GUARDIANSHIP AND ADMINISTRATION AMENDMENT BILL 1999
Explanatory Notes

Clause 1. Short title

Short title of the Act.

Clause 2. Commencement

The Act will come into operation upon Royal Assent.

Clause 3. The Act amended

The amendments in this Act are to amend the *Guardianship and Administration Act 1990.*

Clause 4. Section 3 amended - Interpretation

(1) As a consequence of changes to s15A and 17C, which respectively deal with the grounds on which the Board may decline to give leave to hear a matter and the length of time in which a party may appeal a decision by the Board, the interpretation of a determination by the Guardianship and Administration Board is expanded.

(2) As a consequence of changes to s64 and s106, which respectively deal with the persons for whom an Administration Order can be made and the declaration of incapacity by the Board in respect to Enduring Powers of Attorney, an interpretation of mental disability is provided.

Clause 5. Section 6 amended – President and Deputy President

The present Act requires that the Minister must appoint an acting Deputy in every case. The amendment removes this routine matter from requiring the attention of the Minister and allows the acting deputy to be appointed by default or by the Chief Justice. The amendment rectifies an anomaly between the processes of appointing an acting Deputy and an acting President.

Clause 6. Section 15A amended – The Board may decline to hear application

The Board may currently decline to hear applications that are considered to be misconceived or lacking in substance. This amendment will give the Board authority not to hear repeated or vexation applications. The Bill does however provide that any determination made by the Board under this section will be subject to the normal appeal process.

Clause 7. Section 17A amended – Review

(1) There is no need to define the division of the Act under which a single board member will be making a determination. This statement is superfluous to the section and has the potential to cause confusion to a person considering applying for a review.

(2) 10 days is too short a timeframe given that most appeal processes allow between 21 and 30 days and most parties appear before the Board without legal representation. This clause addresses the anomaly that a party has 30 days to request a statement of reasons for a determination of the Board, which is an advisable course of action prior to deciding whether to seek a review, yet has 10 days in which to file a review. This is not practicable.

Clause 8. Section 45 amended – Authority of plenary guardian

The role of a Plenary Guardian is further articulated. Changes will assist the Board to make limited orders, and assist Guardians to understand their responsibilities when given plenary authority.

Clause 9. Section 64 is amended – Making of an administration order

The amendment means that "mental disability" now covers both mental disorder and intellectual disability, both of which were previously defined under the Act. The latter is within the context of s3 of the *Authority for Intellectually Handicapped Person Act 1985*, which has since been repealed and replaced with *Disability Services Act 1993* which has no similar provisions. The repealing of these definitions by the Bill allows for the ordinary dictionary meanings to be used. The amendment will therefore allow Administration Orders to be made if a person has a mental disability, the interpretation of which includes intellectual disability, psychiatric condition, acquired brain injury and dementia.

Clause 10. Section 70 amended – Administrator to act in the best interests of the represented person

The responsibilities of an Administrator are currently not fully prescribed and require articulation. This change will ensure that the responsibilities of an Administrator mirror those of a Guardian, creating consistency and facilitating a clear understanding of the need to include best interests when making a decision on behalf of a represented person.

Clause 11. Section 90 amended – Powers of Board on review

The principle of "best interests" is one of the four principles to be observed by the Guardianship and Administration Board in all of its decision making, however it is not listed under s90 as a reason for revoking or varying an Order when the Board conducts a review. This amendment will require that review applications be subjected to the test of "best interests" consistent with new applications.

Clause 12. Section 102 amended – Enduring Power of Attorney Definitions

Allows the definition of a donee to include a substitute attorney as per clause 14.

Clause 13: Section 104 amended – Execution of Enduring Power of Attorney

For an instrument to be effective as an Enduring Power of Attorney there must be a statement of acceptance by the donee(s) and, where applicable, the substitute attorney as per clause 14.

Clause 14 – Section 104B inserted – Substitute donees for Enduring Powers of Attorney

At present the Act is not clear on the matter of substitute donees. This is addressed by the Bill which would enable:

- The donor to nominate a substitute donee in the event that the original donee is unable to act, eg. where a husband wants his wife to act as sole donee until her death or incapacity, and then for the role to pass onto a son and daughter jointly,
- A donee to appoint a substitute donee, eg. where the donee is unexpectedly required to go overseas for a lengthy period of time.

Experience has shown there is a need for the ability to appoint a substitute donee and there has been community demand for this. The provision for substitute donees will provide greater flexibility, maximise the public's choice and can prevent an application for Administration.

Clause 15 – Section 106 amended – Donee of an Enduring Power of Attorney to apply for declaration of legal incapacity

The changes to this clause provide consistency with changes outlined in clause 9, by allowing the Board to declare legal incapacity and to invoke an Enduring Power of Attorney if the Donor is deemed to have a "mental disability".

Clause 16 – Section 107 amended – Obligations of a donee of an Enduring Power of Attorney

When Administrators becomes bankrupt they are obliged to inform the Board of this. It is not explicit in the Act that donees who are subject to bankruptcy provisions must have their authority reviewed by the Board. The requirement in the Bill for a donee to apply to the Board if they become bankrupt is a safeguard and emphasises the responsibility this authority carries.

Clause 17 – Section 109 amended – On application the Board may intervene in an Enduring Power of Attorney

(1) In line with changes outlined in clause 14, the provisions of this clause will allow the Board, in the event that the donee is deemed unfit or unable to continue his/her role, to appoint the person nominated as a substitute donee.

(2) In line with changes outline in clause 16 this provision will allow the Board to intervene when notified of a donee's bankruptcy.

Clause 18 – Section 119 amended – Medical and dental treatment

(1) (2) The Act currently provides a Guardian to give consent for medical treatment in most circumstances. A Guardian's consent is not required if treatment is urgently needed to save life, and is also often not sought by doctors when the person is receiving minor treatment. The section has lacked clarity and guidance for persons dealing with

the Act. It has been difficult to administer and has not properly provided for the widely accepted role that next of kin play in consent to medical treatment.

This clause therefore proposes a hierarchy of *persons responsible* who would be able to consent to medical/dental treatment without being appointed Guardian. It is an adoption of a model successfully used in New South Wales, and is in the process of being adopted in other states, including Victoria.

The Board's involvement would be required if the patient or the *person responsible* was objecting to proposed treatment, or there was dispute about proposed treatment. The requirement that application is made for joint consent, between a Guardian and the Board for a procedure for the purpose of sterilisation remains unchanged. Other contentious treatments and procedures that it is considered may require the Board's involvement are currently subject to community consultation and may be progressed at a later date.

(3) The current definition of urgent treatment focuses solely on saving life and is too narrow. The proposed change is an adoption of the definition used in New South Wales and is reflective of acceptable medical practice.

Clause 19 – Schedule 1 amended – Registrar may act as Deputy

The clause is as a consequence of changes outlined in clause 6, and

Clause 20 – Schedule 3 amended – Form 1, Enduring Power of Attorney

As a consequence of changes outlined in clause 14.

Clause 21 – Transitional and validation, Substitute donees for Enduring Powers of Attorney

Although the Act has not specifically allowed for the appointment of substitute donees in the past, it is known that Enduring Powers of Attorney have been created containing conditional alternative appointments. This clause will allow validation of any substitute donee arrangement currently in existence.