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## CAPACITY BILL 2021

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### Explanatory Memorandum

1. This Bill is promoted by
2. In the opinion of the member moving the Bill its provisions are compatible with the Convention rights within the meaning of the Human Rights Act 2001.
3. *Clause 1* of the Bill provides for the short title of the resulting Act.
4. *Clause 2* provides for the commencement of the resulting Act.

#### *Part 2*

#### *People who lack capacity*

#### Division 1 – The principles and Preliminary

5. *Clause 3* sets out the underlying principles of capacity.
  - 5.1 Subsection (1) refers to the key principles applying to decisions and actions taken under the Act.
  - 5.2 Subsection (2) provides that the starting point is a presumption of capacity.
  - 5.3 Subsection (3) provides that a person must be assumed to have capacity until it is proved otherwise. A person must also be supported to make his own decision, as far it is practicable to do so.
  - 5.4 Subsection requires “all practicable steps” to be taken to help the person to make a decision.
  - 5.5 Subsection (5) provides that everything done, or decision made, under the Act for a person who lacks capacity must be done in that person’s best interests.
  - 5.6 Subsection (6) provides that in making decisions or doing an act in relation, the person making the decision or acting must think whether it is possible to decide or act in a way that would interfere less with the rights and freedom of action of the person who lacks capacity to a person (the “least restrictive option”).
6. *Clause 4* sets out in broad terms when a person lacks capacity.
  - 6.1 Subsection (1) provides that a person lacks capacity if they are unable to make decision due to an impairment of or disturbance in the functioning of the mind or brain.
  - 6.2 Subsection (2) provides that the impairment may be permanent or temporary.
  - 6.3 Subsection (3) makes it clear that such determinations should not merely be made on the basis of a person’s age, appearance or unjustified assumptions about capacity based on the person’s condition or behaviour.

- 6.4 Subsection (4) provides that in “proceedings” questions of capacity are to be determined on a balance of probabilities.
- 6.5 Subsection (5) makes it clear that powers under the Act generally only arise where the person lacking capacity is 18 or over.
- 7. *Clause 5* deals with the inability to make decisions
  - 7.1 Subsection (1) provides four reasons why a person may be categorised as unable to make a decision, an inability to (a) comprehend the information relevant to the decision (further defined in subsection (4)), (b) retain that information for the appropriate period, (c) “weigh” it and (d) to communicate a decision in respect of it.
  - 7.2 Subsection (2) makes clear that a determination of incapacity may not be reached without the relevant information having been presented to the person in a way that is appropriate to his circumstances.
  - 7.3 Subsection (3) specifies how a period of time is to be assessed as “appropriate” for the purposes of the section.
  - 7.4 Subsection (4) sets out the matters to be considered in including an appreciation of the consequences of making and not making a decision.
  - 7.5 Subsection (5) provides that a person is not to be regarded as incapable of making a decision because they can retain information for a short time only.
  - 7.6 Subsection (6) provides that the Department may make regulations setting out the steps to be taken to assist a person to make a decision for themselves.
- 8. *Clause 6* deals with a key principle of the Act that all steps and decisions taken for someone who lacks capacity must be taken in the person’s best interests.
  - 8.1 Subsection (1) provides a person making a decision in the best interests of P merely on the basis of P’s age, appearance or behaviour.
  - 8.2 Subsection (2) makes clear that determining what is in a person’s best interests requires a consideration of all relevant circumstances (defined in subsection (11)).
  - 8.3 Subsection (3) provides that the decision-maker must consider whether the individual concerned is likely to have capacity at some future date (subsection (3)).
  - 8.4 Subsection (4) provides that the person concerned must so far as possible be involved in the process.
  - 8.5 Subsection (5) applies to determinations as to whether treatment that is necessary to sustain life is in the best interests of the person concerned. It provides that the decision-maker must not be motivated by a desire to bring about the person’s death.
  - 8.6 Subsection (6) provides that the decision-maker must also consider, as far as is reasonably ascertainable, the “past and present wishes and feelings” of the person concerned.
  - 8.7 Subsection (7) specifies who should be consulted when making a best interests determination.
  - 8.8 Subsection (8) provides that where the matters referred to in subsection (6) are ascertainable they are to be the paramount consideration.
  - 8.9 Subsection (9) applies the best interests principle to situations where the person concerned may not lack capacity.
  - 8.10 Subsection (10) provides protection to those who act in the reasonable belief that they are doing so in the other person’s best interests.
  - 8.11 Subsection (11) defines “relevant circumstances” for the purposes of the section.

9. *Clause 7* covers acts in connection with care or treatment
  - 9.1 Subsection (1) sets out when an act in connection with care and treatment is subject to the section.
  - 9.2 Subsection (2) provides that the person doing the act (D) will not incur any liability which would not have arisen if P, with capacity to do so, had in fact consented to D's act.
  - 9.3 Subsection (3) makes it clear that liability for negligence is unaffected by the section.
  - 9.4 Subsection (4) provides that nothing in the section affects the operation of advance decisions to refuse treatment.
10. *Clause 8* deals with limitations to acts under section 7.
  - 10.1 Subsection (1) provides that if D does an act intended to restrain a person (P), the section applies only if two further conditions are satisfied.
  - 10.2 Subsection (2) sets out the first condition – that restraint is permitted only when the person using it reasonably believes it is necessary to prevent harm to P.
  - 10.3 Subsection (3) sets out the second condition – that the restraint used must be proportionate both to the likelihood of P suffering harm and the seriousness of that harm.
  - 10.4 Subsection (4) provides that D restrain P if D uses or threatens to use force where P resists or restricts P's liberty of movement.
  - 10.5 Subsection (5) makes it clear that a valid decision by an attorney or a delegate takes priority over any action which might be taken under section 7.
  - 10.6 Subsection (6) makes it clear that action can be taken to sustain life or prevent serious deterioration while any such dispute is referred to the court.
11. *Clause 9* deals with limitations to acts under section 7.
  - 11.1 Subsection (1) provides that if D does an act in pursuance of a relevant decision, section 7 applies only if two further conditions are satisfied.
  - 11.2 Subsection (2) sets out the first condition – that D is acting in a professional capacity or for remuneration.
  - 11.3 Subsection (3) sets out the second condition – that prior to the act there exists a written record containing the required information.
  - 11.4 Subsection (4) provides that nothing in subsections (2) and (3) prevent D from doing an act D believes necessary to prevent harm to P or to prevent deterioration in P's condition.
  - 11.5 Subsection (5) makes it clear that section 7 does not authorise D to do an act which conflicts with a lasting power of attorney or the powers of a delegate.
  - 11.6 Subsection (6) makes it clear that action can be taken to sustain life or prevent serious deterioration while any such dispute is referred to the court.
  - 11.7 Subsection (7) defines a "relevant decision".
  - 11.8 Subsection (8) defines "required information".
  - 11.9 Subsection (9) defines "serious medical treatment".
  - 11.10 Subsection (10) enables the Department to modify the list of relevant decisions in subsection (7).
12. *Clause 10* deals with payment for necessary goods and services
  - 12.1 Subsection (1) provides that the person lacking capacity must still pay a reasonable price for necessities.
  - 12.2 Subsection (2) repeats the established legal definition of what is 'necessary'.

13. *Clause 11* deals with expenditure
- 13.1 Subsection (1) allows a person who is acting under section 7 and who arranges something for P's care or treatment that costs money to promise that P will pay and use money which P has in his possession.
- 13.2 Subsection (2) enables D to pay himself back from P's money in D's possession or consider himself owed by P.
- 13.3 Subsection (3) provides that D's powers under this section are not affected by the fact that other people may have control over P's money or property by other routes.

Division 2 – Lasting Powers of Attorney

14. *Clause 12* – introduces lasting powers of attorney (LPA)
- 14.1 Subsection (1) specifies that a lasting power of attorney may deal with personal welfare matters and property and affairs matters and also makes clear that to be valid an LPA must include authority to make decisions when the donor no longer has capacity to make those decisions himself.
- 14.2 Subsection (2) deals with the creation of an LPA. It requires compliance with certain rules in order for the LPA to be considered valid.
- 14.3 Subsection (3) provides that if the rules are not complied with the document created will not be a valid LPA and cannot be lawfully used to make decisions on behalf of the donor.
- 14.4 Subsection (4) reiterates that any donee must apply the principles set out in sections 3 and 6 and that the donee's authority is also subject to any conditions or restrictions that the donor may choose to put in the LPA document itself.
15. *Clause 13* deals with the appointment of donees
- 15.1 Subsection (1) requires a donee to be aged 18 or over. If the LPA relates only to property and affairs, the donee can be either an individual or a trust corporation.
- 15.2 Subsection (2) provides that a donee of a lasting power of attorney which relates only to a donor's property and affairs, must be an individual who has reached the age of 18 or a trust corporation.
- 15.3 Subsection (3) provides that regulations must set out who cannot be the donee of a power of attorney and provides that a bankrupt cannot be a donee of a property and affairs power but can be a donee of a personal welfare power.
- 15.4 Subsection (4) provides that where two or more people are appointed as donees, they may be appointed either to act jointly.
- 15.5 Subsection (5) introduces the remaining subsections.
- 15.6 Subsection (6) provides that the donor may appoint two or more persons to act jointly in respect of some matters and jointly and severally in respect of others.
- 15.7 Subsection (7) To the extent that the donor does not specify in the instrument whether donees are to act jointly or jointly and severally, it will be assumed from the instrument that they are appointed to act jointly
- 15.8 Subsection (8) provides that where donees are to act jointly, a failure of one of them to act does not prevent a valid power from being created.
- 15.9 Subsection (9) provides that where donees are to act jointly and severally, a failure of one of them to act does not prevent a valid power from being created.
- 15.10 Subsection (10) allows a donor to provide for the replacement of the donee(s) on the occurrence of a specified event which would normally terminate a donee's powers.
16. *Clause 14* deals with restrictions on lasting powers of attorney

- 16.1 Subsection (1) provides that a LPA does not authorise a donee to restrain the donor unless 3 conditions are satisfied.
- 16.2 Subsection (2) provides the first condition - relating to the donee's capacity.
- 16.3 Subsection (3) provides the second condition - that the donee reasonably believes he needs to act in order to prevent harm to the donor.
- 16.4 Subsection (4) requires any action of the donor to be proportionate to the likelihood, and degree of harm, the donor may suffer.
- 16.5 Subsection (5) states when a donee restrains a donor.
- 16.6 Subsection (6) provides that a donee's powers in relation to personal welfare do not extend to things in respect of which the donee believes the donor may have capacity or which are the subject to an advance decision.
- 16.7 Subsection (7) (read with subsection (6)(c)) provides that although an attorney may give or refuse consent to the carrying out or continuation of health care, this would not extend to refusing life-sustaining treatment unless the LPA expressly said so, and is subject to any conditions or restrictions in the LPA.
- 17. *Clause 15* deals with lasting powers of attorney and gifts
  - 17.1 Subsection (1) operates as a specific restriction in relation to gifts.
  - 17.2 Subsection (2) allows the donee to make modest gifts proportionate to the donor's assets to people related or connected to the donor (including himself) on "customary occasions", as defined; and to charities (subject to any conditions or restrictions in the LPA itself).
  - 17.3 Subsection (3) defines a "customary occasion".
  - 17.4 Subsection (4) provides that the donee's powers under this section are subject to the express terms of the LPA.
- 18. *Clause 16* deals with the revocation of lasting powers of attorney
  - 18.1 Subsection (1) states when the section is to apply.
  - 18.2 Subsection (2) provides that a donor may revoke an LPA at any time while he has capacity to do so.
  - 18.3 Subsection (3) provides that the donee's bankruptcy revokes an LPA dealing with property and affairs.
  - 18.4 Subsection (4) provides that events specified in subsection (5) terminate the donee's appointment and revoke the LPA.
  - 18.5 Subsection (5) lists the events bringing about the consequences mentioned in subsection (4).
  - 18.6 Subsection (6) provides for the instances where the occurrence of an event which would otherwise revoke the LPA, do not.
  - 18.7 Subsection (7) provides that a donee's bankruptcy does not revoke a personal welfare LPA.
  - 18.8 Subsection (8) provides that the dissolution of a marriage or civil partnership does not revoke the appointment of a donee unless the LPA specifically so provides.
  - 18.9 Subsection (9) provides that before making regulations under the section the Department must consult the Deemsters and the Registrar General.
- 19. *Clause 17* deals with the protection of a donee and others if no LPA was created or has been revoked
  - 19.1 Subsection (1) provides when the section is to apply.
  - 19.2 Subsection (2) provides that a donee who acts in pursuance of an LPA does not incur liability unless the donee has knowledge that it was not properly created or is aware of its revocation.
  - 19.3 Subsection (3) A third party who deals with a donee is protected unless that third party is aware of the relevant deficiency in the power.

- 19.4 Subsection (4) provides that a purchaser dealing with a donee is presumed to have entered into a valid transaction where it satisfies one of two specified conditions.
- 19.5 Subsection (5) provides for section 9 of the Powers of Attorney Act 1987 to have effect in certain circumstances.
- 19.6 Subsection (6) provides that the section applies to all donees.
- 20. *Clause 18* deals with the powers of the court in relation to the validity of lasting powers of attorney
  - 20.1 Subsection (1) sets out when this section and the following section apply.
  - 20.2 Subsection (2) provides that the court can determine questions about validity and revocation.
  - 20.3 Subsection (3) provides that the court can direct that an instrument should not be registered or (if it is unregistered) revoke it on the grounds set out in that subsection (fraud or undue pressure, or misbehaviour by the attorney).
  - 20.4 Subsection (4) provides that the court may direct that an instrument be treated as not creating an LPA.
  - 20.5 Subsection (5) provides that where there is more than one donee the court may revoke the instrument or the LPA so far as it relates to any of them.
- 21. *Clause 19* deals with the powers of court in relation to operation of lasting powers of attorney
  - 21.1 Subsection (1) provides that the court can determine any question as to the meaning and effect of an LPA or a document purporting to create one.
  - 21.2 Subsection (2) enables the court to authorise a donee to do anything a donor with capacity could have authorised.
  - 21.3 Subsection (3) makes subsection (2) subject to the terms of the LPA.
  - 21.4 Subsection (4) enables the court to direct a donee to do a number of things in relation to accounts and information where the donor lacks capacity.
  - 21.5 Subsection (5) enables the court to authorise the making of gifts in addition to those permitted under section X.
  - 21.6 Subsection (6) provides the section applies to all appointed donees.
- 22. *Clause 20* provides that the Registrar General has the function of establishing and maintaining a register of lasting powers of attorney.

### Division 3 – General Powers of the court and appointment of delegates

- 23. *Clause 21* deals with the power of the court to make declarations
  - 23.1 Subsection (1) enables the court to make declarations in respect of a person's capacity in relation to a specific thing or decision and to the lawfulness of an act in respect of the person.
  - 23.2 Subsection (2) provides that an "act" includes an omission.
- 24. *Clause 22* deals with courts powers to make decisions and appoint delegates: general
  - 24.1 Subsection (1) sets the parameters of the section.
  - 24.2 Subsection (2) sets out the core jurisdiction of the court to make decisions about personal welfare or property and affairs for persons lacking capacity or to appoint a delegate to do so.
  - 24.3 Subsection (3) confirms that the principles in sections 3 and 6.
  - 24.4 Subsection (4) requires the court to consider two additional principles in deciding whether to appoint a delegate i.e. that a decision of the court is preferable to the appointment of a delegate and that, if a delegate is appointed, the appointment should be as limited in scope and duration as is reasonably practicable in the circumstances.

- 24.5 Subsection (5) enables the court to grant the delegate powers or impose duties on the delegate as it thinks necessary
- 24.6 Subsection (6) gives the court an “own motion” power to make whatever order is in the person’s best interests.
- 24.7 Subsection (7) enables the court to vary or discharge its orders.
- 24.8 Subsection (8) provides that the court has power to take away or alter a delegate’s powers in certain situations.
- 25. *Clause 23* deals with the courts powers in respect of personal welfare
  - 25.1 The powers created by section 19 in relation to making orders and appointing delegates will extend to a wide range of personal welfare issues. The list in the subsection is not an exhaustive, merely an indicative, list.
  - 25.2 Subsection (2) cross refers to section 26.
- 26. *Clause 24* deals with the courts powers in relation to property and affairs
  - 26.1 Subsection (1) indicates the extent of the court’s powers with regard to property and affairs. It provides a non-exhaustive, indicative list of the matters within the powers relating to property and affairs – including the making of a will.
  - 26.2 Subsection (2) provides that a will cannot be made under a court order where the person has not attained the age of 18.
  - 26.3 Subsection (3) enables the Attorney General to exercise specific powers.
  - 26.4 Subsection (4) cross refers to section 26.
- 27. *Clause 25* deals with the appointment of delegates
  - 27.1 Subsection (1) provides who may be a delegate.
  - 27.2 Subsection (2) provides that a delegate may be the holder of an office.
  - 27.3 Subsection (3) provides that a person must consent to being appointed as a delegate.
  - 27.4 Subsection (4) provides that one or more delegates may be appointed and can act jointly, jointly and severally, or jointly for some matters and jointly and severally for other matters.
  - 27.5 Subsection (5) gives the court the power to appoint a successor or successors to the original appointees.
  - 27.6 Subsection (6) provides that a delegate will be treated as an “agent” of the adult who lacks capacity.
  - 27.7 Subsection (7) provides for reimbursement of delegates.
  - 27.8 Subsection (8) enables the court to confer powers on a delegate to take control and possession of a person’s property.
  - 27.9 Subsection (9) provides that the court may require a delegate to give the Attorney General security against misbehaviour and to direct the delegate to file with the Attorney General reports and accounts as it sees fit.
- 28. *Clause 26* deals with restrictions on delegates.
  - 28.1 Subsection (1) specifies that a delegate cannot act where the person concerned is able to act for himself. Subsection (6) reiterates that a delegate must act in accordance with section 1 (principles) and section 4 (best interests).
  - 28.2 Subsections (2) and (3) relate back to sections 22 and 23 and list certain matters which must always be dealt with by the court, not a delegate.
  - 28.3 Subsection (4) makes it clear that a delegate cannot be given power to “trump” an attorney.
  - 28.4 Subsection (5) restricts delegates from refusing consent to the carrying out or continuation of treatment that is necessary to sustain life.
  - 28.5 Subsection (6) clarifies that the principles in section 3 and 6.
  - 28.6 Subsections (7) to (11) impose limitations on delegates in relation to restraint.

- 28.7 Subsection (12) provides when a delegate “restrains” a person.
29. *Clause 27* provides that the Registrar General has the function of establishing and maintaining a register of delegates
30. *Clause 28* deals with the functions of the Attorney General in relation to e.g. delegates and donees of an LPA.

#### Division 4 – The Attorney General

31. *Clause 29* deals with the Attorney General’s powers to institute inquiries.
- 31.1 Subsection (1) empowers the Attorney General to institute inquiries into any matter covered by section 28.
- 31.2 Subsection (2) provides that an inquiry may be conducted by the Attorney General or an appointee.
32. *Clause 30* deals with evidence in relation to inquiries.
- 32.1 Subsection (1) defines inquiry.
- 32.2 Subsection (2) specifies various information gathering powers in relation to inquiries.
- 32.3 Subsection (3) gives the Attorney General access rights to certain records and documents.
33. *Clause 31* deals with the Attorney General’s power to examine and take copies of certain records for the purpose of the Attorney’s functions under the Act.
34. *Clause 32* deals with Regulations.
- 34.1 Subsection (1) provides that DHSC may make regulations in respect of the Attorney General’s functions under section 28.
- 34.2 Subsection (2) provides a non-exhaustive list of what regulations may contain.
- 34.3 Subsection (3) provides that before making regulations, the Deemsters and the Attorney General must be consulted.

#### Division 5 – Advance decisions to refuse treatment

35. *Clause 33* deals with advance decisions to refuse treatment
- 35.1 Subsection (1) specifies when an advance decision may be made.
- 35.2 Subsection (2) provides that an advance decision need not be in technical language.
- 35.3 Subsection (3) spells out the formalities for an advance decision.
- 35.4 Subsection (4) provides for the withdrawal and alteration of an advance decision.
- 35.5 Subsection (5) sets out the formalities for a “withdrawal”.
- 35.6 Subsection (6) sets out the requirements for an “alteration”.
36. *Clause 34* deals with validity and applicability of advance decisions
- 36.1 Subsection (1) deals with the liability of a person carrying out treatment where an advance decision is valid and operative.
- 36.2 Subsection (2) states when an advance decision is not valid i.e. when withdrawn, conflicts with an LPA or is otherwise inconsistent with a decision of the person in question.
- 36.3 Subsection (3) provides an advance decision is not applicable to treatment where, at the material time, a person has capacity.
- 36.4 Subsection (4) specifies when an advance decision is not applicable to treatment.
- 36.5 Subsection (5) introduces further rules about the applicability of advance decisions to refuse treatment that is necessary to sustain life. An advance decision will not apply to life-sustaining treatment unless it is verified by a statement confirming that the decision is to apply to that treatment even if life is at risk.



- 36.6 Subsection (6) provides that an LPA does not prevent an advance decision being valid.
- 37. *Clause 35* deals with the effect of advance decisions
  - 37.1 Subsection (1) sets out the effect of a valid and effective advance decision.
  - 37.2 Subsections (2) and (3) clarify the rules about liability. A treatment-provider may safely treat unless satisfied that there is a valid and applicable qualifying advance refusal; and a treatment-provider may safely withhold or withdraw treatment as long as the provider has reasonable grounds for believing that there is a valid and applicable qualifying advance decision.
  - 37.3 Subsection (4) provides that the court may make certain declarations in respect of an advance decision, including as to its validity.
  - 37.4 Subsection (5) provides nothing in an advance decision prevents life-sustaining treatment being given pending a decision of the court.
- 38. *Clause 36* introduces advance consents to treatment
  - 38.1 Subsection (1) sets out what an advance consent is and covers.
  - 38.2 Subsection (2) provides that an advance consent need not be in technical language.
  - 38.3 Subsection (3) sets out the formalities for an advance consent.
  - 38.4 Subsection (4) provides for the withdrawal and alteration of an advance consent.
  - 38.5 Subsection (5) sets out the formalities for a “withdrawal”.
  - 38.6 Subsection (6) sets out the requirements for an “alteration”.
- 39. *Clause 37* deals with validity and applicability of advance consents
  - 39.1 Subsection (1) deals with the liability of a person carrying out treatment where an advance consent is valid and operative.
  - 39.2 Subsection (2) states when an advance consent is not valid i.e. when withdrawn, conflicts with an LPA or is otherwise inconsistent with a decision of the person in question.
  - 39.3 Subsection (3) provides an advance consent is not applicable to treatment where, at the material time, a person has capacity.
  - 39.4 Subsection (4) specifies when an advance consent is not applicable to treatment.
  - 39.5 Subsection (5) introduces further rules about the applicability of an advance consent where treatment is necessary to sustain life. An advance consent will not apply to life-sustaining treatment unless it is verified by a statement confirming that the consent is to apply to that treatment even if life is at risk.
  - 39.6 Subsection (6) enables DHSC to make regulations prescribing the form and content of an advance consent.
  - 39.7 Subsection (7) provides that an LPA does not prevent an advance consent being treated as valid.
- 40. *Clause 38* deals with the effect of an advance consent.
  - 40.1 Subsection (1) sets out the effect of a valid and effective advance decision.
  - 40.2 Subsections (2) and (3) clarify the rules about liability. A treatment-provider may safely treat unless satisfied that there is a valid and applicable qualifying advance consent; and a treatment-provider may safely withhold or withdraw treatment as long as the provider has reasonable grounds for believing that there is a valid and applicable qualifying advance decision.
  - 40.3 Subsection (4) provides that the court may make certain declarations in respect of an advance consent, including as to its validity.

- 40.4 Subsection (5) provides nothing in an advance consent prevents life-sustaining treatment being given pending a decision of the court

#### Division 6 - Supplemental

41. *Clause 39* deals with family relationships
- 41.1 Subsection (1) lists certain decisions that can never be made under the Act on behalf of a person who lacks capacity. For example, in relation to marriage, sexual relations and adoption.
- 41.2 Subsection (2) defines “adoption order” for the purposes of subsection (1).
- 41.3 Subsection (3) provides that DHSC may make regulations modifying the list in subsection (1).
42. *Clause 40* deals with Mental Health Act matters
- 42.1 Subsection (1) provides that this Bill does not apply to any treatment for mental disorder which is being given in accordance with the rules about compulsory treatment set out in Part 4 of the 1998 Act.
- 42.2 Subsection (2) provides that certain terms have the same meaning for the purposes of the Bill as they have under the Mental Health Act 1998.
43. *Clause 41* deals with voting rights.
- 43.1 Subsection (1) provides that the Bill does not apply to decisions on voting.
- 43.2 Subsection (2) defines “referendum”.
44. *Clause 42* deals with research
- 44.1 Subsection (1) provides that research may only be carried out in accordance with this section.
- 44.2 Subsection (2) provides that the interests of the person must be presumed to outweigh the interests of science and society.
- 44.3 Subsections (3) to (5) provide that intrusive research may only be carried out if specified conditions are satisfied relating to benefit and risk.
- 44.4 Subsection (6) specifies the limits on research by reference to an objection from the person concerned and the existence of advance decisions and similar statements.
- 44.5 Subsection (7) enables DHSC to make regulations about research and contains a non-exhaustive list of things regulations may cover.
45. *Clause 43* deals with ill-treatment
- 45.1 Subsections (1) and (2) create an offence of ill-treatment or wilful neglect of a person lacking capacity by anyone responsible for that person’s care, donees of LPAs or enduring powers of attorney, or delegates appointed by the court
- 45.2 Subsection (3) specifies the penalty for the offence.

#### Division 7 – Codes of Practice

46. *Clause 44* deals with Codes of Practice
- 46.1 Subsection (1) provides for DHSC to make and revise a code or codes of practice to supplement the Act. This subsection specifies the persons to whom and the purposes in respect of which such guidance is to be issued.
- 46.2 Subsection (2) allows for the revision of Codes.
- 46.3 Subsection (3) allows the preparation of Codes to be delegated.
- 46.4 Subsection (4) specifies who is to have regard to a Code.
- 46.5 Subsection (5) provides that any codes of practice issued may be used as evidence in court or tribunal proceedings.
47. *Clause 45* deals with procedure in relation to Codes of Practice
- 47.1 Subsection (1) deals with prior consultation.
- 47.2 Subsection (2) requires a code to be laid before Tynwald.

- 47.3 Subsection (3) provides that a code is to come into operation on an appointed day.
- 47.4 Subsection (4) deals with publication.

*Part 3*  
*Interim Orders & Directions etc*

Division 1 – Interim Orders and Directions

- 48. *Clause 46* deals with interim orders and allows the court to make interim orders even if evidence as to lack of capacity is not yet available, where there is reason for the court to believe that the person lacks capacity in respect of a particular matter and it is in his best interests for the court to act without delay.
- 49. *Clause 47* deals with the power to make reports
  - 49.1 Subsection (1) states when the section applies.
  - 49.2 Subsection (2) enables the court to require reports from DHSC, the Attorney General or anyone else it may direct.
  - 49.3 Subsection (3) enables the court to direct that a private medical examination be carried out on a person.
  - 49.4 Subsections (4) and (5) provide for court rules to specify the matters to be dealt with in a report.
  - 49.5 Subsection (6) provides for the interviewing of person in private and for access to certain records.
  - 49.6 Subsection (7) enables the Attorney General to appoint someone to carry out the matters referred to in subsection (6).
  - 49.7 Subsection (7) deals with the form of reports.

Division 2 – Practice and Procedure

- 50. *Clause 48* deals with applications to the court.
  - 50.1 Subsection (1) provides that persons listed therein can apply to the Court as of right.
  - 50.2 Subsection (2) provides that other persons require permission to apply to the court.
  - 50.3 Subsection (3) sets out the factors that the court must have regard to when considering whether to grant permission.
- 51. *Clause 49* deals with High Court Rules
  - 51.1 Subsection (1) provides that Court rules are to be made in accordance with section 25 of the High Court Act 1991.
  - 51.2 Subsection (2) provides that relevant proceedings are to be conducted in accordance with court rules.
  - 51.3 Subsection (3) contains a non-exhaustive list of the things court rules may cover.
  - 51.4 Subsection (4) lists other matters court rules may cover.
  - 51.5 Subsection (5) provides that directions may take the place of court rules.
- 52. *Clause 50* gives power to make practice directions in accordance with the High Court Act 1991.
- 53. *Clause 51* deals with rights of appeal.
  - 53.1 Subsection (1) provides that court rules must make provision about appeals.
  - 53.2 Subsection (2) states what court rules may make provision about in relation to appeals.

Division 3 – Fees and Costs

- 54. *Clause 52* deals with fees.

- 54.1 Subsection (1).provides that court rules must make provision for fees.
- 54.2 Subsection (2) contains a non-exhaustive list of the things such rules may contain.
55. Clause 56 deals with costs.
- 55.1 Subsection (1) provides that, subject to court rules, costs are discretionary.
- 55.2 Subsection (2) refer to a number of things rule son costs may cover.
- 55.3 Subsection (3) gives the court full power in respect of an award of costs.
- 55.4 Subsection (4) enables the court to disallow costs and for the payment of wasted costs.
- 55.5 Subsections (5) and (6) are definitional.
56. *Clause 53* deals with supplementary matters relating to costs and fees.
- 56.1 Subsection (1) provides that court rules can deal with the way in which, and funds from which, fees and costs are to be paid and make provision for them to be charged against the estate of the person concerned.
- 56.2 Subsection (2) provides that a charge on an estate does not have certain specified effects.

### Part 3 – Miscellaneous and General

57. *Clause 54* deals with interpretation.
- 57.1 Subsection (1) defines terms used in the Act.
- 57.2 Subsection (2) to (5) provide for certain references throughout the Act to be construed in certain ways.
58. *Clause 55* deals with Regulations.
- 58.1 Subsection provides for Tynwald procedure.
- 58.2 Subsection (2) provides that regulations may , inter alia, modify any provision of this Act, make supplementary, incidental and consequential provision.
59. *Clause 56* deals with existing receivers and enduring powers of attorney etc.
- 59.1 Subsection (1) repeals Part 7 of the Mental Health Act 1998 (management of property and affairs of patients) and the whole of the Enduring Powers of Attorney Act 1987
- 59.2 Subsection (2) provides that no new power of attorney under the Powers of Attorney Act 1987 is to be created after the coming into operation of this Act.
- 59.3 Subsection (3) introduces transitional provisions in relation to an enduring power of attorney made before the repeal of the Enduring Powers of Attorney Act 1987.
60. *Clause 57* deals with minor consequential amendments and repeals and introduces Schedules 3 and 4.

### Schedules

61. Schedule 1 deals with the formalities for LPAs
- 61.1 Part 1 deals with the making of instruments (paragraphs 1 to 3). In particular it provides that —
- an LPA must be in the form prescribed by regulations;
  - the form must contain statements by both the donor and the donee of the power to the effect that they have read, or have had read to them, such information as may be prescribed;
  - the LPA must include names of any persons whom the donor wishes to be notified of any application to register the LPA or a statement that there are no such persons;
  - the form must also include a certificate by a person of a prescribed description that, in that person's opinion, at the time when the donor

(D) executes the instrument D understands the purpose of the instrument and the scope of the authority conferred, that no fraud or undue pressure is being used to induce D to create an LPA, and that there is nothing else that would prevent an LPA from being created by the instrument;

- the Registrar General may treat an LPA differing in an immaterial respect from the prescribed form as sufficient to create an LPA;
- the court has the power to make a declaration that an instrument not in the prescribed form is to be treated as if it were, if satisfied that the persons executing the instrument intended to create an LPA.

61.2 Part 2 deals with registration (paragraphs 4 -16). In particular it provides that —

- an application to register an LPA must be made by the donor or donee(s) to the Registrar General;
- when about to apply to register the LPA, the donor or donee(s) must notify the named persons to inform them of the pending registration; the Registrar General is required to notify the donor or donee(s) (depending on who makes the application);
- the court has the power to dispense with the notification requirement on the application of either the donor or donee;
- if the instrument received by the Registrar General is flawed the Registrar General must refer it to the court and must not register the instrument in the interim;
- the court can either remove (or “sever”) the offending provision from the instrument or direct the Registrar General not to register the LPA instrument;
- if the court severs a provision, the Registrar General can then register the instrument, but must attach a note to that effect to it;
- objections can be made to the registration of the LPA within a prescribed period. An objection by a donor to registration by the donee(s) must be made to the Registrar General and the court will only direct him to register the LPA if satisfied that the donor lacks capacity to object. An objection by a donee or named person on the basis that the LPA has been revoked (for example, because of bankruptcy of the donee) must also be made to the Registrar General who, if satisfied, will not register the LPA;
- if the person wishing to register the LPA disagrees with the Registrar General’s decision not to register the instrument, that person can apply to the court. If the court finds that the grounds for the Registrar General objecting to registration are not established, the court can direct the Registrar General to register the LPA;
- the Registrar General must not register the instrument, unless told to do so by the court, where it appears to him that there is a delegate appointed for the donor and that the powers of the delegate would conflict with the powers to be conferred on the donee.

61.3 Part 3 deals with the cancellation of registration and notification of severance (paragraphs 17-20). In particular it provides that —

- the Registrar General will cancel an LPA if satisfied that the power has been revoked on certain specified grounds;
- on cancellation of the registration of an LPA the Registrar General is to notify both the donor and donee to this effect;

- where the court has removed a provision from an instrument, the court is required to notify the Registrar General of the severance of that provision;
  - where the court determines that a provision in an instrument means that instrument cannot operate as a valid LPA, the court is required to direct the Registrar General to cancel the registration of that instrument as an LPA.
- 61.4 Part 4 deals with records of alterations in registered powers (paragraphs 21-25). In particular it provides that —
- a note of any revocation of an LPA, because of the donor or donee's bankruptcy is to be attached to the LPA by the Registrar General;
  - the Registrar General must also attach a note to an instrument if an event has terminated the appointment of the donee but not revoked the instrument, where a donee's ability to act has been suspended by the making of an interim bankruptcy restrictions order or the appointment of the donee has been replaced under the terms of the LPA;
  - the Registrar General must give the donor and donee notice of any notes attached to the LPA. Where the court has notified the Registrar General that it has removed a provision from an instrument, paragraph 24 requires that the Registrar General must attach a note to that effect to the instrument.
- 61.5 Part 5 deals with instruments in overseas form (paragraph 26) and, in particular, enables DHSC to provide (in regulations) that such an instrument shall be treated as made in the form and in accordance with the laws of the Island.
- 61.6 Part 6 deals with the register of lasting powers (paragraphs 27-28) and deals with the disclosure of information on the register, information required to effect a search and the issue of office copies of entries on the register.
62. *Schedule 2* deals with supplementary provisions relating to property and affairs (paragraphs 1-9)
- 62.1 The Schedule contains detailed provisions relating to the court's powers in relation to property and affairs, in particular the making of wills and settlements. Paragraphs 1 to 4 deal with wills that can be made on behalf of an adult lacking capacity.
- 62.2 Paragraphs 5 and 6 concern settlements.
- 62.3 Paragraph 7 enables the court to direct the transfer of stocks to a person appointed outside the Island.
63. *Schedule 3* deals with any Enduring Power of Attorney (EPA) remaining at the time of the repeal of the *Powers of Attorney Act 1983* and the *Powers of Attorney Act 1987*.
- 63.1 Part 1 deals with the basics of enduring powers of attorney (paragraphs 1 – 3). In particular it provides that —
- the main elements of EPAs are not revoked by any subsequent mental incapacity of the donor of the power;
  - an EPA is only created if it is in the prescribed form and complies with the provisions in paragraph 2 of this Part;
  - both general and specific EPAs may be subject to conditions and restrictions as set out by the donor;
  - a donee may from time to time make gifts from the donor's property to people connected to the donor (including the donee) and to any charity the donor may have been expected to make gifts to.

- 63.2 Part 2 deals with actions on actual or impending incapacity of donor (paragraph 4). In particular it provides that — once the attorney believes that the donor is or is becoming mentally incapacitated the attorney must immediately make an application to the Registrar General to register the power.
- 63.3 Part 3 deals with notification prior to registration (paragraphs 5-12). In particular it provides that —
- the attorney must give notice of intention to register the power to all those entitled to receive notice;
  - the attorney must give notice of intention to register to the donor;
  - the attorney may apply to the court to dispense with the requirement to give notice to entitled persons;
  - notices should be in the prescribed form and must contain specific information, especially with regard to the right of that person to object to registration.
- 63.4 Part 4 deals with registration (paragraphs 13-14). In particular it provides that —
- where an application for registration is made in accordance with the provisions of Part 2, the Registrar General must register the instrument unless a valid notice of objection has been made in accordance with the provisions of this part;
  - a notice of objection must be made on specified grounds;
  - if the court is satisfied that one of the grounds it made out it must direct the Registrar General not to register the instrument;
  - if the court is satisfied that fraud or undue pressure was used or that the donee is unsuitable, it must also order the revocation of the power created by the instrument.
- 63.5 Part 5 deals with the legal position after registration (paragraphs 15-17). In particular it provides that —
- the Registrar General must not register an EPA if a delegate has been appointed and the powers of the attorney would conflict.
  - once an EPA has been registered any revocation of the power must be confirmed by the court;
  - A disclaimer by the attorney is not valid until the attorney has given notice of such to the Registrar General;
  - the court has a number of functions, not least the power to decide any question about the meaning or effect of an EPA.
  - the court is also under an obligation to direct the Registrar General to cancel the registration of a power in a number of circumstances
  - the Registrar General is obliged to cancel the registration of a power, such as on receipt of a disclaimer from the attorney.
- 63.6 Part 6 deals with the protection of an attorney and third parties (paragraphs 18-19). In particular it provides protection for those who act under a power which is invalid as long as at the time of acting they did not know that the power was invalid or that, had the EPA been valid, either an event had occurred which would have revoked the power or that the power would have expired.
- 63.7 Part 7 deals with joint and joint and several attorneys (paragraphs 20-22). In particular it provides that —
- a document which appoints more than one attorney cannot create an EPA unless the attorneys are appointed to act jointly or jointly and severally;

- where attorneys are appointed to act jointly and severally, if one of them fails to comply with the necessary requirements for the creation of an EPA, then the document will not create a power in that attorney's case. But this will not affect the creation of a power in relation to the other attorneys;
- if one or more (but not both or all) of the attorneys applies to register the document, they must notify the other attorney(s) of this.

63.8 Part 8 defines terms used in the Schedule (paragraph 23).

64. *Schedule 4*: deals with the repeal of the Powers of Attorney Act 1987 and its consequences (paragraphs 1-4). In particular provision is made for the continuation of procedural matters (e.g. appeals and other legal proceedings) relating to EPAs which remain in place by the time the Powers of Attorney Act 1987 is repealed.
65. *Schedule 5* deals with minor consequential amendments and repeals
66. *Schedule 6* contains a table of repeals.



# C

## CAPACITY BILL 2021

### Index

Section	Page
<b>PART 1 – INTRODUCTORY</b>	<b>5</b>
1 Short title .....	5
2 Commencement .....	5
<b>PART 2 - PERSONS WHO LACK CAPACITY</b>	<b>5</b>
<b>DIVISION 1: THE PRINCIPLES AND PRELIMINARY</b>	<b>5</b>
<i>The principles</i>	<b>5</b>
3 The principles .....	5
<i>Preliminary</i>	<b>6</b>
4 People who lack capacity .....	6
5 Inability to make decisions .....	6
6 Best interests .....	7
7 Acts in connection with care or treatment .....	8
8 Section 7 acts: limitations .....	8
9 Section 7 acts: further limitations .....	9
10 Payment for necessary goods and services .....	10
11 Expenditure .....	10
<b>DIVISION 2: LASTING POWERS OF ATTORNEY</b>	<b>11</b>
12 Lasting powers of attorney .....	11
13 Appointment of donees .....	11
14 Lasting powers of attorney: restrictions .....	12
15 Scope of lasting powers of attorney: gifts .....	13
16 Revocation of lasting powers of attorney etc. ....	13
17 Protection of donee and others if no power created or power revoked .....	14
18 Powers of court in relation to validity of lasting powers of attorney .....	15
19 Powers of court in relation to operation of lasting powers of attorney .....	16
20 Register of lasting powers of attorney .....	16
<b>DIVISION 3: GENERAL POWERS OF THE COURT AND APPOINTMENT OF DELEGATES</b>	<b>16</b>
21 Power to make declarations .....	16
22 Powers to make decisions and appoint delegates: general .....	16
23 Section 22 powers: personal welfare .....	17
24 Section 22 powers: property and affairs .....	17
25 Appointment of delegates .....	18
26 Restrictions on delegates .....	19
27 Register of delegates .....	20

<b>DIVISION 4: THE ATTORNEY GENERAL</b>	<b>20</b>
28 Functions of the Attorney General .....	20
29 General power to institute inquiries .....	20
30 Obtaining evidence etc. for purposes of inquiry .....	21
31 Access to records .....	21
32 Regulations .....	21
<b>DIVISION 5: ADVANCE DECISIONS TO REFUSE TREATMENT</b>	<b>22</b>
33 Advance decisions to refuse treatment: general .....	22
34 Validity and applicability of advance decisions .....	22
35 Effect of advance decisions .....	23
36 Advance consent to treatment: general .....	23
37 Validity and applicability of advance consents .....	24
38 Effect of advance consents .....	25
<b>DIVISION 6: SUPPLEMENTAL</b>	<b>25</b>
<b><i>Excluded decisions</i></b> .....	<b>25</b>
39 Family relationships etc. ....	25
40 Mental Health Act matters .....	26
41 Voting rights .....	26
<b><i>Research</i></b> .....	<b>26</b>
42 Research .....	26
43 Ill-treatment or neglect .....	27
<b>DIVISION 7: CODES OF PRACTICE</b>	<b>28</b>
44 Codes of practice .....	28
45 Codes of practice: procedure .....	28
<b>PART 3 – INTERIM ORDERS AND DIRECTIONS ETC</b>	<b>29</b>
<b>DIVISION: INTERIM ORDERS AND DIRECTIONS</b>	<b>29</b>
46 Interim orders and directions .....	29
47 Power to call for reports .....	29
<b>DIVISION 2: PRACTICE AND PROCEDURE</b>	<b>30</b>
48 Applications to the Court .....	30
49 High Court Rules .....	30
50 Practice directions .....	31
51 Rights of appeal .....	31
<b>DIVISION 3: FEES AND COSTS</b>	<b>32</b>
52 Fees .....	32
53 Costs .....	32
54 Fees and costs: supplementary .....	32
<b>PART 4 - MISCELLANEOUS AND GENERAL</b>	<b>33</b>
55 Interpretation .....	33
56 Regulations .....	34
57 Existing receivers and enduring powers of attorney etc. ....	34
58 Minor and consequential amendments and repeals .....	34

<b>SCHEDULE 1</b>	<b>35</b>
<b>[SECTION 12]</b>	<b>35</b>
LASTING POWERS OF ATTORNEY: FORMALITIES	35
<b>SCHEDULE 2</b>	<b>43</b>
<b>[SECTION 24]</b>	<b>43</b>
PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS	43
<b>SCHEDULE 3</b>	<b>47</b>
PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY	47
2 CHARACTERISTICS OF AN ENDURING POWER OF ATTORNEY	47
3 SCOPE OF AUTHORITY ETC. OF ATTORNEY UNDER ENDURING POWER	48
PART 2 - ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR	49
4.DUTIES OF ATTORNEY IN EVENT OF ACTUAL OR IMPENDING INCAPACITY OF DONOR	49
8. DUTY TO GIVE NOTICE TO DONOR	51
9 CONTENTS OF NOTICES	51
10 NOTICE TO THE DONOR	51
11 DUTY TO GIVE NOTICE TO OTHER ATTORNEYS	51
12 SUPPLEMENTARY	52
13 REGISTRATION OF INSTRUMENT CREATING POWER	52
14 REGISTER OF ENDURING POWERS	53
15 EFFECT AND PROOF OF REGISTRATION	53
20 APPLICATION TO JOINT AND JOINT AND SEVERAL ATTORNEYS	57
21 JOINT ATTORNEYS	58
<b>SCHEDULE 4</b>	<b>59</b>
SAVINGS: POWERS OF ATTORNEY	59
<b>SCHEDULE 5</b>	<b>60</b>
MINOR AND CONSEQUENTIAL AMENDMENTS	60

<b>1</b>	<b>TRUSTEE ACT 1961</b>	<b>60</b>
	REPEALS	62

minus liberty safeguards

# C

## CAPACITY BILL 2021

**A BILL** to make provision relating to persons who lack capacity, for lasting powers of attorney; and for connected purposes

**BE IT ENACTED** by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows: —

### PART 1 – INTRODUCTORY

**1 Short title**

The short title of this Act is the Capacity Bill 2021.

**2 Commencement**

This Act apart from section 1 and this section, comes into operation on such day or days as the Department by order appoints.

### PART 2 - PERSONS WHO LACK CAPACITY

#### DIVISION 1: THE PRINCIPLES AND PRELIMINARY

##### *The principles*

**3 The principles**

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that person lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help that person to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because that person makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in that person's best interests.

- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

*Preliminary*

**4 People who lack capacity**

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time that person is unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to —
- (a) a person's age or appearance; or
  - (b) a condition of a person, or an aspect of a person's behaviour, which might lead others to make unjustified assumptions about that person's capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person ("D") may exercise under this Act —
- (a) in relation to a person who lacks capacity; or
  - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to such a person under 18.

**5 Inability to make decisions**

- (1) For the purposes of section 4, a person is unable to make a decision for themselves if that person is unable to do any of the following—
- (a) to understand the information relevant to the decision;
  - (b) to retain that information for an appropriate period;
  - (c) to use or weigh that information as part of the process of making the decision;
  - (d) to communicate that person's decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if that person is able to understand an explanation of it given to that person in a way that is appropriate to that person's circumstances (using simple language, visual aids or any other means).
- (3) A period of time is appropriate if it is —
- (a) appropriate in the circumstances in which it is given;
  - (b) appropriate for the purpose for which it is given having regard to whether that purpose is for a single event or state of affairs or a continuing event or state of affairs;

- (c) given in a way that is appropriate to a person's particular circumstances (whether given using simple language, visual aids or any other means).
- (4) Due regard being had to subsection (3), the information relevant to a decision includes information about the reasonably foreseeable consequences of —
  - (a) deciding one way or another; or
  - (b) failing to make the decision.
- (5) The fact that a person is able to only retain the information relevant to a decision for a short period does not prevent that person from being regarded as able to make the decision.
- (6) The Department may make regulations as to the steps to be taken to assist a person to make a decision for themselves.

## 6 Best interests

- (1) In determining for the purposes of this Act what is in a person's ("P") best interests, the person making the determination ("D") must not make it merely on the basis of —
  - (a) P's age or appearance; or
  - (b) a condition of P's, or an aspect of P's behaviour, which might lead others to make unjustified assumptions about what might be in P's best interests.
- (2) D must consider all the relevant circumstances and, in particular, take the following steps.
- (3) D must consider whether it is likely that P will at some time have capacity in relation to the matter in question, and if it appears likely that P will, when that is likely to be.
- (4) D must, so far as reasonably practicable, permit and encourage P to participate, or to improve P's ability to participate, as fully as possible in any act done for P and any decision affecting P.
- (5) Where the determination relates to life-sustaining treatment D must not, in considering whether the treatment is in the best interests of P, be motivated by a desire to bring about P's death.
- (6) D must consider, so far as is reasonably ascertainable —
  - (a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity);
  - (b) the beliefs and values that would be likely to influence P's decision if P had capacity; and
  - (c) the other factors that P would be likely to consider if P were able to do so.
- (7) D must take into account, if it is practicable and appropriate to consult them, the views of —
  - (a) anyone named by P as someone to be consulted on the matter in question or on matters of that kind;
  - (b) anyone engaged in caring for P or interested in P's welfare;

- (c) any donee of a lasting power of attorney granted by P; and
- (d) any delegate appointed for P by the court,

as to what would be in P's best interests and, in particular, as to the matters mentioned in subsection (6).

- (8) Where ascertainable, the matters referred to in subsection (6) are to be the paramount consideration of D when determining what is in P's best interests.
- (9) The duties imposed by subsections (1) to (8) also apply in relation to the exercise of any powers which are exercisable under a lasting power of attorney or are exercisable by a person under this Act where that person reasonably believes that another person lacks capacity.
- (10) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) that person reasonably believes that what that person does or decides is in the best interests of the person concerned.
- (11) "Relevant circumstances" are those of which D is aware and which it would be reasonable to regard as relevant.

## **7 Acts in connection with care or treatment**

- (1) If a person ("D" in this and the following sections of this Division) does an act in connection with the care or treatment of another person ("P" in this and the following sections of this Division), the act is one to which this section applies if —
  - (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question; and
  - (b) when doing the act, D reasonably believes that P lacks capacity in relation to the matter and that it will be in P's best interests for the act to be done.
- (2) D does not incur any liability in relation to the act that D would not have incurred if P had had capacity to consent in relation to the matter and had done so.
- (3) Nothing in this section excludes D's —
  - (a) civil liability for loss or damage; or
  - (b) criminal liability, resulting from D's negligence in doing the act.
- (4) Nothing in this section affects the operation of sections 33 to 35 (advance decisions to refuse treatment).

## **8 Section 7 acts: limitations**

- (1) If D does an act that is intended to restrain P, it is not an act in connection with the care and treatment of P to which section 7 applies unless two further conditions are satisfied.
- (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.



- (3) The second condition is that the act is a proportionate response to the likelihood of P suffering harm and the seriousness of that harm.
- (4) For the purposes of this section, D restrains P if D —
  - (a) uses, or threatens to use, force to secure the doing of an act which P resists; or
  - (b) restricts P's liberty of movement, whether or not P resists.
- (5) Section 7 does not authorise a person to do an act which conflicts with a decision made, within the scope of that person's authority and in accordance with this Part, by —
  - (a) a donee of a lasting power of attorney granted by P; or
  - (b) a delegate appointed for P by the court.
- (6) While a decision as respects any relevant issue is sought from the court, nothing in subsection (5) stops a person —
  - (a) providing life-sustaining treatment; or
  - (b) doing any act which that person reasonably believes to be necessary to prevent a serious deterioration in P's condition.

**9 Section 7 acts: further limitations**

- (1) If D does an act in pursuance of a relevant decision, it is not an act in connection with the care and treatment of P to which section 7 applies unless two further conditions are satisfied.
- (2) The first condition is that D is acting in a professional capacity or for remuneration.
- (3) The second condition is that prior to the act, there exists —
  - (a) a written record of required information which has been compiled by D; or
  - (b) a written record compiled by some other person and which D reasonably believes contains the required information.
- (4) But nothing in this section stops a person from doing any act, without complying with subsection (2) or (3) which that person reasonably believes to be necessary to prevent a serious harm or a serious deterioration in P's condition.
- (5) Section 7 does not authorise a person to do an act which conflicts with a decision made, within the scope of that person's authority and in accordance with this Part, by —
  - (a) a donee of a lasting power of attorney granted by P; or
  - (b) a delegate appointed for P by the court.
- (6) While a decision as respects any relevant issue is sought from the court nothing in subsection (5) stops a person —
  - (a) providing life-sustaining treatment; or
  - (b) doing any act which that person reasonably believes to be necessary to prevent a serious deterioration in P's condition.
- (7) A "relevant decision" is a decision—

- (a) by the Department to meet P's care, support and health needs by arranging for P to move into prescribed accommodation for more than 28 days;
  - (b) to prevent or restrict P's contact with a named person or an identified class of persons;
  - (c) to provide or secure the provision of serious medical treatment for P;
  - (d) to administer treatment to which it is reasonably suspected P may object to but which is in P's best interests.
- (8) "Required information" means—
- (a) a description of the steps that have been taken to assess whether P lacks capacity in relation to the [decision] [matter] in question;
  - (b) a description of the steps that have been taken to assist P in making a decision in relation to that [decision] [matter];
  - (c) an explanation as to why it is considered that P lacks capacity by including a statement of the impairment of, or a disturbance in the functioning of, the mind or brain which is the cause of that incapacity and which of the matters in section 5(1) illustrate that incapacity;
  - (d) a description of the steps that have been taken to assess whether the act in question has been taken in P's best interests;
  - (e) a description of the steps taken to ascertain the matters referred to in section 6(6) and, in the event that the relevant decision conflicts with any such matter, a justification for taking the decision;
  - (f) where a relevant decision is one falling with subsection (7)(c) or (d), confirmation that the act would not be contrary to a valid advance decision made by P.
- (9) "Serious medical treatment" means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the Department.
- (10) The Department may by regulations modify the list of relevant decisions in subsection (7).

## 10 Payment for necessary goods and services

- (1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, that person must pay a reasonable price for them.
- (2) "Necessary" means suitable to a person's condition in life and to that person's actual requirements at the time when the goods or services are supplied.

## 11 Expenditure

- (1) If an act to which section 7 applies involves expenditure, it is lawful for D to do the following—
  - (a) to pledge P's credit for the purpose of the expenditure;
  - (b) to apply money in P's possession for meeting the expenditure.
- (2) If the expenditure is borne for P by D, it is lawful for D to be reimbursed out of money in P's possession or to be otherwise indemnified by P.

- (3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person —
  - (a) has lawful control of P's money or other property; and
  - (b) has power to spend money for P's benefit.

## DIVISION 2: LASTING POWERS OF ATTORNEY

### 12 Lasting powers of attorney

- (1) A lasting power of attorney is a power of attorney under which the donor ("R") confers on the donee (or donees) authority to make decisions about all or any of the following —
  - (a) R's personal welfare or specified matters concerning R's personal welfare;
  - (b) R's property and affairs or specified matters concerning R's property and affairs,and which includes authority to make such decisions in circumstances where R no longer has capacity.
- (2) A lasting power of attorney is not created unless all of the following are satisfied —
  - (a) section 13 is complied with;
  - (b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1;
  - (c) at the time when R executes the instrument, R has reached the age of 18 and has capacity to execute it.
- (3) An instrument which purports to create a lasting power of attorney but which does not comply with this section, section 13 or Schedule 1, confers no authority.
- (4) The authority conferred by a lasting power of attorney is subject to —
  - (a) the provisions of this Act and, in particular, sections 3 (the principles) and 6 (best interests); and
  - (b) any conditions or restrictions specified in the instrument.

### 13 Appointment of donees

- (1) A donee of a lasting power of attorney which relates only to R's welfare must be an individual who has reached the age of 18.
- (2) A donee of a lasting power of attorney which relates only to R's property and affairs, must be an individual who has reached the age of 18 or a trust corporation.
- (3) The Department must by regulations specify who may not be appointed as a donee of a lasting power of attorney and whilst an individual who is bankrupt may not be appointed a donee of a lasting power of attorney in relation to R's property and affairs, such an individual may be appointed a donee of such a power in relation to R's personal welfare.
- (4) An instrument creating a lasting power of attorney may appoint one or more persons to act as donees.

- (5) Subsections (7) to (9) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.
- (6) The instrument may appoint them to act —
  - (a) jointly;
  - (b) jointly and severally; or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.
- (7) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.
- (8) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.
- (9) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 —
  - (a) prevents the appointment taking effect in that person's case; but
  - (b) does not prevent a lasting power of attorney from being created in the case of the other or others.
- (10) An instrument used to create a lasting power of attorney —
  - (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor; but
  - (b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 16(5)(a) to (d) which has the effect of terminating the donee's appointment.

#### 14 Lasting powers of attorney: restrictions

- (1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain R, unless three conditions are satisfied.
- (2) The first condition is that R lacks, or the donee reasonably believes that R lacks, capacity in relation to the matter in question.
- (3) The second condition is that the donee reasonably believes that it is necessary to do the act in order to prevent harm to R.
- (4) The third condition is that the act is a proportionate response to the likelihood of R's suffering harm and the seriousness of that harm.
- (5) For the purposes of this section, the donee restrains R if the donee —
  - (a) uses, or threatens to use, force to secure the doing of an act which R resists; or
  - (b) restricts R's liberty of movement, whether or not R resists, or if the donee authorises another person to do any of those things.

- (6) Where a lasting power of attorney authorises the donee (or, if more than one, any of them) to make decisions about R's personal welfare, the authority —
  - (a) does not extend to making such decisions in circumstances other than those where R lacks, or the donee reasonably believes that R lacks, capacity;
  - (b) is subject to sections 33 to 35 (advance decisions to refuse treatment); and
  - (c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for R.
- (7) But subsection (6)(c)—
  - (a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect; and
  - (b) is subject to any conditions or restrictions in the instrument.

## 15 **Scope of lasting powers of attorney: gifts**

- (1) Where a lasting power of attorney confers authority to make decisions about R's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of R's property by making gifts except to the extent permitted by subsection (2).
- (2) The donee may make gifts—
  - (a) on customary occasions to persons (including the donee) who are related to or connected with R; or
  - (b) to any charity to whom R made or might have been expected to make gifts,if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of R's estate.
- (3) "Customary occasion" means—
  - (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership; or
  - (b) any other occasion on which presents are customarily given within families or among friends or associates.
- (4) Subsection (2) is subject to any conditions or restrictions in the instrument.

## 16 **Revocation of lasting powers of attorney etc.**

- (1) This section applies if —
  - (a) R has executed an instrument with a view to creating a lasting power of attorney; or
  - (b) a lasting power of attorney is registered as having been conferred by R,and in this section references to revoking the power include revoking the instrument.
- (2) R may, at any time when R has capacity to do so, revoke the power.

- (3) R's bankruptcy revokes the power so far as it relates to R's property and affairs.
- (4) The occurrence in relation to a donee of an event mentioned in subsection (5) terminates the donee's appointment and, except in the cases referred to in subsection (6), revokes the power.
- (5) The events are—
  - (a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Department;
  - (b) the donee coming within section 13(2);
  - (c) where the donee is a trust corporation, its winding-up or dissolution;
  - (d) subject to subsection (8), the dissolution or annulment of a marriage or civil partnership between R and the donee;
  - (e) the lack of capacity of the donee.
- (6) The cases are—
  - (a) the donee is replaced under the terms of the instrument;
  - (b) the donee is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee.
- (7) The bankruptcy of a donee does not terminate the donee's appointment, or revoke the power, in so far as the donee's authority relates to R's personal welfare.
- (8) The dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.
- (9) Before making regulations under subsection (5)(a), the Department must consult the Deemsters and the Registrar General.

## 17 Protection of donee and others if no power created or power revoked

- (1) Subsections (2) and (3) apply if —
  - (a) an instrument has been registered under Schedule 1 as a lasting power of attorney; but
  - (b) a lasting power of attorney was not created,whether or not the registration has been cancelled at the time of the act or transaction in question.
- (2) A donee who acts in purported exercise of the power does not incur any liability (to R or any other person) because of the non-existence of the power unless at the time of acting the donee —
  - (a) knows that a lasting power of attorney was not created; or
  - (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated the donee's authority to act as a donee.
- (3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of

the transaction that person has knowledge of a matter referred to in subsection (2).

- (4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if —
  - (a) the transaction was completed within 12 months of the date on which the instrument was registered; or
  - (b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that other person had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.
- (5) In its application to a lasting power of attorney which relates to matters in addition to R's property and affairs, section 9 of the *Powers of Attorney Act 1987* (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to R's property and affairs.
- (6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

## 18 Powers of court in relation to validity of lasting powers of attorney

- (1) This section and section 19 apply if—
  - (a) a person ("P") has executed or purported to execute an instrument with a view to creating a lasting power of attorney; or
  - (b) an instrument has been registered as a lasting power of attorney conferred by P.
- (2) The court may determine any question relating to—
  - (a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;
  - (b) whether the power has been revoked or has otherwise come to an end.
- (3) Subsection (4) applies if the court is satisfied of any of the following—
  - (a) that fraud or undue pressure was used to induce P to execute an instrument for the purpose of creating a lasting power of attorney;
  - (b) that fraud or undue pressure was used to induce P to create such a lasting power of attorney;
  - (c) that the donee (or, if more than one, any of them) of a lasting power of attorney has behaved, or is behaving, or proposes to behave in a way that contravenes the donee's authority or is not in P's best interests.
- (4) The court may direct that an instrument purporting to create the lasting power of attorney is not be regarded as doing so.
- (5) "Donee" includes an intended donee.

**19 Powers of court in relation to operation of lasting powers of attorney**

- (1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.
- (2) The court may give any consent or authorisation to act which the donee would have to obtain from P if P had capacity to give it.
- (3) The court may only do the things referred to in subsection (4) where that is consistent with the terms of the power of attorney.
- (4) The court may, if P lacks capacity to do so—
  - (a) give directions to the donee with respect to the rendering by the donee of reports or accounts and the production of records kept by the donee for that purpose;
  - (b) require the donee to supply information or produce documents or things in the donee's possession as donee;
  - (c) give directions with respect to the remuneration or expenses of the donee;
  - (d) relieve the donee wholly or partly from any liability which the donee has or may have incurred on account of a breach of the donee's duties.
- (5) The court may authorise the making of gifts which are not within section 15(2) (permitted gifts) where that is not inconsistent with the terms of the power of attorney.
- (6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

**20 Register of lasting powers of attorney**

The Registrar General has the function of establishing and maintaining a register of lasting powers of attorney.

**DIVISION 3: GENERAL POWERS OF THE COURT AND APPOINTMENT OF DELEGATES****21 Power to make declarations**

- (1) The court may make declarations as to—
  - (a) whether a person ("P" in this Division) has or lacks capacity to make a decision specified in the declaration;
  - (b) whether P has or lacks capacity to make decisions on such matters as are described in the declaration;
  - (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to P.
- (2) "Act" includes an omission and a course of conduct.

**22 Powers to make decisions and appoint delegates: general**

- (1) This section applies if P lacks capacity in relation to a matter or matters concerning P's personal welfare or P's property and affairs.
- (2) The court may —



- (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters ("a welfare order"); or
  - (b) appoint a person (a "delegate") to make decisions on P's behalf in relation to the matter or matters.
- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 3 (the principles) and 6 (best interests).
- (4) When deciding whether it is in P's best interests to appoint a delegate, the court must have regard (in addition to the matters mentioned in section 6) to the principles that—
  - (a) a decision by the court is to be preferred to the appointment of a delegate to make a decision; and
  - (b) the powers conferred on a delegate should be as limited in scope and duration as is reasonably practicable in the circumstances.
- (5) The court may make such further orders or give such directions, and confer on a delegate such powers or impose on a delegate such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
- (6) Without prejudice to section 6, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.
- (7) An order of the court may be varied or discharged by a subsequent order.
- (8) The court may, in particular, revoke the appointment of a delegate or vary the powers conferred on a delegate if it is satisfied that the delegate has behaved, or is behaving, or proposes to behave in a way that contravenes the authority conferred on the delegate by the court or is not in P's best interests.

### 23 Section 22 powers: personal welfare

- (1) The powers under section 22 as respects P's personal welfare extend in particular to—
  - (a) deciding where P is to live;
  - (b) deciding what contact, if any, P is to have with any specified persons;
  - (c) making an order prohibiting a named person from having contact with P;
  - (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;
  - (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.
- (2) Subsection (1) is subject to section 26.

### 24 Section 22 powers: property and affairs

- (1) The powers under section 22 as respects P's property and affairs extend in particular to —

- (a) the control and management of P's property;
  - (b) the sale, exchange, charging, gift or other disposition of P's property;
  - (c) the acquisition of property in P's name or on P's behalf;
  - (d) the carrying on, on P's behalf, of any profession, trade or business;
  - (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;
  - (f) the carrying out of any contract entered into by P;
  - (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
  - (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
  - (i) the execution for P of a will;
  - (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
  - (k) the conduct of legal proceedings in P's name or on P's behalf.
- (2) No will may be made under subsection (1)(i) at a time when P has not reached 18.
- (3) Subject to any court rules, the powers referred to in subsection (1)(a) to (c) and (f) may be exercised by the Attorney General but not so as to authorise the sale, exchange, charging or other disposition or dealing with any land of P.
- (4) Subsection (1) is subject to section 26.
- (5) Schedule 2 supplements the provisions of this section.

## 25 Appointment of delegates

- (1) A delegate appointed by the court must be—
- (a) an individual who has reached 18; or
  - (b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.
- (2) "Individual" includes the holder for the time being of a specified office or position.
- (3) A person may not be appointed as a delegate without that person's consent.
- (4) The court may appoint two or more delegates to act —
- (a) jointly;
  - (b) jointly and severally; or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.
- (5) When appointing a delegate or delegates, the court may at the same time appoint one or more other persons to succeed the existing delegate or those delegates—
- (a) in such circumstances, or on the happening of such events, as may be specified by the court;
  - (b) for such period as may be so specified.

- (6) A delegate is to be treated as P's agent in relation to anything done or decided by the delegate within the scope of the delegate's appointment and in accordance with this Division.
- (7) The delegate is entitled —
  - (a) to be reimbursed out of P's property for the delegate's reasonable expenses in discharging the delegate's functions; and
  - (b) if the court so directs when appointing the delegate, to remuneration out of P's property for discharging those functions.
- (8) The court may confer on a delegate powers to—
  - (a) take possession or control of all or any specified part of P's property;
  - (b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.
- (9) The court may require a delegate to do either or both of the following—
  - (a) to give to the [Attorney General] such security as the court thinks fit for the due discharge of the delegate's functions;
  - (b) to submit to the [Attorney General] such reports at such times or at such intervals as the court may direct.

## 26 Restrictions on delegates

- (1) A delegate does not have power to make a decision on behalf of P in relation to a matter if the delegate knows or has reasonable grounds for believing that P has capacity in relation to the matter.
- (2) Nothing in section 22(5) or 23 permits a delegate to be given power —
  - (a) to prohibit a named person from having contact with P;
  - (b) to direct a person responsible for P's health care to allow a different person to take over that responsibility.
- (3) A delegate may not be given powers with respect to —
  - (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
  - (b) the execution for P of a will; or
  - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
- (4) A delegate may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of a donee's authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them).
- (5) A delegate may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P.
- (6) The authority conferred on a delegate is subject to the provisions of this Act and, in particular, sections 3 (the principles) and 6 (best interests).
- (7) A delegate may not do an act that is intended to restrain P unless four conditions are satisfied.
- (8) The first condition is that, in doing the act, the delegate is acting within the scope of an authority expressly conferred on the delegate by the court.

- (9) The second condition is that P lacks, or the delegate reasonably believes that P lacks, capacity in relation to the matter in question.
- (10) The third condition is that the delegate reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (11) The fourth condition is that the act is a proportionate response to the likelihood of P's suffering harm and the seriousness of that harm.
- (12) For the purposes of this section, a delegate restrains P if the delegate, or some other person authorised by the delegate —
  - (a) uses, or threatens to use, force to secure the doing of an act which P resists; or
  - (b) restricts P's liberty of movement, whether or not P resists.

## 27 Register of delegates

The Registrar General has the function of establishing and maintaining a register of delegates.

### DIVISION 4: THE ATTORNEY GENERAL

## 28 Functions of the Attorney General

The Attorney General has the following functions—

- (a) supervising delegates appointed by the court;
- (b) monitoring compliance by delegates with the provisions of this Act and any court order;
- (c) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney is exercising their powers,
- (d) dealing with representations (including complaints) about the way in which a delegate appointed by the court is exercising their powers;
- (e) receiving security which the court requires a person to give for the discharge of the person's functions,
- (f) receiving reports from donees of lasting powers of attorney and delegates appointed by the court,
- (g) reporting to the court on such matters relating to proceedings under this Act as the court requires,
- (h) publishing, in any manner the Attorney General thinks appropriate, any information the Attorney General thinks appropriate about the discharge of the Attorney General functions.

## 29 General power to institute inquiries

- (1) The Attorney General may from time to time institute inquiries with regard to the matters referred to in section 28, either generally or for particular purposes.
- (2) The Attorney General may conduct such an inquiry or appoint a person to conduct such an inquiry and make a report to the Attorney.

**30 Obtaining evidence etc. for purposes of inquiry**

- (1) In this section “inquiry” means an inquiry under section 29.
- (2) For the purposes of an inquiry, the Attorney General, or a person appointed by the Attorney General to conduct it, may direct any person —
  - (a) if a matter in question at the inquiry is one on which the person has or can reasonably obtain information—
    - (i) to provide accounts and statements in writing with respect to the matter, or to return answers in writing to any questions or inquiries addressed to the person on the matter, and
    - (ii) to verify any such accounts, statements or answers by statutory declaration;
  - (b) to provide copies of documents which are in the custody or under the control of the person and which relate to any matter in question at the inquiry, and to verify any such copies by statutory declaration;
  - (c) to attend at a specified time and place and give evidence or produce any such documents;
  - (d) to attend at a specified time and place for an interview.
- (3) The Attorney General may, at all reasonable times, examine and take copies of any of the following—
  - (a) any health record;
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function;
  - (c) any record held by a person registered under Part 3 of the *Regulation of Care Act 2013*,  
which relates to a person and which the Attorney General considers may be relevant to the inquiry.

**31 Access to records**

The Attorney General, for the purpose of exercising any of the Attorney General’s functions under this Act, may at all reasonable times, examine and take copies of records (wherever held) —

- (a) relating to the appointment of receivers under section 103 of the *Mental Health Act 1998*;
- (b) accounts rendered by a receiver under s109 of that Act; and
- (c) any other documents the Attorney General considers necessary for the effective discharge of those functions.

**32 Regulations**

- (1) The Department may make regulations in connection with the Attorney General’s functions under section 28.
- (2) The regulations may, in particular, provide —
  - (a) for the giving of security by a delegate appointed by the court;
  - (b) the enforcement and discharge of such a security;
  - (c) for the making of reports to the Attorney General by —

- (i) a delegate appointed by the court;
  - (ii) persons exercising authority under a lasting or enduring power of attorney;
  - (iii) any other person directed by the court to act in, or carry out, a transaction on behalf of a person who lacks capacity.
- (3) Before making regulations under this section, the Department shall consult the Attorney General and the Deemsters.

#### DIVISION 5: ADVANCE DECISIONS TO REFUSE TREATMENT

### 33 Advance decisions to refuse treatment: general

- (1) “Advance decision” means a decision made by a person (“A” in this, and sections 34 and 35), who at the time of making it had capacity to do so and was aged at least 16, that if —
  - (a) at a later time and in such circumstances as A may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for A; and
  - (b) at that time A lacks capacity to consent to the carrying out or continuation of the treatment,the specified treatment is not to be carried out or continued.
- (2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though expressed in layman’s terms.
- (3) An advance decision must be —
  - (a) in writing;
  - (b) signed by A or by someone on A’s behalf and in A’s presence; and
  - (c) witnessed by an appropriately qualified person in A’s presence.
- (4) A may withdraw or alter an advance decision at any time when A has capacity to do so.
- (5) A withdrawal (including a partial withdrawal) must be in writing and signed by A or by someone on A’s behalf and in A’s presence.
- (6) An alteration of an advance decision must comply with the requirements referred to in subsection (3).

### 34 Validity and applicability of advance decisions

- (1) An advance decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to A unless the decision is at the material time both valid and applicable to the treatment.
- (2) An advance decision is not valid if A has —
  - (a) has withdrawn the decision at a time when A had capacity to do so;
  - (b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates; or

- (c) has done anything else clearly inconsistent with the advance decision remaining A's fixed decision.
- (3) An advance decision is not applicable to the treatment in question if at the material time A has capacity to give or refuse consent to it.
- (4) An advance decision is not applicable to the treatment in question if —
  - (a) that treatment is not the treatment specified in the advance decision;
  - (b) any circumstances specified in the advance decision are absent; or
  - (c) there are reasonable grounds for believing that circumstances exist which A did not anticipate at the time of the advance decision and which would have affected A's decision had A anticipated them.
- (5) An advance decision is applicable to life-sustaining treatment where the decision may reasonably be regarded as including such treatment or circumstances even though expressed in layman's terms.
- (6) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

### 35 Effect of advance decisions

- (1) If A has made an advance decision which is both valid and applicable to a treatment, the decision has effect as if A had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.
- (2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, that person is satisfied that an advance decision exists which is valid and applicable to the treatment.
- (3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from A if, at the time, that person reasonably believes that an advance decision exists which is valid and applicable to the treatment.
- (4) The court may make a declaration as to whether an advance decision —
  - (a) exists;
  - (b) is valid;
  - (c) is applicable to a treatment.
- (5) Nothing in an apparent advance decision stops a person —
  - (a) providing life-sustaining treatment; or
  - (b) doing any act that person reasonably believes to be necessary to prevent a serious deterioration in A's condition,while a decision as respects any relevant issue is sought from the court.

### 36 Advance consent to treatment: general

- (1) "Advance consent" means consent given by a person ("C" in this, and sections 37 and 38), after C has reached 16 and when C has capacity to do so, that if —

- (a) at a later time and in such circumstances as C may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for C; and
  - (b) at that time C lacks capacity to consent to the carrying out or continuation of the treatment,
- the specified treatment may be carried out or continued.
- (2) For the purposes of subsection (1)(a), an advance consent may be regarded as specifying a treatment or circumstances even though expressed in layman's terms.
  - (3) An advance consent must be —
    - (a) in writing;
    - (b) signed by C or by someone on C's behalf and in C's presence; and
    - (c) witnessed by an appropriately qualified person in C's presence.
  - (4) C may withdraw or alter an advance consent at any time when C has capacity to do so.
  - (5) A withdrawal (including a partial withdrawal) need not be in writing.
  - (6) An alteration of an advance consent must comply with the requirements of subsection (3).

### 37 **Validity and applicability of advance consents**

- (1) An advance consent does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to C unless that consent is, at the material time, both valid and applicable to the treatment.
- (2) An advance consent is not valid —
  - (a) beyond the period specified by C when giving it or, in the absence of such a period being specified, beyond the prescribed period;
  - (b) if C has withdrawn the consent at a time when C had capacity to do so;
  - (c) if C has, under a lasting power of attorney created after the advance consent was made, conferred authority on the donee (or, if more than one, any of them) to give consent to the treatment to which the advance consent relates; or
  - (d) if C has done anything else clearly inconsistent with the advance consent remaining C's fixed decision.
- (3) An advance consent is not applicable to the treatment in question if at the material time C has capacity to give consent to it.
- (4) An advance consent is not applicable to the treatment in question if —
  - (a) that treatment is not the treatment specified in the advance consent;
  - (b) any circumstances specified in the advance consent are absent; or
  - (c) there are reasonable grounds for believing that circumstances exist which C did not anticipate at the time of the advance consent and which would have affected C's decision had C anticipated them.
- (5) An advance consent is not applicable to life-sustaining treatment unless —
  - (a) the decision is verified by a statement by C to the effect that it is to apply to that treatment even if life is at risk; and



- (b) the statement complies with subsection (6).
- (6) The Department may make regulations prescribing the form and content of a statement.
- (7) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(c) does not prevent the advance consent from being regarded as valid and applicable.

### 38 Effect of advance consents

- (1) If C has made an advance consent which is both valid and applicable to a treatment, the decision has effect as if C had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.
- (2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, that person is satisfied that an advance consent exists which is valid and applicable to the treatment.
- (3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from C if, at the time, that person reasonably believes that an advance consent exists which is valid and applicable to the treatment.
- (4) The court may make a declaration as to whether an advance consent —
  - (a) exists;
  - (b) is valid;
  - (c) is applicable to a treatment.
- (5) Nothing in an apparent advance consent stops a person —
  - (a) providing life-sustaining treatment; or
  - (b) doing any act that person reasonably believes to be necessary to prevent a serious deterioration in C's condition,while a decision as respects any relevant issue is sought from the court.

### DIVISION 6: SUPPLEMENTAL

#### *Excluded decisions*

### 39 Family relationships etc.

- (1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person —
  - (a) consenting to marriage or a civil partnership;
  - (b) consenting to have sexual relations;
  - (c) consenting to a decree of divorce being granted on the basis of two years' separation;
  - (d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation;
  - (e) consenting to a child's being placed for adoption by an adoption agency;

- (f) consenting to the making of an adoption order;
  - (g) discharging parental responsibilities in matters not relating to a child's property.
- (2) "Adoption order" means an adoption order within the meaning of the *Adoption Act 20\*\**.
- (3) The Department may by regulations modify the list of matters in subsection (1).

#### 40 Mental Health Act matters

- (1) Nothing in this Act authorises anyone —
- (a) to give a patient medical treatment for mental disorder; or
  - (b) to consent to a patient's being given medical treatment for mental disorder,
- if, at the time when it is proposed to treat the patient, that patient's treatment is regulated by Part 4 of the *Mental Health Act 1998*.
- (2) "Medical treatment", "mental disorder" and "patient" have the same meaning as in that Act.

#### 41 Voting rights

- (1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person.
- (2) "Referendum" means a referendum or other poll held in pursuance of any provision made by or under an act of Tynwald on one or more questions or propositions specified in, or in accordance with, any such provision.

### Research

#### 42 Research

- (1) Intrusive research carried out on, or in relation to, a person (P) who lacks capacity to consent to it may only be carried out as provided for in this section.
- (2) In all cases, the interests of the person must be assumed to outweigh those of science and society.
- (3) Intrusive research must not be carried out unless the following conditions are satisfied.
- (4) The first condition is that the research —
- (a) has the potential to produce a real benefit to P without imposing on P a burden that is disproportionate to the potential benefit to P; or
  - (b) has the aim of contributing, through significant improvement in the scientific understanding of P's condition, to results capable of conferring a benefit to P or others with a similar condition as P.
- (5) The second condition is that the risk to P from taking part in the research is likely to be minimal and entails only a minimal burden for P, and that

anything done to, or in relation to, P will not interfere with P's freedom of action or privacy in a significant way or be duly invasive or restrictive.

- (6) Nothing may be done to, or in relation to, P in the course of the research —
  - (a) to which P appears to object (whether by showing signs of resistance or otherwise) except where what is being done is intended to protect P from harm or to reduce or prevent pain or discomfort; or
  - (b) which would be contrary to —
    - (i) an advance decision of P's which has effect; or
    - (ii) any other form of statement made by P and not subsequently withdrawn,
 of which the person conducting or responsible for the research is aware.
- (7) The Department may make regulations about intrusive research and such regulations may, in particular, make provision about—
  - (a) what constitutes intrusive research whether generally or otherwise;
  - (b) the circumstances which may make research intrusive for the purposes of this section;
  - (c) the requirements to be met before the Department will approve intrusive research;
  - (d) the consultation of P's carers or representatives including the circumstances in which it is to take place and the matters to be consulted on;
  - (e) the termination of research;
  - (f) the circumstances when P may be withdrawn from the research;
  - (g) the circumstances where research is to be terminated;
  - (h) the safeguards which must apply to, and during the course of, intrusive research;
  - (i) the circumstances where research in respect of P may be continued notwithstanding a loss of capacity on P's part.

#### 43 Ill-treatment or neglect

- (1) Subsection (2) applies if a person ("D") —
  - (a) has the care of a person ("P") who lacks, or whom D reasonably believes to lack, capacity;
  - (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 1), created by P; or
  - (c) is a delegate appointed by the court for P.
- (2) D is guilty of an offence if D ill-treats or wilfully neglects P.
- (3) A person guilty of an offence under this section is liable —
  - (a) on summary conviction, to custody for a term not exceeding 6 months or a fine not exceeding twice the level 5 amount;
  - (b) on conviction on indictment, to custody for a term not exceeding 2 years or a fine.

## DIVISION 7: CODES OF PRACTICE

**44 Codes of practice**

- (1) The Department must prepare and issue one or more codes of practice —
  - (a) for the guidance of persons assessing whether a person has capacity in relation to any matter;
  - (b) for the guidance of persons acting in connection with the care or treatment of another person;
  - (c) for the guidance of donees of lasting powers of attorney;
  - (d) for the guidance of delegates appointed by the court;
  - (e) for the guidance of persons carrying out research in reliance on any provision made under this Act; and
  - (f) with respect to such other matters concerned with this Act as the Department thinks fit.
- (2) The Department may from time to time revise a code.
- (3) The Department may delegate the preparation or revision of the whole or any part of a code so far as it considers expedient.
- (4) It is the duty of a person to have regard to any relevant code if that person is acting in relation to a person who lacks capacity and is doing so in one or more of the following ways —
  - (a) as the donee of a lasting power of attorney;
  - (b) as a delegate appointed by the court;
  - (c) as a person carrying out research in reliance on any provision made under this Act;
  - (d) in a professional capacity;
  - (e) for remuneration.
- (5) If it appears to a court or tribunal conducting any criminal or civil proceedings that —
  - (a) a provision of a code; or
  - (b) a failure to comply with a code,is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.
- (6) In this section and in section 45, “code” means a code prepared or revised under this section.

**45 Codes of practice: procedure**

- (1) Before preparing or revising a code, the Department must consult such persons as it considers appropriate.
- (2) The Department may not issue a code unless a draft of the code has been laid by it before Tynwald.
- (3) A code shall come into operation on such date as the Department may by order appoint.

- (4) The Department must arrange for any code that it has issued to be published in such a way as it considers appropriate for bringing it to the attention of persons likely to be concerned with its provisions.

## PART 3 – INTERIM ORDERS AND DIRECTIONS ETC

### DIVISION: INTERIM ORDERS AND DIRECTIONS

#### 46 Interim orders and directions

The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if all of the following apply—

- (a) there is reason to believe that P lacks capacity in relation to the matter;
- (b) the matter is one to which its powers under this Act extend;
- (c) it is in P’s best interests to make the order, or give the directions, without delay.

#### 47 Power to call for reports

- (1) This section applies where, in proceedings brought in respect of a person (“P”) under this Act, the court is considering a question relating to P.
- (2) The court may do either of the following—
  - (a) require the Department to arrange for a report to be made to it by one of the Department’s officers or employees;
  - (b) require a report to be made to it by the Attorney General or such other person as the court may direct.
- (3) The court may direct an officer or employee referred to in subsection (2)(a) or a person referred to in subsection (2)(b)(ii) to carry out, in private, such medical, psychiatric or psychological examination of P as that person is appropriately qualified to perform.
- (4) Court rules may specify matters which, unless the court otherwise directs, must be dealt with in the report.
- (5) The report must deal with —
  - (a) those matters specified in court rules (subject to subsection (3)); and
  - (b) such other matters relating to P as the court may direct.
- (6) For the purpose of complying with subsection (5), the persons referred to in subsection (2) may—
  - (a) interview P in private;
  - (b) at all reasonable times, take copies of the following records relating to P—
    - (i) any health record;
    - (ii) any record of, or held by, a local authority and compiled in connection with a social services function; and

- (iii) any record held by a person registered under Part 3 of the *Regulation of Care Act 2013*,  
but a person referred to in paragraph (b)(ii) of subsection (5), may only do so subject to any conditions in the court's direction.
- (7) The Attorney General may appoint some other person to interview P in private and to take copies of the records referred to in subsection (6)(b), and such a person must provide the Attorney General with a record of the interview and the copies of the records.
- (8) The report referred to in subsection (2) may be made in writing or orally, as the court may direct.

## DIVISION 2: PRACTICE AND PROCEDURE

### 48 Applications to the Court

- (1) No permission is required for an application to the court for the exercise of any of its powers under this Act —
  - (a) by a person who lacks, or is alleged to lack, capacity;
  - (b) by the donor or a donee of a lasting power of attorney to which the application relates;
  - (c) by a delegate appointed by the court for a person to whom the application relates; or
  - (d) by a person named in an existing order of the court, if the application relates to the order.
- (2) But, subject to Court rules, permission is required for any other application to the court.
- (3) In deciding whether to grant permission the court must, in particular, have regard to —
  - (a) the applicant's connection with the person to whom the application relates;
  - (b) the reasons for the application;
  - (c) the benefit to the person to whom the application relates of a proposed order or directions; and
  - (d) whether the benefit can be achieved in any other way.

### 49 High Court Rules

- (1) Court rules with respect to the practice and procedure of the court may be made in accordance with section 25 to the *High Court Act 1991*.
- (2) Proceedings with respect to persons suffering or alleged to be suffering from a lack of capacity, shall be conducted in accordance with court rules.
- (3) Court rules may, in particular, make provision —
  - (a) for the carrying out of preliminary or incidental inquiries;
  - (b) as to who can commence proceedings;
  - (c) as to the manner and form in which proceedings are to be commenced;

- (d) as to the persons entitled to be notified of, and be made parties to, the proceedings;
  - (e) for enabling the court to appoint a suitable person to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate;
  - (f) for enabling an application to the court to be disposed of without a hearing;
  - (g) for the attendance and examination of the person to whom the proceedings relate;
  - (h) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
  - (i) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;
  - (j) as to the administration of oaths;
  - (k) as to the furnishing of information and documents;
  - (l) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented;
  - (m) for the enforcement of orders made and directions given in the proceedings;
  - (n) as to the termination of proceedings.
- (4) Court rules may also make provision for —
- (a) the giving of a security by any person and for its enforcement and discharge;
  - (b) the scale of costs, fees and percentages; and
  - (c) the rendering of accounts (form and frequency) by a person ordered, directed or authorised to do anything under this Act.
- (5) Court rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.

## 50 Practice directions

Directions as to the practice and procedure of the court may be given in accordance with section 27A of the *High Court Act 1991*.

## 51 Rights of appeal

- (1) Court rules must make provision about appeals from any decision of the court.
- (2) Court rules may make provision —
  - (a) that, in such cases as may be specified, an appeal from a decision of the court may not be made without permission;
  - (b) as to the person or persons entitled to grant permission to appeal;
  - (c) as to any requirements to be satisfied before permission is granted;
  - (d) as to any considerations to be taken into account in relation to granting or refusing permission to appeal.

## DIVISION 3: FEES AND COSTS

**52 Fees**

- (1) Court rules may provide for fees to be payable in respect of anything dealt with by the court.
- (2) Such rules may in particular make provision as to —
  - (a) scales or rates of fees;
  - (b) exemptions from and reductions in fees;
  - (c) remission of fees in whole or in part.

**53 Costs**

- (1) Subject to court rules, the costs of and incidental to all proceedings in the court are in its discretion.
- (2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.
- (3) The court has full power to determine by whom and to what extent the costs are to be paid.
- (4) The court may, in any proceedings —
  - (a) disallow; or
  - (b) order the legal or other representatives concerned to meet,the whole of any wasted costs or such part of them as may be determined in accordance with the rules.
- (5) “Legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on that person’s behalf.
- (6) “Wasted costs” means any costs incurred by a party —
  - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

**54 Fees and costs: supplementary**

- (1) Court rules may make provision —
  - (a) as to the way in which, and funds from which, fees and costs are to be paid;
  - (b) for charging fees and costs upon the estate of the person to whom the proceedings relate;
  - (c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings.



- (2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing.

## PART 4 - MISCELLANEOUS AND GENERAL

### 55 Interpretation

- (1) In this Act —

“**advance decision**” has the meaning given in section 33(1);

“**appropriately qualified person**” means a person whose training and experience qualifies that person to make an assessment of another person’s capacity to make an advance decision;

“**the court**” means the High Court;

“**Court rules**” means Rules of High Court made under section 25 to the *High Court Act 1991*;

“**delegate**” has the meaning given in section 22(2)(b);

“**Department**” means the Department of Health and Social Care;

“**enactment**” includes a provision of subordinate legislation (within the meaning of the *Interpretation Act 2015*);

“**health record**” means a record which —

- (a) consists of data concerning health; and
- (b) has been made by and on behalf of a health professional in connection with the diagnosis, care or treatment of the individual to whom the data relates;

“**lasting power of attorney**” has the meaning given in section 12;

“**life-sustaining treatment**” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life;

“**local authority**” has the meaning given in section 72 of the *Local Government Act 1985*;

“**notifiable person**” means —

- (a) the donor’s spouse or civil partner;
- (b) any other person (whether of a different sex or the same sex) with whom the donor lives as partner in an enduring family relationship;
- (c) the donor’s children;
- (d) the donor’s siblings;
- (e) the donor’s parents,

and includes relationships of full blood or half blood and, in the case of an adopted person, such of those relationships as would exist but for adoption;

“**prescribed**”, in relation to regulations made under this Act, means prescribed by those regulations;

“**property**” includes any thing in action and any interest in real or personal property;

“**treatment**” includes a diagnostic or other procedure;

“**trust corporation**” has the meaning given in section 65A of the *Trustee Act 1961*;

“**will**” includes codicil.

- (2) In this Act, references to making decisions, in relation to a donee of a lasting power of attorney or a delegate appointed by the court, include, where appropriate, acting on decisions made.

## 56 Regulations

- (1) Regulations under this Act shall not have effect unless approved by Tynwald.
- (2) Regulations under this Act may —
  - (a) modify any provision of this Act;
  - (b) make supplementary, incidental, consequential, transitional or saving provision;
  - (c) make different provision for different cases.
- (3) Regulations may, in particular —
  - (a) provide for a provision of this Act which comes into force before another provision of this Act has come into force to have effect, until the other provision has come into force, with specified modifications;
  - (b) amend, repeal or revoke an enactment.
- (4) The amendments that may be made under subsection (3)(b) are in addition to those made by or under any other provision of this Act.

## 57 Existing receivers and enduring powers of attorney etc.

- (1) The following provisions cease to have effect —
  - (a) Part 7 of the *Mental Health Act 1998*;
  - (b) the *Powers of Attorney Act 1983*;
  - (c) the *Powers of Attorney Act 1987*.
- (2) No enduring power of attorney within the meaning of the *Powers of Attorney Act 1983* or the *Powers of Attorney Act 1987* is to be created after the commencement of subsection (1)(b) and (c).
- (3) Schedule 3 has effect in place of the *Powers of Attorney Act 1983* and the *Powers of Attorney Act 1987* in relation to any enduring power of attorney created before the commencement of subsection (1)(b) and (c).

## 58 Minor and consequential amendments and repeals

- (1) Schedule 4 contains savings in respect of the repeal of the *Powers of Attorney Act 1987*.
- (2) Schedule 5 contains minor and consequential amendments.
- (3) Schedule 6 contains a table of repeals.

## SCHEDULE 1

## [section 12]

## LASTING POWERS OF ATTORNEY: FORMALITIES

## PART 1 - MAKING INSTRUMENTS

*General requirements as to making instruments*

- 1 (1) An instrument is not made in accordance with this Schedule unless —
- (a) it is in the prescribed form;
  - (b) it complies with paragraph 2; and
  - (c) any prescribed requirements in connection with its execution (including who may be a witness and what a witness is required to certify) are satisfied.
- (2) Regulations may make different provision according to whether —
- (a) the instrument relates to personal welfare or to property and affairs (or to both);
  - (b) only one or more than one donee is to be appointed (and if more than one, whether jointly or jointly and severally).
- (3) In this Schedule —
- “**prescribed**” means prescribed by regulations;
- “**regulations**” means regulations made for the purposes of this Schedule by the Department.

*Requirements as to content of instruments*

- 2 (1) The instrument must include —
- (a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney;
  - (b) a statement by the donor to the effect that the donor —
    - (i) has read the prescribed information or a prescribed part of it (or has had it read to the donor); and
    - (ii) intends the authority conferred under the instrument to include authority to make decisions on the donor’s behalf in circumstances where the donor no longer has capacity;
  - (c) a statement by the donee (or, if more than one, each of them) to the effect that the donee —
    - (i) has read the prescribed information or a prescribed part of it (or has had it read to the donee ); and
    - (ii) understands the duties imposed on a donee of a lasting power of attorney under sections 3 (the principles) and 6 (best interests); and
  - (d) a certificate by a person of a prescribed description that, in that person’s opinion, at the time when the donor executes the instrument —

- (i) the donor understands the purpose of the instrument and the scope of the authority conferred under it;
  - (ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney; and
  - (iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument.
- (2) Regulations may provide that, where the instrument includes a statement under sub-paragraph (1)(c)(ii), two persons of a prescribed description must each give a certificate under sub-paragraph (1)(d).
- (3) A certificate under sub-paragraph (1)(d) —
  - (a) must be made in the prescribed form; and
  - (b) must include any prescribed information.
- (1) The certificate may not be given by a person appointed as donee under the instrument.

*Failure to comply with prescribed form*

- 3 (1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Registrar General as sufficient in point of form and expression.
- (2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.

## PART 2 – REGISTRATION

*Applications and procedure for registration*

- 4 (1) An application to the Registrar General for the registration of an instrument intended to create a lasting power of attorney —
  - (a) must be made in the prescribed form; and
  - (b) must include any prescribed information.
- (2) The application may be made —
  - (a) by the donor;
  - (b) by the donee or donees; or
  - (c) if the instrument appoints two or more donees to act jointly and severally in respect of any matter, by any of the donees.
- (3) The application must be accompanied by —
  - (a) the instrument; and
  - (b) any fee provided for under section 52.
- (4) A person who, in an application for registration, makes a statement which that person knows to be false in a material particular is guilty of an offence and is liable —
  - (a) on summary conviction, to custody for a term not exceeding 6 months or a fine not exceeding twice the level 5 amount;
  - (b) on conviction on indictment, to custody for a term not exceeding 2 years or a fine.

- 5 Subject to paragraphs 11 to 14, the Registrar General must register the instrument as a lasting power of attorney at the end of the prescribed period.

*Notification requirements*

- 6 (1) A donor about to make an application under paragraph 4(2)(a) must notify each notifiable person that the donor is about to do so.
- (2) The donee (or donees) about to make an application under paragraph 4(2)(b) or (c) must notify each notifiable person that the donee is (or they are) about to do so.
- 7 As soon as is practicable after receiving an application by the donor under paragraph 4(2)(a), the Registrar General must notify —
- (a) the donee (or donees); and
- (b) each notifiable person,
- that the application has been received.
- 8 (1) As soon as is practicable after receiving an application by a donee (or donees) under paragraph 4(2)(b), the Registrar General must notify —
- (a) the donor; and
- (b) each notifiable person;
- that the application has been received.
- (2) As soon as is practicable after receiving an application by a donee under paragraph 4(2)(c), the Registrar General must notify —
- (a) the donor;
- (b) the donee or donees who did not join in making the application;
- and
- (c) each notifiable person,
- that the application has been received.
- 9 (1) A notice under paragraph 6 must be made in the prescribed form.
- (2) A notice under paragraph 6, 7 or 8 must include such information, if any, as may be prescribed.

*Power to dispense with notification requirements*

- 10 The court may —
- (a) on the application of the donor, dispense with the requirement to notify under paragraph 6(1); or
- (b) on the application of the donee or donees concerned, dispense with the requirement to notify under paragraph 6(2),
- if satisfied that no useful purpose would be served by giving the notice.

*Instrument not made properly or containing ineffective provision*

- 11 (1) If it appears to the Registrar General that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule,

the Registrar General must not register the instrument unless the court directs the Registrar General to do so.

- (2) Sub-paragraph (3) applies if it appears to the Registrar General that the instrument contains a provision which —
  - (a) would be ineffective as part of a lasting power of attorney; or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (3) The Registrar General —
  - (a) must apply to the court for it to determine the matter under section 19(1); and
  - (b) pending the determination by the court, must not register the instrument.
- (4) Sub-paragraph (5) applies if the court determines under section 19(1) (whether or not on an application by the Registrar General) that the instrument contains a provision which —
  - (a) would be ineffective as part of a lasting power of attorney; or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (5) The court must —
  - (a) notify the Registrar General that it has severed the provision; or
  - (b) direct the Registrar General not to register the instrument.
- (6) Where the court notifies the Registrar General that it has severed a provision, the Registrar General must register the instrument with a note to that effect attached to it.

*Delegate already appointed*

- 12 (1) Sub-paragraph (2) applies if it appears to the Registrar General that —
  - (a) there is a delegate appointed by the court for the donor; and
  - (b) the powers conferred on the delegate would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney.
- (2) The Registrar General must not register the instrument unless the court directs him to do so.

*Objection by donee or notifiable person*

- 13 (1) Sub-paragraph (2) applies if a donee or a notifiable person —
  - (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument; and
  - (b) before the end of the prescribed period, gives notice to the Registrar General of an objection to the registration on the ground that an event mentioned in section 16(3) or (5)(a) to (d) has occurred which has revoked the instrument.
- (2) If the Registrar General is satisfied that the ground for making the objection is established, the Registrar General must not register the instrument unless the court, on the application of the person applying for the registration —
  - (a) is satisfied that the ground is not established; and

- (b) directs the Registrar General to register the instrument.
- (3) Sub-paragraph (4) applies if a donee or a notifiable person —
  - (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument; and
  - (b) before the end of the prescribed period —
    - (i) makes an application to the court objecting to the registration on a prescribed ground; and
    - (ii) notifies the Registrar General of the application.
- (4) The Registrar General must not register the instrument unless the court directs the Registrar General to do so.

*Objection by donor*

- 14 (1) This paragraph applies if the donor —
  - (a) receives a notice under paragraph 8 of an application for the registration of an instrument; and
  - (b) before the end of the prescribed period, gives notice to the Registrar General of an objection to the registration.
- (2) The Registrar General must not register the instrument unless the court, on the application of the donee or, if more than one, any of them —
  - (a) is satisfied that the donor lacks capacity to object to the registration; and
  - (b) directs the Registrar General to register the instrument.

*Notification of registration*

- 15 Where an instrument is registered under this Schedule, the Registrar General must give notice of the fact in the prescribed form to —
  - (a) the donor,
  - (b) the donee or, if more than one, each of them, and
  - (c) each notifiable person.

*Evidence of registration*

- 16 (1) A document purporting to be an office copy of an instrument registered under this Schedule is evidence of —
  - (a) the contents of the instrument; and
  - (b) the fact that it has been registered.
- (2) Subsection (1) is without prejudice to any other method of proof authorised by law.

### **PART 3 - CANCELLATION OF REGISTRATION AND NOTIFICATION OF SEVERANCE**

- 17 (1) The Registrar General must cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been revoked —

- (a) as a result of the donor's bankruptcy; or
  - (b) on the occurrence of an event mentioned in section 16(5)(a) to (d).
- (2) If the Registrar General cancels the registration of an instrument the Registrar General must notify —
  - (a) the donor;
  - (b) the donee or, if more than one, each of them; and
  - (c) each notifiable person.
- 18 The court must direct the Registrar General to cancel the registration of an instrument as a lasting power of attorney if it —
  - (a) determines under section 18(2)(a) that a requirement for creating the power was not met;
  - (b) determines under section 18(2)(b) that the power has been revoked or has otherwise come to an end; or
  - (c) directs that the instrument is not to be regarded as creating a lasting power of attorney.
- 19 (1) Sub-paragraph (2) applies if the court determines under section 19(1) that a lasting power of attorney contains a provision which —
  - (a) is ineffective as part of a lasting power of attorney; or
  - (b) prevents the instrument from operating as a valid lasting power of attorney.
 (2) The court must —
  - (a) notify the Registrar General that it has severed the provision; or
  - (b) direct the Registrar General to cancel the registration of the instrument as a lasting power of attorney.
- 20 On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Registrar General to be cancelled.

## PART 4 - RECORDS OF ALTERATIONS IN REGISTERED POWERS

### *Partial revocation or suspension of power as a result of bankruptcy*

- 21 If in the case of a registered instrument it appears to the Registrar General that under section 16 a lasting power of attorney is revoked, or suspended, in relation to the donor's property and affairs (but not in relation to other matters), the Registrar General must attach to the instrument a note to that effect.

### *Termination of appointment of donee which does not revoke power*

- 22 If in the case of a registered instrument it appears to the Registrar General that an event has occurred —
  - (a) which has terminated the appointment of the donee; but
  - (b) which has not revoked the instrument,

the Registrar General must attach to the instrument a note to that effect.



*Replacement of donee*

- 23 If in the case of a registered instrument it appears to the Registrar General that the donee has been replaced under the terms of the instrument the Registrar General must attach to the instrument a note to that effect.

*Severance of ineffective provisions*

- 24 If in the case of a registered instrument the court notifies the Registrar General under paragraph 19(2)(a) that it has severed a provision of the instrument, the Registrar General must attach to it a note to that effect.

*Notification of alterations*

- 25 If the Registrar General attaches a note to an instrument under paragraph 21, 22, 23 or 24 the Registrar General must give notice of the note to the donee or donees of the power (or, as the case may be, to the other donee or donees of the power).

**PART 5 – INSTRUMENTS IN OVERSEAS FORM***Power of attorney in overseas form*

- 26 (1) This paragraph applies to an instrument —
- (a) made under the law of a prescribed overseas country;
  - (b) in a prescribed form;
  - (c) which has the effect of conferring on a person named in the instrument authority to do on behalf of the maker of the instrument —
    - (i) anything specified in the instrument;
    - (ii) anything which the maker can lawfully do by an agent or attorney; or
    - (iii) anything (except a thing or things specified in the instrument).
- (2) The Department may by regulations provide that such an instrument shall have effect according to its tenor, as if it had been made in a form having effect for that purpose under the law of the Island.
- (3) Regulations under this paragraph may modify the provisions of this Part.
- (4) Nothing in regulations under this paragraph enables anything to be done which cannot lawfully be done by an agent or attorney.
- (5) In this section “overseas country” means a country or territory outside the Island.

**PART 6 – REGISTER OF LASTING POWERS***The Register of lasting powers*

- 27 The Registrar General’s function referred to in section 20 of establishing and

maintaining a register of lasting powers applies for the purposes of this Schedule.

*Disclosure of information on a register*

- 28 (1) Any person may, by an application made under paragraph (2), request the Registrar General to carry out a search of the register.
- (2) An application must—
- (a) state—
    - (i) the name of the person to whom the application relates; and
    - (ii) such other details about that person as the Registrar General may require for the purpose of carrying out the search; and
  - (b) be accompanied by any prescribed fee.
- (3) The Registrar General may require the applicant to provide such further information, or produce such documents, as the Registrar General reasonably considers necessary to enable the Registrar General to carry out the search.
- (4) As soon as reasonably practicable after receiving the application—
- (a) the Registrar General must by certificate notify the applicant of the result of the search; and
  - (b) in the event that it reveals one or more entries on the register, the Registrar General must disclose to the applicant all the information appearing on the register in respect of each entry.
- (5) The Registrar General may, upon a request in writing, supply any person with an office copy of a registered instrument if the Registrar General is satisfied that the person making the request has a good reason for doing so and it is not reasonably practicable to obtain a copy of the instrument from the donor or donee.
- (6) “Office copy” means a true copy of the original marked by the Registrar General as being an office copy.

**SCHEDULE 2****[section 24]****PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS***Wills: general.***1 Wills: general**

Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 24, on behalf of P.

**2 Provision that may be made in will**

The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if P had capacity to make it.

**3 Wills: requirements relating to execution**

- (1) Sub-paragraph (2) applies if under section 22 the court makes an order or gives directions requiring or authorising a person (“the authorised person”) to execute a will on behalf of P.
- (2) Any will executed in pursuance of the order or direction —
  - (a) must state that it is signed by P acting by the authorised person;
  - (b) must be signed by the authorised person with the name of P and the authorised person’s own name, in the presence of two or more witnesses present at the same time;
  - (c) must be attested and subscribed by those witnesses in the presence of the authorised person; and
  - (d) must be sealed with the official seal of the court.

**4 Wills: effect of execution**

- (1) This paragraph applies where a will is executed in accordance with paragraph 3.
- (2) The *Wills Act 1985* has effect in relation to the will as if it were signed by P by P’s own hand, except that —
  - (a) section 3 of that Act (requirements as to signing and attestation) does not apply; and
  - (b) in the subsequent provisions of that Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with paragraph 3.
- (3) The will has the same effect for all purposes as if —
  - (a) P had had the capacity to make a valid will; and
  - (b) the will had been executed by P in the manner required by the 1985 Act.
- (4) But sub-paragraph (3) does not have effect in relation to the will —
  - (a) in so far as it disposes of immovable property outside the Island; or

- (b) in so far as it relates to any other property or matter if, when the will is executed —
    - (i) P is domiciled outside the Island; and
    - (ii) the condition in sub-paragraph (5) is met.
- (5) The condition is that, under the law of P's domicile, any question of P's testamentary capacity would fall to be determined in accordance with the law of a place outside the Island.

## **5 Vesting orders ancillary to settlement etc**

- (1) If provision is made by virtue of section 24 for —
  - (a) the settlement of any property of P; or
  - (b) the exercise of a power vested in P of appointing trustees or retiring from a trust,the court may also make, as respects the property settled or the trust property, such consequential vesting or other orders as the case may require.
- (2) The power under sub-paragraph (1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the *Trustee Act 1961*.

## **6 Variation of settlements**

- (1) If a settlement has been made by virtue of section 24, the court may by order vary or revoke the settlement if —
  - (a) the settlement makes provision for its variation or revocation;
  - (b) the court is satisfied that a material fact was not disclosed when the settlement was made; or
  - (c) the court is satisfied that there has been a substantial change of circumstances.
- (2) Any such order may give such consequential directions as the court thinks fit.

## **7 Vesting of stock in curator appointed outside the Island**

- (1) Sub-paragraph (2) applies if the court is satisfied —
  - (a) that under the law prevailing in a place outside the Island, a person ("M") has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions with respect to the management and administration of P's property and affairs, and
  - (b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph.
- (2) The court may direct —
  - (a) any stocks standing in the name of P; or
  - (b) the right to receive dividends from the stocks,

to be transferred into M's name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks.

(3) "Stocks" includes —

- (a) shares; and
- (b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities,

and "dividends" is to be construed accordingly.

## **8 Preservation of interests in property disposed of on behalf of person lacking capacity**

(1) Sub-paragraphs (2) and (3) apply if —

- (a) P's property has been disposed of by virtue of section 24;
- (b) under P's will or intestacy, or by a gift perfected or nomination taking effect on P's death, any other person would have taken an interest in the property but for the disposal; and
- (c) on P's death, any property belonging to P's estate represents the property disposed of.

(2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.

(3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.

(4) The court may direct that, on a disposal of P's property —

- (a) which is made by virtue of section 24; and
- (b) which would apart from this paragraph result in the conversion of personal property into real property,

property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property.

(5) References in sub-paragraphs (1) to (4) to the disposal of property are to —

- (a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;
- (b) the removal of property from one place to another;
- (c) the application of money in acquiring property;
- (d) the transfer of money from one account to another,

and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.

(6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.

## **9 Permanent improvements and benefits**

(1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money —

- (a) for carrying out permanent improvements on any of P's property; or
  - (b) otherwise for the permanent benefit of any of P's property.
- (2) The court may order that —
  - (a) the whole of the money expended or to be expended; or
  - (b) any part of it,is to be a charge on the property either without interest or with interest at a specified rate.
- (3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3).
- (4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P.
- (5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P's lifetime.

**SCHEDULE 3****PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY***[Section 57]***PART 1 - ENDURING POWERS OF ATTORNEY****1 Enduring power of attorney to survive mental incapacity of donor**

- (1) Where an individual has created a power of attorney which is an enduring power within the meaning of this Schedule—
- (a) the power is not revoked by any subsequent mental incapacity of that individual;
  - (b) upon such incapacity supervening, the donee of the power may not do anything under the authority of the power except as provided by sub-paragraph (2) unless or until the instrument creating the power is registered under paragraph 13; and
  - (c) if and so long as paragraph (b) operates to suspend the donee's authority to act under the power, section 4 of the *Powers of Attorney Act 1983* (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity,
- and, accordingly, section 3 of this Act does not apply.
- (2) Despite sub-paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until it is registered, the attorney may take action under the power—
- (a) to maintain the donor or prevent loss to the attorney's estate; or
  - (b) to maintain the attorney or other persons in so far as paragraph 3(2) permits the attorney to do so.
- (3) Where the attorney purports to act as provided by sub-paragraph (2) then, in favour of a person who deals with the attorney without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with sub-paragraph (2)(a) or (b).

**2 Characteristics of an enduring power of attorney**

- (1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power—
- (a) is in the prescribed form;
  - (b) was executed in the prescribed manner by the donor and the attorney; and
  - (c) incorporated at the time of execution by the donor the prescribed explanatory information.
- (2) In this paragraph, "prescribed" means prescribed by the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (GC 355/87).

- (3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.
- (4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression.
- (5) A power of attorney cannot be an enduring power unless, when the attorney executes the instrument creating it, the attorney is—
  - (a) an individual who has reached 18 and is not bankrupt; or
  - (b) a trust corporation.
- (6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.
- (7) An enduring power is revoked by the bankruptcy of the donor or attorney.
- (8) An enduring power is revoked if the court—
  - (a) exercises a power under sections 16 to 20 in relation to the donor; and
  - (b) directs that the enduring power is to be revoked.
- (9) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 14(1) applies, to the Registrar General.

### **3 Scope of authority etc. of attorney under enduring power**

- (1) If the instrument which creates an enduring power of attorney is expressed to confer general authority on the attorney, the instrument operates to confer, subject to—
  - (a) the restriction imposed by sub-paragraph (3); and
  - (b) any conditions or restrictions contained in the instrument,authority to do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument.
- (2) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit the attorney or other persons than the donor to the following extent but no further—
  - (a) the attorney may so act in relation to the attorney or in relation to any other person if the donor might be expected to provide for the attorney's or that person's needs respectively; and
  - (b) the attorney may do whatever the donor might be expected to do to meet those needs.
- (4) Without prejudice to sub-paragraph (2) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further—



- (a) the attorney may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, to persons (including the attorney) who are related to or connected with the donor; and
- (b) the attorney may make gifts to any charity to whom the donor made or might be expected to make gifts,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

## **PART 2 - ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR**

### **4. Duties of attorney in event of actual or impending incapacity of donor**

- (1) Sub-paragraphs (2) to (6) apply if the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable.
- (2) The attorney must, as soon as practicable, make an application to the Registrar General for the registration of the instrument creating the power.
- (3) Before making an application for registration the attorney must comply with the provisions as to notice set out in Part 3 of this Schedule.
- (4) An application for registration—
  - (a) must be made in the prescribed form; and
  - (b) must contain such statements as may be prescribed.
- (5) The attorney—
  - (a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power; and
  - (b) must comply with any direction given to the attorney by the court on that determination.
- (6) No disclaimer of the power is valid unless and until the attorney gives notice of it to the Registrar General; and the Registrar General must notify the donor if the Registrar General receives a notice under this sub-paragraph.
- (7) A person who, in an application for registration, makes a statement which that person knows to be false in a material particular is guilty of an offence and is liable—
  - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.
- (8) In this paragraph, “prescribed” means prescribed by regulations made for the purposes of this Schedule by the Department.

## **PART 3 - NOTIFICATION PRIOR TO REGISTRATION**

### **5. Notice to donors**

Subject to paragraph 7, before making an application for registration the attorney must give notice of the attorney's intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 6.

## 6 Relatives

- (1) Subject to sub-paragraphs (2) to (4), persons of the following classes ("relatives") are entitled to receive notice under paragraph 5—
  - (a) the donor's spouse or civil partner;
  - (b) the donor's children;
  - (c) the donor's parents;
  - (d) the donor's brothers and sisters, whether of the whole or half blood;
  - (e) the widow, widower or surviving civil partner of a child of the donor;
  - (f) the donor's grandchildren;
  - (g) the children of the donor's brothers and sisters of the whole blood;
  - (h) the children of the donor's brothers and sisters of the half blood;
  - (i) the donor's uncles and aunts of the whole blood;
  - (j) the children of the donor's uncles and aunts of the whole blood.
- (2) A person is not entitled to receive notice under paragraph 5 if—
  - (a) that person's name or address is not known to, and cannot be reasonably ascertained by, the attorney; or
  - (b) the attorney has reason to believe that the person has not reached 18 or is mentally incapable.
- (3) Except where sub-paragraph (4) applies—
  - (a) no more than 3 persons are entitled to receive notice under paragraph 5; and
  - (b) in determining the persons who are so entitled, persons falling within the class in sub-paragraph (1)(a) are to be preferred to persons falling within the class in sub-paragraph (1)(b), those falling within the class in sub-paragraph (1)(b) are to be preferred to those falling within the class in sub-paragraph (1)(c), and so on.
- (4) Despite the limit of 3 specified in sub-paragraph (3), where—
  - (a) there is more than one person falling within any of classes (a) to (j) of sub-paragraph (1); and
  - (b) at least one of those persons would be entitled to receive notice under paragraph 5,then, subject to sub-paragraph (2), all the persons falling within that class are entitled to receive notice under paragraph 5.

## 7 Notice

- (1) An attorney is not required to give notice under paragraph 5—
  - (a) to the attorney; or
  - (b) to any other attorney under the power who is joining in making the application,even though the attorney or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 6.

- (2) In the case of any person who is entitled to receive notice by virtue of paragraph 6, the attorney, before applying for registration, may make an application to the court to be dispensed from the requirement to give that person notice; and the court must grant the application if it is satisfied—
  - (a) that it would be undesirable or impracticable for the attorney to give that person notice; or
  - (b) that no useful purpose is likely to be served by giving that person notice.

## **8 Duty to give notice to donor**

- (1) Subject to sub-paragraph (2), before making an application for registration the attorney must give notice of the attorney's intention to do so to the donor.
- (2) Paragraph 7(2) applies in relation to the donor as it applies in relation to a person who is entitled to receive notice under paragraph 5.

## **9 Contents of notices**

A notice to relatives under this Part of this Schedule must—

- (a) be in the prescribed form;
- (b) state that the attorney proposes to make an application to the Registrar General for the registration of the instrument creating the enduring power in question;
- (c) inform the person to whom it is given of that person's right to object to the registration under paragraph 13(4), and
- (d) specify, as the grounds on which an objection to registration may be made, the grounds set out in paragraph 13(9).

## **10 Notice to the donor**

A notice to the donor under this Part of this Schedule—

- (a) must be in the prescribed form;
- (b) must contain the statement mentioned in paragraph 9(b), and
- (c) must inform the donor that, while the instrument remains registered, any revocation of the power by the donor will be ineffective unless and until the revocation is confirmed by the court.

## **11 Duty to give notice to other attorneys**

- (1) Before making an application for registration an attorney under a joint and several power must give notice of the attorney's intention to do so to any other attorney under the power who is not joining in making the application; and paragraphs 7(2) and 9 apply in relation to attorneys entitled to receive notice by virtue of this paragraph as they apply in relation to persons entitled to receive notice by virtue of paragraph 6.
- (2) An attorney is not entitled to receive notice by virtue of this paragraph if—
  - (a) that attorney's address is not known to, and cannot reasonably be ascertained by, the applying attorney; or
  - (b) the applying attorney has reason to believe that the other attorney has not reached 18 or is mentally incapable.

## 12 Supplementary

For the purposes of this Part of this Schedule a notice given by post is to be regarded as given on the date on which it was posted.

## PART 4 - REGISTRATION

### 13 Registration of instrument creating power

- (1) If an application is made in accordance with paragraph 4(3) and (4) the Registrar General must, subject to the provisions of this paragraph, register the instrument to which the application relates.
- (2) If it appears to the Registrar General that—
  - (a) there is a delegate appointed for the donor of the power created by the instrument; and
  - (b) the powers conferred on the delegate would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney,the Registrar General must not register the instrument except in accordance with the court's directions.
- (3) The court may, on the application of the attorney, direct the Registrar General to register an instrument even though notice has not been given as required by paragraph 4(3) and Part 3 of this Schedule to a person entitled to receive it, if the court is satisfied—
  - (a) that it was undesirable or impracticable for the attorney to give notice to that person; or
  - (b) that no useful purpose is likely to be served by giving that person notice.
- (4) Sub-paragraph (5) applies if, before the end of the period of 5 weeks beginning with the date (or the latest date) on which the attorney gave notice under paragraph 5 of an application for registration, the Registrar General receives a valid notice of objection to the registration from a person entitled to notice of the application.
- (5) The Registrar General must not register the instrument except in accordance with the court's directions.
- (6) Sub-paragraph (7) applies if, in the case of an application for registration—
  - (a) it appears from the application that there is no one to whom notice has been given under paragraph 5; or
  - (b) the Registrar General has reason to believe that appropriate inquiries might bring to light evidence on which the Registrar General could be satisfied that one of the grounds of objection set out in sub-paragraph (9) was established.
- (7) The Registrar General—
  - (a) must not register the instrument; and
  - (b) must undertake such inquiries as the Registrar General thinks appropriate in all the circumstances.

- (8) If, having complied with sub-paragraph (7)(b), the Registrar General is satisfied that one of the grounds of objection set out in sub-paragraph (9) is established—
- (a) the attorney may apply to the court for directions; and
  - (b) the Registrar General must not register the instrument except in accordance with the court's directions.
- (9) A notice of objection under this paragraph is valid if made on one or more of the following grounds—
- (a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney;
  - (b) that the power created by the instrument no longer subsists;
  - (c) that the application is premature because the donor is not yet becoming mentally incapable;
  - (d) that fraud or undue pressure was used to induce the donor to create the power;
  - (e) that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (10) If any of those grounds is established to the satisfaction of the court it must direct the Registrar General not to register the instrument, but if not so satisfied it must direct its registration.
- (11) If the court directs the Registrar General not to register an instrument because it is satisfied that the ground in sub-paragraph (9)(d) or (e) is established, it must by order revoke the power created by the instrument.
- (12) If the court directs the Registrar General not to register an instrument because it is satisfied that any ground in sub-paragraph (9) except that in paragraph (c) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs.

#### **14 Register of enduring powers**

The Registrar General has the function of establishing and maintaining a register of enduring powers for the purposes of this Schedule.

### **PART 5 - LEGAL POSITION AFTER REGISTRATION**

#### **15 Effect and proof of registration**

- (1) The effect of the registration of an instrument under paragraph 13 is that—
- (a) no revocation of the power by the donor is valid unless and until the court confirms the revocation under paragraph 16(3);
  - (b) no disclaimer of the power is valid unless and until the attorney gives notice of it to the Registrar General;
  - (c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by the donor after registration, in the case of a consent, confers any right and, in the case of an instruction, imposes or confers any obligation or

right on or creates any liability of the attorney or other persons having notice of the instruction or consent.

- (2) Sub-paragraph (1) applies for so long as the instrument is registered under paragraph 13 whether or not the donor is for the time being mentally incapable.
- (3) A document purporting to be an office copy of an instrument registered under this Schedule is evidence of—
  - (a) the contents of the instrument; and
  - (b) the fact that it has been so registered.
- (4) Sub-paragraph (3) is without prejudice to any other method of proof authorised by law.

## **16 Functions of court with regard to registered power**

- (1) Where an instrument has been registered under paragraph 13, the court has the following functions with respect to the power and the donor of and the attorney appointed to act under the power.
- (2) The court may—
  - (a) determine any question as to the meaning or effect of the instrument;
  - (b) give directions with respect to—
    - (i) the management or disposal by the attorney of the property and affairs of the donor;
    - (ii) the rendering of accounts by the attorney and the production of the records kept by the attorney for the purpose;
    - (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;
  - (c) require the attorney to supply information or produce documents or things in the attorney's possession as attorney;
  - (d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;
  - (e) authorise the attorney to act so as to benefit the attorney or other persons than the donor otherwise than in accordance with paragraph 3(2) and (3) (but subject to any conditions or restrictions contained in the instrument);
  - (f) relieve the attorney wholly or partly from any liability which the attorney has or may have incurred on account of a breach of the attorney's duties as attorney.
- (3) On application made for the purpose by or on behalf of the donor, the court must confirm the revocation of the power if satisfied that the donor—
  - (a) has done whatever is necessary in law to effect an express revocation of the power; and
  - (b) was mentally capable of revoking a power of attorney when the donor did so (whether or not he is so when the court considers the application).

- (4) The court must direct the Registrar General to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances—
- (a) on confirming the revocation of the power under sub-paragraph (3);
  - (b) on directing under paragraph 2(9)(b) that the power is to be revoked;
  - (c) on being satisfied that the donor is and is likely to remain mentally capable;
  - (d) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney;
  - (e) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected;
  - (f) on being satisfied that fraud or undue pressure was used to induce the donor to create the power;
  - (g) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (5) If the court directs the Registrar General to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(f) or (g) it must by order revoke the power created by the instrument.
- (6) If the court directs the cancellation of the registration of an instrument under sub-paragraph (4) except paragraph (c) the instrument must be delivered up to the Registrar General to be cancelled, unless the court otherwise directs.

#### **17 Cancellation of registration by Registrar General**

The Registrar General must cancel the registration of an instrument creating an enduring power of attorney—

- (a) on receipt of a disclaimer signed by the attorney;
- (b) if satisfied that the power has been revoked by the death or bankruptcy of the donor or attorney or, if the attorney is a body corporate, by its winding up or dissolution;
- (c) on receipt of notification from the court that the court has revoked the power;
- (d) on confirmation from the court that the donor has revoked the power.

### **PART 6 -PROTECTION OF ATTORNEY AND THIRD PARTIES**

#### **18 Protection of attorney and third persons where power is invalid or revoked**

- (1) Sub-paragraphs (2) and (3) apply where an instrument which did not create a valid power of attorney has been registered under paragraph 13 (whether or not the registration has been cancelled at the time of the act or transaction in question).
- (2) An attorney who acts in pursuance of the power does not incur any liability (either to the donor or to any other person) because of the non-existence of the power unless at the time of acting the attorney knows—
- (a) that the instrument did not create a valid enduring power;

- (b) that an event has occurred which, if the instrument had created a valid enduring power, would have had the effect of revoking the power; or
  - (c) that, if the instrument had created a valid enduring power, the power would have expired before that time.
- (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person has knowledge of any of the matters mentioned in sub-paragraph (2).
- (4) If the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of sub-paragraph (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—
  - (a) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered; or
  - (b) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that the person had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction.
- (5) For the purposes of section 4 of the *Powers of Attorney Act 1983* (protection where power is revoked) in its application to an enduring power the revocation of which by the donor is by virtue of paragraph 15 invalid unless and until confirmed by the court under paragraph 16—
  - (a) knowledge of the confirmation of the revocation is knowledge of the revocation of the power; but
  - (b) knowledge of the unconfirmed revocation is not.

## 19 Further protection of attorney and third persons

- (1) If—
  - (a) an instrument framed in a form prescribed as mentioned in paragraph 2(2) creates a power which is not a valid enduring power; and
  - (b) the power is revoked by the mental incapacity of the donor, sub-paragraphs (2) and (3) apply, whether or not the instrument has been registered.
- (2) An attorney who acts in pursuance of the power does not, by reason of the revocation, incur any liability (either to the donor or to any other person) unless at the time of acting the attorney knows—
  - (a) that the instrument did not create a valid enduring power; and
  - (b) that the donor has become mentally incapable.
- (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person knows—
  - (a) that the instrument did not create a valid enduring power; and
  - (b) that the donor has become mentally incapable.
- (4) Paragraph 18(4) applies for the purpose of determining whether a transaction was valid by virtue of sub-paragraph (3) as it applies for the



purpose or determining whether a transaction was valid by virtue of paragraph 18(3).

## **PART 7 - JOINT AND JOINT AND SEVERAL ATTORNEYS**

### **20 Application to joint and joint and several attorneys**

- (1) An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act—
  - (a) jointly; or
  - (b) jointly and severally.
- (2) This Schedule, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in paragraph 21.
- (3) This Schedule, in its application to joint and several attorneys, applies with the modifications specified in sub-paragraphs (4) to (7) and in paragraph 21.
- (4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers—
  - (a) prevents the instrument from creating such a power in that attorney's case; but
  - (b) does not affect its efficacy for that purpose as respects the other or others or its efficacy in that attorney's case for the purpose of creating a power of attorney which is not an enduring power.
- (5) If one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument—
  - (a) an attorney who is not an applicant as well as one who is may act pending the registration of the instrument as provided in paragraph 1(2), an application must also be given under Part 3 of this Schedule to the other attorney or attorneys, and
  - (c) objection may validly be taken to the registration on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant.
- (6) The Registrar General is not precluded by paragraph 13(5) or (8) from registering an instrument and the court must not direct the Registrar General not to do so under paragraph 13(10) if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question; and where the Registrar General registers an instrument in that case, the Registrar General must make against the registration an entry in the prescribed form.
- (7) Sub-paragraph (6) does not preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in paragraph 13(9)(d) or (e) is established; and where any ground in paragraph 13(9) affecting any other attorney is established the court must direct the Registrar General to make against the registration an entry in the prescribed form.
- (8) In sub-paragraph (4), "the requirements for the creation of enduring powers" means the provisions of—

- (a) paragraph 2 other than sub-paragraphs (8) and (9), and
- (b) the regulations mentioned in paragraph 2.

## 21 Joint attorneys

- (1) In paragraph 2(5), the reference to the time when the attorney executes the instrument is to be read as a reference to the time when the second or last attorney executes the instrument.
- (2) In paragraph 2(6) to (8), the reference to the attorney is to be read as a reference to any attorney under the power.
- (3) Paragraph 13 has effect as if the ground of objection to the registration of the instrument specified in sub-paragraph (9)(e) applied to any attorney under the power.
- (4) In paragraph 16(2), references to the attorney are to be read as including references to any attorney under the power.

## PART 8 - INTERPRETATION

### 23 Interpretation

- (1) In this Schedule—

**“enduring power”** is to be construed in accordance with paragraph 2;

**“mentally incapable”** or **“mental incapacity”**, except where it refers to revocation at common law, means in relation to any person, that person is incapable by reason of mental disorder;

**“notice”** means notice in writing;

**“prescribed”**, except for the purposes of paragraph 2, means prescribed by regulations made for the purposes of this Schedule by the Department.

- (2) In sub-paragraph (1), “mental disorder” has the same meaning as in the *Mental Health Act 1998*.
- (3) Any question arising under or for the purposes of this Schedule as to what the donor of the power might at any time be expected to do is to be determined by assuming that the donor had full mental capacity at the time but otherwise by reference to the circumstances existing at that time.

**SCHEDULE 4****SAVINGS: POWERS OF ATTORNEY****1 Orders, determinations, applications etc.**

- (1) This Act (including the repeals and amendments made by it) shall not have effect in relation to —
  - (a) any order or determination made, or other thing done, under the Powers of Attorney Act 1983 and the Powers of Attorney Act 1987 (“the 1987 Act”) which has effect immediately before this Schedule comes into operation;
  - (b) any instrument registered under the 1987 Act;
  - (c) an application for the exercise of a power under the 1987 Act which is pending immediately before this Schedule comes into operation.
- (2) Paragraph 1 is without prejudice to section 58 of the *Legislation Act 2015* (savings on repeal).
- (3) Paragraph 1(c) applies to —
  - (a) a pending application under section 4(2) of the 1987 Act for the registration of an instrument;
  - (b) a notice of objection to the registration of an instrument under section 6 of the 1987 Act;
  - (c) pending proceedings under section 6 of the 1987 Act.

**2 Appeals**

- (1) The 1987 Act and, so far as relevant, the provisions of Part 7 of the *Mental Health Act 1998* and the rules made under it as applied by section 10 of the 1987 Act are to continue to have effect in relation to any appeal brought by virtue of section 10(1)(c) of the 1987 Act which has not been determined before this Schedule comes into operation.
- (2) If, in the case of an appeal brought by virtue of section 107(1) of the *Mental Health Act 1998* as applied by section 10(1)(c) of the 1987 Act (appeal to nominated judge), the judge nominated under the *Mental Health Act 1998* has begun to hear the appeal, the judge is to continue to do so.

## SCHEDULE 5

## MINOR AND CONSEQUENTIAL AMENDMENTS

**1 Trustee Act 1961**

- (1) The Trustee Act 1961 is amended as follows.
- (2) In section 35 (power of appointing new or additional trustees) —
  - (a) in subsection (1)—
    - (i) for “is incapable of acting” there is substituted «lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) to act»;
    - (ii) for “being incapable” there is substituted «lacking capacity»;
  - (b) for subsection 9(a) there is substituted—
    - «(a) lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) of exercising his functions as trustee».
- (3) In section 37(1) (evidence as to vacancy in a trust) for “is incapable of acting” there is substituted «lacks capacity (within the meaning of the Mental Capacity Act 20\*\*)».
- (4) In section 41(1)(a) (power of court to appoint new trustees) for “is incapable” there is substituted «lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) to exercise».
- (5) In section 43B (appointment of substitute for incapable trustee)—
  - (a) in subsection (1) —
    - (i) for paragraph (a) there is substituted—
      - «(a) a trustee lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) to exercise his functions as trustee»;
    - (ii) in paragraph (b) for “under section 6 of the Powers of Attorney Act 1987” there is substituted «Schedule 1 to the Mental Capacity Act 20\*\*»;
    - (iii) in the full out words, for “incapable trustee” there is substituted «the trustee who lacks capacity».

**2 Family Law Reform (Isle of Man) Act 1971**

After section 13(3) of the Family Law Reform (Isle of Man) Act 1971 (consents etc, required for taking of bodily samples) there is inserted—

- «(4) A bodily sample may be taken from a person who lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) to give his consent if consent is given by—
  - (a) the court giving the direction under section 12;
  - (b) a done of an enduring power of attorney or a lasting power of attorney (within the meaning of that Act); or
  - (c) a delegate appointed in that respect.
- (5) The foregoing provisions of this section are without prejudice to the provisions of section 15 of this Act»

**3 Jury Act 1980**

In Schedule 1, Group F (mentally disordered persons) to the Jury Act 1980 for the last paragraph there is substituted «A person who lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) to serve as a juror.»

#### 4 **Sale of Goods Act 1983**

In section 3(2) of the Sale of Goods Act 1983 (capacity to buy and sell) omit “mental capacity or”.

#### 5 **Limitation Act 1980**

Section 36 of the Limitation Act 1984 (interpretation) is amended as follows—

- (a) for subsection (2) there is substituted—

« (2) For the purposes of this Act a person shall be treated as under a disability while he is a minor, or lacks capacity (within the meaning of the Mental Capacity Act 20\*\*) to conduct legal proceedings.»

- (b) omit subsections (3) and (4).

#### 6 **Administration of Estates Act**

Section 45 of the Administration of Estates Act 1990 (consents to appropriation) is amended as follows —

- (a) in subsection (2) for “is incapable, by reason of mental disorder within the meaning of Mental Health Act 1998” there is substituted «lacks capacity (within the meaning of the Mental Capacity Act 20\*\*)»;
- (b) in subsection (4)(a) for “receiver” there is substituted «deputy».

#### 7 **Patronage Measure (Isle of Man) 1997**

After section 5(3) of the Patronage Measure (Isle of Man) 1997 there is inserted—

- (5) «The reference in subsection (3) to a power of attorney does not include an enduring power of attorney or a lasting power of attorney (within the meaning of the Mental Capacity Act 20\*\*).»

#### 8 **Mental Health Act 1998**

- (1) The Mental Health Act 1998 is amended as follows.
- (2) In section 135(1) (protection for acts done in pursuance of this Act), there is omitted “or in, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the judge having jurisdiction under Part 7,”.
- (3) Section 136 (pay, pension etc of mentally disordered persons) is omitted.
- (4) Sub-paragraph (5) applies where, before the commencement of sub-paragraph (3), an authority has, in respect of a person referred to in that section as “the patient”, made payments under that section—
- (a) to an institution or person having care of the patient, or
- (b) in accordance with subsection (2)(a) or (b) of that section.
- (5) The authority may, in respect of the patient, continue to make payments under that section to that institution or person, or in accordance with subsection (2)(a) or (b) of that section, despite the amendments made by sub-paragraph (3).
- (6) In section 138(1) (interpretation), in the definition of “patient” there is omitted “(except in Part 7)”.

SCHEDULE 6

REPEALS

Short title	Extent of repeal
Powers of Attorney Act 1983	The whole Act
Powers of Attorney Act 1987	The whole Act
Mental Health Act 1998	Part 7
*****	*****
*****	*****