

Passed by both Houses



New South Wales

Guardianship Amendment Bill 2007

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2007*



New South Wales

Guardianship Amendment Bill 2007

Act No , 2007

An Act to amend the *Guardianship Act 1987* with respect to the review of guardianship orders, the constitution of the Guardianship Tribunal, the exercise of certain functions of that Tribunal by its Registrar and the review of the exercise of those functions and the term of office of members of that Tribunal; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Guardianship Amendment Act 2007*.

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 Amendment of Powers of Attorney Act 2003 No 53

The *Powers of Attorney Act 2003* is amended by omitting section 35 (4).

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Amendments

(Section 3)

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

community member means a member of the Tribunal in the member category referred to in section 49 (3) (c).

legal member means a member of the Tribunal in the member category referred to in section 49 (3) (a).

member category means a category of member of the Tribunal provided for by section 49 (3).

professional member means a member of the Tribunal in the member category referred to in section 49 (3) (b).

Registrar means the Registrar of the Tribunal.

[2] Section 3 (1), definition of “exempt premises”

Omit “*Education Reform Act 1990*” from paragraph (a) (i) of the definition.

Insert instead “*Education Act 1990*”.

[3] Section 3 (1), definition of “officer”

Omit the definition. Insert instead:

officer means a person employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* in the Government Service to enable the Tribunal to exercise its functions.

[4] Section 16 Guardianship orders

Omit section 16 (2A). Insert instead:

- (2A) A guardianship order may contain a statement to the effect that the order will not be reviewed under section 25 (2) (b) at the expiration of the period for which it has effect, but only if the Tribunal is satisfied that, in all the circumstances, it is in the best interests of the person who is the subject of the order that the order is not reviewed at the expiration of that period.

Note. Section 25 (1) and (2) (a) provide for the review of a guardianship order on the Tribunal’s own motion or at the request of any person entitled to request a review. Those rights to review are unaffected by any statement in the guardianship order that the order will not be reviewed under section 25 (2) (b) at its expiration.

[5] Section 49 Constitution of the Tribunal

Omit section 49 (3). Insert instead:

- (3) Of the members of the Tribunal:
 - (a) at least 3 must be persons who are Australian lawyers of at least 7 years' standing (*legal members*), and
 - (b) at least 3 must be persons (such as medical practitioners, psychologists and social workers) who, in the opinion of the Minister, have experience in assessing or treating persons to whom Part 3, 4 or 5 relates (*professional members*), and
 - (c) at least 4 must be persons (other than those referred to in paragraph (a) or (b)) who, in the opinion of the Minister, have had experience with persons to whom Part 3, 4 or 5 relates (*community members*).

[6] Section 49 (4)

Omit "members of the Tribunal referred to in subsection (3) (a)".

Insert instead "legal members of the Tribunal".

[7] Section 50 Registrar and other staff of the Tribunal

Omit the section.

[8] Section 51 Composition of the Tribunal

Omit section 51 (1). Insert instead:

- (1) For the purposes of exercising its functions the Tribunal is to be constituted by no fewer than 3 and no more than 5 of its members of whom:
 - (a) at least 1 is a legal member, and
 - (b) at least 1 is a professional member, and
 - (c) at least 1 is a community member.

[9] Section 51 (3)

Omit the subsection.

[10] Section 51A

Omit the section. Insert instead:

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

- (1) Despite section 51 (1), the Tribunal may, at the discretion of the President of the Tribunal, be constituted by 1 or 2 members if the Tribunal is exercising its functions referred to in:
 - (a) Division 4 (Assessment and review of guardianship orders) of Part 3, or
 - (b) Division 2 (Review and revocation of financial management orders) of Part 3A, or
 - (c) Division 3 (Review of appointment of manager) of Part 3A, or
 - (d) section 36 (Who may give consent) in respect of giving consent to the carrying out of minor treatment or major treatment (but not special treatment or treatment in the course of a clinical trial), or
 - (e) Part 5A (Reciprocal arrangements), or
 - (f) Division 2 (Proceedings before the Tribunal) of Part 6 (other than functions under section 65), or
 - (g) section 67E (Review of decisions of the Registrar).
- (2) When the Tribunal is constituted by 2 members, the members must not be in the same member category.
- (3) When constituted by 1 or 2 members, the Tribunal may exercise functions referred to in subsection (1) (f) even if the substantive proceedings are not currently before that sitting of the Tribunal.
- (4) For the purpose of exercising the function of reviewing a decision of the Registrar referred to in subsection (1) (g), the Tribunal (when constituted by 1 or 2 members) must be constituted by or include the President, the Deputy President or a legal member.
- (5) In this section, *clinical trial*, *major treatment*, *minor treatment* and *special treatment* have the same meanings as in Part 5.

[11] Section 51B

Insert after section 51A:

51B Presiding member of Tribunal

The presiding member at any sitting of the Tribunal is to be:

- (a) in the case of the Tribunal constituted by one member—that member, or
- (b) if the Tribunal is so constituted as to include the President of the Tribunal—the President of the Tribunal, or
- (c) if the Tribunal is so constituted as not to include the President of the Tribunal but is so constituted as to include the Deputy President of the Tribunal—the Deputy President of the Tribunal, or
- (d) if the Tribunal is so constituted as to include neither the President nor the Deputy President of the Tribunal but is so constituted as to include a legal member—the member of the Tribunal who is a legal member, or, if there is more than one legal member, such one of those members as the President of the Tribunal nominates, or
- (e) if the Tribunal is so constituted as to include neither the President nor the Deputy President of the Tribunal nor a legal member—the member of the Tribunal that the President of the Tribunal nominates.

[12] Section 54 Voting

Omit section 54 (3). Insert instead:

- (3) Despite subsection (1), questions of law arising at a sitting of the Tribunal are to be determined:
 - (a) if the presiding member is the President or Deputy President of the Tribunal or a legal member—by the presiding member of the Tribunal, or
 - (b) if the presiding member is not the President or Deputy President of the Tribunal or a legal member—by:
 - (i) referring the question of law to the President or Deputy President of the Tribunal or a legal member nominated by the President for the purposes of this section for decision, and
 - (ii) determining the question of law according to the decision on the reference.

[13] Part 6, Division 2, heading

Omit the heading to the Division. Insert before section 53:

Division 2 Proceedings before the Tribunal

[14] Section 57A Tribunal may join parties

Omit “under this Act” from section 57A (1).

Insert instead “(whether under this or any other Act)”.

[15] Section 60 Compulsion of witnesses

Omit section 60 (1). Insert instead:

(1) The President or Deputy President of the Tribunal or the member presiding at a sitting of the Tribunal (if that person is a legal member), or any other legal member nominated in writing by the President for the purposes of this section, may, by instrument in writing, require any person on whom the instrument is served personally or by post:

- (a) to appear before the Tribunal for the purpose of giving evidence, or
 - (b) to produce to the Tribunal any document that is relevant to the proceedings before the Tribunal,
- at a time, date and place specified in the instrument.

(1A) The President or Deputy President of the Tribunal or the member presiding at a sitting of the Tribunal, or any legal member nominated in writing by the President for the purposes of this section, may:

- (a) require a person who appears before the Tribunal to be sworn for the purpose of giving evidence on oath, and
- (b) administer such an oath.

[16] Section 64A

Insert after section 64:

64A Withdrawal of applications

An application to the Tribunal (whether under this or any other Act) cannot be withdrawn except with the consent of the Tribunal.

[17] Section 67 Appeals to the Supreme Court

Omit section 67 (2) (a). Insert instead:

- (a) in the case of a prescribed decision made by the Tribunal in the exercise of a function under section 51A or of a decision made in the exercise of a function under section 64 (2)—within the period ending 28 days after the relevant decision has been made, or

[18] Section 67 (7)

Insert after section 67 (6):

- (7) In this section:
 - prescribed decision* means a decision made in the exercise of a function under:
 - (a) section 36 in respect of giving consent to minor treatment, or
 - (b) Part 5A, or
 - (c) Division 2 of Part 6, or
 - (d) section 67E.

[19] Part 6, Division 3A

Insert after section 67A:

Division 3A Registrar and other staff of Tribunal

67B Registrar and other staff of Tribunal

A Registrar and such other staff as are necessary for the purpose of enabling the Tribunal to exercise its functions are to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*.

67C Functions of the Registrar

- (1) The Registrar may, at the discretion of the President of the Tribunal, exercise any function of the Tribunal in respect of:
 - (a) dismissing an application, at any stage of the proceedings, if satisfied on the face of the application that the Tribunal does not have jurisdiction to hear and determine the application, or

Example of lack of jurisdiction. The Tribunal does not have jurisdiction to hear and determine an application for a guardianship order in respect of a person who is under the age of 16 years.

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- (b) dismissing an application, at any stage of the proceedings, for want of prosecution including, but not limited to, unreasonable delay by the applicant in providing the Tribunal with requested information, or
 - (c) refusing (under section 25A) a request to review a guardianship order, or
 - (d) refusing (under section 25O) a request to review a financial management order on an application under section 25R, or
 - (e) refusing (under section 25T) a request to review the Tribunal's appointment of the manager of a protected person's estate, or
 - (f) recognising (under section 48B) a person's status as the guardian of another person or as the manager of the estate of another person, or
 - (g) joining (under section 57A) a person as a party to any proceedings before the Tribunal, or
 - (h) granting leave (under section 58 (1)) for a person to be represented by an Australian legal practitioner or an agent, or
 - (i) making orders (under section 58 (3)) requiring and securing separate representation for a person, or
 - (j) giving directions as to the conduct of any proceedings before the Tribunal, or
 - (k) adjourning proceedings before the Tribunal (under section 64 (1)), or
 - (l) consenting to the withdrawal of an application to the Tribunal (under section 64A).
- (2) The President of the Tribunal may direct the Registrar to refer the exercise of a function in a particular matter to the Tribunal (as constituted under section 51 or 51A). The Registrar must comply with such a direction.
 - (3) The Registrar may refer a particular matter to the Tribunal if the Registrar considers it would be more appropriate for the Tribunal (as constituted under section 51 or 51A) to deal with the matter.
 - (4) The Registrar constitutes the Tribunal for the purposes of exercising any functions of the Tribunal conferred on the Registrar under this section. However, sections 65, 66, 68 (1A), 69 and 71 do not apply when the Registrar constitutes the Tribunal.

67D Decisions of Registrar

- (1) A decision of the Registrar made in the exercise of a function of the Tribunal is to be confirmed, as soon as practicable after the order arising out of the decision of the Registrar is made, in a written instrument that is:
 - (a) signed by the Registrar or, if it is not practicable for the Registrar to sign the instrument, by the President or Deputy President, and
 - (b) furnished to each of the parties unless, in the particular case, the Registrar considers that there is an appropriate reason not to furnish such an instrument to any or all parties.
- (2) In the case of a decision under section 67C (1) (c)–(e), the Registrar must furnish each party to the proceedings before the Registrar with formal written reasons for the decision as soon as practicable after giving the decision. The reasons for a decision may be included in the instrument confirming the decision or in a separate instrument.
- (3) No decision of the Registrar is to be vitiated merely because of any informality or want of form.
- (4) The Registrar must cause a record to be kept of any decision made by the Registrar in the exercise of any function under section 67C and of the reasons for that decision.
- (5) The regulations may make further provision with respect to the keeping of records of the exercise of any function under section 67C.

67E Review of decisions of the Registrar

- (1) The Tribunal may, on its own motion, review any decision of the Registrar made under section 67C (1) (c)–(e).
- (2) The Tribunal must review any decision of the Registrar made under section 67C (1) (c)–(e) at the request of any person who was a party to the proceedings before the Registrar.
- (3) A request by a person for a review of a decision of the Registrar must be made:
 - (a) within the period ending 14 days after the day on which the written instrument setting out the formal reasons for the decision is furnished to the person, or
 - (b) within such further time as the Tribunal may, in any case, allow.

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- (4) On reviewing a decision of the Registrar, the Tribunal must conduct a re-hearing of the matter and may take into consideration evidence that was not before the Registrar at the time of the decision under review.
 - (5) On reviewing a decision of the Registrar, the Tribunal may make such orders as it thinks fit and may:
 - (a) confirm the decision, or
 - (b) set aside the decision.
 - (6) Unless the Tribunal otherwise orders, a decision made by the Registrar in a matter to be reviewed remains in force until a decision is made at the review.
 - (7) There is no right of appeal under section 67 from a decision made by the Registrar under section 67C.

Note. Nothing prevents a person making a further application to the Tribunal in respect of any matter that has been the subject of a decision by the Registrar.

[20] Section 68 Decisions of Tribunal

Omit “giving” from section 68 (1B). Insert instead “making”.

[21] Section 68 (1C)

Omit the subsection. Insert instead:

- (1C) Despite subsection (1B), the Tribunal is not required to provide formal written reasons for a prescribed decision made in the exercise of a function under section 51A or for a decision made in the exercise of a function under 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.

[22] Section 68 (3)

Insert after section 68 (2):

- (3) In this section:

prescribed decision means a decision made in the exercise of a function under:

 - (a) section 36 in respect of giving consent to minor treatment, or
 - (b) Part 5A, or

- (c) Division 2 of Part 6, or
- (d) section 67E.

[23] Schedule 1 Provisions relating to the Tribunal

Omit “3 years” from clause 1 (1). Insert instead “5 years”.

[24] Schedule 1, clause 2 (3)

Omit “*Public Sector Management Act 1988*”.

Insert instead “*Public Sector Employment and Management Act 2002*”.

[25] Schedule 1, clause 2 (3)

Omit “Part 8”. Insert instead “Chapter 5”.

[26] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1 (1):

Guardianship Amendment Act 2007

[27] Schedule 3, Part 6

Insert after clause 12:

**Part 6 Provisions consequent on enactment of
Guardianship Amendment Act 2007**

13 Definition

In this Part:

amending Act means the *Guardianship Amendment Act 2007*.

14 Giving of reasons for decisions

Section 68 (1C), as substituted by the amending Act, extends to decisions made before the commencement of the amendment.

15 Functions of Registrar

Section 67C applies so as to extend the power of the Registrar to exercise functions in relation to applications made and proceedings pending on the commencement of that section.

16 Term of office of Tribunal members

The amendment made to clause 1 (1) of Schedule 1 by the amending Act does not apply to a person who was, immediately before the commencement of the amendment, a member of the Tribunal, unless that person is later appointed to a further term of office.