

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* (**the Act**) as follows:

(a) to change the circumstances in which the Guardianship Tribunal (**the Tribunal**) may make a guardianship order that will not be required to be reviewed when it expires,

(b) to add to the range of functions that may be exercised by the Tribunal when, at the discretion of the President of the Tribunal, it is constituted by fewer than 3 members and to make provision for the composition and procedure of the Tribunal when so constituted,

(c) to provide that the Registrar of the Tribunal may, at the discretion of the President of the Tribunal, exercise certain functions of the Tribunal, and to provide for certain decisions of the Registrar made in the exercise of those functions to be reviewable by the Tribunal,

(d) to extend the maximum term of office of a member of the Tribunal from 3 years to 5 years.

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 amends the *Powers of Attorney Act 2003* by omitting a provision made redundant as a consequence of the amendment made by **Schedule 1 [14]**.

Clause 5 provides for the repeal of the proposed Act after all of the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Guardianship orders that are not required to be reviewed

Schedule 1 [4] changes the circumstances in which the Tribunal may make a guardianship order that is not required to be reviewed at its expiration, so that such an order can be made only if the Tribunal is satisfied that, in all the circumstances, it is in the best interests of the person who is the subject of the order that the order is not reviewed at its expiration. The Tribunal may still review the order if the Tribunal considers it necessary or if certain persons request a review.

Fewer than 3 Tribunal members may deal with certain matters

Schedule 1 [5], [6] and [8] simplify the language of subsections dealing with the different member categories of the Tribunal. Proposed section 49 (3) (a) (which is inserted by **Schedule 1 [5]**) also makes an amendment to the qualifications of legal members of the Tribunal, by broadening the category to include all Australian lawyers.

Section 51 of the Act provides that the Tribunal is, for the purpose of exercising its functions, to be constituted by no fewer than 3 and no more than 5 members, of whom at least 1 must be a legal member, at least 1 must be a professional member and at least 1 must be a community member. However, section 51A provides that the Tribunal may be constituted by 1 or 2 members if the Tribunal is exercising functions in respect of certain listed functions.

Schedule 1 [10] repeals section 51A and inserts a new section, as follows:

Section 51A (1) includes an expanded list of functions that a Tribunal constituted by fewer than 3 members may exercise, at the discretion of the President of the Tribunal. When the Tribunal is constituted by fewer than 3 members, the President is no longer

required to nominate such members in writing.

Existing section 51A (2) provides that the persons who may constitute the Tribunal are the President, the Deputy President and such other members of the Tribunal as the President may nominate. The new section 51A (2) and (4) specify, respectively, that:

(a) when the Tribunal is constituted by 2 members, the 2 members can be any combination of the different member categories but must not be from the same member category, that is, they must not both be legal members, both be professional members or both be community members, and

(b) when the Tribunal is constituted by a single member for the purpose of exercising the Tribunal's function of reviewing a decision of the Registrar, the single member must be either the President of the Tribunal, the Deputy President of the Tribunal or a legal member, and

(c) when the Tribunal is constituted by 2 members for the purpose of exercising the Tribunal's function of reviewing a decision of the Registrar, at least one member must be either the President of the Tribunal, the Deputy President of the Tribunal or a legal member.

Section 51A (3) provides that, when the Tribunal is constituted by 1 or 2 members, the Tribunal may exercise its functions under Division 2 of Part 6 even if the substantive proceedings are not before the Tribunal.

Section 51A (5) defines terms used in the proposed section.

Schedule 1 [9] omits the current provision specifying who is the presiding member of the Tribunal, which is substituted by **Schedule 1 [11]**.

Schedule 1 [11] specifies who is to be the presiding member at any sitting of the Tribunal. The new section 51B differs from current section 51 (3) and 51A (2) by providing that, if the Tribunal is constituted by a single member, that member is the presiding member and, if the Tribunal is constituted by fewer than 3 members and does not include the President of the Tribunal, the Deputy President of the Tribunal or a legal member, the presiding member is the member of the Tribunal whom the President of the Tribunal nominates.

Schedule 1 [12] provides for the determination of questions of law arising at a sitting of the Tribunal. At present, questions of law are determined by the presiding member of the Tribunal. The amendment provides that, in the case of a Tribunal constituted by fewer than 3 members, if the presiding member of the Tribunal is not the President or the Deputy President of the Tribunal or a legal member, then the presiding member may not determine a question of law arising at a sitting of the Tribunal. In those circumstances, the presiding member must refer the question of law to the President of the Tribunal, the Deputy President of the Tribunal or a legal member nominated by the President of the Tribunal for decision and must then decide the question of law according to the decision on the reference.

Schedule 1 [15] limits the power of the presiding member at a sitting of the Tribunal to order a person to appear before the Tribunal to give evidence or produce documents so that the power will only apply if the presiding member is the President of the Tribunal, the Deputy President of the Tribunal or a legal member.

Schedule 1 [21] provides that, when the Tribunal is constituted by fewer than 3 members, the Tribunal is only required to provide each party with formal written reasons for a decision that relates to consent to major treatment, a review of a guardianship order, a refusal of a request to review a guardianship order, a review of a financial management order, a refusal of a request to review a financial management order, a review of the appointment of a financial manager or a refusal of a request to review the appointment of a financial manager. The Tribunal, when constituted by fewer than 3 members, is not required to provide formal written reasons for other decisions unless a party to the proceedings has requested reasons within 14 days of the decision or an appeal against the decision has been made to the

Supreme Court.

Schedule 1 [17], [18] and [22] make consequential amendments.

Tribunal may join parties

Schedule 1 [14] extends the power of the Tribunal to join parties to proceedings before the Tribunal, so that it applies to any proceedings before the Tribunal, not just proceedings under the *Guardianship Act 1987*. This would include proceedings before the Tribunal under the *Powers of Attorney Act 2003* relating to the review of powers of attorney.

Withdrawal of applications

Schedule 1 [16] provides that an application to the Tribunal (whether under the *Guardianship Act 1987* or any other Act) cannot be withdrawn except with the consent of the Tribunal.

Exercise of certain functions of the Tribunal by the Registrar

Schedule 1 [7] omits the existing provision concerning the appointment of the Registrar and other staff of the Tribunal, which is substituted by proposed section 67B by **Schedule 1 [19]**.

Schedule 1 [19] provides for the appointment of a Registrar and other staff, sets out the functions of the Tribunal that the Registrar may exercise and provides for the review of decisions of the Registrar exercising such functions, as follows:

Proposed section 67B provides for the appointment of a Registrar and other staff (in updated terms).

Proposed section 67C sets out the functions of the Tribunal that the Registrar may exercise, at the discretion of the President of the Tribunal. For example, the section provides for the Registrar to dismiss an application if satisfied, on the face of the application, that the Tribunal does not have jurisdiction to deal with the application and to dismiss an application for want of prosecution. Alternatively, the Registrar may refer a particular matter to the Tribunal if the Registrar considers it more appropriate for the Tribunal to deal with the matter.

Proposed section 67D provides for the confirmation of decisions by the Registrar and provides that the Registrar must provide formal written reasons for any decision to refuse a request to review a guardianship order, to refuse a request to review a financial management order or to refuse a request to review the appointment of a financial manager.

Proposed section 67E provides for the review of certain decisions of the Registrar exercising functions of the Tribunal, either on the Tribunal's own motion or on the application of a party to proceedings before the Registrar. Those decisions are a refusal of a request to review a guardianship order, a refusal of a request to review a financial management order or a refusal of a request to review the appointment of a financial manager. The section also provides for the conduct of reviews of decisions of the Registrar and for the making of orders on such reviews.

Term of office of Tribunal members

Schedule 1 [23] provides that a member of the Tribunal can be appointed to hold office for a maximum period of 5 years (rather than the current maximum period of 3 years).

Schedule 1 [27] provides that the extension of the maximum term of members does not apply to the current appointment of current members of the Tribunal.

Other amendments

Schedule 1 [1] inserts definitions of terms used in the proposed amendments.

Schedule 1 [2] updates a reference to an Act that has been renamed.

Schedule 1 [3], [24] and [25] update references to a repealed Act and its provisions.

Schedule 1 [13] transfers two provisions concerning proceedings before the Tribunal to a more appropriate Division.

Schedule 1 [20] makes the language used in a section consistent.

Schedule 1 [26] provides for the making of savings and transitional regulations

consequent on the enactment of the proposed Act.

Schedule 1 [27] inserts savings and transitional provisions consequent on the enactment of the proposed Act.