Powers of Attorney: evolution[1]

Amendments to the *Powers of Attorney Act 2014* (Vic) will be made by the *Powers of Attorney Amendment Act 2016* (Vic) which has now received Royal Assent. The latest default implementation date is 1 May 2017. One of the purposes of the amending Act is to clarify a number of 'operational' matters.

Some of the main changes, also referring to the Explanatory Memorandum, are:

Section of existing *Powers of Attorney Act 2014* [Explanatory Memorandum clause/section of amending Act]	**Current**	**Changes**
Section 22 – Scope of power [clause/section 4 amending Act]	(1) By an enduring power of attorney a person may authorise anything that a person can lawfully do by an attorney. (2) Without limiting (1) make a power for personal or financial matters or both.	Substituted ss 22(2) clarifies that, without limiting ss 22(1), the power can be confined to personal matters only, *or* financial matters only, *or* to matters specified in the power.
		Prescribed form being revised.
Section 31 – Appointment of alternative attorneys [clause/section 5 amending Act]	(1) The principal may appoint an alternative attorney for any attorney (subject to section 28 eligibility).	Substituted ss 31(1) clarifies that more than one alternative attorney can be appointed for each attorney, and (or) that an alternative attorney can be appointed for more than one attorney (subject to section 28 eligibility per new ss 31(1A)).
Section 55 – Revocation by later enduring power of attorney [clause/section 6 amending Act]	(1) An enduring power of attorney is revoked by a later enduring power so far as the later power is inconsistent (subject in ss 55(2) to the later enduring power of attorney specifying otherwise).	To create consistency in revocations of 'old' enduring powers of attorney under the *Instruments Act 1958* or 'old' appointments of enduring guardian under the *Guardianship and Administration Act 1986* and a new enduring power of

[1] Information sources include Bills, Acts, and Explanatory Memoranda (all sourced from www.legislation.vic.gov.au unless otherwise noted): Powers of Attorney Amendment Bill (Act) 2016, Medical Treatment Planning and Decisions Bill (Act) 2016, Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016; Australian Law Reform Commission Elder Abuse Discussion Paper and related materials (www.alrc.gov.au); Legal Practitioners' Liability Committee and Law Institute of Victoria educational materials as noted. R Curnow Nolch *information included for educational purposes only* – this article is an individual interpretation and does *not* constitute legal advice, and no liability is accepted for any person's reliance upon this information - the reader must read the legislation, Discussion Paper and materials referred to for him or herself and make his or her own enquiries and determination as to the nature and effect of the 'as passed' changes and the proposed changes. The use of clip art is acknowledged - https://openclipart.org/detail/27766/new-document by Ronoaldo. This article first appeared in the January-February 2017 issue of *The Legal Executive*.

		attorney under the *Powers of Attorney Act 2014*, the words in ss 55(1) 'so far as the later enduring power of attorney is inconsistent' are deleted. The amendment enables an enduring power of attorney under the *Powers of Attorney Act 2014* to be automatically revoked by a subsequent enduring power of attorney (unless specified otherwise). [Also see below new sections 152 and 153 in particular].
Section 56 – Resignation (of attorney/alternative) when principal has decision making capacity [clause/section 7 amending Act]	(1) An attorney or alternative attorney who has power for a matter may resign as attorney/alternative attorney for that matter at any time the principal has decision making capacity. (2) On the resignation of the attorney or alternative attorney, the enduring power of attorney is revoked so far as it gives power to the attorney/ alternative attorney.	Ss 56(2) amended to clarify that on the resignation of an attorney/ alternative attorney who has power for a matter under an enduring power of attorney, the enduring power of attorney is revoked insofar as it gives power to the attorney/ alternative attorney for that matter.
Section 62 – Ending of attorney's power where more than one attorney [clause/section 8 amending Act]	(1) The ending of any power of a joint attorney does not affect the ability to exercise that power of any remaining joint attorney/s who have that power. (2) The ending of any power of a joint and several attorney does not affect the ability to exercise that power of any remaining joint and several attorney/s who have that power. (3) The ending of any power of a several or majority attorney does not affect the ability to exercise that power of any remaining several or majority attorney/s who have that power. (4) Unless specified otherwise in the enduring power of attorney.	New ss 62(3A) inserted, vis-à-vis ss 62(3), to provide that if any power of a majority attorney ends, which results in the remaining majority attorneys no longer being able to exercise that power as majority attorneys, then the remaining attorneys must exercise that power jointly. Ss 62(4) also amended to include reference to ss 62(3A).
Section 63 – Duties of attorney (vis-à-vis conflicts)	(1) An attorney under an enduring power of attorney … "(d) must avoid	To ensure consistency with section 65, in ss 63(1)(d) the words 'power so authorises'

[clause/section 9 amending Act]	acting where there is or may be a conflict of interest unless the power so authorises;" …	are deleted, and in lieu the words 'attorney is authorised by the power, the principal or VCAT' are inserted (noting the principal must have capacity to authorise).
Section 93 – Appointment of alternative supportive attorneys [clause/section 11 amending Act]	(1) A principal may appoint an alternative supportive attorney for a supportive attorney (subject to section 91 eligibility).	Ss 93(1) replaced to clarify that more than one alternative supportive attorney can be appointed for each supportive attorney, and (or) an alternative supportive attorney can be appointed for more than one supportive attorney (subject to section 91 eligibility per new ss 93(1A)).
Section 130 – Who can apply for a rehearing [clause/section 13 amending Act, noting clause 13 refers to the original proposed amendment]		Amended to broaden the categories of persons who can apply. [See also new section 154].
Division 3 – Amendment of other Acts [clauses/sections 14 and 15 amending Act]	Sections 149-165 refer to transitional amendments to other Acts, all of which provisions are now in operation.	New Division 3/sections 149-154 inserted: Section 149 – defines an *enduring power of attorney (2014)* to mean a power of attorney under section 22 *Powers of Attorney Act 2014* as in force immediately before the commencement of section 4 amending Act (see above section 22 amendments re scope of power). Section 150 – nothing in this new Division limits the operation of the *Interpretation of Legislation Act 1984*. Section 151 – (1) Notwithstanding the commencement of section 4 amending Act (see above amendments re scope of power, amending section 22), an enduring power of attorney (2014) continues to exist for so long as it is in force on and after the commencement of section 4 amending Act. (2) On and from the commencement of section 6 amending Act (see above

		amendments to section 55 providing for the revocation of an enduring power of attorney on the making of a new enduring power of attorney), section 55 as amended applies to an enduring power of attorney (2014). (3) Notwithstanding the commencement of section 8 amending Act (see above amendments to section 62 re ending of attorney's power), section 62 as in force immediately before the commencement of section 8 continues to apply to an enduring power of attorney (2014). Section 152 – notwithstanding ss 142(2) (transitional provision), on and from the commencement of section 6 amending Act (see above amendments re revocation) – (a) Divisions 1 and 2 of Part 5 apply to an old enduring power of attorney in force immediately prior to that commencement as if it were an enduring power of attorney made under this Act; and (b) Division 3 of Part 5 as amended by section 6 (see above amendments re revocation) applies to an old enduring power of attorney in force immediately before that commencement as if it were an enduring power of attorney made under this Act. I.e. "… despite section 142(2) of the Principal Act not applying any of the provisions of Part 5 to an old enduring power of attorney, Divisions 1, 2 and 3 (as amended by clause 6) of Part 5 of the Principal Act will apply to the revocation of an old enduring power of attorney in force immediately before the

		commencement of clause 6 of this Bill." Section 153 – notwithstanding ss 143(2) (transitional provision), on and from the commencement of section 6 amending Act (see above amendments re revocation) – (a) Divisions 1 and 2 of Part 5 apply to an old enduring power of guardianship in force immediately before that commencement as if it were an enduring power of attorney made under this Act; and (b) Division 3 of Part 5 as amended by section 6 applies to an old enduring power of guardianship in force immediately before that commencement as if it were an enduring power of attorney made under this Act. I.e. "… despite section 143(2) of the Principal Act not applying any of the provisions of Part 5 to an old enduring power of guardianship, Divisions 1, 2 and 3 (as amended by clause 6) of Part 5 of the Principal Act will apply to the revocation of an old enduring power of guardianship in force immediately before the commencement of clause 6 of this Bill." Section 154 – provides that section 130 (who can apply for a rehearing) as amended applies to an application for a VCAT rehearing made but not yet determined.
[clause/section 16 amending Act]	Ss 28(2)(a) *Privacy and Data Protection Act 2014*	Substitute ss 28(2)(a) inserted to provide that a supportive attorney can consent or make a request or exercise a right of access to personal information on behalf of the principal as part of their role.
Witnesses	All *subject to* preconditions listed in the respective sections as to independence from the matter etc.	Unchanged

	Section 35 (EPA): **"Who can witness the signing of an instrument creating an enduring power of attorney?** (1)As to the 2 persons who, under section 33(b), witness the signing of an instrument creating an enduring power of attorney— (a)both persons must be eligible to do so under subsection (2); and (b)one person must be either authorised to witness affidavits or a medical practitioner." … Section 48 (EPA): **"Who can witness the signing of the instrument of revocation?** (1)As to the 2 persons who, under section 46(b), witness the signing of the instrument of revocation— (a)both persons must be eligible to do so under subsection (2); and (b)one person must be either authorised to witness affidavits or a medical practitioner." … Section 97 (supportive attorney appointment): **"Who can witness the signing of an appointment form?** (1)As to the 2 persons who, under section 95(b), witness the signing of an appointment form for a supportive attorney appointment— (a)both persons must be eligible to do so under subsection (2); and (b)one person must be a person who is authorised by law to witness the signing of a statutory declaration; …" Section 107 (supportive attorney appointment): **"Who can witness the signing of the form of revocation?** (1)As to the person who, under section 105(b), witnesses the signing of the form of revocation— (a)the person must be of or over 18 years of age; and (b)the person must be authorised to witness the signing of a statutory declaration; …"	

Further amendments are also foreshadowed, of which some will 'change the landscape' in respect to Enduring Powers of Attorney (Medical Treatment):

Administration and Probate and Other Acts Amendment (Succession and Related Matters) **Bill 2016**	The following is a brief summary of proposed amendments to the *Powers of Attorney Act 2014* (other proposed amendments relating to the *Administration and Probate Act 1958* appear below): • Proposed latest implementation date 1 November 2017 • Insertion of new section 83A providing an exception to ademption for property dealt with by an attorney (as with the exception for property dealt with by an administrator under section 53 *Guardianship and Administration Act 1986*) • Insertion of new section 83B providing that section 83A applies regardless of whether or not the principal has testamentary capacity • Insertion of Division 7[2] giving VCAT powers in relation to Wills where there is an enduring power of attorney; namely that VCAT may open and read a Will of a person who has given an enduring power of attorney and does not have testamentary capacity, or of a deceased person who had granted an enduring power of attorney before their death; VCAT can compel production of a Will if the willmaker has granted an enduring power of attorney and has lost capacity or died; and VCAT may make a copy of a Will (full or redacted) available to an attorney under an enduring power of attorney where the principal does not have testamentary capacity. NB: Consequentially it is proposed to amend section 53 of the *Guardianship and Administration Act 1986* to substitute "a beneficiary of a represented person" in lieu of "her or his heirs, executors, administrators, next of kin, devisees, legatees and assigns" to clarify that the protection from ademption only applies to beneficiaries under a Will and not to an intestacy, and to include a definition of "beneficiary of a represented person" for this purpose; insert a new section 53A into that Act clarifying that section 53 applies whether or not the represented person has testamentary capacity; and insert a definition of "next of kin" in section 56 of that Act.

[2] new sections 134A-134C

***Medical Treatment Planning and Decisions Act 2016* (Vic)** [NB: For ease of readability together with the other information in this article we have used the term 'power' (in lieu of 'appointment' in respect to medical treatment), 'principal' for the person giving the directive or power, and 'appointee' for the person exercising a medical treatment power (although the full term in the Act is the 'appointed medical treatment decision maker')].	The following is a very brief summary of some of the main points contained in the legislation, particularly those of a 'practical' nature. [Consequential amendments to the *Powers of Attorney Act 2014* appear below.] *General* • Latest default date 12 March 2018 • Repeals (and replaces) the *Medical Treatment Act 1988* (Vic) • The principles are similar, but incorporating formalised advance care directives (binding, or expressing preferences and values), processes for consent and approval to medical research procedures, and the facility to appoint a 'support person' • The documentation must be in English, and if an interpreter is used, then an interpreter's certification is also required to be included on the document[3] • Defines 'decision-making capacity' (essentially in the same terms as included in the *Powers of Attorney Act 2014*)[4], and VCAT may be applied to in order to determine whether a person does in fact have decision-making capacity[5] • The appointee (or person performing a function or duty) must have regard to specified overarching principles (quite similar to those in the *Powers of Attorney Act 2014*, but in a medical context)[6] • As well as the principal's full name etc., their date of birth must be included in each of an advance care directive and medical power and support person appointment[7] • Required details of the appointee, to be included, may be prescribed[8] • A number of sections have been included prescribing steps to be taken, and records kept, by health practitioners (in respect to both advance care directives and medical treatment powers) • Advance care directives or medical treatment powers properly made in another State or Territory are recognised[9] • Any unlawful instruction or direction in any of an advanced care directive, medical

[3] sections 16, 28 and 99
[4] section 4
[5] section 5
[6] section 7
[7] sections 16, 28 and 33
[8] sections 28 and 33
[9] sections 95 and 96

Medical Treatment Planning and Decisions Act 2016 (Vic) cont…	treatment power or support person appointment, will be void[10] • Specific changes are made to the *Mental Health Act 2014* in relation to approval procedures for electroconvulsive treatment, and to the *Guardianship and Administration Act 1986* in respect to 'special medical procedures' • New prescribed forms are anticipated • Transitional provisions will apply in respect to an existing refusal of treatment certificate and/or enduring power of attorney (medical treatment)[11]; and also to enduring powers of attorney with power to make medical treatment decisions pursuant to section 155 of the *Powers of Attorney Act 2014* and/or enduring powers of guardianship with power to make medical treatment decisions saved by section 143 of the *Powers of Attorney Act 2014*[12]. *Advance care directives* • An advance care directive constitutes the principal's "binding instructions or preferences and values in relation to the medical treatment of that person in the event that the person does not have decision-making capacity for that medical treatment"[13] • Directives are divided into 'instructional' and 'values' directives, and either or both can be included[14] • Any person, including a child, may give an advance care directive, provided the prerequisites are met[15] • Formal requirements apply, and at least one witness to an advance care directive must be a registered medical practitioner[16] • A third (independent adult) person may sign at the direction of the principal[17] • Any amendment must be made on the face of the original document[18] • Advance care directives must not include unlawful statements[19]

[10] section 97
[11] section 102
[12] section 103
[13] section 12
[14] sections 6 and 12
[15] section 13; although only an adult may appoint a medical treatment decision maker
[16] section 17
[17] section 16
[18] section 20
[19] section 18, e.g. directing that an unlawful act be carried out

Medical Treatment Planning and Decisions Act 2016 (Vic) cont…	• If the formal requirements of an advance care directive are not complied with, the directive may be ratified by VCAT[20] • The advance care directive comes into force when it is made, and remains in force until any expiry date specified in it or until it is revoked[21] • Formal requirements apply to revocation[22] (or VCAT can effect revocation[23]), and an advance care directive will be revoked by any later advance care directive[24] • Specific penalties apply for inducing a principal to give an advance care directive[25]; or for knowingly making false or misleading statements in relation to advance care directives • VCAT can revoke, vary or suspend an instructional directive if the person giving the directive does not have decision-making capacity in relation to that directive, where VCAT is satisfied that either circumstances have changed or the person relied upon incorrect information/assumptions when giving the directive[26]. *Medical treatment powers* • The appointment of a medical appointee can be made at the same time as an advance care directive or at any other time[27] • The appointee has the powers in Parts 4 and 5[28] of this Act, or in any other Act, subject to any specified limitations or conditions in the power[29] • More than one appointee can be appointed, and "(t)he appointed medical treatment decision maker of a person is the first person listed in the appointment who is reasonably available and willing and able to act at the particular time"[30] • Formal requirements apply (to the power and/or revocation)[31], with at least one

[20] section 21
[21] section 19
[22] section 20
[23] section 21
[24] section 20
[25] sections 14 and 15
[26] section 23
[27] section 26
[28] Part 4 Medical treatment decisions, Part 5 Medical research
[29] section 27
[30] section 28; see also section 55 and the priority order of decision makers, and the decision maker in respect to a child
[31] sections 28 and 30

Medical Treatment Planning and Decisions Act 2016 (Vic) cont…	adult witness of two being an authorised witness[32] • A third (independent adult) person may sign at the direction of the principal[33] • The power comes into force on the day it is made, and remains in force until revoked or the appointee resigns[34] • The power has to be formally accepted on the same document by each appointee (and certified/witnessed) before it is effective[35] • As well as a statement of acceptance similar to what is currently in effect, the appointee must state that they have read and understood any advance care directive the principal has given before or at the same time as the power[36] • In exercising the power, there are particular matters the appointee must address[37], and particular matters apply to medical research[38], as opposed to medical treatment[39] • An appointee is entitled to access or collect health information relevant to a medical treatment decision[40] • If the formal requirements of a power are not complied with, it may be ratified by VCAT[41] • Certain requirements apply if the appointee wishes to resign[42] • Formal requirements apply to revocation as above (or VCAT can effect revocation)[43] • Specific penalties apply for purporting to be/act as an appointee or induce the principal to appoint them[44]. *Support person appointment* • Any person with decision-making capacity, including a child, can appoint one other

[32] section 36; and see section 3 "***authorised witness*** means either of the following -
(a) a registered medical practitioner;
(b) a person authorised to take affidavits by section 123C of the **Evidence (Miscellaneous Provisions) Act 1958**"
[33] section 37
[34] section 38; and the resignation must be effected formally: section 39
[35] sections 28 and 29
[36] section 29
[37] section 61; with the health practitioner being obliged to report to the Public Advocate in certain instances: section 62; and with recourse to VCAT for an advisory opinion if the appointee (or health practitioner) is in doubt: section 70 (or in respect to medical research, sections 82 (including a person with a 'special interest') and 83)
[38] Part 5
[39] Part 4
[40] section 94
[41] section 45
[42] section 39
[43] section 30; a revocation may also be signed at the direction of the principal by an independent adult: section 37; see also sections 43-46 as to VCAT's powers and matters to be taken into consideration
[44] sections 41 and 42

Medical Treatment Planning and Decisions Act 2016 (Vic) cont…	person, including a child, as their support person[45] • The role of the support person is not to make the principal's medical treatment decisions, but to support the principal "to make, communicate and give effect to the person's medical treatment decisions; and" represent their interests, *including* when the principal does not have decision-making capacity in respect to medical treatment decisions[46] • Formal requirements apply (to the power and/or revocation)[47], with at least one adult witness of two required to be an authorised witness[48] • A third (independent adult) person may sign at the direction of the principal[49] • The appointment comes into force on the day it is made, and remains in force until revoked or the support person resigns[50] • The appointment must be formally accepted on the same document by the support person (and certified/witnessed) for it to be effective, including that the support person understands their role[51] • A support person is entitled to assist in accessing or collecting health information relevant to a medical treatment decision[52] • If the formal requirements of an appointment are not complied with, it may be ratified by VCAT[53] • Certain requirements apply if the support person wishes to resign[54] • Formal requirements apply to revocation as above (or VCAT can effect revocation), and the appointment will be revoked by any later appointment of a support person[55] • A specific penalty applies for purporting to be/act as a support person[56].

[45] section 31
[46] section 32
[47] sections 33 and 35
[48] section 36; and see section 3 "***authorised witness*** means either of the following -
(a) a registered medical practitioner;
(b) a person authorised to take affidavits by section 123C of the **Evidence (Miscellaneous Provisions) Act 1958**"
[49] section 37
[50] section 38; and the resignation must be effected formally: section 39
[51] sections 33 and 34
[52] section 94
[53] section 45
[54] section 39
[55] section 35; a revocation may also be signed at the direction of the principal by an independent adult: section 37; see also sections 43-46 as to VCAT's powers and matters to be taken into consideration
[56] section 41

***Medical Treatment Planning and Decisions Act 2016* (Vic) continued - consequential amendments to the *Powers of Attorney Act 2014* (Vic)** [insertions / ~~deletions~~]	*Section 3(1) Powers of Attorney Act, as it will be amended by section 150* Definitions "*medical treatment* has the same meaning as it has in the Medical Treatment Planning and Decisions Act 2016;" "*medical research procedure* has the same meaning as it has in the Medical Treatment Planning and Decisions Act 2016;" "*personal matter*, in relation to a principal under an enduring power of attorney, or a supportive attorney appointment, means any matter relating to the principal's personal or lifestyle affairs, and includes any legal matter that relates to the principal's personal or lifestyle affairs, but does not include any matter that relates to medical treatment or medical research procedures; Examples The following are examples of personal matters— (a)where and with whom the principal lives; (b)persons with whom the principal associates; (c)whether the principal works and, if so, the kind and place of work and employer; (d)whether the principal undertakes education or training, the kind of education or training and the place where it takes place; (e)daily living issues such as diet and dress. (f)~~health care matters, including matters provided for in Part 4A of the Guardianship and Administration Act 1986;~~ Note See the Medical Treatment Planning and Decisions Act 2016 for matters relating to medical treatment and medical research procedures." *Section 85(1) Powers of Attorney Act, as it will be amended by section 151* **"**Power to make and scope of appointment (1) A person may appoint an eligible person to support the person in making and giving effect to decisions by exercising any of the powers set out in sections 87, 88 and 89 that are specified in the appointment in relation to any ~~personal or financial or other matters~~ personal matters, financial matters or other matters (excluding matters concerning medical treatment and medical research procedures) specified in the appointment."

Medical Treatment Planning and Decisions Act 2016 (Vic) continued - consequential amendments to the *Powers of Attorney Act 2014* (Vic) cont…	*Part 10 Powers of Attorney Act, as it will be amended by section 152* "Division 4—Transitional—Medical Treatment Planning and Decisions Act 2016 155 Saving—effect of broader definition of *personal matter* Despite the amendment of the definition of *personal matter* in section 3(1) by the Medical Treatment Planning and Decisions Act 2016— (a) an enduring power of attorney as in force immediately before that amendment that applies in respect of medical treatment or medical research procedures continues to apply in the same manner on and after that amendment as if that amendment had not been made; and (b) a supportive attorney whose appointment is in force immediately before that amendment that applies in respect of medical treatment or medical research procedures continues to apply in the same manner on and after that amendment."

Enduring Powers of Attorney as they relate to Australian Legal Practitioners, particularly those who are sole practitioners	It would be remiss, in an article about Powers of Attorney and changing landscapes, not to also mention sole practitioners. Have you ever thought about what would happen to your law practice if you suffered a substantial impairment? If not, the following are excellent resources: • Episode 5 of the Law Institute of Victoria Ethics Series (2016); • LPLC's Blog of 5/6/2015 *Dealing with loss of capacity of a sole practitioner*; • The New Zealand Law Society *Sole Practitioner Power of Attorney Guidelines* referred to in the above Blog[57].

[57] noting that, in New Zealand, it is compulsory for a sole practitioner, or sole director of an incorporated firm, to formally appoint a qualified attorney and alternate attorney within three months of commencing practice

ALRC Inquiry into Elder Abuse	The Discussion Paper (DP 83) released on 12/12/2016 includes a number of proposals[58]: 1. Establish a national register of enduring documents (and related Court/Tribunal orders). 2. Require that an enduring document be registered in order to be valid, with registration of a subsequent enduring document automatically revoking a previous document of the same type. 3. Allow transitional arrangements to ensure registration of existing enduring documents and the validity of unregistered enduring documents for a prescribed period. 4. Limit authorised witnesses to a legal practitioner, medical practitioner, justice of the peace, registrar of the Local or Magistrates Court, or police officer with the rank of sergeant or above. 5. Vest State and Territory Courts/Tribunals with power to order compensation where loss was caused by the enduring attorney or guardian failing to comply with their obligations. 6. Require attorneys to avoid conflicts unless express authorisation is in the power or a Tribunal gives advance authorisation. 7. Mandate that proposed attorneys be ineligible if an undischarged bankrupt, prohibited from acting as a company director, convicted of an offence involving fraud/dishonesty, or where they are/have been a care worker etc. for the principal. 8. Introduce legislation to explicitly list transactions that cannot be completed by an enduring attorney or guardian, such as making or revoking the principal's Will. 9. Require enduring attorneys and guardians to keep records, and enduring attorneys to keep their own property separate. 10. State and Territory governments to introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship, and other substitute decision makers. 11. Re-name substitute decision makers as 'representatives', and develop model 'Representatives Agreements'. 12. Require representatives to 'support and represent the will, preferences and rights of the principal'.

[58] bearing in mind that not all jurisdictions have similar legislation currently in force, and that some listed below already apply in Victoria

***Administration and Probate and Other Acts Amendment (Succession and Related Matters)* Bill 2016** [Note: Prior to reading these notes, it is recommended that you refer to the second reading speech by the Hon. Martin Pakula Attorney-General made on 23/11/2016[59], which incorporates a very succinct synopsis of the proposed changes and the reasons behind them.]	The following is a brief summary of proposed amendments to the *Administration and Probate Act 1958:* *General* • A beneficiary entitled to a pecuniary legacy is entitled to interest if not paid within 12 months of the date of death[60] • The offence of concealing or 'aiding and abetting in the concealment of' a Will is extended to being 'involved in' concealment[61] • The amendments apply in respect to the estate of a person who dies on or after the amendment commencement date[62]. *Executors/Administrators' commission and fees* • The Supreme Court may review and reduce fees, charges and commissions by executors and administrators (excluding State Trustees) including reimbursement of expenses or disbursements[63] • An executor is not entitled to payment under a remuneration clause in a Will unless the testator gave informed written consent before executing the Will[64] • Where there is no remuneration clause (or if it is inadequate) then an executor may charge fees or commission if the informed consent of each interested beneficiary is obtained (other than a trustee company)[65] • Where an executor seeks to be paid they must provide information to each interested beneficiary of the basis of the payment (whether that be a clause in the Will, consent of the beneficiaries or Court order), whether fees are charged or commission (and if commission, the percentage), the estimated value of the payment, and that the interested beneficiaries have the right to apply to the Supreme Court for review; and also requiring notification of any substantial change; with the executor not being entitled to commission or fees unless these requirements are met (other than a trustee company)[66]

[59] which can be located at www.hansard.parliament.vic.gov.au, page 4540
[60] new section 39B(3)
[61] amendment to section 66
[62] new section 106; and regulations may be made to deal with transitional matters: section 107
[63] new section 65A
[64] new section 65B
[65] new section 65C
[66] new section 65D

Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 cont…	• An executor can elect to charge fees instead of commission, provided they are less than commission, are not charged at a professional rate, and are distinguished from professional services fees[67] • Consequentially the *Wills Act 1997* will be amended to provide that a remuneration clause (as defined) in a Will is void unless the testator has given informed consent to its inclusion, and that this applies to Wills executed on or after commencement of this Bill[68]. *Ademption* • A beneficiary under a Will who gains an unjust advantage or suffers an unjust disadvantage because of the application of section 83A *Powers of Attorney Act 2014* or section 53 *Guardianship and Administration Act 1986* may apply to the Supreme Court for remedy[69] • A beneficiary under a Will is entitled to any traceable income or capital gain generated from the disposal of property under either section 83A of the *Powers of Attorney Act 2014* or section 53 of the *Guardianship and Administration Act 1986*[70]. *Intestacy* • Includes a definition of "residuary estate", and moves the definition of "intestate" into the main definitions section[71] • Repeals section 37A (partner obtaining an intestate's interest in a shared home) and section 38 (trust for sale on intestacy), and a number of other sections • Inserts a new Part 1A relating to intestacy (whole or partial): • <u>Division 1 - Application and definitions</u>[72] − Incorporates definitions for the purposes of Part 1A, including a definition of "distribution agreement" (distribution of an intestate's estate between multiple partners) and a definition of "partner" (*including* registered caring partner) − Includes a 30 day survivorship requirement (except where this would result in *bona vacantia*) − Allows for participation in a distribution in more than one capacity

[67] new section 65E
[68] new sections 49A and 56 *Wills Act 1997*
[69] new section 50
[70] new section 51
[71] section 3
[72] new sections 70A–70G

Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 cont…	– Preserves the rights of creditors and the rights of the Crown – Specifies the date of valuation (other than in respect to a partner's property election) as being the date that the value of the residuary estate is ascertained – Provides that the distribution of an intestate's estate is not affected by gifts made during their lifetime or gifts made by Will, repealing the 'hotchpot' rule. • <u>Division 2 - Trust for sale of intestate's property</u>[73] – Provides that the intestate's estate is held on trust by their personal representative, with discretionary power to sell and convert (and invest), with the requirement for payment of funeral and administration expenses, debts or liabilities, and setting aside monies to pay legacies in any Will. • <u>Division 3 - Distribution if intestate leaves a partner</u>[74] – Includes new rules for distribution where the intestate leaves a partner[75]: – Where there is only one partner, the surviving partner is entitled to the whole of the estate where there are no surviving issue – Where there is only one partner, if an intestate leaves a partner and issue (children, grandchildren or more distant lineal descendants) of that partner, the partner is entitled to the whole of the intestate's estate – If an intestate leaves a partner and some issue who are issue of the intestate from another relationship, the surviving partner is entitled to the whole of the estate if worth less than the partner's statutory legacy amount; but if worth more then the surviving partner is entitled to the personal chattels, statutory legacy plus interest, and one half of the balance, with the other half of the balance being shared between any children of the intestate – A new method will be included for determining the value of the partner's

[73] new sections 70H–70I

[74] new sections 70J–70N

[75] Referring to the second reading speech, for the purpose of improving the position of the deceased's partner in case of an intestacy by implementing the recommendation in the 2013 VLRC Succession Laws Report "that where all the deceased's children are also the children of the deceased's surviving partner, the partner should receive the whole of the estate, and the children should not receive anything", allowing the partner to remain in the home and continue to care for the children; rather than the current situation where the deceased and his/her partner might be a couple with a young child, owning the property they live in, and the minor child would inherit a greater share of the deceased's property than the partner. In situations where the deceased's partner is not the parent of the deceased's children, the deceased's estate will be distributed between the partner and children, but the partner will receive a much greater share of the estate as well as expanded election rights.

Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 cont…	statutory legacy, with the statutory legacy for the next financial year published in the Government Gazette. • Division 4 - (Sole) Partner's rights as to estate property by election[76] – Only relevant to sole surviving partners where there are children or issue of the intestate who are not the surviving partner's children or issue – Provides for a sole surviving partner's rights (even if a minor) to property by election – Provides for procedures and timing, including where the property forms part of a larger aggregate and the election could substantially diminish the value of the remainder or make the administration of the property substantially more difficult or the election is of a kind where a Court determination of the partner's legal or equitable interest in the property is required. • Division 5 - Distribution if intestate leaves multiple partners[77] – If the intestate leaves multiple partners then different distribution rules will apply depending upon whether children or other issue also survive the intestate (and also depending upon whether they are children/issue of the partner/s or of a person who is not a partner).[78] • Division 6—Distribution if intestate leaves no partners[79] – Sets out the entitlements of 'next of kin'[80], in this order: – children, grandchildren and more distant lineal descendants – parents if the intestate leaves no partner and no children or other issue – brothers and sisters – grandparents – aunts and uncles, and the entitlement of cousins if aunts and uncles predecease the intestate – the Crown.

[76] new sections 70O–70Y

[77] new sections 70Z–70ZE

[78] Again referring to the second reading speech, the changes will be made to achieve an outcome more likely to satisfy all beneficiaries than is the case with the current formula.

[79] new sections 70ZF-70ZL

[80] As noted in the second reading speech, limiting distributions on intestacy to relatives no more distant than the deceased's first cousins (and then only in the event their parents had died).