**Summary of changes to the Guardianship and Administration (Miscellaneous) Amendment Bill 2021**

**Modernisation of principles and language**

The primary purpose of the Bill is to modernise the principles underpinning the Guardianship and Administration Act 1993 (G&A Act) to reflect best practices around guardianship and administration, and to achieve greater consistency with the language and approach recommended by the United Nations Convention on the Rights of Persons with Disabilities and with other South Australian legislation relating to persons with impaired-decision making capacity.

The Bill replaces the terms 'mental incapacity' or 'mentally incapacitated person' with 'impaired decision-making capacity' and 'person with impaired decision-making capacity'. Decision-making capacity is defined in new section 5A, and makes clear that an adult is presumed to have decision-making capacity. Section 5A requires, if practicable, decision-making to be assessed at a time at which, and in an environment in which, it can be assessed most accurately.

The Bill also replaces references to a 'protected person', being a person who is the subject of a guardianship or administration order, with 'represented person'.

The Bill updates the principles in section 5 of the G&A Act to reflect a more contemporary understanding of capacity, explicitly recognising that a person may be capable of making some decisions but not others and that capacity may fluctuate.

The South Australian Civil and Administrative Tribunal (the Tribunal) must observe these principles when considering whether to make any order under the G&A Act.

New section 5 also places stronger emphasis on personal autonomy, recognising that persons with disabilities have the right to participate in decisions that affect them. As such, the Tribunal must, where practicable seek, and take into account the present will and preferences of the person when considering whether to make an order. Consideration must also be given to the adequacy of existing informal arrangements, and 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.

The current principles give paramount importance to what would, in the opinion of the decision maker, be the wishes of the person if he or she were not mentally incapacitated. The present wishes of the person are a secondary consideration.

Further, the current principles require consideration of the person's wishes, but do not place any obligation on the decision maker to give effect to them.

New section 5(2) sets out the principles that must be observed by a person making a decision on behalf of a represented person, should a guardianship or administration order be granted. Notably, the principles make clear that practical effect should be given to the represented person's will and preferences (to the extent they are reasonably ascertainable) and that the person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm. The views of stakeholders are sought as to whether this threshold (for overriding a person's will and preferences) is appropriate.

While the Bill is intended to achieve greater consistency between the G&A Act and related South Australian legislation, it does not adopt the definition of impaired decision-making capacity in the Advance Care Directives Act 2013. That Act frames capacity in terms of the ability to make a particular decision. It is important to recognise that capacity is decision-specific, however for the purposes of the G&A Act it would be impractical to require the Tribunal to assess and make a determination about capacity in respect of each and every decision that might need to be made.

**Enduring powers of attorney**

The Bill inserts new section 58 of the G&A Act to empower the Tribunal to revoke, vary or suspend an enduring power of attorney in the context of a guardianship or administration application. Under the Powers of Attorney and Agency Act 1984, the Supreme Court has exclusive jurisdiction to resolve disputes about enduring powers of attorney. Where concerns are raised about financial abuse in the context of a hearing under the G&A Act, there may be an urgent need to prevent further abuse. Section 58 empowers the Tribunal to make orders with respect to enduring powers of attorney in this context, and to make any ancillary or consequential order it considers appropriate.

**Registration of inteistate orders**

The Bill further inserts new Part 4A, which provides for interstate guardianship or administration orders to be registered in the Tribunal. Registration of an interstate order will give that order force and effect in South Australia, so that the

decision-making authority of the guardian or administrator is recognised in this State. Where an interstate Public Advocate is appointed as guardian, the Tribunal may appoint the South Australian Public Advocate unless it considers that it is appropriate to appoint another suitable person.