

Guardianship and Administration and Other Legislation Amendment Bill 2018

Explanatory Notes

Short title

The short title of the Bill is the Guardianship and Administration and Other Legislation Amendment Bill 2018

Policy objectives and the reasons for them

The objectives of the Guardianship and Administration and Other Legislation Amendment Bill 2018 (the Bill) are to:

- amend Queensland's guardianship legislation to: provide a focus on contemporary practice and human rights for adults with impaired capacity; enhance safeguards for adults with impaired capacity in the guardianship system; and to improve the efficiency of Queensland's guardianship system or improve the clarity of Queensland's guardianship legislation;
- amend the *Integrity Act 2009* (Integrity Act) to implement recommendations 1 and 2 of the Finance and Administration Committee Report No. 19, *Inquiry into the Report on the Strategic Review of the functions of the Integrity Commissioner* (the FAC Report); and
- amend the *Government Owned Corporations Act 1993* (GOC Act) and the *Public Interest Disclosure Act 2010* (PID Act) to implement recommendation 13 of the Parliamentary Crime and Corruption Committee (PCCC) Report No. 97, *Review of the Crime and Corruption Commission* (PCCC Report).

Queensland's guardianship legislation

The *Guardianship and Administration Act 2000* (GAA), the *Powers of Attorney Act 1998* (POA) and the *Public Guardian Act 2014* (PGA) form the legislative basis for the guardianship system in Queensland.

Queensland's guardianship system provides a scheme for individuals to be appointed to make personal, health and financial decisions on behalf of adults who no longer have capacity to make decisions about certain matters themselves. It also provides a scheme where adults can plan ahead and appoint individuals of their choice to make personal, health and financial decisions and give directions about their future health care.

By way of overview, the GAA provides for the Queensland Civil and Administrative Tribunal (QCAT) to formally appoint guardians and administrators to manage the personal and financial matters respectively of adults with impaired capacity. Depending on the type of matter and the decision to be made, some decisions can be made on an informal basis by members of the adult's existing support network without the appointment of a decision-maker for the adult. The GAA also provides a scheme for substituted consent for health care matters and special health care matters for adults with impaired capacity.

The GAA also establishes the Public Advocate, who has a systemic advocacy function for adults with impaired capacity, which unlike individual advocacy, aims to address systems and structures that have an ongoing impact on adults with impaired capacity.

The POA provides a scheme where an adult may authorise other persons (known as attorneys) to make personal and/or financial decisions on their behalf, or give directions about their future health care. For example by executing an enduring power of attorney (EPA), an adult (the principal) may authorise other persons (an attorney) to make personal (including health) and/or financial decisions on their behalf in the future. An EPA continues after the adult loses capacity to make decisions. In contrast, a General Power of Attorney only allows an attorney to make financial decisions on behalf of the adult while they have capacity.

By executing an advance health directive (AHD) an adult may give directions about their future health care (for both health and special health matters) and appoint an attorney to make health matter decisions for the adult in the event the directions prove inadequate. The AHD operates only while the adult has impaired capacity for the matter. The POA also sets out who is the statutory health attorney. A statutory health attorney is someone in a close relationship with the adult who is authorised under the POA to make decisions about a health matter for an adult with impaired capacity in certain circumstances.

The PGA contains consolidated functions of the Public Guardian for both adults with impaired capacity and children. This Bill is focused on the functions of the Public Guardian relevant to adults with impaired capacity. Under the PGA, the Public Guardian has an overarching function to protect the rights and interests of adults with impaired capacity and has many important functions relevant to adults with impaired capacity, including:

- providing a program called the community visitor program that has a complaints and inquiry function for adults with impaired capacity at certain visitable sites;
- investigating complaints and allegations about actions of attorneys, guardians and administrators; and
- mediating or conciliating between attorneys, guardians and administrators.

The Public Guardian can also act as a person's substitute decision-maker as the adult's guardian (if appointed by QCAT); or as an attorney (for a personal matter under an EPA or health matter under an AHD). The Public Guardian may also act as a person's statutory health attorney of last resort.

The Public Trustee, established under the *Public Trustee Act 1978*, if appointed, can act as a person's administrator or attorney under an EPA.

The Queensland Law Reform Commission Report

A number of the Bill's legislative reforms address recommendations from the Queensland Law Reform Commission's (QLRC) final report following the QLRC's comprehensive five year review of guardianship law – *A Review of Queensland's Guardianship Laws* (the QLRC Report) tabled in Parliament in 2010. The QLRC did not recommend a complete overhaul of the existing guardianship system, but did make 317 recommendations across a broad range of areas relevant to Queensland's guardianship system. The Bill implements a number of those recommendations.

Inquiry into the adequacy of existing financial protections for Queensland seniors

The Bill also progresses a number of actions arising from the Queensland Government response to the report of the *Inquiry into the adequacy of existing financial protections for Queensland seniors* (the Inquiry), undertaken in 2015 by the Communities, Disability Services and Domestic and Family Violence Prevention Parliamentary Committee. A copy of the report of the Inquiry can be accessed at: <http://www.parliament.qld.gov.au/work-of-committees/former-committees/CDSDFVPC/inquiries/past-inquiries/01TheAdequacySeniors>. Many of these recommendations have been incorporated into the *Queensland – An Age Friendly Community – Action Plan and Implementation Schedule* that can be accessed at: <https://www.communities.qld.gov.au/communityservices/seniors/queensland-age-friendly-community>

Actions in the *Queensland: An Age Friendly Community - Action Plan and Implementation Schedule* implemented or implemented in part by the Bill include:

- providing the Public Guardian with a discretion to continue to investigate a complaint that an adult was subject to abuse, neglect or exploitation even after the death of the adult (Action 25);
- enhancing the safeguards for older people who appoint attorneys under EPAs (Action 33); and
- improving financial remedies for adults with impaired capacity when attorneys fail to comply with their duties (Action 38).

Other reforms to guardianship legislation

The Bill also aims to implement other reforms not considered by the QLRC, including the following key reforms:

- *Providing a legislative exception to ademption in certain circumstances*

Ademption occurs where the gift of a specific item of property in a will fails because prior to the testator's death, the property is sold or otherwise disposed of. A common example is where a person leaves their house as a specific testamentary gift in their will but then sells the house to fund their own aged care and does not update their will to reflect the changed circumstances.

Upon the person's death, the gift is adeemed because it no longer forms part of the testator's estate. Any remaining proceeds from the sale fall into the residue of the estate and go to the residuary beneficiaries, potentially leaving the intended beneficiary of the specific gift of the house with no interest under the will.

As such, the rule of ademption may significantly distort the testator's intention and/or result in unjust outcomes. This is especially the case if the testator is an adult with impaired capacity, who will not have the capacity to change their will to deal with the situation. The guardianship legislation provides that the making (or revoking) of a will is considered a special personal matter and as such does not allow a substitute decision-maker to exercise power in relation to these types of matters.

In these cases, the assumption underlying the ademption rule – that a person can always change their will to reflect the new circumstances – does not apply.

A legislative exception to ademption where an attorney under an enduring power of attorney or administrator sells property the subject of a specific gift in a will, would give better effect to the original intention of the testator and assist in overcoming the intended beneficiary's disadvantage in such circumstances.

In New South Wales (NSW) the *Powers of Attorney Act 2003* (NSW) (sections 22 and 23) also provides for a legislative exception to ademption.

- *Missing Persons – enabling appointment of an administrator*

Generally a person is not presumed to be dead until they have been missing and there has been no evidence of them being alive for seven years. Prior to seven years, the presumption is that a person is alive. Rebutting the presumption that a missing person is alive can be an onerous task. In the meantime there may be pressing issues in relation to the person's estate that need immediate resolution in order to preserve the missing person's assets. Currently QCAT does not have specific jurisdiction in these matters.

Other Australian jurisdictions (including the Australian Capital Territory, NSW and Victoria) have legislated for the appointment of a manager of the estate of the missing person.

In order to deal effectively with this situation, and align with interstate jurisdictions, it is proposed to allow QCAT to appoint an administrator for a missing person, where QCAT is satisfied (according to specific criteria) that the person is a missing person and that without an appointment the person's financial interests will be significantly adversely affected. The order will be automatically revoked when: a coroner makes a finding under the *Coroner's Act 2003* that the adult has died; the Supreme Court makes a declaration of death or grants a person leave to swear the death of the adult; or the adult's death is registered under the *Births, Deaths and Marriages Registration Act 2003*. QCAT must also revoke the order if satisfied that the adult is alive (either on QCAT's own initiative or upon application by the administrator or an interested person).

- *Power for QCAT to order an attorney (or former attorney), administrator (or former administrator), guardian (or former guardian) to compensate a principal or a principal's estate*

QCAT, like a court, has jurisdiction to order that an attorney, administrator or guardian pay compensation to the principal or the principal's estate if the attorney, administrator or guardian has caused a loss due to their failure to comply with guardianship legislation. Since the QCAT decision in *LPJ* [2011] QCAT 177 which was followed in *Public Trustee of Queensland v BN and Ors* [2011] QCAT 666 however, QCAT has held that jurisdiction ends when the instrument is revoked (due to the death of the principal) and thus it cannot order a 'former attorney' to pay compensation to a principal's estate. The practical effect of this is that all such claims must proceed in a Court which in some circumstances (dependent on the size of the adult's estate) may be prohibitively costly.

It is proposed to remove this uncertainty and enable QCAT to exercise the same jurisdiction as a court in relation to ordering compensation for a loss to the principal or the principal's estate caused by an attorney or a former attorney, an administrator, or former administrator, a guardian or former guardian who fails to comply with his or her duties.

Other amendments not related to the guardianship system

The policy objectives of the Bill are also to implement certain amendments unrelated to guardianship law.

Amendments to implement recommendations 1 and 2 of the FAC Report

The objectives of the amendments to the Integrity Act are to allow:

- senior executives, senior officers or senior officer equivalents to seek the advice of the Integrity Commissioner without a signed authorisation from the chief executive of the department, public service office or government entity in which they are employed; and
- former designated persons to seek the advice of the Integrity Commissioner for a period of up to two years after they cease to be a designated person on an ethics or integrity issue that arises from a post-separation obligation involving them.

The FAC Report which was tabled on 14 December 2015 made eight recommendations regarding the operation of the Office of the Integrity Commissioner. The Premier and Minister for the Arts tabled the Government response to the FAC Report on 11 March 2016, supporting all of the recommendations.

Recommendations 1 and 2 of the FAC Report recommended that the Government consider amending the Integrity Act to remove the requirement for managerial consent to support a request for advice from the Integrity Commissioner, and to allow former designated persons access to the advice services of the Integrity Commissioner for a period of two years after leaving office. The Government agreed with streamlining the processes for senior executives and senior officers to request the Integrity Commissioner's advice on ethics and integrity issues, and considered that individuals should be able to request the Integrity Commissioner's advice to support their interactions with the Government during their post-separation employment period.

Amendments to implement recommendation 13 of the PCCC Report

On 30 June 2016, the PCCC tabled the PCCC Report. Recommendation 13 called on the Queensland Government to amend the GOC Act and the PID Act to provide that where a government owned corporation (GOC) is required to refer a matter under the *Corporations Act 2001* (Corporations Act) or any other federal government legislation, that the Crime and Corruption Commission (Commission) also be advised so that both Federal and State bodies can liaise on the matter.

The Queensland Government response which was tabled on 16 December 2016, supported in-principle recommendation 13; but recognised that amendments were not required to enable liaison between Federal and State bodies but rather to resolve conflicting statutory obligations in State and Commonwealth legislation which are currently placed on GOCs.

Pursuant to section 156 of the GOC Act, chief executive officers of GOCs are required to notify the Commission of a complaint related to the GOC that involves (or may involve something that would be) corrupt conduct as if the GOC was a unit of public administration under the *Crime and Corruption Act 2001* (CC Act).

Also, section 19(2) of the PID Act permits an employee of the GOC to make a voluntary public interest disclosure to the GOC or the Commission in relation to information about the conduct of another employee of the GOC that could, if proved, be corrupt conduct (such a disclosure is one way in which the chief executive of a GOC may become aware of a matter concerning potential corrupt conduct).

Chapter 9, Part 9.4AAA of the Corporations Act (Cth) provides that a person (including an officer or employee of the GOC) who discloses information to the GOC's representative or auditor is afforded whistle-blower protections if it is a "*qualifying disclosure*", that is, if: (i) the discloser informs the person to whom the disclosure is made of his or her name before making the disclosure; (ii) the discloser has reasonable grounds to suspect that the information indicates that the company or an officer of the company has, or may have contravened a provision of the Corporations legislation; and (iii) the discloser makes the disclosure in good faith.

Section 1317AE of the Corporations Act provides that the person to whom the disclosure is made is under a statutory duty of confidentiality, with limited exceptions. The making of a disclosure which is required or permitted under State legislation is not an authorised exemption for the purposes of section 1317AE(2) of the Corporations Act.

As a result, there is a direct inconsistency between the Queensland and Commonwealth provisions where:

- a person makes a disclosure to a GOC's representative or auditor that qualifies for protection under Chapter 9 Part 9.4AAA of the Corporations Act; and
- the disclosure is made or passed onto the chief executive of the GOC because it includes information which might lead to the suspicion that the matter involves or may involve corrupt conduct for the purposes of the CC Act.

In this scenario, the Commonwealth Act forbids disclosure to the Commission, which is required under section 156 of the GOC Act.

Displacement provisions are necessary to resolve the conflicting state and federal statutory obligations so that GOCs are clear as to their obligations in relation to reporting allegations of corrupt conduct and that such conduct is reported to, and fully investigated by, the Commission.

Achievement of policy objectives

Queensland's guardianship legislation

The Bill achieves its policy objectives in the following ways.

To provide a **focus on contemporary practice and human rights for adults with impaired capacity** the Bill:

- redrafts the general principles and the health care principle to be more consistent with the United Nations *Convention on the Rights of Persons with Disabilities* (QLRC recommendations 4.1,4.3,4.4, 4.6, 5.1, 5.2 and 7.6);
- relocates the general principles and the health care principles to the beginning of both the GAA and the POA (from their current location in the schedules of both Acts) to highlight the new principled approach and encourage the exercise of functions and powers under the Acts in a way that is more consistent with human rights and contemporary practice (not consistent with QLRC recommendation 4.9 and 5.7 which recommended that the principles continue to be located in the schedules);
- clarifies that a person making a decision for an adult on an informal basis must apply the general principles (QLRC recommendation 4.2);
- clarifies that the general principles should be applied whenever a person or entity performs a function or power under the GAA and POA, not just in relation to an adult with impaired capacity (QLRC recommendations 4.7, 4.8, 5.5 and 7.5);
- amends the acknowledgement sections of the GAA and POA to recognise the role that support plays in determining an adult's capacity;
- requires QCAT, in carrying out functions or powers under the GAA, to seek and take into account the views, wishes and preferences expressed or demonstrated by an adult and the views of any member of the adult's support network;
- includes a note to s146(3) of the GAA and in the schedule definition of capacity in the GAA and POA that emphasises that in deciding whether an individual is capable of communicating a decision in some way, that QCAT must investigate the use of all reasonable ways of facilitating communication (such as symbol boards or signing) (QLRC recommendation 7.9);
- clarifies that when QCAT is reviewing an appointment of a guardian, and the Public Guardian is currently the adult's guardian, that QCAT can remove the Public Guardian if there is another appropriate person available for appointment (for example another person in the adult's support network) (QLRC recommendation 14.14); and
- provides that the Minister is to prepare guidelines to assist persons required to make assessments about an adult's capacity (Guidelines for the Assessment of Capacity) (QLRC recommendations 7.11- 7.13).

To **enhance safeguards for adults with impaired capacity in the guardianship system** the Bill:

- ensures service providers in residential services are precluded from being an adult's attorney under an AHD, not just an EPA (QLRC recommendation 9.1);

- strengthens the eligibility requirements for an attorney under an EPA so that the eligible attorney must have capacity for a matter and must not have been a paid carer for the principal (the adult) in the previous three years (QLRC Recommendations 16.1 and 16.4) (Action 33 *Queensland – An Age Friendly Community – Action Plan and Implementation Schedule*);
- aligns the eligibility requirements for a statutory health attorney with existing eligibility requirements for an attorney under an enduring power of attorney, so that a service provider for a residential service where the principal is resident or a health provider cannot be a statutory health attorney for these purposes and that a statutory health attorney who is a spouse must be 18 years or more (QLRC recommendation 10.5);
- provides that for the purpose of who can be a statutory health attorney for an adult, the definition of ‘relation’ means a person who is in a close and personal relationship with the adult (QLRC recommendations 10.3);
- provides that for the purposes of who can be a statutory health attorney for an adult, the definition of ‘relation’ includes a person who under Aboriginal tradition or Torres Strait Islander custom is regarded as a relative (QLRC recommendations 10.4);
- clarifies the capacity needed for an adult to execute an AHD or an EPA (QLRC recommendations 8.1-8.7);
- provides that QCAT must, in determining whether a person is appropriate to be an adult’s guardian or administrator, consider whether the person has ever been a paid carer for an adult (QLRC recommendation 14.4);
- provides that a person who QCAT is considering appointing as an adult’s guardian or administrator must advise QCAT if they have ever been a paid carer for the adult (QLRC recommendation 14.3);
- provides that when a parent of an adult child with impaired capacity applies for an appointment of a guardian or administrator that QCAT should inform the parent of QCAT’s power to appoint successive appointees for the matter (QLRC recommendation 18.2);
- clarifies that where QCAT is making an interim order in relation to an adult, because there is an immediate risk of harm to the health, welfare or property of the adult, one of the grounds on which QCAT must be reasonably satisfied is that the adult has, or may have, impaired capacity for a matter (QLRC recommendation 20.3);
- requires QCAT, when carrying out its functions or powers under the GAA, to the greatest extent practicable, to seek and take into account of the views, wishes and preferences expressed or demonstrated by the adult and any members of the adult’s support network;
- clarifies the scope of conflict transactions (a transaction that results in a conflict of interest between the interests of the principal and the attorney) and recasts the conflict transaction provisions to clearly reflect the need for attorneys and administrators to have prospective authority prior to entering into a conflict transaction on behalf of an adult (QLRC recommendations 17.1-17.14) (Action 33 *Queensland – An Age Friendly Community – Action Plan and Implementation Schedule*). The amendments also clarify that conflict transactions by both administrators and attorneys may also be authorised retrospectively;

- clarifies that QCAT can exercise the same jurisdiction as a court in relation to ordering either an attorney or a former attorney, an administrator or former administrator, guardian or former guardian, to pay compensation for a loss to the principal or the principal's estate due to the attorney's, administrator's or guardian's failure to comply with his or her duties (Actions 33 and 38 *Queensland – An Age Friendly Community –Action Plan and Implementation Schedule*);
- provides that both a court and QCAT can order an attorney or a former attorney, an administrator, or former administrator, a guardian or former guardian, to account for any profits the attorney, administrator or guardian has accrued as a result of the attorney's or administrator's failure to comply with his or her duties (QLRC recommendations 17.17) (Actions 33 and 38 *Queensland – An Age Friendly Community –Action Plan and Implementation Schedule*);
- clarifies that QCAT can order either an attorney or a former attorney, an administrator or former administrator to file in the tribunal records and audited accounts of the administrator's or attorney's dealings and transactions conducted on behalf of the adult (Actions 33 and 38 *Queensland – An Age Friendly Community –Action Plan and Implementation Schedule*);
- limits the number of joint attorneys under an EPA to four (QLRC recommendation 16.7) (Action 33 *Queensland – An Age Friendly Community –Action Plan and Implementation Schedule*);
- provides that where the Registrar of Titles is advised that QCAT has appointed an administrator for a matter involving an interest in land that the Registrar of Titles must record the advice in a way that if a search on the title of the property of the adult is made, it will reveal that an administrator has been appointed, an appointment has been changed, revoked or ended;
- creates a statutory exception to ademption where an attorney or an administrator, sells or disposes of property which is the subject of a specific gift in a will;
- applies the special witness provisions in the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) to guardianship proceedings (QLRC recommendation 21.15);
- amends the definition of interested person so that it focuses on a person who has an interest in promoting and safeguarding the adult's rights and interests, rather than just a continuing interest in the adult (QLRC recommendation 21.2).
- provides a discretionary power for the Public Guardian to investigate a complaint that an adult was subject to abuse, neglect or exploitation after the death of the adult (QLRC recommendation 23.7 and 23.8) (Actions 25 and 33 – *Queensland – An Age Friendly Community –Action Plan and Implementation Schedule*);
- allows a consumer's guardian, administrator, attorney, statutory health attorney, advocate, or an interested person for the consumer to request a visit by the community visitor (QLRC recommendation 26.4);
- to protect the privacy of an adult with respect of whom the Public Guardian has carried out an investigation, allows the Public Guardian to exercise discretion and limit the information provided to those persons entitled to a copy of the investigation report (so as to avoid disclosing confidential personal and financial information);

- provides the Public Guardian with discretion to provide a copy of a community visitor's report to a broader range of persons with an interest in the consumer that was the subject of the visit; and
- broadens the protection available to whistle-blowers, including in respect of reprisal actions (QLRC recommendations 27.1-27.5).

To improve the efficiency of Queensland's guardianship system or improve the clarity of Queensland's guardianship legislation the Bill:

- clarifies that the Public Guardian, when performing a function or power under the PGA, need only apply both the general principles and the health care principles when the Public Guardian is performing a function or exercising a matter in relation to a health matter (QLRC recommendation 23.2);
- clarifies how the presumption of capacity is to be applied in certain circumstances (QLRC recommendations 7.1-7.4);
- clarifies that the Public Trustee, or trustee company, can only be a person's attorney under an EPA for a financial matter (QLRC recommendation 16.2 and 16.3);
- simplifies the certification process in section 45 of the POA required for proving copies of enduring documents (AHDs and EPAs) (QLRC recommendation 9.9);
- clarifies that an AHD made under the POA by an adult residing interstate is effective in Queensland (QLRC recommendation 9.14);
- clarifies that an EPA made under the POA by an adult residing interstate is effective in Queensland (QLRC recommendation 16.23);
- provides that the existing provision that provides that an EPA made in another state can be treated as if it is an EPA made under the POA (under certain circumstances) also extends to an EPA made in another jurisdiction, i.e. New Zealand (QLRC recommendation 16.22);
- extends the protection a person other than an attorney (such as a health provider) has, who acts in reliance on a power exercised under an invalid AHD, to acting in reliance on a direction in an invalid AHD, as long as the person acts in 'good faith' (QLRC recommendations 9.15-9.16);
- clarifies that a health provider is protected from liability to the extent the person does not know of an adult's AHD, as long as the health provider acts in 'good faith' (QLRC recommendation 9.17);
- removes the requirement for a witness to an AHD to be aged at least 21 years (QLRC recommendation 8.11);
- clarifies that a personal matter includes decisions about access and contact with the adult, and advocacy; and that a special personal matter includes entering a plea on a criminal charge (QLRC recommendations 6.1-6.3);
- relocates the provisions which provide the circumstances under which QCAT can approve clinical research with respect to an adult with impaired capacity from the health care principle in Schedule 2 to the GAA to the body of the GAA (QLRC recommendation 5.4);
- provides QCAT with a specific jurisdiction to appoint an administrator for a person who is missing where there is need for a decision in relation to a financial matter and without an appointment the missing person's interests would be adversely affected;

- clarifies the meaning of ‘members of an adult’s family’ in relation to those persons for whom QCAT must provide notice of a hearing of a matter, to ensure only those in a close and continuing relationship with the adult are required to be notified;
- clarifies that QCAT may order that a professional administrator be remunerated for their services, so that it includes not only those persons who are currently carrying on a business of a professional administrator but also those who are carrying on a professional business;
- provides that any member of QCAT, not just the President or the presiding member, can appoint a representative to represent the adult’s views, wishes and interests;
- clarifies the role of a representative appointed by QCAT for an adult (QLRC recommendation 21.9);
- clarifies the circumstances under which a court may relieve a guardian or administrator of personal liability for a contravention of the GAA (so that it is consistent with the equivalent provision for attorneys in the POA) (QLRC recommendation 17.16);
- amends the provisions in relation to ‘gifting’ the adult’s property in the POA so that they are consistent with the gifting provisions in the GAA (QLRC recommendation 16.8);
- clarifies the Public Guardian has a right to personal information to investigate a complaint or allegation, regarding an adult with impaired capacity (QLRC recommendation 23.6);
- allows the Public Guardian to delegate certain powers to an appropriately qualified senior officer;
- allows the Public Trustee to delegate certain powers when acting as an administrator (QLRC recommendations 25.2-25.4);
- clarifies that the Public Guardian may not suspend the power of an attorney under an EPA more than once on the same ground arising from the same circumstances (QLRC recommendation 23.10);
- clarifies that the Public Advocate is appointed under the GAA and not the *Public Service Act 2008*;
- clarifies that if a person who is a public service officer is appointed as the Public Advocate, the officer keeps all rights accrued or accruing as if the service as the Public Advocate were a continuation of service as a public service officer; and
- makes a range of other minor and/or technical amendments to ensure the effective operation of the guardianship legislation.

Amendments to implement recommendations 1 and 2 of the FAC Report

The Bill achieves its policy objective by:

- removing the requirement in section 15 of the Integrity Act for senior executives, senior officers or senior officer equivalents to obtain managerial consent prior to seeking the advice of the Integrity Commissioner;
- expanding the scope of the Integrity Commissioner’s advisory services in section 7 of the Integrity Act to include former designated persons; and
- inserting a new section 20A in the Integrity Act to provide that former designated persons may seek the advice of the Integrity Commissioner on an ethics or integrity issue involving

them that arises from a post-separation employment obligation, for a period of up to two years after ceasing to be a designated person.

Amendments to implement recommendation 13 of the PCCC Report

The Bill will achieve its policy objectives by resolving conflicting state and federal statutory obligations so that GOCs may report allegations of corrupt conduct to the Commission and appropriately handle public interest disclosures made by employees.

The Bill makes amendments to the GOC Act and PID Act to enable GOCs to comply with their obligation to report corrupt conduct to the Commission, without contravening section 1317AE of the Corporations Act. The Bill declares section 156 of the GOC Act and section 19 of the PID Act to be displacement provisions for the purposes of the Corporations Act. The amendments will enable GOCs to report allegations of corrupt conduct to the Commission and appropriately handle public interest disclosures. Displacement provisions are used to avoid direct inconsistency arising between the Corporations legislation and State and Territory laws.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives underlying the specific reforms in this Bill.

Queensland's guardianship legislation

Alongside implementation of the legislative reforms, the Department of Justice and Attorney-General will also be working with stakeholders to:

- redesign the forms for EPAs and AHDs and develop accompanying explanatory guides (QLRC recommendations 9.7, 9.8, 9.10 16.11, 16.13, 16.14, 16.16) (Actions 32, 34 and 35 *Queensland: an Age Friendly Community –Action Plan and Implementation Schedule*); and
- develop Guidelines for the Assessment of Capacity (QLRC recommendation 7.11-7.13).

Estimated cost for government implementation

Any costs arising from these legislative amendments will be met from existing agency resources.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

Legislation has sufficient regard to the rights and liberties of individuals -section 4(2)(a) of Legislative Standards Act 1992.

Section 4(3)(g) Legislative Standards Act - legislation does not adversely affect rights and liberties.

The application of the presumption of capacity (QLRC Recommendation 7.3) – clauses 7 and 75

The Bill amends the GAA and the POA to provide that if QCAT or the Supreme Court has appointed a guardian, or administrator for a matter, the guardian or administrator is not required to apply the presumption that the adult has capacity for that matter.

The Bill also amends the GAA and the POA to provide that if QCAT or the Supreme Court has made a declaration that the adult has impaired capacity for a matter a person or entity who performs a function or exercises a power under the GAA or POA is entitled to rely on the declaration to presume the adult does not have capacity for that matter.

These proposed amendments potentially depart from the fundamental legislative principle that legislation should not adversely affect the rights and liberties of individuals (section 4(3)(g) *Legislative Standards Act 1992*).

Under the guardianship legislation, a person is presumed to have decision-making capacity, unless the presumption is rebutted. The presumption of capacity is central to substitute decision-making and guardianship legislation and its application helps ensure the adult's decision-making autonomy is maintained as much as possible. The consequence of a finding of impaired capacity is that the adult will no longer be able to exercise decision-making autonomy for a matter.

It is however, a presumption that is able to be rebutted, and QCAT must find (among other things) that an adult does not have capacity for a matter in order to appoint a guardian or administrator for the matter or to make a declaration that the adult has impaired capacity for a matter.

The application of the presumption of capacity was considered by the Supreme Court in *Bucknall v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd R 402 (Bucknall)* where the Court examined questions of whether the presumption is required to be applied each time a person or entity exercises a power or performs a function under the Act, and the ensuing difficulties with this approach.

The proposed provisions address concerns raised by the Supreme Court in *Bucknall* about the wording of existing section 11 GAA and sets out (as recommended by the QLRC) how the QCAT and Supreme Court are to apply the presumption of capacity once a formal determination has been made that the adult has impaired capacity for a matter.

The departure from a guardian or administrator having to apply the presumption is restricted to the specific matter for which they are appointed. It is also justified as it is considered necessary to provide a guardian or administrator with certainty when they are acting on behalf of the adult for whom they have been appointed. The departure in relation to allowing a person or other entity to rely on QCAT's declaration that an adult does not have capacity for a matter is also justified as it provides certainty for those who need to rely on that finding (for example guardians, administrators or attorneys). As outlined in the QLRC Report, the object of the appointment or declaration by QCAT would be defeated if the guardian, administrator or attorney were unable to rely on the determination.

It does not prevent a further application to QCAT or the Supreme Court for a declaration that the adult has capacity for a matter, or an application to QCAT for a review of the appointment if it is considered that the adult may have regained their capacity for a matter.

Certain persons ineligible to be attorney (QLRC Recommendations 9.1, 10.5, 16.4) -- clauses 57 and 67

The Bill amends the POA to restrict persons providing particular services to an adult with impaired capacity from being eligible for appointment as an attorney either under the adult's EPA or AHD, or as the adult's statutory health attorney. This places restrictions on the right of the person to choose an attorney, and the availability of statutory health attorneys for an adult.

While, section 29(1) POA already provides that a person who is a paid carer is not an eligible attorney under an EPA, these amendments also specify that a person who has been a paid carer for the principal within the previous three years, is not eligible (QLRC recommendation 16.4).

The Bill also amends section 29(2) POA to make it clear that a service provider for a residential service where the principal is a resident is not an eligible attorney under an AHD (QLRC recommendation 9.1). Section 29(1) POA already provides that such a service provider is not eligible as an attorney under an EPA. It is considered the consistent exclusions should apply for an AHD to ensure the guardianship legislation has consistent safeguards. Further section 59AA POA already provides that if any attorney (including an attorney under an AHD) becomes a service provider, then the enduring document (AHD or EPA) is revoked to the extent that it gives power for a personal matter to an attorney.

The Bill also amends section 63 POA so that a person who has the care of an adult, or is a close friend or relation of the adult, will not be recognised as the statutory health attorney for an adult if he or she is a health provider for the adult or a service provider for a residential service where the adult resides (QLRC recommendation 10.5). Both subsections 63(1)(b) and (c) already provide that neither a person who has the care of an adult, or is a close friend or relation of the adult, can be a statutory health attorney if they also are a paid carer for the adult.

Although these amendments place restrictions upon whom an adult may choose as their attorney, and the availability of statutory health attorneys, any potential breach is justified on the basis the intent of these amendments is to ensure unsuitable people cannot act as attorneys and to reduce the risk of abuse or exploitation to an adult by a person appointed under an enduring document.

Transitional provisions (clause 79) will also provide that these new eligibility requirements will not invalidate existing attorney appointments made under an EPA prior to the commencement of these new provisions. The exception is the restriction on a person who is a service provider for a residential service where the principal is a resident from being an attorney under an AHD. New section 169 provides that on commencement of the amendment to section 29(2), if a person held an appointment as an attorney under an AHD that would no longer be valid, the AHD is revoked to the extent it gives power to the attorney. This approach is justified on the basis that section 59AA POA already provides that where an attorney under an AHD becomes a service provider, the AHD is revoked to the extent it gives power to that attorney.

Limit on number of joint attorneys appointed under EPA (QLRC Recommendation 16.7) – clause 64

The Bill amends the POA to provide that no more than four joint attorneys can be appointed under an EPA (QLRC recommendation 16.7).

This amendment to section 43 POA limits the choice of an adult to appoint over four joint attorneys. However, this amendment is considered justified as it reduces the risk that timely and effective decision-making may be impeded where there are multiple attorneys appointed for a matter, for example, particularly where the attorneys may live in different locations or may not agree in a given case.

Transitional provisions (clause 79) will also provide that this new limitation on the number of joint attorneys will not apply to EPAs that have been executed prior to the commencement of these new provisions.

Creation of new offence of taking reprisal (QLRC Recommendations 27.3 to 27.5) – clause 40

The Bill creates a new indictable offence prohibiting the taking of a reprisal against a person in relation to the disclosure of information under section 247 GAA (Whistleblowers' protection). New section 247B GAA provides that a person must not cause (or attempt or conspire to cause) detriment to another person because, or in the belief that, the other person or someone else has disclosed certain specified information.

The creation of an offence potentially breaches the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals as they impose a penalty upon the person for a breach of the provision.

The QLRC in its Report noted the current lack of protection from reprisal action for whistleblowers creates a disincentive for making disclosures and recommended the need for the creation of this type of offence, based on similar provisions contained in the *Whistleblowers Protection Act 1994* (which has been subsequently repealed and replaced in 2010 by the *Public Interest Disclosure Act 2010* (PID Act)). Any potential breach is justified on this basis.

The maximum penalty for the offence is 167 penalty units or two years imprisonment. This penalty is equivalent to the penalty amount imposed under the PID Act for similar conduct.

Summary disposition of indictable offence – clause 41

The Bill provides (in new section 250B GAA) that the newly created indictable offence of taking a reprisal (new section 247B GAA) must be dealt with summarily, that is, by a magistrate alone. This may appear to result in reduced access to a trial by jury for defendants. However, the Bill provides that defendants will still have the ability to proceed to a trial with a jury, if either on the prosecution or their own application, the magistrate is satisfied there are exceptional circumstances that mean that the charge should be committed for trial.

This is broadly consistent with the approach contained in section 552D (When Magistrates Court must abstain from jurisdiction) of the Criminal Code; and the associated reforms in relation to the summary disposition of indictable offences undertaken in the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* to benefit the administration of justice in general.

Section 4(3)(h) *Legislative Standards Act 1992* - legislation does not confer immunity from proceeding or prosecution without adequate justification

Protection from liability in health context (QLRC Recommendations 9.15, 9.16, 9.17) – Clauses 71, 72 and 73

The Bill amends sections 96 and 100 of the POA to ensure that the protection that is provided to a person other than an attorney (such as a health provider), who acts in reliance on an invalid enduring document in relation to a health matter, applies not only to reliance on an invalid power that is exercised under an EPA or AHD but also extends to reliance on a direction in an invalid AHD, including an AHD that has been revoked.

Existing section 100 of the POA, protects a person, other than an attorney, who acts in reliance on an invalid enduring document in regard to a health matter from liability if he or she does not know of its invalidity (section 96 defines *invalidity* and *know*). As section 100 and the definition of *invalidity* are currently worded, while it is clear that such protection would extend to the reliance on a power exercised by an attorney appointed under an AHD or an EPA, it is not clear whether the protection would extend to the reliance on a direction in an AHD. It is intended that this protection should apply in both situations.

The proposed amendment potentially departs from the principle that legislation should not confer immunity from proceeding or prosecution without adequate justification.

It is generally considered that legislation should not confer immunity on a person that is considered to commit a wrong when acting without authority. The proposed section amends the current protection from liability in the health context in existing section 100 to enhance its operation (as recommended by the QLRC). Further, it is noted chapter 5, part 5 (Protection and relief from liability) of the POA contains a range of protections from liability.

This amendment (and the provision in general) is justified on the basis that it is not realistic or practical in all circumstances for a person acting in reliance on an AHD, or a power for a health matter under an enduring document or a direction in an AHD to know the AHD or power for a health matter is invalid, or the direction in the AHD does not operate. Nor should they be expected to be able to assess the legality of the direction or document beyond its face value. This is especially the case for a health professional who may be required to provide emergency treatment. The departure is therefore considered justified.

Further the amendments to both sections 100 and 102 of the POA (implementation of QLRC recommendation 9.17) in the Bill helps prevent the misuse of the protections provided to health providers by incorporating a ‘good faith’ test. Under section 100 a health provider will only be protected from liability for acting in reliance on an invalid enduring document if the health provider acts in good faith.

Under section 102, as amended, a health provider is protected from liability to the extent the person does not know of an adult's AHD, as long as the health provider acts in 'good faith.' For example, a health provider that deliberately refrained from looking at the part of a person's record that included an AHD would not be acting in good faith.

The broadening of protection for making certain disclosures (QLRC recommendations 27.1 and 27.2) – clause 39

The Bill also amends the GAA to broaden the protection for whistle-blowers who disclose information in certain circumstances. The Bill provides that a person who discloses information, in the process of making a disclosure about what they believe to be conduct that either breaches the legislation or exposes an adult with impaired capacity to abuse, neglect or exploitation, is protected from liability for that disclosure of information (QLRC recommendation 27.1). The effect of the proposed amendments is that it provides protection to an individual that makes an adverse disclosure about a matter, and protects them from liability for this disclosure if it ends up not actually constituting a breach of the legislation.

The proposed amendment potentially departs from the principle that legislation should not confer immunity from proceeding or prosecution without adequate justification.

Currently, the whistle-blowers' protection in existing section 247GAA is applicable only in instances where an actual breach of the guardianship legislation is revealed. Whether an allegation amounts to an actual breach is usually not known until the completion of an investigation. This could act as a potential disincentive for a person disclosing information and does not align with disclosure provisions under the PID Act which enables the lawful disclosure of broader information than the GAA does currently. The amendment is considered justified as the departure will align the GAA with the PID Act and help ensure that infringements on the rights of people with impaired capacity are identified and appropriate action is taken.

Section 4(3)(c) *Legislative Standards Act 1992* - whether legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons

Delegation of powers of Public Trustee (Recommendations 25.2, 25.3) – Clauses 41 and 78

While section 11A of the *Public Trustee Act 1978* provides for the Public Trustee to delegate their powers under that Act, neither the GAA or the POA currently provides for a specific power for the Public Trustee to delegate their powers while acting as an administrator or attorney.

The Bill amends the GAA and the POA to provide that if the Public Trustee has power under the Act for a financial matter for an adult, the Public Trustee may delegate the power to an appropriately qualified member of the Public Trustee's Office's staff (QLRC recommendation 25.2).

In addition, the Bill amends the GAA and the POA to provide that if the Public Trustee has power under the Act for a financial matter for an adult that includes the power to make day-to-day decisions about the matter, the Public Trustee may delegate the power to make day-to-day decisions about the matter to one of the following: an appropriately qualified carer of the adult (although not a paid carer); an attorney under an enduring document; one of the persons who could be eligible to be the adult's statutory health attorney; or any other person the Public

Trustee, in the Public Trustee's discretion, considers appropriate (QLRC recommendation 25.3).

The proposed amendments potentially depart from the principle that legislation should only allow the delegation of administrative power in appropriate cases and to appropriate persons.

The proposed amendments are considered appropriate given the continued growth in the appointments of the Public Trustee as administrator for Queenslanders with impaired capacity for decision-making. The delegation is also limited to appropriately qualified officers/persons. Further the enhanced flexibility to delegate a power to make day-to-day decisions in certain circumstances where appropriate will ensure that decisions are made as efficiently as possible.

Delegation of powers of Public Guardian – clause 94

The Bill amends the PGA to enable the Public Guardian to delegate powers under sections 29 (costs of investigations and audits), 106 (engaging external contractors) and 25(1) (witnesses – to require person to attend and give information).

The proposed amendments potentially depart from the principle that legislation should only allow the delegation of administrative power in appropriate cases and to appropriate persons.

The Public Guardian currently has discretion to delegate a number of functions and powers under section 146 of the PGA, but not the powers outlined above.

The delegation of the Public Guardian's powers in the circumstances described above is considered justified to allow for the efficient operation of the Public Guardian's office.

It is proposed to allow the Public Guardian to delegate the power (section 25) to require a person to attend before the Public Guardian and give information and answer questions, or produce requested documents/things in the context of an ongoing investigation. Given the quasi-judicial nature of the power, this power may only be delegated to another senior executive officer. As such the delegation of this power will be limited to an appropriately qualified senior executive officer within the meaning of the *Acts Interpretation Act 1954*. Further, any sub-delegation of this power is prohibited.

The ability to recover costs of an investigation under certain circumstances (section 29) and to engage an external contractor (section 106) is commensurate with other powers that senior officers exercise in the Public Service. As such it is considered appropriate to also allow the Public Guardian to delegate these powers, but to limit any delegation to an appropriately qualified senior officer within the Public Guardian's office. Further, any further sub-delegation of these powers is prohibited.

Section 4(2)(a) *Legislative Standards Act 1992* – whether legislation has sufficient regard to the institution of Parliament

Section 4(4)(a) *Legislative Standards Act 1992* – legislation allows the delegation of legislative power only in appropriate cases and to appropriate persons.

Guidelines to assist in assessments of capacity (QLRC Recommendations 7.11 and 7.13) – clause 41

The Bill inserts a provision into the GAA (new section 250) that requires the Minister to prepare and issue guidelines for assessing the capacity of adults to make decisions (the guidelines). The guidelines are to include principles to be applied in making such capacity assessments and practical information and advice. In preparing the guidelines consultation must occur with relevantly qualified persons with experience in this area. Finally, the Minister is obliged to review the guidelines at least every five years.

The proposed amendment potentially departs from the principle that legislation must have sufficient regard to the institution of Parliament and allows the delegation of legislative power only in appropriate cases and to appropriate persons.

It is not proposed that the guidelines be provided for in subordinate legislation. It is intended that they act as a complementary educative tool for individuals or entities that have to make a determination about an adult's capacity, e.g. an attorney or administrator or a witness to an enduring document. As noted they are required to be prepared in consultation with relevant experts.

The consequence of a finding of impaired capacity is that the adult will no longer be able to exercise decision-making autonomy for a matter. Consequently, the QLRC considered it important that guidelines be developed to assist individuals, such as substituted decision-makers, in assessing whether an adult has capacity to make a decision for a matter. The majority of stakeholders in their submission to the QLRC supported the proposal. It is argued that the departure is justified on the basis that it will provide practical assistance to individuals or entities required to assess an adult's capacity.

Consultation

Queensland's guardianship legislation

The QLRC consulted widely and extensively, including conducting state-wide community forums and focus groups, and an informal reference group. Over 500 written submissions were also received as part of the QLRC's general review.

The following stakeholders were consulted on a consultation draft of the Bill: the Chief Justice of Queensland; the Chief Judge of Queensland; the President of the QCAT; the Public Guardian; the Public Advocate; the Public Trustee; the Bar Association of Queensland (BAQ); the Queensland Law Society (QLS); Legal Aid (Qld); the Australian Medical Association (Queensland); the Royal Australian and New Zealand College of Psychiatrists; Aged Care and Disability Advocacy; Queensland Advocacy Incorporated; the Australian Centre for Health Law Research, the Queensland University of Technology; the National Seniors Association; the Elder Abuse Prevention Unit, Uniting Care Community; the Anti-Discrimination Commission Queensland; the Social Work Department, the University of Queensland; the Queensland Health Care at the End of Life State Wide Reference Group; and the Caxton Legal Centre Inc.

Stakeholders were invited to provide their comments on the consultation draft of the Bill. Overall, the stakeholders who did provide comments, were supportive of the Bill and their specific feedback was taken into account in further drafting of the Bill.

Amendments to implement recommendations 1 and 2 of the FAC Report

The Office of Best Practice Regulation (OBPR) in the Queensland Productivity Commission has been consulted in relation to the proposed amendments to the Integrity Act. OBPR advised the proposal is exempt from the Treasurer's Regulatory Impact Statement system guidelines on the basis that the amendments only impact on the internal operations of the public sector and have no material impact on business or the community.

Amendments to implement recommendation 13 of the PCCC Report

The provisions to amend the GOC Act and PID Act were contained in a consultation draft of the Crime and Corruption and Other Legislation Bill 2017, which was circulated to key stakeholders, including: the Commission, the Queensland Ombudsman, the Office of the Director of Public Prosecutions, QLS, BAQ, the Aboriginal and Torres Strait Islander Legal Service (Qld), the Queensland Police Union of Employees, the Queensland Police Commissioned Officer's Union of Employees, the Together Union, and the Local Government Association Queensland. Stakeholders did not provide any comment on these provisions.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another State.

While the Bill is not intended to achieve uniformity with guardianship laws in other jurisdictions, the QLRC, in making its recommendations, considered guardianship legislation operating in other Australian jurisdictions.

Also, approaches in other jurisdictions were taken into consideration in the development of the amendments to the Integrity Act.

Notes on provisions

Part 1 Preliminary

Clause 1 states that, when enacted, the Bill will be cited as the *Guardianship and Administration and Other Legislation Amendment Act 2018*.

Clause 2 provides for commencement of the Bill on a date to be fixed by proclamation, except Part 2 (amendment of *Government Owned Corporations Act 1993*), Part 4 (amendment of the *Integrity Act 2009*) and Part 7 (amendment of *Public Interest Disclosure Act 2010*) which will commence upon assent.

Part 2 Amendment of *Government Owned Corporations Act 1993*

Clause 3 states that this part amends the *Government Owned Corporations Act 1993*.

Clause 4 amends section 156 (*Application of Crime and Corruption Act*) by inserting a new subsection which states that section 156 is declared to be a displacement provision for the purposes of the Corporations Act, section 5G, in relation to section 1317AE. A notation is also included which explains the effect of a State law being declared a Corporations legislation displacement provision.

Part 3 Amendment of *Guardianship and Administration Act 2000*

Clause 5 states that this part amends the *Guardianship and Administration Act 2000*. Minor and consequential amendments to the GAA are also contained in schedule 1.

Clause 6 amends section 5 (*Acknowledgements*) to provide that the capacity of any adult (not just an adult with impaired capacity) to make decisions may differ according to:

- i. the type of decision to be made, including, for example the complexity of the decision to be made; and
- ii. the support available from members of the adult's existing support network.

Clause 7 replaces section 11 (*Principles for adults with impaired capacity*) with a new section 11 (*Application of presumption of capacity*) to set out how the presumption that an adult has capacity for a matter is to be applied in particular circumstances.

New subsection 11(1) provides that if, in performing a function or exercising a power under this Act, the Supreme Court or QCAT is required to make a decision about an adult's capacity for a matter, the Court or QCAT is to presume the adult has capacity for the matter, until the contrary is proven.

New subsection 11(2) provides that if the Court or QCAT appoints a guardian or an administrator for an adult for a matter, the guardian or administrator is not required to presume the adult has capacity for the matter (as the presumption has already been rebutted).

Further, new subsection 11(3) provides that if a declaration by the Court or QCAT that an adult has impaired capacity for a matter is in force, a person or another entity that performs a function or exercises a power under the GAA or the POA is entitled to rely on that declaration and presume that the adult does not have capacity for the matter (as the presumption has already been rebutted).

Clause 8 inserts new chapter 2A (Principles), comprising new sections 11B (General principles) and 11C (Health care principles).

The general principles and the health care principle have been relocated from schedule 1 of the GAA to the beginning of the Act and redrafted to more closely align with relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*, to provide a more logical structure, to remove duplicating matters dealt with by both principles and to provide further guidance about the application of the general principles in the context of health care.

New subsection 11B(1) (General principles) provides that the general principles contained in the section must be applied by a person, or other entity that performs a function or exercises a power under the Act.

The GAA recognises that decisions for an adult can be made informally by the adult's 'existing support network' (section 9(2)(a)), that is, by members of the adult's family, close friends of the adult, and other people the QCAT decides provide support to the adult. If there is any doubt about the appropriateness of a decision, QCAT may ratify or approve a decision of an informal decision maker (section 154). Therefore new subsection 11B(2) requires that a person making a decision for an adult on an informal basis must also apply the general principles in making the decision for the adult.

New subsection 11B(3) replicates the current requirement that the community is encouraged to apply and promote the general principles.

Subsection 11B(3) sets out the new general principles (1 to 10) which recognises the presumption of capacity; an adult's right to the same human rights and fundamental freedoms regardless of an adult's capacity; the importance of empowering an adult to exercise their basic human rights and fundamental freedoms; the importance of maintaining an adult's existing supportive relationships; the importance of maintaining an adult's cultural and linguistic environment and values; an adult's right to privacy; an adult's right to liberty and security on an equal basis with others; and the importance of maximising an adult's participation in decision making.

General principles 9 and 10 provide specific guidance for a person or other entity exercising a power or performing a function under the Act, or making a decision on an informal basis for an adult. The person or other entity must perform these functions or exercise the power in a way that: promotes and safeguards the adult's rights, interests and opportunities; and is least restrictive of the adult's rights, interests and opportunities.

General principle 10 provides guidance for applying the requirements in general principle 9, setting out the steps that should be followed.

New section 11C (Health care principles) renames the health care principle as the health care principles (plural) and provides that the health care principles contained in the section must be applied by a person, or entity that performs a function or exercises a power under the Act for a health matter or a special health matter. Also, an entity authorised by an Act (see section 68(2)) to make a decision for an adult about prescribed special health care must apply the health care principles.

Section 11C sets out the new health care principles (1 to 4) which includes that a person or other entity who performs a function or exercises a power under the Act, for a health matter or a special health matter in relation to an adult, must also apply the general principles; and clarification on how to apply general principle 2 (same human rights and fundamental freedoms) and general principles 9 and 10 when exercising a function or power in relation to a health matter or special health matter. Health care principle 4 provides guidance for applying general principle 10(4) (the principle of substituted judgement).

Clause 9 inserts new sections 12A (Appointment – missing person) and 12B (Relationship with *Public Trustee Act 1978*).

New subsection 12A(1) allows QCAT to appoint an administrator for a financial matter for an adult missing person in certain circumstances. QCAT can make the order if satisfied of the matters listed in subsection 12A(1) and (2). In making an appointment of an administrator for an adult who is a missing person (unless otherwise specified) the Act applies with necessary changes and the appointment may be on the terms considered appropriate by QCAT. The section also deals with who may bring an application.

New section 12B provides for the relationship between QCAT's new jurisdiction to appoint administrators for a missing adult under section 12A and the relevant provisions of the *Public Trustee Act 1978* in relation to unclaimed property.

QCAT may not appoint an administrator for a financial matter for an adult who is a missing person if the Public Trustee is already appointed by the court under section 104(1) *Public Trustee Act 1978* as the administrator of the property to which the financial matter relates.

If, however, the Public Trustee is an administrator for the property to which the financial matter relates by virtue of section 104(2) *Public Trustee Act 1978* (that is where the Public Trustee has exercised an election to become administrator for the property without an order of the court), then QCAT may make an appointment under section 12A GAA and the Public Trustee ceases to become administrator of the property under section 104(2) *Public Trustee Act 1978* from that point forward.

Clause 10 amends section 14 (Appointment of 1 or more eligible guardians and administrators) to insert new subsections to provide that QCAT may appoint a person as guardian or administrator for an adult on the application of the adult's parents, only if QCAT has informed the parents of QCAT's power under section 14(6)(e) (as it will be renumbered by the Bill) to appoint successive appointees for a matter. Under section 14(6)(e) QCAT can appoint successive appointees for a matter, whose appointment does not begin until a previous appointee's appointment ends. In this way for example, parents of an adult child with impaired capacity for a matter, can nominate another person to be their child's guardian or administrator, when their appointment ends.

Importantly, a failure to comply with these requirements does not affect the validity of the appointment.

Clause 11 amends section 15 (Appropriateness considerations) to make a minor consequential amendment to existing subsection 15 (1)(b) to refer to the health care principles (plural).

While a person is not eligible to be appointed as a guardian or an administrator if they are currently a paid carer for the adult, an amendment is made to subsection 15(1)(g) to ensure that QCAT must consider whether the person has ever been a paid carer for the adult, in deciding whether a person is appropriate to be appointed as a guardian or administrator.

Clause 12 amends section 16 (Advice from proposed appointee about appropriateness and competence) to expressly provide that a person who has agreed to a proposed appointment as a guardian or administrator for an adult must advise the tribunal before it makes an order appointing the person whether he or she is, or has ever been a paid carer for the adult. Minor renumbering of the section also occurs as a consequence.

Clause 13 amends section 21 (Advice to registrar of titles if appointment concerns land) to clarify that if the Registrar of Titles receives an advice under section 21(1) regarding QCAT appointing an administrator for a matter involving an interest in land, the Registrar must keep the information in such a way that a search of the relevant title reveals the appointment. This will ensure that people dealing with the property of the adult are alerted through a search of the title that an administrator has been appointed.

Clause 14 amends section 26 (Automatic revocation) to provide for additional circumstances when an administrator's appointment under new section 12A (Appointment – missing person) ends. Such an appointment ends when: the coroner makes a finding under the *Coroners Act 2003* that the adult has died; the Supreme Court makes a declaration of death for the adult or grants a person leave to swear the death of the adult; or the adult's death is registered under the *Births, Deaths and Marriages Registration Act 2003*. Provision is also made that if more than one of these events applies, the appointment ends at the happening of the earliest event.

Clause 15 amends section 27 (Withdrawal with tribunal's leave) to provide that if the Registrar of Titles receives a notice under section 27(2)(b) that a person (who was an administrator for an adult for a matter involving an interest in land) has withdrawn as the adult's administrator, the Registrar must keep the information contained in an advice of withdrawal in such a way that ensures that a search of the relevant title reveals the withdrawal of the administrator. This will ensure that people dealing with the property of the adult are alerted through a search of the title of the withdrawal of the administrator.

Clause 16 inserts into chapter 3, part 3 a new division 1A (Provisions about appointment for adult who is missing) comprising new sections 27A and 27B as a consequence of the new ability to appoint an administrator for a missing person under section 12A created by the Bill.

New section 27A (Obligation to notify tribunal of particular circumstances) requires that an administrator appointed under new section 12A must as soon as practicable, after becoming aware that the adult (missing person) is alive or is dead, notify QCAT in writing.

New section 27B (Tribunal must revoke order making appointment) requires QCAT to revoke an appointment of an administrator under section 12A if satisfied: the adult is alive; the adult has died; or the adult may be presumed to be dead (for example if seven years has passed since the adult became a missing person). The appointment can be revoked by QCAT on its own initiative, or on the application of the section 12A administrator, or an interested person.

Clause 17 amends section 31 (Appointment review process) to clarify that when QCAT is reviewing an appointment of a guardian, and the Public Guardian is the current appointee, that QCAT may make an order removing the Public Guardian if there is another appropriate person mentioned in section 14(1) available for appointment (for example another person in the adult's support network). Minor renumbering of the section also occurs as a consequence.

Clause 18 amends section 32A (Additional requirements if change, revocation or ending of appointment and interest in land involved) to provide that if the Registrar of Titles receives a notice that an appointment of an administrator for a matter involving an interest in land has been changed, revoked or ended then the Registrar must keep the information contained in an advice relating to the change, revocation or ending of the appointment in such a way that a search of the relevant title reveals the appointment has changed, revoked or ended. This will ensure that people dealing with the property of the adult are alerted through a search of the title to the change, revocation or ending of the appointment of the administrator. Minor renumbering of the section also occurs as a consequence.

Clause 19 makes a number of consequential amendments to section 34 (Apply principles). The note in subsection 34(1) is amended to correctly identify the principles' new location. New subsection (1A) is inserted to clarify that an administrator appointed under section 12A (an administrator for an adult who is a missing person) is not required to apply the general principles specified. Minor renumbering of the section also occurs as a consequence.

Clause 20 amends section 37 (Avoid conflict transaction). Existing subsection 37(1) is amended to clarify that an administrator for an adult may enter into a conflict transaction only if the tribunal has prospectively authorised the transaction, conflict transactions of that type or conflict transactions generally. This amendment is made to more clearly articulate the duty to avoid entering a conflict transaction unless QCAT has prospectively authorised the transaction. This reflects the fiduciary obligation owed by the administrator to the adult.

Nevertheless, a note is inserted drawing attention to section 152 GAA (Tribunal authorisation and approval) which provides (once amended by clause 35 of the Bill) for QCAT to exercise its discretion and retrospectively authorise a conflict transaction.

Existing subsection 37(2) is amended by the insertion of additional examples of conflict transactions.

Existing subsection 37(3) is recast to clarify the scope of a conflict transaction by expressly providing that a transaction is not a conflict transaction merely because of the matters mentioned in (3) (a) to (c). New subsection 37 (3)(c) replicates existing subsection 37 (3).

New subsection 37(3A) is inserted to remove any doubt that the giving of a gift in accordance with section 54 of the Act is not a conflict transaction. Minor renumbering of the section occurs as a consequence.

Clause 21 makes consequential amendments to the heading of section 43 (Acting contrary to health care principle), and the section itself, to update references from ‘health care principle’ to the ‘general principles or health care principles.’

Clause 22 amends section 48 (Remuneration of professional administrators) to allow QCAT to order that an administrator for an adult is entitled to remuneration if the administrator carries on a business providing professional services. Minor renumbering of the section occurs as a consequence.

Clause 23 Amends section 54 (Gifts) so that it is consistent with the heading and the wording of the equivalent section (as amended) in the *Powers of Attorney Act 1998* (section 88).

Clause 24 replaces section 58 (Power to excuse failure) with a recast new section 58 (Relief from personal liability). The section is amended (consistent with section 105 POA) to remove the inference that section 58 of this Act operates only in regard to prosecution for a breach of a duty. New section 58 provides that the Supreme Court may relieve a guardian or administrator of all, or part of any personal liability, if the court considers the circumstances specified in subsection 58(1) exist.

Clause 25 replaces existing section 59 (Compensation for failure to comply) with a recast new section 59 (Compensation and accounting for profits for failure to comply).

The newly cast section 59 is amended firstly to clarify that a court’s or QCAT’s power to order a guardian or administrator (an appointee) to compensate the adult, or if the adult has died, the adult’s estate, for a loss caused by the appointee’s failure to comply with this Act in the exercise of a power, applies even where the appointee’s appointment has ended.

Section 59 is also amended to allow both a court and QCAT to order that an appointee (or former appointee) account for any profits the appointee has accrued as a result of the failure to comply with this Act in the exercise of a power. This is intended as an alternative remedy to an action for compensation. As such subsection 59(2) (as renumbered by this Bill) is inserted to make clear that the court or QCAT may not order the payment of both in relation to the same exercise of power.

Minor renumbering of the section occurs as a consequence. Current subsection 59(8) (renumbered as 59(10)) provides that in this section ‘court’ means any court. (The Bill makes a corresponding amendment to existing section 106 POA).

Clause 26 inserts new sections 60A (Effect on beneficiary’s interest if property dealt with by administrator), 60B (Administrator not required to keep proceeds and property separate) and 60C (Application to court to confirm or vary operation of s60A), relating to the new statutory exception to ademption.

New section 60A (Effect on beneficiary’s interest if property dealt with by administrator) provides a legislative exception to ademption where an administrator sells or disposes of property which is the subject matter of a specific gift in a deceased adult’s will. A beneficiary will have 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 by an administrator as the beneficiary would have had in the property had it not been sold or otherwise dealt with.

A beneficiary is also entitled to any traceable income or any capital gain generated by the proceeds. Section 60A applies even if the beneficiary is the administrator who sold or otherwise dealt with the adult's property.

While this section creates a legislative exception, so that ademption does not occur (without the need for a court order), it operates subject to any order made by the court under section 60C.

New section 60B (Administrator not required to keep proceeds and property separate) clarifies that section 60A does not require an administrator to keep the proceeds of sale or other dealing of property separate from the other property of the adult. (This does not impact on the continuing obligation (see section 50) for administrators to keep their property separate from the adult's property).

New section 60C (Application to court to confirm or vary operation of s 60A) enables the court, on the application of a beneficiary of the adult's will, a personal representative of a deceased beneficiary of the adult's will or a personal representative of the adult, to make orders confirming or varying the legislative exception to ademption. (Note that the term 'personal representative' is defined in the *Acts Interpretation Act 1954*).

The court may make such orders as it thinks fit to give effect to the legislative exception to ademption (under section 60A) or to ensure that no beneficiary gains an unjust and disproportionate advantage or suffers an unjust and disproportionate disadvantage, of a kind not contemplated by the will.

For example, an adult's will may be designed to treat beneficiaries equally via specific gifts, but, because of the operation of section 60A (that creates the exception to ademption) the sale or a disposition of a property may mean that one beneficiary receives a disproportionately higher or lower benefit under the will. New section 60C will enable a beneficiary to apply to the court for an order that adjusts the beneficiary's entitlements to better reflect the original intention of the testator.

An order made has effect as if it had been made as a codicil to the adult's will executed immediately before the adult's death and applies despite any contrary operation of section 60A. An application must be made within six months of the adult's death. However, the court may extend the application time. Section 44(1) to (4) of the *Succession Act 1981* applies to the application and any order made.

Clause 27 makes a consequential amendment to section 61 (Purpose to achieve balance for health care) as a result of the redrafting of the general principles and the health care principles.

Section 61 will provide that the purpose of chapter 5 (Health matters and special health matters) is to strike a balance between ensuring an adult is not deprived of necessary health care only because the adult has impaired capacity for a health matter (or special health matter); and ensuring health care is given to an adult only if it is appropriate in all the circumstances.

Clause 28 inserts new section 68A (Tribunal to consult in making decision about special health care). Currently, the provisions requiring QCAT or another entity to consult when deciding whether to consent to special health care are located in the health care principle in Schedule 1 of the Act. As this principle only applies in relation to special health care, it is omitted from the new health care principles in new section 11C and relocated to chapter 5.

Clause 29 inserts a new part 3A (Clinical research) into chapter 5, comprising sections 74A (What is *clinical research*), 74B (What is *approved clinical research*), and 74C (Approval of clinical research). Currently, the provisions that set out the threshold criteria QCAT must be satisfied about before granting approval for a person with impaired capacity to participate in ‘clinical research’ are located in Schedule 2 to the Act. Given these provisions relate to substantive powers for the approval of clinical research and effectively operate as a safeguard to protect the interests of adults with impaired capacity, they are relocated to the body of the Act. The definition of clinical research is also updated to include ‘a trial of drugs, *devices*, *biologicals* or techniques.’

Clause 30 amends section 81 (Tribunal’s functions for this Act) to require QCAT, in carrying out functions or powers under the Act, to the greatest extent practicable, to seek and take into account the views, wishes and preferences expressed or demonstrated by an adult and the views of any member of the adult’s support network. Minor renumbering to the section occurs as a consequence.

Clause 31 amends section 101 (Relationship with the QCAT Act) so that the special witness provisions contained in section 99 (Dealing with special witnesses) of the QCAT Act will apply (with some exceptions) to proceedings under chapter 7 of the Act.

The GAA currently provides that the QCAT may make an adult evidence order (section 106(1)) (permitting the QCAT to speak with the adult in the absence of others) or a closure order (section 107(1)) (permitting the QCAT to close a hearing or part of a hearing to all or some members of the public, or to exclude a particular person, even an active party, from a hearing or part of a hearing). While these orders go some way to protecting a vulnerable witness during a hearing, section 99 of the QCAT Act provides for a broader range of orders.

The amendment clarifies that section 99 of the QCAT Act will apply to proceedings other than when QCAT is considering whether to make an order under sections 106(1) (Adult evidence order) or 107 (1) (Closure order) of the Act. In the interests of openness and transparency of guardianship proceedings, the GAA requires quite a high threshold to be met before QCAT may hear evidence in the absence of members of the public or an active party to the proceeding (section 106) or close a hearing to members of the public or active parties (section 107). The amendment excludes the application of section 99 of the QCAT Act in these circumstances to ensure QCAT continues to apply the threshold tests in section 106 and 107 GAA when considering whether to hear evidence in the absence of certain persons or to close a hearing.

Clause 32 amends section 118 (Tribunal advises persons concerned of hearing) to clarify who QCAT must give advance notice of a hearing. Under existing subsection 118(1)(b), notice is required to be given to ‘members of the adult’s family’. This is replaced with a list of categories of persons with a relationship to the adult, to ensure only those in a close and continuing relationship with the adult are required to be notified.

Further, the amendment provides that if no person can be located within those stated categories, QCAT may give notice to a member of the adult's extended family, or a person from the adult's household, if they are in a close and continuing relationship with the adult. The amendment also inserts definitions for the purposes of the section of the terms: *child*, *parent* and *sibling*.

Clause 33 amends section 125 (Representative may be appointed) to allow any member of QCAT (not just the president or presiding member) to appoint a representative to represent an adult's views, wishes and preferences and interests; and clarifies the role of the representative appointed.

Clause 34 amends section 129 (Interim order) to clarify that where QCAT is making an interim order in relation to an adult, because there is an immediate risk of harm to the health, welfare or property of the adult, one of the grounds of which QCAT must be reasonably satisfied is that the adult has, or may have, impaired capacity for a matter.

Clause 35 replaces existing section 152 (Tribunal authorisation or approval) with a recast section 152 (Tribunal authorisation or approval) that clarifies that QCAT can authorise a conflict transaction prospectively (before the administrator enters into a conflict transaction) or retrospectively (after the administrator has entered into a conflict transaction). Given the general duty (see section 37) on administrators to avoid conflict transactions, the recast section 152 provides that until QCAT retrospectively authorises a conflict transaction, an administrator has still acted contrary to his or her duty under section 37.

Subsection (5) maintains the existing position that the tribunal may approve an investment as an authorised investment.

Clause 36 amends section 153 (Records and audit) to clarify that that QCAT can order either an attorney or a former attorney, an administrator or former administrator to file in the tribunal records and audited accounts of the administrator's or attorney's dealings and transactions conducted on behalf of the adult. That is, section 153 is amended to clarify that the existing provision applies even if the administrator's appointment has ended, the enduring power of attorney has been revoked, or the adult has died.

Clause 37 amends section 213 (Appointment) to make clear the Public Advocate is appointed under this Act and not the *Public Service Act 2008*.

Clause 38 inserts new section 217A (Preservation of rights of public advocate) to provide that if a person who is a public service officer is appointed as the Public Advocate, the officer keeps all rights accrued (or accruing) as if service as the Public Advocate were a continuation of service as a public service officer. At the end of the person's term of office, or on resignation, the person's service is taken to be public service for deciding the person's rights as a public service officer. This provision is consistent with section 100 PGA that provides for the preservation of rights of the public guardian.

Clause 39 amends section 247 (Whistleblowers' protection) to insert a new subsection (1) that broadens the scope of the existing whistleblower protection. The protection offered by the current provision is limited to disclosure about conduct that is an actual breach of the GAA, the POA or the PGA.

The amended whistleblowers' protection applies if the person honestly believes, on reasonable grounds: the information tends to show another person contravened the GAA, the POA or the PGA; or an adult is (or has been) the subject of exploitation, abuse or neglect (including self-neglect); or the information would help in the assessment or investigation of a complaint that there has been a contravention of the above mentioned Acts or an adult is the subject of exploitation, neglect or abuse.

Clause 40 inserts new sections 247A (Reprisal and grounds for reprisal), 247B (Offence of taking reprisal) and 247C (Damages for reprisal).

Although section 247 protects a person (a whistleblower) who makes a disclosure from liability under certain circumstances, there is not currently any protection for that person from being subject to a reprisal as a result of making the disclosure. New section 247A (Reprisal and grounds for reprisal) provides that a person must not cause, or attempt or conspire to cause, detriment to another because, or in the belief that, the other person or someone else has disclosed or intends to disclose information under section 247(1). An attempt to cause detriment includes an attempt to induce a person to cause detriment. A contravention of this provision is a reprisal or the taking of a reprisal, and a ground mentioned in subsection 247A(1) as the ground for a reprisal is the unlawful ground for the reprisal. For a contravention to happen, it is sufficient if the unlawful ground is a substantial reason, even if there is another ground for the act or omission.

New section 247B (Offence of taking reprisal) creates the indictable offence (that is a misdemeanour) that a person must not take a reprisal and carries a maximum penalty of 167 penalty units or two years imprisonment. (New section 250B inserted by the Bill deals with proceedings for indictable offences).

New section 247C (Damages for reprisal) provides that a reprisal is a tort and a person is liable in damages to any person who suffers detriment as a result. Any appropriate remedy, that may be granted by a court for a tort, including exemplary damages, may be granted by a court for the taking of a reprisal. If the damages claim goes to trial in the Supreme or District Court, it must be heard by a judge without a jury. Subsection 247(4) makes it clear that the right to bring proceedings for damages does not affect any other right or remedy available to the person. Further, proceedings are not dependent on a prosecution under section 247B. Subsection (6) makes it clear the *Workers' Compensation and Rehabilitation Act 2003* does not apply to proceedings for damages brought under this section.

Clause 41 inserts into chapter 11, new part 4A (Miscellaneous) comprising new sections 250, and 250A to 250B.

New section 250 (Guidelines to assist in assessments of capacity) requires the Minister responsible for administering the Act to prepare guidelines to assist people to make assessments about adults' capacity to make decisions about matters. The section specifies that guidelines are to include principles to be used in making assessments about the capacity of adults to make decisions about matters and information and advice that will give practical guidance for making such assessments. In preparing the guidelines, the Minister must consult with persons who have qualifications relevant to, or experience in, making assessments about the capacity of adults to make decisions about matters. The guidelines are to be published on the responsible department's website, and reviewed by the Minister at least every five years.

New section 250A (Delegation of public trustee's powers under this Act) provide that if the Public Trustee has power under the Act for a financial matter for an adult, the Public Trustee may delegate the power to an appropriately qualified member of the Public Trustee's staff.

For day-to-day decisions about a financial matter which are minor, uncontroversial decisions about day-to-day issues that involve no more than a low risk to the adult, the Public Trustee may delegate the power to an appropriately qualified carer of the adult, an attorney under an enduring document, a person who would be eligible to be the adult's statutory health attorney or another person the Public Trustee considers appropriately qualified to exercise the power. However, the Public Trustee may not delegate the Public Trustee's powers for day-to-day decisions about a financial matter to the Public Guardian or a paid carer for the adult.

New section 250B (Proceedings for indictable offences) provides that a proceeding on a charge for an indictable offence under this Act must be heard summarily. However, a Magistrate Court must abstain from dealing summarily with the offence if satisfied (on an application made by the defence or the prosecution), that because of exceptional circumstances, the charge should not be heard and decided summarily. The section then provides how the matter should proceed if it is not dealt with summarily.

Clause 42 inserts into chapter 12, new part 12 regarding transitional provisions for the Act associated with the Bill, comprising new sections 270 to 274.

New section 270 (Definition for part 12) provides the definition of *amendment Act* for the part as meaning the *Guardianship and Administration Other Legislation Amendment Act 2018*.

New section 271 (Obligation of registrar of titles) provides that the obligations on the Registrar of Titles in sections 21(2), 27(3) and 32A(3), as amended by the amendment Act, apply only in relation to an advice received by the Registrar of Titles after commencement.

New section 272 (Application of subsection 60A – 60C) provides that sections 60A to 60C apply in relation to the will of an adult who dies after the commencement and regardless of whether the sale, mortgage, charge, disposition of, or other dealing with, property by the administrator happened before or after the commencement.

New section 273 (Validation of delegation) provides that a delegation of a power by the Public Trustee of a type permitted in new section 250A (Delegation of public trustee's powers under this Act) before the commencement of the amendment Act is taken to be, and always have been, as valid and effective as it would have been if it were made after the commencement. While section 11A of the *Public Trustee Act 1978* provides for the Public Trustee to delegate their powers under the Act, new section 250A provides specific delegation powers in relation to the role as an administrator or attorney.

New section 274 (Existing proceedings) provides that where proceedings under this Act have been started, but not finished, the proceeding continues as if the amendment Act had not been enacted.

Clause 43 omits schedule 1 (Principles) in its entirety. This is a consequence of the relocation by this Bill of the principles into new chapter 2A (Principles), comprising new sections 11B (General principles) and 11C (Health care principles).

Clause 44 amends schedule 2 (Types of matters), part 2 (Personal matters). Existing section 2 (personal matter) is amended to clarify the scope of the meaning of *personal matter* by inserting two additional examples of a personal matter for an adult, i.e. who may have access visits to, or other contact with, the adult; and advocacy relating to the care and welfare of the adult. These amendments clarify that where an adult does not have capacity to determine who has contact with them or to seek out advocacy support, a guardian appointed for personal matters can make these decisions in accordance with the general principles.

Clause 45 amends schedule 2 (Types of matters), part 3 (Special personal matters) by expressly providing that a *special personal matter* includes entering a plea on a criminal charge for the adult. This removes any doubt that such an act is not a personal matter (for which an adult's guardian could make the decision).

Clause 46 amends schedule 2 (Types of matters), by omitting section 13 (Approved clinical research) in its entirety as a consequence of this Bill relocating the provision into the body of the Act in new part 3A (Clinical research) of Chapter 5.

Clause 47 Amends the Schedule 4 (Dictionary) to replace the definition of *health care principle* (to reflect the new location of the principles (plural)) and update references to *approved clinical research*, *clinical research*, and *general principles* (to reflect their new locations in the body of the Act). The definition of *interested person* is reframed so that it focuses on a person who has an interest in promoting and safeguarding the adult's rights and interests, rather than simply focusing on a person having a continuing interest in an adult. A note is added to the definition of *capacity* to emphasise that all reasonable means should be used to facilitate communication before a person is treated as unable to communicate. The definition *community visitor* is omitted, as it is now defined in the PGA.

Part 4 Amendment of *Integrity Act 2009*

Clause 48 states that Part 4 of the Bill amends the *Integrity Act 2009* (Integrity Act).

Clause 49 amends section 7(1)(a) of the Integrity Act to insert a reference to a 'former designated person'. The effect of the amendment is to broaden the functions of the Integrity Commissioner to give written advice to both designated persons and former designated persons on ethics or integrity issues as provided for under chapter 3, part 2 of the Integrity Act.

Clause 50 makes multiple amendments to section 15 of the Integrity Act.

This clause amends section 15(2) to insert a reference to a 'former designated person' to allow both particular designated persons and particular former designated persons to make a written request to the Integrity Commissioner for advice on an ethics or integrity issue as provided for in sections 16 to 20A of the Integrity Act.

This clause also omits section 15(3) as relevant officers (senior executives, senior officers or senior officer equivalents) will no longer be required to give the Integrity Commissioner a signed authority from the chief executive of the department, public service office or government entity in which they are employed to ask for the Integrity Commissioner's advice.

This clause amends section 15(6) to replace the reference to ‘section 16’ to ‘sections 16 and 20A’ to reflect that former designated persons may request advice under new section 20A from the Integrity Commissioner about an ethics or integrity issue involving the person that arises from a post-separation obligation.

This clause also omits section 15(7) as a definition for ‘relevant officers’ is no longer required due to section 15(3) being omitted, and renumbers the section.

Clause 51 amends the Integrity Act by inserting a new section 20A to provide that a former designated person may request the Integrity Commissioner’s advice on an ethics or integrity issue involving them that arises from a post-separation obligation, for a period of up to two years after they cease to be a designated person. On commencement of the amendments, particular persons who ceased to be a designated person in the previous two year period will become eligible to seek the advice of the Integrity Commissioner.

The new section 20A also provides a definition for *post-separation obligation*. A *post-separation obligation* is defined as meaning an obligation (including an obligation under an Act, contract of employment, directive, policy or code of conduct) that is related to contact with a government or opposition representative and applies to a person because the person was a designated person. A *post-separation obligation* also includes an obligation under section 70 of the Integrity Act, which prohibits related lobbying by former senior government representatives or former opposition representatives.

Clause 52 inserts a new section 21(5) into the Integrity Act to provide the Integrity Commissioner with the authority to give advice to former designated persons on an integrity or ethics issue sought under new section 20A.

Clause 53 amends the definition of *relevant document*, for an ethics or integrity issue, in paragraph (a) of section 25 of the Integrity Act. The reference to section 15(3) of the Integrity Act is omitted from the definition as it will no longer be required once clause 50 is given effect.

Clause 54 inserts a reference to a ‘former designated person’ into section 26(1) of the Integrity Act. Amendment of this section will allow the Integrity Commissioner to disclose relevant documents to both designated persons and former designated persons if they request advice under section 15 of the Integrity Act on an ethics or integrity issue.

Part 5 Amendment of Powers of Attorney Act 1998

Clause 55 states that this part amends the *Powers of Attorney Act 1998 (POA)*. Minor and consequential amendments to the POA are also contained in schedule 1.

Clause 56 inserts new chapter 1A (Principles) which contains new sections 6C (General principles) and 6D (Health care principles).

The general principles and the health care principle have been relocated from schedule 1 of the POA to the beginning of the Act and redrafted to more closely align with relevant articles of the United Nations *Convention on the Rights of Persons with Disabilities*, to provide a more logical structure, remove duplicating matters dealt with by both principles and to provide further guidance about the application of the general principles in the context of health care.

New subsection 6C (General principles) provides that the general principles contained in the section must be applied by a person, or other entity that performs a function or exercises a power under the Act or an enduring document (an EPA or AHD).

Subsection 6C also sets out the new general principles (1 to 10) which recognises the presumption of capacity; an adult's right to the same human rights and fundamental freedoms regardless of an adult's capacity; the importance of empowering an adult to exercise their basic human rights and fundamental freedoms; the importance of maintaining an adult's existing supportive relationships; the importance of maintaining an adult's cultural and linguistic environment and values; an adult's right to privacy; an adult's right to liberty and security on an equal basis with others; and the importance of maximising an adult's participation in decision making.

General principles 9 and 10 provide specific guidance for a person or other entity exercising a power or performing a function under the Act or under an enduring document (i.e. an EPA or AHD). The person or other entity must perform these functions or exercise the power in a way that: promotes and safeguards the adult's rights, interests and opportunities; and is least restrictive of the adult's rights, interests and opportunities.

General principle 10 provides guidance for applying the requirements in general principle 9, setting out the steps that should be followed.

New section 6D (Health care principles) renames the health care principle as the health care principles (plural) and provides that the health care principles contained in the section must be applied by a person, or entity that performs a function or exercises a power under the Act or an enduring document (i.e. an EPA or AHD) for a health matter.

Section 6D also sets out the new health care principles (1 to 4) which includes that a person or other entity who performs a function or exercises a power under the Act or an enduring document, for a health matter in relation to an adult, must also apply the general principles; and clarification on how to apply general principle 2 (same human rights and fundamental freedoms) and general principles 9 and 10 when exercising a function or power in relation to a health matter. Health care principle 4 provides guidance for applying general principle 10(4) (the principle of substituted judgement).

Clause 57 amends section 29 (Meaning of *eligible attorney*). This section provides for who is an eligible attorney for an enduring power of attorney or an advance health directive.

Subsection 29 (1) which outlines who is an eligible attorney for a matter under an EPA is amended to clarify that an eligible attorney should have capacity for the matter.

While, subsection 29(1) already provides that a person who is a paid carer is not an eligible attorney under an EPA, these amendments also specify that a person who has been a paid carer for the principal within the previous three years, is not eligible. Finally, amendments also clarify that the Public Trustee (or a trustee company) can be an eligible attorney under an EPA for a financial matter only; and the Public Guardian can be an eligible attorney under an EPA for a personal matter only.

Subsection 29(2) which provides who is an eligible attorney for an AHD is amended for consistency with existing subsection 29(1) to make clear that a service provider for a residential service where the principal is a resident is not an eligible attorney for an AHD. Subsection 29(2) is further amended to clarify that the Public Trustee is not an eligible attorney for an AHD.

Clause 58 amends section 31 (Meaning of eligible witness) to remove the requirement that the witness for an AHD must be at least 21 years of age.

Clause 59 amends section 32 (Enduring power of attorney) to clarify that an EPA may be made by an adult principal outside the State. This clarifies that where the person lives interstate or overseas and makes an EPA under Queensland legislation, the instrument will be effective in Queensland.

Clause 60 amends both the heading of section 34 (Recognition of enduring power of attorney made in other States), and the section itself, to expand the recognition in Queensland of an EPA made in another state (in accordance with the requirements in that state) to recognise an EPA made in another jurisdiction (that will include New Zealand). Previously such recognition only applied to another State. A corresponding amendment is made to schedule 3 (Dictionary) for the term *jurisdiction*.

Clause 61 amends section 35 (Advance health directive) to clarify that an AHD may be made by an adult principal who is outside the State. This clarifies that where the person lives interstate or overseas and makes an AHD under Queensland legislation, the instrument will be effective in Queensland.

Clause 62 amends section 41 (Principal's capacity to make an enduring power of attorney) to clarify the test of capacity that applies when considering whether a principal has capacity to make an EPA and to clarify that the definition of capacity in the schedule 3 (Dictionary) does not apply. The presumption of capacity in the general principles will continue to apply to the test of capacity in section 41.

New subsection 41(1) states that a principal has capacity to make an EPA only if the principal: is capable of making the EPA freely and voluntarily; and understands the nature and effect of the EPA. Existing subsection 41(2) also stipulates that understanding the nature and effect of an EPA includes understanding the matters listed in that subsection. Further new subsection 41(3) is inserted to clarify that the definition of *capacity* in the schedule 3 (Dictionary) does not apply to section 41.

Clause 63 replaces existing section 42 (Principal's capacity to make an advance health directive) with a recast section 42 to clarify the test of capacity that applies when considering whether a principal has capacity to make an AHD and to clarify that the definition of capacity in the schedule 3 (Dictionary) does not apply. The presumption of capacity in the general principles will continue to apply to the test of capacity in section 42.

By executing an AHD a principal can give directions about health matters and special health matters, for his or her future health care, and appoint one or more persons who are eligible attorneys to exercise power for the health matter for the principal in the event the directions prove inadequate.

New subsections 42(1) and (2) clarify the capacity required by a principal in making an AHD, to the extent it does not give power to an attorney; and new subsection 42(3) clarifies the capacity required by the principal in making an AHD, to the extent it gives power to an attorney.

New subsection 42(1) states that a principal may make an AHD only if the principal: understands the nature and effect of the AHD; and is capable of making the advance health directive freely and voluntarily. Subsection 42(2) also stipulates that understanding the nature and effect of the AHD includes understanding the matters listed in that subsection.

New subsection 42(3) provides that a principal has the capacity necessary to make an AHD, to the extent it gives power to an attorney, only if the principal has the capacity to make an EPA giving the same power (see amended section 41).

New subsection 42(4) is inserted to clarify that the definition of *capacity* in schedule 3 (Dictionary) does not apply to section 42.

Clause 64 amends section 43 (Appointment of 1 or more eligible attorneys) to provide that a principal may appoint a maximum of four joint attorneys for a matter under an EPA. Previously there was no limit.

Clause 65 amends section 45 (Proof of enduring document) to simplify the requirements for certifying that a copy of an enduring document (an AHD or EPA) is a true and complete copy of the original. Rather than certifying each page of the enduring document, amended section 45 requires only that the copy is certified to the effect that it is a true and complete copy of the original.

Clause 66 inserts new sections 61A to 61D into existing chapter 3 (Enduring documents) part 6 (Other provisions) relating to the statutory exception to ademption.

New section 61A (Application of sections 61B – 61D) provides that these sections only apply in relation to EPAs. That is, they do not apply to General Powers of Attorney.

New section 61B (Effect on beneficiary's interest if property dealt with by attorney) provides a legislative exception to ademption where an attorney under an EPA sells or disposes of property which is the subject matter of a specific gift in a deceased principal's will. A beneficiary will have 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 by an attorney as the beneficiary would have had in the property had it not been sold or otherwise dealt with.

A beneficiary is also entitled to any traceable income or a capital gain generated by the proceeds. Section 61B applies even if the beneficiary is the attorney who sold or otherwise dealt with the principal's property. While this section creates a legislative exception, so that ademption does not occur (without the need for a court order), it operates subject to any order made by the court under section 61D(1).

New section 61C (Attorney not required to keep proceeds and property separate) clarifies that section 61B does not require an attorney to keep the proceeds of sale or other dealing of property separate from the other property of the principal. This does not impact on the continuing obligation (see section 86) for an attorney to keep the attorney's property separate from the principal's property.

New section 61D (Application to court to confirm or vary operation of s 61B) enables the court, on the application of a beneficiary of the adult's will, a personal representative of a deceased beneficiary of the adult's will or a personal representative of the principal, to make orders confirming or varying the legislative exception to ademption. (Note that the term 'personal representative' is defined in the *Acts Interpretation Act 1954*).

The court may make such orders as it thinks fit to give effect to the legislative exception to ademption (under section 61B) or to ensure that no beneficiary gains an unjust and disproportionate advantage or suffers an unjust and disproportionate disadvantage, of a kind not contemplated by the will.

For example, a principal's will may be designed to treat beneficiaries equally via specific gifts, but, because of the operation of section 61B (that creates the exception to ademption) the sale or a disposition of a property may mean that one beneficiary receives a disproportionately higher or lower benefit under the will. New section 61D will enable a beneficiary to apply to the court for an order that adjusts the beneficiary's entitlements to better reflect the original intention of the testator.

An order made has effect as if it had been made as a codicil to the principal's will executed immediately before the principal's death and applies despite any contrary operation of section 61B. An application must be made within six months of the principal's death. However, the court may extend the application time. Section 44(1) to (4) of the *Succession Act 1981* applies to the application and any order made.

Clause 67 amends section 63 (Who is a statutory health attorney) which provides (in a priority list) who is a statutory health attorney for an adult.

Existing subsection 63(1)(a) is amended to clarify that the adult's spouse will be recognised as a *statutory health attorney* only if the spouse is 18 years or more. This is for consistency with the requirements of section 29 (Meaning of *eligible attorney*). A note is also inserted to draw attention to the *Acts Interpretation Act 1954*, definition of *spouse* which includes a de facto or civil partner.

Existing subsections 63(1)(b) and (c) are amended to provide that a person who has the care of an adult, or is a close friend or relation of the adult cannot be a statutory health attorney if that person is a health provider for the adult; or a service provider for a residential service where the adult lives. Both subsections 63(1)(b) and (c) already provide that neither a person who has the care of an adult, or is a close friend or relation of the adult, can be a statutory health attorney if they are a paid carer for the adult.

New subsection 63(5) provides the meaning of *a relation of the adult* for the purposes of subsection 63(1)(c) to make it clear that that it is a person who is in a close personal relationship with the adult and has a personal interest in the adult's welfare. It also provides that a relation is a person who is either related to the adult by blood, spousal relationship, adoption or a foster relationship; or for a person who is an Aboriginal person or a Torres Strait Islander, a person who under Aboriginal tradition or Island custom is regarded as a relative of the adult.

Clause 68 amends section 73 (Avoid conflict transaction). Existing subsection 73(1) is amended to clarify that an attorney for a financial matter may enter into a conflict transaction only if the principal, or the court under section 118(2) of the POA (i.e. the Supreme Court or QCAT by virtue of section 109A of the POA), has prospectively authorised the transaction, conflict transactions of that type or conflict transactions generally. This amendment is made to more clearly articulate the duty for an attorney to avoid entering a conflict transaction unless the principal, the Supreme Court or QCAT has prospectively authorised the transaction. This reflects the fiduciary obligation owed by the attorney to the adult.

New subsections 73(1A) and (1B) are inserted. New subsection 73(1A) (renumbered by the Bill as subsection 73(2)) makes clear that despite subsection (1), the principal may retrospectively authorise the mentioned transactions, if the principal has capacity to do so. While new subsection 73(1B) (renumbered by the Bill as subsection 73(3)) deals with the validity of the conflict transaction where the principal retrospectively authorises it, by making clear that in such circumstances the conflict transaction is taken to be as valid as if it had been entered into by prospective authorisation given by the principal.

A note is also added drawing attention to the operation of section 118(3) of the POA, which provides that the Supreme Court may retrospectively authorise an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake (Section 118 is amended by clause 76 of the Bill).

New subsections 73(1C) and 73(1D) (renumbered by the Bill as subsections 73(4) and 73(5)) are inserted. These subsections provide that that if an attorney for financial matters enters into a conflict transaction without obtaining an authorisation mentioned in section 73(1), the attorney has acted contrary to section 73(1), until such time as the transaction is authorised under section 73(2) or section 118(3).

Existing subsection 73(2) is amended (and renumbered as subsection 73(6)) to include additional examples of conflict transactions. Minor renumbering of the examples occurs as a consequence.

Existing subsection 73(3) (renumbered as subsection 73(7)) is recast to clarify the scope of a conflict transaction by inserting new subsections to expressly provide that a transaction is not a conflict transaction merely because the attorney is related to the principal, or the attorney may be a beneficiary of the principal's estate on the principal's death.

New subsections 73(3A) and (3B) (renumbered as subsections 73(8) and 73(9)) are also inserted. New subsection 73(3A) serves to clarify that the giving of a gift in accordance with section 88 of the POA is not a conflict transaction. New subsection 73(3B) also clarifies that a conflict transaction between an attorney and a person who does not know (or have reason to believe) a transaction is a conflict transaction is, in favour of the person, as valid as if the

transaction were not a conflict transaction. This is consistent with existing section 37(4) in the GAA.

Clause 69 omits section 76 (General principles for adults with impaired capacity) as it will replicate the requirement in new section 6C (inserted by clause 43) that a person or other entity that performs a function or exercises a power under the Act, or under an enduring document, must apply the general principles.

Clause 70 replaces existing section 88 (Gifts) with new section 88 (Gifts and donations) in order to ensure it is consistent with existing section 54 of the GAA. New section 88 gives a limited power to attorneys to make gifts or donations of the adult principal's property. Unless otherwise authorised under the POA, a gift or donation can only be made if it is of the nature the principal made when the principal had capacity, or of the nature the principal might reasonably be expected to make; and its value is reasonable having regard to all the circumstances, particularly, the principal's financial circumstances.

New subsection 88(2) provides that neither the attorney, nor a charity with which the attorney is connected, is prevented from receiving such a gift or donation.

Clause 71 replaces existing section 96 (Interpretation) with new section 96 (Definitions for part) to recast the definition of *invalidity* and *know* when used in part 5 (Protection and relief of liability) of the Act. The recast definitions will (with new section 100 POA) ensure that the protection that is provided to a person other than an attorney (such as a health provider), who acts in reliance on an invalid enduring document in relation to a health matter, not only applies to a decision of an attorney (that is, the exercise of a power) but also extends to a person who acts in reliance on a direction under an invalid AHD, including an AHD that has been revoked (wholly or partially).

The new definition of *invalidity* now applies to both an AHD (to ensure that directions under an invalid AHD are covered) and powers exercised under an enduring document (so that powers exercised by attorneys appointed under either an invalid AHD or EPA are covered).

The definition of *invalidity* also reflects that an enduring document may be revoked in its entirety or only to the extent that it gives the power (see sections 55 to 59AA POA).

The new definition of *know* is defined as it relates to the invalidity of an AHD and the invalidity of a powers under an enduring document (i.e. AHD and EPA).

Clause 72 replaces existing section 100 (Additional protection if unaware of invalidity in health context). Section 100 POA provides protection from liability to a person, other than an attorney (such as a health provider), who without knowing an AHD or a power for a health matter under an enduring document (an AHD or EPA) is invalid, relies on the AHD or the purported exercise of that power.

Currently it is not clear (because of the wording of this section and the definition of *invalidity* in section 96) whether the protection from liability would extend to a person who acted in reliance on a direction in an AHD without knowing that the AHD had been revoked. Along with the new definitions inserted by clause 71, this recast section will now ensure that the protection that is provided to a person (such as a health provider), who acts in reliance on an invalid enduring document in relation to a health matter, also extends to a person who acts in

reliance on a direction under an invalid advance health directive, or a direction that is otherwise inoperative.

The newly cast section 100 also incorporates a ‘good faith’ requirement into section 100, so that the person is only provided with protection from liability if the person acts in ‘good faith,’ that is for example if the person made inquiries that a reasonable person would make on the face of the document and acted with reasonable care and skill.

Clause 73 amends section 102 (Protection of health provider unaware of advance health directive) to clarify that a health provider is protected from liability to the extent the person does not know of an adult’s AHD, as long as the health provider acts in ‘good faith.’ For example, a health provider that deliberately refrained from looking at the part of a person’s record that included an AHD would not be acting in good faith.

Clause 74 replaces existing section 106 (Compensation for failure to comply) with recast section 106 (Compensation and accounting for profits for failure to comply).

The newly-cast section 106 is amended to clarify that a court’s or QCAT’s power to order an attorney to compensate the adult, or if the adult has died, the adult’s estate, for a loss caused by the attorney’s failure to comply with this Act in the exercise of a power, applies even where the attorney’s appointment has ended.

Section 106 is also amended to allow both a court and QCAT to order than an attorney (or former attorney) account for any profits the attorney has accrued as a result of their failure to comply with this Act in the exercise of a power. This is intended as an alternative remedy to compensation. As such subsection 106(2) is amended to make it clear that the court or QCAT may not order the payment of both in relation to the exercise of the same power.

The Bill makes a corresponding amendment to existing section 59 of the GAA.

Clause 75 inserts new section 111A (Application of presumption of capacity). Consistent with the corresponding amendments made to the GAA, new section 111A sets out how the Supreme Court and QCAT are to apply the presumption of capacity in particular circumstances. Subsection 111A(1) states that if, when performing a function or exercising a power under this Act, the Supreme Court or QCAT are required to make a decision about an adult’s capacity for a matter, the court or QCAT is to presume the adult has capacity for a matter until the contrary is proven. Subsection 111A (2) clarifies that if a declaration that an adult has impaired capacity for a matter by the Supreme Court or QCAT is in force, a person or other entity that performs a function or exercises a power under the POA is entitled to rely on that declaration to presume the person does not have capacity for the matter.

Clause 76 amends section 118 (Advice, directions and recommendations etc.) to clarify that the Supreme Court (and QCAT by virtue of the application of section 109A POA) may both prospectively and retrospectively authorise a transaction that an attorney is not, or may not be, otherwise authorised to undertake. Section 118(2) provides that the Supreme Court may authorise an attorney to undertake a transaction an attorney is not, or may not be, otherwise authorised to undertake. Section 118(2) is amended by the Bill to omit the current requirement in subsection 118(2) that the court consider the best interests of the principal (when considering whether to authorise an attorney to undertake a transaction the attorney is not otherwise authorised to undertake, for example a conflict transaction) and replacing it with a requirement

that to make such an order the court is satisfied the transaction would be in accordance with the general principles.

New subsection 118(3) is inserted to clarify that if an attorney undertakes a transaction mentioned in subsection 118(2) that has not been authorised under that subsection, the Supreme Court may retrospectively authorise the transaction.

New subsection 118(4) deals with the validity of the transactions where the Supreme Court retrospectively authorises it, by making clear that in such circumstances the transaction is taken to be as valid as if it had been entered into by prospective authorisation of the court.

Clause 77 amends existing section 122 (Records and audit) to clarify that the Supreme Court or QCAT can order either an attorney or a former attorney to file in the court or the tribunal records and audited accounts of the attorney's dealings conducted on behalf of the adult. To this end, new subsection (4) is inserted to make it clear that the court or tribunal can make this order even if the enduring power has been revoked or the principal has died.

Clause 78 inserts new section 160 (Delegation of public trustee's powers under this Act) into chapter 8 (Other) of the Act. New section 160 provides for the delegation of the Public Trustee's powers under the Act for a financial matter to an appropriately qualified member of the Public Trustee's staff, or for day-to-day decisions for a financial matter (defined in the section as meaning minor, uncontroversial decisions that involve no more than low risk to the adult) to the persons listed in subsection 160(1)(b). The term 'appropriately qualified' is defined in the *Acts Interpretation Act 1954*. New subsection 106(2) expressly provides that such day-to-day decisions may not be delegated to the Public Guardian or a paid carer of the adult.

Clause 79 inserts chapter 9, a new part 4 regarding transitional provisions for the Act associated with the Bill, comprising new sections 167 to 175.

New section 167 (Definition for part) provides the definition of *amendment Act* for the part as meaning the *Guardianship and Administration Other Legislation Amendment Act 2018*.

New section 168 (Existing appointment – eligible attorney (enduring power of attorney)) provides for the transitional application of the amendment to section 29(1) (Meaning of *eligible attorney*). This transitional provision provides that the amendment to section 29(1) will not impact on the person's appointment. Section 29(1) is amended to specify that not only is a paid carer not eligible to be an attorney under an EPA, but that a person who has been a paid carer for the principal within the previous three years, is also not eligible. The amendments also clarify that the Public Trustee (or a trustee company) can be an eligible attorney under an EPA for a financial matter only; and the Public Guardian can be an eligible attorney under an EPA only for a personal matter. By virtue of new section 168 if a person held a valid appointment as an attorney under an EPA just prior to the commencement of the amendment Act, the amendment to s29(1) will not affect the validity of that appointment.

New section 169 (Existing appointment – eligible attorney (advance health directive)) provides for the transitional application of the amendment to section 29(2) (Meaning of *eligible attorney*). Section 29 (2), which provides who is an eligible attorney for an AHD, is amended for consistency with existing subsection 29(1) to make clear that a service provider for a residential service where the principal is a resident is not an eligible attorney for an AHD.

Subsection 29 (2) is further amended to clarify that the Public Trustee is not an eligible attorney for an AHD. Unlike the transitional provision for eligible attorneys for EPAs, this provision makes clear that if by virtue of amended section 29(2) the person who held an appointment as an attorney under an AHD immediately before the commencement would no longer be an eligible attorney (due to this amendment to section 29(2)) on commencement of these amendments, that AHD is revoked (to the extent that it gives power to the attorney).

New section 170 (Existing appointment – more than 4 joint attorneys (enduring power of attorney) provides for the transitional application of the amendment to section 43 (Appointment of 1 or more eligible attorneys). The amendment does not apply if, immediately before commencement of the amendment Act, more than 4 persons were joint attorneys under an EPA.

New section 171 (Existing certified copy of enduring document) provides for the transitional application of the amendment to section 45 (Proof of enduring document). The amendment does not apply to a copy of an enduring document certified under section 45 before the commencement of the amendment Act.

New section 172 (Application of subsection 61A – 61D) provides that sections 61A to 61D apply in relation to the will of a principal who dies after the commencement of the amendment Act and regardless of whether the sale, mortgage, charge, disposition of, or other dealing with, property by the attorney happened before or after the commencement.

New section 173 (Validation of delegation) provides that a delegation of a power by the public trustee of a type permitted in new section 160 (Delegation of public trustee's powers under this Act) before the commencement of the amendment Act is taken to be, and always have been, as valid and effective as it would have been if it were made after the commencement. While section 11A of the *Public Trustee Act 1978* provides for the Public Trustee to delegate their powers under the Act, new section 160 provides specific delegation powers in relation to the Public Trustee's role as an administrator.

New section 174 (Enduring documents started) provides that this Act, as amended by the amendment Act applies to the preparation of an enduring document started, but not finished, immediately before commencement.

New section 175 (Existing proceedings) provides that where proceedings under this Act have been started, but not finished, the proceeding continues as if the amendment Act had not been enacted.

Clause 80 omits schedule 1 (Principles) in its entirety. This is a consequence of the relocation by this Bill of the principles into new chapter 1A (Principles) of the Act, comprising new sections 6C (General principles) and 6D (Health care principles).

Clause 81 amends schedule 2 (Types of matters). Section 2 (personal matter) is amended to clarify the scope of the definition of *personal matter* by inserting two additional examples of a personal matter for a principal, i.e. who may have access visits to, or other contact with, the principal; and advocacy relating to the care and welfare of the principal. These amendments clarify that where an adult does not have capacity to determine who has contact with them or to seek out advocacy support, an attorney appointed for personal matters can make these decisions in accordance with the general principles.

Clause 82 amends schedule 2, section 3 (Special personal matter) to expressly provide that a *special personal matter* includes entering a plea on a criminal charge for the principal. This

removes any doubt that such an act is not a personal matter (for which an adult's attorney could make the decision).

Clause 83 amends schedule 2, section 13 (Approved clinical research) to reflect the relocation of the definition of approved clinical research to the body of the GAA (section 74C) and the change to the definition of *clinical research* to also include 'devices or biologicals.'

Clause 84 amends schedule 3 (Dictionary) to replace the definition of *health care principle* (to reflect the new location of the principles (plural)) and to reframe the definition of *interested person* (consistent with the amendment to the GAA) so that it focuses on a person who has an interest in promoting and safeguarding the adult's rights and interests, rather than simply focusing on a person's continuing interest in an adult.

A note is added to the definition of *capacity* (to emphasise that all reasonable means should be used to facilitate communication before a person is treated as unable to communicate).

The definition of *general principles* is amended to reflect the new location of the principles in the Act.

Definitions of *jurisdiction* and *support network* are also added to the dictionary.

Part 6 Amendment of *Public Guardian Act 2014*

Clause 85 states that this part amends the *Public Guardian Act 2014*. Minor and consequential amendments to the Public Guardian Act are also contained in schedule 1.

Clause 86 makes a consequential amendment to section 6 (Principles for adults with impaired capacity for a matter) to remove the reference to the principles being contained in Schedule 1 of the GAA. As the Bill relocates the principles into new chapter 2A (Principles) of the GAA, comprising new sections 11B (General principles) and 11C (Health care principles), section 6 is amended accordingly.

Clause 87 amends section 19 (Investigate complaints) to clarify that the Public Guardian has a discretion to investigate a complaint or an allegation of the type mentioned in subsection 19(1), even after the adult's death.

Clause 88 amends section 21 (Records and audit) to expressly provide that the Public Guardian's power to require certain attorneys/administrators to file a summary of receipts and expenditure, or more detailed accounts of dealings and transactions for the adult, applies even after the adult's death. Minor renumbering to the section occurs as a consequence.

Clause 89 amends section 22 (Right to information) by clarifying that the Public Guardian's right to information includes the right to a person's personal information. The term 'personal information' is defined in schedule 1 (dictionary).

Clause 90 replaces existing section 31 (Report after investigation or audit) with a recast section 31 (Report and information after investigation or audit). The newly-cast section is updated to provide the Public Guardian with discretion to provide information about the results of the investigation to particular persons in a way the Public Guardian considers appropriate. This is to protect an adult's personal information. Currently, for example, a report must be provided

to the person at whose request the investigation or audit was carried out. In some cases, this may be an adult's neighbour or other associate of the adult's to whom it is not appropriate to provide the adult's personal information. Despite this amendment the Public Guardian can still provide a full copy of the investigation report (whether with redactions of personal information or not) to every attorney, guardian or administrator for the adult; the person at whose request the investigation was carried out; or if the adult has died, the adult's personal representative.

Clause 91 amends section 34 (Suspension of attorney's power) by inserting new subsection (3A) to expressly provide that, if the Public Guardian has suspended all or some of an attorney's power, the Public Guardian cannot extend the suspension, or suspend the attorney more than once on the same ground arising from the same circumstances of the original suspension. Minor renumbering occurs as a consequence of this amendment.

Clause 92 amends section 43 (Requirement to visit visitable site if asked) by inserting new subsection 43(1A) which enables the entities listed, including for example a consumer's attorney or administrator or guardian, to ask for a community visitor (adult) to visit the visitable site. Minor renumbering occurs as a consequence.

Clause 93 amends section 47 (Reports by community visitors (adult)) to expand the list of who the Public Guardian may give a copy of a community visitor report to include: an interested person for the consumer; or if the report relates to a visit requested by an entity listed in new subsection 43 (1A), the entity who made the request.

Clause 94 amends section 146 (Delegation) to allow the Public Guardian to delegate powers under section 29 (Costs of investigations and audits) and section 106 (Engaging external contractor) to a senior executive or a senior officer. The term *senior officer* is defined in schedule 4 of the *Public Service Act 2008*. The term senior executive is defined in schedule 1 of the *Acts Interpretation Act 1954*. A further amendment allows the Public Guardian to delegate the powers under section 25(1), relating to the power to require a person to attend before the Public Guardian and give information and answer questions, or produce requested documents/things, to a senior executive only.

Clause 95 amends schedule 1 (Dictionary) to replace the definition of *health care principle* (to reflect the new location of the principles (plural) in the GAA) and to reframe the definition of *interested person* so that it focuses on a person who has an interest in promoting and safeguarding the adult's rights and interests, rather than just a continuing interest.

A definition of *personal information* is also inserted.

The definition of *general principles* is amended to reflect the new location of the principles in the GAA.

Part 7 Amendment of Public Interest Disclosure Act 2010

Clause 96 states that this part amends the *Public Interest Disclosure Act 2010*.

Clause 97 amends section 19 (Disclosure concerning GOC or rail government entity) by inserting a new subsection (10) which states that section 19 is declared to be a displacement

provision for the purposes of the Corporations Act, section 5G, in relation to section 1317AE. A notation is also included which explains the effect of a Corporations legislation displacement provision.

Part 8 Consequential and minor amendments

Clause 98 provides that schedule 1 (consequential and minor amendments) amends the Acts it mentions. Schedule 1 makes consequential and minor amendments to the GAA, POA and PGA.

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