

2007

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

POWERS OF ATTORNEY REGULATION 2007

EXPLANATORY STATEMENT

Circulated by authority of
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Attorney General

Outline

The *Powers of Attorney Act 2006* (the Act) is to commence operation on 30 May 2007. The Act provides for the Minister to approve forms for the Act.

In drafting forms of general and enduring powers of attorney under the Act, it was found that it is necessary to make some minor amendments to the Act before the forms may be approved by the Minister. Those amendments correct some inconsistencies and do not involve change of policy. In particular, amendments provide for reading some provisions by replacing the expression ‘authorisation’ of an attorney with ‘appointment’ of an attorney in some provisions, and vice versa in other provisions. Amendments also clarify that an enduring power of attorney operates as a general power of attorney during the capacity of the principal only in relation to property matters, and that the power of the public trustee to examine an attorney’s books at the request of the public advocate is discretionary.

Schedule 1 to the Powers of Attorney Regulation modifies Chapter 20 (Transitional provisions) of the Act. The Regulation is made under section 156(2) of the Act which enables a regulation to be made to modify Chapter 20 to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in that chapter.

It is proposed to amend the Act in the near future to formalise the amendments proposed in Schedule 1 to the Regulation. Until that time, the Regulation will remain as a transitional arrangement.

NOTES ON CLAUSES

Clause 1 Name of Regulation

This clause explains that the name of the Regulation is the *Powers of Attorney Regulation 2007*.

Clause 2 Commencement

This clause explains that the Regulation will commence 30 May 2007.

Clause 3 Modification of Act, ch 20 – Act, s 156

This clause explains that schedule 1 to the Regulation will modify chapter 20 (Transitional provisions) of the *Powers of Attorney Act 2006*

Schedule 1 Modification of Act, ch 20 (Transitional provisions)

Clause 1.1 New sections 156A to 156M

Clause 1.1 inserts new sections 156A to 156 M.

New Section 156A Meaning of *health care matter*

New section 156A provides that section 12 applies as if example 2 were omitted. Section 12 defines ‘health care matter’ for which powers may be given to an attorney under an enduring power of attorney. Example 2 of this matter is “donations under the *Transplantation and Anatomy Act 1978* by the principal to someone else”. This item appears to create confusion in the mind of a reader when section 37 provides that “removal of non-regenerative tissue from the principal while alive for donation to someone else” to be a special health matter, that is, a matter for which power cannot be given to an attorney. Donation of regenerative tissue of a principal is not a special health matter, and the Act does not state that such power cannot be given to an attorney.

New section 156 B Authorisation of attorneys

New section 156B inserts section 13 heading to be “**Appointment of attorneys**” and replaces the heading “**Authorisation of attorneys**”.

New section 156 C Authorisation of attorneys

New section 156C provides that section 13 applies as if ‘authorise’ were omitted and ‘appoint’ were substituted. It is considered that authorisation of an attorney to exercise power in relation to a thing follows the attorney’s appointment in a power of attorney, and that section 13 deals with appointment of attorneys.

New section 156D Authorisation of attorneys by name or position

New section 156D provides for reading section 15 by replacing ‘authorise’ with ‘appoint’. It also inserts a new heading ‘**Appointment of attorneys by name or position**’.

New Section 156E Who can be a witness?

Section 21(1) provides that an attorney ‘authorised’ under a power of attorney cannot be a witness to the power of attorney. Section 21(2) provides that only one of the witnesses can be a relative of a person ‘authorised’ as attorney under the power of attorney. New section 156E provides for section 21(1) and (2) to apply as if ‘authorised’ were omitted, and ‘appointed’ were substituted.

New section 156F Certificates by witnesses to powers of attorney

Section 22(2) provides for a witness certificate when a power of attorney is signed on behalf of the principal at the principal’s direction. Paragraph 22(2)(d) provides for a witness to certify that the principal appeared to understand the nature and effect of making the power of attorney at that time the principal signed it. New section 156F provides for applying this statement to relate to the time the principal gave the direction to sign the power of attorney. A section 22(2) certificate is not needed when the principal himself or herself signs the power of attorney. A section 22(1) certificate applies in that event.

New Section 156G Appointment of 2 or more attorneys

Provisions under Part 3.3 are about authorising 2 or more attorneys. Part 3.1 contains provisions for appointing an attorney or attorneys. New section 156G provides for reading the heading of Part 3.3 as if ‘Appointment’ were omitted and ‘Authorisation’ substituted.

New section 156H Appointment of 2 or more attorneys under power of attorney

Section 25 is in Part 3.3. New section 156H provides for applying section 25 heading as if ‘Appointment’ were omitted and ‘Authorisation’ substituted.

New section 156I How does enduring power of attorney operate while principal has capacity?

Section 31 provides for the operation of an enduring power of attorney as a general power of attorney while the principal has decision-making capacity. New section 156I provides for applying this section as if it provides for such operation only in relation to property matters.

New section 156J Obligation of attorneys to keep interested people informed

New section 156J provides for applying section 43(1) as if ‘authorisation’ were omitted and ‘appointment’ were substituted.

New section 156K Resignation of attorney’s authorisation under power of attorney

New section 156K provides for applying section 53 as if ‘authorisation’ were omitted and ‘appointment’ were substituted.

New section 156L Public trustee to assist if asked

New section 156L provides for applying the heading of section 83 to read as “**Assistance by public trustee**”.

New Section 156M Public trustee to assist if asked

New section 156M provides for applying section 83(3) as if the public trustee may, if asked by the public advocate, assist the public advocate by examining and reporting on the books, accounts or other records of an attorney under an enduring power of attorney. This section in its current form makes this function mandatory for the public trustee. It is not appropriate to compel an administrative agency of the government to act at the request of another administrative agency. It is expected that government administrative agencies will enter into appropriate arrangements, without being forced to act in relation to each other.

Section 83(2) makes a similar obligation on the public trustee mandatory if the guardianship tribunal makes the request.