



New South Wales

Guardianship Amendment Act 1997 No 49

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New South Wales

Guardianship Amendment Act 1997 No 49

Act No 49, 1997

An Act to amend the *Guardianship Act 1987* with respect to guardianship, the medical and dental treatment of persons under guardianship and the making of financial management orders; to make consequential amendments to the *Protected Estates Act 1983* and other Acts; and for other purposes. [Assented to 2 July 1997]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Guardianship Amendment Act 1997*.

2 Commencement

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

3 Amendment of Guardianship Act 1987 No 257

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

4 Consequential amendment of Protected Estates Act 1983 No 179

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

5 Consequential amendment of other Acts

Each Act specified in Schedule 3 is amended as set out in that Schedule.

Schedule 1 Amendment of Guardianship Act 1987

(Section 3)

[1] The whole Act

Omit “Board” wherever occurring, except where occurring in any matter being omitted by this Act.
Insert instead “Tribunal”.

[2] Section 3 Definitions

Omit the definition of *Board* from section 3 (1).

[3] Section 3 (1)

Insert in alphabetical order:

enduring guardian means a person appointed as an enduring guardian under Part 2.

estate of a person means the property and affairs of the person.

guardianship order means an order referred to in section 14.

person in need of a guardian means a person who, because of a disability, is totally or partially incapable of managing his or her person.

Protective Commissioner means the person holding the office of Protective Commissioner under the *Protected Estates Act 1983*.

Tribunal means the Guardianship Tribunal constituted by this Act.

[4] Section 3 (1) definition of “guardian”

Insert “, and includes an enduring guardian” after “16 years)”.

[5] Section 3 (1) definitions of “party” and “person responsible”

Omit the definitions.

[6] Section 3 (1) definition of “person under guardianship”

Omit the definition. Insert instead:

person under guardianship means a person who has a guardian within the meaning of this Act.

[7] Section 3A

Omit the section.

[8] Sections 3B–3F

Insert before section 4:

3B Notes

Notes included in this Act are explanatory notes and do not form part of this Act.

3C Relationship with Mental Health Act 1990

- (1) A guardianship order may be made in respect of a patient within the meaning of the *Mental Health Act 1990*.
- (2) The fact that a person under guardianship becomes a patient within the meaning of the *Mental Health Act 1990* does not operate to suspend or revoke the guardianship.
- (3) However:
 - (a) a guardianship order made, or
 - (b) an instrument appointing an enduring guardian,in respect of a person who is, or becomes, a patient within the meaning of the *Mental Health Act 1990* is effective only to the extent that the terms of the order or instrument are consistent with any determination or order made under the *Mental Health Act 1990* in respect of the patient.

3D Circumstances in which a person “has the care of another person”

- (1) For the purposes of this Act, 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
 - (b) arranges for the other person to be provided with such services and support.
- (2) 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.
- (3) In this section, *remuneration* does not include a carer’s pension.

3E Meaning of “close friend or relative”

- (1) A person is a *close friend or relative* of another person for the purposes of this Act 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 a close friend or relative if the person is receiving remuneration (whether from the other person or some other source) for, or has a financial interest in, any services that he or she performs for the other person in relation to the person’s care.
- (2) The President of the Tribunal may issue guidelines, not inconsistent with subsection (1), specifying the circumstances in which a person is to be regarded as a close friend or relative of another person.
- (3) In this section, *remuneration* does not include a carer’s pension.

3F Persons who are “parties” to proceedings under this Act

- (1) A person is a party to proceedings before the Tribunal under this Act as provided by this section.
- (2) Each of the following persons is a party to any proceedings before the Tribunal in respect of an application for a guardianship order under this Act:
 - (a) the applicant,
 - (b) the person to whom the application relates,
 - (c) the spouse, if any, of the person to whom the application relates,
 - (d) the person, if any, who has care of the person to whom the application relates,
 - (e) the Public Guardian,
 - (f) any person whom the Tribunal has joined as a party under section 57A.
- (3) Each of the following persons is a party to proceedings consisting of a review by the Tribunal of a guardianship order made under this Act:
 - (a) the person, if any, who requested the review,
 - (b) the person the subject of the order,
 - (c) the spouse, if any, of the person the subject of the order,
 - (d) the person who has care of the person the subject of the order,
 - (e) the guardian appointed under the order,
 - (f) any person whom the Tribunal has joined as a party under section 57A.
- (4) Each of the following persons is a party to proceedings consisting of a review by the Tribunal of an appointment (or purported appointment) of an enduring guardian under this Act:
 - (a) the person, if any, who requested the review,
 - (b) the person appointed as the enduring guardian,

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- (c) the person who appointed the enduring guardian,
 - (d) the spouse, if any, of the person who appointed the enduring guardian,
 - (e) the person, if any, who has care of the person who appointed the enduring guardian,
 - (f) any person whom the Tribunal has joined as a party under section 57A.
- (5) Each of the following persons is a party to any proceedings before the Tribunal in respect of an application for a financial management order under this Act:
- (a) the applicant,
 - (b) the person to whom the application relates,
 - (c) the spouse, if any, of the person to whom the application relates,
 - (d) the person, if any, who has care of the person to whom the application relates,
 - (e) the person, if any, appointed attorney by the person to whom the application relates under a power of attorney that is in force,
 - (f) the Protective Commissioner,
 - (g) any person whom the Tribunal has joined as a party under section 57A.
- (6) Each of the persons specified in subsection (7) is a party to proceedings consisting of a review by the Tribunal of
- (a) a financial management order made under this Act, or
 - (b) the appointment under this Act of a manager of an estate.
- (7) For the purposes of subsection (6), the persons are:
- (a) the person, if any, who requested the review,
 - (b) the protected person to whom the relevant financial management order relates,

- (c) the spouse, if any, of the protected person,
 - (d) the person, if any, who has care of the protected person,
 - (e) the person appointed as the manager of the estate concerned,
 - (f) the Protective Commissioner,
 - (g) any person whom the Tribunal has joined as a party under section 57A.
- (8) In this section, *financial management order* and *protected person* have the same meanings as in Part 3A.

[9] Part 2 (sections 5–6N)

Insert after Part 1:

Part 2 Appointment of enduring guardians

5 Definitions

In this Part:

appointee means a person appointed as an enduring guardian under this Part.

appointor means a person who has appointed an enduring guardian under this Part.

6 Adult person may appoint guardian

A person of or above the age of 18 years may, by instrument in writing, appoint a person as his or her guardian.

6A When appointment has effect

- (1) An appointment under this Part:
 - (a) has effect only during such period of time as the appointor is a person in need of a guardian, and
 - (b) unless revoked or suspended under this Part, has effect during all such periods.
- (2) A person appointed under this Part is appointed as an *enduring guardian*.

6B Eligibility for appointment

- (1) A person is not eligible to be appointed as an enduring guardian unless he or she is of or above the age of 18 years.
- (2) A person is not eligible to be appointed as an enduring guardian if he or she is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the medical care or treatment of the person making the appointment (or if he or she is the spouse, parent, child, brother or sister of a person so responsible or involved).
- (3) However, if a person who is validly appointed as an enduring guardian becomes responsible for or involved in the medical care or treatment of the appointor, the appointment does not lapse.

6C Method of appointment

An instrument does not operate to appoint a person as an enduring guardian unless:

- (a) it is in or to the effect of the form prescribed by the regulations, and
- (b) it is endorsed with the appointee's acceptance of the appointment, and
- (c) it is witnessed by a legal practitioner, the Clerk of a Local Court or a person prescribed by the regulations for the purposes of this paragraph, and
- (d) the witness certifies that both appointor and appointee signed the instrument voluntarily in the presence of the witness, and that each appeared to understand the effect of the instrument.

6D Appointment of 2 or more enduring guardians

An instrument appointing an enduring guardian may appoint 2 or more such guardians, either jointly (each having the same functions) or separately (each having

different functions). In the latter case, a reference in this Act to the enduring guardian of the appointor is a reference to whichever of those enduring guardians has the relevant function.

6E Functions of enduring guardian

- (1) Subject to subsection (2), an instrument appointing a person as an enduring guardian authorises the appointee, while the appointment has effect, to exercise the following functions:
 - (a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live,
 - (b) deciding the health care that the appointor is to receive,
 - (c) deciding the other kinds of personal services that the appointor is to receive,
 - (d) giving consent under Part 5 to the carrying out of medical or dental treatment on the appointor,
 - (e) any other function relating to the appointor's person that is specified in the instrument.
- (2) The instrument of appointment may limit or exclude the authority it confers in relation to any one or more of the functions specified in subsection (1).
- (3) The functions authorised by an instrument appointing an enduring guardian are, unless the Tribunal otherwise directs, to be exercised in accordance with any lawful directions contained in the instrument.

6F Ancillary powers of enduring guardian

An enduring guardian may, on behalf of the appointor, sign and do all such things as are necessary to give effect to any function of the enduring guardian.

6G Acts of enduring guardian take effect as acts of appointor

A decision made, an action taken and a consent given by an enduring guardian in the exercise of a function of the enduring guardian have effect as if:

- (a) the decision had been made, the action taken and the consent given by the appointor, and
- (b) the appointor had the legal capacity to do so (if the appointor would have that legal capacity but for his or her disability).

6H Revocation of appointment by appointor

- (1) A person who has appointed an enduring guardian may, by instrument in writing, revoke the appointment.
- (2) An instrument does not operate to revoke the appointment of an enduring guardian unless:
 - (a) at the time of executing the instrument, the appointor had the legal capacity to revoke the appointment, and
 - (b) the instrument:
 - (i) is in or to the effect of the form prescribed by the regulations, and
 - (ii) is witnessed by a legal practitioner, the Clerk of a Local Court or a person prescribed by the regulations for the purposes of this subparagraph, and
 - (c) the witness certifies that the appointor signed the instrument voluntarily in the presence of the witness, and that he or she appeared to understand the effect of the instrument, and
 - (d) written notice of the revocation is given to the appointee.

6I Automatic suspension

- (1) A guardianship order made in respect of a person who has appointed an enduring guardian operates to suspend, for the duration of the order, all authority of the enduring guardian to exercise a function under the appointment.

- (2) If a person who is the subject of a guardianship order purports to appoint an enduring guardian, the purported appointment is of no effect.
- (3) In this section, a reference to a guardianship order includes:
 - (a) an order to the like effect made by the Supreme Court in the exercise of its jurisdiction with respect to guardianship of persons, and
 - (b) an order to the like effect made under a corresponding law as referred to in Part 5A.

6J Tribunal's review of appointment

- (1) The Tribunal:
 - (a) may, on its own motion, and
 - (b) must, at the request of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor,review the appointment (or purported appointment) of an enduring guardian.
- (2) Before carrying out the review, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will carry out the review to be served on each party to the review.
- (3) The Tribunal may, by order, suspend the appointment (or purported appointment) of the enduring guardian until the Tribunal takes action under section 6K (1).
- (4) A failure to serve notice in accordance with this section does not vitiate the decision of the Tribunal on the review.

6K Action on review

- (1) On reviewing the appointment of an enduring guardian, the Tribunal may:
 - (a) revoke the appointment, or
 - (b) confirm the appointment, with or without varying the functions of the enduring guardian under the appointment.

- (2) The Tribunal must not revoke the appointment of an enduring guardian unless:
 - (a) the enduring guardian requested the revocation, or
 - (b) the Tribunal is satisfied that it is in the best interests of the appointor that the appointment be revoked.
- (3) If, in the course of the review, the Tribunal decides to revoke the appointment of an enduring guardian, it may proceed as if:
 - (a) an application for a guardianship order under Part 3, or
 - (b) an application for a financial management order under Part 3A, or
 - (c) applications for both such orders,had been made in respect of the person who appointed the enduring guardian.

6L Supreme Court may review appointment

The Supreme Court may review the appointment (or purported appointment) of an enduring guardian and may make such orders as it thinks appropriate in respect of the appointment.

6M Tribunal may declare appointment has effect

- (1) A person appointed as an enduring guardian may apply to the Tribunal for an order declaring that the appointment has effect.
- (2) If the Tribunal is satisfied that the appointor of the enduring guardian:
 - (a) is a person in need of guardianship, and
 - (b) has appointed the applicant as his or her enduring guardian,

the Tribunal may, by order, declare that appointment of the enduring guardian has effect.

- (3) The fact that the Tribunal has made an order under this section declaring that the appointment of an enduring guardian has effect does not prevent the Tribunal from making a guardianship order under Part 3, or a financial management order under Part 3A, in respect of the appointor.
- (4) The Tribunal may at any time, of its own motion or on the application of a person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor, revoke an order made under this section.

6N Evidence as to appointor's capacity

In any proceedings in which the question of whether, on a particular day or during a particular period, the appointor of an enduring guardian was a person in need of a guardian is in issue, the certificate of a medical practitioner to the effect that the appointor was, on that day or during that period, totally or partially incapable of managing his or her person because of a disability is evidence of the fact that the appointor was a person in need of a guardian.

[10] Part 3, heading

Insert "orders" after "Guardianship".

[11] Section 7 Definitions

Omit the definitions of *guardianship order* and *person in need of a guardian*.

[12] Section 9 Applications

Omit section 9 (1) (b).

[13] Section 10 Service of applications

Omit section 10 (1). Insert instead:

- (1) The applicant for a guardianship order in respect of a person must, as soon as practicable after the application has been made, cause a copy of the application to be served on each party (other than the applicant) to the proceedings before the Tribunal in respect of the application.
- (1A) 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.

[14] Section 14 Tribunal may make guardianship orders

Omit section 14 (2) (a) (ii). Insert instead:

- (ii) the person's spouse, if any, and
- (iii) the person, if any, who has care of the person.

[15] Section 16 Guardianship orders

Insert after section 16 (2):

- (2A) A guardianship order may contain a statement to the effect that the order will not be reviewed at the expiration of the period for which it has effect, but only if:
 - (a) the order relates solely to the taking of one or more specific decisions or actions on behalf of the person the subject of the order, and
 - (b) the Tribunal is satisfied that there is no need for the order to continue after the decisions or actions concerned have been taken.

[16] Section 16 (3) and (4)

Omit section 16 (3). Insert instead:

- (3) Two or more guardians of a person may be appointed under one or more limited guardianship orders, either jointly (each having the same functions) or separately (each having different functions). However, the Public Guardian is not to be appointed a joint guardian.
- (4) A reference in this Act to the guardian of a person is:
 - (a) in the case of joint guardians, a reference to all of the guardians, and
 - (b) in the case of separate guardians, a reference to whichever of those guardians has the relevant function.

[17] Section 18 Term of guardianship orders

Insert after section 18 (1):

- (1A) Despite subsection (1), the Tribunal may specify, in a continuing guardianship order, that the order has effect for a period not exceeding:
 - (a) in the case of an initial order—3 years, and
 - (b) in the case of an order that is renewed—5 years, from the date on which it was made.
- (1B) Subsection (1A) applies in relation to a guardianship order only if the Tribunal is satisfied that:
 - (a) the person the subject of the order has permanent disabilities, and
 - (b) it is unlikely that the person will become capable of managing his or her person, and
 - (c) there is a need for an order of longer duration than the relevant period specified in subsection (1).

[18] Section 20 Alternative guardians

Insert after section 20 (1):

- (1A) Subsection (1) applies even if 2 or more persons are appointed (either jointly or separately, as referred to in section 16 (3)) guardians of the person concerned. However, if 2 or more guardians of a person are appointed separately (each having different functions), the guardianship order or orders concerned may appoint persons to be the alternative guardians of the person under guardianship in respect of those different functions.

[19] Section 20 (2)

Omit the subsection. Insert instead:

- (2) During the absence or incapacity of a guardian of a person under guardianship, the person's alternative guardian for the absent or incapacitated guardian has the functions of that guardian.

[20] Section 21 Relationship of guardians to persons under guardianship

Omit section 21 (1) (b). Insert instead:

- (b) has all the functions of a guardian of that person that a guardian has at law or in equity.

[21] Section 21 (2A)

Insert after section 21 (2):

- (2A) Subject to any conditions specified in the order, the guardian of a person the subject of a guardianship order (whether plenary or limited) has the power, to the exclusion of any other person, to make the decisions,

take the actions and give the consents (in relation to the functions specified in the order) that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity.

[22] Sections 21A–21C

Insert after section 21:

21A Power to enforce guardianship orders

- (1) Without limiting section 16, a guardianship order may specify that:
- (a) the person appointed as guardian, or
 - (b) another specified person or a person of a specified class of persons, or
 - (c) a person authorised by the guardian (the *authorised person*),

is empowered to take such measures or actions as are specified in the order so as to ensure that the person under guardianship complies with any decision of the guardian in the exercise of the guardian's functions.

- (2) If a person referred to in subsection (1) (a), (b) or (c) takes any measure or action specified in the order in the reasonable belief that:
- (a) he or she is empowered by the guardianship order to take the measure or action, and
 - (b) the measure or action is in the best interest of the person under guardianship, and
 - (c) it is necessary or desirable to take that measure or action in the circumstances,

the person concerned is not liable to any action, liability, claim or demand arising out of the taking of that measure or action.

21B Ancillary powers of guardian

A guardian may, on behalf of a person under guardianship, sign and do all such things as are necessary to give effect to any function of the guardian.

21C Acts of guardian take effect as acts of person under guardianship

A decision made, an action taken and a consent given by a guardian under a guardianship order have effect as if:

- (a) the decision had been made, the action taken and the consent given by the person under guardianship, and
- (b) that person had the legal capacity to do so (if the person would have had that legal capacity but for his or her disability).

[23] Section 22A

Insert after section 22:

22A Death of guardian

- (1) If the guardian of a person dies:
 - (a) any other person appointed as a guardian jointly with the deceased guardian (the *surviving guardian*) may exercise the functions that he or she exercised jointly with the deceased guardian (and, if there is more than one surviving guardian, the surviving guardians may exercise those functions jointly), or
 - (b) if there is no surviving guardian, the person's alternative guardian for the deceased guardian is taken to be the person's guardian, or
 - (c) if there is no surviving guardian or alternative guardian, the Public Guardian is taken to be the person's guardian.
- (2) The provisions of this section apply until the relevant guardianship order is reviewed.

[24] Section 23 Guardianship orders of no effect in certain circumstances

Omit section 23 (a).

[25] Section 24

Omit the section. Insert instead:

24 Assessment of persons under guardianship

- (1) The Tribunal may specify in a guardianship order that an assessment of the person the subject of the order, and of the operation of the order in respect of the person, is to be made, by or on behalf of the Tribunal, at a specified time during the currency of the order.
- (2) The Tribunal is to cause any such required assessment to be made as specified.

[26] Sections 25–25C

Omit section 25. Insert instead:

25 Review of guardianship orders

- (1) The Tribunal may, on its own motion, review any guardianship order.
- (2) The Tribunal must review each guardianship order:
 - (a) at the request of any person entitled to request a review of the order, and
 - (b) at the expiration of the period for which the order has effect.
- (3) Despite subsection (2) (b):
 - (a) a review required by that paragraph may be commenced before the expiration of the period concerned, and

- (b) the Tribunal is not required to review a guardianship order under that paragraph if the order contains a statement (referred to in section 16 (2A)) to the effect that the order will not be reviewed at the expiration of the period for which it has effect.
- (4) Before carrying out the review, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will carry out the review to be served on each party to the proceedings. The review is taken to have commenced on the issue of such a notice.
- (5) A failure to serve notice in accordance with this section does not vitiate the decision of the Tribunal on the review.
- (6) If a review of a guardianship order is commenced but not completed before the expiration of the period specified in the order as the period for which the order has effect, the order is taken to be extended until the completion of the review.

25A Requested review not required in certain cases

Despite section 25 (2) (a), the Tribunal may refuse a request to review a guardianship order if:

- (a) in the opinion of the Tribunal, the request does not disclose grounds that warrant a review, or
- (b) the Tribunal has previously reviewed the order.

25B Persons entitled to request review

The following persons are entitled to request a review of a guardianship order:

- (a) the guardian,
- (b) the person under guardianship,
- (c) the Public Guardian,
- (d) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person under guardianship.

25C Action on review

- (1) On reviewing a guardianship order under section 25 (1) or (2) (a), the Tribunal may:
 - (a) vary the order, or
 - (b) suspend or revoke the order, or
 - (c) confirm the order.
- (2) On reviewing a guardianship order under section 25 (2) (b), the Tribunal may:
 - (a) renew, or renew and vary the order, or
 - (b) determine that the order is to lapse (and revoke the order in respect of any unexpired period for which the order is specified to have effect).

[27] Part 3A (sections 25D–25U)

Insert before Part 4:

Part 3A Financial management

Division 1 Making of financial management orders

25D Definitions

In this Part:

financial management order means an order referred to in section 25E, and includes an interim financial management order.

protected person means a person whose estate (or part of whose estate) is subject to a financial management order that is in force.

25E Tribunal may make financial management orders

- (1) The Tribunal may, in accordance with this Part, order that the estate of a person be subject to management under the *Protected Estates Act 1983*.
- (2) The Tribunal may exclude a specified part of the estate from the financial management order.

- (3) However, the Tribunal must not exclude a specified part of the estate from a financial management order unless the Tribunal:
- (a) has notified the Protective Commissioner in writing of the proposed order, and
 - (b) has allowed a reasonable time after that notification for the Protective Commissioner to advise the Tribunal of his or her views on the proposed order, and
 - (c) has taken any views so advised to the Tribunal into consideration.

25F When financial management order may be made

The Tribunal may make a financial management order subject to and in accordance with this Part:

- (a) in connection with its making a guardianship order under Part 3 in respect of the person concerned, or
- (b) following (or in the course of) proceedings under Part 3 in respect of the person, being proceedings in which it decided not to make a guardianship order, or
- (c) if an application for such an order has been made to it under section 25I in respect of the person (whether or not an application for a guardianship order has also been made in respect of the person).

25G Grounds for making financial management order

The Tribunal may make a financial management order in respect of a person only if the Tribunal has considered the person's capability to manage his or her own affairs and is satisfied that:

- (a) the person is not capable of managing those affairs, and
- (b) there is a need for another person to manage those affairs on the person's behalf, and
- (c) it is in the person's best interests that the order be made.

25H Interim financial management orders

- (1) Despite section 25G, the Tribunal may, in relation to any proceedings before it under Part 3 or this Part (including proceedings arising out of the operation of section 6K (3)), make a financial management order for a specified period not exceeding 6 months (an *interim financial management order*), pending the Tribunal's further consideration of the capability of the person to whom the order relates to manage his or her own affairs.
- (2) An interim financial management order may be made only in respect of a person:
 - (a) who is under guardianship, or
 - (b) who is the subject of an application under Part 3 or this Part.
- (3) If the further consideration of the capability of the person to whom the interim financial order relates to manage his or her own affairs is not completed before the expiry of the period specified in the order, the order is taken to be revoked on that expiry.

25I Application to Tribunal for a financial management order

- (1) An application for a financial management order may be made by:
 - (a) the Protective Commissioner, or
 - (b) any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person who is the subject of the application.
- (2) An application must specify the grounds on which it is claimed that the person the subject of the application is not capable of managing his or her own affairs.
- (3) As soon as practicable after making the application, the applicant must cause a copy of the application to be served on each party to the proceedings.

- (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 Tribunal on the application.

25J Subsequent applications

- (1) A person may be the subject of an application under section 25I whether or not the person has previously been the subject of such an application.
- (2) The Tribunal may make a financial management order in respect of a person whose capability to manage his or her own affairs has previously been considered by the Tribunal even though there may have been no change in that capability since it was last considered by the Tribunal.

25K Tribunal cannot make financial management order in certain circumstances

- (1) The Tribunal does not have jurisdiction to make a financial management order other than an interim financial management order in respect of a person if the question of the person's capability to manage his or her own affairs is before the Supreme Court.
- (2) The Tribunal does not have jurisdiction to make any financial management order (including an interim financial management order) in respect of a person if an order made under the *Protected Estates Act 1983* or the *Mental Health Act 1990* is in force in respect of any part of the person's estate.

25L Tribunal may refer proceeding to Supreme Court

The Tribunal may, if it considers it appropriate to do so, and with the concurrence of the Supreme Court, refer a proceeding relating to a person's capability to manage his or her own affairs to that Court.

25M Tribunal may commit estate of protected person to management

- (1) If the Tribunal makes a financial management order in respect of the estate (or part of the estate) of a person, the Tribunal may, by order:
 - (a) appoint a suitable person as manager of that estate, or
 - (b) commit the management of that estate to the Protective Commissioner.

Note. Section 23A of the *Protected Estates Act 1983* is to the effect that a protected person has no power to deal with so much of his or her estate as is under the management of the Protective Commissioner or another person unless the manager of the estate authorises otherwise.

- (2) Despite section 68 (1), an order under subsection (1) (a) does not authorise the person appointed as manager to interfere in any way with the estate concerned before all directions of the Supreme Court relevant to the management of the estate that are required under the Rules of that Court have been obtained.
- (3) However, the person appointed as manager may take such action as may be necessary for the protection of the estate (including action specified by the Tribunal) pending the directions of the Court.

Division 2 Review and revocation of financial management orders

25N Review of financial management orders

- (1) The Tribunal may order that a financial management order be reviewed within a specified time.
- (2) The requirement for a review may be contained in the financial management order or in a subsequent order.
- (3) The Tribunal must begin any required review within the time specified in the relevant order.

- (4) The Tribunal:
- (a) may, at any time on its own motion, and
 - (b) must, on an application under section 25R for revocation or variation of the order,
- review a financial management order.
- (5) If a financial management order would cease to have effect before the completion of such a review, the order is taken to be extended until the completion of the review.
- (6) Before carrying out the review, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will carry out the review to be served on each party to the proceedings. The review is taken to have commenced on the issue of such a notice.
- (7) A failure to serve notice in accordance with this section does not vitiate the decision of the Tribunal on the review.

25O Requested review not required in certain cases

Despite section 25N (4) (b), the Tribunal may refuse to review a financial management order, on an application under section 25R if:

- (a) in the opinion of the Tribunal, the application does not disclose grounds that warrant a review, or
- (b) the Tribunal has previously reviewed the order.

25P Action on review

- (1) On reviewing a financial management order under section 25N, the Tribunal must vary, revoke or confirm the order.

- (2) The Tribunal may revoke a financial management order only if:
 - (a) the Tribunal is satisfied that the protected person is capable of managing his or her affairs, or
 - (b) the Tribunal considers that it is in the best interests of the protected person that the order be revoked (even though the Tribunal is not satisfied that the protected person is capable of managing his or her affairs).

25Q Disposal of estate

- (1) If a financial management order is revoked (or varied so as to exclude from the order a specified part of the estate previously subject to it), the person appointed as manager of the estate is to pay over or hand over the estate (or the relevant part of the estate):
 - (a) to the owner of the estate, or
 - (b) to a person (designated by the Tribunal) on behalf of the owner of the estate.
- (2) If:
 - (a) the appointment of a person as the manager of an estate is revoked under Division 3, and
 - (b) the relevant financial management order is not revoked,the person concerned is to pay over or hand over the estate to the person appointed under section 25U (3) as manager of the estate in substitution for that person.
- (3) A person who pays over or hands over any part of an estate in accordance with this section does not incur any liability for doing so.
- (4) The paying over or handing over of any part of an estate in accordance with this section does not operate to change the ownership of the estate.

25R Application for revocation or variation of financial management order

The following persons are entitled to apply for an order revoking or varying a financial management order:

- (a) the protected person concerned,
- (b) the Protective Commissioner,
- (c) the manager of the estate, or part of the estate, of the protected person,
- (d) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the protected person.

Division 3 Review of appointment of manager

25S Review of appointment of manager

- (1) The Tribunal:
 - (a) may, on its own motion, and
 - (b) must, at the request of:
 - (i) the Protective Commissioner, or
 - (ii) any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the protected person,

review its appointment of the manager of the protected person's estate.

- (2) Subsection (1) applies even if the person appointed as manager is the Protective Commissioner.
- (3) Before carrying out the review, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will carry out the review to be served on each party to the proceedings. The review is taken to have commenced on the issue of such a notice.
- (4) A failure to serve notice in accordance with this section does not vitiate the decision of the Tribunal on the review.

25T Requested review not required in certain cases

Despite section 25S (1) (b) (ii), the Tribunal may refuse a request under that subparagraph to review the appointment of the manager of a protected person's estate if:

- (a) in the opinion of the Tribunal, the request does not disclose grounds that warrant a review, or
- (b) the Tribunal has previously reviewed the appointment.

25U Action on review

- (1) On reviewing its appointment of the manager of a protected person's estate, the Tribunal may:
 - (a) revoke the appointment, or
 - (b) confirm the appointment.
- (2) The Tribunal may also review the financial management order under which the manager was appointed, and may take any action in respect of that order that it may take on a review of such an order under Division 2.
- (3) If the relevant financial management order is not revoked under subsection (2), the Tribunal is to appoint another person as manager of the estate subject to the order in substitution for a person whose appointment as manager has been revoked under this section.
- (4) The Tribunal may revoke the appointment under review only if:
 - (a) the person appointed seeks the revocation, or
 - (b) the Tribunal is satisfied that it is in the best interests of the protected person that the appointment be revoked, or
 - (c) the financial management order in respect of the estate concerned is revoked.

Note. Section 25Q provides for the disposal of the estate on revocation of a financial management order.

[28] Section 33 Definitions

Insert in alphabetical order in section 33 (1):

person responsible has the meaning given by section 33A.

[29] Section 33A

Insert after section 33:

33A Person responsible

- (1) **Object**
The object of this section is to specify the person who is the *person responsible* for another person for the purposes of this Part.
- (2) **Person responsible for child**
The *person responsible* for a child is the person responsible for the child within the meaning of the *Children (Care and Protection) Act 1987*. However, the person responsible is the Minister if the child is in the care of the Minister or the Director-General if the child is in the care of the Director-General.
- (3) **Person responsible for person in care of Director-General**
The *person responsible* for a person in the care of the Director-General under section 13 is the Director-General.
- (4) **Person responsible for another person**
There is a hierarchy of persons from whom the *person responsible* for a person other than a child or a person in the care of the Director-General under section 13 is to be ascertained. That hierarchy is, in descending order:
 - (a) the person's guardian, if any, but only if the order or instrument appointing the guardian provides for the guardian to exercise the function of giving consent to the carrying out of medical or dental treatment on the person,

- (b) the spouse of the person, if any, if:
 - (i) the relationship between the person and the spouse is close and continuing, and
 - (ii) the spouse is not a person under guardianship,
- (c) a person who has the care of the person,
- (d) a close friend or relative of the person.

Note. Circumstances in which a person is to be regarded as *having the care of another person* are set out in section 3D. The meaning of *close friend or relative* is given in section 3E.

(5) **Operation of hierarchy**

If:

- (a) a person who is, in accordance with the hierarchy referred to in subsection (4), the *person responsible* for a particular person declines in writing to exercise the functions under this Part of a person responsible, or
- (b) a medical practitioner or other person qualified to give an expert opinion on the first person's condition certifies in writing that the person is not capable of carrying out those functions,

the person next in the hierarchy is the *person responsible* for the particular person.

[30] **Section 44 (2) (a) (iv)**

Omit the subparagraph.

[31] **Section 46A Power of guardian to override patient's objection to treatment when authorised by the Tribunal**

Omit "the patient has on previous occasions objected to similar treatment being carried out on the patient" from section 46A (2). Insert instead "any such objection will be made because of the patient's lack of understanding of the nature of, or reason for, the treatment".

[32] Part 5A (sections 48A and 48B)

Insert after section 48:

Part 5A Reciprocal arrangements

48A Corresponding law

In this Part, *corresponding law* means a law in force in another State, a Territory, another country or part of another country that is declared by the regulations to be a corresponding law for the purposes of this Part.

48B Recognition of guardians and managers appointed under corresponding law

- (1) A person who, under a corresponding law, is appointed as:
 - (a) the guardian of another person, or
 - (b) the manager of the estate of another person,may apply to the Tribunal for recognition of his or her status as such.
- (2) The Tribunal must recognise the applicant if satisfied that the applicant has been so appointed.
- (3) On recognition, the applicant is taken to be appointed under this Act as guardian or manager of the estate (as the case may be) of the other person.
- (4) However, the applicant:
 - (a) is not to exercise a function under this Act unless it is a function of a kind authorised by the terms of his or her appointment under the corresponding law, and
 - (b) is not to exercise a function authorised by the terms of his or her appointment under the corresponding law unless it is a function authorised by this Act.

- (5) The applicant's recognition may be reviewed, varied and revoked as if it were an appointment under this Act.
- (6) As soon as practicable in each case, the Tribunal must notify the appropriate authority in the relevant country, State or Territory of:
 - (a) a recognition under this section, and
 - (b) any subsequent revocation of the recognition, and
 - (c) any other action taken by the Tribunal in relation to the recognition.
- (7) The regulations may make provision with respect to the application of this Act in respect of recognition under this Part.

[33] Section 51A

Insert after section 51:

51A Fewer than 3 Tribunal members may deal with certain matters

- (1) Despite section 51 (1), the Tribunal may be constituted by one or two members if the Tribunal is exercising its functions in respect of
 - (a) giving consent to the carrying out of minor treatment (but not major, treatment or special treatment) on a patient to whom Part 5 applies, or
 - (b) any one or more of the following procedural matters:
 - (i) the joining of a person as a party to a proceeding before the Tribunal,
 - (ii) the granting of leave to appear in a proceeding,
 - (iii) giving directions as to the conduct of a proceeding,
 - (iv) the adjournment of a proceeding,
 - (v) the withdrawal of an application to the Tribunal.

-
- (2) The persons who may constitute the Tribunal for the purposes of this section are the President and Deputy President of the Tribunal and such other members of the Tribunal as the President may nominate in writing for the purposes of this section.
- (3) In this section, *major treatment*, *minor treatment* and *special treatment* have the same meanings as in Part 5.

[34] Section 53 Procedure at sittings of Tribunal

Omit section 53 (2) and (3).

[35] Section 57 Publication of names

Insert after paragraph (a) of the definition of *prescribed person* in section 57 (4):

- (a1) a protected person,

[36] Section 57 (4) definition of “prescribed person”

Omit paragraph (b). Insert instead:

- (b) a person to whom an application or request under Part 2, 3 or 3A, and a person to whom an application under Part 4 or 5, relates,

[37] Section 57A

Insert after section 57:

57A Tribunal may join parties

- (1) The Tribunal may join, as a party to any proceedings before the Tribunal under this Act, any person who, in the opinion of the Tribunal, should be a party to the proceedings (whether because of the person’s concern for the welfare of the person the subject of the proceedings or for any other reason).

- (2) If the Tribunal joins a person as a party to any proceedings, the Tribunal must, as soon as practicable, notify the applicant (if any) for the proceedings accordingly.

[38] Section 58 Right of appearance

Insert after paragraph (a) of the definition of *prescribed person* in section 58 (5):

- (a1) a protected person,

[39] Section 58 (5) definition of “prescribed person”

Omit paragraph (b). Insert instead:

- (b) a person to whom an application or request under Part 2, 3 or 3A, and a person to whom an application under Part 4 or 5, relates,

[40] Section 60 Compulsion of witnesses

Omit “member presiding at a sitting of the Board” from section 60 (1).

Insert instead “President or Deputy President of the Tribunal or the member presiding at a sitting of the Tribunal, or any other member appointed under section 49 (3) (a) and nominated in writing by the President for the purposes of this section,”.

[41] Section 63 Witnesses’ expenses

Omit “Minister”.

Insert instead “President of the Tribunal”.

[42] Section 64 Adjournments

Omit “Board’s” from section 64 (2). Insert instead “Tribunal’s”.

[43] Section 66 Conciliation to be attempted

Insert after section 66 (1):

- (1A) Subsection (1) does not apply in respect of an application if the Tribunal considers that it is not possible, or appropriate, to attempt to bring the parties to a settlement.

[44] Section 67 Appeals to the Supreme Court

Omit section 67 (2). Insert instead:

- (2) An appeal by a person under this section is to be instituted:
 - (a) in the case of a decision made by the Tribunal in the exercise of a function under section 51A (1) (b) or 64 (2)—within the period ending 28 days after the day on which the decision is made, or
 - (b) in any other case—within the period ending 28 days after the day on which the written instrument setting out the formal reasons for the decision is furnished to the person, or
 - (c) within such further time as the Supreme Court may, in any case, allow.

[45] Section 67 (6)

Insert at the end of section 67:

- (6) The Tribunal is not liable for any costs relating to:
 - (a) an order or decision of the Tribunal in respect of which an appeal is made, or
 - (b) any such appeal.

[46] Section 68 Decisions of Tribunal

Omit section 68 (1). Insert instead:

- (1) A decision of the Tribunal with respect to proceedings before it takes effect immediately the order arising out of the decision is made, unless the order specifies otherwise or is stayed under section 67 (5).

- (1A) A decision is to be confirmed, as soon as practicable after the relevant order is made, in a written instrument that is:
- (a) signed by the member who presided at the sitting of the Tribunal at which the decision was made (or, if it is not practicable for that member to sign the instrument, by the President or Deputy President), and
 - (b) furnished to each party to the proceedings.
- (1B) The Tribunal must also furnish each party to the proceedings with formal written reasons for the decision as soon as practicable after giving the decision. The reasons may be included in the instrument confirming the decision or in a separate instrument.
- (1C) Despite subsection (1B), the Tribunal is not required to provide formal written reasons for a decision made in the exercise of a function under section 51A (1) (b) or section 64 (2) unless:
- (a) a party to the proceedings concerned requests the Tribunal, within the period ending 14 days after the relevant decision has been made, to specify its reasons for the decision, or
 - (b) an appeal against the decision is instituted under section 67.

[47] Section 76A

Insert after section 76:

76A Annual report

- (1) The Tribunal must, as soon as practicable after 30 June and in any case before 1 November in each year, prepare and forward to the Minister (in addition to any report required from the President of the Tribunal under section 76) a report on its work and activities for the 12 months ending on that 30 June.

- (2) It is not necessary for the report to include any matter that is required to be included in the annual report, under the *Annual Reports (Departments) Act 1985*, of any Department administered by the Minister.
- (3) The Minister is to table the report, or cause it to be tabled, in both Houses of Parliament as soon as practicable after the report is received by the Minister.

[48] Section 108 Regulations

Omit section 108 (1) (a).

[49] Section 109

Insert after section 108:

109 Savings and transitional provisions

Schedule 3 has effect.

[50] Schedule 3

Insert after Schedule 2:

Schedule 3 Savings and transitional provisions

(Section 109)

Part 1 Preliminary

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
Guardianship Amendment Act 1997
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.

- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of Guardianship Amendment Act 1997

2 Definitions

In this Part:

the former Board means the Guardianship Board constituted under section 49 before the amendment made to that section by Schedule 1 [1] to the amending Act.

the amending Act means the *Guardianship Amendment Act 1997*.

3 Tribunal is former Board

The Tribunal is the same entity as, and a continuation of, the former Board.

4 Member of former Board is member of Tribunal

A person holding office as the President, Deputy President or other member of the former Board under section 49 immediately before the commencement of the amendment made to that section by Schedule 1 [1] to the amending Act is taken to be appointed as the President, Deputy President or other member of the Tribunal under that section as so amended.

5 Construction of references to former Board

On and from the commencement of Schedule 1 [1] to the amending Act, a reference (however expressed) in any other Act (whether assented to before, on or after that commencement), in any instrument made under an Act or in any other instrument of any kind to the Guardianship Board is, except in so far as the context or subject-matter otherwise indicates or requires, taken to be a reference to the Tribunal.

6 Saving of former Board's orders under Protected Estates Act 1983

- (1) An order made by the former Board under section 17A of the *Protected Estates Act 1983* before the repeal of that section by Schedule 2 [7] to the amending Act, being an order that was in force at the time of that repeal, is taken to be an order of the Tribunal under section 25E of this Act—that is, a financial management order.
- (2) An interim order made by the former Board under Division 1 of Part 3 of the *Protected Estates Act 1983* as referred to in section 20 (1A) of that Act before the repeal of that subsection by Schedule 2 [10] to the amending Act, being an order that was in force at the time of that repeal, is taken to be an order of the Tribunal under section 25H of this Act—that is, an interim financial management order.
- (3) An order made by the former Board under section 22A of the *Protected Estates Act 1983* before the repeal of that section by Schedule 2 [14] to the amending Act, being an order that was in force at the time of that repeal, is taken to be an order of the Tribunal under section 25M (1) of this Act—that is, an order either:
 - (a) appointing a person as manager of the estate of a protected person, or
 - (b) committing the management of the estate concerned to the Protective Commissioner,according to the tenor of the order under section 22A.

7 Effect of amendments on pending proceedings

- (1) The amendments made to this Act and to the *Protected Estates Act 1983* by the amending Act apply to and in respect of an application for a guardianship order under section 9 made before the commencement of Schedule 1 [12] to the amending Act, being an application in respect of which a decision had not been made at the time of that commencement.
- (2) An application:
 - (a) under section 17B of the *Protected Estates Act 1983* for an order under section 17A (1) of that Act made before the commencement of Schedule 2 [8] to the amending Act, or
 - (b) under section 19 (3) of the *Protected Estates Act 1983* made before the commencement of Schedule 2 [9] to the amending Act,

being an application in respect of which a decision had not been made at the time of the relevant commencement, is taken to be an application under section 25I of this Act.

Schedule 2 Amendment of Protected Estates Act 1983

(Section 4)

[1] Section 4 Definitions

Omit the definition of *Board* from section 4 (1).

[2] Section 4

Insert in alphabetical order:

Guardianship Tribunal means the Guardianship Tribunal constituted under the *Guardianship Act 1987*.

[3] Section 4 (1) definition of “person under guardianship”

Omit “*Disability Services and*”.

[4] Section 4 (1) definition of “protected person”

Insert “or the *Guardianship Act 1987*” after “this Act”.

[5] Section 4 (4)

Insert “However, if a part of a person’s estate is excluded from an order under any Act that the person’s estate be subject to management under this Act, a reference in this Act to the estate of the person is a reference to so much of the property and affairs of the person as is subject to the order.” after “affairs of the person.”

[6] Section 6 Inquiries may be referred to the Protective Commissioner

Omit section 6 (2).

[7] Section 17A Guardianship Board may make management orders

Omit the section.

[8] Section 17B Application to the Guardianship Board for a management order

Omit the section.

[9] Section 19 Subsequent applications

Omit section 19 (3) and (4).

[10] Section 20 Interim orders

Omit section 20 (1A).

[11] Section 21 Appeals against orders

Omit “the Board,” from section 21 (1).

[12] Section 21 (4)

Omit “Neither the Board or any member of the Board, nor the Tribunal or any member of the Tribunal,”.

Insert instead “Neither the Tribunal nor any member of the Tribunal”.

[13] Section 21 (4)

Omit “the Board or” where secondly occurring.

[14] Section 22A Management of estates of protected persons who are persons under guardianship etc

Omit the section.

[15] Section 23A

Insert after section 23:

23A Protected person cannot deal with estate committed to management

- (1) The power of a protected person to deal with his or her estate is suspended in respect of so much of that estate as is, under this Act or the *Guardianship Act 1987*, committed to the management of the Protective Commissioner or another person.
- (2) However, the person managing the protected person's estate may, by instrument in writing, authorise the protected person to deal with so much of the estate as the manager considers appropriate and specifies in the instrument.
- (3) The authorisation may be given at any time and may be withdrawn, wholly or in part, at any time.
- (4) More than one authorisation may be given under this section.
- (5) If the person managing the protected person's estate is not the Protective Commissioner, an authorisation must not be given or withdrawn without the approval of the Protective Commissioner.

[16] Section 30 Functions of Protective Commissioner under this Division

Omit "by the Board under section 22A" from section 30 (3).
Insert instead "by the Guardianship Tribunal under section 25M (1) (a) of the *Guardianship Act 1987*".

[17] Section 31 Security in respect of management

Omit "the Board" from section 31 (1).
Insert instead "the Guardianship Tribunal (under section 25M (1) (a) of the *Guardianship Act 1987*)".

[18] Section 35A Revocation of order by the Board

Omit the section.

[19] Section 41 Continuation of management after discharge etc

Omit “the Board, the Tribunal” from section 41 (1).
Insert instead “the Guardianship Tribunal, the Mental Health Review Tribunal”.

[20] Section 57 Surplus income from common fund

Omit “Disability Services and”.

[21] Section 76 Powers of attorney

Insert after section 76 (5):

(5A) Despite subsection (5), if the Guardianship Tribunal, in making a financial management order under section 25E of the *Guardianship Act 1987* in relation to a principal, excludes a specified part of the principal’s estate from the order, the Guardianship Tribunal may order that the power of attorney is to remain in force in respect of so much of the estate as is excluded from the financial management order concerned.

(5B) The Guardianship Tribunal may make a similar order in respect of so much of the estate as the principal is authorised, under section 23A of this Act, to deal with, but only if the principal is a protected person because of a financial management order made by the Guardianship Tribunal.

[22] Section 81 Regulations

Omit section 81 (1A).

Schedule 3 Amendment of other Acts

(Section 5)

3.1 Community Services (Complaints, Appeals and Monitoring) Act 1993 No 2

Section 107 Constitution of Community Services Review Council

Omit “Guardianship Board” from section 107 (1) (d).
Insert instead “Guardianship Tribunal”.

3.2 Medical Practice Act 1992 No 94

Section 36 Meaning of “unsatisfactory professional conduct”

Omit “Disability Services and” from the matter under the heading “Special medical treatment” in section 36.

3.3 Mental Health Act 1990 No 9

[1] Sections 5 (c), 12 (2), 16, 65 (3) and 68 (2) (c) and Dictionary definitions of “guardian” and “nearest relative”

Omit “Disability Services and” wherever occurring.

[2] Section 12 (2)

Omit “Board”. Insert instead “Tribunal”.

3.4 Minors (Property and Contracts) Act 1970 No 60

Section 9 Full age generally

Omit “Disability Services and” from section 9 (3) (c).

**3.5 Statutory and Other Offices Remuneration Act 1975
(1976 No 4)**

Schedule 3 Public offices

Omit “Guardianship Board” from Part 2 wherever occurring.
Insert instead “Guardianship Tribunal”.

[Minister’s second reading speech made in—
Legislative Council on 7 May 1997
Legislative Assembly on 27 June 1997 p.m.]