

## Guardianship Amendment (Enduring Guardians) Bill 2002

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

#### Overview of Bill

The object of this Bill is to amend the *Guardianship Act 1987*:

- (a) to allow a person appointing an enduring guardian (the **appointor**) and the person so appointed (the **appointee**) to have the instrument of appointment explained to them and signed by them using different witnesses and at different times and places, and
- (b) to enable legal practitioners from other States and Territories to witness the resignation, or the appointment or revocation of the appointment, of enduring guardians, and
- (c) to enable persons with physical disabilities who are unable to sign documents to execute documents appointing an enduring guardian, or revoking or resigning such an appointment, by directing another person to sign on their behalf or by affixing their mark, and
- (d) to enable an alternative enduring guardian to take over on the death, incapacity or resignation of an original enduring guardian, and
- (e) to enable an appointor to appoint enduring guardians to act either jointly or severally (or both) when making decisions on behalf of the appointor, and
- (f) to enable an enduring guardian to resign his or her appointment, and
- (g) to permit the continuation of the appointment of a joint enduring guardian after the death, incapacity or resignation of another joint enduring guardian, and
- (h) to enable an appointor to specify in the document making the appointment that the death, incapacity or resignation of a joint enduring guardian does not terminate the authority of any other joint enduring guardian that the appointor appoints, and
- (i) to enable the Guardianship Tribunal to appoint a new enduring guardian where an existing enduring guardian has died, become incapacitated or wishes to resign, and
- (j) to enable the Guardianship Tribunal to validate an otherwise invalid or incomplete appointment of an enduring guardian, and
- (k) to provide for the recognition in New South Wales of the appointment of enduring guardians in other States and Territories, and
- (l) to provide for the revocation of the appointment of an enduring guardian if the appointor marries or remarries, and
- (m) to make additional classes of persons ineligible for appointment as enduring guardians, and
- (n) to ensure that an enduring guardian has access to relevant information to make informed decisions concerning the appointor.

The Bill also makes consequential amendments to the *Guardianship Regulation 2000*.

#### Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Guardianship Act 1987* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the *Guardianship Regulation 2000* set out in Schedule 2.

## **Schedule 1 Amendment of Guardianship Act 1987**

**Schedule 1 [1]** amends section 5 of the Act to insert several new definitions for terms that are used in provisions to be inserted by the proposed Act.

**Schedule 1 [2]** amends section 6B of the Act to specify additional classes of persons who are ineligible to be appointed as enduring guardians.

Currently, section 6B provides that a person is not eligible to be appointed as an enduring guardian if he or she is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the medical care or treatment of the person making the appointment (or if he or she is the spouse, parent, child, brother or sister of a person so responsible or involved).

Section 6B, as amended, will provide that a person will not be eligible to be appointed as an enduring guardian if:

- (a) the person is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the provision of any of the following services for fee or reward to the person making the appointment:
  - (i) medical services (whether provided in a hospital, at home or otherwise),
  - (ii) accommodation,
  - (iii) any other services to support the person making the appointment in his or her activities of daily living, or
- (b) the person is the spouse, parent, child, brother or sister of a person so responsible or involved.

**Schedule 1 [3]** makes a consequential amendment to section 6B.

**Schedule 1 [4]** re-enacts section 6C of the Act.

Currently, section 6C specifies how an instrument must be framed and witnessed before it can operate to appoint a person as an enduring guardian.

Section 6C, as re-enacted, will have the following additional features:

- (a) Currently, the person making the appointment must sign the instrument. The re-enacted provision will enable the appointor to place his or her mark on the instrument or direct another person to sign on his or her behalf.
- (b) Currently, the execution of the instrument of appointment by both the appointor and appointee must be witnessed by the same witness. Also, that witness must be a legal practitioner, a Clerk of the Local Court or a person prescribed by the regulations. The re-enacted provision will enable the execution of the instrument by the appointor and appointee to be witnessed by different witnesses and at different times and places. The re-enacted provision also enables legal practitioners from other States and Territories to witness the execution of such instruments.

**Schedule 1 [5]** replaces section 6D of the Act (which deals with the appointment of 2 or more enduring guardians).

The new section will enable an appointor to appoint 2 or more enduring guardians to act jointly, severally or jointly and severally.

It will also provide that an instrument appointing 2 or more joint enduring guardians may provide that the death, resignation or incapacity of one or more of the appointees does not operate to terminate the appointment of any other appointee.

Finally, the new section will enable a person who was appointed by an instrument executed by an appointor as a joint enduring guardian to apply to the Guardianship Tribunal for an order confirming his or her appointment as an enduring guardian if each other appointee has died, resigned or become incapacitated.

**Schedule 1 [6]** inserts a new section 6DA in the Act to enable an instrument of appointment of an enduring guardian to appoint another person to be an alternative enduring guardian. An alternative enduring guardian will be able to take over the role of the original enduring guardian if he or she dies, resigns or becomes incapacitated. The appointment will not operate unless the alternative enduring guardian accepts the appointment.

**Schedule 1 [7]** amends section 6E of the Act to enable a person who has been appointed as an enduring guardian to have, for the purpose of exercising the guardian's functions, the same right of access to information about the appointor as the appointor has.

The amendments make it clear that nothing in the *Privacy and Personal Information Protection Act 1998* prevents a public sector agency (within the meaning of that Act) from disclosing information about an appointor to an appointee if the agency is satisfied that the disclosure of the information would assist the appointee to exercise his or her functions as an enduring guardian.

The amendments also provide that the operation of the *Health Records and Information Privacy Act 2002* is not affected in relation to the disclosure of health information about an appointor to an appointee.

Section 7 of the *Health Records and Information Privacy Act 2002* (when read with section 8 of that Act) provides that a guardian of an individual may do any act authorised, permitted or required by that Act on behalf of an individual who is incapable of doing that act. An individual is incapable of doing an act for the purposes of section 7 if the individual is incapable, by reason of age, injury, illness or physical or mental impairment, of understanding the general nature and effect of the act or communicating the individual's intentions with respect to the act. If the individual is capable of doing the act, then the guardian may not do the act on behalf of the individual unless expressly authorised to do so.

**Schedule 1 [8]** and **[9]** amend section 6H of the Act to enable an appointor to sign an instrument revoking the appointment of an enduring guardian by placing his or her mark on the instrument or directing another person to sign on his or her behalf. Currently, the appointor must sign any such instrument personally.

**Schedule 1 [10]** inserts new sections 6HA and 6HB in the Act.

Proposed section 6HA provides that the appointment of a person as an enduring guardian is revoked if the appointor marries or remarries a person (other than the appointee) after the date on which the person was appointed as an enduring guardian.

Proposed section 6HB enables a person appointed as an enduring guardian to resign his or her appointment.

**Schedule 1 [11]** amends section 6K of the Act to enable the Guardianship Tribunal to confirm the appointment (or purported appointment) of a person as an enduring guardian even if the appointment was not made in accordance with the formal requirements

of the Act or the appointor became incapacitated after announcing his or her intention to make a formal appointment. However, the Tribunal will be able to confirm such an appointment (or purported appointment) only if it is satisfied that the confirmation of the appointment would reflect the appointment that the person purporting to make the appointment intended to make.

**Schedule 1 [12]** inserts a new section 6MA in the Act to enable the Guardianship Tribunal to appoint a person to replace an enduring guardian who has died, resigned or become incapacitated. The Tribunal will be able to make such an appointment only if:

- (a) the person is eligible to be appointed as an enduring guardian, and
- (b) the Tribunal is satisfied that:
  - (i) the appointor is in need of an enduring guardian, and
  - (ii) the person has a close personal relationship with the appointor, and
  - (iii) the person is capable of carrying out the functions of an enduring guardian.

**Schedule 1 [13]** inserts a new section 6O in the Act to provide for the recognition in New South Wales of the appointment of enduring guardians made in other States or Territories.

**Schedule 1 [14]** amends clause 1 of Schedule 3 to the Act to enable regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

**Schedule 1 [15]** inserts a new Part in Schedule 3 to the Act containing certain provisions of a savings and transitional nature.

## **Schedule 2 Amendment of Guardianship**

### **Regulation 2000**

Schedule 2 makes consequential amendments to the *Guardianship Regulation 2000*.