an adult or represent that they have the power, when the person knows there is no power to do so or by acting recklessly indifferent about whether there is power or not.

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

Clause 94 allows the adult guardian to intervene if a disagreement between attorneys about health care cannot be resolved by mediation or if a health attorney refuses to make a decision or makes a decision which is contrary to the health care principle.

PART 5—PROTECTION AND RELIEF FROM LIABILITY

Interpretation

Clause 95 defines the term “invalidity” and “know” when used in this part.

Protection if court advice, direction or recommendation

Clause 96 provides protection to an attorney who acts on the advice direction or recommendation of the Court.

Protection for attorney if unaware of invalidity

Clause 97 provides that an attorney who does not know of the invalidity of any power of attorney or advance health directive does not incur liability to the principal or anyone else for a purported exercise of power.

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

Clause 98 provides that a person who deals with an attorney and does not know or have reason to believe that a principal has impaired capacity is entitled to rely on the certificate of the witness as evidence of capacity of the principal to make the document.

Where the interest of a purchaser depends on the validity of an attorney’s power used in a preceding transaction with a third person, the purchaser is protected if the third person has completed a statutory declaration at the time of the purchase or within three months thereafter that he or she did not know of any invalidity at the time of the transaction. The purchaser is also protected if the transaction between the attorney and the third person was completed within one year after the power of attorney was made.

Additional protection if unaware of invalidity in a health context

Clause 99 protects a person who without knowledge of any invalidity, relies on an advance health directive or a health power under an enduring power of attorney.

No less protection than if the adult gave health consent

Clause 100 provides that a health provider is in the same position in relation to a direction under an advance health directive or a decision by an attorney as if the direction or decision had been made by the principal.

Protection of health provider unaware of advance health directive

Clause 101 protects a health provider for treatment which is given contrary to a directive if the provider does not know of the directive.

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

Clause 102 enables a health provider to refuse to follow an advance health directive if there are reasonable grounds to believe that the direction is uncertain or that circumstances, including advances in medical science, have changed.

The health provider is required to consult with an attorney appointed to make health decisions.

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

Clause 103 allows a health provider to rely on the purported exercise of a health care power by an attorney provided that the health provider did not know or could not reasonably be expected to have known that the person did not have that power.

Relief from personal liability

Clause 104 allows a court to excuse an attorney, who has acted honestly and reasonably, for a breach of the Act.

PART 6—COMPENSATION**Compensation for failure to comply**

Clause 105 allows a court to order that an attorney compensate the

principal or the principals estate for a loss caused by a breach of the Act.

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

Clause 106 enables a person who has lost a benefit from the estate of the principal as a result of the exercise of power for a financial matter, to apply to the court for compensation out of the estate.

CHAPTER 6—SUPREME COURT

PART 1—GENERAL

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

Clause 107 ensures that the Court's powers have application to all powers of attorney and are not limited to documents made under the Act.

Supreme Court's inherent jurisdiction and powers not affected

Clause 108 preserves the inherent *parens patriae* jurisdiction of the Court in relation to people with a disability.

Next friend and guardian ad litem process not affected

It also provides that the Act does not affect the rules of court about the appointment of a next friend or guardian ad litem for a person with impaired capacity.

PART 2—COURTS POWERS

Application and participation

Clause 109 sets out the people who can apply to the court for orders and consent for a special health matter under the Act, namely the principal; a member of the principal's family; an attorney; the adult guardian or public trustee; a health provider or an interested person.

Determination of capacity

Clause 110 enables the court to make a declaration about a person's capacity.

Effect of declaration about capacity to enter contract

Clause 111 provides that a declaration of capacity may be used in subsequent proceedings.

Declaration about validity

Clause 112 enables the court to make a declaration about the validity of a power of attorney, enduring power of attorney or advance health directive whether made before or after the commencement of the Act.

Effect of invalidity

Clause 113 provides that a power of attorney, enduring power of attorney or advance health directive which is found to be invalid is invalid from the start.

Declaration about commencement of power

Clause 114 provides that a court may make a declaration about when a power commences.

Order removing attorney or changing or revoking document

Clause 115 enables a court to remove and replace an attorney; remove and replace the power of an attorney; change the terms of a power of attorney or advance health directive and revoke all or any part of a document.

Changed circumstances as a basis for change or revocation

Clause 116 provides the grounds on which a court may make an order changing the terms of a power of attorney or advance health directive.

Advice, directions and recommendations etc.

Clause 117 enables a court to give advice and directions about a matter.

Consent to special health care

Clause 118 empowers a court to give consent for a special health matter such as living organ donation, pregnancy termination, sterilization.

Court may proceed without all relevant material

Clause 119 enables a court in urgent or special circumstances to decide a matter before receiving all relevant material.

Report by adult guardian or public trustee

Clause 120 enables the court to act on a report by the adult guardian or public trustee

Records and audit

Clause 121 provides that the court may order that an attorney file in court a summary of receipts and expenditure or detailed accounts. It may order that accounts be audited or that the attorney present a plan of financial management.

Court may dismiss frivolous etc applications

Clause 122 enables a court to dismiss and order the payment of costs if an application is considered to be frivolous, vexatious, misconceived or lacking in substance.

Written reasons for decision

Clause 123 provides that a court must give written reasons for a decision if an application is made by a person with a sufficient interest.

Costs

Clause 124 provides that costs in a proceeding are within the court's discretion and unless otherwise ordered follow the event.

CHAPTER 7—ADULT GUARDIAN

PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS

Adult guardian

Clause 125 established the position of adult guardian.

Functions

Clause 126 provides that the adult guardian's role is to protect the rights and interest of adult s who have impaired capacity.

The adult guardian is given the functions of protecting adult s with impaired capacity from neglect and exploitation; investigating complaints; mediating and conciliating between attorneys or attorneys and others; acting as attorney for personal matters; seeking assistance for and advocating on behalf of people with impaired capacity and educating and advising people about the Act.

Powers

Clause 127 provides that the adult guardian has the powers given under this or any other Act.

Not under Ministerial control

Clause 128 establishes that the adult guardian is not under the control of the Minister in relation to the exercise of powers.

Delegation

Clause 129 enables the adult guardian to delegate powers to an appropriately qualified carer; health provider; attorney; or a person who could be a statutory health attorney for the adult .

Consultation and employment of professionals

Clause 130 enables the adult guardian to consult with and employ medical, legal, accounting or other professionals in connection with the discharge of functions and to be reimbursed for any remuneration paid.

Advice and supervision

Clause 131 provides that the adult guardian may give advice to an attorney; by written notice supervise an attorney who has contravened the Act; require the presentation of a management plan for approval.

Whistleblowers's protection

Clause 132 gives protection to a person who discloses to the adult guardian information about another person's breach of the Act.

PART 2—INVESTIGATIVE POWERS**Investigate complaints**

Clause 133 enables the adult guardian to investigate complaints that a person with impaired capacity is being exploited or abused or has inappropriate or inadequate decision-making arrangements.

Records and audit

Clause 134 enables the adult guardian to require an attorney to submit records of income and expenditure and accounts. An audit of the accounts may be required.

Right to information

Clause 135 provides that the adult guardian has a right to all the information necessary to investigate a complaint or allegation or carry out an audit.

Power to summon

Clause 136 enables the adult guardian in the performance of functions to require a person to give evidence on oath or by statutory declaration and produce documents.

Witness expenses must be paid according to the Magistrates Courts Rules 1960.

Cost of investigation and audits

Clause 137 enables the adult guardian to require the person requesting an audit or investigation to pay the costs involved, otherwise it is payable by the principal. A person required to make a payment has the right to apply to the court for an order which will act as a review mechanism.

False or misleading statements

Clause 138 makes it an offence to make false or misleading statements to the adult guardian. Maximum penalty—100 penalty units.

False, misleading or incomplete documents

Clause 139 makes it an offence to give the adult guardian false or misleading documents. Maximum penalty—100 penalty units.

Obstructing investigation or audit

Clause 140 makes it an offence to obstruct or improperly influence the conduct of an investigation or audit by the adult guardian. Maximum penalty 100 penalty units

Report after investigation or audit

Clause 141 requires the adult guardian to give a written report to the person who requested the investigation or audit. An interested person is entitled to inspect a copy of the report of the audit or investigation.

PART 3—PROTECTIVE POWERS**Proceedings for protection of property**

Clause 142 allows the adult guardian to claim and recover possession of property or damages for conversion or money payable to an adult .

Suspension

Clause 143 empowers the adult guardian to suspend an attorney's

power under an enduring power of attorney if it is suspected that the attorney is not suitable or competent.

The suspension cannot exceed 3 months and during the suspension the public trustee must exercise the suspended power for financial matters and the adult guardian power for personal matters.

The adult guardian may apply to the court for orders it considered appropriate.

Application for entry and removal warrant

Clause 144 empowers the adult guardian to apply to a magistrate for a warrant to enter a place and remove an adult

Issue of entry and removal warrant

Clause 145 provides that a magistrate may issue a warrant only if the magistrate is satisfied there are grounds for suspecting there is an immediate danger because of neglect, exploitation or abuse to an adult who has impaired capacity.

Role of occupier if entry and removal warrant

Clause 146 enables the adult guardian to require the occupier of a place or other person at the place to help in the exercise of adult guardian's powers. It is an offence to refuse without reasonable excuse. Maximum penalty—100 penalty units.

Role of police officer if entry and removal warrant

Clause 147 enables the adult guardian to obtain police help in the exercise of the adult guardian's power under the warrant.

Reporting requirement after removal of adult

Clause 148 requires the adult guardian to apply to the court for orders about the adult's welfare, the power of attorney or the attorney for the adult.

PART 4—ADMINISTRATIVE PROVISIONS

Appointment

Clause 149 provides that the adult guardian is appointed by the Governor in Council and must not hold any other office having functions concerning the protection of the rights and interest of persons with impaired capacity.

Duration of appointment

Clause 150 provides that the adult guardian holds office for a term of not longer than 5 years.

The adult guardian may be removed by the Governor in Council for physical incapacity; neglect of duty; dishonourable conduct; or by being found guilty of an offence which in the Ministers opinion makes the person unsuitable.

Terms of appointment

Clause 151 provides that the remuneration and allowances of the adult guardian are decided by the Governor in Council as are the terms upon which office is held.

Leave of absence

Clause 152 provides that the Minister may give the adult guardian leave of absence on terms the Minister considers appropriate.

Acting adult guardian

Clause 153 provides that the Governor in Council may appoint an acting adult guardian for a vacant period or any or all periods when the adult guardian is absent from duty.

Staff

Clause 154 provides that staff necessary for the adult guardian's functions are appointed under the *Public Service Act 1996*.

The adult guardian has all the functions and powers of a chief executive of a department as if the office of the adult guardian were a unit of the public service.

Protection from liability

Clause 155 defines “official” as the adult guardian, a member of the adult guardian’s staff, a professional consultant or an expert adviser. An official is not liable civilly for an act or omission done honestly and without negligence.

Preservation of confidentiality

Clause 156 requires a person to maintain confidentiality in relation to information gained through involvement in the administration of the Act.

Disclosure of information about investigations

Clause 157 provides that the previous section does not prevent the disclosure of information if the adult guardian considers it is reasonably necessary in the public interest. A disclose must not be made if it would prejudice an investigation.

Budget

Clause 158 provides that the adult guardian must submit a budget each year for approval by the Minister.

Annual report

Clause 159 requires the adult guardian to make an annual report to Minister who must table a copy in the Legislative Assembly.

CHAPTER 9—OTHER

Chief executive may approve forms

Clause 160 provides for the chief executive to approve forms under the Act.

Regulation-making power

Clause 161 provides that the Governor in Council may make regulations under the Act.

**CHAPTER 10—TRANSITIONAL AND
CONSEQUENTIAL****PART 1—TRANSITIONAL****Powers of attorney under *Property Law Act 1974***

Clause 162 provides that a general power of attorney or enduring power of attorney under the *Property Law Act 1974* becomes a general power of attorney or enduring power of attorney under this Act.

**PART 2—AMENDMENT OF *FREEDOM OF INFORMATION
ACT 1992*****Act amended in pt 1**

Clause 163 provides for the amendment of the *Freedom of Information Act 1992* by this part.

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

Clause 164 provides for the insertion in section 11(1) of an exemption of the adult guardian in relation to an investigation or audit.

PART 3—AMENDMENT OF INTELLECTUALLY DISABLED CITIZENS ACT 1985**Act amended in pt 2**

Clause 165 provides for the amendment of the *Intellectually Disabled Citizens Act 1985*.

Amendment of section 4 (Definitions)

Clause 166 inserts the definition of “adult guardian” into section 4 of the Act.

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

Clause 167 (1) amends section 13(A)(1) so that a panel can make a decision rather than only a recommendation to the Council.

Section 13 (A) (2) and (3) is also amended to facilitate the constitution of panels which are appropriate to particular types of hearings, and to allow one-member panels to deal with reviews.

Amendment of s 18 (Quorum)

Clause 168 makes an amendment to quorum requirements which is necessary to accommodate the powers given to panels.

Amendment of s 19 (Meetings)

Clause 169 omits words which are no longer necessary as a result of the new panel powers.

Replacement of pt 2 (LEGAL FRIEND)

Clauses 170 inserts a new Part 2A—LEGAL FRIEND AND ADULT GUARDIAN into the *Intellectually Disabled Citizens Act 1985*

These provisions separate the roles of the legal friend and adult guardian and authorise the adult guardian, in lieu of the legal friend, to give consent for a citizen to medical, dental or surgical or other professional treatment or care. This eliminates any potential for duplication in the medical consent

role.

The powers duties and responsibilities of the adult guardian for this purpose are identical to those which previously applied to the legal friend.

Clauses 171 to 173, 176 and 177 amend various sections of the *Intellectually Disabled Citizens Act 1985* to effect the inclusion of the role of the adult guardian under the Act.

Clauses 174 and 175 amend the provisions of the *Intellectually Disabled Citizens Act 1985* dealing with the conduct of proceedings for applications and reviews. Enabling the Chairperson to give procedural directions is consistent with more recent trends in case management by courts.

PART 4—AMENDMENT OF LAND ACT 1994

Act amended in pt 3

Clause 178 provides for the amendment of the *Land Act 1994*.

Amendment of s385 (Acts by Attorneys)

Clause 179 changes the heading to a more appropriate title and provides for an attorney, where appointed, to do on behalf of a person an act required to be done under the Act.

PART 5—AMENDMENT OF PROPERTY LAW ACT 1974

Act amended in pt 4

Clause 180 provides for the amendment of the *Property Law Act 1974*

Omission of pt 9

Clause 181 omits this part which provided for powers of attorney and enduring powers of attorney and which are now dealt with the *Powers of Attorney Act 1997*.

PART 6—AMENDMENT OF PUBLIC TRUSTEE ACT 1978

Act amended in pt 5

Clause 182 provides for the amendment of the *Public Trustee Act 1978*.

Insertion of new s 63A

Clause 183 inserts a new provision entitled ‘adult guardian resources’ which gives legislative authority for the public trustee to provide funding and other resources, in accordance with a budget approved by the Minister, for the performance of the functions of the adult guardian. The Minister can specify in writing any additional resources which may be required.

The former role of the public trustee in supervising attorneys under enduring powers of attorney is transferred to the adult guardian by the legislation.

SCHEDULE 1

PART 1—GENERAL PRINCIPLES

These principles recognize the rights of people with a decision-making disability as reflected in United National Declarations on such rights. They provide guidance for attorneys and others in relation to the exercise of powers for a person with impaired capacity.

PART 2—HEALTH CARE PRINCIPLE

These principles are directed to the way in which decisions in health matters and special health matters should be made by an attorney and others. They include provisions from existing legislation—*that power should be exercised in the way which is least restrictive of the adult’s rights* and reflect internationally recognized concepts.

SCHEDULE 2

PART 1—FINANCIAL MATTERS

This schedule defines the financial property and legally related matters over which an attorney under an enduring power of attorney may exercise power.

PART 2—PERSONAL MATTER

This part defines the types of personal decisions which can be made by an attorney

This includes ‘health matters’.

Also defined are ‘special personal matters’ and ‘special health matters, which are matters over which an attorney has no power.

Special health matters require the consent of the Court. Because of the wider reference to the adult guardian’s powers in the *Intellectually Disabled Citizens Act 1985* consent to some special health matters may be given by the adult guardian under that Act.

The part contains definitions of terms used in a health context.

SCHEDULE 3—DICTIONARY

This contains the meanings of words used in the Act and which are not defined in specific sections.

