

# **GUARDIANSHIP (AMENDMENT) ACT 1993 No. 26**

NEW SOUTH WALES



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**GUARDIANSHIP (AMENDMENT) ACT 1993 No. 26**

NEW SOUTH WALES



**Act No. 26, 1993**

An Act to amend the Guardianship Act 1987 with respect to consents to medical and dental treatment for persons with disabilities and for other purposes; and to amend the Protected Estates Act 1983. [Assented to 8 June 1993]

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Guardianship (Amendment) Act 1993.

**Commencement**

2. This Act commences on a day or days to be appointed by proclamation.

**Amendment of Guardianship Act 1987 No. 257**

3. The Guardianship Act 1987 is amended as set out in Schedule 1.

**Amendment of Protected Estates Act 1983 No. 179**

4. The Protected Estates Act 1983 is amended as set out in Schedule 2.

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**SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987**

(Sec. 3)

(1) Section 3 (**Definitions**):

- (a) From section 3 (1), omit the definition of “person responsible”, insert instead:

“**person responsible**” has the meaning given by section 3A;

- (b) Omit section 3 (5).

(2) Section 3A:

After section 3, insert:

**Persons responsible**

3A. (1) For the purposes of this Act, the “**person responsible**” for another person (not being a child) means:

- (a) if the other person is under guardianship—the guardian of the other person; or

(b) if:

- paragraph (a) does not apply; and

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- the other person has a spouse (not being a person who is himself or herself under guardianship) with whom the other person has a close, continuing relationship,

the spouse; or

(c) if:

- paragraphs (a) and (b) do not apply; and
- subject to subsections (3) and (4), a person has the care of the other person,

the person who has care of the other person; or

(d) if:

- paragraphs (a), (b) and (c) do not apply; and
- the other person has a close friend or relative, that friend or relative; of

(e) if the other person is in the care of the Director-General under section 13—the person who was the responsible person for the other person immediately before the other person came to be in the care of the Director-General.

However, in Part 5 (Medical and dental treatment), “**person responsible**” for another person means the Director-General if the other person is in the care of the Director-General under section 13.

(2) For the purposes of this Act, “person responsible?” for a child means a person responsible for the child within the meaning of the Children (Care and Protection) Act 1987. However, in Part 5 of this Act, “**person responsible**” for a child means the Minister or the Director-General if the child is in the care of the Minister or Director-General under Part 5 or 6 of that Act.

(3) The circumstances in which a person is to be regarded as having the care of another person include (but are not limited to) the case where the person, otherwise than for remuneration (whether from the other person or any other source), on a regular basis:

- (a) provides domestic services and support to the other person; or

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued*

(b) arranges for the other person to be provided with such services and support.

(4) A person who resides in an institution (such as a hospital, nursing home, group home, boarding-house or hostel) at which he or she is cared for by some other person is not, merely because of that fact, to be regarded as being in the care of that other person, and remains in the care of the person in whose care he or she was immediately before residing in the institution.

(5) A person is a close friend or relative of another person for the purposes of this section if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare. However, a person is not to be regarded as such a friend or relative if the person is receiving remuneration (whether from the person or some other source) for any services that he or she performs for the other person in relation to the person's care.

(6) The President of the Board may issue guidelines, not inconsistent with subsection (5), specifying the circumstances in which a person is to be regarded as a close friend or relative of another person.

(7) In this section, “**remuneration**” does not include a carer's pension.

(3) Section 16 (**Guardianship orders**):

After section 16 (2), insert:

(3) Two or more guardians of a person, each with different functions, may be appointed under one or more limited guardianship orders. In that case, a reference to the guardian of the person is a reference to whichever of those guardians has the relevant function.

(4) Section 33 (**Definitions**):

(a) Omit section 33 (1), insert instead:

(1) In this Part:

“**medical or dental treatment**” or “**treatment**” means:

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SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued*

- (a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by or under the supervision of a medical practitioner; or
  - (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist; or
  - (c) any other act declared by the regulations to be treatment for the purposes of this Part,
- but does not include:
- (d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or
  - (e) first-aid medical or dental treatment; or
  - (f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (being a drug for which a prescription is not required and which is normally self-administered); or
  - (g) any other kind of treatment that is declared by the regulations not to be treatment for the purposes of this Part;

**“major treatment”** means treatment (other than special treatment) that is declared by the regulations to be major treatment for the purposes of this Part;

**“minor treatment”** means treatment that is neither special treatment nor major treatment;

**“special treatment”** means:

- (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or
- (b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned; or

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued*

- (c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part.
- (b) Omit section 33 (4).
- (5) Part 5, Division 2:  
Omit the Division, insert instead:

**Division 2—Medical and dental treatment**

**Offences**

35. (1) A person must not carry out medical or dental treatment on a patient to whom this Part applies unless:

- (a) consent for the treatment has been given in accordance with this Part; or
- (b) the carrying out of the treatment is authorised by this Part without any such consent; or
- (c) the treatment is carried out in accordance with an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons.

Maximum penalty:

- in the case of special treatment (on conviction on indictment)—imprisonment for 7 years; or
- in the case of minor or major treatment (on summary conviction)—imprisonment for 1 year or 10 penalty units, or both.

(2) This section does not limit the operation of any other Act or law under which minor treatment may be carried out on a person without that person's consent.

**Who may give consent**

36. (1) Consent to the carrying out of medical or dental treatment on a patient to whom this Part applies may be given:

- (a) in the case of minor or major treatment—by the person responsible for the patient; or
- (b) in any case—by the Board.

(2) The guardian of a patient may also consent to the carrying out of continuing or further special treatment if the Board has previously given consent to the carrying out of the

**SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued***

treatment and has authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature.

**When treatment may be carried out without any such consent**

37. (1) Medical or dental treatment may be carried out on a patient to whom this Part applies without consent given in accordance with this Part if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency:

- (a) to save the patient's life; or
- (b) to prevent serious damage to the patient's health; or
- (c) except in the case of special treatment—to prevent the patient from suffering or continuing to suffer significant pain or distress.

(2) Minor treatment may (subject to subsection (3)) also be carried out on a patient to whom this Part applies without any consent given in accordance with this Part if

- (a) there is no person responsible for the patient; or
- (b) there is such a person but that person either cannot be contacted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment.

(3) The medical practitioner or dentist carrying out, or supervising the carrying out of, minor treatment in accordance with subsection (2) is required to certify in writing in the patient's clinical record that:

- (a) the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being; and
- (b) the patient does not object to the carrying out of the treatment.

**(6) Section 41 (Consents given by the Public Guardian):**

Omit the section.



SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued*

(7) Section 42 (**Applications to the Board**):

Omit section 42 (3), insert instead:

(3) Whenever such an application is made for consent to the carrying out of medical or dental treatment and the treatment cannot be carried out without that consent, the Board may, by order:

(a) direct the person who is to carry out the treatment not to start the treatment; or

(b) if the treatment has already started—direct the person who is carrying out the treatment to discontinue it, until the Board has determined the application.

(4) A person who, without lawful excuse, fails to comply with such an order is guilty of an offence.

Maximum penalty (subsection (4)): 5 penalty units.

(8) Section 43 (**Service of applications**):

(a) After “the patient;” wherever occurring, insert “and”.

(b) From section 43 (1) (c), omit “located; and”, insert instead “located.”.

(c) Omit section 43 (1) (d).

(9) Section 44 (**Board may give consent**):

From section 44 (2) (a) (iv), omit “the Public Guardian”, insert instead “any guardian of the patient who has responsibility for making decisions with respect to the carrying out of medical or dental treatment on the patient”.

(10) Section 45:

Omit the section, insert instead:

**Restrictions on Board’s power to give consent**

45. (1) The Board must not give consent to the carrying out of medical or dental treatment on a patient to whom this Part applies unless the Board is satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient’s health and well-being.

(2) However, the Board must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued*

(a) to save the patient's life; or  
(b) to prevent serious damage to the patient's health,  
or unless the Board is authorised to give that consent under  
subsection (3).

(3) In the case of:

- (a) special treatment of a kind specified in paragraph (b)  
of the definition of that expression in section 33 (1); or  
(b) prescribed special treatment (other than special  
treatment of a kind specified in paragraph (a) of that  
definition),

the Board may give consent to the carrying out of the  
treatment if it is satisfied that:

- (c) the treatment is the only or most appropriate way of  
treating the patient and is manifestly in the best  
interests of the patient; and  
(d) in so far as the National Health and Medical Research  
Council has prescribed guidelines that are relevant to  
the carrying out of that treatment—those guidelines  
have been or will be complied with as regards the  
patient.

(11) Section 45A:

After section 45, insert:

**Consents to continuing or further special treatment by a  
patient's guardian with authority of the Board**

45A. (1) The Board may, when giving consent to the  
carrying out of special treatment on a patient to whom this  
Part applies, confer on the guardian of the patient authority to  
consent:

- (a) to the continuation of the treatment; or  
(b) to the carrying out on the patient of further special  
treatment of a similar nature.

(2) The Board may only confer such an authority at the  
request or with the consent of the guardian.

(3) The Board may at any time:

- (a) impose conditions or give directions as to the exercise  
of such an authority; or

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
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(b) revoke such an authority.

(4) If the guardian has an authority conferred under this section, any person may request the guardian for the guardian's consent to the carrying out of the relevant treatment.

(5) In considering a request, a guardian must have regard to:

- (a) the views (if any) of the patient; and
- (b) the objects of this Part.

(12) Section 46 (**Effect of consent**):

(a) In section 46 (2), after "person responsible for", insert ", or the guardian of,".

(b) From section 46 (2) (a), omit "by whom the proposed treatment is to be carried out", insert instead "carrying out or supervising the proposed treatment".

(c) Omit section 46 (3), insert instead:

(3) A consent given by the guardian of the patient has effect despite any objection made by a patient to the carrying out of the treatment if the guardian has consented to that treatment in accordance with the authority of the Board under section 46A.

(4) For the purposes of this section, an objection by a patient to that carrying out of proposed medical or dental treatment is to be disregarded if

- (a) the patient has minimal or no understanding of what the treatment entails; and
- (b) the treatment will cause the patient no distress or, if it will cause the patient some distress, the distress is likely to be reasonably tolerable and only transitory.

(5) Nothing in this Part precludes the Board, a person responsible or a guardian from giving consent to the carrying out on a patient to whom this Part applies of medical or dental treatment specifically excluded from the definition of that expression in section 33 (1). This section applies to any such consent as if that treatment were not excluded from that definition.

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—  
*continued*

(13) Section 46A:

After section 46, insert:

**Power of guardian to override patient's objection to treatment when authorised by the Board**

46A. (1) The Board may confer on the guardian of a patient to whom this Part applies authority to override the patient's objection to the carrying out on the patient of major or minor treatment.

(2) The Board may confer such an authority only at the request or with the consent of the guardian and only if it is satisfied that the patient has on previous occasions objected to similar treatment being carried out on the patient.

(3) The Board may at any time:

- (a) impose conditions or give directions as to the exercise of such an authority; or
- (b) revoke such an authority.

(4) The guardian may exercise such an authority only if satisfied that the proposed treatment is manifestly in the best interests of the patient.

(14) Section 53 (**Procedure at sittings of the Board**):

Omit section 53 (2), insert instead:

(2) The provisions of this Act, the regulations and the rules of the Board relating to proceedings before the Board apply to proceedings before the Board under the Protected Estates Act 1983.

**SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES  
ACT 1983**

(Sec. 4)

(1) Section 17A (**Guardianship Board may make management orders**):

(a) Omit section 17A (1), insert instead:

(1) The Board may:

- (a) on an application made in accordance with section 17B; or

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SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT  
1983—*continued*

(b) on making a guardianship order under Part 3 of the Guardianship Act 1987,

consider a person's capability to manage his or her own affairs and, if satisfied that the person is not capable of managing those affairs, may order that the estate of the person be subject to management under this Act.

(b) After section 17A (2), insert:

(3) The Board has no jurisdiction to make an order under this section in respect of a person if the question as to the person's capability to manage his or her own affairs is before the Court.

(4) The Board may, if it considers it appropriate to do so and with the concurrence of the Court, refer a proceeding relating to a person's capability to manage his or her affairs to the Court.

(2) Section 17B:

After section 17A, insert:

**Application to the Guardianship Board for a management order**

17B. (1) An application for an order under section 17A (1) may be made by any person who claims to have a genuine concern for the welfare of the person who is the subject of the application.

(2) An application must specify:

- (a) the applicant's interest in the matter; and
- (b) the grounds on which it is claimed that a person named in the application is not capable of managing his or her own affairs.

(3) The applicant must, as soon as practicable after making an application, arrange for a copy of the application to be served on:

- (a) the person referred to in subsection (2) (b); and
- (b) if there is a person responsible for that person (within the meaning of the Guardianship Act 1987)—the person responsible; and
- (c) the Protective Commissioner.

SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT  
1983—*continued*

(4) The copy of the application so served must be endorsed with a notice specifying the time, date and place set down for hearing the application.

(5) A failure to serve a copy of the application in accordance with this section does not vitiate a decision of the Board on the application.

(6) The proceedings of the Board in relation to the application are regulated by the Guardianship Act 1987.

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*[Minister's second reading speech made in—  
Legislative Assembly on 21 April 1993  
Legislative Council on 18 May 1993]*