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LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

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*Preliminary Paper 40*

MISUSE OF  
ENDURING POWERS OF ATTORNEY

*A discussion paper*

*The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.*

These should be forwarded to the Law Commission  
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by 31 July 2000

*May 2000*  
Wellington, New Zealand

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# Misuse of enduring powers of attorney

## THE PROJECT

- 1 **T**HE LAW NEEDS MACHINERY to enable decisions to be made on behalf of those unable to manage their own financial affairs or properly look after themselves. Since it came into force on 1 October 1988, the relevant New Zealand statute has been the Protection of Personal and Property Rights Act 1988.
- 2 The present project, of which this discussion paper is part, has been triggered by concern expressed to the Law Commission (notably by Age Concern Auckland Incorporated) about the lack of protection for those whom the statute is designed to assist that can result from an absence of safeguards under Part IX of the 1988 Act (Enduring Powers of Attorney). Such inquiries as we have been able to make to date support the complaint that there are indeed matters that warrant attention. The purpose of this paper is to seek help in relation to the two questions that, in making its final recommendations, the Law Commission must answer:
  - Is there sufficient of a problem to warrant a recommendation to change Part IX?
  - If yes, what should that change be?

## THE LEGAL HISTORY

- 3 It is unnecessary to discuss the other parts of the 1988 Act beyond noting that they are successors to earlier statutes, reflecting the concern (and to many modern eyes the excessively intrusive concern) of the state to protect persons with mental disabilities. Such concern has long been a part of New Zealand law and of English law from which New Zealand law derives. Because of the role allotted to the Family Court by those parts of the Act, the precise problems encountered under Part IX, with which this paper is concerned, do not arise.
- 4 The background to Part IX is a bit different. Part IX was something of an afterthought. It was inserted into the 1988 Act at select committee stage. An opportunity for public submissions on the proposed addition to the Bill was provided. Part IX replaces and expands upon the Aged and Infirm Persons Act 1912, which was one of a number of innovative statutes enacted by the New Zealand Parliament in the early years of the 20th century. There are many situations in which a person is (in the words of that statute as first enacted) “by reason of age, disease, illness or physical or mental infirmity” unable to manage his

affairs satisfactorily.<sup>1</sup> In practice, the statute was most commonly used in respect of an elderly person who was not (in the language of the day) a mental defective (or whose family wished to avoid the stigma of his or her being so labelled), but whose circumstances required a substitute decision-maker. There could be other cases in which the statute was useful: a stroke victim unable to communicate is an example. An application had to be made to the Supreme Court (later High Court) for the appointment of a manager who (unless the Public Trustee) could be required to furnish security. The manager's powers were limited; they did not, for example, include a power of sale unless expressly given. The manager was required to file regular statements of account in the Court and (unless the Public Trustee or a trust company was the manager) to furnish a copy of the accounts to the Public Trustee. There was not much room for abuse.

- 5 But there were a number of problems with the statute. The main one was simply that the process was cumbersome and expensive. It made economic sense to invoke it only when the individual was so wealthy or his or her affairs so complex that the setting in place of formal arrangements for managing the individual's affairs could not sensibly be avoided.

## ENDURING POWERS OF ATTORNEY

- 6 It has always been possible for elderly (or any other) persons, while they still have the capacity (meaning the mental capacity) so to do, to give powers of attorney authorising the attorney to exercise powers over their financial affairs. A power of attorney can give powers that are unlimited (lawyers used, in their cheerful way, to call this a "cut-throat power of attorney").<sup>2</sup> It can be of a fixed or of unlimited duration. Except in the small class of cases where an irrevocable power of attorney is possible, the power can be revoked by the donor of the power at any time extremely informally and without prior notice. Sometimes a person giving a power of attorney is called the donor and the person authorised to act a donee. We prefer in this paper to use the terms "donor" and "attorney" because that is language of the 1988 Act.
- 7 A power of attorney is simply a formal type of agency under which the donor appoints the attorney as agent, to do certain things that the donor himself has the legal right to do. The law of agency provides that an agent may not have powers greater than those of the donor, which is logical enough. The difficulty in the present context was, however, that if the donor's loss of mental ability was so severe that the donor ceased to possess the capacity to perform the delegated acts, the agent's powers to do those acts also came to an end. Often in the cases of powers of attorney granted by the elderly this meant that the power ceased to be effective in the very situation where it was most needed. If the attorney continued to act as if he still had those powers, he ran the risk that his actions could in the event of a dispute be declared void, in which event he would be personally liable for resultant loss.<sup>3</sup> Even so, the literature suggests that many attorneys were prepared, both in New Zealand and other jurisdictions, to take this risk, reasoning that in a family situation if no one was prejudiced no one was likely to complain.

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<sup>1</sup> In 1969 this was replaced with "by reason of age, disease, physical or mental illness or infirmity or mental subnormality".

<sup>2</sup> Powers of attorney are interpreted strictly and the advantage of unlimited powers is that disputes founded on accidental omissions or drafting inadequacies are avoided.

<sup>3</sup> *Yonge v Toynbee* [1910] 1 KB 215.

- 8 The solution to this problem, which has been adopted in most of North America, in all Australian states, in England,<sup>4</sup> and in New Zealand by Part IX of the 1988 Act, was to provide by legislation that the power of attorney would continue in effect despite the donor's supervening incapacity.<sup>5</sup> In England and Australasia such documents are called *enduring powers of attorney*. The equivalent term in the United States of America is *durable powers of attorney*.

## PART IX

- 9 Part IX and the Third Schedule of the 1988 Act are reproduced in Appendix A.<sup>6</sup> An enduring power of attorney must be substantially in the form provided by the Third Schedule. It must be signed by both the donor and the attorney. The signature of each must be witnessed (section 95). It seems probable that in most cases the attorney is a relative of the donor. An enduring power of attorney is not revoked by the donor's subsequent mental incapacity (section 96). The enduring power of attorney may relate to property (section 97), to the donor's personal care and welfare (an innovation) (section 98), or to both (section 99). Where the enduring power of attorney relates to the donor's personal care and welfare, it is what the New York statute calls (reviving an archaism) a "springing" power. It does not come into effect "unless the donor is mentally incapable" (section 98(3)), a term that is defined in section 94. Sections 101–105 confer jurisdiction on the Family Court to interfere in certain circumstances.

## THE ABSENCE OF EFFECTIVE SAFEGUARDS

- 10 It is entirely understandable that those who settled the form of Part IX should have been concerned to devise a procedure as swift, inexpensive, informal and lawyer-free as possible. But it leaves little protection for vulnerable donors who, in many (perhaps most) cases, will have signed an enduring power of attorney only because of an awareness of deteriorating capacity and a belief that they were unable to cope on their own. We list some of the problems:
- There is no monitoring of whether, on signing the power, the donor had the capacity to understand the effect of what is being signed. (The threshold of understanding required appears not to be high. The donor needs to understand the fact and extent of delegation as distinct from the details of managerial steps the attorney is likely to take.)<sup>7</sup>
  - Although the prescribed forms warn donors about the need to obtain legal advice, there is no requirement of independent legal advice or that questions

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<sup>4</sup> Enduring Powers of Attorney Act 1985 (UK).

<sup>5</sup> There is a useful list of publications on the subject by law reform agencies in Robin Creyke "Privatising Guardianship – The EPA Alternative" (1993) 15 Adel LR 79, 86.

<sup>6</sup> There is a helpful account of Part IX by WR Atkin at [1988] NZLJ 368. His article "The Courts, Family Control and Disability – Aspects of New Zealand's Personal and Property Rights Act 1988" (1988) 18 VUWLR 345 discusses, in relation to the entirety of the Act, the tension between the interests of the handicapped person and the members of that person's family.

<sup>7</sup> *Re K* [1988] Ch 310; *Re EW* (1993) 11 FRNZ 118; *Gibbons v Wright* (1954) 91 CLR 423, 444. A more cautious view is expressed by R Munday at (1989) 13 NZULR 253, 269–270, "In strict law, therefore, the enduring power of attorney is not a device to which recourse can be safely had when senility has begun to manifest itself in the donor".

such as how wide the powers conferred on the attorney need to be are discussed with the donor.

- There is no machinery to ensure that the donor is informed of the donor's right of revocation.
  - There is no requirement to file accounts comparable to that in the repealed statute and no independent monitoring of the acts of the attorney.
  - There is no monitoring of the decision that a donor is mentally incapable which triggers the personal care and welfare powers.
  - The powers of the Family Court to intervene are in practice largely ineffectual because nothing happens unless someone sets proceedings in train.
  - There is understandable reluctance by donors to take court proceedings against children or other family members who have misused powers.
  - The donor may be prevented from involving Family Court assistance by ignorance, lack of funds, or social isolation.
- 11 It should also be noted that there is no requirement to register enduring powers of attorney comparable to those found in other jurisdictions (under the English statute for example). This means that no one knows how many enduring powers of attorney exist and how the powers they confer are being exercised. Whether such a registration system would safeguard donors is discussed in paragraph 24 of this paper.

## NOTICE OF THE NEED FOR SAFEGUARDS

- 12 Prior to the 1988 Act there were clear warnings about the need for safeguards. Terry Carney spoke in 1981 (published in a paper the following year) of the fact that “the literature is replete with articles warning of the danger that open-ended guardianship laws will be subverted and abused by family members, and others intent on advancing their own interests”.<sup>8</sup> He observed:
- There is also a substantial risk that guardians, once appointed, will misuse the powers delegated to them. Empirical studies of related areas confirm the need for caution in appointing a family member as a guardian “since it often may be his or her family from which the patient most needs protection”.<sup>9</sup>
- 13 The English Law Commission in its report, on which was based the English statute of 1985 (a statute plainly relied on by the framers of Part IX), discusses safeguards and what it calls the “delicate balance” between the need for a simple, effective, and inexpensive machinery on the one hand and protection of the donor's interests against exploitation on the other.<sup>10</sup> There is reference to the likelihood of attorneys who are relatives persuading themselves that, had the donor been capable, he would have wished them to have the benefit to which they are helping themselves.

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<sup>8</sup> Terry Carney “Civil and Social Guardianship for Intellectually Handicapped People” (1982) 1 Monash U LR 199, 227.

<sup>9</sup> Carney, above n 8, 230.

<sup>10</sup> Law Commission (England and Wales) *The Incapacitated Principal: No 122* (HMSO, London, 1983) paras 3.9–3.38.



- 14 The only reference to safeguards made at the second reading stage by the minister in charge of the bill that became the 1988 Act was the sentence:

Thirdly, to guard against any abuse by attorneys under enduring powers of attorney, the family courts are given extensive powers to supervise the activities of attorneys and even revoke their appointments if they are not acting in the best interests of their donors.<sup>11</sup>

The illusory nature of this protection has already been referred to in paragraph 10 of this paper.

## TYPES OF MISUSE

- 15 What form is misuse of enduring powers of attorney likely to take? It is likely to include the following:

- Outright embezzlement, often rationalised by the attorney as “borrowing”, or as a reasonable anticipation of entitlement on succession, or “I am sure if Mum could understand she wouldn’t mind”. It may be thought that the door to such behaviour is unwisely opened by the terms of section 107(1) entitling the attorney to act for his or her own benefit:

but only if, and only to the extent that, the donor might be expected to provide for the needs of the attorney . . .

- The attorney helping himself or herself to the donor’s belongings including consumer durables and decorative items. These actions may be motivated by greed or by a desire to get in ahead of siblings.
- Failure to institutionalise the donor where this is plainly necessary, such failure being motivated by a desire not to diminish the size of the estate ultimately available to the donor’s heirs, of whom the attorney is one.
- The reverse situation of prematurely institutionalising the donor to suit the convenience of the attorney.
- Following the institutionalisation of the donor, selling the donor’s home without the donor’s knowledge or consent, and so removing from the donor the hope, however irrational, that he or she may some day be able to return there.

## THE EXTENT OF MISUSE

- 16 Is there evidence of misuse by attorneys of powers exercisable under Part IX of the 1988 Act sufficiently extensive to warrant statutory change? It seems to the Law Commission more helpful to define the issue in this narrowly focused way than to engage in generalisations on “elder abuse” or “granny bashing”.

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<sup>11</sup> GWR Palmer (18 February 1988) 486 NZPD 2120. To be fair, none of the submissions on the proposal referred to the risk of misuse except that of the Alzheimer’s Disease and Related Disorders Society NZ Incorporated, which suggested that the donor’s execution of the document be witnessed by a solicitor placed under a duty comparable to that of solicitors witnessing agreements under the Matrimonial Property Act 1976.

- 17 The Law Commission does *not* believe that every child appointed an attorney is a potential Goneril or Regan.<sup>12</sup> No doubt there is a very large number of cases in which Part IX functions precisely as its authors intended. But because, as already mentioned, no one knows the number of enduring powers of attorney, and also because it is likely that there is hidden misuse, it is not possible to tell in what proportion of cases things go wrong.
- 18 What we do know is that:
- The enduring power of attorney system with its lack of safeguards provides opportunity for misuse.
  - Experience both overseas and in New Zealand points to the frequency of the economic exploitation of the aged.
  - Social workers and others concerned with the welfare of the aged are convinced of the occurrence of misuse and provide anecdotes as to its occurrence.
  - An examination of 130 case studies of elder abuse,<sup>13</sup> compiled by Age Concern Auckland in respect of a two year period, showed 40 attributable to misuse of an enduring power of attorney.
- 19 This may be viewed as a statistically shaky foundation for legislative action, but it is, we think, enough to warrant our placing the problem before the public.

## REMEDIES

- 20 Assuming that there is sufficient evidence of abuse of the Part IX procedures to justify changing the law, what form should that change take? Any changes should be devised with a view to interfering as little as possible with the great virtues of the Part IX procedures, which are their cheapness and the fact that they enable the donor to make his or her own decision as to who should be the donor's substituted decision-maker. In the following paragraphs, we list a number of possibilities that have occurred to us, have been suggested to us, have been adopted in other jurisdictions, or are to be found advocated in the literature. Any views we express on these suggestions can be no more than tentative. What we badly need are the opinions of those who do the actual work in this field.
- 21 Firstly there is the question of the donor's mental capacity at the time of the first signing of the power. It would not, we think, add excessively to the cost of the process if it were to be a condition of the validity of the power that the donor's signature was witnessed by a solicitor who certified: that he was acting in the matter for the donor independently of the attorney; that the donor appeared to

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<sup>12</sup> In Shakespeare's play, Goneril and Regan are the daughters between whom King Lear divides his kingdom on terms that proper provision will be made for him. Goneril and Regan do not stick to their side of the arrangement.

<sup>13</sup> Elder abuse is defined as "where a person aged 65 or more experiences harmful physical, psychological, sexual, material or social effects caused by the behaviour of another person with whom they have a relationship implying trust", Sue Martin *Current and Future Implications for the Older Population with the Enduring Powers of Attorney* (Age Concern Auckland Inc, Auckland, 1999) 16, quoting *Age Concern Elder Abuse Manual* (Age Concern Auckland Inc, Auckland, 1999) para 3.3.

have the necessary capacity; and that, in particular, the solicitor had advised the donor on the width of the powers conferred by the particular document and whether they were necessary or appropriate in the donor's particular circumstances; and advised the donor on the powers of revocation and how the donor might go about exercising them. Our tentative view is that, in addition, there should be a certificate of capacity from a medical practitioner. *Re EW*<sup>14</sup> provides a cautionary tale on the risks of relying solely on a solicitor's certificate. In that case, the solicitor who witnessed the signature of the donor, who was suffering from "senile dementia of the Alzheimer type", formed the view in the course of a 15-minute contact at a rest home that the donor had capacity. The Family Court Judge described this view as "in stark contrast with the evidence of all the mental health professionals who were involved in EW's care" at the relevant time.<sup>15</sup> What, in our tentative view, is required is a solicitor charged with the responsibility of giving the appropriate advice and warnings (the printed warnings on the statutory form cannot, we think, be relied on) and a medical practitioner to assess capacity.

- 22 Another inexpensive step that would help in the situation where one child of a widowed parent tries, by procuring appointment as attorney, to steal a march over siblings, or appears to those siblings to be so doing, would perhaps be a requirement that near relatives (to be appropriately defined) be formally notified of the grant of an enduring power of attorney and of the stage at which it was claimed that the donor had become "mentally incapable" so as to bring the personal care and welfare provision into force under section 98(3). There is a comparable requirement (hitched to the statutory requirement of registration) under the United Kingdom Enduring Powers of Attorney Act 1985 (section 4(3) and Schedule 1).
- 23 Section 98(3) is a source of substantial difficulty. The definition of "mentally incapable" assumes that it is possible to define a point when the donor has reached that state, when in fact the typical pattern of senile mental decay is of a continuum lacking any such definable moment. We seek opinion on whether there is a need for the safeguard of an objective independent certification that the state of "mentally incapable" has been reached.
- 24 Great faith was placed by the English Law Commission on public registration of enduring powers of attorney as a safeguard<sup>16</sup> and there is provision for registration in the Northern Territory and Tasmania.<sup>17</sup> The Queensland Law Commission has recommended against such a proposal.<sup>18</sup> Age Concern Auckland mentioned to us the case of a demented woman who gave a series of powers of attorney, with each attorney ignorant of what had gone before. Apart from this sort of situation which we would imagine is rare, we see no advantage in registration. The English Law Commission at one stage seemed inclined to retreat from its earlier stand<sup>19</sup> but

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<sup>14</sup> *Re EW* (1993) 11 FRNZ 118.

<sup>15</sup> *Re EW*, above n 14, 123.

<sup>16</sup> Law Commission (England and Wales), above n 10, paras 4.34–4.58.

<sup>17</sup> Powers of Attorney Act 1934 (Tas), s6, s11E(3); Powers of Attorney Act 1980 (NT), s13(c).

<sup>18</sup> Queensland Law Reform Commission *Assisted and Substituted Decisions: Decision-Making By and For People With a Decision-Making Disability: No 49* (Brisbane, 1996) 148–158.

<sup>19</sup> Law Commission (England and Wales) *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction: Consultation Paper No 128* (HMSO, London, 1993) paras 7.20–7.23.

later still seems to have reversed this position to one favouring the retention of registration on the basis that bringing a document into the public domain:

will undoubtedly discourage some people who might abuse powers which remain in the private domain and will provide a point of reference for those who have queries or concerns about the status of a particular document.<sup>20</sup>

- 25 In the end there has to be resort to the determination of a supervisory agency. Under Part IX the supervisory agency is the Family Court, but any court by its nature will be the reverse of proactive and there are the usual impediments to access including cost and formality. Just how does a bedridden 90-year-old women in a private hospital in a city suburb, who is worried that her son who is her attorney is embezzling her assets, invoke the help of the Family Court? The preference in various Australian jurisdictions is to substitute a tribunal for a court on the basis that a tribunal can be cheaper, more informal, and more accepting that in any examination it should be the donor who occupies the centre stage. Professor Carney has invited consideration in New Zealand of this model, and has suggested a role for the Health and Disability Commissioner.<sup>21</sup>
- 26 The Law Commission sees difficulties in this. It is not unknown for tribunals to invent their own formalities and bureaucratic rituals and to become as bogged down in delays as any court. The expertise of the Health and Disability Commissioner is probably more in the field of institutions than resolving conflicts between individuals. Probably the sensible solution is for the Family Court to retain the determination jurisdiction, but for there to be created a Commissioner for the Aged to act as old people's champion. The elaborate provisions for an adult guardian in Chapter 7 of the Queensland Powers of Attorney Act 1998 (reproduced in Appendix B) may be thought of some value as a model.
- 27 Does section 107(1), which allows an attorney to act for that attorney's own benefit, need to be changed?<sup>22</sup>

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<sup>20</sup> Law Commission (England and Wales) *Mental Incapacity: No 231* (HMSO, London, 1995) paras 7.28–7.31.

<sup>21</sup> Terry Carney "Abuse of Enduring Power of Attorney – Lessons from the Australian Tribunal Experiment" (1999) 18 NZULR 481.

<sup>22</sup> There are two interlocutory Family Court judgments relevant to s 107. In one, (*Hansen & Ors v Baikie* (28 October 1997) District Court, Christchurch, PPPR 28/97, leave was granted to trustees of the donor's estate to apply for review of a decision of an attorney to draw a cheque for \$12 000 on the donor's bank account on the day she died, without the knowledge or consent of a co-attorney, in recompense for services provided. In the other judgment, *Re Tindall* [2000] NZFLR 373, where the attorney had provided a home for the donor, her grandmother, leave was granted to challenge certain expenditure including the cost of a car for the attorney which she regarded as more suitable for transporting the donor.

## CONCLUSION

- 28 The Law Commission would be pleased to receive comments and submissions on this paper by 31 July 2000. In particular, we would be grateful for:
- Information on the extent of the misuse of enduring powers of attorney.
  - The views of those experienced in this field as to appropriate safeguards that might be put in place.
- 29 The Commissioner in charge of this project is DF Dugdale. The Legal Research Officer is Helen Colebrook.
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APPENDIX A

Extract from the  
Protection of Personal and  
Property Rights Act 1988

PART IX  
ENDURING POWERS OF ATTORNEY

94 INTERPRETATION –

- (1) For the purposes of this Part of this Act, the donor of an enduring power of attorney is mentally incapable, –
  - (a) In relation to property, if the donor is not wholly competent to manage his or her own affairs in relation to his or her property; or
  - (b) In relation to personal care and welfare, if the donor –
    - (i) Lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
    - (ii) Has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.
- (2) Nothing in subsection (1) of this section shall affect any rule of law relating to capacity to give or to revoke a power of attorney.

95 WHEN POWER OF ATTORNEY IS AN ENDURING POWER OF ATTORNEY –

- (1) Subject to the provisions of this section, a power of attorney is an enduring power of attorney if the instrument that creates the power –
  - (a) Is in a form set out in the Third Schedule to this Act; and
  - (b) Is signed by the donor [, or by some other person in the presence of the donor and by the direction of the donor,] whose signature is attested by a witness to the signing, not being the attorney; and
  - (c) Is signed by the attorney (or, if more than one, each attorney) whose signature is attested by a witness to the signing, not being the donor.
- (2) A power of attorney purporting to be an enduring power of attorney shall have effect notwithstanding that it is in a form different from a form set out in the Third Schedule to this Act, if, but only if, the differences are immaterial.
- (3) A power of attorney shall not have effect as an enduring power of attorney unless the attorney, when signing the instrument creating it, is –
  - (a) An individual who is not less than 20 years of age, is not bankrupt, and is not subject to a personal order or a property order; or
  - (b) A trustee corporation.
- (4) A power of attorney delegating trustee powers, authorities, and discretions under section 31 of the Trustee Act 1956 shall not have effect as an enduring power of attorney.
- (5) A power of attorney that gives the attorney the right to appoint a substitute or a successor shall not have effect as an enduring power of attorney; but an enduring

power of attorney may provide for successive attorneys, the appointment of one being conditional upon the cessation of the appointment of another.

- (6) A power of attorney executed before the commencement of this Act shall not have effect as an enduring power of attorney.
- 96 ENDURING POWER OF ATTORNEY NOT REVOKED BY DONOR'S SUBSEQUENT MENTAL INCAPACITY –  
An enduring power of attorney shall not be revoked by the donor's subsequent mental incapacity, but shall continue to have effect according to its tenor.
- 97 ENDURING POWER OF ATTORNEY IN RELATION TO PROPERTY –
- (1) A donor of an enduring power of attorney may authorise the attorney to act generally in relation to the whole or a specified part of the donor's affairs in relation to his or her property, or to act in relation to specified things on the donor's behalf, and in either case such authorisation may be given subject to conditions and restrictions.
- (2) Where a donor of an enduring power of attorney authorises the attorney to act generally in relation to the whole or a specified part of the donor's affairs in relation to the donor's property, the attorney shall have authority to do anything on behalf of the donor that the donor can lawfully do by an attorney, but subject to sections 100 and 107 of this Act and to any conditions or restrictions contained in the enduring power of attorney.
- (3) Where a donor of an enduring power of attorney has become mentally incapable, the attorney shall be authorised to make an application under section 122 of the Land Transfer Act 1952 to have a transmission registered where the attorney believes that the donor is entitled to any estate or interest in land by virtue of that transmission, and a District Land Registrar is authorised to accept such an application notwithstanding the fact that the attorney is not the person claiming to be entitled to the estate or interest in land.
- 98 ENDURING POWER OF ATTORNEY IN RELATION TO PERSONAL CARE AND WELFARE –
- (1) Subject to subsections (3) and (4) of this section, a donor of an enduring power of attorney may authorise the attorney to act in relation to the donor's personal care and welfare, either generally or in relation to specific matters, and in either case such authorisation may be given subject to conditions and restrictions.
- (2) Notwithstanding section 95(3) of this Act, an enduring power of attorney may not appoint a trustee corporation to be an attorney, nor may it appoint more than one individual to be attorneys, to act in relation to the donor's personal care and welfare.
- (3) The attorney shall not act in relation to the donor's personal care and welfare unless the donor is mentally incapable.
- (4) The attorney shall not act in respect of any matter relating to the donor's personal care and welfare where, if the attorney were the welfare guardian of the donor, the attorney would be denied the power to act by section 18 of this Act.
- (5) Subject to subsections (3) and (4) of this section, any action taken by the attorney in relation to the donor's personal care and welfare shall have the same effect as it would have had if it had been taken by the donor and the donor had had full capacity to take it.
- 99 BOTH KINDS OF POWERS MAY BE GIVEN –
- (1) Nothing in section 95 or section 97(1) or section 98(1) of this Act shall prevent a donor from –
- (a) Authorising the attorney, whether in the same or in a separate document, to act both –

- (i) In relation to the whole or a specified part of the donor's affairs in relation to his or her property, or to act in relation to specified things on the donor's behalf; and
- (ii) In relation to the donor's personal care and welfare, either generally or in relation to specific matters; or
- (b) Giving an enduring power of attorney to any person or persons for the purposes described in subparagraph (i) of paragraph (a) of this subsection, and, whether in the same or in a separate document, to another person for the purposes described in subparagraph (ii) of that paragraph.
- (2) In any case to which subsection (1) (b) of this section applies, in the event of any conflict arising between the exercise of the powers of the attorney appointed for the purposes described in subparagraph (i) of paragraph (a) of subsection (1) of this section and the exercise of the powers of the attorney appointed for the purposes of subparagraph (ii) of that paragraph, the latter shall prevail unless a Court, on the application of either attorney, otherwise directs in any particular case.

100 ENDURING POWERS OF ATTORNEY SUBJECT TO PERSONAL ORDER AND PROPERTY ORDER –

Where an enduring power of attorney is given by a person who is or who subsequently becomes subject to a personal order or a property order, the order shall be binding on the attorney; and, in the event of any conflict arising between the powers and duties of the attorney and the terms of the order, the order shall prevail.

101 ATTORNEY MAY SEEK DIRECTIONS FROM COURT –

- (1) The attorney under an enduring power of attorney may apply to a Court for directions relating to the exercise of the attorney's powers.
- (2) Nothing in subsection (1) of this section shall limit or affect the jurisdiction of any other court.

102 COURT'S JURISDICTION IN RESPECT OF AN ENDURING POWER OF ATTORNEY –

- (1) A Court shall have jurisdiction to determine –
  - (a) Whether or not any instrument is an enduring power of attorney; or
  - (b) Whether or not the donor of an enduring power of attorney is mentally incapable.
- (2) A Court shall have jurisdiction to do all or any of the following things in respect of an enduring power of attorney where the donor has become mentally incapable:
  - (a) Determine any question as to the meaning or effect of the instrument by which the power is given:
  - (b) Determine whether or not any such instrument has ceased to have effect:
  - (c) Give directions with respect to –
    - (i) The management or disposal by the attorney of the property and affairs of the donor; or
    - (ii) The rendering of accounts by the attorney and the production of the records kept by the attorney for the purpose; or
    - (iii) The remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration; or
    - (iv) Any matter relating to the personal care and welfare of the donor:
    - (v) Any other matter on which the directions of the Court are sought under section 99(2) or section 101 of this Act:



- (d) Modify the scope of the enduring power of attorney by including or excluding –
    - (i) Part of the donor’s affairs in relation to his or her property, or any powers relating to any such affairs; or
    - (ii) Any specific matters in relation to the donor’s personal care and welfare, or any powers relating to any such matters, not being a matter referred to in section 98(4) of this Act:
  - (e) Require the attorney to furnish information or produce documents or things in his or her possession as attorney:
  - (f) Give any consent or authorisation to act that the attorney would have to obtain from the donor if the donor were mentally capable:
  - (g) Authorise the attorney to act, otherwise than in accordance with section 107 of this Act, to the benefit of the attorney or persons other than the donor, but subject to any conditions or restrictions contained in the instrument:
  - (h) Determine whether the donor of the power was induced by undue influence or fraud to create the power:
  - (i) Determine whether, having regard to all the circumstances and, in particular, the attorney’s relationship with the donor, the attorney is suitable to be the donor’s attorney.
- (3) Nothing in the foregoing provisions of this section shall limit or affect the jurisdiction of any other court.

103 REVIEW OF ATTORNEY’S DECISIONS –

- (1) The donor of an enduring power of attorney, and any other person with leave of the Court, may at any time apply to a Court to review any decision made by the attorney while the donor is or was mentally incapable, and the Court may, if it thinks it reasonable to do so in all the circumstances, review the decision and make such order as it thinks fit.
- (2) An order made under subsection (1) of this section shall have effect according to its tenor.

104 DISCLAIMER BY ATTORNEY –

- (1) An attorney under an enduring power of attorney may not disclaim that power otherwise than by notice given as follows:
  - (a) Where the donor is not mentally incapable, by written notice to the donor:
  - (b) Where the donor is mentally incapable, by filing a notice in a Court.
- (2) If, in any case to which subsection (1) (b) of this section applies, the attorney considers that it may be desirable in the interests of the donor that a welfare guardian be appointed under Part I of this Act in respect of the donor’s personal care and welfare, or that a manager be appointed under Part III of this Act in respect of any property owned by the donor, the attorney may attach a report to that effect to the notice filed in the Court.
- (3) On receiving a report under subsection (2) of this section, the Registrar shall refer the matter to a Judge who may give to the Registrar all such directions as the Judge considers appropriate to have the matter drawn to the attention of such person or persons described in section 7 or section 26 of this Act as the Judge thinks fit.

105 COURT MAY REVOKE APPOINTMENT OF ATTORNEY –

- (1) Where a Court is satisfied that an attorney appointed under an enduring power of attorney has not acted, is not acting, or proposes not to act in the best interests of the donor of that power, the Court may revoke the appointment of the attorney.
- (2) Where a Court under paragraph (h) or paragraph (i) of section 102(2) of this Act determines that the donor of an enduring power of attorney was induced by

undue influence or fraud to create the power or that the attorney is not suitable to be the donor's attorney, the Court shall revoke the appointment of the attorney.

106 CIRCUMSTANCES IN WHICH ENDURING POWER OF ATTORNEY SHALL CEASE TO HAVE EFFECT –

- (1) An enduring power of attorney shall cease to have effect when –
  - (a) The donor revokes the power while mentally capable of doing so; or
  - (b) The donor dies; or
  - (c) The attorney gives notice of disclaimer in accordance with section 104 of this Act; or
  - (d) The attorney dies, or is adjudged bankrupt, or becomes a special or committed patient under the Mental Health Act 1969, or becomes subject to a personal order or a property order, or otherwise becomes incapable of acting; or
  - (e) In the case of an enduring power of attorney that appoints more than one attorney with joint but not several authority, one of the attorneys dies, or is adjudged bankrupt, or becomes a special or committed patient under the Mental Health Act 1969, or becomes subject to a personal order or a property order, or otherwise becomes incapable of acting; or
  - (f) A Court revokes the appointment of the attorney pursuant to section 105 of this Act.
- (2) In any case where the enduring power of attorney provides for successive attorneys, the appointment of one being conditional upon the cessation of the appointment of another, the provisions of paragraphs (c) to (f) of subsection (1) of this section shall apply only in respect of the last such attorney.

107 ATTORNEY'S POWER TO BENEFIT SELF AND OTHERS –

- (1) Subject to the terms of, and any conditions or restrictions in, an enduring power of attorney, at any time while the donor is mentally incapable the attorney may act to the benefit of the attorney or persons other than the donor if, but only if, and only to the extent that, the donor might be expected to provide for the needs of the attorney or those other persons.
- (2) Without limiting the generality of subsection (1) of this section, but subject to the terms of, and any conditions or restrictions in, the enduring power of attorney, the attorney may dispose of the property of the donor by way of gift if, but only if, the gift is –
  - (a) Of a seasonal nature or at a time or an anniversary of a birth or marriage to a person (including the attorney) who is a relative of the donor; or
  - (b) To a charity to which the donor made or might be expected to make gifts, – and the value of the gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

108 PROCEDURE –

For the purpose of proceedings under this Part of this Act, the provisions of Part VI (except section 64), and sections 83 to 85 of this Act, so far as they are applicable and with any necessary modifications, shall apply as if the donor were a person in respect of whom an application for a personal order or a property order was being sought or in respect of whom such an order had been made, subject to the following provisions:

- (a) Where the application for the exercise of the Court's jurisdiction is made by any person other than the attorney, a copy of the application shall be served on the attorney (as well as the persons listed in section 63(1) of this Act):

- (b) Where a donor has given 2 or more enduring powers of attorney and it is intended to apply to the Court under this Part of this Act in respect of any 2 or more of those powers, the applications may be joined, and, subject to any rules of procedure made under this Act, it shall not be necessary to file separate applications:
- (c) A Court may hear and determine any proceedings before it under this Part of this Act in conjunction with any other proceedings under this or any other Part of this Act in any case where both proceedings are in respect of the same person, whether or not the parties to the proceedings are the same.

**THIRD SCHEDULE**

**Section 95**

FORM OF ENDURING POWER OF ATTORNEY IN RELATION  
TO PROPERTY

THIS ENDURING POWER OF ATTORNEY is made this ..... day of ..... 19 .... by *(Full name, address, and occupation of donor)*.

1. I hereby appoint *(Full name, address, and occupation of attorney)* to be my attorney for the purpose of Part IX of the Protection of Personal and Property Rights Act 1988 with

\* general authority to act on my behalf

*or*

\* authority to act on my behalf in the following respects only:

.....  
.....

\* in relation to the whole of my property

*or*

\* in relation to the following property only:

.....  
.....

\* subject to the following conditions and restrictions:

.....  
.....

2. \* I intend that the authority in paragraph 1 of this instrument shall not be revoked if I become mentally incapable.

*or*

\* I intend that the authority in paragraph 1 of this instrument shall have effect only if I become mentally incapable.

Signed by *(Name of Donor)* .....

in the presence of .....

Signed by *(Name of Attorney)* .....

in the presence of .....

\* Delete where not applicable

\_\_\_\_\_

NOTES ON THE ABOVE FORM

1. The effect of this document is to authorise the person you have named as your attorney to act on your behalf in respect of your affairs in relation to your property. As you will see from the form, you can authorise your attorney to act in respect of all your property affairs, or only some of them. If you want the attorney to act in respect of some of them only, you must specify which they are.
2. You must also indicate whether you wish this document to be effective even while you are mentally capable and to continue if you become mentally incapable, or whether you want it to have effect only if you become mentally incapable.
3. You should consider very carefully what conditions you may wish to impose on the attorney's right to act to his or her own benefit or to the benefit of other persons. Subject to anything you may state in this document, the attorney may act in such a way as to benefit the attorney or other persons if you might be expected to provide for the needs of the attorney or those other persons. The attorney will also be able to make seasonal gifts and charitable donations on your behalf.
4. Before signing this document, you should seek legal advice.

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FORM OF ENDURING POWER OF ATTORNEY IN RELATION TO  
PERSONAL CARE AND WELFARE

THIS ENDURING POWER OF ATTORNEY is made this ..... day of  
..... 19 .... by *(Full name, address, and occupation of donor)*.

1. I hereby appoint *(Full name, address, and occupation of attorney)* to be my attorney for the purpose of Part IX of the Protection of Personal and Property Rights Act 1988 to act on my behalf, if I become mentally incapable,  
\* in relation to my personal care and welfare generally

or

\* in relation to the following specific matters relating to my personal care and welfare

.....  
.....  
.....

\* subject to the following conditions and restrictions:

.....  
.....  
.....

Signed by *(Name of Donor)* .....  
in the presence of .....

Signed by *(Name of Attorney)* .....  
in the presence of .....

Delete where not applicable

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NOTES TO THE ABOVE FORM

1. The effect of this document is to authorise the person you have named as your attorney to act on your behalf in relation to your personal care and welfare. As you will see from this form, you can authorise your attorney to act in relation to

your personal care and welfare generally, or only in relation to specific matters. If you want the attorney to act in respect of specific matters only, you must specify what they are.

2. You can appoint only 1 person to act as your attorney at any one time. A trustee company cannot act as an attorney under this form.
  3. The attorney cannot act for you on certain matters. These are –
    - (a) To make any decisions relating to your entering into marriage, or the dissolution of your marriage; or
    - (b) To make any decision relating to the adoption of a child of yours; or
    - (c) The refusal of consent to any standard medical treatment or procedure intended to save your life or to prevent serious damage to your health; or
    - (d) The giving of consent to the administering of electro-convulsive treatment; or
    - (e) The giving of consent to the performance on you of any surgery or other treatment designed to destroy any part of your brain or any of your brain functions for the purposes of changing your behaviour; or
    - (f) The giving of consent to your taking part in any medical experiment (except for the purpose of saving your life or of preventing serious damage to your health).
  3. Before signing this document, you should seek legal advice.
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APPENDIX B

Powers of Attorney Act 1998  
(Queensland), chapter 7 –  
adult guardian

PART 1 – ESTABLISHMENT, FUNCTIONS AND POWERS

**Adult guardian**

126. There must be an Adult Guardian.<sup>1</sup>

**Functions**

127. (1) The adult guardian's role is to protect the rights and interests of adults who have impaired capacity.
- (2) The adult guardian has the functions given to the adult guardian by this Act or another Act, including the following functions –
- (a) protecting adults who have impaired capacity from neglect, exploitation or abuse;
  - (b) investigating complaints and allegations about actions by an attorney or person acting or purporting to act under –
    - (i) a general power of attorney made under this Act; or
    - (ii) an enduring document; or
    - (iii) a power of attorney made otherwise than under this Act, whether before or after its commencement;
  - (c) mediating and conciliating between attorneys or between attorneys and others, for example, health providers, if the adult guardian considers this appropriate to resolve a dispute;
  - (d) acting as attorney –
    - (i) for a personal matter under an enduring power of attorney; or
    - (ii) under an advance health directive; or
    - (iii) for a health matter under chapter 4;<sup>2</sup> or
    - (iv) if appointed by the court;
  - (e) seeking assistance (including assistance from a government department, or other institution, welfare organisation or provider of a service or facility) for, making representations for, or acting for, an adult who has impaired capacity for a matter;
  - (f) educating and advising people about, and conducting research into, the operation of this Act.
- (3) In performing a function or exercising a power, the adult guardian must comply with the general principles and the health care principle.<sup>3</sup>

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Footnotes not the original numbering.

<sup>1</sup> See part 4 (Administrative provisions), particularly section 150 (Appointment).

<sup>2</sup> Chapter 4 (Statutory health attorneys).

<sup>3</sup> See schedule 1.

### **Powers**

128. (1) The adult guardian has the powers given under this Act or another Act.  
(2) Also, the adult guardian may do all things necessary or convenient to be done for performing the adult guardian's functions.

### **Not under Ministerial control**

129. 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.

### **Delegation**

130. (1) The adult guardian may delegate<sup>4</sup> the adult guardian's powers to an appropriately qualified member of the adult guardian's staff.  
(2) Also, if the adult guardian has power for a personal matter for an adult, the adult guardian may delegate the power to make day-to-day decisions about the matter to 1 of the following –  
(a) an appropriately qualified carer of the adult;  
(b) a health provider of the adult;<sup>5</sup>  
(c) an attorney under –  
(i) a general power of attorney made under this Act; or  
(ii) an enduring document; or  
(iii) a power of attorney made otherwise than under this Act, whether before or after its commencement;  
(d) 1 of the people who could be eligible to be the adult's statutory health attorney.  
(3) In this section –

“**appropriately qualified**”, for a person to whom a power under an Act may be delegated, includes having the qualifications, experience or standing appropriate to exercise the power.

*Example of “standing” for a person working in a hospital or care facility –*

A person's level of authority in the hospital or care facility.

“**day-to-day decision**” means a minor, uncontroversial decision about day-to-day issues that involves no more than a low risk to the adult.

*Example of day-to-day decision –*

A decision about podiatry, physiotherapy, non-surgical treatment of pressure sores and health care for colds and influenza.

### **Consultation and employment of professionals**

131. (1) The adult guardian may consult with, employ, and remunerate, the medical, legal, accounting or other professionals the adult guardian considers necessary.  
(2) The adult guardian is entitled to reimbursement from an adult for remuneration paid concerning the adult.

### **Advice and supervision**

132. The adult guardian may –  
(a) give advice to an attorney; and  
(b) by written notice, make an attorney under an enduring power of attorney or

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<sup>4</sup> The *Acts Interpretation Act 1954*, section 27A applies to the delegation.

<sup>5</sup> This is despite an adult's paid carer or health provider not being eligible to be appointed as the adult's attorney – see section 29 (Meaning of “eligible attorney”).

advance health directive subject to the adult guardian's supervision for a reasonable period if the adult guardian believes, on reasonable grounds, that it is necessary in the adult's interests including, for example, because the attorney has contravened this Act or the attorney's duties but has not done this wilfully; and  
(c) require an attorney who may exercise power for a financial matter under an enduring power of attorney to present a plan of management for approval.

### **Whistleblowers' protection**

133. (1) A person is not liable, civilly, criminally or under an administrative process, for disclosing to the adult guardian information about a person's conduct that breaches this Act.
- (2) Without limiting subsection (1) –
- (a) in a proceeding for defamation the discloser has a defence of absolute privilege for publishing the disclosed information; and
  - (b) if the discloser would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice – the discloser –
    - (i) does not contravene the Act, oath, rule of law or practice for disclosing the information; and
    - (ii) is not liable to disciplinary action for disclosing the information.
- (3) A person's liability for the person's own conduct is not affected only because the person discloses it to the adult guardian.

## **PART 2 – INVESTIGATIVE POWERS**

### **Investigate complaints**

134. The adult guardian may investigate a complaint or allegation that an adult who has impaired capacity –
- (a) is being neglected, exploited or abused; or
  - (b) has inappropriate or inadequate decision-making arrangements.

### **Records and audit**

135. If an attorney under an enduring power of attorney<sup>6</sup> has power for a financial matter, the adult guardian may, by written notice to the attorney, require that –
- (a) the attorney files with the adult guardian a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, under the power for a specified period; or
  - (b) the accounts be audited by an auditor appointed by the adult guardian and that a copy of the auditor's report be given to the adult guardian.<sup>7</sup>

### **Right to information**

136. (1) The adult guardian has a right to all the information necessary to investigate a complaint or allegation or to carry out an audit.<sup>8</sup>
- (2) On request, a person who has custody or control of the information must –
- (a) disclose the information to the adult guardian; and

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<sup>6</sup> An enduring power of attorney made under the Property Law Act 1974 and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act – section 163.

<sup>7</sup> See section 122 which gives the court similar power.

<sup>8</sup> In addition, section 81 gives the adult guardian a right to information as an attorney.



- (b) if the person is an attorney and the information is contained in a document – give the document to the adult guardian; and
- (c) if the person is not an attorney and the information is contained in a document – allow the adult guardian to inspect the document and take a copy of it.

Maximum penalty – 100 penalty units.

- (3) This section overrides –
  - (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and
  - (b) any claim of confidentiality or privilege, including a claim based on legal professional privilege.

#### **Power to summon**

- 137. (1) For the performance of the adult guardian’s functions, the adult guardian may, by written notice given to a person, require the person –
  - (a) to give information by statutory declaration; or
  - (b) to attend before the adult guardian at a stated time and place to give information and answer questions, or produce stated documents or things.
- (2) The person must comply with the notice.  
Maximum penalty – 100 penalty units.
- (3) The adult guardian may –
  - (a) require the person either to take an oath or make an affirmation; and
  - (b) administer an oath or affirmation to the person, or, if telephone conferencing, video conferencing or another form of telecommunication is to be used, make arrangements that appear to the adult guardian to be appropriate in the circumstances for administering an oath or affirmation to the person; and
  - (c) allow the person to give information by tendering a written statement, verified, if the adult guardian directs, by oath or affirmation.
- (4) The person must comply with a requirement under subsection (3) (a).  
Maximum penalty – 100 penalty units.
- (5) The adult guardian must pay or tender to the person an amount equivalent to the fees and expenses allowable to witnesses under the *Magistrates Courts Rules 1960*.

#### **Cost of investigations and audits**

- 138. (1) If –
  - (a) the adult guardian undertakes an investigation concerning a financial matter or audit at the request of a person; and
  - (b) the adult guardian is satisfied the request is frivolous or vexatious or otherwise without good cause;
 the adult guardian may, by written notice, require the person to pay the amount the adult guardian considers appropriate for the cost of the investigation or audit.
- (2) The adult guardian may, by written notice, require a person who requests an investigation or audit to pay the amount the adult guardian considers appropriate as security for a payment under subsection (1).

#### **False or misleading statements**

- 139. (1) A person must not –
  - (a) state anything to the adult guardian the person knows is false or misleading in a material particular; or
  - (b) omit from a statement made to the adult guardian anything without which the statement is, to the person’s knowledge, misleading in a material particular.
 Maximum penalty – 100 penalty units.

- (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.

#### **False, misleading or incomplete documents**

140. (1) A person must not give the adult guardian a document containing information the person knows is false, misleading or incomplete in a material particular.  
Maximum penalty – 100 penalty units.
- (2) Subsection (1) does not apply to a person if the person, when giving the document –
- (a) tells the adult guardian, to the best of the person’s ability, how it is false, misleading or incomplete; and
  - (b) if the person has, or can reasonably obtain, the correct information – gives the correct information.
- (3) It is enough for a complaint against a person for an offence against subsection (1) to state the document contained information that was “false, misleading or incomplete” to the person’s knowledge.

#### **Obstructing investigation or audit**

141. (1) A person must not obstruct or improperly influence the conduct of an investigation or audit.  
Maximum penalty – 100 penalty units.
- (2) In this section –
- “**influence**” includes attempt to influence.
  - “**obstruct**” includes hinder, resist and attempt to obstruct.

#### **Report after investigation or audit**

142. (1) After the adult guardian has carried out an investigation or audit, the adult guardian must make a written report and give a copy of the report to any person at whose request the investigation or audit was carried out and to every attorney.
- (2) It is a lawful excuse for the publication of any defamatory statement made in the report that the publication is made in good faith and is, or purports to be, made for the purposes of this Act.
- (3) The adult guardian must allow an interested person to inspect a copy of the report at all reasonable times and, at the person’s own expense, to be given a copy of the report.

### **PART 3 – PROTECTIVE POWERS**

#### **Proceedings for protection of property**

143. (1) If the adult guardian considers that –
- (a) property of an adult who has impaired capacity is wrongfully held, detained, converted or injured; or
  - (b) money is payable to the adult;
- the adult guardian, either in the name of the adult guardian or the adult, may claim and recover possession of the property, damages for conversion of or injury to the property, or payment of the money, by application to the court by originating summons.
- (2) However –
- (a) the adult guardian may proceed in another way; and
  - (b) the court may direct that the adult guardian proceed in another way, for example, by bringing an action or other proceeding.

- (3) The court may make –
  - (a) an order requiring the person proceeded against to give up possession of the property or to pay damages as assessed by the court for the conversion of or injury to the property, or payment of the money; and
  - (b) an order about costs it considers appropriate.
- (4) An order under this section has the same effect and may be enforced in the same way as a judgment of the court.

### **Suspension**

- 144. (1) This section applies to an attorney under an enduring document.<sup>9</sup>
- (2) The adult guardian may, by written notice to an attorney, suspend the operation of all or some of the attorney’s power if the adult guardian suspects, on reasonable grounds, that the attorney is not suitable or competent, for example, because –
  - (a) a relevant interest of the adult has not been, or is not being, adequately protected; or
  - (b) the attorney has neglected the attorney’s duties, or abused the attorney’s powers (whether generally or in relation to a specific power); or
  - (c) the attorney has otherwise contravened this Act.
- (3) The suspension may not be for more than 3 months.<sup>10</sup>
- (4) During the suspension –
  - (a) the public trustee must exercise suspended power for a financial matter; and
  - (b) the adult guardian must exercise suspended power for a personal matter.
- (5) The adult guardian may lift the suspension with or without conditions.
- (6) The attorney may apply to the court and the court may make the order it considers appropriate.

### **Application for entry and removal warrant**

- 145. (1) The adult guardian may apply to a magistrate for a warrant to enter a place and to remove an adult.
- (2) The application must be sworn and state the grounds on which the warrant is sought.
- (3) The magistrate may refuse to consider the application until the adult guardian gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.

*Example –*

The magistrate may require additional information supporting the application to be given by statutory declaration.

### **Issue of entry and removal warrant**

- 146. (1) The magistrate may issue a warrant only if the magistrate is satisfied there are reasonable grounds for suspecting there is an immediate danger, because of neglect, exploitation or abuse, to an adult who has impaired capacity for a matter.

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<sup>9</sup> An enduring power of attorney made under the *Property Law Act 1974* and of force and effect before the commencement of section 163 is taken to be an enduring power of attorney made under this Act – section 163.

<sup>10</sup> During this period, the adult guardian may carry out an investigation (section 134) or audit (section 135) or apply to the court to remove the attorney’s power or revoke the enduring power of attorney (section 116) or to give directions or advice or make a recommendation, order or declaration about a matter (section 118).

- (2) The warrant must state –
  - (a) that the adult guardian may, with necessary and reasonable help and force, enter the place and remove the adult; and
  - (b) the hours of the day or night when the place may be entered; and
  - (c) the date, within 14 days after the warrant's issue, the warrant ends.

#### **Role of occupier if entry and removal warrant**

- 147. (1) The adult guardian may require the occupier of the place or another person at the place to help in the exercise of the adult guardian's powers under the warrant.
- (2) When making the requirement, the adult guardian making it must warn that it is an offence to fail to comply with the requirement unless a person has a reasonable excuse.
- (3) A person required to give reasonable help must comply with the requirement, unless the person has a reasonable excuse.  
Maximum penalty – 100 penalty units.

#### **Role of police officer if entry and removal warrant**

- 148. (1) The adult guardian may ask a police officer to help in the exercise of the adult guardian's powers under the warrant.
- (2) The police officer must give the adult guardian the reasonable help the adult guardian requires, if it is practicable to give the help.

#### **Reporting requirement after removal of adult**

- 149. As soon as practicable after the adult has been removed under the warrant, the adult guardian must apply to the court for the orders the adult guardian considers appropriate about the following –
  - (a) the adult's personal welfare;
  - (b) a power of attorney, enduring power of attorney or advance health directive of the adult;
  - (c) an attorney of the adult.

## **PART 4 – ADMINISTRATIVE PROVISIONS**

### **Appointment**

- 150. (1) The adult guardian is to be appointed on a full-time basis by the Governor in Council.
- (2) A person may not hold office as adult guardian at the same time as the person holds another office having functions concerning the protection of the rights and interests of, or the provision of services or facilities to, adults who have impaired capacity.

### **Duration of appointment**

- 151. (1) The adult guardian holds office for a term of not longer than 5 years.<sup>11</sup>
- (2) The office of adult guardian becomes vacant if the adult guardian resigns by signed notice of resignation given to the Governor in Council.

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<sup>11</sup> However, the adult guardian may be reappointed – see *Acts Interpretation Act 1954*, section 25(1)(c).

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

#### **Terms of appointment**

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

#### **Leave of absence**

153. The Minister may give the adult guardian leave of absence on the terms the Minister considers appropriate.

#### **Acting adult guardian**

154. The Governor in Council may appoint a person to act as the adult guardian –
- (a) for any period the office is vacant; or
  - (b) for any period, or all periods, when the adult guardian is absent from duty or is, for another reason, unable to perform the duties of the office.

#### **Staff**

155. (1) Staff necessary to enable the adult guardian to perform the adult guardian’s functions are to be appointed under the *Public Service Act 1996*.
- (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 Act 1996*; and
  - (b) the adult guardian were the chief executive of the department.

#### **Protection from liability**

156. (1) In this section –
- “official” means a person who is or has been –
- (a) the adult guardian; or
  - (b) a member of the adult guardian’s staff; or
  - (c) a professional consulted or employed by the adult guardian; or
  - (d) an expert adviser to the adult guardian.
- (2) The official is not civilly liable for an act done, or omission made, honestly and without negligence under this Act.
- (3) If subsection (2) prevents a civil liability attaching to an official, the liability attaches instead to the State.

#### **Preservation of confidentiality**

157. (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).

- (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 –
  - (a) the adult guardian; or
  - (b) a member of the adult guardian’s staff; or
  - (c) a professional consulted or employed by the adult guardian; or
  - (d) an expert adviser to the adult guardian.
- (3) A person may make a record of confidential information, or disclose it to someone else –
  - (a) for this Act; or
  - (b) to discharge a function under another law; or
  - (c) for a proceeding in a court or relevant tribunal; or
  - (d) if authorised under a regulation or another law; or
  - (e) if authorised by the person to whom the information relates.
- (4) In this section –
 

“**confidential information**” includes information about a person’s affairs but does not include –

  - (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
  - (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

**Disclosure of information about investigations**

- 158. (1) Section 157<sup>12</sup> does not prevent the adult guardian from disclosing information to a person or to members of the public about an issue the subject of an investigation by the adult guardian if the adult guardian is satisfied the disclosure is necessary and reasonable in the public interest.
- (2) However, the adult guardian must not make the disclosure if it is likely to prejudice the investigation.
- (3) In a disclosure under subsection (1), the adult guardian –
  - (a) may express an opinion expressly or impliedly critical of an entity only if the adult guardian has given the entity an opportunity to answer the criticism; and
  - (b) may identify the complainant directly or indirectly, only if it is necessary and reasonable.

**Budget**

- 159. The adult guardian must submit for approval of the Minister a budget for each financial year.

**Annual report**

- 160. (1) The adult guardian must, as soon as practicable after each financial year –
  - (a) prepare a report on the exercise of the adult guardian’s functions during the year; and
  - (b) give a copy of the report to the Minister.
- (2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report.

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<sup>12</sup> Section 157 prohibits the improper recording or disclosure of confidential information.

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