

Guardianship and Administration and Other Acts Amendment Bill 2008

Explanatory Notes

Objectives of the Bill

The objectives of this Bill are to –

- amend the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* to implement the recommendations of the Queensland Law Reform Commission (QLRC) report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (the QLRC Report);
- amend the *Guardianship and Administration Act 2000* to make the Act more workable and efficient in operation;
- amend the *Jury Act 1995* to provide that a judge may allow a jury to separate, or an individual juror to separate from the jury, after the jury has retired to consider its verdict; and
- amend the *Status of Children Act 1978* to correct an anomaly in provisions relating to in vitro fertilisation procedures for unmarried women and married women who underwent such procedures without the consent of their husband.

Reasons for the objectives of the Bill and how they will be achieved

QLRC Report

The *Guardianship and Administration Act 2000* (GAA) provides for the appointment of guardians and administrators to manage personal and financial affairs of adults with impaired decision-making capacity and establishes the Guardianship and Administration Tribunal (the Tribunal), Public Advocate, Community Visitor Program and Office of Adult Guardian. The GAA operates in partnership with the *Powers of Attorney Act 1998*, which governs powers of attorney, enduring powers of attorney

and statutory health attorneys. Both Acts provide for the substitute decision making regime for adults with impaired decision making capacity. This regime was largely based on the recommendations of the Queensland Law Reform Commission (QLRC) in its Report No 49, *Assisted and Substituted Decisions*.

In October 2005, the then Attorney-General and Minister for Justice referred to the QLRC:

- (i) a review of the confidentiality provisions of the guardianship legislation (Stage One); and
- (ii) a broader review of the guardianship legislation (Stage Two).

The QLRC completed Stage One of the review by providing the QLRC Report to the Queensland Government in July 2007. The QLRC Report contains recommendations on the confidentiality provisions in the guardianship legislation. The QLRC Report explores the need for balance in the guardianship system between protecting the privacy of persons with impaired capacity and promoting accountability and transparency in decision-making. The recommendations in the QLRC Report are aimed at achieving a balance between these interests by enhancing the focus on open justice and procedural fairness.

The Bill implements the QLRC recommendations (with some minor modifications) that relate to legislative reform. The Bill provides for greater openness in the guardianship system that will promote accountability and transparency and increase community confidence in the guardianship system. Greater openness will also result in improved outcomes for adults with impaired decision-making capacity through open and accountable decision-making. The Bill achieves this by:

- replacing the current regime of ‘confidentiality orders’ with four new types of orders: adult evidence orders, closure orders, non-publication orders and confidentiality orders (collectively called ‘limitation orders’);
- establishing a legislative presumption of openness and requiring serious harm or injustice to be demonstrated before the Tribunal may make a limitation order; and
- generally permitting publication of information about Tribunal proceedings provided the publication does not lead to identification of the adult.

Under the proposed amendments, the Tribunal will have strict legislative criteria to observe before making an order to withhold information or documents from an active party, to exclude a person from a hearing or withhold the publication of information about a Tribunal hearing. The Tribunal may only make such an order if it is necessary to avoid serious harm or injustice to a person. The result is that the threshold for making a limitation order (formally known as a confidentiality order) is high and the circumstances where a limitation order can be made are limited.

The Bill provides that when the Tribunal is considering making a limitation order to protect the confidentiality of health information, it only needs to be satisfied that the release of the information would result in a “significant health detriment” to a person. This is a lower threshold test than that of “serious harm” which applies for the release of non-health related information. This lower threshold recognises the special characteristics of health information and that this type of information requires a different standard of treatment when the Tribunal is considering making a limitation order.

The Bill strengthens an active party’s right to participate in hearings and be accorded procedural fairness through the clearly defined legislative criteria to guide the decisions of the Tribunal to make a limitation order. There are requirements for the Tribunal to provide its decision and reasons to any party who is aggrieved by the decision to make a limitation order. The presumption that all hearings should be open to the public and that an active party has a right to all documents or information that are credible, relevant and significant, together with the above recommendations support a more open and transparent guardianship system.

The only QLRC recommendation that has not been implemented in the Bill is Recommendation 4-19. This recommendation proposes the Public Advocate act in the role similar to that of a ‘contradictor’ in limitation order proceedings (excluding adult evidence orders) to provide submissions to the Tribunal and act as a safeguard to ensure that the Tribunal only makes orders in accordance with the new confidentiality provisions. The Queensland Government decided not to implement this recommendation because:

- this is a move towards intervention in individual cases and could draw the Public Advocate away from its core role of systems advocacy;

- the suite of other safeguards to be implemented will result in increased openness and transparency in the guardianship system; and
- the Public Advocate will retain the right the Public Advocate currently has to intervene in proceedings where the Public Advocate believes there are systemic issues.

As an alternative, the Bill provides that the Public Advocate is to be provided with all information available to the Tribunal when considering making a limitation order, including any information or documents that are being considered as the subject of the confidentiality order and a copy of the Tribunal's decision and reasons. The Public Advocate will be able to report on any systemic issues based on the information provided by the Tribunal. This is more consistent with the systemic advocacy functions of the Public Advocate.

Other GAA Amendments

The two other amendments included in this Bill assist to achieve better workability of the GAA. The amendment to section 20 of GAA will clarify that a management plan referred to in that section relates only to financial matters so as to avoid administrators including irrelevant personal information in a financial management plan to be provided to the Tribunal.

The Bill includes a new section 138AA in the GAA to provide that the Tribunal may make a binding direction to a former attorney whose authority to act as an attorney has ended. This provision is similar to section 32B that provides for the making of binding directions by the Tribunal to former guardians and administrators. This new section enables the Tribunal to make a direction to a former attorney to provide information about past decisions so that appropriate orders or actions can be taken to protect the interests of that adult.

Amendments to Jury Act 1995

Currently, the *Jury Act 1995* provides that after a jury in a criminal trial has been sworn, the jurors must not separate (i.e. must remain together) until they have given a verdict or have been discharged by the judge. The exceptions to this requirement are that a judge must allow the jurors to separate during a lunch or dinner adjournment to obtain meals and a judge may allow the jury to separate before retiring to consider its verdict during an adjournment of the court or while proceedings are held in the jury's absence unless the judge considers allowing the jury to separate may

prejudice a fair trial. Section 55(2) of the Act provides that, while a jury is kept together outside court, the jurors must be provided with accommodation, meals and refreshments as the judge directs.

The requirement for juries to be kept together while considering a verdict can create difficulties for courts and inconvenience jurors. A number of problems have been experienced in circumstances where suitable accommodation for jurors is not readily available. This situation often arises because jury deliberations do not start until late and major sporting or other events have resulted in a lack of accommodation. In most other jurisdictions in Australia, the court or a judge may allow a jury to separate in criminal proceedings after it retires to consider its verdict.

To address these difficulties and recognising the family and personal commitments of jurors, the amendment included in this Bill to the Jury Act will give a trial judge discretion to allow a jury to separate, or an individual juror to separate from the jury, after the jury has retired to consider its verdict provided this would not prejudice a fair trial. If a judge decides to exercise this discretion, there will also be provision for the judge to impose conditions on a juror or jurors.

Amendments to Status of Children Act 1978

The purpose of the *Status of Children Act 1978* (SCA) is to protect children by conferring parental status on adults to enable them to exercise the powers and responsibilities of parents under statute and common law to care for their children.

The SCA creates parentage presumptions for the married mother of a child born as a result of artificial insemination or a procedure where an embryo fertilised outside her body is implanted in her womb (in vitro fertilisation). The SCA also creates presumptions of law for the mother's husband or male de facto partner. The donor of semen or ovum is presumed to not have produced the semen or ovum and not to be the father or mother of the child born as the result of such a procedure.

However, where an in vitro fertilisation procedure is performed on an unmarried woman (a single woman or woman in a same sex relationship) or a married woman without the consent of her husband, the donor of semen or ovum is not excluded from any responsibilities or rights in relation to a child born as the result of such a procedure.

This unintended anomaly creates uncertainty for the status of children born as a result of such procedures and the rights and liabilities of donors of

semen or ovum. The Bill addresses this anomaly by clarifying the parentage status of children and the parentage status and rights and liabilities of donors.

Estimated Cost for Government Implementation

The costs associated with the implementation of the Bill will be met within existing resources.

Consistency with Fundamental Legislative Principles

Amendments to the GAA

The amendments to the GAA in the Bill do not breach any fundamental legislative principles.

However, confidentiality provisions in legislation will require the balancing of the need to provide for accountability and transparency in decision-making against the privacy rights of a person.

Stage One of the guardianship review was guided by: the principle of open justice; the requirements of procedural fairness and the protective nature of the guardianship system. The QLRC formed the view that greater openness would result in an increase in public confidence by bringing more accountability and transparency to decision-making processes and increase public awareness of the role of the guardianship system. Although there is now greater openness in the guardianship system, the Bill maintains appropriate protection of a person's confidential information, including prohibitions against publication of certain information and the ability of the Tribunal to make limitation orders.

Also, the Bill inserts a new provision, section 138AA into the GAA that allows the Tribunal to make a direction, which is binding upon a former attorney after the appointment of the attorney has ended. There are no time limits on when the binding direction can be made upon a former attorney. Section 138AA will apply to a former attorney whose appointment ended prior to the commencement of this section. This will impose a retrospective obligation on a former attorney whose appointment ended prior to the commencement of this section, but the hearing is held and the binding direction is made after the commencement of this section.

The retrospective operation of section 138AA is justified. A person who has accepted an appointment to act as an attorney (whether before or after this section commenced) is under stringent and onerous responsibilities

and duties and must act in the best interests of the adult. For example, in circumstances where the adult with impaired capacity has been neglected, abused or exploited by the former attorney, the Tribunal may wish to issue a direction to the former attorney for the provision of information or other matters considered necessary to protect the interests of the adult. An attorney who has used his or her position to gain a benefit to the detriment of the adult should be held accountable for such actions, irrespective of when the abuse occurred or how long the appointment has ended. If there is no authority for the Tribunal to make the former attorney provide the information, the attorney may be able to avoid any legal responsibility for their actions to the detriment of the adult with impaired capacity.

Amendments to the Status of Children Act 1978

The proposed amendments to the *Status of Children Act 1978* amendment will be made retrospectively to clarify the rights and liabilities of donors and the parentage status of children born as a result of fertilisation procedures.

Ensuring the retrospective operation of the provision is important for the clear parentage and identity of a child born in these circumstances. Retrospectivity will also ensure that ongoing legal relationships are not unintentionally created between the mother and the donor/s and the child and the donor/s.

Amendments to the Jury Act 1995

The amendments to the *Jury Act 1995* are consistent with fundamental legislative principles.

Consultation

The Guardianship and Administration Tribunal, the Adult Guardian, the Public Advocate, the Commissioner for Children and Young People, Legal Aid Queensland, the QLRC and the Public Trustee have been consulted on the proposed amendments to the *Guardianship and Administration Act 2000*.

The Chief Justice of Queensland, the Chief Judge of the District Court, the Chief Magistrate, the Director of Public Prosecutions, Legal Aid Queensland, Queensland Law Society and Bar Association of Queensland have been consulted on the proposed amendment to the *Jury Act 1995*.

The Queensland Fertility Group was consulted on the proposed amendment to the *Status of Children Act 1978*.

Is the Bill substantially uniform or complementary with Commonwealth or another State's legislation

The *Guardianship and Administration Act 2000* and the *Jury Act 1995* are not Acts that are uniform or complementary with Commonwealth or another State's legislation.

The *Status of Children Act 1978* and similar legislation in other States and Territories was introduced in the 1970s to remove discrimination against children based on the marital status of their parents and to provide legal certainty about the parentage of children.

With the development of assisted reproductive technologies, amendments were made to legislation containing the parentage presumptions in most States and Territories in the 1990s to clarify the status of parents, children and donors. This occurred in 1988 in Queensland following the passage of the *Status of Children Act Amendment Act 1988*.

Since this time, most States and Territories have passed amendments to legislation providing for the status of children conceived using donor material.

Notes on Provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Act to be the *Guardianship and Administration and Other Acts Amendment Act 2008*.

Clause 2 sets out the commencement date for Parts 1, 2 and 3 as a day to be fixed by proclamation and the commencement date for Parts 4 and 5 is on assent.

Part 2 Amendment of Guardianship and Administration Act 2000

Clause 3 states that this part amends the *Guardianship and Administration Act 2000* (GAA).

Clause 4 amends section 20 to clarify that a management plan prepared by an administrator under this section relates only to financial information. Clarification to this effect will avoid administrators providing irrelevant or personal information in a management plan that is provided to the Tribunal.

Clause 5 amends section 80A. Section 80A is the definition section for chapter 5A (Consent to sterilisation of child with impairment). The phrase ‘confidentiality order’ is omitted from the list of definitions for the purposes of chapter 5A, as the Bill provides for a new regime for confidentiality orders. These types of orders are now described as limitation orders and they are defined in the new section 99B.

Clause 6 amends section 80E by replacing the reference to section 109 with section 109B and removing the reference to section 158. Section 80E describes which of the provisions of chapter 7 apply in relation to chapter 5A. The amendments in this Bill to provide for the new regime for confidentiality provisions will now apply to chapter 5A. The reference to section 109 is no longer relevant as this Bill creates a new section 109. The new section 109B provides for a new type of confidentiality order called an ‘adult evidence order’ and this section is not relevant to chapter 5A proceedings. Section 158 will now apply to chapter 5A so the reference to section 158 that says that section 158 does not apply, should be omitted.

Clause 7 provides that section 80G and chapter 5A part 3, division 4 are omitted. Section 80G provides for the making of confidentiality orders in chapter 5A proceedings. The provisions in chapter 5A, part 3, division 4 describe how and to whom the Tribunal will provide their decision and reasons. As the confidentiality provisions in the GAA will now apply to chapter 5A proceedings, the sections omitted by this clause are no longer required.

Clause 8 amends section 98 to include a provision that the Tribunal must also include in their annual report details and type of limitation orders made by the Tribunal during that year. The new sub-section 98(1)(a)(ii) is included in this amendment because Clause 24 of the *Disability Services and Other Legislation Amendment Act 2008* passed on 30 April 2008 also

amended section 98 to include a requirement for details of orders made under the new Chapter 5B (Restrictive practices) be taken into account.

Clause 9 inserts a new section 99A (Definitions for part 1) and section 99B (Types of limitation order).

The new section 99A (Definitions for part 1) provides for the definition of ‘health information’, ‘significant health detriment’ and ‘document’ for the purposes of chapter 7, part 1 (Tribunal proceedings). The terms ‘health information’ and ‘significant health detriment’ apply where an application for a limitation order is made and it relates to ‘health information’ for a person. In relation to these applications ‘serious harm’ to the person includes a ‘significant health detriment’. A ‘significant health detriment’ to a person means significant identifiable detriment to any of the following: the person’s physical or mental health or wellbeing; the person’s health care or the person’s relationship with a health provider (including the person’s willingness to fully disclose relevant information to the health provider).

The word ‘document’ for the purposes of part 1 includes a photograph, drawing, model or other object.

The new section 99B (Types of limitation order) describes the new types of limitation orders that can be made by the Tribunal. The types of limitation orders that may be made by the Tribunal are: an adult evidence order; a closure order; a non-publication order and a confidentiality order. These orders are described in the new sections 109B, 109C, 109D and 109E respectively.

Clause 10 amends sections 108 and section 109 by omitting both these sections and replacing these sections with new sections 108 to 109I.

The new section 108 (Procedural fairness and access) provides that the Tribunal must observe the rules of procedural fairness and describes the rights of an active party to access documents or information before the Tribunal and to be given a reasonable opportunity to present their case. This section does not prevent the Tribunal from making a confidentiality order under the new section 109E that will displace the active party’s right to access a document or other information.

The new section 109 (Open) provides that a hearing by the Tribunal of a proceeding must be in public. However, the Tribunal may make an adult evidence order or a closure order under the new sections 109B and 109C

respectively that will override the requirement that the hearing must be in public.

The new section 109A (Basis of consideration for limitation order) sets out the criteria the Tribunal must take as the basis of its consideration before a limitation order is made.

The new section 109B (Adult evidence order) provides the authority for the Tribunal to make an adult evidence order. An adult evidence order will allow the Tribunal to obtain relevant information that the Tribunal would not otherwise receive from the adult in the proceeding in the absence of anyone else, including for example a member of the public or a particular person, including an active party. The Tribunal may make an adult evidence order only if satisfied it is necessary to avoid serious harm or injustice to a person or to obtain relevant information the Tribunal would not otherwise receive. If the relevant information is 'health information' about a person, serious harm to a person includes 'significant health detriment' to the person. This section also creates an offence if a person contravenes an adult evidence order and provides for a maximum penalty of 200 penalty units.

The new section 109C (Closure order) provides the authority for the Tribunal to make a closure order. A closure order will allow the Tribunal to close a hearing or part of a hearing to all or some members of the public and/or to exclude a particular person, including an active party, from a hearing or part of a hearing. The Tribunal may make a closure order only if satisfied it is necessary to avoid serious harm or injustice to a person and only to the extent that it is necessary. If the hearing or part of the hearing concerns 'health information' about a person, serious harm to a person includes 'significant health detriment'. This section also creates an offence if a person contravenes a closure order and provides for a maximum penalty of 200 penalty units.

The new section 109D (Non-publication order) provides the authority for the Tribunal to make a non-publication order. A non-publication order will allow the Tribunal to prohibit the publication of information about a Tribunal proceeding, the publication of which is not prohibited by the new section 112. The Tribunal may make a non-publication order only if the Tribunal is satisfied it is necessary to avoid serious harm or injustice to a person and only to the extent that it is necessary. If the publication of information concerns 'health information' about a person, serious harm to a person includes 'significant health detriment'.

In the circumstances where the information relates to health information about a person, an application can be made to the Tribunal for a non-publication order by an interested person for the person to whom that information relates. An interested person is defined in schedule 4 to mean a person who has a sufficient and continuing interest in the other person. If the application relates to health information about a person, the application can be made to the Tribunal even after the person has died. Also, if a non-publication order that relates to health information about a person is made before the person's death, the death of the person does not affect the order.

This section also creates an offence if a person contravenes a non-publication order and provides for a maximum penalty of 200 penalty units.

The new section 109E (Confidentiality order) provides the authority for the Tribunal to make a confidentiality order. A confidentiality order will allow the Tribunal to withhold from an active party or other person a document, a part of a document or other information that is before the Tribunal. The Tribunal may make a non-publication order only if the Tribunal is satisfied it is necessary to avoid serious harm or injustice to a person and only to the extent that it is necessary. If the document or other information concerns 'health information' about a person, serious harm to a person includes 'significant health detriment'. This section also creates an offence if a person contravenes a confidentiality order and provides for a maximum penalty of 200 penalty units.

The new section 109F (Non-publication or confidentiality order made before hearing) allows the Tribunal to make a non-publication order or a confidentiality order before a hearing of the proceeding starts. However, the order will be vacated at the start of the hearing to allow a party who may be affected by the making of the non-publication order or confidentiality order, to appear before the Tribunal and make submissions about the making of the limitation order. If a non-publication order or confidentiality order is made before a hearing of the proceeding starts, sections 109G and 109I do not apply to that order.

The new section 109G (Standing for limitation order) provides that any party that would be adversely affected by a proposed limitation order has standing to be heard in relation to the making of the limitation order. This section also provides that an active party or any entity affected by a limitation order may appeal the Tribunal decision to make the order to the court.

The new section 109H (Making and notifying decision for limitation order) provides that as soon as practicable after hearing any submissions about the making of a limitation order, the Tribunal must give its decision and then after making its decision, notify and give a copy of the decision to: the adult; another active party in the proceeding; each entity heard in relation to the order and the Public Advocate. This section also allows any other person who requests a copy of the decision to be given a copy of the decision, provided that the copy of the decision does not contravene section 112 (that is, the decision must not contain any information that is likely to lead to the identification of the adult by a member of the public or by a member of a section of the public to whom the information is published).

Section 109H also provides that within 28 days of making its decision about a limitation order, the Tribunal must give to the Public Advocate all the information and relevant documents the Tribunal has considered in the making of the limitation order, including the document or other information being considered as the subject of the confidentiality order.

The new section 109I (Written reasons for limitation order and copy of reasons) applies when the Tribunal decides to make a limitation order. Other than for an adult evidence order, the Tribunal must give written reasons for its decision to make a limitation order. The Tribunal may give written reasons for its decision to make an adult evidence order. The Tribunal must give a copy of its written reasons within 28 days of making the decision to: the adult; each other active party; each entity heard in relation to the order and the Public Advocate. This section also allows any other person who requests a copy of the written reasons to be given a copy of the written reasons, provided that the copy of the written reasons does not contravene section 112 (that is, the written reasons must not contain any information that is likely to lead to the identification of the adult by a member of the public or by a member of a section of the public to whom the information is published).

Clause 11 provides for the replacement of section 112 with a new section 112. The new section 112 describes when information about a Tribunal proceeding may be published. A non-publication order made under the provisions of section 109D may override the provisions of this section that allows the publication of certain information. The new section 112 provides that generally information about a guardianship proceeding may be published. However, this section further provides that a person must not, without a reasonable excuse, publish information about a guardianship proceeding to the public or a section of the public if the publication is

likely to lead to the identification of the adult by a member of the public or by a member of a section of the public to whom the information is published. There is a maximum penalty of 200 penalty units for a breach of this section.

However, there are exceptions to the prohibition on the publication of information as provided for in section 112(2) above. Firstly, if there has been a publication of information in contravention of the GAA, the Adult Guardian or Public Advocate are permitted, if they consider it necessary in the public interest, to publish information in response to that prohibited publication. Also, if the adult the subject of the proceedings has died, information about the Tribunal proceeding may be published (apart from any health information that has been made subject of a non-publication order under section 109D(6)). Lastly, a court or the Tribunal may make an order that information that is otherwise prohibited from publication under this section may be published, if it is in the public interest or the interests of the adult.

Clause 12 amends section 138. Section 138 describes when the Tribunal may give or make advice, directions or recommendations to various parties involved in Tribunal proceedings. A note will be included after section 138(1) about section 143(d) that provides for an offence for a person to disobey a lawful order or direction of the Tribunal. Also, section 138(5) is to be omitted. This section provides that a guardian, administrator or attorney must comply with a direction given by the Tribunal unless that person has a reasonable excuse. Given section 143(d) provides for the same offence, section 138(5) is not necessary.

Clause 13 inserts a new section 138AA (Directions to former attorney). Section 138AA provides the Tribunal with the authority to make a binding direction to an attorney whose authority to act as an attorney has ended (a former attorney). The direction must only be necessary because of the ending of the former attorney's power and relate to the matter or matters the subject of the appointment. This provision is similar to section 32B of the GAA that relates to binding directions issued to former guardians and administrators. This new section will ensure that in situations where past abuse or exploitation of an adult by an attorney has occurred, the Tribunal may make a direction to the former attorney so that appropriate actions can be taken to protect the interests of that adult.

Clause 14 inserts a new section 143A (Exclusion of disruptive person from tribunal). The Tribunal is authorised to exclude a disruptive person from a hearing and may authorise the Tribunal's staff to use necessary and

reasonable help and force to remove the disruptive person. The order of the Tribunal made under this section is taken to be an authorising law for the purposes of section 16 of the *Police Powers and Responsibilities Act 2000*, that will allow a police officer to help the Tribunal staff to remove a disruptive person from the Tribunal hearing.

Clause 15 provides for the replacement of sections 156, 157 and 158 with new sections 156, 157, 158 and 158A.

The new section 156 (Making and notifying decision) does not apply to the making of a limitation order. The Tribunal must make its decision within a reasonable time after the matter is heard and as soon as practicable after making its decision must notify and give a copy of its decision to the adult, another active party in the proceeding and another person who was given notice of the hearing (under section 118). This section also allows any other person who requests a copy of the decision to be given a copy of the decision, provided that the copy of the decision does not contravene section 112 (that is, the decision must not contain any information that is likely to lead to the identification of the adult by a member of the public or by a member of a section of the public to whom the information is published). This section also provides that the copy of the decision that is provided must include a notice that states that if the person is aggrieved by the decision, they may obtain written reasons by making a written request within 28 days after the person is given the notice.

The new section 157 (Order postponing giving copy of decision) allows the Tribunal to make a postponement order. A postponement order will allow the Tribunal to postpone the notifying and giving a copy of its decision to a person under section 156, if the Tribunal is satisfied on reasonable grounds that the delay is necessary to avoid serious harm to a person or avoid the effect of the order being defeated. The maximum period the order may be postponed from being notified and given to a person is 14 days. However, this postponement order may be renewed but only if there are exceptional circumstances justifying the renewal. An exceptional circumstance may be where the adult is an acute mental state and receipt of the decision may result in a decline in the adult's mental state.

The new section 158 (Written reasons for decision) does not apply to the making of a limitation order. Section 158 provides that if directed by the President of the Tribunal to give written reasons for the decision, the Tribunal must give written reasons for the decision within 28 days after the later of either the day the decision was made or the day the direction was given. A person aggrieved by a decision may also request the Tribunal to

provide written reasons (see section 156(6)) and the Tribunal must provide written reasons to the aggrieved person within 28 days after receiving the request.

The new section 158A (Copy of reasons to be given) does not apply to the making of a limitation order. Section 158A describes to whom the Tribunal gives its written reasons and includes the adult concerned in the matter and each other active party in the proceeding. (Section 119 describes who is an active party for a proceeding). This section also allows any other person who requests a copy of the written reasons to be given a copy of the written reasons, provided that the copy of the written reasons does not contravene section 112 (that is, the written reasons must not contain any information that is likely to lead to the identification of the adult by a member of the public or by a member of a section of the public to whom the information is published).

Clause 16 amends section 164. Section 164 describes who may appeal against a Tribunal decision and they are known as an ‘eligible person’. This amendment adds a further category to the list of who is an eligible person that may appeal against a Tribunal decision. This additional category is a party or entity who is entitled to appeal under section 109G(2) in relation to the making of a limitation order.

Clause 17 amends section 164A to include a further subsection that describes when the notice of appeal may be filed when a postponement order is made under section 157. When the Tribunal has made a postponement order, the notice of appeal may be filed within 28 days after the later of: the last day of the specified period or periods or the date of the written reasons for the Tribunal’s decision.

Clause 18 provides for the replacement of section 193 (Report after investigation or audit) with a new section 193 and section 193A.

The new section 193 (Report after investigation or audit) provides that after the Adult Guardian has carried out an investigation or audit in relation to an adult, the Adult Guardian must prepare a written report and give a copy of the written report to any person who requested the investigation or audit and to every attorney, guardian or administrator for the adult. The Adult Guardian must also allow an interested person to inspect a copy of the report and obtain a copy (at the interested person’s own expense). An interested person is defined in schedule 4. The Adult Guardian may also, if the Adult Guardian considers it appropriate, remove information from a

copy of the report that is to be given, provided or inspected if that information is likely to result in a person's identification.

The new section 193A (Prohibited use of report after investigation or audit) provides that a person who has accessed a copy of an investigation report by the Adult Guardian must not (except if there is a reasonable excuse) publish information contained in the report to the public or section of the public, if the publication is likely to result in the identification of a person (whose identifying information has been removed by the Adult Guardian in that report) by a member of the public or by a member of the section of the public to whom the information is published. This section creates an offence if a person contravenes this section and provides for a maximum penalty of 200 penalty units. This section does not apply to persons to whom section 249 (Protected use of confidential information) applies and to an attorney. Section 249 describes the duty of confidentiality for certain persons, such as guardians or administrators. Section 74 of the *Powers of Attorney Act 1998* describes the duty of confidentiality for an attorney.

Clause 19 amends section 246 that provides for the definitions to be used in part 4 of Chapter 11. Part 4 of chapter 11 provides for the protection from liability and dealing with information under the GAA. Section 246 includes further definitions such as: '*commission*', '*confidential information*', '*consultant*', '*relevant person*', '*relevant tribunal person*', '*substituted decision-making review*' and '*use*'.

Clause 20 provides for the replacement of sections 249 and 250 with the new sections 249, 249A and 250.

The new section 249 (Protected use of confidential information) describes the obligations of a 'relevant person' (as defined in section 246) for the use or disclosure of confidential information (also defined in section 246). A relevant person is only permitted to use the confidential information for the purposes of this Act or as provided for under section 249(3).

The new section 249A (Prohibited use of confidential information) provides that a relevant person (as defined in section 246) must not use confidential information (also defined in section 246) that is gained because of being a relevant person, or because of an opportunity being given by being a relevant person, other than for the purposes of the GAA or as provided for in section 249(3), unless the person has a reasonable excuse. The maximum penalty for a contravention of this section is 200 penalty points.

The new section 250 (Disclosure of information about investigations) provides the authority of the Adult Guardian to disclose information about an investigation to the public or section or the public about an issue the subject of an investigation by the Adult Guardian, if the Adult Guardian is satisfied the disclosure is in the public interest. When determining whether it is in the public interest to disclose information under this section, the Adult Guardian must have regard to any likely prejudice to the investigation, any need to protect the identity of a complainant or other entity and any other circumstance of urgency. Also, if the information contains any adverse statements about the entity that would normally require the entity be given an opportunity to comment upon those adverse statements, the Adult Guardian must have regard to this but may decide to publish the adverse statement/s without giving the entity an opportunity to comment upon the adverse statement/s, if the disclosure of the adverse statement/s is necessary and reasonable in the public interest.

Clause 21 inserts a new section 267 (Directions to former attorney) that provides for the transitional operation of the new section 138AA included in this Bill. This section provides that section 138AA also applies in relation to a person whose appointment as attorney for a matter ended before the commencement of this section. This section will allow for the retrospective operation of section 138AA, so that when the appointment of an attorney ends prior to the commencement of section 138AA, the Tribunal may make a binding direction to that former attorney under section 138AA.

Clause 22 amends Schedule 4 (Dictionary) to include the new definitions used in this Bill. These new definitions include: *'adult for chapter 7 proceedings'*, *'adult evidence order'*, *'closure order'*, *'confidentiality order'*, *'document'*, *'guardianship proceeding'*, *'health information'*, *'limitation order'*, *'non-publication order'*, *'power of attorney'* and *'significant health detriment'*. The definition of *'forensic examination'* is also amended as a consequence of the amendment to the *Police Powers and Responsibilities Act 2000*. The definition of *'management plan'* is also amended as a consequence of the amendment to section 20 of the GAA.

Part 3 **Amendment of Powers of Attorney Act 1998**

Clause 23 states that this part amends the *Powers of Attorney Act 1998* (POA).

Clause 24 provides for the replacement of section 74 with the new sections 74 and 74A.

The new section 74 (Protected use of confidential information) describes the obligations of an attorney or statutory health attorney for the use or disclosure of confidential information. Confidential information is defined in section 74(4). An attorney or statutory health attorney who gains confidential information because of being an attorney or statutory health attorney, or because of an opportunity being given by being an attorney or statutory health attorney is only permitted to use the confidential information for the purposes of the POA or as provided for under section 74(3).

The new section 74A (Prohibited use of confidential information) provides that an attorney or statutory health attorney must not use confidential information (defined in section 74(4)) that is gained because of being an attorney or statutory health attorney, or because of an opportunity being given by being an attorney or statutory health attorney unless the person has a reasonable excuse. The maximum penalty for a contravention of this section is 200 penalty points.

Part 4 **Amendment of *Jury Act 1995***

Clause 25 states that this part amends the *Jury Act 1995*.

Clause 26 replaces section 53 of the *Jury Act 1995*. The new section 53 continues to include a general provision prohibiting a jury in a criminal trial from separating after it has been sworn in until it has given its verdict or been discharged by the judge. A trial judge will continue to have power to allow the jury to separate during an adjournment or while proceedings are held in their absence and be required to allow the jury to separate during a lunch or dinner adjournment to obtain meals.

Section 53 also includes a new provision in subsection 5 which gives discretion to a trial judge, after a jury has retired to consider its verdict, to allow the jury to separate, or an individual juror to separate from the jury, if the judge considers that allowing the jury or juror to separate would not prejudice a fair trial. The trial judge also has power to impose conditions on the jury or juror in such circumstances and it is an offence for a juror not to comply with any conditions imposed.

If a juror separates from the rest of the jury in contravention of section 53 the validity of proceedings is not affected although the juror may be punished summarily for contempt of court. The judge can also discharge the jury if the judge considers that the contravention would prejudice a fair trial if the contravention is discovered before the verdict is given.

Clause 27 inserts a new section 78 in the Act. This new section is a transitional provision for section 53. It provides that sections 53(5) and (6), which give a judge discretion to allow a jury to separate after retiring to consider its verdict and power to impose conditions on jurors in such circumstances, only apply where the jury retires on or after commencement of the new section 53.

Part 5 Status of Children Act 1978

Clause 28 states that this part amends the *Status of Children Act 1998*.

Clause 29 makes amendments to section 14 to clarify the retrospective operation of the parentage of children provisions in certain situations.

Section 14(1) is amended to make the provisions of division 2, subdivision 2 (Fertilisation procedures – married women with consent) and section 18 (Artificial insemination) apply to pregnancies and children referred to in sections 15, 16, 17 or 18, regardless of whether the pregnancy or birth occurred before or after the passing of the *Status of Children Act Amendment Act 1988*.

Section 14(2) is amended to clarify that nothing in any provision of division 2, subdivision 2 (Fertilisation procedures – married women with consent) or section 18 (Artificial insemination) affects the vesting in possession or in interest of any property that occurred before the passing of the *Status of Children Act Amendment Act 1988*.

A new section 14(2A) is inserted. This subsection provides that the provisions of division 2, subdivision 3 (other than section 18) apply:

- in relation to a pregnancy mentioned in section 18AA or 18AB, whether the pregnancy happened before or after the commencement of the *Guardianship and Administration and Other Acts Amendment Act 2008*, part 5, whether or not it resulted from a procedure carried out in Queensland; and
- in relation to any child born as a result of any pregnancy mentioned in section 18AA or 18AB, whether or not the child was born before or after the *Guardianship and Administration and Other Acts Amendment Act 2008*, part 5.

A new section 14(2B) is also inserted. It provides that nothing in subdivision 2, subdivision 3 (other than section 18) affects the vesting in possession or in interest of any property that occurred before the passing of the *Guardianship and Administration and Other Acts Amendment Act 2008*, part 5.

Clause 30 inserts a new subdivision 1 and heading, “Subdivision 1 Interpretation”.

Clause 31 inserts a new subdivision 2 and heading, “Subdivision 2 Fertilisation procedures – married women with husband’s consent”, and a new section 14B. The new section 14B provides that the subdivision applies if a married woman undergoes a fertilisation procedure with the consent of her husband.

The creation of these new subdivisions 1 and 2 (together with subdivision 3 created by *Clause 35*) make it simpler to ascertain the different presumptions and rights and liabilities pertaining to the different circumstances in which a child may be born.

Clause 32 omits the words, “in accordance with the consent of her husband” from section 15(2).

Clause 33 omits the words “in accordance with the consent of her husband” from section 16(2).

Clause 34 omits the words “in accordance with the consent of her husband” from section 17(2).

Clause 35 inserts after section 17, a new subdivision 3 and heading, “Subdivision 3 Fertilisation procedures – other married women and unmarried women” and creates a new section, section 17A.

The new section 17A provides that subdivision 3 applies if a woman who is not married undergoes a fertilisation procedure or a married woman, without the consent of her husband, undergoes a fertilisation procedure.

Clause 36 amends section 18 by replacing the heading with a new heading, “Artificial insemination” and, as the new section 17A clarifies the application of the section, removes reference to a woman who is not married or who is married but undergoes the procedure without her husband’s consent. It also clarifies a reference to the man who produced the semen in section 18(2).

Clause 37 inserts new sections, section 18AA and 18AB.

The new section 18AA refers to procedures where fertilisation is by the implanting in the womb of a woman an embryo derived from her ovum and fertilised outside her body by semen produced by a man who is not her husband.

If a woman becomes pregnant by such a procedure, the section states:

- that the man who produced the semen has no rights and liabilities in relation to any child born unless, at any, time he becomes the husband of the child’s mother;
- if the man becomes the husband of the child’s mother, his rights and liabilities are the rights and liabilities of a father of a child, but unless there is agreement to the contrary, are restricted to the rights and liabilities that arise after the man becomes the mother’s husband.

The new section 18AB refers to procedures where fertilisation is by the implanting in the woman of a woman an embryo derived from an ovum produced by another woman and fertilised by semen produced by a man who is not the first mentioned woman’s husband.

If a woman becomes pregnant by such a procedure, the following presumptions of law are made irrebuttable:

- the woman who underwent the procedure is presumed to have produced the ovum and to be the mother of any child born;
- the woman who produced the ovum used in the procedure is presumed not to be the mother of any child born.

Further, if a woman becomes pregnant by such a procedure, the section states:

- that the man who produced the semen has no rights and liabilities in relation to any child born unless, at any, time he becomes the husband of the child's mother;
- if the man becomes the husband of the child's mother, his rights and liabilities are the rights and liabilities of a father of a child, but unless there is agreement to the contrary, are restricted to the rights and liabilities that arise after the man becomes the mother's husband.

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