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# **ASSISTED AND SUBSTITUTED DECISIONS**

**Decision-making by and for people  
with a decision-making disability**

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MAKING BILL 1996**

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**1996**

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**A BILL**

**FOR**

**An Act facilitating the decision making of and for adults with  
impaired decision-making capacity because of a mental or  
intellectual impairment, and for other purposes**

---

The Parliament of Queensland enacts—

1

## CHAPTER 1—PRELIMINARY MATTERS

2

### Short title

3

1. This Act may be cited as the *Assisted and Substituted Decision Making Act 1996*.

4

5

### Dictionary

6

2. The dictionary in schedule 2 defines particular words used in this Act.<sup>1</sup>

7

### Act binds all persons

8

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

9

10

11

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

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

Signpost definitions in the dictionary alert the reader to the terms defined elsewhere in the Act and tell the reader where the definitions can be found. For example, the definition “**health care principle**” see section 144.’ tells the reader there is a definition of health care principle in the section.

**CHAPTER 2—EXPLANATION**

1

**PART 1—PHILOSOPHY AND PURPOSE**

2

**Acknowledgments**

3

**4. This Act acknowledges the following—**

4

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity; 5  
6
- (b) the right to make decisions includes the right to make decisions with which others may not agree; 7  
8
- (c) the decision-making capacity of an adult with a mental or intellectual impairment may differ according to— 9  
10
  - (i) the nature and extent of the impairment; and 11
  - (ii) the complexity of the decision to be made; and 12
  - (iii) the support available from members of the adult's existing support network; 13  
14
- (d) the right of an adult with a mental or intellectual impairment to make decisions should be restricted, and interfered with, as little as possible; 15  
16  
17
- (e) an adult with a mental or intellectual impairment has a right to adequate and appropriate support for decision making. 18  
19

**Purpose to achieve balance**

20

**5. This Act seeks to strike a balance between—**

21

- (a) the right of an adult with a mental or intellectual impairment to the greatest possible degree of autonomy in decision making; and 22  
23
- (b) the adult's right to adequate and appropriate support for decision making. 24  
25

*Assisted and Substituted Decision Making*

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<b>Way purpose achieved</b>	1
6. This Act—	2
(a) provides that an adult is presumed to be capable of making a decision unless there is evidence to rebut the presumption; and	3 4
(b) provides a comprehensive scheme to facilitate decision making by or for an adult who needs, or may need, a decision-making assistant or a substitute decision maker; and	5 6 7
(c) states principles to be observed by anyone performing a function or exercising a power under the scheme; and	8 9
(d) encourages involvement in decision making of the members of the adult's existing support network; and	10 11
(f) reforms the law about enduring powers of attorney and provides for advance health care directives; and	12 13
(g) establishes an independent tribunal to administer certain aspects of the scheme; and	14 15
(h) recognises the public trustee is available as a possible substitute decision maker for financial decisions and decisions about legal matters; and	16 17 18
(i) establishes an office of the adult guardian to be available as a possible substitute decision maker for personal decisions and health care decisions and for other purposes; and	19 20 21
(j) establishes an office of the public advocate to carry out systemic advocacy for adults with a mental or intellectual impairment. <sup>2</sup>	22 23

---

<sup>2</sup> The commission's recommendations make the Intellectually Disabled Citizens Council and the Legal Friend established under the *Intellectually Disabled Citizens Act 1985* redundant and the commission recommends their abolition. The commission also recommends that the powers of notification in the *Mental Health Act 1974*, schedule 5 be abolished. This Bill does not yet include the consequential amendments and transitional provisions.

**PART 2—CONCEPTS****Types of capacity**

7. This Act categorises capacity for a decision as follows—

- decision-making capacity
- impaired decision-making capacity.<sup>3</sup>

**Types of decision making**

8. This Act deals with assisted decision making and substituted decision making.

**Assisted decision making**

9.(1) Assisted decision making involves someone assisting an adult to make the adult's own decision.

(2) This assistance may be given—

- (a) on an informal basis by members of the adult's existing support network; or
- (b) on a formal basis by an appointed assistant (a person appointed by the tribunal).<sup>4</sup>

**Substituted decision making**

10.(1) Substituted decision making involves someone making a decision for an adult.

(2) Depending on the type of decision to be made and other circumstances,<sup>5</sup> this may be done—

- (a) on an informal basis by members of the adult's existing support

<sup>3</sup> Schedule 1, part 1 contains definitions about capacity.

<sup>4</sup> This Act deals with formal assisted decision making.

<sup>5</sup> See attachment for a reference table.

network;<sup>6</sup>

(b) on a formal basis by—

(i) a substitute decision maker; or

(ii) the tribunal; or

(iii) the prescribed entity for consenting to prescribed psychiatric health care.<sup>7</sup>

### **Types of substitute decision maker**

11.(1) This Act categorises substitute decision makers as follows—

- chosen decision makers
- statutorily authorised health care decision makers
- appointed decision makers.

(2) Each of these substitute decision makers is explained in section 13.

### **Types of decision**

12. This Act categorises decisions as follows—

- personal decisions
- excluded personal decisions
- health care decisions
- special consent health care decisions

<sup>6</sup> Although this Act deals primarily with formal substituted decision making, a decision or proposed decision of an informal decision maker may be ratified under section 243.

<sup>7</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decisions, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

*Assisted and Substituted Decision Making*

- financial decisions 1
- decisions about legal matters.<sup>8</sup> 2

### PART 3—SCHEME TO FACILITATE DECISION MAKING 3 4

#### Overview 5

13.(1) This Act's scheme to facilitate decision making includes facilitating the following in appropriate circumstances— 6  
7

- appointment by the tribunal of a person (an **“appointed assistant”**) to assist an adult to make the adult's own decisions 8  
9
- allowing an adult with the required understanding to choose a substitute decision maker (a **“chosen decision maker”**) for, and give instructions about, certain decisions in an enduring power of attorney 10  
11  
12  
13
- allowing an adult with the required understanding to make, and give information relevant to, a health care decision or special consent health care decision in an advance health care directive 14  
15  
16
- allowing an adult with the required understanding to choose a substitute decision maker (a **“chosen decision maker”**) for a health care decision in an advance health care directive 17  
18  
19
- allowing a family member or close friend (a **“statutorily authorised health care decision maker”**) to make a health care decision for an adult 20  
21  
22
- appointment by the tribunal of a substitute decision maker (an **“appointed decision maker”**) for an adult 23  
24
- consent by the tribunal to special consent health care (other than 25

<sup>8</sup> Schedule 1, part 2 contains definitions about types of decisions.

prescribed psychiatric health care <sup>9</sup> )	1
• approval or ratification by the tribunal of a proposed decision, or decision, of an informal decision maker.	2 3
<b>Assistance to adult to make own decisions—appointed assistants</b>	4
14. In appropriate circumstances, <sup>10</sup> the tribunal may appoint a person (an “appointed assistant”) to assist an adult to make the adult’s own decisions.	5 6 7
<b>Choice by adult under enduring power of attorney—chosen decision makers</b>	8 9
15.(1) By an enduring power of attorney, <sup>11</sup> an adult may choose a substitute decision maker (a “chosen decision maker”) for, and give instructions about, a decision of the following types—	10 11 12
• a personal decision	13
• a health care decision	14
• a financial decision	15
• a decision about a legal matter	16
but not a decision of the following types—	17
• an excluded personal decision	18
• a special consent health care decision.	19
(2) A chosen decision maker’s power to make a personal decision or	20

<sup>9</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decisions, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

<sup>10</sup> See section 117 (Usual appointment).

<sup>11</sup> See chapter 4 (Enduring power of attorney).



health care decision is exercisable only while the adult has impaired decision-making capacity for the decision. 1  
2

**Decision or choice by adult under advance health care directive—also chosen decision makers** 3  
4

16.(1) By an advance health care directive,<sup>12</sup> an adult may make, and include information relevant to, a decision of the following types— 5  
6

- a health care decision 7
- a special consent health care decision 8

and choose a substitute decision maker (a “**chosen decision maker**”) for a health care decision (if the decisions included in the directive are inadequate), but not for a special consent health care decision. 9  
10  
11

(2) A chosen decision maker’s power to make a health care decision is exercisable only while the adult has impaired decision-making capacity for the decision. 12  
13  
14

**Health care decision by family or friend—statutorily authorised decision makers** 15  
16

17.(1) If a health care decision is not dealt with in an enduring power of attorney or advance health care directive and an adult has impaired decision-making capacity for the decision, this Act<sup>13</sup> allows any member of an adult’s family (such as a spouse, child or parent, or sometimes a sibling),<sup>14</sup> or a close friend of the adult, to make the decision as a “**statutorily authorised decision maker**”. 17  
18  
19  
20  
21  
22

(2) Subsection (1) does not cover a special consent health care decision. 23

<sup>12</sup> See chapter 5 (Advance health care directive).

<sup>13</sup> See section 155 (Statutorily authorised health care decision maker’s power).

<sup>14</sup> More detail is given in the definition of “family”—see schedule 2 (Dictionary).

---

**Substitute decision maker appointed by tribunal—appointed decision makers**

18. In appropriate circumstances,<sup>15</sup> the tribunal may appoint a substitute decision maker (an “**appointed decision maker**”) to make a decision of the following types for an adult—

- a personal decision
- a health care decision
- a financial decision
- a decision about a legal matter

but not a decision of the following types—

- an excluded personal decision
- a special consent health care decision.

**Special consent health care decision by tribunal**

19.(1) If a special consent health care decision, other than a decision consenting to prescribed psychiatric health care, is not made by an advance health care directive and an adult has impaired decision-making capacity for the decision, only the tribunal may make the decision.<sup>16</sup>

(2) If a decision consenting to prescribed psychiatric health care is not made by an advance health care directive and the adult has impaired

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<sup>15</sup> See section 117 (Usual appointment).

<sup>16</sup> However, for a subsequent special consent decision, the tribunal may appoint a substitute decision maker—see section 162 (Subsequent special consent decision for adult).

decision-making capacity for the decision, only the prescribed entity<sup>17</sup> may make the decision. 1  
2

**Inconsistency between decision document and order** 3

**20.(1)** An adult's decision document<sup>18</sup> prevails over a later tribunal order (other than an order about the document) to the extent of an inconsistency. 4  
5

**(2)** A tribunal order about making an adult's decision prevails over a later decision document of the adult about making the decision to the extent of an inconsistency.<sup>19</sup> 6  
7  
8

**CHAPTER 3—GENERAL PRINCIPLES** 9

**PART 1—WAY GENERAL PRINCIPLES ARE TO BE USED** 10  
11

**General principles must be complied with by all** 12

**21.** The principles in part 2 (the "general principles") must be complied 13

---

<sup>17</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decision, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

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<sup>18</sup> "Decision document" means an enduring power of attorney or advance health care directive—see schedule 2 (Dictionary).

---

<sup>19</sup> Inconsistency between decision documents is dealt with in sections 54 and 96.

with by a person or other entity who performs a function<sup>20</sup> or exercises a power<sup>21</sup> under this Act. 1  
2

**General application and promotion by community** 3

22. The community is encouraged to apply and promote the general principles. 4  
5

**PART 2—LIST OF GENERAL PRINCIPLES** 6

**Presumption of capacity to make decisions** 7

23. An adult is presumed to have the capacity to make the adult's own decisions. 8  
9

**Same human rights** 10

24.(1) The right of all adults to the same basic human rights regardless of a particular adult's decision-making capacity must be recognised and taken into account. 11  
12  
13

(2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account. 14  
15

**Individual value** 16

25. An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account. 17  
18

**Valued role as member of society** 19

26.(1) An adult's right to be a valued member of society must be 20

---

<sup>20</sup> "Function" includes duty—see *Acts Interpretation Act 1954*, section 36.

<sup>21</sup> "Power" includes authority—see *Acts Interpretation Act 1954*, section 36.

recognised and taken into account.	1
(2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.	2 3
<b>Participation in community life</b>	4
27. The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.	5 6 7
<b>Encouragement of self-reliance</b>	8
28. The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.	9 10 11
<b>Maximum participation and minimal limitations</b>	12
29.(1) The adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life (including the development of policies, programs and services for people with impaired decision-making capacity) must be recognised and taken into account.	13 14 15 16
(2) Also the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.	17 18 19
(3) So, for example—	20
(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and	21 22 23
(b) to the greatest extent practicable, for a decision for the adult, the adult's views and wishes are to be sought and taken into account; and	24 25 26
(c) if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be—a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other	27 28 29 30

- entity considers would be the adult's views and wishes; and 1
- (d) a person or other entity in performing a function or exercising a 2  
power under this Act must do so in the way least restrictive of the 3  
adult's rights. 4
- (4) However, a person or other entity in performing a function or 5  
exercising a power under this Act must always do so in a way consistent 6  
with the adult's proper care and protection. 7
- (5) Views and wishes may be expressed orally, in writing or in another 8  
way, including, for example, by conduct. 9
- Maintenance of existing supportive relationships** 10
30. The importance of maintaining the adult's existing supportive 11  
relationships must be taken into account. 12
- Maintenance of environment and values** 13
- 31.(1) The importance of maintaining the adult's cultural and linguistic 14  
environment, and set of values (including any religious beliefs), must be 15  
taken into account. 16
- (2) For an adult who is a member of an Aboriginal community or a 17  
Torres Strait Islander, this means the importance of maintaining the adult's 18  
Aboriginal or Torres Strait Islander cultural and linguistic environment, and 19  
set of values (including Aboriginal tradition<sup>22</sup> or Island custom<sup>23</sup>), must be 20  
taken into account. 21

---

<sup>22</sup> "Aboriginal tradition" means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36.

<sup>23</sup> "Island custom", known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36.

<b>Appropriate to circumstances</b>	1
32. Assistance given to an adult to make a decision and a decision made for, or about, an adult should be appropriate to the adult's characteristics and needs.	2 3 4
<b>Confidentiality</b>	5
33. An adult's right to confidentiality of information about the adult must be recognised and taken into account.	6 7
<b>CHAPTER 4—ENDURING POWER OF ATTORNEY</b>	8 9
<b>PART 1—INTRODUCTION</b>	10
<b>Overview</b>	11
34.(1) An adult who understands the matters necessary to make an enduring power of attorney <sup>24</sup> may make an enduring power of attorney.	12 13
(2) In the enduring power of attorney, the adult may—	14
(a) choose 1 or more decision makers; and	15
(b) give a chosen decision maker power to make specified or all personal decisions, health care decisions, financial decisions or decisions about legal matters for the adult; and	16 17 18
(c) limit the power given to a chosen decision maker; and	19
(d) state instructions for a chosen decision maker to apply when making decisions; and	20 21
(e) for financial decisions or decisions about legal matters—state when the power begins (for example, immediately, on a stated	22 23

<sup>24</sup> See section 36 (Capacity to make an enduring power of attorney).

day or only if the adult becomes an adult with impaired decision-making capacity).

(3) In the enduring power of attorney, the adult may not give power to make an excluded personal decision or special consent health care decision.

(4) This Act limits who may be chosen<sup>25</sup> as a decision maker by an enduring power of attorney and when<sup>26</sup> the power of attorney is exercisable.

(5) An enduring power of attorney is not revoked by the adult becoming an adult with impaired decision-making capacity.

#### **Chapter layout**

35.(1) Part 2 deals with making an enduring power of attorney.

(2) Part 3 deals with using an enduring power of attorney.

(3) Part 4 deals with revoking an enduring power of attorney.

(4) Part 5 deals with tribunal proceedings about enduring powers of attorney.

(5) Part 6 contains other provisions.

## **PART 2—MAKING AN ENDURING POWER OF ATTORNEY**

### **Capacity to make an enduring power of attorney**

36. An adult may make an enduring power of attorney only if the adult understands the following matters—

(a) the adult may, in the power of attorney, specify or limit the power

<sup>25</sup> See sections 37 (Eligibility to be chosen—personal or health care decision) and 38 (Eligibility to be chosen—financial decision or decision about a legal matter).

<sup>26</sup> See sections 45 (Exercising personal or health care decision making) and 46 (Exercising financial decision making or decision making about a legal matter).



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to be given to a chosen decision maker and instruct a chosen decision maker about the exercise of the power;	1 2
(b) when the power begins;	3
(c) if the power for a specified decision or type of decision begins, the chosen decision maker will make, and have full control over, the specified decision or all the adult's decisions of the specified type unless limitations or instructions are included in the power of attorney;	4 5 6 7 8
(d) the power the adult has given continues even if the adult becomes an adult with impaired decision-making capacity;	9 10
(e) the adult may revoke the power of attorney at any time the adult is capable of making an enduring power of attorney giving the same power;	11 12 13
(f) at any time the adult is not capable of revoking the enduring power of attorney, the adult is unable to effectively oversee the use of the power.	14 15 16
<b>Eligibility to be chosen—personal or health care decision</b>	17
<b>37.</b> A person may be chosen by an enduring power of attorney as a chosen decision maker for a personal decision or health care decision for an adult only if the person is—	18 19 20
(a) an individual who is at least 18 years old and not a paid carer, or health care provider, for the adult; or	21 22
(b) the adult guardian.	23
<b>Eligibility to be chosen—financial decision or decision about a legal matter</b>	24 25
<b>38.</b> A person may be chosen by an enduring power of attorney as a chosen decision maker for a financial decision or decision about a legal matter only if the person is—	26 27 28
(a) an individual who is at least 18 years old and not a paid carer, or health care provider, for the adult; or	29 30

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(b) the public trustee; or	1
(c) a trustee company under the <i>Trustee Companies Act 1968</i> .	2
 <b>More than 1 decision maker may be chosen</b>	 3
<b>39.</b> By an enduring power of attorney, an adult may choose 1 or more of the following—	4 5
(a) 1 chosen decision maker for a decision or all decisions;	6
(b) different chosen decision makers for different decisions;	7
(c) a person to act as a chosen decision maker for a decision or all decisions in a circumstance stated in the power of attorney;	8 9
(d) alternative chosen decision makers for a decision or all decisions so power is given to a particular chosen decision maker only in a circumstance stated in the power of attorney;	10 11 12
(e) successive chosen decision makers for a decision or all decisions so power is given to a particular chosen decision maker only when power given to another chosen decision maker ends;	13 14 15
(f) joint or several, or joint and several, chosen decision makers for a decision or all decisions;	16 17
(g) 2 or more joint chosen decision makers for a decision or all decisions (being a number less than the total number of chosen decision makers for the decision or all decisions).	18 19 20
 <b>Formal requirements</b>	 21
<b>40.(1)</b> An adult's enduring power of attorney must—	22
(a) be in the approved form; <sup>27</sup> and	23
(b) be signed—	24
(i) by the adult; or	25
(ii) if the adult instructs—for the adult and in the adult's presence, by a person eligible to sign on the adult's behalf;	26 27

---

<sup>27</sup> Draft forms recommended by the commission are included in this report.

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- and
- (c) be signed and dated by a person eligible to be the adult's witness.
- (2) If the enduring power of attorney is signed by the adult, it must include a certificate signed by the witness stating the adult—
- (a) signed the enduring power of attorney in the witness's presence; and
- (b) at the time, appeared to the witness to understand the matters necessary to make the enduring power of attorney.<sup>28</sup>
- (3) If the enduring power of attorney is signed by a person for the adult, it must include a certificate signed by the witness stating—
- (a) in the witness's presence, the adult instructed the person to sign the enduring power of attorney on the adult's behalf; and
- (b) the person signed it in the presence of the adult and witness; and
- (c) at the time, the adult appeared to the witness to understand the matters necessary to make the enduring power of attorney.
- (4) The power of attorney is only effective to give power to a chosen decision maker if the chosen decision maker has signed the power of attorney acknowledging the power has been given.
- (5) An enduring power of attorney made under this section has the effect of a deed<sup>29</sup> even though it is not executed under seal.
- Eligibility to sign on adult's behalf**
41. A person is eligible to sign an adult's enduring power of attorney or part of an adult's enduring power of attorney on an adult's behalf if the person—
- (a) is at least 18 years old; and
- (b) is not the witness for the power of attorney or part of the power

---

<sup>28</sup> "Matters necessary to make an enduring power of attorney" means the matters in section 36—see schedule 2 (Dictionary).

<sup>29</sup> To effectively give power to execute a deed, the power of attorney must itself be in the form of a deed—see *Steiglitz v Egginton* (1815) Holt 141; 171 ER 193.

of attorney; and	1
(c) is not, or will not by the power of attorney be, a chosen decision maker of the adult.	2 3
<b>Eligibility to witness</b>	4
<b>42.</b> A person is eligible to witness an adult's enduring power of attorney or part of an enduring power of attorney if the person—	5 6
(a) is a justice, <sup>30</sup> commissioner for declarations or lawyer; <sup>31</sup> and	7
(b) is not the person signing the power of attorney or part of the power of attorney on the adult's behalf; and	8 9
(c) is not, or will not by the power of attorney be, a chosen decision maker of the adult; and	10 11
(d) is not a relation of the adult or a relation of a chosen decision maker of the adult; and	12 13
(e) if the power of attorney or part of the power of attorney gives power to make a health care decision—is not a health care provider of the adult.	14 15 16
<b>Protection if unaware of invalidity</b>	17
<b>43.(1)</b> A person chosen by an adult as a substitute decision maker by an invalid enduring power of attorney who, without knowing of the invalidity, <sup>32</sup> purports to use power that the power of attorney, if valid, would have given does not incur any liability (either to the adult or anyone else) because of the invalidity.	18 19 20 21 22
(2) A transaction between—	23

<sup>30</sup> “Justice” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

<sup>31</sup> “Lawyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

<sup>32</sup> See section 63 (Declaration about validity).

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- (a) a person chosen as a substitute decision maker by an invalid enduring power of attorney who purports to use power that the enduring power of attorney, if valid, would have given; and 1  
2  
3
- (b) a person who does not know of the invalidity; 4
- is, in favour of the second person, as valid as if the enduring power of attorney were valid. 5  
6
- (3) In this section— 7
- “know”, of an enduring power of attorney’s invalidity, includes have 8  
reason to believe the power of attorney— 9
- (a) does not comply with this part; or 10
- (b) is invalid for another reason, for example, the adult was induced 11  
to make the power of attorney by dishonesty or undue influence. 12

### **PART 3—USING AN ENDURING POWER OF ATTORNEY**

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#### **Chosen decision maker’s power**

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**44.(1)** While power to make a decision is exercisable under an adult’s enduring power of attorney, it gives— 16  
17

- (a) the chosen decision maker for the decision; or 18
- (b) if there is more than 1 chosen decision maker for the 19  
decision—the chosen decision makers acting jointly or severally, 20  
as the power of attorney requires; 21

power to do, for the adult, anything in relation to the decision the adult could lawfully do if the adult had decision-making capacity for the decision. 22  
23

(2) However, the power given is subject to the limitations expressly stated in the enduring power of attorney. 24  
25

*Assisted and Substituted Decision Making*

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(3) Functions and powers are also given to chosen decision makers by this Act.<sup>33</sup> 1  
2

**Exercising personal or health care decision making** 3

**45.** Power to make a personal decision or health care decision under an adult's enduring power of attorney— 4  
5

- (a) begins when (if ever) the adult has impaired decision-making capacity for the decision; and 6  
7
- (b) can not begin before then; and 8
- (c) continues to be exercisable unless the adult regains decision-making capacity for the decision. 9  
10

**Exercising financial decision making or decision making about a legal matter** 11  
12

**46.(1)** This section applies if an adult's enduring power of attorney gives power to make a financial decision or a decision about a legal matter. 13  
14

**(2)** If the power of attorney does not state a time when, or occasion on which, power to make the decision begins— 15  
16

- (a) power to make the decision begins when the power of attorney is made; and 17  
18
- (b) the power continues to be exercisable indefinitely subject to the terms of the power of attorney. 19  
20

**(3)** If the power of attorney states the power is exercisable only while the adult has impaired decision-making capacity for the decision— 21  
22

- (a) power to make the decision begins whenever the adult has impaired decision-making capacity for the decision; and 23  
24
- (b) the power continues to be exercisable unless the adult regains decision-making capacity for the decision. 25  
26

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<sup>33</sup> Chapter 8 states the functions and powers given to substitute decision makers. A chosen decision maker must exercise power as required by the terms of the enduring power of attorney under which the person is appointed—see section 172 (Act as required by terms of power).

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- (4) If the power of attorney states a time when, or occasion on which, the power to make the decision begins—
- (a) power to make the decision begins at the earlier of—
    - (i) the stated time or occasion; and
    - (ii) any time the adult has impaired decision-making capacity for the decision; and
  - (b) the power continues to be exercisable—
    - (i) if the power begins under paragraph (a)(i)—indefinitely subject to the terms of the power of attorney; or
    - (ii) if the power begins under paragraph (a)(ii)—unless the adult regains decision-making capacity for the decision.

**Tribunal help**

47. The tribunal is able to—
- (a) make a declaration about an enduring power of attorney's validity;<sup>34</sup> or
  - (b) make a declaration about whether power to make a decision has begun;<sup>35</sup> or
  - (c) give other help with the power of attorney;<sup>36</sup> or
  - (d) make an order changing or revoking the power of attorney.<sup>37</sup>

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<sup>34</sup> See section 63 (Declaration about validity).

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<sup>35</sup> See section 64 (Declaration about commencement of power).

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<sup>36</sup> See section 65 under which the tribunal may make an order, declaration or recommendation, or give a direction or advice, about an issue involving the power of attorney.

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<sup>37</sup> See section 66 (Order changing or revoking power of attorney).

## PART 4—REVOKING AN ENDURING POWER OF ATTORNEY

### *Division 1—Formal revocation*

#### Formal revocation by adult

**48.(1)** An adult's enduring power of attorney is revoked to the extent the adult revokes it under this section.

**(2)** The adult may revoke the enduring power of attorney only if the adult understands the matters necessary for making an enduring power of attorney giving the same power.<sup>38</sup>

**(3)** A revocation under this section must—

(a) be in the approved form; and

(b) be signed—

(i) by the adult; or

(ii) if the adult revoking it instructs—for the adult and in the adult's presence, by a person eligible to sign on the adult's behalf; and

(c) be signed and dated by a person eligible to be the adult's witness.

**(4)** If the revocation is signed by the adult, it must include a certificate signed by the witness stating the adult—

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

(b) at the time, appeared to the witness to understand the matters necessary to make an enduring power of attorney giving the same power as the enduring power of attorney being revoked gave.

**(5)** If the revocation is signed by a person for the adult, it must include a certificate signed by the witness stating—

(a) in the witness's presence, the adult instructed the person to sign

<sup>38</sup> "Matters necessary to make an enduring power of attorney" means the matters in section 36—see schedule 2 (Dictionary).



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- the revocation for the adult; and
- (b) the person signed it in the presence of the adult and witness; and
- (c) at the time, the adult appeared to the witness to understand the matters necessary to make an enduring power of attorney giving the same power as the enduring power of attorney being revoked gave.
- (6) If the adult revokes an enduring power of attorney under this section, the adult must take reasonable steps to—
- (a) advise all chosen decision makers under the enduring power of attorney of the revocation; and
- (b) if a request to register the enduring power of attorney has been lodged under the *Land Title Act 1994*—deregister the registered power of attorney under that Act.
- Formal revocation by adult—health care decisions**
- 49.(1)** An adult’s enduring power of attorney (except provisions relevant to making a personal decision, financial decision or decision about a legal matter) is revoked to the extent the adult revokes it under this section.
- (2) The adult may revoke power to make a health care decision under the enduring power of attorney only if the adult understands the matters necessary for making an enduring power of attorney<sup>39</sup> giving the same power to make a health care decision.
- (3) A revocation under this section must—
- (a) be in writing; and
- (b) be signed—
- (i) by the adult; or
- (ii) if the adult revoking it instructs—for the adult and in the adult’s presence, by a person eligible to sign on the adult’s behalf; and

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<sup>39</sup> “Matters necessary to make an enduring power of attorney” means the matters in section 36—see schedule 2 (Dictionary).

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- (c) be signed and dated by a person eligible to be the adult's witness. 1
- (4) If the revocation is signed by the adult, it may include as evidence of 2  
 revocation a statement signed by the witness stating the adult— 3
- (a) signed the revocation in the witness's presence; and 4
- (b) at the time, appeared to the witness to understand the matters 5  
 necessary to make an enduring power of attorney giving the same 6  
 power to make a health care decision as the power being revoked. 7
- (5) If the revocation is signed by a person for the adult, it may include as 8  
 evidence of revocation a statement signed by the witness stating— 9
- (a) in the witness's presence, the adult instructed the person to sign 10  
 the revocation for the adult; and 11
- (b) the person signed it in the presence of the adult and witness; and 12
- (c) at the time, the adult appeared to the witness to understand the 13  
 matters necessary to make an enduring power of attorney giving 14  
 the same power to make a health care decision as the power being 15  
 revoked. 16
- (6) A revocation of an enduring power of attorney under this section may 17  
 be in the approved form. 18
- (7) If the adult revokes an enduring power of attorney under this section, 19  
 the adult must take reasonable steps to advise all chosen decision makers 20  
 under the enduring power of attorney of the revocation. 21
- Eligibility to sign on adult's behalf** 22
- 50.** A person is eligible to sign an adult's revocation of an enduring 23  
 power of attorney if the person— 24
- (a) is at least 18 years old; and 25
- (b) is not the witness for the revocation; and 26
- (c) was not a chosen decision maker of the adult under the power of 27  
 attorney. 28

**Eligibility to witness**

51.(1) A person is eligible to witness an adult's revocation of an enduring power of attorney if the person—

- (a) is a justice,<sup>40</sup> commissioner for declarations or lawyer;<sup>41</sup> and
- (b) is not the person signing the revocation on the adult's behalf; and
- (c) was not a chosen decision maker of the adult under the power of attorney; and
- (d) is not a relation of the adult or a relation of a chosen decision maker of the adult; and
- (e) if the revocation revokes a power to make a health care decision—is not a health care provider of the adult.

(2) Subsection (1)(a) does not apply if the revocation is only of power to make a health care decision.

***Division 2—Revocation by other action of adult*****Marriage**

52.(1) If an adult marries after making an enduring power of attorney, the power of attorney is revoked.

(2) However, if the enduring power of attorney gives power to the person who becomes the adult's spouse, the power of attorney is only revoked to the extent it gives power to another person.

(3) The application of this section may be changed by a contrary intention in the power of attorney.

<sup>40</sup> "Justice" means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

<sup>41</sup> "Lawyer" means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

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**Divorce**

53. If an adult divorces after making an enduring power of attorney, the power of attorney is revoked to the extent it gives power to the divorced spouse.

**Later decision document**

54.(1) An adult's enduring power of attorney is revoked, to the extent of an inconsistency, by a later decision document<sup>42</sup> of the adult.

*Example—*

If an adult gives—

- (a) power to make a decision about a matter to a chosen decision maker by an enduring power of attorney; and
- (b) power to make a decision about the same matter to a different chosen decision maker by a later decision document;

the earlier power of attorney is revoked to the extent it gives power to make a decision about the matter.

(2) If an adult's power of attorney is revoked under this section, the adult must take reasonable steps to—

- (a) advise all chosen decision makers under the power of attorney of the revocation; and
- (b) if a request to register the enduring power of attorney has been lodged under the Land Title Act 1994—deregister the registered power of attorney under that Act.

**Death**

55.(1) When an adult who has made an enduring power of attorney dies, the power of attorney is revoked.

(2) If a request to register the enduring power of attorney has been lodged under the *Land Title Act 1994*, the adult's personal representative

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<sup>42</sup> "Decision document" means an enduring power of attorney or advance health care directive—see schedule 2 (Dictionary).

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must take reasonable steps to deregister the registered power of attorney under that Act. 1  
2

***Division 3—Revocation by action of chosen decision maker*** 3**Withdrawal** 4

**56. If—** 5

(a) an adult's enduring power of attorney gives a chosen decision maker power to make a decision or type of decision; and 6  
7

(b) the chosen decision maker withdraws as chosen decision maker for the decision or type of decision;<sup>43</sup> 8  
9

the power of attorney is revoked to the extent it gives power to the chosen decision maker for the decision or type of decision. 10  
11

**Paid carer or health care provider** 12

**57. If a chosen decision maker under an adult's enduring power of attorney becomes a paid carer, or health care provider, for the adult, the power of attorney is revoked to the extent it gives power to the chosen decision maker.** 13  
14  
15  
16

**Impaired decision-making capacity** 17

**58. If—** 18

(a) an adult's enduring power of attorney gives a chosen decision maker power to make a decision or type of decision; and 19  
20

(b) the chosen decision maker has impaired decision-making capacity for the decision or type of decision; 21  
22

the power of attorney is revoked to the extent it gives power to the chosen decision maker for the decision or type of decision. 23  
24

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<sup>43</sup> A chosen decision maker may withdraw with the tribunal's leave (section 194(1)) or by signed notice to the adult if the adult has decision-making capacity for the decision or type of decision (section 194(3)).

*Assisted and Substituted Decision Making*

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**Bankruptcy or insolvency**

59. If—

- (a) an adult's enduring power of attorney gives a chosen decision maker power to make a financial decision or decision about a legal matter or a type of financial decision or decision about a legal matter; and
- (b) the chosen decision maker becomes bankrupt or insolvent;

the power of attorney is revoked to the extent it gives power to the chosen decision maker for the decision or type of decision.

*Example—*

Under an enduring power of attorney, chosen decision maker, X exercises power to make all financial decisions. X becomes bankrupt. Therefore, the power of attorney is revoked to the extent it gives power to X to make financial decisions.

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

The same applies if X was a joint chosen decision maker with Y because of section 176.<sup>44</sup>

If X was not a joint and several chosen decision maker and the enduring power of attorney provides an alternative or successive decision maker for financial decisions, the alternative or next chosen decision maker is then able to make financial decisions under it. Otherwise, no one is able to make financial decisions under the power of attorney.

**Death**

60.(1) When a chosen decision maker under an enduring power of attorney dies, the power of attorney is revoked to the extent it gives power to the chosen decision maker.<sup>45</sup>

(2) If a request to register the enduring power of attorney has been lodged under the *Land Title Act 1994*, the chosen decision maker's personal

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<sup>44</sup> Section 176 allows the remaining joint chosen decision maker to exercise a power that another joint decision maker is unable to exercise.

<sup>45</sup> If the deceased was a joint chosen decision maker, section 176 allows the remaining joint chosen decision maker or makers to exercise the power.

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representative may take reasonable steps to deregister the registered power of attorney under that Act. 1  
2

***Division 4—Tribunal action*** 3**Tribunal action** 4

61. The tribunal is able to change or revoke an enduring power of attorney.<sup>46</sup> 5  
6

***Division 5—Other*** 7**Protection if unaware of revocation** 8

62.(1) This section applies if— 9

(a) an adult's enduring power of attorney gives power to a chosen decision maker; and 10  
11

(b) the power is revoked. 12

(2) The chosen decision maker who, without knowing of the revocation, purports to use the power, does not incur any liability (either to the adult or anyone else) because of the revocation. 13  
14  
15

(3) A transaction between— 16

(a) a person who does not know of the revocation; and 17

(b) the chosen decision maker who purports to use the power; 18

is, in favour of the person, as valid as if the power had not been revoked. 19

(4) In this section— 20

“revoke”, of a power of a chosen decision maker under an adult's enduring power of attorney, includes change by the tribunal of the power by— 21  
22

(a) declaring the power of attorney invalid; or 23

(b) changing the power of attorney's terms; or 24

<sup>46</sup> See section 66 (Order changing or revoking power of attorney).

*Assisted and Substituted Decision Making*

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- (c) revoking the power of attorney; or 1
  - (d) removing a chosen decision maker under the power of attorney; 2  
or 3
  - (e) removing a power from a chosen decision maker under the 4  
power of attorney. 5
- “knowing”**, of a revocation of a power, includes— 6
- (a) knowing of the happening of an event<sup>47</sup> that revokes the power; 7  
and 8
  - (b) having reason to believe the revocation has happened. 9

## PART 5—TRIBUNAL PROCEEDINGS ABOUT 10 ENDURING POWERS OF ATTORNEY 11

### Declaration about validity 12

**63.(1)** The tribunal may decide the validity of an adult’s enduring power 13  
of attorney. 14

**(2)** The tribunal may declare an adult’s enduring power of attorney 15  
invalid if the tribunal is satisfied— 16

- (a) the adult did not understand the matters necessary to make the 17  
power of attorney; or 18
- (b) the power of attorney does not comply with the other 19  
requirements of this Act; or 20
- (c) the power of attorney is invalid for another reason, for example, 21  
the adult was induced to make the power of attorney by 22  
dishonesty or undue influence.<sup>48</sup> 23

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<sup>47</sup> For example, an adult’s enduring power of attorney is revoked if the adult dies (section 55) or, to the extent a chosen decision maker was given power, if the chosen decision maker becomes a health care provider for the adult (section 57).

<sup>48</sup> See section 36 (Capacity to make an enduring power of attorney) and section 40 (Formal requirements). Protection is given in section 43 to those unaware of the invalidity.



(3) If the tribunal declares an adult's enduring power of attorney invalid, the tribunal may, at the same time, appoint 1 or more substitute decision makers for the adult. 1  
2  
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**Declaration about commencement of power** 4

64. The tribunal may make a declaration that— 5

(a) a power under an adult's enduring power of attorney has begun; 6  
or 7

(b) the adult has impaired decision-making capacity for a particular 8  
decision or for all decisions. 9

**Other tribunal help with power of attorney** 10

65. The tribunal may make an order, declaration or recommendation, or 11  
give a direction or advice, about— 12

(a) the exercise of a power under an enduring power of attorney; or 13

(b) the interpretation of its terms; or 14

(c) another issue involving the power of attorney. 15

**Order changing or revoking power of attorney** 16

66.(1) The tribunal may, by order— 17

(a) remove a chosen decision maker under an adult's enduring power 18  
of attorney and appoint an appointed decision maker to replace the 19  
removed chosen decision maker; or 20

(b) remove a power from a chosen decision maker and give the 21  
removed power to another chosen decision maker or to an 22  
appointed decision maker; or 23

(c) change the terms of the power of attorney; or 24

(d) revoke all or part of the power of attorney. 25

(2) The tribunal may only make an order under subsection (1)(a) 26  
or (1)(b) if the tribunal considers the chosen decision maker is no longer 27  
suitable or competent to act as empowered (whether generally or in relation 28

to a specific power).	1
(3) A chosen decision maker is no longer suitable or competent if, for example—	2
	3
(a) a relevant interest of the adult has not been, or is not being, adequately protected; or	4
	5
(b) the chosen decision maker has neglected the chosen decision maker's duties, or abused the chosen decision maker's powers (whether generally or in relation to a specific power), or	6
	7
	8
(c) the chosen decision maker has otherwise contravened this Act	9
(4) The tribunal may only make an order under subsection (1)(c) or (1)(d) if the tribunal considers—	10
	11
(a) a relevant interest of the adult has not been, or is not being, adequately protected; or	12
	13
(b) circumstances (including, for a power to make a health care decision, advances in medical science) have changed to the extent that the terms of the power or the power itself is inappropriate.	14
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<b>Effect of tribunal change or revocation</b>	17
67.(1) An enduring power of attorney is changed if the tribunal makes an order changing its terms.	18
	19
(2) An enduring power of attorney is revoked to the extent the tribunal makes an order revoking it.	20
	21
<b>Tribunal to advise of change etc.</b>	22
68. If the tribunal changes or revokes an adult's enduring power of attorney, the registrar must take reasonable steps to—	23
	24
(a) advise the adult and all chosen decision makers under the enduring power of attorney of the change or revocation; and	25
	26
(b) if a request to register the enduring power of attorney has been lodged under the <i>Land Title Act 1994</i> —register the change, or deregister the registered power of attorney, under that Act.	27
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<b>Tribunal action on own initiative or if application</b>	1
69. The tribunal may do a thing under this part on its own initiative or on the application of a person allowed to apply.	2 3
<b>Applicant in proceeding</b>	4
70. Each of the following persons may apply to the tribunal for it to do something under this part about an adult's enduring power of attorney—	5 6
(a) the adult;	7
(b) a member of the adult's family;	8
(c) a chosen decision maker under the power of attorney;	9
(d) for an application also involving a personal decision of an adult—the adult guardian;	10 11
(e) for an application also involving a health care decision of the adult—the adult guardian, a health care provider of the adult or a statutorily authorised health care decision maker;	12 13 14
(f) for an application also involving a financial decision, or decision about a legal matter, of the adult—the public trustee;	15 16
(g) another interested person.	17
<b>Participants in proceeding</b>	18
71. Each of the following persons may participate in a proceeding about an adult's enduring power of attorney—	19 20
(a) the adult;	21
(b) the applicant;	22
(c) a chosen decision maker under the power of attorney;	23
(d) for a proceeding also involving a personal decision, or health care decision, of the adult—the adult guardian;	24 25
(e) for a proceeding also involving a financial decision, or decision about a legal matter, of the adult—the public trustee;	26 27

- (f) a person joined as a party to the proceeding; 1  
 (g) another interested person. 2

## **PART 6—OTHER** 3

### **Registration for land dealings** 4

72. An enduring power of attorney giving power, whether expressly or 5  
 in general terms, to deal with land may be registered, and deregistered, 6  
 under the *Land Title Act 1994*.<sup>49</sup> 7

### **Offence to dishonestly induce the making or revocation of power of attorney** 8 9

73. A person must not dishonestly induce an adult to make or revoke an 10  
 enduring power of attorney. 11

Maximum penalty— 12

### **Recognition of enduring powers of attorney made in other States** 13

74. If— 14

(a) an enduring power of attorney is made by an adult in another 15  
 State; and 16

(b) the power of attorney complies with the requirements in the other 17  
 State in relation to an enduring power of attorney; 18

then, to the extent the powers given by the enduring power of attorney could 19  
 validly have been given in Queensland, the enduring power of attorney 20  
 must be treated as if it had been made in Queensland and complied with the 21  
 requirements in this chapter. 22

<sup>49</sup> See that Act, sections 132D and 135 as inserted by this Act.

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<b>Protection if unaware of noncompliance of interstate enduring power of attorney</b>	1
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75.(1) This section applies if—	3
(a) an adult's enduring power of attorney is made in another State;	4
and	5
(b) the power of attorney gives power to a chosen decision maker;	6
and	7
(c) the power of attorney does not comply with the other State's requirements in relation to an enduring power of attorney.	8
	9
(2) The chosen decision maker who, without knowing of the noncompliance, purports to use the power does not incur any liability (either to the adult or anyone else) because of the noncompliance.	10
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	12
(3) A transaction between—	13
(a) the chosen decision maker who purports to use the power; and	14
(b) a person who does not know of the noncompliance;	15
is, in favour of the person, as valid as if the power of attorney complied with the other State's requirements in relation to an enduring power of attorney.	16
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	18
(4) In this section—	19
“know”, of an enduring power of attorney's noncompliance, includes have reason to believe the power of attorney does not comply with the other State's requirements in relation to an enduring power of attorney.	20
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	22

## CHAPTER 5—ADVANCE HEALTH CARE DIRECTIVE

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2

### PART 1—INTRODUCTION

3

#### Overview

4

76.(1) An adult who understands the matters necessary to make an advance health care directive<sup>50</sup> may make an advance health care directive.

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(2) An advance health care directive may include the adult's health care decisions and special consent health care decisions about the adult's future health care.

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(3) It may also—

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(a) include information relevant to a future health care decision or special consent health care decision of, or for, the adult; and

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(b) choose 1 or more decision makers to make future health care decisions for the adult if the decisions included in the directive are inadequate.

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(4) A chosen decision maker under an advance health care directive may not make a special consent health care decision for the adult.

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(5) This Act limits when an advance health care directive may operate.<sup>51</sup>

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(6) The advance health care directive is not revoked by the adult becoming an adult with impaired decision-making capacity for a decision.

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#### Chapter layout

21

77.(1) Part 2 deals with making an advance health care directive.

22

(2) Part 3 deals with using an advance health care directive.

23

(3) Part 4 deals with revoking an advance health care directive.

24

<sup>50</sup> See section 79 (Capacity to make an advance health care directive).

<sup>51</sup> See section 86 (Operation of directive).

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(4) Part 5 deals with tribunal proceedings about advance health care directives. 1

(5) Part 6 contains other provisions. 2

**Common law not affected** 3

78. This Act does not affect common law recognition of instructions about health care given by an adult that are not given in an advance health care directive made under this Act. 4  
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**PART 2—MAKING AN ADVANCE HEALTH CARE DIRECTIVE** 8  
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**Capacity to make an advance health care directive** 10

79.(1) An adult may make an advance health care directive, to the extent it does not give power to a chosen decision maker, only if the adult understands the following matters— 11  
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(a) if the directive includes a health care decision or special consent health care decision—the nature and the likely effects of the decision; 14  
15  
16

(b) a decision in the directive operates only while the adult has impaired decision-making capacity for the decision; 17  
18

(c) the adult may revoke a decision in the directive at any time the adult has decision-making capacity for the decision; 19  
20

(d) at any time the adult is not capable of revoking a decision in the directive, the adult is unable to effectively oversee the implementation of the directive. 21  
22  
23

(2) An adult may make an advance health care directive, to the extent it gives power to a chosen decision maker, only if the adult understands the following matters— 24  
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26

(a) the adult may, in the directive, specify or limit the power to be given to a chosen decision maker and instruct a chosen decision 27  
28

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maker about the exercise of the power;	1
(b) the power to make a decision operates only while the adult has impaired decision-making capacity for the decision;	2 3
(c) if the power for a specified decision or type of decision begins, the chosen decision maker will make, and have full control over, the specified decision or all the adult's decisions of the specified type unless limitations or instructions are included in the directive;	4 5 6 7
(d) the adult may revoke the directive at any time the adult is capable of making an advance health care directive giving the same power;	8 9 10
(e) at any time the adult is not capable of revoking the directive, the adult is unable to effectively oversee the use of the power.	11 12
<b>Eligibility to be chosen—health care decision</b>	13
<b>80.</b> A person may be chosen by an advance health care directive as a chosen decision maker for a health care decision for an adult only if the person is—	14 15 16
(a) an individual who is at least 18 years old and not a paid carer, or health care provider, for the adult; or	17 18
(b) the adult guardian.	19
<b>More than 1 decision maker may be chosen</b>	20
<b>81.(1)</b> By an advance health care directive, an adult may choose 1 or more of the following—	21 22
(a) 1 chosen decision maker for a decision or all decisions;	23
(b) different chosen decision makers for different decisions;	24
(c) a person to act as a chosen decision maker for a decision or all decisions in a circumstance stated in the directive;	25 26
(d) alternative chosen decision makers for a decision or all decisions so power is given to a particular chosen decision maker only in a circumstance stated in the directive;	27 28 29
(e) successive chosen decision makers for a decision or all decisions	30



*Assisted and Substituted Decision Making*

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so power is given to a particular chosen decision maker only when power given to another chosen decision maker ends;	1 2
(f) joint or several, or joint and several, chosen decision makers for a decision or all decisions;	3 4
(g) 2 or more joint chosen decision makers for a decision or all decisions (being a number less than the total number of chosen decision makers for the decision or all decisions).	5 6 7
(2) In this section—	8
“decision” means a health care decision.	9
<b>Formal requirements</b>	10
<b>82.(1) An advance health care directive of an adult must—</b>	11
(a) be written; and	12
(b) be signed—	13
(i) by the adult; or	14
(ii) if the adult instructs—for the adult and in the adult’s presence, by a person eligible to sign on the adult’s behalf; and	15 16 17
(c) be signed and dated by a person eligible to be the adult’s witness.	18
(2) The directive may be in the approved form.	19
(3) If the directive is signed by the adult, it must include a certificate signed by the witness stating the adult—	20 21
(a) signed the advance health care directive in the witness’s presence; and	22 23
(b) at the time, appeared to the witness to understand the matters necessary to make the advance health care directive.	24 25
(4) If the directive is signed by a person for the adult, it must include a certificate signed by the witness stating—	26 27
(a) in the witness’s presence, the adult instructed the person to sign the advance health care directive on the adult’s behalf; and	28 29
(b) the person signed it in the presence of the adult and witness; and	30

(c) at the time, the adult appeared to the witness to understand the matters necessary to make the advance health care directive.

(5) If the directive chooses 1 or more decision makers to make future health care decisions, it is only effective to give power to a chosen decision maker if the chosen decision maker has signed the directive acknowledging the power has been given.

#### **Eligibility to sign on adult's behalf**

**83.** A person is eligible to sign an adult's advance health care directive on an adult's behalf if the person—

- (a) is at least 18 years old; and
- (b) is not the witness for the directive; and
- (c) is not, or will not by the directive be, a chosen decision maker of the adult.

#### **Eligibility to witness**

**84.** A person is eligible to witness an adult's advance health care directive if the person—

- (a) is a justice,<sup>52</sup> commissioner for declarations or lawyer;<sup>53</sup> and
- (b) is not the person signing the directive on the adult's behalf; and
- (c) is not, or will not by the directive be, a chosen decision maker of the adult; and
- (d) is not a relation of the adult or a relation of a chosen decision maker of the adult; and
- (e) is not a health care provider of the adult.

<sup>52</sup> "Justice" means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

<sup>53</sup> "Lawyer" means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

**Protection if unaware of invalidity**

**85.(1)** A health care provider who, without knowing of an adult’s health care directive’s invalidity, acts in reliance on the directive does not incur any liability (either to the adult or anyone else) because of the invalidity.

**(2)** A person chosen by an adult as a substitute decision maker by an invalid advance health care directive who, without knowing of the invalidity,<sup>54</sup> purports to use power that the directive, if valid, would have given, does not incur any liability (either to the adult or anyone else) because of the invalidity.

**(3)** If—

(a) a person chosen by an adult as a substitute decision maker by an invalid advance health care directive purports to use power that the directive, if valid, would have given; and

(b) without knowing of the invalidity, another person acts in reliance on the purported use of power;

the other person does not incur any liability (either to the adult or anyone else) because of the invalidity.

**(4)** In this section—

“know”, of an advance health care directive’s invalidity, includes have reason to believe the directive—

(a) does not comply with this part; or

(b) is invalid for another reason, for example, the adult was induced to make the directive by dishonesty or undue influence.

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<sup>54</sup> See section 105 (Declaration about validity).

## PART 3—USING AN ADVANCE HEALTH CARE DIRECTIVE

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<b>Operation of directive</b>	3
86. An adult's advance health care directive about a health care decision or special consent health care decision—	4
	5
(a) begins to operate when (if ever) the adult has impaired decision-making capacity for the decision; and	6
	7
(b) can not begin to operate before then; and	8
(c) continues to operate unless the adult regains decision-making capacity for the decision.	9
	10
<b>Effect of decision in directive</b>	11
87. While an advance health care directive operates, a health care or special consent health care decision included in the directive is as effective as if—	12
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	14
(a) the adult made the decision when it needed to be made; and	15
(b) the adult had capacity to make the decision then.	16
	17
<b>Chosen decision maker's power</b>	17
88.(1) If an adult's advance health care directive gives power to make a health care decision, then, while the power is exercisable, it gives—	18
	19
(a) the chosen decision maker for the decision; or	20
(b) if there is more than 1 chosen decision maker for the decision—the chosen decision makers acting jointly or severally, as the directive requires;	21
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power to do, for the adult, anything in relation to the decision the adult could lawfully do if the adult had decision-making capacity for the decision. <sup>55</sup>	24
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<sup>55</sup> This does not give a chosen decision maker power to make a special consent health care decision—see schedule 1 (Types of capacity and decision), section 8 (Health care decision).

(2) However, the power given is subject to the limitations expressly stated in the advance health care directive. 1  
2

(3) Functions and powers are also given to chosen decision makers by this Act.<sup>56</sup> 3  
4

**Exercising health care decision making** 5

**89.** If an adult's advance health care directive gives power to make a health care decision, the power— 6  
7

(a) begins when (if ever) the adult has impaired decision-making capacity for the decision; and 8  
9

(b) can not begin before then; and 10

(c) continues to be exercisable unless the adult regains decision-making capacity for the decision. 11  
12

**Tribunal help** 13

**90.** The tribunal is able to— 14

(a) make a declaration about an advance health care directive's validity;<sup>57</sup> or 15  
16

(b) make a declaration about whether the adult has impaired decision-making capacity or the power to make a decision has begun;<sup>58</sup> or 17  
18  
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<sup>56</sup> Chapter 8 states the functions and powers given to substitute decision makers. A chosen decision maker must exercise power as required by the terms of the advance health care directive under which the person is appointed—see section 172 (Act as required by terms of power).

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<sup>57</sup> See section 105 (Declaration about validity).

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<sup>58</sup> See section 106 (Declaration about impaired decision-making capacity etc.).

- (c) give other help with the directive;<sup>59</sup> or 1
- (d) make an order changing or revoking the directive.<sup>60</sup> 2

## **PART 4—REVOKING AN ADVANCE HEALTH CARE DIRECTIVE** 3 4

### *Division 1—Formal revocation* 5

#### **Formal revocation by adult** 6

**91.(1)** An adult's advance health care directive is revoked to the extent the adult revokes it under this section. 7  
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**(2)** The adult may revoke the advance health care directive, to the extent it includes a health care decision or special consent health care decision, only if the adult has decision-making capacity for the decision. 9  
10  
11

**(3)** The adult may revoke the advance health care directive, to the extent it gives power to a chosen decision maker, only if the adult understands the matters necessary to make an advance health care directive giving the same power. 12  
13  
14  
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**(4)** A revocation under this section must— 16

(a) be written; and 17

(b) be signed— 18

(i) by the adult; or 19

(ii) if the adult revoking it instructs—for the adult and in the adult's presence, by a person eligible to sign on the adult's behalf; and 20  
21  
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<sup>59</sup> See section 107 under which the tribunal may make an order, declaration or recommendation, or give a direction or advice, about an issue involving the directive.

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<sup>60</sup> See section 108 (Order changing or revoking directive).

*Assisted and Substituted Decision Making*

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- (c) be signed and dated by a person eligible to be the adult's witness. 1
- (5) If the revocation is signed by the adult, it must include a certificate 2  
signed by the witness stating the adult— 3
- (a) signed the revocation in the witness's presence; and 4
- (b) at the time, appeared to the witness to— 5
- (i) have decision-making capacity for a decision being revoked; 6  
and 7
- (ii) if the directive being revoked gave power to make a 8  
decision—understand the matters necessary to make an 9  
advance health care directive giving the same power as the 10  
directive being revoked gave. 11
- (6) If the revocation is signed by a person for the adult, it must include a 12  
certificate signed by the witness stating— 13
- (a) in the witness's presence, the adult instructed the person to sign 14  
the revocation for the adult; and 15
- (b) the person signed the revocation in the presence of the adult and 16  
witness; and 17
- (c) at the time, the adult appeared to the witness to— 18
- (i) have decision-making capacity for a decision being revoked; 19  
and 20
- (ii) if the directive being revoked gave power to make a 21  
decision—understand the matters necessary to make an 22  
advance health care directive giving the same power as the 23  
directive being revoked gave. 24
- (7) A revocation of an advance health care directive may be in the 25  
approved form. 26
- (8) If the adult revokes a directive under this section, the adult must take 27  
reasonable steps to advise any chosen decision maker under the directive of 28  
the revocation. 29
- Eligibility to sign on adult's behalf** 30
- 92.** A person is eligible to sign an adult's revocation of an advance health 31

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care directive if the person—

- (a) is at least 18 years old; and
- (b) is not the witness for the revocation; and
- (c) was not a chosen decision maker of the adult under the directive.

**Eligibility to witness**

**93.** A person is eligible to witness an adult's revocation of an advance health care directive if the person—

- (a) is not the person signing the revocation on the adult's behalf; and
- (b) was not a chosen decision maker of the adult under the directive; and
- (c) is not a relation of the adult or a relation of a chosen decision maker of the adult; and
- (d) is not a health care provider of the adult.

***Division 2—Revocation by other action of adult*****Marriage**

**94.(1)** This section applies only if an adult's advance health care directive gives power to 1 or more chosen decision makers.

**(2)** If the adult marries after making the directive, it is revoked to the extent it gives power to a chosen decision maker.

**(3)** However, if the directive gives power to the person who becomes the adult's spouse, the directive is only revoked to the extent it gives power to another person.

**(4)** The application of this section may be changed by a contrary intention in the directive.

**Divorce**

**95.(1)** This section applies only if an adult's advance health care directive



gives power to 1 or more chosen decision makers.	1
(2) If the adult divorces after making the directive, it is revoked to the extent it gives power to the divorced spouse.	2 3
<b>Later decision document</b>	4
96.(1) The adult's advance health care directive is revoked, to the extent of an inconsistency, by a later decision document <sup>61</sup> of the adult.	5 6
(2) If the adult revokes a directive under this section, the adult must take reasonable steps to advise any chosen decision maker under the directive of the revocation.	7 8 9
<b>Death</b>	10
97. When the adult dies, the advance health care directive is revoked.	11
<i>Division 3—Revocation by action of chosen decision maker</i>	12
<b>Application of division</b>	13
98. This division applies only if an adult's advance health care directive gives power to 1 or more chosen decision makers to make a decision.	14 15
<b>Withdrawal</b>	16
99. If a chosen decision maker withdraws <sup>62</sup> as chosen decision maker for the decision or a type of decision, the advance health care directive is revoked to the extent it gives power to the chosen decision maker for the decision or a type of decision.	17 18 19 20

<sup>61</sup> "Decision document" means an enduring power of attorney or advance health care directive—see schedule 2 (Dictionary).

<sup>62</sup> A chosen decision maker may withdraw with the tribunal's leave (section 194(1)) or by signed notice to the adult if the adult has decision-making capacity for the decision or type of decision (section 194(3)).

*Assisted and Substituted Decision Making***Paid carer or health care provider**

100. If a chosen decision maker becomes a paid carer, or health care provider, for the adult, the advance health care directive is revoked to the extent it gives power to the chosen decision maker.

**Impaired decision-making capacity**

101. If a chosen decision maker has impaired decision-making capacity for the decision or a type of decision, the advance health care directive is revoked to the extent it gives power to the chosen decision maker for the decision or type of decision.

**Death**

102. When a chosen decision maker dies, the advance health care directive is revoked to the extent it gives power to the chosen decision maker.

***Division 4—Tribunal action*****Tribunal action**

103. The tribunal is able to change or revoke an advance health care directive.<sup>63</sup>

***Division 5—Other*****Protection if unaware of revocation**

104.(1) A health care provider is not affected by a revocation of an advance health care directive to the extent the health care provider does not know, or have reason to believe, the advance health care directive has been revoked.

(2) Subsections (3) and (4) apply if—

<sup>63</sup> See section 108 (Order changing or revoking directive).

*Assisted and Substituted Decision Making*

- (a) an adult's advance health care directive gives power to a chosen decision maker; and 1
- (b) the power is revoked. 2
- (3) The chosen decision maker who, without knowing of the revocation, purports to use the power does not incur any liability (either to the adult or anyone else) because of the revocation. 3
- (4) If— 4
- (a) the chosen decision maker purports to use the power; and 5
- (b) without knowing of the revocation, a person acts in reliance on the purported use of power; 6
- the person does not incur any liability (either to the adult or anyone else) because of the revocation. 7
- (5) In this section— 8
- “revoke”, for an adult's advance health care directive, includes change of the directive by the tribunal— 9
- (a) declaring the directive invalid; or 10
- (b) changing the directive's terms; or 11
- (c) revoking the directive; or 12
- (d) removing a chosen decision maker under the directive; or 13
- (e) removing a power from a chosen decision maker under the directive. 14
- “know”, of a revocation of a power, includes— 15
- (a) know of the happening of an event<sup>64</sup> that revokes the power; and 16
- (b) have reason to believe the revocation has happened. 17
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<sup>64</sup> For example, an adult's advance health care directive is revoked if the adult dies (section 97) or, to the extent a chosen decision maker was given power, if the chosen decision maker becomes a health care provider for the adult (section 100).

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**PART 5—TRIBUNAL PROCEEDINGS ABOUT  
ADVANCE HEALTH CARE DIRECTIVES**

**Declaration about validity**

**105.(1)** The tribunal may decide the validity of an adult's advance health care directive.

**(2)** The tribunal may declare an adult's advance health care directive invalid if the tribunal is satisfied—

- (a) the adult did not understand the matters necessary to make the directive; or
- (b) the directive does not comply with the other requirements of this Act; or
- (c) the directive is invalid for another reason, for example, the adult was induced to make the directive by dishonesty or undue influence.<sup>65</sup>

**Declaration about impaired decision-making capacity etc.**

**106.** The tribunal may make a declaration—

- (a) that the adult who made the advance health care directive has impaired decision-making capacity for a particular health care decision or special consent health care decision or for all decisions of these types; or
- (b) if the directive gives power to make a decision—that the power has begun.

**Other tribunal help with directive**

**107.** The tribunal may make an order, declaration or recommendation, or give a direction or advice, about—

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<sup>65</sup> See section 79 (Capacity to make an advance health care directive) and section 82 (Formal requirements). Protection is given in section 85 to those unaware of the invalidity.

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- (a) a decision, information or something else included in an adult's advance health care directive; or 1  
2
- (b) the interpretation of the directive's terms; or 3
- (c) if the directive gives power to make a decision—the exercise of the power; or 4  
5
- (d) another issue involving the directive. 6

**Order changing or revoking directive** 7**108.(1)** The tribunal may, by order— 8

- (a) change the terms of an adult's advance health care directive; or 9
- (b) revoke all or part of the directive; or 10
- (c) if the directive gives power to make a health care decision— 11
  - (i) remove a chosen decision maker under the directive and appoint an appointed decision maker to replace the removed decision maker; or 12  
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14
  - (ii) remove a power from a chosen decision maker and give the removed power to another chosen decision maker or to an appointed decision maker; 15  
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**(2)** The tribunal may only make an order under subsection (1)(a) or (1)(b) if the tribunal considers circumstances (including advances in medical science) have changed to the extent that the terms of the directive are inappropriate. 18  
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**(3)** The tribunal may only make an order under subsection (1)(c) if the tribunal considers the chosen decision maker is no longer suitable or competent to act as empowered (whether generally or in relation to a specific power). 22  
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**(4)** A chosen decision maker is no longer suitable or competent if, for example— 26  
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- (a) a relevant interest of the adult has not been, or is not being, adequately protected; or 28  
29
- (b) the chosen decision maker has neglected the chosen decision maker's duties or abused the chosen decision maker's power 30  
31

(whether generally or in relation to a specific power); or	1
(c) the chosen decision maker has otherwise contravened this Act.	2
<b>Effect of tribunal change or revocation</b>	3
<b>109.(1)</b> An advance health care directive is changed if the tribunal makes an order changing its terms.	4 5
<b>(2)</b> An advance health care directive is revoked to the extent the tribunal makes an order revoking it.	6 7
<b>Tribunal to advise of change etc.</b>	8
<b>110.</b> If the tribunal changes or revokes an adult's advance health care directive, the registrar must take reasonable steps to advise the adult and all chosen decision makers under the directive of the change or revocation.	9 10 11
<b>Tribunal action on own initiative or if application</b>	12
<b>111.</b> The tribunal may do a thing under this part on its own initiative or on the application of a person allowed to apply.	13 14
<b>Applicant in proceeding</b>	15
<b>112.</b> Each of the following persons may apply to the tribunal for it to do something under this part about an adult's advance health care directive—	16 17
(a) the adult;	18
(b) a member of the adult's family;	19
(c) a chosen decision maker under the directive;	20
(d) the adult guardian;	21
(e) a health care provider of the adult;	22
(f) a statutorily authorised health care decision maker;	23
(g) another interested person.	24

<b>Participants in proceeding</b>	1
<b>113.</b> Each of the following persons may participate in a proceeding about an adult's advance health care directive—	2 3
(a) the adult;	4
(b) the applicant;	5
(c) a chosen decision maker under the directive;	6
(d) the adult guardian;	7
(e) a person joined as a party to the proceeding;	8
(f) another interested person.	9

## **PART 6—OTHER**

<b>Offence to dishonestly induce the making or revocation of directive</b>	11
<b>114.</b> A person must not dishonestly induce an adult to make or revoke an advance health care directive.	12 13
Maximum penalty—	14
<b>Protection if unaware of directive</b>	15
<b>115.</b> A health care provider is not affected by an adult's advance health care directive to the extent the health care provider does not know the adult has an advance health care directive.	16 17 18

**CHAPTER 6—APPOINTMENTS BY TRIBUNAL** 1**PART 1—EXPLANATION** 2**Chapter layout** 3

**116.(1)** This chapter allows the tribunal to appoint— 4

(a) an appointed assistant to assist an adult to make the adult's own decisions; or 5  
6

(b) an appointed decision maker to make decisions for the adult. 7

(2) Part 2 states the requirements for an appointment. 8

(3) Part 3 states who may be appointed. 9

(4) Part 4 deals with changing or revoking an appointment order. 10

(5) Part 5 deals with tribunal proceedings involving appointed assistants or appointed decision makers. 11  
12

(6) Part 6 contains other provisions. 13

**PART 2—REQUIREMENTS FOR APPOINTMENT** 14**Usual appointment** 15

**117.(1)** The tribunal may, by order, appoint an appointed assistant or appointed decision maker for a decision for an adult if the tribunal is satisfied— 16  
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(a) the adult— 19

(i) needs to make the decision; or 20

(ii) is likely to make the decision and the decision involves, or is likely to involve, substantial risk to the adult's health, welfare or property; and 21  
22  
23

(b) for the appointment of an appointed assistant—the adult would 24



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- have decision-making capacity for the decision with the assistance of an appointed assistant; and 1  
2
- (c) for the appointment of an appointed decision maker—the adult has impaired decision-making capacity for the decision; and 3  
4
- (d) there is an appropriate person available for appointment; and 5
- (e) without an appointment— 6
- (i) the adult's needs will not be adequately met; or 7
- (ii) the adult's interests will not be adequately protected. 8
- (2) The appointment may be on terms considered appropriate by the tribunal. 9  
10
- (3) The tribunal may make the order on its own initiative or on the application of the adult or anyone else. 11  
12

**Advance appointment** 13

- 118.(1)** The tribunal may, by order, make an advance appointment of an appointed assistant or appointed decision maker for a decision for an individual who is at least 17½ years but not 18 years if the tribunal is satisfied— 14  
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- (a) there is a reasonable likelihood, when the individual turns 18, the individual— 18  
19
- (i) will need to make the decision; or 20
- (ii) is likely to make the decision and the decision involves, or is likely to involve, substantial risk to the individual's health, welfare or property; and 21  
22  
23
- (b) for the appointment of an appointed assistant—there is a reasonable likelihood, when the individual turns 18, the individual will have decision-making capacity for the decision only with the assistance of an appointed assistant; and 24  
25  
26  
27
- (c) for the appointment of an appointed decision maker—there is a reasonable likelihood, when the individual turns 18, the individual will have impaired decision-making capacity for the decision; and 28  
29  
30
- (d) there is an appropriate person available for appointment; and 31

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- (e) there is a reasonable likelihood, without an appointment, when the individual turns 18—
- (i) the individual's needs would not be adequately met; or
  - (ii) the individual's interests would not be adequately protected.
- (2) The appointment begins when the individual turns 18.
- (3) The appointment ends when the individual turns 19 unless the tribunal orders the appointment to be for a longer period.
- (4) The tribunal may order the appointment for a longer period only if the tribunal considers—
- (a) the need for an appointment will continue for the longer period; and
  - (b) the need for the tribunal to review the appointment is very limited.
- (5) The longer period may be up to 3 years.
- (6) The appointment may be on terms considered appropriate by the tribunal.
- (7) The tribunal may make the order on its own initiative or on the application of the individual or anyone else.

**Flexibility of appointment**

119. The tribunal may appoint 1 or more of the following—
- (a) a single appointee for a decision or all decisions;
  - (b) different appointees for different decisions;
  - (c) a person to act as appointee for a decision or all decisions in a stated circumstance;
  - (d) alternative appointees for a decision or all decisions so power is given to a particular appointee only in stated circumstances;
  - (e) successive appointees for a decision or all decisions so power is given to a particular appointee only when power given to a previous appointee ends;
  - (f) joint or several, or joint and several, appointees for a decision or all decisions;

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- (g) 2 or more joint appointees for a decision or all decisions (being a number less than the total number of appointees for the decision or all decisions). 1  
2  
3

### **PART 3—WHO MAY BE APPOINTED** 4

#### **Eligibility—personal, excluded personal, health care or special consent health care decision** 5 6

120.(1) Subsection (2) states the requirements for a person to be eligible for appointment by the tribunal as— 7  
8

- (a) an appointed assistant for an adult for a decision of the following types— 9  
10
- (i) a personal decision; 11
  - (ii) an excluded personal decision; 12
  - (iii) a health care decision; 13
  - (iv) a special consent health care decision; or 14
- (b) an appointed decision maker for an adult for a decision of the following types— 15  
16
- (i) a personal decision; 17
  - (ii) a health care decision. 18

(2) The person must be— 19

- (a) either— 20
- (i) an individual who is at least 18 years and not a paid carer, or health care provider, for the adult; or 21  
22
  - (ii) the adult guardian; and 23
- (b) considered by the tribunal as appropriate for appointment having regard to the appropriateness considerations.<sup>66</sup> 24  
25

<sup>66</sup> See section 122 (Appropriateness considerations).

(3) No-one may be appointed as an appointed decision maker for an excluded personal decision or special consent health care decision.<sup>67</sup> 1  
2

**Eligibility—financial or decision about a legal matter** 3

121.(1) Subsection (2) states the requirements for a person to be eligible for appointment by the tribunal as an appointed assistant, or appointed decision maker, for an adult for a decision of the following types— 4  
5  
6

- (a) a financial decision; 7
- (b) a decision about a legal matter. 8

(2) The person must be— 9

- (a) one of the following— 10
  - (i) an individual who is at least 18 years and not a paid carer, or health care provider, for the adult; 11  
12
  - (ii) a trustee company under the *Trustee Companies Act 1968*; 13
  - (iii) the public trustee; and 14

(b) considered by the tribunal as appropriate for appointment having regard to the appropriateness considerations.<sup>68</sup> 15  
16

**Appropriateness considerations** 17

122.(1) In deciding whether a person is appropriate for appointment for an adult, the tribunal must consider the following matters (“appropriateness considerations”)— 18  
19  
20

- (a) the general principles and whether the person is likely to comply with them; 21  
22
- (b) if the appointment is for a health care decision—the health care principle and whether the person is likely to comply with it; 23  
24

<sup>67</sup> The tribunal may make a special consent health care decision (other than a decision consenting to psychiatric health care prescribed by regulation)—see chapter 7 (Health care decisions and special consent health care decisions), part 4 (Tribunal’s power).

<sup>68</sup> See section 122 (Appropriateness considerations).

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|---|----------------------|
| (c) whether the adult's and person's interests are likely to conflict;  | 1                    |
| (d) whether the adult and person are compatible;  | 2                    |
| (e) if more than 1 person is to be appointed—whether the persons are compatible;  | 3<br>4               |
| (f) whether the person would be available and accessible to the adult;  | 5                    |
| (g) the person's suitability and competence to perform functions and exercise powers under an appointment order.  | 6<br>7               |
| (2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.   | 8<br>9               |
| (3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.                        | 10<br>11<br>12       |
| (4) In considering the person's suitability and competence, the tribunal must have regard to the following—   | 13<br>14             |
| (a) the nature and circumstances of any criminal conviction of the person including the likelihood the commission of the offence may adversely affect the adult;  | 15<br>16<br>17       |
| (b) the nature and circumstances of any refusal of, or removal from, appointment (whether in Queensland or elsewhere) as—   | 18<br>19             |
| (i) a person assisting someone else to make decisions; or   | 20                   |
| (ii) a person making decisions for someone else;  | 21                   |
| (c) if the proposed appointment is for a financial decision or a decision about a legal matter and the person is an individual—   | 22<br>23             |
| (i) the nature and circumstances of a current creditor's or debtor's petition presented against the person under the <i>Bankruptcy Act 1966</i> (Cwlth) or a similar law of a foreign jurisdiction; and | 24<br>25<br>26<br>27 |
| (ii) the nature and circumstances of the person being a bankrupt under the <i>Bankruptcy Act 1966</i> (Cwlth) or a similar law of a foreign jurisdiction; and   | 28<br>29<br>30       |
| (iii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors entered   | 31<br>32             |

- into under the *Bankruptcy Act 1966* (Cwlth), part 10 or a similar law of a foreign jurisdiction; and 1  
2
- (iv) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management the person is or was involved. 3  
4  
5  
6  
7
- (5) In this section— 8
- “external administration” includes liquidation, dissolution by insolvency or charge, receivership or compromise entered into with creditors under the Corporations Law, the *Partnership Act 1891* or a similar law of an Australian or foreign jurisdiction. 9  
10  
11  
12
- Advice from proposed appointee about suitability and competence** 13
- 123.(1)** An individual who has agreed to proposed appointment must advise<sup>69</sup> the tribunal on oath or affirmation whether he or she— 14  
15
- (a) is under 18 years; or 16
- (b) is a paid carer or health care provider for the adult; or 17
- (c) has any criminal history (whether in Queensland or elsewhere); or 18  
19
- (d) has been (whether in Queensland or elsewhere) refused, or removed from, appointment as— 20  
21
- (i) a person assisting someone else to make a decision; or 22
- (ii) a person making a decision for someone else. 23
- (e) if the proposed appointment is for a financial decision or a decision about a legal matter— 24  
25
- (i) is the debtor in a current creditor’s or debtor’s petition presented under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or 26  
27  
28
- (ii) has ever been bankrupt under the *Bankruptcy Act 1966* 29

<sup>69</sup> Section 319 applies to the advice.

- (Cwlth) or a similar law of a foreign jurisdiction; or 1
- (iii) is proposing to make, or has ever made, an arrangement 2  
with his or her creditors under the *Bankruptcy Act 1966* 3  
(Cwlth), part 10 or a similar law of a foreign jurisdiction; or 4
- (iv) is or was a director, secretary or partner, or is or was 5  
involved in the management of a corporation, partnership or 6  
other entity that is proposing to be, is or has been, under 7  
external administration. 8
- (2) In this section— 9
- “external administration” includes liquidation, dissolution by insolvency 10  
or charge, receivership or compromise entered into with creditors 11  
under the Corporations Law, the *Partnership Act 1891* or a similar law 12  
of an Australian or foreign jurisdiction. 13
- Inquiries about suitability and competence** 14
- 124.(1) The tribunal may make inquiries about the suitability and 15  
competence to perform functions and exercise powers under an 16  
appointment order of a person who has agreed to proposed appointment. 17
- (2) If asked by the tribunal, the commissioner of the police service must 18  
give the tribunal a written report about the criminal history of— 19
- (a) a person who has agreed to proposed appointment; or 20
- (b) if the person who has agreed to proposed appointment is a 21  
company—a director, secretary or other principal officer of the 22  
company. 23

**PART 4—CHANGING OR REVOKING AN  
APPOINTMENT ORDER**

*Division 1—Effective revocation by action of appointee*

**Paid carer or health care provider**

125. If an appointed assistant, or appointed decision maker, for an adult becomes a paid carer, or health care provider, for the adult, the appointment ends.

*Division 2—Change or revocation at tribunal review*

**Periodic automatic review**

126. The tribunal must periodically review an appointment.

**First automatic review**

127.(1) The first review of an appointment must happen not more than 2 years after the appointment is made unless the tribunal abridges or extends the first review period.

(2) The tribunal may extend the first review period to a maximum of 3 years only if the tribunal considers—

- (a) the need for the appointment will continue for more than 2 years;  
and
- (b) the need for the tribunal to review the appointment is very limited.

**Subsequent automatic review**

128. A review of an appointment (other than the first review) must happen no more than 3 years after the most recent review.

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**Other review**

**129.** The tribunal may review an appointment at any time on its own initiative or on the application of an interested person.

**Review process**

**130.(1)** The tribunal may conduct a review in the way it considers appropriate.

**(2)** At the end of a review of an appointment for an adult, the tribunal must revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an appointment were to be made.

**(3)** If the tribunal is satisfied there are appropriate grounds for an appointment to continue, it may either—

- (a) continue its order making the appointment; or
- (b) change its order making the appointment, including, for example, by—
  - (i) changing the terms of the appointment; or
  - (ii) removing an appointee; or
  - (iii) making a new appointment; or
  - (iv) making an order, or further order, changing the review period.<sup>70</sup>

**(4)** However, the tribunal may make an order removing an appointee only if the tribunal considers the appointee is no longer suitable or competent to act as appointed.

**(5)** An appointee is no longer suitable or competent if, for example—

- (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
- (b) the appointee has neglected the appointee's duties or abused the

<sup>70</sup> See section 126 (Periodic automatic review).

- appointee's powers; or 1  
 (c) the appointee has otherwise contravened this Act. 2

**Tribunal to advise of change etc.** 3

**131.(1)** This section applies if the tribunal changes or revokes the appointment of an appointed decision maker under an order. 4  
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**(2)** The registrar must take reasonable steps to— 6

(a) advise the adult and all appointed decision makers under the order of the change or revocation of appointment; and 7  
 8

(b) if a request to register the order has been lodged under the *Land Title Act 1994*—register the change, or deregister the order, under that Act. 9  
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**PART 5—TRIBUNAL PROCEEDINGS ABOUT** 12  
**APPOINTED ASSISTANTS OR APPOINTED** 13  
**DECISION MAKERS** 14

**Other provisions** 15

**132.** Applications for the appointment of appointed assistants or appointed decision makers and review of appointments are dealt with elsewhere in this chapter.<sup>71</sup> 16  
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**Other tribunal help after appointment order** 19

**133.** The tribunal may make an order, declaration or recommendation, or give a direction or advice, about— 20  
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- (a) the interpretation of the order's terms; or 22

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<sup>71</sup> Applications for appointment are dealt with in section 117 and section 118. Applications for review of an appointment are dealt with in section 129 and section 130.

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- (b) the exercise of a power under an order appointing an appointed assistant or appointed decision maker; or 1  
2
- (c) another matter involving the directive. 3

**Tribunal action on own initiative or if application** 4

134. The tribunal may do a thing under this chapter on its own initiative or on the application of a person allowed to apply. 5  
6

**Applicant in proceeding** 7

135. Each of the following persons may apply to the tribunal for it to do a thing under this chapter about a proposed or current appointment for an adult— 8  
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- (a) the adult; 11
- (b) a member of the adult's family; 12
- (c) an appointed assistant or appointed decision maker; 13
- (d) for an application involving a personal decision of the adult—the adult guardian; 14  
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- (e) for an application involving a health care decision of the adult—the adult guardian, a health care provider of the adult or a statutorily authorised health care decision maker; 16  
17  
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- (f) for an application involving a financial decision, or decision about a legal matter, of the adult—the public trustee; 19  
20
- (g) another interested person. 21

**Participants in proceeding** 22

136. Each of the following persons may participate in a proceeding about a proposed or current appointment for an adult— 23  
24

- (a) the adult; 25
- (b) the applicant; 26
- (c) an appointee proposed by the applicant; 27

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- (d) the members of the adult's family; 1
- (e) a primary carer of the adult (other than a family member); 2
- (f) a current appointed assistant or substitute decision maker for the adult; 3  
4
- (g) for a proceeding also involving a personal decision, health care decision or special consent health care decision—the adult guardian; 5  
6  
7
- (h) for a proceeding also involving a financial decision or decision about a legal matter—the public trustee; 8  
9
- (i) an interested person; 10
- (j) another person the tribunal considers should be notified of the proceeding. 11  
12

**PART 6—OTHER** 13**Registration for land dealings** 14

137. A tribunal order giving an appointed decision maker power, whether expressly or in general terms, to deal with land may be registered, and deregistered, under the *Land Title Act 1994*.<sup>72</sup> 15  
16  
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**Implied power to execute a deed** 18

138. If a tribunal order gives a person power to do a thing, the person is given power to execute a deed to do the thing. 19  
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**Protection if unaware substitute decision maker already chosen** 21

139.(1) This section applies if— 22

<sup>72</sup> See that Act, sections 133 and 135A as inserted by this Act.

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- (a) an adult's decision document<sup>73</sup> gives a power to a chosen decision maker; and 1
- (b) after the decision document is made but without reference to it, the tribunal gives the power to an appointed decision maker.<sup>74</sup> 2
- (2) The appointed decision maker who, without knowing the power is given to a chosen decision maker, purports to use the power does not incur any liability (either to the adult or anyone else) because of the power having been given to the chosen decision maker. 3
- (3) A transaction between— 4
- (a) the appointed decision maker who purports to use the power; and 5
- (b) a person who does not know the power is given to a chosen decision maker; 6
- is, in favour of the person, as valid as if the power had not been given to the chosen decision maker. 7
- (4) In this section— 8
- “know”, a power is given to a chosen decision maker, includes have reason to believe the power is given to the chosen decision maker. 9
- Protection if unaware decision already made by advance health care directive** 10
- 140.(1)** This section applies if— 11
- (a) an adult's advance health care directive includes a decision about an issue; and 12
- (b) after the directive is made, but without reference to it, the tribunal gives power to make a decision about the issue to an appointed decision maker. 13
- (2) The appointed decision maker who, without knowing a decision 14

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<sup>73</sup> “Decision document” means an enduring power of attorney or advance health care directive—see schedule 2 (Dictionary). 15

<sup>74</sup> Section 20(1) provides that an adult's decision document prevails over a later tribunal order (other than an order about the document) to the extent of an inconsistency. 16

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about the issue is included in an advance health care directive, purports to use the power does not incur any liability (either to the adult or anyone else) because of the decision being included in the directive. 1  
2  
3

(3) If— 4

(a) the appointed decision maker purports to use the power to decide an issue; and 5  
6

(b) without knowing a decision about the issue is included in an advance health care directive, a person acts in reliance on the purported use of power; 7  
8  
9

the person does not incur any liability (either to the adult or anyone else) because of the decision being included in the directive. 10  
11

(4) In this section— 12

“know”, a decision about an issue is included in an advance health care directive, includes have reason to believe the issue is dealt with by an advance health care directive. 13  
14  
15

**Protection if unaware of change** 16

141.(1) This section applies if— 17

(a) the tribunal gives power to an appointed decision maker; and 18

(b) the power is changed. 19

(2) The appointed decision maker who, without knowing of the change, purports to use the power does not incur any liability (either to the adult or anyone else) because of the change. 20  
21  
22

(3) A transaction between— 23

(a) the appointed decision maker who purports to use the power; and 24

(b) a person who does not know of the change; 25

is, in favour of the person, as valid as if the power had not been changed. 26

(4) In this section— 27

“change”, of a power given to an appointed decision maker, includes— 28

(a) change the terms of the appointment; or 29

- (b) remove power from an appointed decision maker; or 1
- (c) revoke the order making the appointment; or 2
- (d) end an appointment. 3

“know”, of a change of a power, includes— 4

- (a) know of the happening of an event<sup>75</sup> that changes the power; and 5
- (b) have reason to believe the change has happened. 6

**CHAPTER 7—HEALTH CARE DECISIONS AND SPECIAL CONSENT HEALTH CARE DECISIONS** 7  
8

**PART 1—PHILOSOPHY AND PURPOSE** 9

**Purpose to achieve balance** 10

**142.** This chapter seeks to strike a balance between— 11

- (a) ensuring an adult is not deprived of necessary health care merely because the adult has impaired decision-making capacity for a health care or special consent health care decision; and 12  
13  
14
- (b) ensuring health care given to the adult is only for the purpose of promoting and maintaining the adult’s health and well-being. 15  
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**General principles and health care principle must be complied with** 17

**143.(1)** In making a health care decision for an adult, or assisting an adult to make a health care decision or special consent health care decision, a 18  
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<sup>75</sup> For example, an appointment ends if an adult’s appointed decision maker becomes a paid carer, or health care provider, for the adult—see section 125 (Paid carer or health care provider).

person must comply with the general principles<sup>76</sup> and health care principle.<sup>77</sup> 1

(2) In making a special consent health care decision for an adult, the 2  
tribunal must comply with the general principles and health care principle. 3

### **Health care principle** 4

144.(1) A health care or special consent health care decision for an adult 5  
should be made only if the decision is appropriate to promote and maintain 6  
the adult's health and well-being. This principle is the "health care 7  
principle". 8

(2) In deciding whether a decision is appropriate, the tribunal or relevant 9  
person must, to the greatest extent practicable— 10

(a) seek the adult's views and wishes and take them into account; and 11

(b) take the information given by the adult's health care provider<sup>78</sup> to 12  
the person or tribunal into account. 13

(3) Views and wishes may be expressed orally, in writing or in another 14  
way, including, for example, by conduct. 15

## **PART 2—SCHEME FOR HEALTH CARE AND 16 SPECIAL CONSENT HEALTH CARE DECISIONS 17**

### *Division 1—Health care—no consent* 18

#### **Division's scope** 19

145. This division deals with when health care (other than special consent 20  
health care) may be carried out without consent. 21

<sup>76</sup> See section 21 (General principles must be complied with by all).

<sup>77</sup> See section 144 (Health care principle).

<sup>78</sup> See section 165 (Health care providers to give information).



**Urgent health care**

- 146.(1) Health care (other than special consent health care) of an adult may be carried out without consent if the adult's health care provider considers—
- (a) the adult has impaired decision-making capacity for a decision about the health care; and
  - (b) the health care should be urgently carried out—
    - (i) to meet imminent risk to the adult's life or health; or
    - (ii) to prevent significant pain or distress to the adult; and
  - (c) it is not reasonably practicable to get consent from a person who may give it under this Act.
- (2) However, the health care may not be carried out without consent if the adult objects to the health care unless—
- (a) the adult has minimal or no understanding of 1 or both of the following—
    - (i) what the health care involves;
    - (ii) why the health care is required; and
  - (b) the health care is likely to cause the adult—
    - (i) no distress; or
    - (ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care.
- (3) The health care provider must certify in the adult's clinical records as to the various things enabling the health care to be carried out because of this section.
- (4) A health care provider may use the minimum force that is necessary and reasonable to carry out the proposed health care.

**Minor, uncontroversial health care and no statutorily authorised health care decision maker**

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

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(a) a health care provider considers the adult has impaired decision-making capacity for a decision about the health care; and	1 2
(b) the health care provider considers there is no statutorily authorised health care decision maker who is reasonably available and willing to make a decision about the health care; and	3 4 5
(c) the health care provider considers the health care is—	6
(i) necessary to promote the adult's health and well-being; and	7
(ii) of the type that will best promote the adult's health and well-being; and	8 9
(iii) minor and uncontroversial; and	10
(d) the health care provider does not know, and can not reasonably be expected to know, of any dispute among interested parties about—	11 12 13
(i) the carrying out of the health care; or	14
(ii) the decision-making capacity of the adult for a decision about the health care; and	15 16
(e) the adult does not object to the health care.	17
(2) The health care provider must certify in the adult's clinical records as to the various things enabling the health care to be carried out because of this section.	18 19 20
<b>Limitation on health care without consent</b>	21
148. The health care that may be carried out without consent may be limited by regulation.	22 23
<b><i>Division 2—Health care and special consent health care—consent</i></b>	24
<b>Division's scope</b>	25
149. This division deals with who may consent to health care or special consent health care.	26 27

**Adult with decision-making capacity**

**150.** If an adult has decision-making capacity for a health care decision or special consent health care decision, only the adult may make the decision.

**Adult may make enduring power of attorney**

**151.(1)** An adult who understands the matters<sup>79</sup> necessary to make an enduring power of attorney, may make an enduring power of attorney choosing 1 or more substitute decision makers for a health care decision or all health care decisions.<sup>80</sup>

**(2)** However, power to make a special consent health care decision may not be given by enduring power of attorney.

**Adult may make advance health care directive**

**152.(1)** An adult who understands the matters<sup>81</sup> necessary to make an advance health care directive, may make an advance health care directive (including health care decisions and special consent health care decisions about the adult's future health care).<sup>82</sup>

**(2)** The advance health care directive may also—

- (a)** include information relevant to a future health care decision or special consent health care decision of, or for, the adult; and
- (b)** choose 1 or more decision makers to make future health care decisions for the adult if the decisions included in the directive are inadequate.

**(3)** However, power to make a special consent health care decision may not be given by advance health care directive.

<sup>79</sup> See section 36 (Capacity to make an enduring power of attorney).

<sup>80</sup> See chapter 4 (Enduring power of attorney) about enduring powers of attorney.

<sup>81</sup> See section 79 (Capacity to make an advance health care directive).

<sup>82</sup> See chapter 5 (Advance health care directive) about advance health care directives.

**Adult with impaired decision-making capacity—health care decisions**

153. If an adult has impaired decision-making capacity for a health care decision, the decision is to be made—

- (a) as required by the adult's most recent decision document<sup>83</sup> (if any) dealing with the decision;<sup>84</sup> or
- (b) if the decision is not dealt with in a decision document of the adult and there is an appointed decision maker authorised to make the decision or a relevant tribunal order—by the appointed decision maker or under the tribunal order; or
- (c) if the decision is not dealt with in a decision document of the adult and there is no appointed decision maker authorised to make the decision or a relevant tribunal order—by a statutorily authorised health care decision maker.<sup>85</sup>

**Adult with impaired decision-making capacity—special consent health care decisions**

154. If an adult has impaired decision-making capacity for a special consent health care decision, the decision is to be made—

- (a) by the adult as required by the adult's most recent advance health care directive (if any) containing the decision; or
- (b) if paragraph (a) does not apply—to the extent no other person or

<sup>83</sup> "Decision document" means an enduring power of attorney or advance health care directive—see schedule 2 (Dictionary).

<sup>84</sup> A later document revokes an earlier document to the extent of an inconsistency—see sections 54(1) and 96 (Later decision document).

<sup>85</sup> See section 155 (Statutorily authorised health care decision maker's power).

entity is authorised by an Act to make the decision,<sup>86</sup> by the tribunal.<sup>87</sup>

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**PART 3—STATUTORILY AUTHORISED HEALTH CARE DECISION MAKER’S POWER**

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**Statutorily authorised health care decision maker’s power**

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155. If—

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- (a) an adult has impaired decision-making capacity for a health care decision; and
- (b) the decision is not dealt with in an enduring power of attorney or advance health care directive of the adult; and
- (c) the tribunal has not appointed a decision maker for the decision;

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a statutorily authorised health care decision maker for the adult may make the decision.<sup>88</sup>

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<sup>86</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decision, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

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<sup>87</sup> See part 4 (Tribunal’s power).

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<sup>88</sup> If statutorily authorised health care decision makers disagree about a health care decision, an application should be made to the tribunal—see section 174(2).

**PART 4—TRIBUNAL'S POWER****Special consent health care decisions**

**156.(1)** This part deals with the tribunal's power to make special consent health care decisions.

**(2)** To the extent another person or entity is authorised by an Act to make a decision for an adult about psychiatric health care, or other health care, prescribed under the regulations, the tribunal does not have power to make the decision.<sup>89</sup>

**Donation of tissue**

**157.(1)** The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to removal of tissue from the adult for donation to another person only if the tribunal is satisfied—

- (a) the risk to the adult is small; and
- (b) the risk of failure of the donated tissue is low; and
- (c) the life of the proposed recipient would be in danger without the donation; and
- (d) no other compatible donor is reasonably available; and
- (e) there is, or has been, a close personal relationship between the adult and proposed recipient.

**(2)** The tribunal may not consent if the adult objects<sup>90</sup> to the health care.

<sup>89</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decision, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

<sup>90</sup> Section 163 (which effectively enables an adult's objection to be overridden in some cases) does not apply.

(3) If the tribunal consents to removal of tissue for donation, the tribunal's order must specify the proposed recipient. 1  
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### **Sterilisation** 3

158.(1) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to sterilisation of the adult only if the tribunal is satisfied— 4  
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(a) one of the following applies— 7

(i) the sterilisation is medically necessary; 8

(ii) the adult is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied; 9  
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(iii) if the adult is female—the adult has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems; and 12  
13  
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(b) the sterilisation can not reasonably be postponed; and 15

(c) the adult is unlikely, in the foreseeable future, to have decision-making capacity for a decision about sterilisation. 16  
17

(2) Sterilisation is not medically necessary if the sterilisation is— 18

(a) for eugenic<sup>91</sup> reasons; or 19

(b) to remove the risk of pregnancy resulting from sexual abuse. 20

(3) Also, in deciding whether to consent for the adult to a sterilisation procedure, the tribunal must take into account— 21  
22

(a) alternative forms of health care (including other sterilisation procedures) available or likely to become available in the foreseeable future; and 23  
24  
25

(b) the nature and extent of short-term, or long-term, significant risks associated with the proposed procedure and available alternative forms of health care (including other sterilisation procedures). 26  
27  
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<sup>91</sup> Eugenics is the science of improving the qualities of the human race, especially the careful selection of parents—see *Macquarie Dictionary* 2nd ed.

(4) An adult's sterilisation, to which the tribunal has consented for the adult, is not unlawful. 1  
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**Termination of pregnancy** 3

159.(1) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to termination of the adult's pregnancy only if the tribunal is satisfied the termination is necessary to preserve the adult from serious danger to her life or physical or mental health. 4  
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(2) Termination of an adult's pregnancy, to which the tribunal has consented for the adult, is not unlawful. 9  
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**Research and experimental health care** 11

160.(1) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to the adult's participation in research or experimental health care to diagnose or treat the adult only if the tribunal is satisfied about the following matters— 12  
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(a) the research or health care is approved by an appropriate ethics committee; 16  
17

(b) the risk and inconvenience to the adult and the adult's quality of life is small; 18  
19

(c) the research or health care relates to a condition the adult has; 20

(d) the research or health care may result in significant benefit to the adult; 21  
22

(e) the potential benefit can not be achieved in another way. 23

(2) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to the adult's participation in research or experimental health care treatment intended to gain knowledge that can be used in the diagnosis or treatment of a condition affecting the adult only if the tribunal is satisfied about the following matters— 24  
25  
26  
27  
28

(a) the research or treatment is approved by an appropriate ethics committee; 29  
30

(b) the risk and inconvenience to the adult and the adult's quality of 31



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life is small;	1
(c) the research or health care relates to a condition the adult has or has had;	2 3
(d) the research or health care may result in significant benefit to the adult or other persons with the condition;	4 5
(e) the research or health care can not be carried out without a person with the condition taking part;	6 7
(f) the research or health care will not unduly interfere with the adult's privacy.	8 9
(3) The tribunal may not consent—	10
(a) if the adult objects <sup>92</sup> to the research or health care; or	11
(b) for consent to the adult's participation in research or experimental health care to diagnose or treat the adult—if, in a decision document, the adult indicated unwillingness to participate in such research or health care; or	12 13 14 15
(c) for consent to the adult's participation in research or experimental health care treatment intended to gain knowledge that can be used in the diagnosis or treatment of a condition affecting the adult—if, in a decision document, the adult indicated unwillingness to participate in such research or health care.	16 17 18 19 20
<b>Other special health care</b>	21
<b>161.1</b> To the extent no other person or entity is authorised by an Act to make the decision, <sup>93</sup> the tribunal may consent, for an adult with impaired	22 23

<sup>92</sup> Section 163 (which effectively enables an adult's objection to be overridden in some cases) does not apply.

<sup>93</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decision, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

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decision-making capacity for the decision, to the adult having special health care prescribed under the regulations. 1  
2

(2) The tribunal may consent only if it is satisfied of the matters prescribed under the regulations. 3  
4

**Subsequent special consent decision for adult** 5

**162.(1)** If the tribunal makes a special consent health care decision, the tribunal may appoint 1 or more substitute decision makers for the adult and give an appointed decision maker power to consent for the adult to— 6  
7  
8

(a) continuation of the special consent health care; or 9

(b) the carrying out on the adult of similar special consent health care. 10

(2) The requirements for a person to be eligible for appointment are the requirements for appointment to make a health care decision. 11  
12

(3) The appointment order may include a declaration, order, direction, recommendation, or advice about how the power given is to be used. 13  
14

(4) The appointment order may be changed by the tribunal on its own initiative or on the application of an interested person. 15  
16

(5) In deciding whether to consent, an appointed decision maker must comply with the general principles and the health care principle. 17  
18

**PART 5—OTHER** 19

**Effect of objection to health care by adult** 20

**163.(1)** Generally, a health care decision or special consent health care decision is ineffective to give consent to the health care if the health care provider is aware, or ought reasonably be aware, the adult objects to the health care. 21  
22  
23  
24

(2) However, a health care decision or special consent health care decision (other than consent to removal of tissue for donation or consent to research or experimental health care) is effective to give consent to the 25  
26  
27

health care despite an objection by the adult to the health care if—	1
(a) the adult has minimal or no understanding of 1 or both of the following—	2
(i) what the health care involves;	3
(ii) why the health care is required; and	4
(b) the proposed health care is likely to cause the adult—	5
(i) no distress; or	6
(ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care.	7
	8
	9
<b>Use of force</b>	10
<b>164.</b> A health care provider may use the minimum force that is necessary and reasonable to carry out health care authorised under this Act.	11
	12
<b>Health care providers to give information</b>	13
<b>165.(1)</b> A health care provider, who is treating an adult with impaired decision-making capacity for a health care decision or a special consent health care decision, must give information to the following as appropriate—	14
(a) a person assisting an adult to make the health care decision or special consent health care decision;	15
(b) a substitute decision maker who has power to make the health care decision for the adult;	16
(c) if the tribunal is considering making the special consent health care decision for the adult—the tribunal.	17
<b>(2)</b> The information to be given is information about the following—	18
(a) the nature of the adult's condition;	19
(b) the alternative forms of health care available, or likely to be available in the foreseeable future, for the condition;	20
(c) the general nature and effect of each form of health care;	21
(d) the nature and extent of short-term, or long-term, significant risks	22
	23
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associated with each form of health care;	1
(e) the reasons why it is proposed a particular form of health care should be carried out.	2 3
<b>Protection of health care provider</b>	4
166.(1) To the extent a health care provider complies with a purported health care decision made by a person who represented to the health care provider that the person had the right to make the decision, the health care provider is taken to have the adult's consent to the decision.	5 6 7 8
(2) Subsection (1) does not apply if the health care provider knew, or could reasonably be expected to have known, the person did not have the right to make the decision.	9 10 11
<b>Offence to make decision for adult if no right to do so</b>	12
167. It is an offence for a person who knows the person has no right to make a health care decision for an adult, or who is recklessly indifferent about whether the person has a right to make a health care decision for an adult, to—	13 14 15 16
(a) purport to make the health care decision; or	17
(b) represent to a health care provider for the adult that the person has a right to make the health care decision.	18 19
Maximum penalty—	20
<b>Offence to carry out health care unless authorised</b>	21
168.(1) It is an offence for a person to carry out health care of an adult with impaired decision-making capacity unless—	22 23
(a) this Act provides that the health care may be carried out without consent; <sup>94</sup> or	24 25

<sup>94</sup> See section 146 (Urgent health care) and section 147 (Minor, uncontroversial health care and no statutorily authorised health care decision maker).

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- (b) consent to the health care is given under this or another Act;<sup>95</sup> or 1
- (c) the health care is authorised by an order of the Supreme Court 2  
made in its *parens patriae* jurisdiction.<sup>96</sup> 3
- Maximum penalty if special consent health care carried out— 4
- Maximum penalty if other health care carried out— 5
- (2) This section has effect despite the Criminal Code, section 282.<sup>97</sup> 6
- Other liability not affected** 7
- 169.** This chapter does not affect a person's liability for health care given 8  
to an adult to which the person would have been subject if— 9
- (a) the adult had been capable of consenting to the health care; and 10
- (b) the health care had been given with the adult's consent. 11

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<sup>95</sup> A medical superintendent or medical practitioner may consent to a surgical procedure in certain cases under the *Medical Act 1939*, section 52 (Operations when patient incapable of consenting).

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<sup>96</sup> This jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint decision makers for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

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<sup>97</sup> The Criminal Code, section 282 provides as follows—  
**'Surgical operations**

**282.** A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.'

<b>CHAPTER 8—SUBSTITUTE DECISION MAKER</b>	1
<b>PART 1—GENERAL FUNCTIONS AND POWERS</b>	2
<b>Comply with principles</b>	3
170.(1) A substitute decision maker must comply with the general principles.	4 5
(2) In making a health care decision, a substitute decision maker must also comply with the health care principle.	6 7
<b>Act honestly and reasonably</b>	8
171. A substitute decision maker who may make a decision for an adult must exercise the power honestly and with the degree of care that is reasonable for a person having the substitute decision maker's experience and expertise.	9 10 11 12
Maximum penalty—	13
<b>Act as required by terms of power</b>	14
172. A substitute decision maker who may make a decision for an adult must, when exercising the power, exercise it as required by the terms of the power.	15 16 17
<i>Example—</i>	18
A decision maker chosen under an enduring power of attorney must exercise power as required by the terms of the enduring power of attorney.	19 20
<b>Multiple chosen decision makers are joint if not otherwise stated</b>	21
173. Two or more chosen decision makers for a decision or type of decision are chosen as joint chosen decision makers for the decision or type of decision if the relevant decision document does not state how they are to share the power given to them.	22 23 24 25

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<b>Consult with adult's other substitute decision makers</b>	1
174.(1) If there are 2 or more substitute decision makers for an adult, the substitute decision makers must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them.	2 3 4 5
(2) If 2 or more of the substitute decision makers for an adult disagree about the way a power to make a decision for the adult should be exercised, 1 or more of the substitute decision makers may apply to the tribunal for directions.	6 7 8 9
<i>Example—</i>	10
An adult chooses 1 substitute decision maker for all personal decisions and another for all financial decisions. The substitute decision maker for personal decisions considers the adult should remain at home with in-house support rather than move to a residential care facility. However, the substitute decision maker for financial decisions does not want to authorise expenditure for in-house support and considers it unreasonable. Either of the substitute decision makers may apply to the tribunal for directions.	11 12 13 14 15 16 17
<b>Act together with joint substitute decision makers</b>	18
175.(1) Substitute decision makers who may make a decision jointly for an adult must exercise the power unanimously.	19 20
(2) If it is impracticable or impossible to exercise the power unanimously, 1 or more of the joint substitute decision makers may apply to the tribunal for directions.	21 22 23
<b>Effect of 1 joint chosen decision maker not able to use power</b>	24
176. If 1 or more joint chosen decision makers is unable to exercise the power given to them—	25 26
(a) the remaining chosen decision maker may exercise the power; and	27 28
(b) if 2 or more joint chosen decision makers remain—the remaining chosen decision makers may only exercise the power jointly.	29 30

<b>Advise tribunal of change of alternative appointed decision maker</b>	1
177.(1) This section applies if the tribunal appoints alternative appointed decision makers for a decision so power is given to a particular appointed decision maker in particular stated circumstances and to a different appointed decision maker in different stated circumstances.	2 3 4 5
(2) If the power of 1 alternative appointed decision maker is used by another alternative appointed decision maker for more than 6 weeks, the alternative decision maker using the power must advise the tribunal of the change as soon as practicable.	6 7 8 9
<b>Advise tribunal of change of successive appointed decision maker</b>	10
178.(1) This section applies if the tribunal appoints successive appointed decision makers so power is given to a particular appointed decision maker only when the power of a previous appointed decision maker ends.	11 12 13
(2) If the power of a previous appointed decision maker ends, the next successive appointed decision maker must advise the tribunal of the change as soon as practicable.	14 15 16
<b>Comply with other tribunal requirement</b>	17
179.(1) The tribunal may impose a requirement, including a requirement about giving security, on a substitute decision maker or a person who is to become a substitute decision maker.	18 19 20
(2) A substitute decision maker or person who is to become a substitute decision maker must comply with the requirement.	21 22
<b>Execution of instrument</b>	23
180.(1) If a person is given power under an adult's decision document to execute an instrument, the instrument is validly executed if it is executed—	24 25
(a) by the person in a way permitted by law; and	26
(b) in a way showing that the person executes it as chosen decision maker for the adult under the decision document.	27 28
(2) If a person is given power by the tribunal to execute an instrument for	29



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- an adult, the instrument is validly executed if it is executed— 1
- (a) by the person in a way permitted by law; and 2
  - (b) in a way showing that the person executes it as appointed decision 3  
maker for the adult under a tribunal order. 4
- Proof of decision document** 5
- 181.(1)** A document purporting to be a certified copy of a decision 6  
document is evidence of the decision document.<sup>98</sup> 7
- (2) Each page (other than the last page) of the copy must be certified to 8  
the effect that the copy is a true and complete copy of the corresponding 9  
page of the original. 10
- (3) The last page of the copy must be certified to the effect that the copy 11  
is a true and complete copy of the original. 12
- (4) Certification must be by one of the following persons— 13
- (a) the adult who made the decision document; 14
  - (b) a justice;<sup>99</sup> 15
  - (c) a commissioner for declarations; 16
  - (d) a lawyer.<sup>100</sup> 17

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<sup>98</sup> See section 249 for proof of tribunal orders and decisions.

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<sup>99</sup> “Justice” means justice of the peace—see *Acts Interpretation Act 1954*, section 36.

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<sup>100</sup> “Lawyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

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**PART 2—FUNCTIONS AND POWERS FOR  
FINANCIAL AND LITIGATION RELATED  
DECISIONS**

**Present management plan if asked**

**182.** A substitute decision maker who may make a financial decision, or decision about a legal matter, for an adult must, if ordered by the tribunal, present a plan of management to the tribunal or its nominee for approval.

**Keep records**

**183.(1)** A substitute decision maker who may make a financial decision, or decision about a legal matter, for an adult must—

- (a) keep such records as are reasonable in the circumstances; and
- (b) if required by the tribunal—produce such records of dealings and transactions involving the adult's property as are reasonable for inspection at the time the tribunal determines.

**Maximum penalty—**

**(2)** A substitute decision maker who may make a financial decision, or decision about a legal matter, for an adult must also, if required by the tribunal—

- (a) keep such records as the tribunal determines; and
- (b) produce the records for inspection at the time and in the way the tribunal determines.<sup>101</sup>

**Maximum penalty—****Keep property separate**

**184.(1)** A substitute decision maker who may make a financial decision for an adult must keep the substitute decision maker's property separate

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<sup>101</sup> An order under section 244 may require a substitute decision maker to file a summary of receipts and expenditure or more detailed accounts of dealings and transactions.

from the adult's property.	1
(2) Subsection (1) does not apply to property owned jointly by the adult and substitute decision maker.	2 3
(3) Subsection (1) does not affect another obligation imposed by law.	4
<b>Get approval for unauthorised investments</b>	5
185. A substitute decision maker who may invest for an adult may invest in investments that are not authorised investments only with the tribunal's approval.	6 7 8
<b>Get approval for unauthorised real estate transaction</b>	9
186. A substitute decision maker who may undertake real estate transactions for an adult may undertake a real estate transaction that is not an authorised real estate transaction only with the tribunal's approval.	10 11 12
<b>Get approval for unauthorised security transaction</b>	13
187. A substitute decision maker who may undertake security transactions for an adult may undertake a security transaction that is not an authorised security transaction only with the tribunal's approval.	14 15 16
<b>Avoid conflict transaction</b>	17
188.(1) Generally, a substitute decision maker who may make a financial decision, or decision about a legal matter, for an adult must not enter into a conflict transaction.	18 19 20
(2) A substitute decision maker may enter into a conflict transaction only if—	21 22
(a) the transaction provides for a person's needs and—	23
(i) the adult might reasonably be expected to provide for the needs; and	24 25
(ii) what is provided is not more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances; or	26 27 28

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- (b) the substitute decision maker obtains the tribunal's consent; or 1
- (c) for a chosen decision maker empowered by an enduring power of attorney—the enduring power of attorney includes the adult's consent to the transaction. 2  
3  
4
- (3) The needs mentioned in subsection (2)(a) may include the substitute decision maker's needs. 5  
6
- (4) The tribunal or adult may consent to a transaction by consenting to— 7
- (a) a type of conflict transaction that includes the transaction; or 8
- (b) a series of related conflict transactions that includes the transaction. 9  
10
- (5) This section does not affect another obligation imposed by law. 11
- Meaning of “conflict transaction”** 12
- 189.(1)** In this Act— 13
- “conflict transaction”, for an adult and substitute decision maker, 14  
means— 15
- (a) a transaction in which there is or could be conflict between— 16
- (i) the duty of the substitute decision maker towards the adult concerning the transaction; and 17  
18
- (ii) the interests of the substitute decision maker, or a relation, business associate or close friend of the substitute decision maker, in the transaction; or 19  
20  
21
- (b) a transaction that results or could result in conflict between— 22
- (i) the duty of the substitute decision maker towards the adult concerning the transaction; and 23  
24
- (ii) a duty of the substitute decision maker towards a person, other than the adult, because of the transaction. 25  
26
- (2) The fact that a person is a relation of the adult does not, in itself, mean the substitute decision maker's duty towards the adult and the substitute decision maker's interests conflict or could conflict. 27  
28  
29
- (3) The fact the substitute decision maker may be a beneficiary of the 30

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adult's estate on the adult's death does not, in itself, mean the substitute decision maker's duty towards the adult and the substitute decision maker's interests conflict or could conflict. 1  
2  
3

*Example—* 4

A conflict transaction happens if a substitute decision maker who may make financial decisions for an adult buys the adult's car. The sale price does not have to be less than market value for the sale to be a conflict transaction. 5  
6  
7

**Gifts** 8

**190.(1)** A substitute decision maker who may make a financial decision for an adult may give away the adult's property only if— 9  
10

(a) the gift is— 11

(i) to a relation or close friend of the adult; and 12

(ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or 13  
14

(b) the gift is a donation of the nature that the adult made when the adult had decision-making capacity or that the adult might reasonably be expected to make; 15  
16  
17

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances. 18  
19

**(2)** The substitute decision maker or a charity with which the substitute decision maker has a connection is not precluded from receiving a gift under subsection (1). 20  
21  
22

**(3)** The application of this section may be changed by the terms of the power given. 23  
24

**Maintain adult's dependants** 25

**191.(1)** A substitute decision maker who may make a financial decision for an adult may provide from the adult's estate for the needs of a dependant of the adult. 26  
27  
28

**(2)** However, what is provided must not be more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances. 29  
30  
31

(3) The application of this section may be changed by the terms of the power given. 1  
2

### **PART 3—MISCELLANEOUS** 3

#### **Power to excuse failure** 4

192. If a substitute decision maker is prosecuted in a court for a failure to comply with this chapter, the court may, if it considers it fair, completely or partly excuse the failure. 5  
6  
7

#### **Compensation for failure to comply** 8

193.(1) A substitute decision maker who may make a decision for an adult may be required by the tribunal or a court to compensate the adult (or, if the adult has died, the adult's estate) for a loss caused by the substitute decision maker's failure to comply with this chapter. 9  
10  
11  
12

(2) If either or both of the adult or substitute decision maker has died, the application for compensation must be made to the tribunal or a court within 6 months after the first death. 13  
14  
15

(3) The tribunal or a court may extend the application time. 16

(4) Compensation paid under a tribunal or court order must be taken into account in assessing damages in a later civil proceeding in relation to the substitute decision maker's exercise of the power. 17  
18  
19

#### **Withdrawal of appointed assistant or substitute decision maker** 20

194.(1) A person may, with the tribunal's leave, withdraw as appointed assistant or substitute decision maker for a decision the person has been given power to make. 21  
22  
23

(2) If the tribunal gives leave for an appointed assistant or substitute decision maker to withdraw for a decision, the tribunal may appoint someone else to replace the withdrawing person for the decision. 24  
25  
26

(3) If an adult who has given a chosen decision maker power to make a 27

decision has decision-making capacity for the decision, the chosen decision maker may also withdraw as chosen decision maker for the decision by signed notice given to the adult. 1  
2  
3

(4) If— 4

(a) a request to register an enduring power of attorney or tribunal order has been lodged under the *Land Title Act 1994*; and 5  
6

(b) a substitute decision maker withdraws under this section; 7

the substitute decision maker must take reasonable steps to deregister the registered power of attorney, or registered order, under that Act. 8  
9

## CHAPTER 9—TRIBUNAL PROCESS 10

### PART 1—GENERAL 11

#### Members constituting tribunal 12

195. At a hearing, the tribunal must be constituted by 3 members as follows— 13  
14

(a) the president, deputy president or a member who was a person eligible for appointment because of a legal background;<sup>102</sup> 15  
16

(b) a member who was a person eligible for appointment because of a professional background;<sup>103</sup> 17  
18

(c) a member who was a person eligible for appointment because of personal experience.<sup>104</sup> 19  
20

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<sup>102</sup> See section 270(3)(a).

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<sup>103</sup> See section 270(3)(b).

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<sup>104</sup> See section 270(3)(c).

<b>Presiding member</b>	1
196. At the hearing of a proceeding before the tribunal, the president, deputy president or member who was a person eligible for appointment because of a legal background <sup>105</sup> presides.	2 3 4
<b>Way procedure to be decided</b>	5
197. In a proceeding before the tribunal, procedure is within the presiding member's discretion if it is not provided for by—	6 7
(a) this Act; or	8
(b) tribunal rules; <sup>106</sup> or	9
(c) presidential directions. <sup>107</sup>	10
<b>Way question of law to be decided</b>	11
198. A question of law arising in a proceeding before the tribunal is to be decided according to the presiding member's opinion.	12 13
<b>Way other question to be decided</b>	14
199. If the members constituting the tribunal for a particular proceeding are divided in opinion about the decision to be made on a question (other than a question of law)—	15 16 17
(a) if there is a majority of the same opinion—the question is decided according to the majority opinion; or	18 19
(b) otherwise—the question is decided according to the opinion of the presiding member.	20 21

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<sup>105</sup> See section 270(3)(a).

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<sup>106</sup> See section 278 (Rule-making power).

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<sup>107</sup> See section 279(2).



**Informal**

**200.(1)** A proceeding before the tribunal must be conducted as simply and quickly as the requirements of this Act and an appropriate consideration of the matters before the tribunal allow.

**(2)** The tribunal is not bound by the rules of evidence and may inform itself on a matter in a way it considers appropriate.

**Procedural fairness**

**201.(1)** The tribunal must observe the rules of procedural fairness.

**(2)** Each participant in a proceeding must be given a reasonable opportunity to present the participant's case, and in particular, to inspect a document to which the tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions about the document.

**(3)** However, the tribunal may displace the right to inspect in a confidentiality order.<sup>108</sup>

**Open**

**202.(1)** Generally, a hearing by the tribunal of a proceeding must be in public.

**(2)** However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a "confidentiality order")—

- (a) give directions about the persons who may or may not be present; and
- (b) direct a hearing or part of a hearing take place in private; and
- (c) give directions prohibiting or restricting the publication of information given before the tribunal (whether in public or in private), or of matters contained in documents filed with, or received by, the tribunal; and

<sup>108</sup> Section 202(2)(d) allows the tribunal to impose a prohibition or restriction on inspection of a document if this is desirable because of its confidential nature or for another reason.

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(d) give directions prohibiting or restricting the disclosure to some or all of the participants in a proceeding of—	1 2
(i) information given before the tribunal; or	3
(ii) matters contained in documents filed with, or received by, the tribunal; or	4 5
(iii) the tribunal's decision or reasons.	6
(3) The tribunal may make the order on its own initiative or on the application of a participant.	7 8
(4) A person must not contravene an order under this section unless the person has a reasonable excuse.	9 10
Maximum penalty—	11
<b>Procedural directions</b>	12
<b>203.(1)</b> Directions about the procedure to be followed for a proceeding may be given—	13 14
(a) if the directions are of general application or apply to a class of proceeding—by the president; or	15 16
(b) if the directions apply to a particular proceeding that has started—by the president or presiding member.	17 18
<b>(2)</b> Without limiting subsection (1), a procedural direction may—	19
(a) join a person as a party to a proceeding before the tribunal; or	20
(b) engage a person with appropriate knowledge or experience, including, for example, a person with appropriate communication skills or appropriate cultural or social knowledge or experience, to assist the tribunal in a proceeding; or	21 22 23 24
(c) require a person to undergo examination by a doctor <sup>109</sup> or	25

<sup>109</sup> A “doctor” is a person registered as a medical practitioner and whose name remains on the register of medical practitioners, Queensland—see *Acts Interpretation Act 1954*, section 36 and *Medical Act 1939*, section 4.

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psychologist <sup>110</sup> in the ordinary course of the doctor's medical practice or the psychologist's practice; or	1 2
(d) require the person the subject of the proceeding to be brought before the tribunal.	3 4
(3) A procedural direction may be changed or revoked by a person who has power to give the direction.	5 6
(4) The tribunal must pay the amount prescribed by regulation for assistance given by a person engaged, or an examination required, under this section.	7 8 9
<b>Tribunal may change procedure</b>	10
<b>204.</b> If the tribunal considers it in the interests of justice for a proceeding, the tribunal may, by order, change a procedure under this Act.	11 12
(2) The tribunal may act on its own initiative or on the application of a participant in a proceeding.	13 14
<i>Example—</i>	15
Despite the requirement in section 210(1) for an application to be written, the tribunal may accept an oral application if it considers it in the interests of justice.	16 17
<b>Use of technology</b>	18
<b>205.(1)</b> The tribunal may allow a person to take part in a proceeding by using technology (“ <b>participation using technology</b> ”), including—	19 20
(a) telephone conferencing; or	21
(b) video conferencing; or	22
(c) another form of telecommunication, including, for example, fax or computer.	23 24
(2) A person who takes part in a proceeding under subsection (1) may be taken to have attended in person at the proceeding.	25 26

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<sup>110</sup> A “**psychologist**” is a person registered as a psychologist under the *Psychologists Act 1977* and whose name remains on the register—see *Psychologists Act 1977*, section 4 and schedule 2 (Dictionary).

<b>Publication about proceeding or disclosure of identity</b>	1
<b>206.(1)</b> If the tribunal is satisfied that publication of information about a proceeding is in the public interest, the tribunal may, by order, permit publication of the information.	2 3 4
<b>(2)</b> If the tribunal is satisfied that publication of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit disclosure of the person's identity.	5 6 7
<b>(3)</b> A person must not, without reasonable excuse, publish information about a proceeding, or disclose the identity of a person involved in a proceeding, unless the tribunal has, by order, permitted the publication or disclosure.	8 9 10 11
Maximum penalty—	12
<b>(4)</b> In this section—	13
(a) a reference to information about a proceeding includes a reference to—	14 15
(i) information given before the tribunal; or	16
(ii) matters contained in documents filed with, or received by, the tribunal; or	17 18
(iii) the tribunal's decision or reasons.	19
(b) a reference to involvement in a proceeding includes a reference to—	20 21
(i) making an application to the tribunal; and	22
(ii) being a person about whom an application is made; and	23
(iii) being a participant in the hearing of a proceeding; and	24
(iv) giving information or documents to a person who is performing a function under this Act; and	25 26
(v) appearing as a witness at the hearing of a proceeding; and	27
(vi) involvement in a prosecution for an offence against this Act.	28

<b>Location</b>	1
<b>207.</b> A proceeding before the tribunal or a part of the proceeding may be conducted at any place in Queensland.	2 3
<b>No filing fee payable</b>	4
<b>208.</b> A fee is not payable to the tribunal for making an application, or filing another document, under this Act.	5 6
<b>PART 2—APPLICATIONS</b>	
	7
<b>Scope of applications</b>	8
<b>209.(1)</b> An application may be made to the tribunal for a declaration, order, direction, recommendation or advice about something in, or related to, this Act.	9 10 11
<b>(2)</b> The application may be by the adult concerned or another interested person unless this Act states otherwise.	12 13
<b>How to apply</b>	14
<b>210.(1)</b> An application must be written <sup>111</sup> and filed with the tribunal.	15
<b>(2)</b> The application must include the following—	16
(a) the reasons for the application;	17
(b) to the best of the applicant's knowledge, information about the following people—	18 19
(i) the applicant;	20
(ii) the adult concerned in the application;	21

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<sup>111</sup> However, the tribunal may change a procedure (including, for example, by accepting an oral application) if it considers it in the interests of justice—see section 204 (Tribunal may change procedure).

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(iii) the members of the adult's family;	1
(iv) any primary carer of the adult (other than a family member);	2
(v) all current appointed assistants and substitute decision makers for the adult;	3 4
(c) other information prescribed under the regulations.	5
(3) The information required under subsection (2) is to enable the tribunal to give notice of the hearing and must consist of—	6 7
(a) each person's name; and	8
(b) either—	9
(i) details the applicant knows of the person's address and telephone and facsimile number; or	10 11
(ii) if the applicant does not know the details—a way known to the applicant of contacting the person.	12 13
<b>Application for appointed assistant or decision maker</b>	14
<b>211.</b> An application for the appointment of an appointed assistant or appointed decision maker must include the written agreement to appointment of the proposed appointee.	15 16 17
<b>Tribunal advises people concerned of hearing</b>	18
<b>212.(1)</b> At least 7 days before the hearing of an application about a matter, the tribunal must give notice of the hearing to the adult concerned in the matter and, as far as practicable, to the following—	19 20 21
(a) the applicant;	22
(b) the members of the adult's family;	23
(c) any primary carer of the adult (other than a family member);	24
(d) all current appointed assistants and substitute decision makers for the adult;	25 26
(e) the adult guardian;	27
(f) the public trustee;	28

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- (g) anyone else the tribunal considers should be notified. 1
- (2) Notice to the adult must be given in the way the tribunal considers most appropriate having regard to the person's needs. 2  
3
- Example—* 4
- If the tribunal is aware the adult is not literate in English but is literate in another language, the notice must be given in the other language. 5  
6
- (3) However, the adult's failure to understand the notice does not affect its validity. 7  
8
- (4) The tribunal may— 9
- (a) dispense with the requirement to give notice to all or any of the people listed in subsection (1), other than the adult; and 10  
11
- (b) reduce the time stated in subsection (1). 12
- (5) Failure to comply with the requirement to give notice to the adult invalidates a hearing and the tribunal's decision about an application. 13  
14
- (6) Failure to comply with the requirement to give notice to all or any of the other people listed in subsection (1) does not affect the validity of a hearing or the tribunal's decision about an application. 15  
16  
17
- Protection if unaware of invalidity** 18
- 213.(1)** A person appointed as an appointed assistant or appointed decision maker for an adult by an invalid tribunal order who, without knowing of the order's invalidity, purports to use power given by the order does not incur any liability (either to the adult or anyone else) because of the invalidity. 19  
20  
21  
22  
23
- (2) A transaction between— 24
- (a) a person appointed as appointed decision maker by an invalid tribunal order; and 25  
26
- (b) a person who does not know of the invalidity; 27
- is, in favour of the second person, as valid as if the tribunal order were valid. 28  
29
- (3) In this section— 30
- “know”, of a tribunal order's invalidity, includes have reason to believe 31

notice of the hearing of an application was not given to the adult as required. 1  
2

**Withdrawal of application** 3

**214.(1)** An applicant may withdraw the application at any time by written notice filed with the tribunal. 4  
5

**(2)** On the notice being filed, the application lapses. 6

**PART 3—PARTICIPATION** 7

**Right of participant to appear** 8

**215.(1)** A participant in a proceeding before the tribunal may appear in person. 9  
10

**(2)** If the participant is a corporation, the corporation may appear through an officer of the corporation. 11  
12

**Representative may be used with tribunal's leave** 13

**216.(1)** A participant may, with the tribunal's leave, be represented by a lawyer<sup>112</sup> or agent. 14  
15

**(2)** A person summoned to appear at a hearing may, with the tribunal's leave, be represented by a lawyer or agent. 16  
17

**Representative may be appointed** 18

**217.(1)** If in a proceeding before the tribunal about an adult— 19

(a) the adult is not represented in the proceeding; or 20

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<sup>112</sup> "Lawyer" means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.



(b) the adult is represented in the proceeding by a representative whom the president or presiding member considers to be unsuitable to represent the adult's interests;	1 2 3
the president or the presiding member may appoint a representative to represent the adult's views, wishes and interests.	4 5
(2) A proceeding may be adjourned to allow the appointment to be made.	6
<b>Tribunal to decide who are interested persons</b>	7
218.(1) If it is necessary to decide whether a person is an interested person under this Act, the tribunal may decide whether the person has a relevant appropriate interest. <sup>113</sup>	8 9 10
(2) If the tribunal decides a person does not have a relevant appropriate interest and the person asks for the tribunal's reasons, the tribunal must give the person written reasons for its decision.	11 12 13
<b>Costs</b>	14
219.(1) Each participant in a proceeding is to bear the participant's own costs of the proceeding.	15 16
(2) However, the tribunal may order an applicant to pay a participant's costs in exceptional circumstances, including, for example, if the tribunal considers the application is frivolous or vexatious.	17 18 19
<b>Assistance</b>	20
220.(1) A person who—	21
(a) has made, or proposes to make, an application to the tribunal; or	22
(b) is a participant in a proceeding before the tribunal;	23
may apply to the Minister for legal, financial or other assistance for the proceeding.	24 25
(2) The Minister may grant assistance for the proceeding if the Minister is satisfied—	26 27

<sup>113</sup> See "interested person"—schedule 2 (Dictionary).

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- (a) it would involve hardship to the applicant for assistance if the application were refused; and
- (b) it is reasonable for the application for assistance to be granted.
- (3) The grant of assistance may be on terms the Minister considers appropriate.

**PART 4—PROCEEDING****Tribunal may stay decision pending hearing**

**221.(1)** If a person applies to the tribunal about an adult's decision that has been made, the person may also apply to the tribunal for a stay of the decision.

(2) The tribunal may stay the decision to secure the effectiveness of the application.

(3) A stay—

- (a) may be given on the conditions the tribunal considers appropriate; and
- (b) operates for the period fixed by the tribunal; and
- (c) may be revoked or amended by the tribunal.

(4) The period of a stay must not extend past the time when the tribunal decides the application.

**Interim order**

**222.(1)** If the tribunal is satisfied urgent action is required, it may make an interim order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act.

(2) An interim order has effect for the period stated in the order.

(3) The maximum period that may be stated in an interim order is

10 days.	1
(4) An interim order may be renewed.	2
<b>Tribunal to ensure it has all relevant material</b>	3
223. To hear and decide a matter in a proceeding, the tribunal must ensure, as far as it considers it practicable, it has all the relevant material.	4 5
<b>Tribunal may proceed without further information</b>	6
224.(1) If the tribunal considers urgent or special circumstances justify it doing so, the tribunal may proceed to decide a matter on the information before it without receiving further information.	7 8 9
(2) If all the participants in a proceeding agree, the tribunal may also proceed to decide a matter in the proceeding on the information before it when the agreement was reached without receiving further information.	10 11 12
(3) Before the participants agree, the tribunal must ensure they are aware of the material on which the matter will be decided.	13 14
<b>Tribunal may proceed in absence of participant</b>	15
225. The tribunal may proceed in the absence of a participant who has had reasonable notice of a proceeding.	16 17
<b>Tribunal may adjourn proceeding</b>	18
226. The tribunal may adjourn a proceeding.	19
<b>Report by tribunal staff</b>	20
227.(1) The tribunal may—	21
(a) receive in evidence in a proceeding a written report by tribunal staff on a matter in the proceeding; and	22 23
(b) have regard to the matter contained in the report.	24
(2) Generally, if the tribunal receives the report in evidence in a proceeding, the adult concerned in the proceeding and each participant in the	25 26

proceeding must be given a copy of the report. 1

(3) However, the right to be given a copy may be displaced in a 2  
 confidentiality order.<sup>114</sup> 3

**Witnesses** 4

**228.(1)** The tribunal may receive evidence on oath or affirmation or by 5  
 statutory declaration. 6

(2) In a proceeding, the president or the member who is to preside, or 7  
 presides, at the hearing, may, by written notice given to a person, require the 8  
 person to attend the hearing at a stated time and place to give evidence or 9  
 produce stated documents or things. 10

(3) The member presiding at a hearing— 11

(a) may require a person appearing at the hearing to give evidence 12  
 either to take an oath or make an affirmation; and 13

(b) may administer an oath or affirmation to a person appearing as a 14  
 witness at the hearing; and 15

(c) for participation by technology<sup>115</sup>—may make arrangements that 16  
 appear to the member to be appropriate in the circumstances for 17  
 administering an oath or affirmation to the person. 18

(4) The presiding member may allow a person appearing as a witness at 19  
 the hearing to give information by tendering a written statement, verified, if 20  
 the member directs, by oath or affirmation. 21

**Witness fees and expenses** 22

**229.(1)** The tribunal may make an order as to fees and expenses to be 23  
 paid to a witness. 24

(2) The fees and expenses ordered must not be more than the fees and 25  
 expenses allowable to witnesses under the *Magistrates Courts Rules 1960*. 26

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<sup>114</sup> Section 202(2) allows the tribunal to impose a prohibition or restriction on  
 access to a report if this is desirable because of the report's confidential nature  
 or for another reason.

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<sup>115</sup> See section 205 (Use of technology).

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(3) In this section—	1
“witness” means a person actually in attendance in a proceeding under this Act and includes an interpreter required to interpret the evidence of a witness to the tribunal.	2 3 4
<b>Offences by witnesses</b>	5
<b>230.(1)</b> A person given notice under section 228 must not, without reasonable excuse—	6 7
(a) fail <sup>116</sup> to attend as required by the notice; or	8
(b) fail to continue to attend as required by the member presiding at the hearing until excused from further attendance.	9 10
Maximum penalty—	11
(2) A person appearing as a witness at a hearing must take an oath or make an affirmation when required by the presiding member.	12 13
Maximum penalty—	14
(3) Also a person appearing as a witness at a hearing must not, without reasonable excuse—	15 16
(a) fail <sup>116</sup> to answer a question the person is required to answer by the presiding member; or	17 18
(b) fail to produce a document or thing the person is required to produce by a notice under section 228.	19 20
Maximum penalty—	21
(4) It is not a reasonable excuse for a person to fail to answer a question because answering the question might tend to incriminate the person.	22 23
(5) It is not a reasonable excuse for a person to fail to produce a document or thing because producing the document or thing might tend to incriminate the person.	24 25 26
(6) However, a person’s answer that might tend to incriminate the person, or a person’s production of a document or thing that might tend to incriminate the person, is not admissible in evidence against the person in a	27 28 29

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<sup>116</sup> “Fail” includes refuse—see *Acts Interpretation Act 1954*, section 36.

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civil or criminal proceeding, other than—	1
(a) a proceeding for an offence against section 234, 235 or 236 <sup>117</sup> or another offence about the falsity of the answer, document or thing; or	4
(b) if the answer or production is relevant to the person's employment—a proceeding brought by or for the person against the person's employer; or	7
(c) if the answer or production is relevant to—	8
(i) the person's professional registration or licence; or	9
(ii) the person's registration, licence or approval as proprietor or operator of an institution or facility involved in the care of adults with a mental or intellectual impairment;	12
a proceeding about the registration, licence or approval.	13
 <b>Tribunal may dismiss frivolous etc. applications</b>	 14
<b>231.(1)</b> The tribunal may dismiss an application if the tribunal is satisfied the application is—	16
(a) frivolous or vexatious; or	17
(b) misconceived or lacking in substance.	18
<b>(2)</b> If the tribunal considers it appropriate, the tribunal may also direct that the applicant must not, without the tribunal's leave, make a subsequent application to the tribunal of a type stated in the direction.	21
<b>(3)</b> The tribunal may discharge or change a direction under subsection (2).	23
 <b>Advice, directions and recommendations</b>	 24
<b>232.(1)</b> Once an application about a matter has been made to the tribunal, the tribunal may—	26

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<sup>117</sup> Section 234 deals with false or misleading information.  
Section 235 deals with false, misleading or incomplete documents.  
Section 236 deals with influencing participants.

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- 
- (a) give advice or directions about the matter it considers appropriate; 1  
or 2
- (b) make recommendations it considers appropriate about action a 3  
participant should take. 4
- (2) If the tribunal gives advice or a direction or makes a 5  
recommendation, it may also do the following— 6
- (a) continue with the application; 7
- (b) adjourn the application; 8
- (c) dismiss the application; 9
- (d) reserve leave for a participant to apply to the tribunal for 10  
directions about implementing the recommendation. 11
- (3) A substitute decision maker who acts under the tribunal's advice, 12  
directions or recommendations is taken to have complied with this Act 13  
unless the substitute decision maker knowingly gave the tribunal false or 14  
misleading information relevant to the tribunal's advice, directions or 15  
recommendations. 16
- (4) If the tribunal gives directions to a substitute decision maker, the 17  
substitute decision maker must comply with them unless the substitute 18  
decision maker has a reasonable excuse. 19
- (5) If the tribunal gives directions to an appointed assistant, the appointed 20  
assistant must comply with them unless the appointed assistant has a 21  
reasonable excuse. 22

<b>Fabricating evidence</b>	1
233. The tribunal is a tribunal for the purposes of the Criminal Code, section 126. <sup>118</sup>	2 3
<b>False or misleading statements</b>	4
234.(1) A person must not—	5
(a) state anything to the tribunal, registrar or another tribunal staff member the person knows is false or misleading in a material particular; or	6 7 8
(b) omit from a statement made to the tribunal, registrar or another tribunal staff member anything without which the statement is, to the person's knowledge, misleading in a material particular.	9 10 11
Maximum penalty—	12
(2) It is enough for a complaint against a person for an offence against subsection (1) to state the statement made was false or misleading to the person's knowledge.	13 14 15
<b>False, misleading or incomplete documents</b>	16
235.(1) A person must not give the tribunal, registrar or another tribunal staff member a document containing information the person knows is false, misleading or incomplete in a material particular.	17 18 19
Maximum penalty—	20
(2) Subsection (1) does not apply to a person if the person, when giving the document—	21 22

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<sup>118</sup> The Criminal Code, section 126 provides as follows—

**'Fabricating evidence**

126.(1) Any person who, with intent to mislead any tribunal in any judicial proceeding—

- (a) fabricates evidence by any means other than perjury or counselling or procuring the commission of perjury; or
- (b) knowingly makes use of such fabricated evidence; is guilty of a crime.'



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- (a) tells the tribunal, registrar or tribunal staff member, to the best of the person's ability, how it is false, misleading or incomplete; and 1  
2
- (b) if the person, has, or can reasonably obtain, the correct information—gives the correct information. 3  
4
- (3) It is enough for a complaint against a person for an offence against subsection (1) to state the statement made was false, misleading or incomplete to the person's knowledge. 5  
6  
7

**Influencing participants** 8

**236.** A person must not improperly influence a person in relation to the person's participation in a proceeding (whether as a member of the tribunal or as a witness) to act other than in the course of the person's duty in relation to the proceeding. 9  
10  
11  
12

Maximum penalty— 13

**Contempt of tribunal** 14

**237.** A person must not, without reasonable excuse— 15

(a) insult a member in relation to the performance of the member's functions as a member; or 16  
17

(b) interrupt a tribunal proceeding; or 18

(c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place the tribunal is sitting; or 19  
20

(d) do anything that would, if the tribunal were a court of record, be a contempt of court. 21  
22

Maximum penalty— 23

**Obstructing tribunal** 24

**238.(1)** A person must not obstruct or improperly influence the conduct of a tribunal proceeding or attempt to do so. 25  
26

Maximum penalty— 27

(2) In this section— 1  
 “obstruct” includes hinder, resist and attempt to obstruct. 2

**Protection of members, representatives and witnesses 3**

239.(1) A member has, in the honest performance of the member’s 4  
 duties as a member, the same protection and immunity as a Supreme Court 5  
 judge. 6

(2) A person representing a participant in a proceeding under this Act has 7  
 the same protection and immunity as a barrister appearing for a party in a 8  
 proceeding in the Supreme Court. 9

(3) A person given notice under section 228 or appearing at a proceeding 10  
 under this Act has the same protection and immunity as a witness in a 11  
 proceeding in the Supreme Court. 12

**PART 5—SPECIFIC PROCEEDINGS 13**

**Determination of decision-making capacity 14**

240.(1) The tribunal may make a declaration about an individual’s 15  
 decision-making capacity. 16

(2) The tribunal may do this on its own initiative or on the application of 17  
 the individual or another interested person. 18

**Prerequisite in determining decision-making capacity 19**

241.(1) In part, to have decision-making capacity for a decision, an 20  
 individual must, whether with or without assistance, be capable of 21  
 communicating the decision in some way.<sup>119</sup> 22

(2) In determining whether an individual is capable of communicating 23  
 the decision in some way, the tribunal must investigate the use of all 24

<sup>119</sup> See definition of “decision-making capacity”—schedule 2 (Dictionary).

reasonable ways of facilitating communication, including, for example, sign boards.	1 2
<b>Effect of declaration about capacity to enter contract</b>	3
<b>242.</b> A declaration about whether an adult had decision-making capacity to enter a contract is binding in a subsequent proceeding in which the validity of the contract is in issue.	4 5 6
<b>Ratification of decision of informal decision maker</b>	7
<b>243.(1)</b> The tribunal may, by order, approve a decision an informal decision maker proposes to make for an adult with impaired decision-making capacity for the decision.	8 9 10
<b>(2)</b> The tribunal may, by order, ratify a decision an informal decision maker has made for an adult with impaired decision-making capacity for the decision.	11 12 13
<b>(3)</b> The tribunal may only approve or ratify the decision if—	14
<b>(a)</b> it considers the informal decision maker proposes to act, or has acted, honestly and with the degree of care that is reasonable for a person with the informal decision maker's experience and expertise; and	15 16 17 18
<b>(b)</b> the proposed decision or decision is not an excluded personal decision or a special consent health care decision.	19 20
<b>(4)</b> The tribunal may make the order on its own initiative or on the application of the adult or informal decision maker.	21 22
<b>(5)</b> If the tribunal approves or ratifies the decision, the informal decision maker does not incur any liability (either to the adult or anyone else) for making the decision.	23 24 25
<b>(6)</b> In this section—	26
<b>"informal decision maker"</b> , for an adult's decision, means a person who makes the decision for the adult and is—	27 28
<b>(a)</b> a member of the adult's support network; and	29
<b>(b)</b> not a substitute decision maker for the decision.	30

**Records and audit**

244.(1) If a substitute decision maker has power to make a financial decision, or decision about a legal matter, for an adult, the tribunal may make an order that—

- (a) the substitute decision maker files in the tribunal, and serves on the applicant, a summary of receipts and expenditure under the power; or
- (b) the substitute decision maker files in the tribunal, and serves on the applicant, more detailed accounts of dealings and transactions under the power; or
- (c) the accounts be audited by an auditor appointed by the tribunal and that a copy of the auditor's report be given to the tribunal and the applicant.

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

(3) The tribunal may make an order under subsection (1)(b) or (c) only if the tribunal suspects on reasonable grounds a relevant interest of the adult has not been, or is not being, adequately protected.

(4) The tribunal may make an order about payment of the auditor's costs.

**Entry and removal order**

245.(1) If the adult guardian or an interested person considers an adult with impaired decision-making capacity is at risk of neglect, exploitation or abuse, the adult guardian or interested person may apply to the tribunal for an entry and removal order.

(2) The tribunal may make an entry and removal order if the tribunal is satisfied there is enough evidence—

- (a) the adult has impaired decision-making capacity; and
- (b) there is an immediate danger to the adult because of neglect, exploitation or abuse.

(3) An entry and removal order authorises the adult guardian to take the action stated in it.

(4) An entry and removal order must state—

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- (a) the purpose for which it is made; and 1
- (b) the place, and hours during which, it authorises the adult guardian to enter; and 2  
3
- (c) the adult whose removal it authorises; and 4
- (d) whether the adult guardian is authorised to be accompanied by police officers who may use necessary and reasonable force; and 5  
6
- (e) the day when it ceases to have effect. 7
- (5) An entry and removal order has effect for a maximum of 7 days from the day it is made. 8  
9
- (6) A person must not obstruct the adult guardian or a police officer acting under an entry and removal order. 10  
11
- Maximum penalty— 12
- (7) As soon as practicable after an adult has been removed under an entry and removal order, the applicant for the order must apply to the tribunal— 13  
14
- (a) if there is no appointed assistant or substitute decision maker for the adult—for the tribunal to decide whether an appointed assistant or appointed decision maker should be appointed; and 15  
16  
17
- (b) if there is an appointed assistant or substitute decision maker for the adult—for the tribunal to decide whether another order, direction, advice or recommendation should be made or given. 18  
19  
20

**PART 6—DECISION** 21**Decision within reasonable time** 22

- 246.** The tribunal must give its decision on a matter involved in a proceeding within a reasonable time after the matter is heard. 23  
24

**Written reasons for decision**

**247.** The tribunal must give written reasons for its decision within 28 days after giving its decision.<sup>120</sup>

**Decision and reasons to each participant etc.**

**248.(1)** Generally, the tribunal must give a copy of its decision, and written reasons for its decision, on an application about a matter to—

- (a) the adult concerned in the matter; and
- (b) each participant in the proceeding.

**(2)** Generally, the tribunal must also give a copy of its decision to each person given notice of the hearing of the application.

**(3)** However, a confidentiality order may displace the requirement to give copies of its decision or reasons.<sup>121</sup>

**(4)** The tribunal may also give a copy of its decision or its reasons to anyone else as required by a tribunal order.

**Proof of orders and decisions**

**249.** A document purporting to be certified by the registrar and to be a copy of an order or decision of the tribunal, is, in a proceeding (whether or not before the tribunal) or for registration, or deregistration, under the *Land Title Act 1994*, evidence of the order or decision.

<sup>120</sup> *Acts Interpretation Act 1954*, section 27B provides as follows—

**'Content of statement of reasons for decision**

**27B.** If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—

- (a) set out the findings on material questions of fact; and
- (b) refer to the evidence or other material on which those findings were based.'

<sup>121</sup> Section 202(2) allows the tribunal to impose a prohibition or restriction on access to its decision or reasons if this is desirable because of their confidential nature or for another reason.

**PART 7—APPEAL****Tribunal may suspend decision pending appeal**

**250.(1)** The tribunal may give a stay of a tribunal decision appealed against to secure the effectiveness of the appeal.

**(2)** A stay—

(a) may be given on the conditions the tribunal considers appropriate; and

(b) operates for the period fixed by the tribunal; and

(c) may be revoked or amended by the tribunal.

**(3)** The period of a stay must not extend past the time when the appeal is decided.

**(4)** In this section—

“tribunal decision” includes an order or direction of the tribunal.

**Appellant**

**251.(1)** An eligible person may appeal against a tribunal decision to the Supreme Court.<sup>122</sup>

**(2)** The Supreme Court’s leave is not required for an appeal only on a question of law.

**(3)** However, the Supreme Court’s leave is required for an appeal on another question.

**(4)** In this section—

“tribunal decision” includes a declaration, order or direction of the tribunal.

“eligible person” means—

(a) the person whose decision-making needs were under consideration in the tribunal’s proceeding; or

<sup>122</sup> “Supreme Court” means a judge of the Supreme Court—see schedule 2 (Dictionary).

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(b) the applicant in the tribunal's proceeding; or	1
(c) a person proposed for appointment by the tribunal proceeding; or	2
(d) a person whose power as substitute decision maker was changed or removed by the tribunal proceeding; or	3 4
(e) the adult guardian; or	5
(f) the public trustee; or	6
(g) the Attorney-General; or	7
(h) a person given leave to appeal by the Supreme Court.	8
<b>How to start appeal</b>	9
<b>252.(1) An appeal is started by—</b>	10
(a) filing written notice of appeal with the registrar of the Supreme Court; and	11 12
(b) serving a copy of the notice—	13
(i) if the appellant is not the adult concerned in the tribunal's proceeding—the adult; and	14 15
(ii) the tribunal; and	16
(c) complying with rules of court applying to the appeal.	17
<b>(2) The notice of appeal must be filed—</b>	18
(a) within 28 days after the day on which the appellant becomes aware of the tribunal's decision; or	19 20
(b) within the further time allowed by the Supreme Court.	21
<b>(3) The notice of appeal must state fully the grounds of the appeal and the facts relied on.</b>	22 23
<b>(4) In this section—</b>	24
<b>“day on which the appellant becomes aware of the tribunal's decision”,</b> for an appellant who must be given a copy of the reasons for the decision under section 248, means the day on which the appellant is given the copy.	25 26 27 28



<b>Additional service of notice of appeal</b>	1
253. The Supreme Court may direct notice of the appeal to be served on all or any participants in the tribunal proceeding or on a person not a participant.	2 3 4
<b>Application to be made party to appeal</b>	5
254.(1) An interested person may apply to the Supreme Court to be made a party to the appeal.	6 7
(2) The court may grant or refuse the application.	8
<b>Nature of appeal</b>	9
255. The Supreme Court may decide the appeal on—	10
(a) the material before the tribunal; and	11
(b) further evidence (if any) the court considers appropriate to receive.	12 13
<b>Appeal powers</b>	14
256.(1) In deciding an appeal, the Supreme Court may—	15
(a) confirm the decision appealed against; or	16
(b) change the decision appealed against; or	17
(c) set aside the decision appealed against and make a decision in substitution for the decision set aside; or	18 19
(d) set aside the decision appealed against and return the issue to the tribunal with directions or recommendations.	20 21
<b>Appeal costs</b>	22
257.(1) Each party to an appeal is to bear the party's own costs of the appeal.	23 24
(2) However, the Supreme Court may order a party to an appeal to pay costs to another party if the Supreme Court considers—	25 26

- 
- (a) the appeal was frivolous or vexatious; or 1
  - (b) the party has not been given reasonable notice of intention to 2  
apply for an adjournment; or 3
  - (c) the party has incurred costs because the appellant defaulted in the 4  
procedural requirements. 5

## **PART 8—RECOGNITION OF ORDER MADE UNDER ANOTHER LAW**

### **Application** 8

**258.** A person may apply to the tribunal to register a relevant order made 9  
in another State or a foreign jurisdiction prescribed under the regulations. 10

### **Registration** 11

**259.** The tribunal must register the order only if— 12

- (a) the order was made under a provision of a law of another State or 13  
a prescribed foreign jurisdiction that substantially corresponds to 14  
a provision of this Act; and 15
- (b) the original order or a certified copy of the order has been filed 16  
with it. 17

### **Effect of registration** 18

**260.** The effect of registration of an order is the order is treated (except 19  
for an appeal) as if it were an order made by the tribunal. 20

### **Notice of registration etc. to original maker** 21

**261.(1)** As soon as reasonably practicable after registering an order, the 22  
tribunal must advise the entity that originally made the order of the 23  
registration. 24

(2) As soon as reasonably practicable after the tribunal takes any subsequent action about the order (including, for example, making a further order or changing or revoking the order), the tribunal must advise the entity that originally made the order of the action.

## **PART 9—OTHER**

### **Enforcement of orders**

262.(1) A tribunal order (other than an order entitling a person to payment) may be registered in a court having jurisdiction to make the order.

(2) A tribunal order entitling a person to payment may be registered in a court having jurisdiction for the recovery of debts up to the amount remaining unpaid.

(3) Proceedings for the enforcement of a tribunal order may be taken as if the tribunal order were an order of the court in which the tribunal order is registered.

## **CHAPTER 10—TRIBUNAL ADMINISTRATION**

### **PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS**

#### **Tribunal**

263.(1) An Assisted and Substituted Decisions Tribunal is established.

(2) It consists of the president, deputy president and members.

*Assisted and Substituted Decision Making*

<b>Functions</b>	1
<b>264.(1)</b> The tribunal has the functions given to it by this Act, including the following functions—	2 3
(a) making declarations about the decision-making capacity <sup>123</sup> of an adult, appointed assistant or substitute decision maker;	4 5
(b) making and reviewing orders appointing appointed assistants and appointed decision makers;	6 7
(c) making declarations, orders or recommendations, or giving a directions or advice, in relation to the following—	8 9
(i) enduring powers of attorney;	10
(ii) advance health care directives;	11
(iii) appointed assistants;	12
(iv) substitute decision makers;	13
(v) related matters;	14
(d) to the extent no other person or entity is authorised by an Act to make the decision <sup>124</sup> —making special consent health care decisions for adults with impaired decision-making capacity for the decisions;	15 16 17 18
(e) registering a relevant order made in another State or a foreign jurisdiction prescribed under the regulations.	19 20
<b>(2)</b> The tribunal also has the other functions given to it by another Act.	21

<sup>123</sup> Capacity to communicate a decision, whether with or without assistance, is an element of decision-making capacity—see schedule 2 (Dictionary). In determining communication capacity, the tribunal must investigate the use of all reasonable ways of facilitating communication—see section 241 (Prerequisite in determining decision-making capacity).

<sup>124</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decision, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

<b>Powers</b>	1
<b>265.(1)</b> The tribunal has the powers given under this Act.	2
<b>(2)</b> The tribunal also may do all things necessary or convenient to be done for performing the tribunal's functions.	3 4
<b>Nonapplication of Supreme Court of Queensland Act 1991, s 72</b>	5
<b>266.</b> The <i>Supreme Court of Queensland Act 1991</i> , section 72 <sup>125</sup> does not apply to the tribunal.	6 7
<b>PART 2—ADMINISTRATIVE PROVISIONS</b>	8
<b>Appointment of president and deputy president</b>	9
<b>267.(1)</b> There are to be a president and deputy president of the tribunal appointed on a full-time basis by the Governor in Council.	10 11
<b>(2)</b> The president and deputy president are members of the tribunal.	12
<b>(3)</b> A person is eligible for appointment under this section only if the person is a lawyer <sup>126</sup> of at least 5 years standing whose knowledge or experience, in the Minister's opinion, makes the person suitable to be the president or deputy president.	13 14 15 16
<b>(4)</b> A person ceases to be a member if the person ceases to be the president or deputy president.	17 18

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<sup>125</sup> The *Supreme Court of Queensland Act 1991*, section 72 allows the Litigation Reform Commission to make reports and recommendations about courts and certain tribunals.

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<sup>126</sup> "Lawyer" means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—see *Acts Interpretation Act 1954*, sections 33A and 36.

**President may delegate to deputy president**

1

268. The president may delegate the president's powers under this Act to the deputy president.

2  
3**Training**

4

269.(1) It is the duty of the president to ensure members are adequately and appropriately trained to enable the tribunal to perform its functions effectively and efficiently.

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(2) The president may direct a member to attend at, and take part in, a training program stated in the direction.

8  
9

(3) A member must not, without reasonable excuse, fail to comply with a direction given under subsection (2).

10  
11**Appointment of members**

12

270.(1) The members are to be appointed by the Governor in Council.

13

(2) Members may be appointed as full-time or part-time members.

14

(3) A person is eligible for appointment as a member only if the person is—

15  
16

(a) a lawyer<sup>127</sup> of at least 5 years standing whose knowledge or experience, in the Minister's opinion, makes the person suitable to be a member (a "person eligible for appointment because of a legal background"); or

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(b) in the Minister's opinion, a person with extensive professional knowledge or experience of persons with a mental or intellectual impairment (a "person eligible for appointment because of a professional background"); or

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(c) in the Minister's opinion, a person with experience of a person with a mental or intellectual impairment (a "person eligible for appointment because of personal experience").

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(4) The importance of the membership of the tribunal reflecting, to the

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<sup>127</sup> See preceding footnote.

greatest extent practicable, the social and cultural diversity of the general community must be taken into account in appointing members. 1  
2

**Selection** 3

**271.(1)** For selecting a person for recommendation for appointment as president, deputy president or a member, the Minister must advertise for applications from suitably qualified persons to be considered for selection. 4  
5  
6

**(2)** The Governor in Council may appoint a president, deputy president or member only if subsection (1) has been complied with for the appointment. 7  
8  
9

**Duration of appointment** 10

**272.(1)** The president or deputy president hold office for a term of not longer than 5 years.<sup>128</sup> 11  
12

**(2)** A member holds office for a term of not longer than 3 years.<sup>129</sup> 13

**(3)** The office of president, deputy president or a member becomes vacant if the holder of the office resigns by signed notice of resignation given to the Governor in Council. 14  
15  
16

**(4)** The Governor in Council may remove the president, deputy president or a member from office for— 17  
18

(a) physical or mental incapacity to perform official duties satisfactorily; or 19  
20

(b) neglect of duty; or 21

(c) dishonourable conduct; or 22

(d) being found guilty of an offence that, in the Minister's opinion, makes the person unsuitable to perform official duties. 23  
24

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<sup>128</sup> The president or deputy president may be reappointed—see *Acts Interpretation Act 1954*, section 25(1)(c).

<sup>129</sup> A member may be reappointed—see *Acts Interpretation Act 1954*, section 25(1)(c).

<b>Terms of appointment</b>	1
273.(1) The Governor in Council may decide the remuneration and allowances payable to the president, deputy president, and other full-time and part-time members.	2 3 4
(2) The president, deputy president and other full-time and part-time members are to be paid the remuneration and allowances decided by the Governor in Council.	5 6 7
(3) To the extent this Act does not state the terms on which a president, deputy president or other member holds office, the person holds office on the terms set by the Governor in Council.	8 9 10
<b>Leave of absence</b>	11
274. The Minister may give the president, deputy president or another member leave of absence on the terms the Minister considers appropriate.	12 13
<b>Acting appointment</b>	14
275.(1) The Governor in Council may appoint a person to act as president or deputy president—	15 16
(a) for any period the office is vacant; or	17
(b) for any period, or all periods, when the president or deputy president is absent from duty or Australia or can not, for another reason, perform the duties of the office.	18 19 20
(2) The Governor in Council may appoint a person to act as a member—	21
(a) while the office is vacant; or	22
(b) for any period when one of the members is absent from duty or Australia or can not, for another reason, perform the duties of the office.	23 24 25
<b>Registrar and staff</b>	26
276.(1) The registrar of the tribunal, and other staff necessary to enable the tribunal to exercise its functions, are to be appointed under the <i>Public Service Management and Employment Act 1988</i> .	27 28 29



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(2) The registrar may hold another office in the public service at the same time. 1  
2

(3) The president has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit made up of the registrar and tribunal staff, as if— 3  
4  
5

(a) the unit were a department within the meaning of the *Public Service Management and Employment Act 1988*; and 6  
7

(b) the president were the chief executive of the department. 8

### **Annual report** 9

277.(1) As soon as practicable after each financial year, the tribunal must— 10  
11

(a) prepare a report on its operations during the year; and 12

(b) give a copy of the report to the Minister. 13

(2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives the report. 14  
15

## **PART 3—INTERNAL OPERATION** 16

### **Rule-making power** 17

278.(1) The president may make rules (“tribunal rules”) about the practices and procedure of the tribunal or the tribunal registry. 18  
19

(2) A rule is subordinate legislation. 20

### **Arrangement of business** 21

279.(1) The president is responsible for ensuring the quick and efficient discharge of the tribunal’s business. 22  
23

(2) For example, the president may give directions (“presidential directions”) about— 24  
25

*Assisted and Substituted Decision Making*

(a) the arrangement of the tribunal's business; and	1
(b) the members who are to constitute the tribunal for a particular proceeding; and	2 3
(c) the places the tribunal is to sit; and	4
(d) the tribunal's procedure.	5
(3) Directions under subsection (2) may be of general or limited application.	6 7
<b>Disqualification from hearing</b>	8
<b>280.(1)</b> This section applies if—	9
(a) the president, deputy president or other member has a personal interest, or a direct or indirect financial interest, in a matter before the tribunal; and	10 11 12
(b) the interest could conflict with the proper performance of the member's duties on the matter.	13 14
(2) If this section applies for the president, the president must give written notice of the nature of the interest to the deputy president as soon as practicable after the relevant facts come to the president's attention.	15 16 17
(3) If this section applies for the deputy president or another member, the deputy president or member must give written notice of the nature of the interest to the president as soon as practicable after the relevant facts come to the deputy president's or member's attention.	18 19 20 21
(4) The person giving notice must not—	22
(a) be present when the tribunal considers the matter; or	23
(b) take part in a tribunal decision about the matter.	24
(5) Subsection (4) does not apply to the person giving notice if the person to whom notice is given decides the interest is not of a material nature.	25 26 27

**CHAPTER 11—ADULT GUARDIAN** 1**PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS** 2  
3**Adult guardian** 4**281.** There is to be an Adult Guardian. 5**Functions** 6**282.** The adult guardian has the functions given to the adult guardian by this Act, including the following functions— 7  
8

- (a) protecting from neglect, exploitation or abuse— 9
  - (i) adults with decision-making capacity only with assistance; 10  
or 11
  - (ii) adults with impaired decision-making capacity; 12
- (b) acting as a chosen decision maker for personal decisions and health care decisions if chosen under an enduring power of attorney or advance health care directive; 13  
14  
15
- (c) acting as an appointed assistant or appointed decision maker for personal and health care decisions if appointed by the tribunal; 16  
17
- (d) establishing and administering a community appointees scheme involving— 18  
19
  - (i) recruiting and training people suitable for appointment as an appointed assistant or appointed decision maker; and 20  
21
  - (ii) supporting and monitoring people recruited under the scheme who are appointed; 22  
23
- (e) establishing and administering a community visitors scheme involving— 24  
25
  - (i) recruiting and training people suitable for allocation as a community visitor for a hospital or care facility in which an adult with a mental or intellectual impairment lives; and 26  
27  
28

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(ii) supporting and monitoring people recruited under the scheme who are allocated for a hospital or care facility;	1 2
(f) educating and advising people about, and conducting research into, the operation of this Act;	3 4
(g) seeking assistance for an adult with a mental or intellectual impairment from a government department, institution, welfare organisation or the provider of a service or facility;	5 6 7
(h) other functions given to the adult guardian by another Act;	8
(i) taking action incidental or conducive to discharging the functions.	9
<b>Powers</b>	10
<b>283.(1)</b> The adult guardian has the powers given under this Act.	11
<b>(2)</b> The adult guardian also may do all things necessary or convenient to be done for performing the adult guardian's functions.	12 13
<b>Not under Ministerial control</b>	14
<b>284.</b> In performing the adult guardian's functions and exercising the adult guardian's powers, the adult guardian is not under the control or direction of the Minister.	15 16 17
<b>Delegation—other than powers under appointment</b>	18
<b>285.</b> The adult guardian may delegate <sup>130</sup> the adult guardian's powers (other than powers given to the adult guardian because the adult guardian is an appointed assistant or appointed decision maker) to a member of the adult guardian's staff.	19 20 21 22
<b>Delegation—powers under appointment</b>	23
<b>286.(1)</b> If the adult guardian is appointed as an appointed assistant or appointed decision maker for an adult, the adult guardian may delegate <sup>111</sup> a power given to the adult guardian by the appointment to make day-to-day	24 25 26

<sup>130</sup> The *Acts Interpretation Act 1954*, section 27A applies to the delegation.

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decisions.	1
(2) Despite a paid carer or health care professional not being eligible for appointment as an appointed assistant or appointed decision maker, the adult guardian may delegate a power to make day-to-day decisions to a paid carer or a health care professional.	2 3 4 5
(3) In this section—	6
“day-to-day decision” means a minor, uncontroversial decision about day-to-day issues.	7 8
<b>Community visitor</b>	9
287.(1) To safeguard the interests of adults with a mental or intellectual impairment living in a hospital or care facility, the adult guardian may allocate a community visitor for the hospital or care facility.	10 11 12
(2) A community visitor for a hospital or care facility must act in a way that preserves, as far as possible, the privacy of each adult with a mental or intellectual impairment living there (a “resident”).	13 14 15
(3) A community visitor for a hospital or care facility must—	16
(a) regularly visit the residents; and	17
(b) investigate complaints about the care or treatment of a resident.	18
(4) If a community visitor investigates a complaint, the community visitor must give the adult guardian the results of an investigation.	19 20
(5) A community visitor for a hospital or care facility may do all things necessary or convenient to be done for performing the community visitor’s functions mentioned in subsection (2), including, for example—	21 22 23
(a) entering the hospital or care facility between 9 am and 6 pm; and	24
(b) conferring alone with a resident; and	25
(c) if investigating a complaint about the care or treatment of a resident and with the adult guardian’s written consent—	26 27
(i) entering the hospital or care facility at the time necessary to investigate the complaint; and	28 29
(ii) requiring a staff member of the hospital or care facility to answer questions and produce documents about the care or	30 31

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treatment of the resident; and	1
(d) if investigating a complaint—examining, taking extracts from, or making copies of, a document about the care or treatment of the resident.	2 3 4
(6) To the greatest extent practicable, a community visitor for a hospital or care facility must seek and take into account the views and wishes of a resident before—	5 6 7
(a) asking a staff member of the hospital or care facility a question about the care or treatment of the resident; or	8 9
(b) examining a document about the care or treatment of the resident.	10
(7) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.	11 12
(8) However, regardless of the resident's views and wishes, the community visitor must act in a way consistent with the resident's proper care and protection.	13 14 15
(9) Community visitors may be paid by the adult guardian the fees and allowances decided by the Governor in Council.	16 17
<b>Investigate complaints</b>	18
288. The adult guardian may investigate a complaint or allegation that an adult with impaired decision-making capacity or decision-making capacity only with assistance—	19 20 21
(a) is being neglected, exploited or abused; or	22
(b) has inappropriate decision-making arrangements; or	23
(c) needs decision-making arrangements to be made under this Act.	24
<b>Annual report</b>	25
289.(1) The adult guardian must, as soon as practicable after each financial year—	26 27
(a) prepare a report on the exercise of the adult guardian's functions during the year; and	28 29

- (b) give a copy of the report to the Minister. 1
- (2) The Minister must table a copy of the report in the Legislative 2  
Assembly within 14 sitting days after receiving the report. 3

## **PART 2—ADMINISTRATIVE PROVISIONS** 4

### **Appointment** 5

**290.(1)** The adult guardian is to be appointed on a full-time basis by the 6  
Governor in Council. 7

(2) A person is eligible for appointment as adult guardian only if the 8  
person has demonstrated commitment to the rights and welfare of people 9  
with a mental or intellectual impairment. 10

(3) A person may not hold office as adult guardian at the same time as 11  
the person holds office as public advocate or public trustee. 12

### **Selection** 13

**291.(1)** For selecting a person for recommendation for appointment as 14  
adult guardian, the Minister must advertise for applications from suitably 15  
qualified persons to be considered for selection. 16

(2) The Governor in Council may appoint a person as adult guardian 17  
only if subsection (1) has been complied with for the appointment. 18

### **Duration of appointment** 19

**292.(1)** The adult guardian holds office for a term of not longer than 20  
5 years.<sup>131</sup> 21

(2) The office of adult guardian becomes vacant if the adult guardian 22  
resigns by signed notice of resignation given to the Governor in Council. 23

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<sup>131</sup> The adult guardian may be reappointed—see *Acts Interpretation Act 1954*,  
section 25(1)(c).

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- (3) The Governor in Council may remove the adult guardian from office for— 1  
2
- (a) physical or mental incapacity to perform official duties satisfactorily; or 3  
4
  - (b) neglect of duty; or 5
  - (c) dishonourable conduct; or 6
  - (d) being found guilty of an offence that, in the Minister's opinion, makes the person unsuitable to perform official duties. 7  
8

**Terms of appointment** 9

293.(1) The Governor in Council may decide the remuneration and allowances payable to the adult guardian. 10  
11

(2) The adult guardian is to be paid the remuneration and allowances decided by the Governor in Council. 12  
13

(3) To the extent this Act does not state the terms on which the adult guardian holds office, the adult guardian holds office on the terms decided by the Governor in Council. 14  
15  
16

**Leave of absence** 17

294. The Minister may give the adult guardian leave of absence on the terms the Minister considers appropriate. 18  
19

**Acting adult guardian** 20

295. The Governor in Council may appoint a person to act as the adult guardian— 21  
22

- (a) for any period the office is vacant; or 23
- (b) for any period, or all periods, when the adult guardian is absent from duty or Australia or can not, for another reason, perform the duties of the office. 24  
25  
26



**Staff**

**296.(1)** Staff necessary to enable the adult guardian to perform the adult guardian's functions are to be appointed under the *Public Service Management and Employment Act 1988*.

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

- (a) the unit were a department within the meaning of the *Public Service Management and Employment Act 1988*; and
- (b) the adult guardian were the chief executive of the department.

**CHAPTER 12—PUBLIC ADVOCATE****PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS****Public advocate**

**297.** There is to be a Public Advocate.

**Functions—systemic advocacy**

**298.** The public advocate has the following functions—

- (a) protecting the rights of adults with a mental or intellectual impairment;
- (b) promoting the protection of the adults and their rights from neglect, exploitation or abuse;
- (c) encouraging the development of programs to assist the adults to reach the greatest practicable degree of autonomy;
- (d) promoting the provision of services and facilities for the adults;

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- (e) monitoring and reviewing the delivery of services and facilities to the adults. 1  
2

**Powers 3**

**299.(1)** The public advocate may do all things necessary or convenient to be done for performing the public advocate's functions. 4  
5

**(2)** If the public advocate considers it appropriate to do so, the public advocate may intervene in a proceeding involving protection of the rights or interests of adults with a mental or intellectual impairment with the leave of the court hearing the proceeding and subject to any conditions imposed by the court. 6  
7  
8  
9  
10

**Not under Ministerial control 11**

**300.** In performing the public advocate's functions and exercising the public advocate's powers, the public advocate is not under the control or direction of the Minister. 12  
13  
14

**Delegation 15**

**301.** The public advocate may delegate<sup>132</sup> the public advocate's powers to a member of the public advocate's staff. 16  
17

**Annual report 18**

**302.** The public advocate must, as soon as practicable after each financial year— 19  
20

(a) prepare a report on the exercise of the public advocate's functions during the year; and 21  
22

(b) give a copy of the report to the Minister. 23

**(2)** The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report. 24  
25

<sup>132</sup> The *Acts Interpretation Act 1954*, section 27A applies to the delegation.

**PART 2—ADMINISTRATIVE PROVISIONS**

1

**Appointment**

2

**303.(1)** The public advocate is to be appointed on a full-time basis by the Governor in Council.

3

4

**(2)** A person is eligible for appointment as public advocate only if the person has demonstrated commitment to advocacy for people with a mental or intellectual impairment.

5

6

7

**(3)** A person may not hold office as public advocate at the same time as the person holds office as adult guardian or public trustee.

8

9

**Selection**

10

**304.(1)** For selecting a person for recommendation for appointment as public advocate, the Minister must advertise for applications from suitably qualified persons to be considered for selection.

11

12

13

**(2)** The Governor in Council may appoint a person as public advocate only if subsection (1) has been complied with for the appointment.

14

15

**Duration of appointment**

16

**305.(1)** The public advocate holds office for a term of not longer than 5 years.<sup>133</sup>

17

18

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

19

20

**(3)** The Governor in Council may remove the public advocate from office for—

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22

(a) physical or mental incapacity to perform official duties satisfactorily; or

23

24

(b) neglect of duty; or

25

(c) dishonourable conduct; or

26

<sup>133</sup> The public advocate may be reappointed—see *Acts Interpretation Act 1954*, section 25(1)(c).

(d) being found guilty of an offence that, in the Minister's opinion, makes the person unsuitable to perform official duties.	1 2
<b>Terms of appointment</b>	3
<b>306.(1)</b> The Governor in Council may decide the remuneration and allowances payable to the public advocate.	4 5
<b>(2)</b> The public advocate is to be paid the remuneration and allowances decided by the Governor in Council.	6 7
<b>(3)</b> To the extent this Act does not state the terms on which the public advocate holds office, the public advocate holds office on the terms decided by the Governor in Council.	8 9 10
<b>Leave of absence</b>	11
<b>307.</b> The Minister may give the public advocate leave of absence on the terms the Minister considers appropriate.	12 13
<b>Acting public advocate</b>	14
<b>308.</b> The Governor in Council may appoint a person to act as the public advocate—	15 16
(a) for any period the office is vacant; or	17
(b) for any period, or all periods, when the public advocate is absent from duty or Australia or can not, for another reason, perform the duties of the office.	18 19 20
<b>Staff</b>	21
<b>309.(1)</b> Staff necessary to enable the public advocate to perform the public advocate's functions may be appointed under the <i>Public Service Management and Employment Act 1988</i> .	22 23 24
<b>(2)</b> The public advocate has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit made up of the public advocate's staff, as if—	25 26 27
(a) the unit were a department within the meaning of the <i>Public</i>	28

- Service Management and Employment Act 1988*; and 1  
 (b) the public advocate were the chief executive of the department. 2

## CHAPTER 13—MISCELLANEOUS 3

### PART 1—RELATIONSHIP WITH COURT 4 JURISDICTION 5

#### **Next friend and guardian ad litem process not affected 6**

**310.** This Act does not affect rules of court of the Supreme Court, 7  
 District Courts or Magistrates Courts about a person with impaired 8  
 decision-making capacity suing by a 'next friend', or defending proceedings 9  
 by a 'guardian ad litem', appointed by the relevant court.<sup>134</sup> 10

#### **Supreme Court's inherent jurisdiction not affected 11**

**311.** This Act does not affect the inherent jurisdiction of the Supreme 12  
 Court, including its *parens patriae* jurisdiction.<sup>135</sup> 13

#### **Supreme Court given same power of attorney jurisdiction as tribunal 14**

**312.(1)** In addition to its inherent jurisdiction, the Supreme Court is 15  
 given the same jurisdiction about enduring powers of attorney as the 16  
 tribunal. 17

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<sup>134</sup> The commission recommends the repeal of the *Mental Health Act 1974*, schedule 5. This will require consequential amendments of the court rules and section 7 will then be made subject to these amendments. However, these consequential amendments are not yet included in the Bill.

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<sup>135</sup> This jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint decision makers for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

(2) For this purpose only, a reference in this Act to the tribunal includes a reference to the Supreme Court.<sup>136</sup>

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### **Transfer of proceeding**

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313.(1) The Supreme Court may, if it considers it appropriate, transfer a proceeding within the tribunal's jurisdiction to the tribunal.

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(2) The tribunal may, if it considers it appropriate, transfer a proceeding within the Supreme Court's jurisdiction to the court.

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(3) The transfer may be ordered on the court or tribunal's initiative or on the application of a party to, or participant in, the proceeding.

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### **Stay of proceeding**

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314.(1) If there is a Supreme Court and tribunal proceeding about an enduring power of attorney, the tribunal may stay the tribunal proceeding.

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(2) The stay may be ordered on the tribunal's initiative or on the application of a party to the Supreme Court proceeding or a participant in the tribunal proceeding.

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### **Interim appointed decision maker if Supreme Court proceeding**

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315.(1) If there is a Supreme Court proceeding about an adult's enduring power of attorney, the tribunal may appoint 1 or more substitute decision makers for the adult until the proceeding is resolved.

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(2) Chapter 6 applies to the appointment.

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(3) The appointment may be made on the tribunal's initiative or on the application of the adult or anyone else.

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<sup>136</sup> "Supreme Court" means a judge of the Supreme Court—see schedule 2 (Dictionary).

**PART 2—SETTLEMENTS OR DAMAGES AWARDS****Court sanction of settlement**

**316.(1)** This section only applies to a civil proceeding or civil claim involving an adult, who, in the opinion of the appropriate court, has impaired decision-making capacity for a decision about settlement of the proceeding or claim.

(2) Settlement of a proceeding or claim is valid only with the sanction of the appropriate court.<sup>137</sup>

(3) A settlement sanctioned by the appropriate court is binding on the adult.

(4) In this section—

“appropriate court” means—

- (a) if the proposed settlement is of a proceeding—the court having jurisdiction in relation to the proceeding; or
- (b) if the proposed settlement is of a claim out of court before a proceeding is started—a court in which a proceeding could have been started.

“settlement” includes compromise or acceptance of money paid into court.

**Settlements and judgments in favour of adult**

**317.(1)** This section only applies if—

- (a) a court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; and
- (b) in the court’s opinion, the adult might be an adult the tribunal could decide had impaired decision-making capacity for decisions about the control and management of the settlement proceeds or judgment amount.

<sup>137</sup> The commission recommends that sanction of settlements by the public trustee under the *Public Trustee Act 1978* be discontinued. The Bill does not yet include consequential amendments and transitional provisions.

*Assisted and Substituted Decision Making*

- (2) In making its order, the court must— 1
- (a) make an order requiring the settlement proceeds or judgment amount not to be paid directly to the adult except under this Act; and 2
  - (b) make an order as to costs (including a direction that costs be taxed on a party and party basis or solicitor and client basis); and 3
  - (c) refer the issue of control and management of the settlement proceeds or judgment amount to the tribunal.<sup>138</sup> 4
- (3) If the other person is given a copy of a capacity declaration of the tribunal within 21 days of the court's order, the settlement proceeds or judgment amount, less any statutory refunds, may be paid to the adult whose receipt is enough to discharge the other person. 5
- (4) If the other person is given a copy of a substitute decision maker order of the tribunal within 21 days of the court's order, the settlement proceeds or judgment amount, less any statutory refunds, may be paid to the substitute decision maker for control and management of the settlement proceeds or judgment amount whose receipt is enough to discharge the other person. 6
- (5) If the other person is not given a copy of a capacity declaration or appointment order within 21 days of the court's order, the settlement proceeds or judgment amount, less any statutory refunds, may be paid to the registrar of the court whose receipt is enough to discharge the other person. 7
- (6) If— 8
- (a) the settlement proceeds or judgment amount is paid to the registrar of the court (“money paid into court”); and 9
  - (b) the registrar is given a copy of a tribunal order; 10
- the registrar must pay the money paid into court, with appropriate accretions or deductions— 11

<sup>138</sup> The commission recommends that protection orders and certificates of disability under the *Public Trustee Act 1978* be discontinued. It recommends that existing protection orders and certificates of disability continue to have effect until the tribunal makes an inconsistent order. This Bill does not yet include consequential amendments and transitional provisions.



*Assisted and Substituted Decision Making*

(c) if the tribunal order includes a capacity declaration—to the adult; or	1 2
(d) if the tribunal order is a substitute decision maker order—to the substitute decision maker for control and management of the settlement proceeds or judgment amount; or	3 4 5
(e) in any other case—as required by the tribunal order.	6
(7) This section does not affect a solicitor’s lien for costs.	7
(8) In this section—	8
<b>“capacity declaration”</b> means an order declaring the adult to have decision-making capacity for decisions about the control and management of the settlement proceeds or judgment amount.	9 10 11
<b>“substitute decision maker order”</b> means—	12
(a) an order declaring a chosen decision maker under an enduring power of attorney of the adult to have current power to make decisions about the control and management of the settlement proceeds or judgment amount; or	13 14 15 16
(b) an order appointing an appointed decision maker for decisions about the control and management of the settlement proceeds or judgment amount.	17 18 19
 <b>PART 3—PROTECTION FROM LIABILITY</b>	 20
<b>Protection from liability—officials</b>	21
318.(1) In this section—	22
<b>“official”</b> means—	23
(a) a member; or	24
(b) a tribunal staff member (including the registrar); or	25
(c) the adult guardian; or	26
(d) a member of the adult guardian’s staff; or	27

*Assisted and Substituted Decision Making*

- (e) the public advocate; or 1
- (f) a member of the public advocate's staff; or 2
- (g) a community visitor. 3
- (2) An official is not civilly liable for an act done, or an omission made, honestly and without negligence under this Act. 4  
5
- (3) If subsection (2) prevents a civil liability attaching to an official, the liability attaches instead to the State. 6  
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**PART 4—DEALING WITH INFORMATION** 8**Preservation of confidentiality** 9

**319.(1)** If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (3). 10  
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**Maximum penalty—** 14

(2) A person gains information through involvement in the administration of this Act if the person gains the information because of being, or an opportunity given by being— 15  
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(a) the president, deputy president or another member of the tribunal; 18  
or 19

(b) the registrar or a member of the tribunal staff; or 20

(c) the adult guardian or a member of the adult guardian's staff; or 21

(d) the public advocate or a member of the public advocate's staff; or 22

(e) an appointed assistant or substitute decision maker; or 23

(f) a community visitor. 24

(3) A person may make a record of confidential information, or disclose it to someone else— 25  
26

(a) for this Act; or 27

*Assisted and Substituted Decision Making*

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- (b) to discharge a function under another law; or 1
- (c) for a proceeding in a court or relevant tribunal; or 2
- (d) if authorised under a regulation or another law; or 3
- (e) if authorised by the person to whom the information relates; or 4
- (f) if authorised by the tribunal in the public interest because a 5  
 person's life or physical safety could otherwise reasonably be 6  
 expected to be endangered. 7
- (4) In this section— 8
- “confidential information”** includes information about a person's affairs 9  
 but does not include— 10
- (a) information already publicly disclosed unless further disclosure 11  
 of the information is prohibited by law; or 12
- (b) statistical or other information that could not reasonably be 13  
 expected to result in the identification of the person to whom the 14  
 information relates. 15
- Disclosure of information about investigations** 16
- 320.(1)** Section 319<sup>139</sup> does not prevent the adult guardian from 17  
 disclosing information to a person or to members of the public about an 18  
 issue the subject of an investigation by the adult guardian if the adult 19  
 guardian is satisfied the disclosure is necessary and reasonable in the public 20  
 interest. 21
- (2) However, the adult guardian must not make the disclosure if it is 22  
 likely to prejudice the investigation. 23
- (3) In a disclosure under subsection (1), the adult guardian— 24
- (a) may express an opinion expressly or impliedly critical of an entity 25  
 only if the adult guardian has given the entity an opportunity to 26  
 answer the criticism; and 27

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<sup>139</sup> Section 319 prohibits the improper recording or disclosure of confidential information.

- (b) may identify the complainant, directly or indirectly, only if it is necessary and reasonable. 1  
2

## **PART 5—FORMAL MATTERS** 3

### **Chief executive may approve forms** 4

321. The chief executive may approve forms for use under this Act. 5

### **Regulation-making power** 6

322. The Governor in Council may make regulations under this Act. 7

## **CHAPTER 14—CONSEQUENTIAL AND TRANSITIONAL** 8 9

*[Note – This chapter contains a preliminary draft of certain consequential provisions. Transitional provisions and further consequential provisions are necessary.]* 10  
11  
12

## **PART 1—AMENDMENT OF LAND ACT 1994** 13

### **Act amended in pt 1** 14

323. This part amends the *Land Act 1994*. 15

### **Replacement of s 383 (Power of attorney)** 16

324. Section 383— 17  
*omit, insert—* 18

<b>‘Registration under Land Title Act</b>	1
‘383. A power of attorney, or authorisation order, registered in the power of attorney register under the <i>Land Title Act 1994</i> is taken to be registered for this Act.	2 3 4
<b>‘Effect of general power of attorney</b>	5
‘383A.(1) By giving a power of attorney that is not an enduring power of attorney and registering it under the <i>Land Title Act 1994</i> , the donor authorises the donee to deal with an interest in land that may be dealt with by the donor under this Act.	6 7 8 9
‘(2) However, the authority given is subject to the limitations expressly stated in the power of attorney. <sup>140</sup> ’.	10 11
<b>Replacement of s 385 (Acts by attorneys)</b>	12
325. Section 385—	13
omit, insert—	14
<b>‘Acts in relation to attorneys and authorised person</b>	15
‘385.(1) If an act is required or permitted to be done in relation to a person under this Act, the act may be done in relation to—	16 17
(a) if there is a power of attorney for the person that is not an enduring power of attorney—the donee; or	18 19
(b) if there is an enduring power of attorney that has begun to give a donee power to make a decision dealing with land for the person—the donee; or	20 21 22
(c) if there is an authorisation order for the person—the authorised person.	23 24
‘(2) In this section—	25
“authorised person” see <i>Land Title Act 1994</i> , section 132.’.	26

<sup>140</sup> The *Assisted and Substituted Decision Making Act 1996*, section 172 provides that a substitute decision maker (whether under an enduring power of attorney or tribunal appointment order) must, when exercising power, exercise it as required by the terms of the power.

<b>Amendment of sch 6 (Dictionary)</b>	1
326. Schedule 6—	2
<i>insert</i> —	3
‘“authorisation order” see <i>Land Title Act 1994</i> , section 132.’.	4
<b>PART 2—AMENDMENT OF LAND TITLE ACT 1994</b>	5
<b>Act amended in pt 2</b>	6
327. This part amends the <i>Land Title Act 1994</i> .	7
<b>Amendment of s 4 (Definitions)</b>	8
328. Section 4, definition “instrument”, paragraph (d), after ‘attorney’—	9
<i>insert</i> —	10
‘or authorisation order’.	11
<b>Amendment of s 33 (Separate part of the freehold land register for powers of attorney)</b>	12
329. Section 33, after ‘attorney’—	13
<i>insert</i> —	14
‘and registered authorisation orders’.	15
<b>Replacement of ss 132–133</b>	16
330. Sections 132 to 133—	17
<i>omit, insert</i> —	18
	19
<b>‘Definitions for division</b>	20
‘132. In this division—	21
“authorisation order” means—	22

*Assisted and Substituted Decision Making*

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- (a) an order of a court authorising a person to act for another person, including, for example, an order under section 136; or 1  
2
- (b) an order of the decisions tribunal appointing a substitute decision maker to make, whether expressly or in general terms, a decision dealing with land for a person. 3  
4  
5
- “authorised person” means—** 6
- (a) for a court order authorising a person to act for another person—the person authorised; or 7  
8
- (b) for a tribunal order appointing a substitute decision maker for a person—the substituted decision maker. 9  
10
- “decisions tribunal” means the Assisted and Substituted Decisions Tribunal.** 11  
12
- “enduring power of attorney” means an enduring power of attorney under the *Assisted and Substituted Decision Making Act 1996*<sup>141</sup> giving power, whether expressly or in general terms, to deal with land.** 13  
14  
15
- “power of attorney” includes an enduring power of attorney.** 16
- “substitute decision maker” see the *Assisted and Substituted Decision Making Act 1996*.** 17  
18
- “Power of attorney register** 19
- 132A. The registrar must keep a “power of attorney register” to register—** 20  
21
- (a) powers of attorney that are not enduring powers of attorney; and 22
- (b) enduring powers of attorney that have begun to give a donee power to deal with land for the donor; and 23  
24
- (c) authorisation orders. 25

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<sup>141</sup> Transitional provisions have not been included in the draft Bill. However, it is proposed that the definition of “enduring power of attorney” transitionally include enduring powers of attorney made under the *Property Law Act 1974* before the commencement of the *Assisted and Substituted Decision Making Act 1996*.

<b>‘Effect of general power of attorney</b>	1
‘132B.(1) By giving and registering a power of attorney that is not an enduring power of attorney, the donor authorises the donee to deal with an interest in land that may be dealt with by the donor under this Act.	2 3 4
‘(2) However, the authority given is subject to the limitations expressly stated in the power of attorney. <sup>142</sup>	5 6
<b>‘Power of attorney or authorisation order must register first</b>	7
‘132C. An instrument executed by a donee under a power of attorney, or an authorised person under an authorisation order, must not be registered until the power of attorney or authorisation order is registered.	8 9 10
<b>‘Registering power of attorney</b>	11
‘132D.(1) The registrar may register a power of attorney by recording particulars of it in the power of attorney register if—	12 13
(a) a request to register it is lodged; and	14
(b) the power of attorney is deposited with the request; and	15
(c) for an enduring power of attorney—enough evidence is given of the enduring power of attorney having begun to give a donee power to make a decision dealing with land for the donor.	16 17 18
‘(2) If an enduring power of attorney gives a donee power to make a decision dealing with land if the donor has impaired decision-making capacity for the decision, enough evidence of the enduring power of attorney having begun to give the donee the power is—	19 20 21 22
(a) a certified copy of an order of the decisions tribunal that the person has impaired decision-making capacity for the decision; or	23 24
(b) a certificate from 2 doctors that the person has impaired decision-making capacity for the decision.	25 26

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<sup>142</sup> The *Assisted and Substituted Decision Making Act 1996*, section 165 provides that a substitute decision maker (whether under an enduring power of attorney or tribunal appointment order) must, when exercising power, exercise it as required by the terms of the power.



'(3) The registrar must keep a certified copy of the registered power of attorney and return the original to the person who deposited it.

'(4) However, if a registered enduring power of attorney includes provisions not relevant to a power to deal with land, the registrar must keep only a certified copy of an extract of the provisions relevant to a power to deal with land and return the original power of attorney to the person who deposited it.

#### **'Registering authorisation order**

'133.(1) The registrar may register an authorisation order by recording particulars of it in the power of attorney register if—

- (a) a request to register it is lodged; and
- (b) a certified copy of the order is lodged.

'(2) If the order includes provisions not relevant to a power to deal with land, the registrar must keep only a certified copy of an extract of the provisions relevant to a power to deal with land and return the certified copy of the order to the person who deposited it.'

#### **Amendment of s 134 (Effect of registering a power of attorney)**

331.(1) Section 134(2), (3) and (4)—

*renumber* as section 134(4), (5) and (6).

(2) Section 134(1)—

*omit, insert*—

'134.(1) An act done by a donee under the terms of a registered power of attorney that is not an enduring power of attorney has the same effect as if the act were done by the donor.

'(2) An act done in dealing with land by a donee under the terms of a registered enduring power of attorney has the same effect as if—

- (a) the act were done by the donor; and
- (b) the donor had capacity to do the act.

'(3) However, if the enduring power of attorney is invalid or has been

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- revoked under the *Assisted and Substituted Decision Making Act 1996*, the donee's act has the effect given by subsection (2) only in favour of a person who does not know of the invalidity or revocation.' 1  
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3
- (3) Section 134(4), 'the donee'— 4  
*omit, insert—* 5  
'a donee'. 6
- (4) Section 134(5), after 'the power of attorney'— 7  
*insert—* 8  
'is operational and'. 9
- (5) Section 134(6)(a)— 10  
*omit, insert—* 11  
'(a) deregistration of the power of attorney; or'. 12
- (6) After section 134(6)— 13  
*insert—* 14  
'(7) In this section— 15  
"know", of a revocation of a power, includes— 16  
(a) know of the happening of an event that revokes the power;<sup>143</sup> and 17  
(b) having reason to believe the revocation has happened. 18
- "revoke", of a donee's power under an adult's enduring power of attorney, 19  
includes change by the decisions tribunal of the power by— 20  
(a) declaring the power of attorney invalid; or 21  
(b) changing the power of attorney's terms; or 22  
(c) revoking the power of attorney; or 23  
(d) removing a donee under the power of attorney; or 24  
(e) removing power from a donee under the power of attorney.'. 25

<sup>143</sup> For example, an adult's enduring power of attorney is revoked if the adult dies—see *Assisted and Substituted Decision Making Act 1996*, section 57.

<b>Insertion of new s 134A</b>	1
<b>332. After section 134—</b>	2
<i>insert—</i>	3
<b>‘Effect of registering an authorisation order</b>	4
<b>‘134A.(1) An act done for a person by an authorised person under the</b>	5
<b>terms of a registered authorisation order not made by the decisions tribunal</b>	6
<b>has the same effect as if—</b>	7
(a) the act were done by the person; and	8
(b) the person had capacity to do the act.	9
<b>‘(2) A registered authorisation order not made by the decisions tribunal is</b>	10
<b>evidence the authorised person is authorised to do anything within the terms</b>	11
<b>of the order.</b>	12
<b>‘(3) An act done in dealing with land for a person under the terms of a</b>	13
<b>registered authorisation order of the decisions tribunal has the same effect as</b>	14
<b>if—</b>	15
(a) the act were done by the person; and	16
(b) the person had capacity to do the act.	17
<b>‘(4) A registered authorisation order of the decisions tribunal is evidence</b>	18
<b>the authorised person is authorised to deal with land within the terms of the</b>	19
<b>order.</b>	20
<b>‘(5) The registrar may register an instrument executed under a registered</b>	21
<b>authorised order without being satisfied the order has not been revoked.</b>	22
<b>‘(6) The registrar must not register an instrument executed under a</b>	23
<b>registered authorisation order if the instrument became effective after—</b>	24
(a) registration of an order revoking or disclaiming the registered	25
order; or	26
(b) someone else is registered as owner of the relevant lot after the	27
death or bankruptcy of the person.’	28
<b>Replacement of s 135</b>	29
<b>333. Section 135—</b>	30

<i>omit, insert—</i>	1
<b>‘Deregistration of registered power of attorney</b>	2
<b>‘135.(1)</b> A registered power of attorney that is not an enduring power of attorney may be deregistered by registering an instrument of revocation or disclaimer.	3 4 5
<b>‘(2)</b> A registered enduring power of attorney may only be deregistered by—	6 7
(a) registering an instrument of revocation or disclaimer; or	8
(b) registering an instrument containing enough evidence the power to deal with land is invalid or no longer exercisable as registered or the power has been revoked.	9 10 11
<b>‘(3)</b> An instrument mentioned in subsection (2)(b) may only be lodged by one of the following persons—	12 13
(a) the person who made the enduring power of attorney or, after the person’s death, the person’s personal representative;	14 15
(b) a chosen decision maker under the power of attorney or, after the chosen decision maker’s death, the chosen decision maker’s personal representative;	16 17 18
(c) a substitute decision maker appointed by the decisions tribunal;	19
(d) the registrar of the decisions tribunal;	20
(e) a person directed to lodge by the Supreme Court.	21
<b>‘Deregistration of registered authorisation order</b>	22
<b>‘135A.(1)</b> A registered authorisation order may be deregistered by registering an order of revocation or disclaimer.	23 24
<b>‘(2)</b> Also, a registered order of the decisions tribunal may be deregistered by registering an instrument containing enough evidence the power to deal with the land is no longer exercisable as registered.	25 26 27
<b>‘(3)</b> An instrument mentioned in subsection (2) may only be lodged by one of the following persons—	28 29
(a) the person for whom the decisions tribunal appointed a substitute decision maker;	30 31

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- (b) a substitute decision maker appointed by the decisions tribunal; 1
- (c) the registrar of the decisions tribunal; 2
- (d) a person directed to lodge by the Supreme Court. 3

'(4) In this section— 4

"order of disclaimer", for an authorisation order of the decisions tribunal, 5  
includes an order declaring the authorisation order invalid.' 6

**Replacement of s 137 7**

**334. Section 137— 8**

*omit, insert— 9*

**'Acts in relation to attorneys and authorised persons 10**

'137.(1) If an act is required or permitted to be done in relation to a 11  
person under this Act, the act may be done in relation to— 12

- (a) if there is a power of attorney for the person that is not an 13  
enduring power of attorney—the donee; or 14
- (b) if there is an enduring power of attorney that has begun to give a 15  
donee power to make a decision dealing with land for the 16  
person—the donee; or 17
- (c) if there is an authorisation order for the person—the authorised 18  
person. 19

**'Acts for minors 20**

'137A. If— 21

- (a) an act is required or permitted to be done by or in relation to a 22  
person under this Act; and 23
- (b) the person is a minor; 24

the act may be done by or in relation to a person who is responsible by law 25  
for the management and care of the minor's interests.' 26

<b>Amendment of s 154 (Lodging certificate of title)</b>	1
335. Section 154(2)(d), after ‘attorney’—	2
<i>insert—</i>	3
‘or authorisation order’.	4
<b>Amendment of s 161 (Execution and proof)</b>	5
336. After section 161(3A)—	6
<i>insert—</i>	7
‘(3B) An enduring power of attorney is validly executed if it is executed under the <i>Assisted and Substituted Decision Making Act 1996</i> .’	8
	9
<b>PART 3—AMENDMENT OF PROPERTY LAW</b>	10
<b>ACT 1974</b>	11
<b>Act amended in pt 3</b>	12
337. This part amends the <i>Property Law Act 1974</i> .	13
<b>Omission of pt 9, div 1, heading</b>	14
338. Part 9, division 1, heading—	15
<i>omit.</i>	16
<b>Amendment of s 168 (Application of pt 9)</b>	17
339. Section 168—	18
<i>insert—</i>	19
‘(1A) This part does not apply to enduring powers of attorney under the <i>Assisted and Substituted Decision Making Act 1996</i> .’	20
	21

**Omission of pt 9, div 2**

340. Part 9, division 2—

*omit.*<sup>144</sup>

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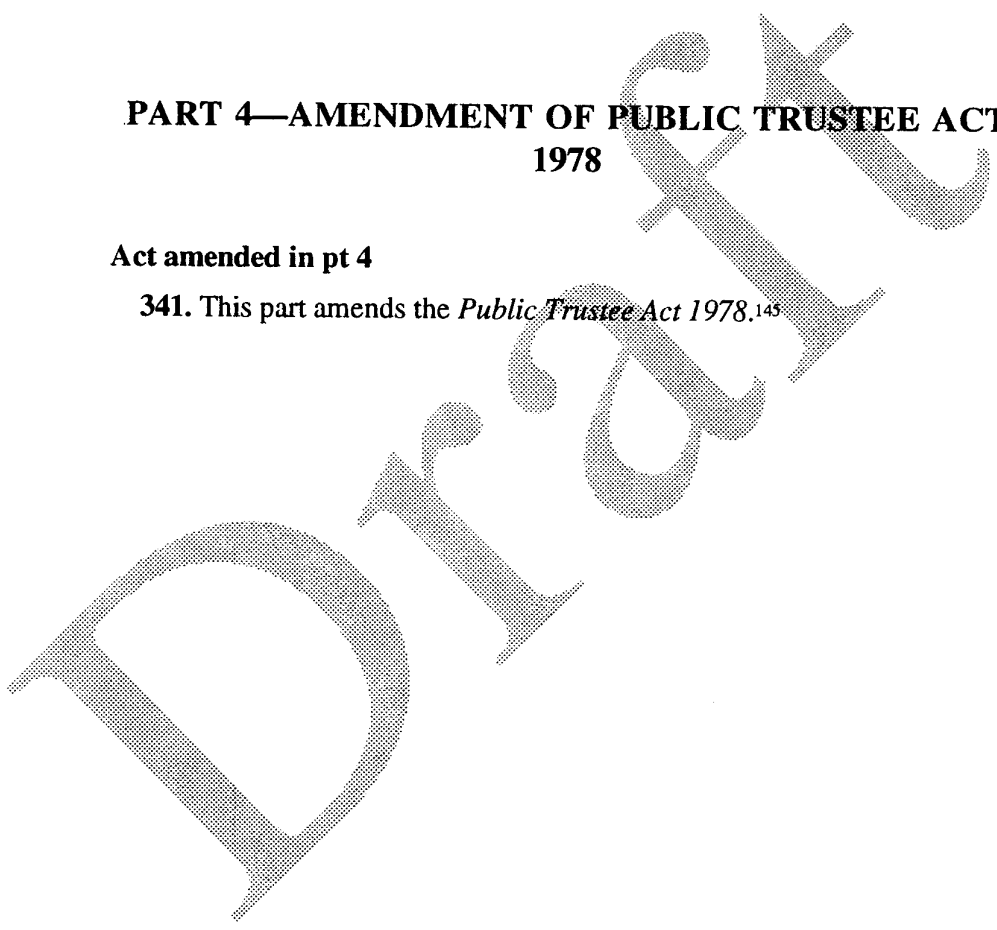
**PART 4—AMENDMENT OF PUBLIC TRUSTEE ACT  
1978**

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**Act amended in pt 4**

341. This part amends the *Public Trustee Act 1978*.<sup>145</sup>

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<sup>144</sup> Transitional provisions dealing with existing enduring powers of attorney under the *Property Law Act 1974* are not yet included in the Bill.

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<sup>145</sup> The commission recommends the *Public Trustee Act 1978*, part 6 (Management of incapacitated persons) be amended to abolish new Protection Orders and Certificates of Disability. It recommends that a tribunal order may displace an existing Protection Order or Certificate of Disability.

**SCHEDULE 1**

1

**TYPES OF CAPACITY AND DECISION**

2

schedule 2

3

**PART 1—CAPACITY**

4

**Types of capacity**

5

1. This Act categorises capacity for a decision as follows—

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- decision-making capacity
- impaired decision-making capacity.

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**Decision-making capacity**

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2. A person has “**decision-making capacity**” for a decision if the person is capable, whether with or without assistance, of—

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- (a) understanding the nature and foreseeing the effects of the decision; and
- (b) communicating the decision in some way.<sup>146</sup>

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14

**Impaired decision-making capacity**

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3. A person has “**impaired decision-making capacity**” for a decision if the person does not have decision-making capacity for the decision.

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<sup>146</sup> In determining whether an individual is capable of communicating the decisions in some way, the tribunal must investigate the use of all reasonable ways of facilitating communication, including, for example, sign boards—see section 241 (Prerequisite in determining decision-making capacity).



## SCHEDULE 1 (continued)

**PART 2—DECISION** 1*Division 1—Introduction* 2**References to “decision”** 3

4. A reference to a decision includes a reference to a type of decision. 4

*Example—* 5

A reference in section 39 to an adult choosing a chosen decision maker for a 6  
decision includes a reference to an adult choosing a chosen decision maker for a 7  
type of decision (for example, certain financial decisions). 8

**Types of decision** 9

5. This Act categorises decisions as follows— 10

- personal decisions 11
- excluded personal decisions 12
- health care decisions 13
- special consent health care decisions 14
- financial decisions 15
- decisions about legal matters. 16

*Division 2—Personal and excluded personal decisions* 17**Personal decision** 18

6. A “personal decision” of, or for, an adult is a decision (other than an 19  
excluded personal decision) about the adult’s care (other than health care) or 20  
welfare, including, for example, a decision about 1 or more of the 21  
following— 22

- (a) where the adult lives; 23

## SCHEDULE 1-(continued)

(b) with whom the adult lives;	1
(c) whether the adult works and, if so, the kind and place of work and the employer;	2 3
(d) what education or training the adult undertakes;	4
(e) whether the adult applies for a licence or permit;	5
(f) day-to-day issues, including, for example, diet and dress.	6
<b>Excluded personal decision</b>	7
7. An “ <b>excluded personal decision</b> ” of, or for, an adult is a decision about 1 or more of the following—	8 9
(a) making or revoking the adult’s will;	10
(b) making or revoking an enduring power of attorney or advance health care directive of the adult;	11 12
(c) exercising the adult’s right to vote in a Commonwealth, State or local government election or referendum;	13 14
(d) consenting to adoption of a child of the adult under 18 years old;	15
(e) consenting to marriage of the adult.	16
<b><i>Division 3—Health care and special consent health care decisions</i></b>	17
<b>Health care decision</b>	18
8.(1) A “ <b>health care decision</b> ” of, or for, an adult is a decision about health care (other than special consent health care) of the adult.	19 20
(2) However, if an adult is terminally ill or in a state of permanent or persistent unconsciousness, a health care decision of, or for, the adult does not include a decision to withhold or withdraw life-sustaining measures intended to sustain or prolong the adult’s life.	21 22 23 24

## SCHEDULE 1 (continued)

(3) This Act does not affect the common law relating to withholding or withdrawing life-sustaining measures.	1 2
(4) In this section—	3
<b>“life-sustaining measures”</b> means health care that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, and includes assisted ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation.	4 5 6 7 8
<b>Health care</b>	9
9. <b>“Health care”</b> of an adult is care, treatment, service or a procedure—	10
(a) to maintain, diagnose or treat the adult’s physical or mental condition; and	11 12
(b) carried out by, or under the supervision of, a health care provider;	13
but does not include—	14
(c) the administration of a pharmaceutical drug if—	15
(i) a prescription is not needed to obtain the drug; and	16
(ii) the drug is normally self-administered; and	17
(iii) the administration is for a recommended purpose and at a recommended dosage level; or	18 19
(d) first aid treatment of the adult; or	20
(e) a non-intrusive examination made for diagnostic purposes.	21
<i>Example of paragraph (e)—</i>	22
A visual examination of an adult’s mouth, throat, nasal cavity, eyes or ears.	23
<b>Special consent health care decision</b>	24
10. <b>“Special consent health care decision”</b> of, or for, an adult is a decision consenting to special consent health care of the adult.	25 26

## SCHEDULE 1 (continued)

<b>Special consent health care</b>	1
<b>11. “Special consent health care” of an adult is—</b>	2
(a) removal of tissue from the adult for donation to someone else; or	3
(b) sterilisation of the adult; or	4
(c) termination of a pregnancy of the adult; or	5
(d) participation by the adult in research or experimental health care; or	6 7
(e) psychiatric health care of the adult prescribed under the regulations; <sup>147</sup> or	8 9
(f) other health care of the adult prescribed under the regulations.	10
 <b>Removal of tissue for donation</b>	 11
<b>12.(1) “Removal of tissue for donation” to someone else includes</b> removal of tissue from the adult so laboratory reagents, or reference and control materials, derived completely or partly from pooled human plasma may be given to the other person.	12 13 14 15
<b>(2) “Tissue” is—</b>	16
(a) an organ, blood or part of a human body; or	17
(b) a substance that may be extracted from an organ, blood or part of a human body.	18 19

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<sup>147</sup> The commission considers decisions about certain psychiatric health care for adults with impaired decision-making capacity should not be dealt with in the same way as health care decisions. For this reason, certain psychiatric health care is categorised as special consent health care. However, instead of the tribunal being able to consent to this type of special consent health care decision, the commission considers appropriate special consent procedures for psychiatric health care of adults with impaired decision-making capacity should be contained in mental health legislation.

## SCHEDULE 1-(continued)

<b>Sterilisation</b>	1
<b>13.(1) “Sterilisation”</b> is a surgical procedure—	2
(a) performed on an adult who is, or is reasonably likely to be, fertile; and	3 4
(b) intended, or reasonably likely, to make the adult, or ensure the adult is, permanently infertile.	5 6
<b>(2)</b> Sterilisation does not include a procedure performed primarily to treat organic malfunction or disease of the adult.	7 8
<b>Termination</b>	9
<b>14. “Termination”</b> of a pregnancy of an adult does not include a procedure performed primarily to treat organic malfunction or disease of the adult.	10 11 12
<b>Primary reason for treatment</b>	13
<b>15.</b> Performance of a procedure on an adult is “ <b>primarily to treat     organic malfunction or disease</b> ” if the adult’s organic malfunction or disease is likely to cause serious or irreversible damage to the adult’s physical health if the procedure is not performed.	14 15 16 17
<i>Examples—</i>	18
1. A procedure involving sterilisation may be primarily to treat organic malfunction or disease if the adult has uterine cancer, bilateral testicular cancer or cryptorchidism.	19 20 21
2. A procedure involving termination of a pregnancy may be primarily to treat organic malfunction if the adult is a pregnant woman requiring abdominal surgery for injuries sustained in an accident.	22 23 24

## SCHEDULE 1 (continued)

***Division 4—Financial decisions*** 1**Financial decision** 2

16. A “financial decision” of, or for, an adult is a decision (other than a decision about a legal matter) about the possession, custody, control or management of the adult’s property, including, for example, a decision about 1 or more of the following— 3  
4  
5  
6

- (a) paying maintenance and accommodation expenses for the adult and the adult’s dependants; 7  
8
- (b) paying the adult’s debts; 9
- (c) to the extent the decision is not a decision about a legal matter—receiving and recovering money payable to the adult; 10  
11
- (d) carrying on any trade or business of the adult; 12
- (e) performing contracts entered into by the adult; 13
- (f) discharging a mortgage over the adult’s property; 14
- (g) paying rates, taxes, insurance premiums or other outgoings for the adult’s property; 15  
16
- (h) insuring the adult or the adult’s property; 17
- (i) otherwise preserving or improving the adult’s estate; 18
- (j) investing for the adult in authorised investments; 19
- (k) with the tribunal’s approval, investing for the adult in investments that are not authorised investments; 20  
21
- (l) taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult’s existing shareholding (whether or not the shares are an authorised investment); 22  
23  
24  
25
- (m) undertaking an authorised real estate transaction for the adult; 26
- (n) with the tribunal’s approval, undertaking a real estate transaction for the adult that is not an authorised real estate transaction; 27  
28

## SCHEDULE 1 (continued)

(o) undertaking an authorised security transaction for the adult;	1
(p) with the tribunal's approval, undertaking a security transaction for the adult that is not an authorised security transaction.	2 3
<b>Authorised investment</b>	4
17. An "authorised investment" is an investment authorised by the <i>Trust Accounts Act 1973</i> other than a sale or purchase of real property.	5 6
<b>Real estate transaction</b>	7
18. A "real estate transaction" means a transaction involving the sale or purchase of real property.	8 9
<b>Authorised real estate transaction</b>	10
19. An "authorised real estate transaction" for an adult is a transaction involving—	11 12
(a) the sale of some or all of the adult's existing real property to enable a suitable home to be supplied for the adult or a dependant of the adult; or	13 14 15
(b) the purchase of real property as a home for the adult or a dependant of the adult; or	16 17
(c) the purchase of real property to protect the value of some or all of the adult's existing real property.	18 19
<b>Security transaction</b>	20
20. A "security transaction" for an adult is a transaction involving the use of the adult's property as security, for example, for a loan.	21 22

## SCHEDULE 1-(continued)

<b>Authorised security transaction</b>	1
<b>21.(1)</b> An “authorised security transaction” for an adult is a security transaction in which—	2 3
(a) the transaction is to meet the needs of the adult or a dependant of the adult; and	4 5
(b) the amount involved is not more than what is reasonable having regard to all the circumstances and, in particular, the adult’s financial circumstances.	6 7 8
<i>Division 5—Decisions about legal matters</i>	9
<b>Decision about a legal matter</b>	10
<b>22.</b> A “decision about a legal matter” of, or for, an adult is a decision about a legal matter involving the adult or the adult’s property, including, for example—	11 12 13
(a) a decision about using legal services to obtain information about the adult’s legal rights; and	14 15
(b) a decision about using legal services to undertake a transaction; and	16 17
(c) a decision about using legal services to bring or defend a proceeding before a court, tribunal or other entity; and	18 19
(d) a decision involved in bringing or defending a proceeding, including a decision to settle (whether before or after the start of the proceeding). <sup>148</sup>	20 21 22 23

<sup>148</sup> A settlement for an adult whose decision-making capacity is impaired must be sanctioned by a court (section 316). The commission recommends that sanction of settlements by the public trustee under the *Public Trustee Act 1978*, section 59 (Compromise of actions by or on behalf of persons under a legal disability claiming money or damages valid only with sanction of court or public trustee) be discontinued.



**SCHEDULE 2**

1

**DICTIONARY**

2

section 2

3

- “appointed assistant”**, for a decision of an adult, means a person appointed<sup>149</sup> by the tribunal to assist the adult to make the adult’s own decision. 4  
5  
6
- “appointed decision maker”** means a substitute decision maker appointed by the tribunal.<sup>150</sup> 7  
8
- “appointment order”** means an order of the tribunal appointing an appointed assistant or appointed decision maker. 9  
10
- “approved form”** means a form approved by the chief executive. 11
- “authorised investment”** see schedule 1, section 17. 12
- “authorised real estate transaction”** see schedule 1, section 19. 13
- “authorised security transaction”** see schedule 1, section 21. 14
- “bankruptcy”** includes taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction. 15  
16  
17
- “chosen decision maker”** means a substitute decision maker chosen by an adult in an enduring power of attorney<sup>151</sup> or advance health care directive.<sup>152</sup> 18  
19  
20
- “close friend”**, of an adult, means a person who has a close personal relationship with the adult and a personal interest in the adult’s welfare. 21  
22

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<sup>149</sup> An appointed assistant may be appointed under chapter 6.

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<sup>150</sup> An appointed decision maker may be appointed under chapter 6.

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<sup>151</sup> Chapter 4 deals with enduring powers of attorney.

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<sup>152</sup> Chapter 5 deals with advance health care directives.

## SCHEDULE 2-(continued)

<b>“commissioner for declarations”</b> see the <i>Justices of the Peace and Commissioners for Declarations Act 1991</i> .	1 2
<b>“confidentiality order”</b> see section 202(2).	3
<b>“conflict transaction”</b> see section 189.	4
<b>“criminal history”</b> , of a person, means—	5
(a) the person’s criminal record within the meaning of the <i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> and, despite section 6 of that Act, <sup>153</sup> includes a conviction to which the section applies; and	6 7 8 9
(b) charges made against the person for an offence committed in Queensland or elsewhere and the results of the charges.	10 11
<b>“decision about a legal matter”</b> see schedule 1, section 22.	12
<b>“decision document”</b> means an enduring power of attorney or an advance health care directive.	13 14
<b>“decision-making capacity”</b> see schedule 1, section 2.	15
<b>“de facto partner”</b> means a person who lives in a de facto relationship.	16
<b>“de facto relationship”</b> means a relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.	17 18 19 20
<b>“dependant”</b> , of an adult, means a person who is completely or mainly dependent on the adult.	21 22
<b>“deputy president”</b> means the deputy president of the tribunal.	23
<b>“excluded personal decision”</b> see schedule 1, section 7.	24
<b>“family”</b> , of an adult, consists of the following members—	25
(a) the adult’s spouse;	26

<sup>153</sup> See *Criminal Law (Rehabilitation of Offenders) Act 1986*, section 6 (Non-disclosure of convictions upon expiration of rehabilitation period).

## SCHEDULE 2 (continued)

(b) each of the adult's children who is 18 years or more (including a stepchild, an adopted child, and a person for whom the adult was foster-parent or guardian when the person was a child);	1 2 3
(c) each of the adult's parents (including a step-parent, adoptive parent, foster-parent, and guardian);	4 5
(d) if there is no person mentioned in paragraph (a), (b) or (c) who is reasonably available—each of the adult's siblings who is 18 years or more (including a step-sibling, adopted sibling, and foster-sibling).	6 7 8 9
<b>“financial decision”</b> see schedule 1, section 16.	10
<b>“health care”</b> see schedule 1, section 9.	11
<b>“health care decision”</b> see schedule 1, section 8.	12
<b>“health care principle”</b> see section 144.	13
<b>“health care provider”</b> means a person who provides health care in the ordinary course of business or the practice of a profession.	14 15
<b>“impaired decision-making capacity”</b> see schedule 1, section 3.	16
<b>“interested person”</b> means—	17
(a) for an application or proceeding about an enduring power of attorney or related matter—a person who, in the tribunal's opinion, has an appropriate interest in the application; or	18 19 20
(b) for another type of application or proceeding—a person who, in the tribunal's opinion, has an appropriate interest in the adult concerned in the application.	21 22 23
<b>“insolvent”</b> includes external administration (for example, liquidation, receivership or compromise entered into with creditors) under the Corporations Law or a similar law of a foreign jurisdiction.	24 25 26
<b>“matters necessary to make an enduring power of attorney”</b> means the matters in section 36.	27 28
<b>“member”</b> means a member of the tribunal.	29
<b>“object”</b> , by an adult, to health care means—	30

## SCHEDULE 2 (continued)

- (a) the adult indicates the adult does not wish to have the health care; or 1  
2
- (b) the adult previously indicated, in similar circumstances, the adult did not then wish to have the health care and since then the adult has not indicated otherwise. 3  
4  
5
- Example—* 6
- An indication may be given in an enduring power of attorney or advance health care directive or in another way, including, for example, orally or by conduct. 7  
8
- “paid carer”**, for an adult, means someone who— 9
- (a) performs services for the adult’s care; and 10
- (b) receives remuneration from any source for the services, other than— 11  
12
- (i) a carer’s pension; or 13
- (ii) remuneration attributable to the principle<sup>154</sup> that damages may be awarded by a court for voluntary services performed for the adult’s care. 14  
15  
16
- “participation using technology”** see section 205. 17
- “person eligible for appointment because of a legal background”** see section 270(3)(a). 18  
19
- “person eligible for appointment because of a professional background”** see section 270(3)(b). 20  
21
- “person eligible for appointment because of personal experience”** see section 270(3)(c). 22  
23
- “personal decision”** see schedule 1, section 6. 24

<sup>154</sup> This principle was established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161—see Queensland Law Reform Commission Report No. 45, *The assessment of damages in personal injury and wrongful death litigation, Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867*, October 1993. The *Common Law Practice Act 1867*, section 15C has been relocated to the *Supreme Court Act 1995* as section 23.

## SCHEDULE 2 (continued)

<b>“president”</b> means the president of the tribunal.	1
<b>“presidential directions”</b> see section 279(2).	2
<b>“primarily to treat organic malfunction or disease”</b> see schedule 1, section 15.	3 4
<b>“primary carer”</b> , of an adult who lives in a hospital or care facility, means the person in charge of the hospital or care facility.	5 6
<b>“psychologist”</b> see <i>Psychologists Act 1977</i> , section 4.	7
<b>“real estate transaction”</b> see schedule 1, section 18.	8
<b>“relation”</b> , of a person, means—	9
(a) a spouse of the first person; or	10
(b) a person who is related to the first person by blood, marriage or adoption; or	11 12
(c) a person on whom the first person is completely or mainly dependent; or	13 14
(d) a person who is completely or mainly dependent on the first person; or	15 16
(e) a person who is a member of the first person’s household.	17
<b>“removal of tissue for donation”</b> see schedule 1, section 12(1).	18
<b>“security transaction”</b> see schedule 1, section 20.	19
<b>“settle”</b> includes compromise or accept money paid into court.	20
<b>“special consent health care”</b> see schedule 1, section 11.	21
<b>“special consent health care decision”</b> see schedule 1, section 10.	22
<b>“spouse”</b> includes a de facto partner.	23
<b>“statutorily authorised health care decision maker”</b> , for an adult, means each member of the adult’s family or close friend of the adult.	24 25
<b>“sterilisation”</b> see schedule 1, section 13.	26
<b>“substitute decision maker”</b> , for a decision for an adult, means a person	27

## SCHEDULE 2 (continued)

who makes the decision for the adult. <sup>155</sup>	1
<b>“Supreme Court”</b> means a judge of the Supreme Court.	2
<b>“term”</b> includes condition, limitation and instruction.	3
<b>“termination”</b> see schedule 1, section 14.	4
<b>“tissue”</b> see schedule 1, section 12(2).	5
<b>“tribunal”</b> means the Assisted and Substituted Decisions Tribunal.	6
<b>“tribunal rules”</b> see section 278.	7
	8

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<sup>155</sup> This Act categorises substitute decision makers as follows—

- chosen decision makers
- statutorily authorised health care decision makers
- appointed decision makers.