

2015

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Powers of Attorney Amendment Bill 2015

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(Attorney-General)

Powers of Attorney Amendment Bill 2015

A Bill for

An Act to amend the *Powers of Attorney Act 2006*, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1	1	Name of Act
2		This Act is the <i>Powers of Attorney Amendment Act 2015</i> .
3	2	Commencement
4		This Act commences on a day fixed by the Minister by written
5		notice.
6	<i>Note 1</i>	The naming and commencement provisions automatically commence on
7		the notification day (see Legislation Act , s 75 (1)).
8	<i>Note 2</i>	A single day or time may be fixed, or different days or times may be
9		fixed, for the commencement of different provisions (see Legislation
10		Act , s 77 (1)).
11	<i>Note 3</i>	If a provision has not commenced within 6 months beginning on the
12		notification day, it automatically commences on the first day after that
13		period (see Legislation Act , s 79).
14	3	Legislation amended
15		This Act amends the <i>Powers of Attorney Act 2006</i> .
16	<i>Note</i>	This Act also amends the following legislation (see sch 1):
17		• Guardianship and Management of Property Act 1991
18		• Medical Treatment (Health Directions) Act 2006 .
19	4	What is an <i>enduring power of attorney</i>?
20		Section 8, note
21		<i>after</i>
22		general power of attorney
23		<i>insert</i>
24		in relation to property matters

1 **5** **Meaning of *personal care matter***
2 **Section 11, definition of *personal care matter***

3 *omit*

4 special personal matter or special health care matter

5 *substitute*

6 special personal matter, special health care matter or medical
7 research matter

8 **6** **Meaning of *health care matter***
9 **Section 12, definition of *health care matter***

10 *after*

11 special health care matter

12 *insert*

13 or medical research matter

14 **7** **New section 12A**

15 *in chapter 2, insert*

16 **12A** **Meaning of *medical research matter***

17 (1) In this Act:

18 ***medical research matter***, for a principal, means a matter relating to
19 the principal's participation in—

20 (a) medical research; or

21 (b) low-risk research.

22 *Note* The power given to an attorney under an enduring power of attorney in
23 relation to medical research matters must be exercised in accordance
24 with pt 4.3A (Medical research matters).

- 1 (2) In this section:
2 *low-risk research*, in relation to a person—see section 41A.
3 *medical research*, in relation to a person—see section 41A.

4 **8 Appointment of attorneys**
5 **Section 13 (2)**

- 6 *omit*
7 personal care matters or health care matters
8 *substitute*
9 personal care matters, health care matters or medical research
10 matters

11 **9 Section 13 (2), note**

- 12 *omit*

13 **10 Limit on s 13 power to appoint attorneys—enduring**
14 **powers of attorney**
15 **Section 14 (2) and (3)**

- 16 *omit*
17 personal care or health care matter
18 *substitute*
19 personal care matter, health care matter or medical research matter

1 **11 Others acting for attorney**
2 **Section 33 (2)**

3 *omit*

4 decision-making ability

5 *substitute*

6 decision-making capacity

7 **12 Special health care matters**
8 **Section 37 (1) (d)**

9 *omit*

10 **13 New part 4.3A**

11 *insert*

12 **Part 4.3A Medical research matters**

13 **41A Definitions—pt 4.3A**

14 (1) In this part:

15 *approved*, for medical research or low-risk research, means medical
16 research or low-risk research approved by a human research ethics
17 committee constituted in accordance with, and acting in compliance
18 with, the *National Statement on Ethical Conduct in Human*
19 *Research* (2007), published by the NHMRC, as in force from time
20 to time.

21 *Note* The *National Statement on Ethical Conduct in Human Research* (2007)
22 is accessible at www.nhmrc.gov.au.

- 1 ***low-risk research***, in relation to a person—
- 2 (a) means research carried out for medical or health purposes
- 3 that—
- 4 (i) poses no foreseeable risk of harm to the person, other
- 5 than any harm usually associated with the person's
- 6 condition; and
- 7 (ii) does not change the treatment appropriate for the
- 8 person's condition; but
- 9 (b) does not include any activity that is part of a clinical trial.

10 **Examples—par (a)**

- 11 1 research using personal information or personal health information collected
- 12 during routine health care
- 13 2 a non-intrusive examination for research purposes
- 14 3 observing the person's activities for research purposes
- 15 4 research comparing the effectiveness of paracetamol and ibuprofen during
- 16 routine health care
- 17 5 collecting information through a survey for research purposes

18 *Note* An example is part of the Act, is not exhaustive and may extend, but

19 does not limit, the meaning of the provision in which it appears (see

20 [Legislation Act](#), s 126 and s 132).

- 21 ***medical research***, in relation to a person—
- 22 (a) means research in relation to the diagnosis, maintenance or
- 23 treatment of a medical condition that the person has or has had
- 24 or to which the person has a significant risk of being exposed;
- 25 and
- 26 (b) includes—
- 27 (i) experimental health care; and
- 28 (ii) the administration of medication or the use of equipment
- 29 or a device as part of a clinical trial; and
- 30 (iii) research prescribed by regulation as medical research; but

- 1 (c) does not include—
2 (i) low-risk research; or
3 (ii) research prescribed by regulation not to be medical
4 research.

5 **Example—par (b) (ii)**

6 a clinical trial involving a drug usually used for a particular medical condition but
7 trialled as a treatment for a different medical condition

8 ***medical research power of attorney***, for a principal, means—

- 9 (a) an enduring power of attorney under which the principal
10 authorises an attorney to exercise power in relation to a
11 medical research matter; or
12 (b) an enduring power of attorney—
13 (i) under which the principal authorises an attorney to
14 exercise power in relation to a health care matter; and
15 (ii) that was made before the commencement of the *Powers*
16 *of Attorney Amendment Act 2015*.

17 (2) In this section:

18 ***experimental health care*** means research—

- 19 (a) into health care that—
20 (i) has not yet gained the support of a substantial number of
21 practitioners in that field of health care; and
22 (ii) may, but need not, be medical in nature; and
23 (b) delivered as part of a test or trial.

24 **Examples**

- 25 1 trialling increased physical therapy for patients on ventilation apparatus
26 2 trialling a new absorbent material after bathing to treat dermatological
27 conditions

1 *NHMRC* means the National Health and Medical Research Council
2 established under the *National Health and Medical Research*
3 *Council Act 1992* (Cwlth), section 5B.

4 *personal health information*—see the *Health Records (Privacy and*
5 *Access) Act 1997*, dictionary.

6 *personal information*—see the *Information Privacy Act 2014*,
7 section 8.

8 **41B Attorney must follow decision-making principles**

9 (1) This section applies in relation to a medical research power of
10 attorney if the principal has impaired decision-making capacity.

11 (2) An attorney authorised under a medical research power of attorney
12 for a principal who is asked to consent to the principal participating
13 in medical research or low-risk research must exercise the power in
14 accordance with the following principles (the *decision-making*
15 *principles*):

16 (a) the principal's wishes, as far as they can be worked out, must
17 be given effect to, unless making the decision in accordance
18 with the wishes is likely to significantly adversely affect the
19 principal's interests;

20 (b) if giving effect to the principal's wishes is likely to
21 significantly adversely affect the principal's interests—the
22 attorney must give effect to the principal's wishes as far as
23 possible without significantly adversely affecting the
24 principal's interests;

25 (c) if the principal's wishes cannot be given effect to at all—the
26 principal's interests must be promoted;

27 (d) the principal's life (including the principal's lifestyle) must be
28 interfered with to the smallest extent necessary;

29 (e) the principal must be encouraged to look after themselves as far
30 as possible;

-
- 1 (f) the principal must be encouraged to live in the general
2 community, and take part in community activities, as far as
3 possible.
- 4 (3) If the principal was participating in medical research or low-risk
5 research before the principal became a person with impaired
6 decision-making capacity, it is presumed the principal's wishes
7 include to continue participating in the medical research or low-risk
8 research.
- 9 (4) Before making a decision, the attorney must consult with each of the
10 principal's carers.
- 11 (5) However, the attorney must not consult with a carer if the
12 consultation would, in the attorney's opinion, adversely affect the
13 principal's interests.
- 14 (6) Subsection (5) does not limit the consultation that the attorney may
15 carry out.
- 16 (7) In this section:
- 17 *carer*—see the *Guardianship and Management of Property*
18 *Act 1991*, section 6.

19 **41C Attorney may consent to principal's participation in**
20 **low-risk research**

- 21 (1) This section applies in relation to a medical research power of
22 attorney if the principal has impaired decision-making capacity.

1 (2) An attorney authorised under the medical research power of attorney
2 may consent to the principal participating in low-risk research only
3 if the research is approved.

4 *Note* If a principal has made a health direction under the *Medical Treatment*
5 *(Health Directions) Act 2006*, when making a decision under this
6 section, the attorney must comply with—

7 (a) if the health direction is consistent with the power of attorney—
8 the health direction; and

9 (b) if the health direction is inconsistent with the power of attorney—
10 the document that was made most recently (see *Medical*
11 *Treatment (Health Directions) Act 2006*, s 19).

12 (3) If an attorney makes an application, the ACAT must give an opinion
13 or advice to assist the attorney to decide whether to give consent
14 under subsection (2).

15 **41D Attorney may consent to principal's participation in**
16 **medical research**

17 (1) This section applies in relation to a medical research power of
18 attorney if the principal has impaired decision-making capacity.

19 (2) An attorney authorised under a medical research power of attorney
20 for a principal may consent to the principal participating in medical
21 research only if—

22 (a) the research is approved; and

23 (b) the principal is not likely to regain decision-making capacity
24 before the latest time that the principal may meaningfully
25 participate in the research; and

26 *Note* An independent doctor must assess the likelihood of a principal
27 regaining decision-making capacity within the time mentioned
28 (see s 41F).

- 1 (c) the attorney is satisfied on reasonable grounds that—
- 2 (i) the research relates to the diagnosis, maintenance or
- 3 treatment of a condition that the principal has or has had
- 4 or to which the principal has a significant risk of being
- 5 exposed; and
- 6 (ii) the research may result in benefit to the principal or
- 7 others with the condition; and
- 8 (iii) the potential benefit to the principal, or others with the
- 9 condition, of participating in the research outweighs any
- 10 potential risk or inconvenience to the principal, or any
- 11 potential adverse impact on the principal's quality of life;
- 12 and
- 13 (iv) participating in the research will not unduly interfere with
- 14 the principal's privacy.
- 15 *Note* If a principal has made a health direction under the *Medical Treatment*
- 16 *(Health Directions) Act 2006*, when making a decision under this
- 17 section, the attorney must comply with—
- 18 (a) if the health direction is consistent with the power of attorney—
- 19 the health direction; and
- 20 (b) if the health direction is inconsistent with the power of attorney—
- 21 the document that was made most recently (see *Medical*
- 22 *Treatment (Health Directions) Act 2006*, s 19).
- 23 (3) If an attorney makes an application, the ACAT must give an opinion
- 24 or advice to assist the attorney to decide whether to give consent
- 25 under subsection (2).

26 **41E Attorney must not benefit etc from attorney's decision**

- 27 (1) An attorney must not—
- 28 (a) accept a fee or other benefit for consenting, or refusing to
- 29 consent, to a principal participating in low-risk research under
- 30 section 41C or medical research under section 41D; and
- 31 (b) be involved in, or connected to, the research.

- 1 (2) To remove any doubt, subsection (1) (a) does not apply to any
2 personal benefit to the attorney because of an improvement in the
3 principal's health as a result of participating in the research.

4 **41F Assessment of likelihood of principal regaining**
5 **decision-making capacity**

- 6 (1) The likelihood of a principal regaining decision-making capacity
7 within the period mentioned in section 41D (2) (b) must be assessed
8 by an independent doctor, taking into account—
9 (a) the principal's medical, mental and physical condition; and
10 (b) the severity of the principal's condition and the prognosis for
11 the principal; and
12 (c) the current stage of treatment and care required for the
13 principal; and
14 (d) any other circumstances relevant to the principal; and
15 (e) the nature of the medical research, including the type of
16 treatment or care provided by the research and the timeframe
17 for the research.
18 (2) The independent doctor must state, in writing, the doctor's belief
19 whether the principal is likely to regain decision-making capacity
20 within the period mentioned in subsection (1), and the reasons for
21 the belief.

22 *Note 1* An independent doctor must always give a statement under s (2),
23 regardless of whether the ACAT has made a declaration about the
24 decision-making capacity of a principal for an enduring power of
25 attorney under the *Guardianship and Management of Property*
26 *Act 1991*, s 65.

27 *Note 2* In a proceeding, a certificate by an independent doctor under s (2)
28 stating whether the principal is likely to regain decision-making
29 capacity within the required period is evidence of that fact (see s 87).

- 1 (3) In this section:
2 *independent doctor*, in relation to medical research, means a doctor
3 who is not involved in, nor connected to, the research, other than a
4 professional interest in the area of the research.

5 **41G Interested person may apply to ACAT for review of**
6 **attorney's decision**

- 7 (1) An interested person for a principal may apply to the ACAT for
8 review of the decision of the attorney to consent, or refuse to
9 consent, to the principal participating in low-risk research under
10 section 41C or medical research under section 41D.

- 11 (2) In this section:
12 *interested person*, for a principal—see section 74.

13 **14 Obligations on health care facilities in relation to powers**
14 **of attorney**
15 **Section 49 (a)**

- 16 *omit*
17 or health care matters
18 *substitute*
19 , health care matters or medical research matters

20 **15 Meaning of *interested person*—ch 7**
21 **Section 74, definition of *interested person*, new**
22 **paragraph (h)**

- 23 *insert*
24 (h) a person prescribed by regulation.

1 **16 Section 85 heading**

2 *substitute*

3 **85 Attorney's health care, medical research or low-risk**
4 **research decision not in principal's interest**

5 **17 Section 85 (1), new definitions**

6 *insert*

7 *low-risk research*, in relation to a person—see section 41A.

8 *medical research*, in relation to a person—see section 41A.

9 **18 Section 85 (2) (a)**

10 *substitute*

11 (a) an attorney makes a decision in relation to—

12 (i) the health care of the principal; or

13 (ii) the principal participating in medical research or low-risk
14 research; and

15 **19 General principles for enduring powers of attorney**
16 **Schedule 1, section 1.11**

17 *substitute*

18 **1.11 Health care and medical research**

19 (1) An individual is entitled to have decisions about a health care matter
20 or a medical research matter made by an attorney—

21 (a) in the way least restrictive of the individual's rights and
22 freedom of action; and

- 1 (b) only if the exercise of power—
- 2 (i) is, in the attorney’s opinion, necessary and appropriate to
- 3 maintain or promote the individual’s health and
- 4 wellbeing; or
- 5 (ii) is, in all the circumstances, in the individual’s best
- 6 interests.
- 7 (2) An individual’s wishes in relation to a health care matter or a
- 8 medical research matter, and any information provided by the
- 9 individual’s health care provider, must be taken into account when
- 10 an attorney decides what is appropriate in the exercise of power for
- 11 a health care matter or a medical research matter.

12 **20 Dictionary, new definitions**

13 *insert*

14 ***approved***, for medical research or low-risk research, for part 4.3A

15 (Medical research matters)—see section 41A.

16 ***decision-making principles***—see section 41B.

17 ***low-risk research***, in relation to a person, for part 4.3A (Medical

18 research matters)—see section 41A.

19 ***medical research***, in relation to a person, for part 4.3A (Medical

20 research matters)—see section 41A.

21 ***medical research matter***, for a principal—see section 12A.

22 ***medical research power of attorney***, for a principal, for part 4.3A

23 (Medical research matters)—see section 41A.

1 **Schedule 1 Other amendments**

2 (see s 3)

3 **Part 1.1 Guardianship and Management**
4 **of Property Act 1991**

5 **[1.1] Section 7 (3) (e)**

6 *omit*

7 other than

8 *substitute*

9 including medical research or low-risk research but not including

10 **[1.2] Section 7 (3) (e), new note**

11 *insert*

12 *Note* For when a guardian may consent to a person participating in
13 medical research or low-risk research, see pt 2B (Medical
14 research and low-risk research).

15 **[1.3] Section 8B (1) (a)**

16 *after*

17 health care matters

18 *insert*

19 or medical research matters

1 **[1.4] Section 8B (2)**

2 *after*

3 medical treatment

4 *insert*

5 , medical research or low-risk research

6 **[1.5] New section 8B (3)**

7 *insert*

8 (3) In this section:

9 *health care matter*, for a principal—see the *Powers of Attorney*
10 *Act 2006*, section 12.

11 *medical research matter*, for a principal—see the *Powers of*
12 *Attorney Act 2006*, section 12A.

13 **[1.6] Section 32A, definition of *medical treatment*,**
14 **paragraph (b)**

15 *substitute*

16 (b) does not include—

17 (i) a prescribed medical procedure; or

18 (ii) medical research; or

19 (iii) low-risk research.

20 **[1.7] Section 32D (1) (b)**

21 *substitute*

22 (b) while the person is a protected person, the person—

23 (i) needs, or is likely to need, medical treatment; or

1 **[1.12] Section 32E (2)**

2 *after*
3 medical treatment
4 *insert*
5 or low-risk research

6 **[1.13] New section 32E (3)**

7 *insert*
8 (3) If the protected person was participating in low-risk research before
9 the protected person became a person with impaired
10 decision-making capacity, it is presumed the protected person's
11 wishes include to continue participating in the research.

12 *Note* Under the decision-making principles, the protected person's wishes, as
13 far as they can be worked out, must be given effect to (see s 4 (2)).

14 **[1.14] Section 32F (2)**

15 *after*
16 the protected person
17 *insert*
18 or to the protected person participating in low-risk research

19 **[1.15] Section 32G**

20 *after*
21 medical treatment for a protected person,
22 *insert*
23 or to the protected person participating in low-risk research,

1 **[1.16] Section 32G (c) to (i)**

2 *substitute*

- 3 (c) the medical treatment or low-risk research for which consent is
4 sought;
- 5 (d) any alternative medical treatment or low-risk research that is
6 available;
- 7 (e) the nature and likely effect of the medical treatment for which
8 consent is sought and any alternative medical treatment;
- 9 (f) the nature and degree of any significant risks involved with the
10 medical treatment or low-risk research for which consent is
11 sought and any alternative medical treatment;
- 12 (g) the likely effect of not providing the medical treatment or low-
13 risk research for which consent is sought;
- 14 (h) the decision-making principles;
- 15 (i) any other matter that the health professional believes on
16 reasonable grounds is relevant to the provision of consent for
17 the medical treatment or low-risk research.

18 **[1.17] Section 32H (1)**

19 *substitute*

- 20 (1) This section applies if—
- 21 (a) a health professional has requested a health attorney for a
22 protected person to give consent to medical treatment for the
23 protected person or to the protected person participating in
24 low-risk research; and
- 25 (b) the health professional believes the refusal is inconsistent with
26 a health direction under the *Medical Treatment (Health
27 Directions) Act 2006*.

1 **[1.18] Section 32I (1)**

2 *substitute*

3 (1) This section applies if—

4 (a) before obtaining the consent to medical treatment for a
5 protected person from the health attorney that the health
6 professional believes is best able to represent the views of the
7 protected person, the health professional becomes aware that
8 1 or more of the other health attorneys for the protected person
9 objects to the giving of consent; and

10 (b) the health professional is not aware of any health direction
11 under the *Medical Treatment (Health Directions) Act 2006* that
12 is relevant to the issue of whether consent to the medical
13 treatment should be given or not.

14 **[1.19] Section 32J**

15 *substitute*

16 **32J Notice to public advocate—long-term treatment**

17 (1) This section applies if—

18 (a) consent to medical treatment for a protected person, or to the
19 protected person participating in low-risk research, has been
20 given under this part (other than medical treatment involving
21 treatment, care or support under the *Mental Health (Treatment*
22 *and Care) Act 1994*); and

23 (b) the protected person continues to be given medical treatment,
24 or continues to participate in the research, in accordance with
25 the consent 6 months after the consent was given.

26 (2) The health professional who is giving the medical treatment, or
27 carrying out the research, must tell the public advocate of the
28 matters mentioned in subsection (1).

1 **[1.20] New section 32JA**

2 *insert*

3 **32JA Interested person may apply to ACAT for review of health**
4 **attorney's decision**

5 (1) An interested person for a protected person may apply to the ACAT
6 for review of the decision of the health attorney to consent, or refuse
7 to consent, to the protected person participating in low-risk research
8 under section 32D.

9 (2) In this section:

10 *interested person*—see the *Powers of Attorney Act 2006*, dictionary.

11 **[1.21] Section 32M**

12 *after*

13 medical treatment

14 *insert*

15 , or the carrying out of low-risk research,

16 **[1.22] Section 32M (b)**

17 *after*

18 treatment

19 *insert*

20 been provided or research

1 **[1.23] New sections 32O and 32P**

2 *in part 2A, insert*

3 **32O Interested person may withdraw health attorney's**
4 **consent to low-risk research**

5 (1) This section applies if a health attorney consents to a protected
6 person participating in low-risk research under section 32D.

7 (2) An interested person for the protected person may withdraw the
8 health attorney's consent.

9 (3) If the interested person withdraws the consent, any data or bodily
10 tissue collected from the protected person while the person was
11 participating in the research must be removed from the research,
12 unless the interested person agrees, in writing, that the data or bodily
13 tissue may be kept.

14 (4) In this section:

15 *interested person*, for a protected person, means each of the following:

16 (a) if, despite section 32A, definition of *protected person*,
17 paragraph (b), the protected person has appointed an attorney
18 under an enduring power of attorney—the attorney;

19 (b) if, despite section 32A, definition of *protected person*,
20 paragraph (c), the ACAT has appointed a guardian for the
21 person—the guardian;

22 (c) the protected person.

23 **32P Health attorney must not benefit from health attorney's**
24 **decision**

25 (1) A health attorney must not—

26 (a) accept a fee or other benefit for consenting, or refusing to
27 consent, to a protected person participating in low-risk
28 research; or

- 1 (b) be involved in, or connected to, the research.
- 2 (2) To remove any doubt, subsection (1) does not apply to any personal
3 benefit to the health attorney because of an improvement in the
4 protected person's health as a result of participating in the research.

5 **[1.24] New part 2B**

6 *insert*

7 **Part 2B Medical research and low-risk**
8 **research**

9 **33 Guardian may consent to protected person's**
10 **participation in low-risk research**

- 11 (1) This section applies if—
- 12 (a) a guardian is appointed for a person (a *protected person*); and
- 13 (b) the guardian is given the power to give, for the protected
14 person, a consent required for a medical procedure or other
15 treatment under section 7 (3) (e); and
- 16 (c) the guardian is considering whether to consent to the protected
17 person participating in low-risk research.
- 18 (2) A guardian may consent to the protected person participating in
19 low-risk research only if the research is approved.

20 *Note* A guardian's power to consent to a protected person participating in
21 low-risk research must be exercised in a way that is consistent with any
22 existing health direction made by the protected person (see *Medical*
23 *Treatment (Health Directions) Act 2006*, s 18).

- 24 (3) If a guardian makes an application, the ACAT must give an opinion
25 or advice to assist the guardian to decide whether to give consent
26 under subsection (2).

- 1 **34** **Guardian may consent to protected person’s**
2 **participation in medical research**
- 3 (1) This section applies if—
- 4 (a) a guardian is appointed for a person (a *protected person*); and
- 5 (b) the guardian is given the power to give, for the protected
6 person, a consent required for a medical procedure or other
7 treatment under section 7 (3) (e); and
- 8 (c) the guardian is considering whether to consent to the protected
9 person participating in medical research.
- 10 (2) The guardian may consent to the protected person participating in
11 medical research only if—
- 12 (a) the research is approved; and
- 13 (b) the protected person is not likely to regain decision-making
14 capacity before the latest time that the protected person may
15 meaningfully participate in the research; and
- 16 *Note* An independent doctor must assess the likelihood of the principal
17 regaining decision-making capacity within the time mentioned
18 (see s 36).
- 19 (c) the guardian is satisfied on reasonable grounds that—
- 20 (i) the research relates to the diagnosis, maintenance or
21 treatment of a condition that the protected person has or
22 has had or to which the protected person has a significant
23 risk of being exposed; and
- 24 (ii) the research may result in benefit to the protected person
25 or others with the condition; and
- 26 (iii) the potential benefit to the protected person, or others
27 with the condition, of participating in the research
28 outweighs any potential risk or inconvenience to the
29 protected person, or any potential adverse impact on the
30 protected person’s quality of life; and

1 (iv) participating in the research will not unduly interfere with
2 the protected person's privacy.

3 *Note 1* A guardian's power to consent to a protected person participating in
4 medical research must be exercised in a way that is consistent with any
5 existing health direction made by the protected person (see *Medical*
6 *Treatment (Health Directions) Act 2006*, s 18).

7 *Note 2* In considering whether to consent to a protected person participating in
8 medical research, a guardian must follow the decision-making
9 principles (see s 4).

10 (3) If the protected person was participating in medical research before
11 the protected person became a person with impaired
12 decision-making capacity, it is presumed the protected person's
13 wishes include to continue participating in the research.

14 *Note* Under the decision-making principles, the protected person's wishes, as
15 far as they can be worked out, must be given effect to (see s 4 (2)).

16 (4) If a guardian makes an application, the ACAT must give an opinion
17 or advice to assist the guardian to decide whether to give consent
18 under subsection (2).

19 **35 Guardian must not benefit from guardian's decision**

20 (1) A guardian must not—

21 (a) accept a fee or other benefit for consenting, or refusing to
22 consent, to a protected person participating in low-risk research
23 under section 33 or medical research under section 34; or

24 (b) be involved in, or connected to, the research.

25 (2) To remove any doubt, subsection (1) does not apply to any personal
26 benefit to the guardian because of an improvement in the protected
27 person's health as a result of participating in the research.

- 1 **36** **Assessment of likelihood of principal regaining**
2 **decision-making capacity**
- 3 (1) The likelihood of a principal regaining decision-making capacity
4 within the period mentioned in section 34 (2) (b) must be assessed
5 by an independent doctor, taking into account—
- 6 (a) the protected person’s medical, mental and physical condition;
7 and
- 8 (b) the severity of the protected person’s condition and the
9 prognosis for the protected person; and
- 10 (c) the current stage of treatment and care required for the
11 protected person; and
- 12 (d) any other circumstances relevant to the protected person; and
- 13 (e) the nature of the medical research, including the type of
14 treatment or care provided by the research and the timeframe
15 for the research.
- 16 (2) The independent doctor must state, in writing, the doctor’s belief
17 whether the protected person is likely to regain decision-making
18 capacity within the period mentioned in subsection (1), and the
19 reasons for the belief.
- 20 *Note 1* An independent doctor must always give a statement under s (2),
21 regardless of whether the ACAT has made a declaration about the
22 decision-making capacity of a principal for an enduring power of
23 attorney under s 65.
- 24 *Note 2* In a proceeding, a certificate by an independent doctor under s (2)
25 stating whether a protected person is likely to regain decision-making
26 capacity within the required period is evidence of that fact (see s 72D).
- 27 (3) In this section:
- 28 ***independent doctor***, in relation to medical research, means a doctor
29 who is not involved in, nor connected to, the research, other than a
30 professional interest in the area of the research.

- 1 **37** **Interested person may apply to ACAT for review of**
2 **guardian’s decision**
- 3 (1) An interested person for a protected person may apply to the ACAT
4 for review of the decision of the guardian to consent, or refuse to
5 consent, to the protected person participating in low-risk research
6 under section 33 or medical research under section 34.
- 7 (2) In this section:
8 *interested person*—see the *Powers of Attorney Act 2006*, section 74.

9 **[1.25] Section 65 (2)**

- 10 *omit*
- 11 personal care matter or health care matter
- 12 *substitute*
- 13 personal care matter, health care matter or medical research matter

14 **[1.26] New section 65 (3)**

- 15 *insert*
- 16 (3) In this section:
- 17 *health care matter*, for a principal—see the *Powers of Attorney*
18 *Act 2006*, section 12.
- 19 *medical research matter*, for a principal—see the *Powers of*
20 *Attorney Act 2006*, section 12A.
- 21 *personal care matter*, for a principal—see the *Powers of Attorney*
22 *Act 2006*, section 11.
- 23 *property matter*, for a principal—see the *Powers of Attorney*
24 *Act 2006*, section 10.

1 **[1.27] Section 69 (1) (a)**

2 *after*
3 other treatment
4 *insert*
5 under section 7 (3) (e)

6 **[1.28] New section 72D**

7 *insert*

8 **72D Medical certificate about impaired decision-making**
9 **capacity**

- 10 (1) This section applies if, in a proceeding, a question arises about
11 whether, on a particular day or during a particular period, a person
12 had impaired decision-making capacity, whether generally or in
13 relation to a particular matter.
- 14 (2) A certificate by a doctor stating that the person had, or did not have,
15 impaired decision-making capacity either generally or in relation to
16 a particular matter on the day or during the period is evidence of that
17 fact.

18 **[1.29] Dictionary, new definitions**

19 *insert*

20 *approved*, for medical research or low-risk research—see the
21 *Powers of Attorney Act 2006*, section 41A.

22 *low-risk research*, in relation to a person—see the *Powers of*
23 *Attorney Act 2006*, section 41A.

24 *medical research*, in relation to a person—see the *Powers of*
25 *Attorney Act 2006*, section 41A.

1 **Part 1.2** **Medical Treatment (Health**
2 **Directions) Act 2006**

3 **[1.30] Sections 18 and 19**

4 *substitute*

5 **18** **Effect of health directions on later guardian or health**
6 **attorney**

- 7 (1) This section applies if—
- 8 (a) a person has made a health direction; and
- 9 (b) a doctor declares that the person has become a person with
10 impaired decision-making capacity; and
- 11 (c) after the direction was made—
- 12 (i) a guardian is appointed for the person under the
13 *Guardianship and Management of Property Act 1991*; or
- 14 (ii) a health attorney is asked to give a consent under the
15 *Guardianship and Management of Property Act 1991*,
16 section 32D.
- 17 (2) Any power of the guardian or health attorney to consent to medical
18 treatment for the person, or to the person participating in medical
19 research or low-risk research, must be exercised in a way that is
20 consistent with the health direction.

- 1 (3) However, a health attorney need not act consistently with a health
2 direction if it is not reasonable to do so.

3 **Examples**

- 4 1 a health attorney is asked to make an urgent medical decision and the health
5 attorney does not have time to look at the health direction
6 2 a health attorney is unaware, after making reasonable enquiries, that a health
7 direction exists

8 *Note 1* A health attorney is protected from civil and criminal actions and
9 proceedings in relation to consent given, or not given, in good faith as a
10 health attorney (see *Guardianship and Management of Property*
11 *Act 1991*, s 32K).

12 *Note 2* An example is part of the Act, is not exhaustive and may extend, but
13 does not limit, the meaning of the provision in which it appears
14 (see *Legislation Act*, s 126 and s 132).

- 15 (4) In this section:

16 *low-risk research*, in relation to a person—see the *Powers of*
17 *Attorney Act 2006*, section 41A.

18 *medical research*, in relation to a person—see the *Powers of*
19 *Attorney Act 2006*, section 41A.

20 **19 Relationship between health directions and enduring**
21 **powers of attorney**

- 22 (1) This section applies if—

23 (a) a person makes—

24 (i) a health direction; and

25 (ii) an enduring power of attorney under the *Powers of*
26 *Attorney Act 2006*; and

27 (b) the enduring power of attorney deals with a health care matter
28 or a medical research matter.

- 1 (2) If the health direction is consistent with the enduring power of
2 attorney, an attorney authorised under the enduring power of
3 attorney must comply with the health direction when making a
4 decision about a health care matter or medical research matter.
- 5 (3) However, if the health direction is inconsistent with the enduring
6 power of attorney, when making a decision about a health care
7 matter or medical research matter, the attorney must comply with—
- 8 (a) if the health direction was made before the power of attorney—
9 the power of attorney; or
- 10 (b) if the health direction was made after the power of attorney—
11 the health direction.
- 12 (4) The ACAT may, on application by an attorney, declare that a health
13 direction is consistent or inconsistent with an enduring power of
14 attorney.
- 15 (5) In this section:
- 16 *attorney*—see the *Powers of Attorney Act 2006*, section 6.
- 17 *health care matter*, for a principal—see the *Powers of Attorney*
18 *Act 2006*, section 12.
- 19 *medical research matter*, for a principal—see the *Powers of*
20 *Attorney Act 2006*, section 12A.
- 21 *principal*—see the *Powers of Attorney Act 2006*, section 6.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 19 November 2015.

2 Notification

Notified under the [Legislation Act](#) on 2015.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

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