

South Australia

# **Guardianship and Administration (Miscellaneous) Amendment Bill 2021**

A BILL FOR

An Act to amend the *Guardianship and Administration Act 1993* and to make related amendments to the *Coroners Act 2003* and the *Land and Business (Sale and Conveyancing) Act 1994*.

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## **Contents**

### **Part 1—Preliminary**

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

### **Part 2—Amendment of *Guardianship and Administration Act 1993***

- 4 Amendment of long title
- 5 Amendment of section 3—Interpretation
- 6 Substitution of section 5
  - 5 Principles
  - 5A Impaired decision-making capacity
- 7 Amendment of section 21—General functions of Public Advocate
- 8 Amendment of section 22—Public Advocate may raise matters with the Minister and the Attorney-General
- 9 Amendment of section 23—Delegation by Public Advocate
- 10 Amendment of section 24—Annual report
- 11 Amendment of section 29—Guardianship orders
- 12 Amendment of section 31A—Guardian to give effect to advance care directive
- 13 Amendment of section 31B—Alternative guardian
- 14 Amendment of section 32—Special powers to place and detain etc represented persons
- 15 Amendment of section 33—Applications under this Division
- 16 Amendment of section 34—Reciprocal guardianship arrangements
- 17 Amendment of section 35—Administration orders
- 18 Amendment of section 37—Applications under this Division
- 19 Amendment of section 39—Powers and duties of administrator
- 20 Amendment of section 40—Administrator's access to wills and other records
- 21 Amendment of section 41—Power of administrator to continue to act after death etc of represented person
- 22 Amendment of section 42—Power of administrator to avoid dispositions and contracts of represented person
- 23 Amendment of section 43—Where administration has disturbed entitlements of beneficiaries, the Supreme Court has power to intervene

## Guardianship and Administration (Miscellaneous) Amendment Bill 2021

## Contents

- 
- 24 Amendment of section 44—Reporting requirements for private administrators
- 25 Amendment of section 45—Reporting by Public Trustee
- 26 Amendment of section 46—Remuneration of professional administrators
- 27 Amendment of section 47—Registration of administration orders
- 28 Amendment of section 48—Reciprocal administration powers with certain states
- 29 Amendment of section 49—Withdrawal of applications
- 30 Amendment of section 50—Criteria for determining suitability for appointment
- 31 Amendment of section 51—Consent to appointment
- 32 Amendment of section 52—Joint appointments
- 33 Amendment of section 54—Termination of appointment
- 34 Amendment of section 55—Tribunal must give statement of appeal rights
- 35 Amendment of section 56—Restriction of testamentary capacity of represented person
- 36 Amendment of section 57—Review of Tribunal's orders
- 37 Insertion of Part 4 Division 5
- Division 5—Enduring powers of attorney
- 58 Enduring powers of attorney
- 38 Insertion of Part 4A
- Part 4A—Interstate orders
- 59 Preliminary
- 60 Registration of interstate orders
- 39 Amendment of heading to Part 5
- 40 Amendment of section 61—Prescribed treatment not to be carried out without Tribunal's consent
- 41 Amendment of section 64—Reviews and appeals
- 42 Amendment of section 65—Representation on reviews or appeals
- 43 Amendment of section 67—Reasons for decisions
- 44 Amendment of section 69—Tribunal may require reports
- 45 Amendment of section 74—Tribunal may give advice, direction or approval
- 46 Amendment of section 76—Ill-treatment or neglect of person with impaired decision-making capacity
- 47 Amendment of section 77—Offences in relation to certain certificates and reports
- 48 Amendment of section 78—Medical practitioner, psychologist or other health professional cannot act under this Act in respect of a relative
- 49 Amendment of section 80—Duty to maintain confidentiality

## Schedule 1—Related amendments and transitional provisions

## Part 1—Preliminary

- 1 Amendment provisions

Part 2—Amendment of *Coroners Act 2003*

- 2 Amendment of section 3—Interpretation

Part 3—Amendment of *Land and Business (Sale and Conveyancing) Act 1994*

- 3 Amendment of section 24G—Restriction on obtaining beneficial interest in selling or appraising property

## Part 4—Transitional provisions

- 4 Transitional provisions
-

The Parliament of South Australia enacts as follows:

## Part 1—Preliminary

### 1—Short title

This Act may be cited as the *Guardianship and Administration (Miscellaneous) Amendment Act 2021*.

### 5 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

### 3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

## 10 Part 2—Amendment of *Guardianship and Administration Act 1993*

### 4—Amendment of long title

Long title—delete "unable to look after their own health, safety or welfare or to manage their own affairs" and substitute:

15 with impaired decision-making capacity in respect of their own health, safety or welfare or the management of their own affairs

### 5—Amendment of section 3—Interpretation

(1) Section 3(1)—after the definition of *health professional* insert:

*impaired decision-making capacity*—see section 5A;

20 (2) Section 3(1), definitions of *mental incapacity* and *mentally incapacitated person*—delete the definitions

(3) Section 3(1), definition of *person responsible*, (a)—delete "he or she has" and substitute:

they have

25 (4) Section 3(1), definition of *person to whom the proceedings relate*—delete "the person who has or is alleged to have a mental incapacity or mental illness, or the protected person," and substitute:

the person who has or is alleged to have impaired decision-making capacity, or the represented person,

30 (5) Section 3(1), definition of *protected person*—delete the definition

(6) Section 3(1)—after the definition of *recognised advocate* insert:

*represented person* means the person the subject of a guardianship or administration order (or both) under this Act;

**6—Substitution of section 5**

Section 5—delete the section and substitute:

**5—Principles**

- 5 (1) The Tribunal must, when considering whether to make an order  
under this Act in respect of a person, observe the following  
principles:
- 10 (a) the person may be capable of making some decisions about  
the person's own health, safety or welfare or the  
management of the person's own affairs but not other such  
decisions;
- 15 (b) impaired decision-making capacity may be temporary or  
permanent and may fluctuate from time to time and in  
different circumstances;
- (c) the present will and preferences of the person should, unless  
it is not possible or reasonably practicable to do so, be  
sought and taken into account;
- 20 (d) consideration must be given to the adequacy of existing  
informal arrangements for the care of the person or the  
management of the person's financial affairs and to the  
desirability of not disturbing those arrangements;
- (e) any order made must be the one that is the least restrictive of  
the person's rights and personal autonomy as is consistent  
with the person's proper care and protection.
- 25 (2) A person making a decision for a represented person must have  
regard to the following principles:
- 30 (a) the represented person should be provided with appropriate  
support to enable the person, as far as practicable in the  
circumstances, to participate in the decision-making process  
and to express their will and preferences;
- (b) the decision made on behalf of the represented person  
should give practical effect to the represented person's will  
and preferences, to the extent that they are reasonably  
ascertainable in the circumstances;
- 35 (c) if the represented person's will and preferences are not able  
to be determined by the person despite all reasonable efforts,  
effect should be given to what the person considers the will  
and preferences of the represented person would likely be,  
based on all available information;
- 40 (d) if the person is not able to determine the represented  
person's likely will and preferences, the person should act in  
a manner which promotes the represented person's personal  
and social wellbeing;

- 5
- (e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person;
  - (f) a decision made on behalf of the represented person should be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection;
  - (g) consideration must be given to—
    - 10 (i) the importance of encouraging and supporting participation in community life and activities; and
    - (ii) the importance of maintaining the person's existing supportive relationships; and
    - (iii) the importance of maintaining the person's cultural and linguistic environment, values and beliefs.

15 **5A—Impaired decision-making capacity**

- (1) A person has *impaired decision-making capacity* if the person is unable to make decisions about their own health, safety or welfare or the management of their own affairs (such as health care, accommodation or financial affairs) as a result of—
- 20 (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or
- 25 (b) any physical illness or condition that renders the person unable to communicate their intentions or wishes in any manner whatsoever.
- (2) For the purposes of subsection (1), an adult is presumed to be able to make decisions about their own health, safety or welfare or the management of their own affairs unless there is evidence to the contrary.
- 30 (3) A person's decision-making capacity must, if practicable, be assessed at a time at which, and in an environment in which, it can be assessed most accurately.

**7—Amendment of section 21—General functions of Public Advocate**

- 35 (1) Section 21(1)(a)—delete "mentally incapacitated persons" and substitute:  
persons with impaired decision-making capacity
- (2) Section 21(1)(b)—delete "mentally incapacitated persons" and substitute:  
persons with impaired decision-making capacity
- 40 (3) Section 21(1)(c)—delete "mentally incapacitated persons or of mentally incapacitated persons generally" and substitute:  
persons with impaired decision-making capacity or such persons generally

(4) Section 21(1)(d)—delete "mentally incapacitated person" and substitute:  
person with impaired decision-making capacity

(5) Section 21(1)(d)—delete "his or her mental incapacity" and substitute:  
the person's impaired decision-making capacity

5 (6) Section 21(1)(e)—delete "mentally incapacitated persons" and substitute:  
persons with impaired decision-making capacity

(7) Section 21(1)(f)—delete "mentally incapacitated persons" and substitute:  
persons with impaired decision-making capacity

10 (8) Section 21(1)(g)—delete "he or she" and substitute:  
the Public Advocate

(9) Section 21(2)—delete "his or her" and substitute:  
official

(10) Section 21(3)—delete "him or her" and substitute:  
the Public Advocate

15 (11) Section 21(3)—delete "his or her" and substitute:  
the Public Advocate's

### **8—Amendment of section 22—Public Advocate may raise matters with the Minister and the Attorney-General**

20 (1) Section 22(1)—delete "he or she" and substitute:  
the Public Advocate

(2) Section 22(1)—delete "his or her" and substitute:  
the Public Advocate's

### **9—Amendment of section 23—Delegation by Public Advocate**

25 Section 23(1)—delete "his or her" wherever occurring and substitute in each case:  
the Public Advocate's

### **10—Amendment of section 24—Annual report**

Section 24(1)—delete "his or her" and substitute:  
the Public Advocate's

### **11—Amendment of section 29—Guardianship orders**

30 (1) Section 29(1)(a)—delete "a mental incapacity" and substitute:  
impaired decision-making capacity

(2) Section 29(2)—delete "protected" and substitute:  
represented

(3) Section 29(5)—delete "protected" and substitute:  
represented

(4) Section 29(7)—delete "protected" and substitute:  
represented

5 **12—Amendment of section 31A—Guardian to give effect to advance care directive**

Section 31A(1)—delete "protected" wherever occurring and substitute in each case:  
represented

**13—Amendment of section 31B—Alternative guardian**

10 Section 31B(1)—delete "protected" wherever occurring and substitute in each case:  
represented

**14—Amendment of section 32—Special powers to place and detain etc represented persons**

(1) Section 32(a1)(a)—delete "protected" and substitute:  
15 represented

(2) Section 32(1)(b)—delete "he or she" and substitute:  
the person

(3) Section 32(1a)—delete "he or she" and substitute:  
an

20 (4) Section 32(4)(a)—delete "him or her" and substitute:  
the person

(5) Section 32(4)(a)—delete "he or she" and substitute:  
the person

25 (6) Section 32(4)(b)—delete "he or she" and substitute:  
the person

(7) Section 32(6)—delete "he or she" first occurring and substitute:  
the member

(8) Section 32(6)—delete "protected"

(9) Section 32(6)—delete "he or she" second occurring and substitute:  
30 the person

(10) Section 32(8)(a)—delete "protected" and substitute:  
represented

**15—Amendment of section 33—Applications under this Division**

Section 33(1)(b)—delete "his or her" and substitute:  
the Public Advocate's

**16—Amendment of section 34—Reciprocal guardianship arrangements**

- 5 (1) Section 34(1)—delete "a mental incapacity" and substitute:  
impaired decision-making capacity
- (2) Section 34(1)—delete "mentally incapacitated persons" and substitute:  
persons with impaired decision-making capacity

**17—Amendment of section 35—Administration orders**

10 Section 35(1)(a)—delete "a mental incapacity" and substitute:  
impaired decision-making capacity

**18—Amendment of section 37—Applications under this Division**

Section 37(1)(b)—delete "his or her" and substitute:  
the Public Advocate's

**19—Amendment of section 39—Powers and duties of administrator**

- 15 (1) Section 39(1)(a)—delete "he or she" and substitute:  
the administrator
- (2) Section 39(1)(b)—delete "protected" and substitute:  
represented
- 20 (3) Section 39(2)—delete "protected" wherever occurring and substitute in each case:  
represented
- (4) Section 39(2)(j)—delete "he or she" and substitute:  
the administrator
- (5) Section 39(2)(k)—delete "his or her" and substitute:  
25 the represented person's
- (6) Section 39(2)(w)—delete "he or she" and substitute:  
the administrator
- (7) Section 39(2)(w)—delete "his or her" and substitute:  
the represented person's
- 30 (8) Section 39(2)(za)—delete "his or her incapacity" and substitute:  
the person's impaired decision-making capacity
- (9) Section 39(2)(za)—delete "that incapacity" and substitute:  
that impaired decision-making capacity



(10) Section 39(2)(zb)—delete "his or her" and substitute:  
the administrator's

(11) Section 39(4)—delete "protected" and substitute:  
represented

5 **20—Amendment of section 40—Administrator's access to wills and other records**

(1) Section 40(1)—delete "his or her" and substitute:  
their

10 (2) Section 40(1)—delete "protected" wherever occurring and substitute in each case:  
represented

(3) Section 40(3)—delete "he or she" and substitute:  
the administrator

(4) Section 40(3)—delete "protected" and substitute:  
represented

15 **21—Amendment of section 41—Power of administrator to continue to act after death etc of represented person**

(1) Section 41(1)—delete "protected" and substitute:  
represented

(2) Section 41(1)—delete "his or her"

20 (3) Section 41(1)—delete "he or she" and substitute:  
the administrator

(4) Section 41(2)—delete "protected" wherever occurring and substitute in each case:  
represented

25 (5) Section 41(2)—delete "he or she" and substitute:  
the administrator

(6) Section 41(3)—delete "protected" and substitute:  
represented

(7) Section 41(4)—delete "protected" and substitute:  
represented

30 **22—Amendment of section 42—Power of administrator to avoid dispositions and contracts of represented person**

(1) Section 42(1)—delete "his or her" wherever occurring and substitute in each case:  
the person's

35 (2) Section 42(2)—delete "he or she dealt had a mental incapacity" and substitute:  
they dealt had impaired decision-making capacity

- (3) Section 42(3)—delete "protected person and that he or she" and substitute:  
represented person and that the represented person

**23—Amendment of section 43—Where administration has disturbed entitlements of beneficiaries, the Supreme Court has power to intervene**

- 5 (1) Section 43(1)—delete "protected" wherever occurring and substitute in each case:  
represented
- (2) Section 43(2)—delete "protected" wherever occurring and substitute in each case:  
represented
- (3) Section 43(2)—delete "his or her" and substitute:  
10 their

**24—Amendment of section 44—Reporting requirements for private administrators**

- (1) Section 44(1)—delete "protected" and substitute:  
represented
- 15 (2) Section 44(4)(a)—delete "protected" and substitute:  
represented
- (3) Section 44(4)(b)—delete "his or her"
- (4) Section 44(5)(b)—delete "his or her"
- (5) Section 44(6)—delete "protected" and substitute:  
20 represented
- (6) Section 44(7)—delete "protected" wherever occurring and substitute in each case:  
represented
- (7) Section 44(7)—delete "mental"

**25—Amendment of section 45—Reporting by Public Trustee**

- 25 (1) Section 45(1)—delete "protected" and substitute:  
represented
- (2) Section 45(3)—delete "protected" and substitute:  
represented
- (3) Section 45(4)—delete "protected" wherever occurring and substitute in each case:  
30 represented
- (4) Section 45(4)—delete "mental"

**26—Amendment of section 46—Remuneration of professional administrators**

- (1) Section 46(1)—delete "protected" and substitute:  
represented

- (2) Section 46(3)—delete "protected" wherever occurring and substitute in each case:  
represented

**27—Amendment of section 47—Registration of administration orders**

- (1) Section 47(1)—delete "protected" and substitute:  
represented

- (2) Section 47(2)—delete "protected" and substitute:  
represented

**28—Amendment of section 48—Reciprocal administration powers with certain states**

- (1) Section 48(2)—delete "a mental incapacity" and substitute:  
impaired decision-making capacity

- (2) Section 48(2)—delete "he or she were" and substitute:  
the Public Trustee was

- (3) Section 48(3)—delete "protected" wherever occurring and substitute in each case:  
represented

- (4) Section 48(3)—delete "a mental incapacity" and substitute:  
impaired decision-making capacity

- (5) Section 48(3)(a)—delete "he or she" and substitute:  
the administrator

**29—Amendment of section 49—Withdrawal of applications**

- Section 49—delete "him or her" and substitute:  
the person

**30—Amendment of section 50—Criteria for determining suitability for appointment**

- (1) Section 50(1)(a)—delete "protected" and substitute:  
represented

- (2) Section 50(2)—delete "protected" and substitute:  
represented

**31—Amendment of section 51—Consent to appointment**

- Section 51—delete "he or she consents" and substitute:  
they consent

**32—Amendment of section 52—Joint appointments**

- Section 52—delete "protected" wherever occurring and substitute in each case:  
represented

### 33—Amendment of section 54—Termination of appointment

- (1) Section 54(1)(c)—delete "his or her" and substitute:  
     the
- (2) Section 54(2)(a)—delete "his or her" and substitute:  
     their
- (3) Section 54(2)(b)(ii)—delete "protected" and substitute:  
     represented

### 34—Amendment of section 55—Tribunal must give statement of appeal rights

- Section 55(1)(b)—delete "his or her" and substitute:  
     the person's

### 35—Amendment of section 56—Restriction of testamentary capacity of represented person

- (1) Section 56(1)—delete "protected" and substitute:  
     represented
- (2) Section 56(2)—delete "protected" and substitute:  
     represented

### 36—Amendment of section 57—Review of Tribunal's orders

- (1) Section 57(1)—delete "protected" wherever occurring and substitute in each case:  
     represented
- (2) Section 57(3)—delete "protected" and substitute:  
     represented

### 37—Insertion of Part 4 Division 5

After section 57 insert:

#### **Division 5—Enduring powers of attorney**

#### **58—Enduring powers of attorney**

- (1) Where a person the subject of proceedings under this Part is the donor of an enduring power of attorney, the Tribunal may, at any time during the proceedings and as the Tribunal considers appropriate in the circumstances—
- (a) suspend the operation of the enduring power of attorney until the proceedings are finally determined or for a specified period; or
  - (b) vary the terms of the enduring power of attorney; or
  - (c) revoke the enduring power of attorney.

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- (2) The Tribunal may make an order under this section on application or on the Tribunal's own initiative.
- (3) In making an order under subsection (1), the Tribunal may make any ancillary or consequential order that the Tribunal considers appropriate.
- (4) For the avoidance of doubt, the Tribunal may make an order under this section irrespective of whether any other order, such as an administration order, is made under this Act during the proceedings.
- (5) In this section—
- 10 *enduring power of attorney* means an enduring power of attorney within the meaning of the *Powers of Attorney and Agency Act 1984*.

### 38—Insertion of Part 4A

After Part 4 insert:

## Part 4A—Interstate orders

### 59—Preliminary

In this Part—

*corresponding law* means a law of another State or Territory of the Commonwealth that is declared by the regulations to be a corresponding law for the purposes of this Part;

20 *determining body* means a court, tribunal, board or other body that is authorised under a corresponding law to make, revoke, amend or vary a guardianship order or an administration order;

*interstate order* means an order made under a corresponding law.

### 60—Registration of interstate orders

- 25 (1) The Tribunal may register an interstate order in this State on application by—
- (a) a person acting as a guardian or administrator (however described) under the interstate order; or
- (b) the Public Advocate.
- 30 (2) On registration of an interstate order under this section—
- (a) the order has, subject to this Act, the same force and effect in this State according to its terms as if it had been made under this Act; and
- (b) this Act applies to the order, as it applies in this State, as if it were an order made under this Act.
- 35 (3) On registering an interstate order the Tribunal may—
- (a) vary the terms of the order that are to apply in this State as the Tribunal considers appropriate to give it proper effect in this State; and

(b) make any other consequential order as the Tribunal considers appropriate to give the order proper effect in this State.

(4) Without limiting the power of the Tribunal under subsection (3), in the case of an interstate order under which a person who holds an equivalent position to the Public Advocate is appointed as guardian, the Tribunal may, on registering the order, appoint the Public Advocate as the guardian for the represented person in this State unless the Tribunal considers that it is appropriate to appoint another suitable person as guardian.

(5) On registration of an interstate order, the Tribunal must notify the determining body which made the order that the order has been registered.

### **39—Amendment of heading to Part 5**

Heading to Part 5—delete "mentally incapacitated persons" and substitute:  
persons with impaired decision-making capacity

### **40—Amendment of section 61—Prescribed treatment not to be carried out without Tribunal's consent**

(1) Section 61(1)—delete "his or her mental incapacity, is incapable of giving effective consent (whether or not he or she is a protected person)" and substitute:

impaired decision-making capacity, is incapable of giving effective consent (whether or not the person is a represented person)

(2) Section 61(5)—delete "mentally incapacitated person" and substitute:  
person with impaired decision-making capacity

### **41—Amendment of section 64—Reviews and appeals**

(1) Section 64(b)(v)—delete "he or she has" and substitute:  
they have

(2) Section 64(e)—delete "he or she is" and substitute:  
they are

(3) Section 64(j)—delete "he or she is" and substitute:  
they are

### **42—Amendment of section 65—Representation on reviews or appeals**

(1) Section 65(2)—delete "he or she" and substitute:  
the person

(2) Section 65(2)(a)—delete "himself or herself"

(3) Section 65(3)—delete "his or her" and substitute:  
the legal practitioner's

- (4) Section 65(4)—delete "his or her" and substitute:  
their

**43—Amendment of section 67—Reasons for decisions**

Section 67—delete "he or she has" and substitute:  
5 they have

**44—Amendment of section 69—Tribunal may require reports**

- (1) Section 69(1)—delete "his or her mental capacity or a medical report as to his or her health" and substitute:

10 the person's decision-making capacity or a medical report as to the person's health

- (2) Section 69(4)(a)—delete "a mental incapacity" and substitute:

impaired decision-making capacity

- (3) Section 69(5)—delete "he or she considers" and substitute:

they consider

15 **45—Amendment of section 74—Tribunal may give advice, direction or approval**

Section 74(1)—delete "his or her" and substitute:  
their respective

20 **46—Amendment of section 76—Ill-treatment or neglect of person with impaired decision-making capacity**

- (1) Section 76—delete "a mental incapacity" and substitute:

impaired decision-making capacity

- (2) Section 76—delete "ill-treats" and substitute:

ill-treats

25 **47—Amendment of section 77—Offences in relation to certain certificates and reports**

- (1) Section 77(2)—delete "a mental incapacity" wherever occurring and substitute in each case:

impaired decision-making capacity

- 30 (2) Section 77(3)—delete "he or she describes himself or herself" and substitute:

the person describes themselves

- (3) Section 77(4)—delete "a mental incapacity" and substitute:

impaired decision-making capacity

**48—Amendment of section 78—Medical practitioner, psychologist or other health professional cannot act under this Act in respect of a relative**

(1) Section 78—delete "he or she is" and substitute:

they are

(2) Section 78—delete "his or her" and substitute:

their

**49—Amendment of section 80—Duty to maintain confidentiality**

Section 80(2)(a)—delete "his or her" and substitute:

the person's

**Schedule 1—Related amendments and transitional provisions****Part 1—Preliminary****1—Amendment provisions**

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

**Part 2—Amendment of *Coroners Act 2003*****2—Amendment of section 3—Interpretation**

(1) Section 3(1), definition of *reportable death*, (f)(i)— delete "or the *Guardianship and Administration Act 1993*"

(2) Section 3(1), definition of *reportable death*, (f)—after subparagraph (i) insert:

(ia) a represented person under the *Guardianship and Administration Act 1993*; or

**Part 3—Amendment of *Land and Business (Sale and Conveyancing) Act 1994*****3—Amendment of section 24G—Restriction on obtaining beneficial interest in selling or appraising property**

Section 24G(10a)(b)—delete "protected" and substitute:

represented

**Part 4—Transitional provisions****4—Transitional provisions**

(1) A guardianship order under section 29 of the principal Act in force immediately before the commencement of section 6 of this Act continues in force after that commencement as if it were a guardianship order made by the Tribunal under section 29 of the principal Act as in force after that commencement where the Tribunal was satisfied that the person the subject of the order has impaired decision-making capacity and that an order under the section should be made in respect of the person.



- 5 (2) An administration order under section 35 of the principal Act in force immediately before the commencement of section 6 of this Act continues in force after that commencement as if it were an administration order made by the Tribunal under section 35 of the principal Act as in force after that commencement where the Tribunal was satisfied that the person the subject of the order has impaired decision-making capacity and that an order under the section should be made in respect of the person.
- 10 (3) An amendment to the principal Act made by section 37 of this Act applies in relation to proceedings irrespective of whether the proceedings were initiated before or after the commencement of that section.
- 15 (4) The consent of the Tribunal given under section 61(1)(a) of the principal Act and in effect immediately before the commencement of section 6 of this Act in respect of the treatment of a person remains in effect for the purposes of section 61(1)(a) after that commencement as if it was given under section 61(1)(a) of the principal Act as in force after that commencement and the Tribunal was satisfied that the person, by reason of impaired decision-making capacity, is incapable of giving effective consent.
- (5) In this clause—

*impaired decision-making capacity* has the same meaning as in the principal Act as in force immediately after the commencement of section 6 of this Act;

20 *mental incapacity* has the same meaning as in the *Guardianship and Administration Act 1993* as in force immediately before the commencement of section 6 of this Act;

*principal Act* means the *Guardianship and Administration Act 1993*;

*Tribunal* means the South Australian Civil and Administrative Tribunal established under the *South Australian Civil and Administrative Tribunal Act 2013*.