

[Act 1997 No 49]



New South Wales

Guardianship Amendment Bill 1997

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to amend the *Guardianship Act 1987* so as:

- (a) to change the name of the Guardianship Board to the Guardianship Tribunal (the *Tribunal*), and
- (b) to transfer the provisions relating to the Tribunal's powers to make orders concerning the financial management of the estates of persons who are not capable of managing their own affairs from the *Protected Estates Act 1983* to the *Guardianship Act 1987*, and to make those provisions more flexible, and
- (c) to provide for enduring guardianship, and
- (d) to clarify the functions of guardians and alternative guardians, and
- (e) to limit the term *person responsible* to mean only the persons who are authorised to consent to the carrying out of medical and dental treatment on persons who lack the capacity to consent to their own treatment, and to provide a hierarchy of persons responsible, and

* Amended in committee—see table at end of volume.

- (f) to provide for reciprocal arrangements with other jurisdictions in relation to guardians and financial managers, and
- (g) to allow the Tribunal to authorise (in certain circumstances) the participation in clinical trials of persons who lack the capacity to consent to their own medical and dental treatment, and
- (h) to make miscellaneous amendments relating to proceedings of the Tribunal, and
- (i) to make other minor and consequential amendments.

The Bill also makes consequential amendments to the *Protected Estates Act 1983* and certain other Acts.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be fixed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Guardianship Act 1987* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Protected Estates Act 1983* set out in Schedule 2.

Clause 5 is a formal provision giving effect to the amendments to the Acts set out in Schedule 3.

Schedule 1 Amendment of Guardianship Act 1987

Terms—Guardianship Tribunal, “person responsible”, “guardianship order”, “person in need of a guardian” and “party”

At present, the name of the body that (among other things) hears and determines applications for guardianship orders made under the *Guardianship Act 1987* (*the Act*) is the “Guardianship Board”. That name is changed to the “Guardianship Tribunal” to reflect the quasi-judicial nature of the body’s functions (Schedule 1 [1], [2], [39] and [47] and (in part) [3]).

The Act currently uses the term *person responsible* to denote the person who is authorised under the Act to exercise various functions in relation to another person. Part of Schedule 1 [5] removes the definition from section 3 (“*person responsible* has the meaning given by section 3A”) where it operates for the purposes of the whole Act, and Schedule 1 [7] omits section 3A. Part of Schedule 1 [28] inserts the definition (“*person responsible* has the meaning given by section 33A”) in section 33, where it operates only for the purpose of Part 5 (Medical and dental treatment). Schedule 1 [32] inserts the proposed section 33A. The effect is that the term refers only to the persons who are authorised to consent to the carrying out of medical and dental treatment on persons who lack the capacity to consent to their own treatment. The term has the same meaning as that previously given it by section 3A—it sets out a hierarchy of persons from whom the person responsible for a particular person is to be ascertained. However, proposed section 33A (5) provides that if a person who is a person responsible for another person declines in writing to exercise his or her functions as such, or a medical practitioner or other person qualified to give an expert opinion on the person’s condition certifies in writing that the person is not capable of carrying out those functions, the person next in the hierarchy becomes the person responsible.

Schedule 1 [12] and [14] make consequential amendments.

Section 7 of the Act currently defines the terms *guardianship order* and *person in need of a guardian* for the purposes of Part 3 (Guardianship orders) only. As the terms will also be used elsewhere in the Act, Schedule 1 [11] removes the definitions from section 7 and Schedule 1 [3] (in part) inserts them in section 3 (1), where they will have effect for the purposes of the Act as a whole.

Section 3 (1) currently defines *party* in terms of proceedings before the Board in respect of an application under the Act. Schedule 1 [5] (in part) repeals that definition and Schedule 1 [8] (in part) inserts proposed section 3F, which specifies the persons who are parties to proceedings before the Tribunal in relation not only to applications but also in relation to the various reviews that the proposed Act empowers the Tribunal to carry out (eg a review of the appointment of an enduring guardian).

Enduring guardians

Schedule 1 [9] inserts proposed Part 2 (Appointment of enduring guardians), containing proposed sections 5–6N.

Proposed section 5 provides definitions for the purpose of the proposed Part.

Proposed section 6 permits a person of or above the age of 18 years to appoint another person as his or her enduring guardian.

Proposed section 6A specifies the circumstances in which the appointment of an enduring guardian takes effect.

Proposed section 6B identifies the persons who are not eligible to be appointed as enduring guardians (that is, persons aged less than 18 years and persons who have any responsibility for, or involvement in, the medical care or treatment of the person appointing the enduring guardian).

Proposed section 6C specifies the way in which the appointment is to be made.

Proposed section 6D provides for the appointment of 2 or more enduring guardians (either jointly with the same functions or separately with different functions).

Proposed section 6E sets out the functions that an enduring guardian is to exercise.

Proposed section 6F confers ancillary powers on an enduring guardian.

Proposed section 6G provides that the actions of an enduring guardian on behalf of the person who appointed the enduring guardian have effect as the actions of the appointor.

Proposed section 6H enables a person who appointed an enduring guardian to revoke the appointment.

Proposed section 6I makes it clear that any authority conferred on a person appointed as an enduring guardian to exercise a function under the appointment is suspended for the duration of any guardianship order under Part 3. It also provides that any purported appointment of an enduring guardian by a person under guardianship is of no effect.

Proposed section 6J allows the Tribunal to review the appointment of an enduring guardian, and requires it to do so on the request of any person who (in the opinion of the Tribunal) has a genuine concern for the welfare of the person who made the appointment.

Proposed section 6K permits the Tribunal to revoke or confirm (with or without variation) the appointment of an enduring guardian. However, an appointment may be revoked only at the request of the enduring guardian or if the Tribunal is satisfied that it is in the best interests of the appointor that the appointment be revoked. If the Tribunal decides to revoke an

appointment, it may proceed as if an application for a guardianship order under Part 3 or a financial management order under Part 3A (or applications for both orders) had been made in respect of the person who appointed the enduring guardian.

Proposed section 6L formally empowers the Supreme Court to review the appointment of an enduring guardian.

Proposed section 6M specifies the circumstances in which the Tribunal may declare that the appointment of an enduring guardian has effect.

Proposed section 6N is an evidentiary provision relating to the question of whether, at any particular time, the appointor of an enduring guardian was a person in need of a guardian.

Schedule 1 [3] (in part) inserts a definition of *enduring guardian* in section 3 (1) for the purposes of the Act. Schedule 1 [4] amends the definition of *guardian* in that section to make it clear that a guardian includes an enduring guardian. Schedule 1 [6] makes a consequential amendment to the definition of *person under guardianship*. Schedule 1 [10] amends the heading to Part 3 to make it clear that the Part deals only with guardianship orders, not guardianship in general.

Amendments relating to guardianship under a guardianship order

Applications for guardianship orders. Schedule 1 [13] requires the applicant for a guardianship order to serve a copy of the application on each other party to the proceedings before the Tribunal in respect of the application.

Increase in term of guardianship order. Schedule 1 [17] amends section 18 so as to permit the Tribunal, in certain circumstances, to make an initial guardianship order that has effect for up to 3 years (the current limit is 1 year) and to renew a guardianship order for a period of up to 5 years (currently limited to 3 years). The Tribunal must be satisfied that the person the subject of the order has permanent disabilities and is unlikely to become capable of managing his or her person and that there is a need for an order of longer duration than can otherwise be made.

Appointment of more than one guardian. Schedule 1 [16] repeals and re-enacts section 16 (3) (and inserts proposed section 16 (4)) to make it clear that 2 or more guardians of a person may be appointed jointly (with the same function) as well as separately (with different functions).

Alternative guardians. Schedule 1 [18] amends section 20 to make it clear that if 2 or more persons are appointed guardians of a person, alternate guardians may be appointed in respect of those guardians, regardless of whether the original guardians are appointed jointly or separately. Schedule 1 [19] makes a consequential amendment.

Relationship of guardian and person under guardianship. Schedule 1 [20] repeals section 21 (1) (b), which specifies the functions of a guardian of a person the subject of a plenary guardianship order by reference to the *Minors (Property and Contracts) Act 1970*. The paragraph is re-enacted to provide, instead, that the guardian has all the functions of a guardian of the person the subject of the order that a guardian has at law or in equity.

Schedule 1 [21] inserts a new subsection (2A) in section 21 to make it clear that a guardian has the power (subject to any conditions specified in the relevant guardianship order) to do, on behalf of the person under guardianship, all the things that that person could do if he or she had the legal capacity to do so. Under proposed section 21C (as inserted by Schedule 1 [22]), the guardian's actions on behalf of that person have effect as the actions of the person.

Additional powers of guardians. Schedule 1 [22] inserts proposed sections 21A and 21B (as well as proposed section 21C referred to above). Proposed section 21A permits the making of a guardianship order that confers power on the guardian or another specified person (or person of a specified class of persons) or a person authorised by the guardian to take measures or actions specified in the order to ensure that the person under guardianship complies with the decisions of the guardian.

Proposed section 21B confers ancillary powers on guardians in the same way that proposed section 6F confers those powers on an enduring guardian.

Death of guardian. Schedule 1 [23] inserts proposed section 22A, which specifies who is to exercise the functions of the guardian of a person under guardianship if the guardian dies.

Assessment of person under guardianship. At present, section 24 requires an assessment of the person under guardianship, and of the operation of the relevant guardianship order, to be made within the first half of the period for which an initial continuing guardianship order has effect. Schedule 1 [25] repeals and re-enacts section 24 to remove that requirement and, instead, to give the Tribunal the option of specifying in a guardianship order that such assessments are to be made at a specified time during the currency of the order.

Review of guardianship orders. Schedule 1 [26] repeals and re-enacts section 25 and inserts proposed sections 25A, 25B and 25C. The substance of section 25 (which permits the review of guardianship orders on the Tribunal's own motion and requires such a review at the request of persons specified in the section and on the expiry of the period for which the order has effect) is preserved. The section as re-enacted requires notice of the review to be served on each party to the proceedings.

However, proposed section 25A provides that the Tribunal may refuse a request to review a guardianship order if the Tribunal has previously reviewed the order or if, in the opinion of the Tribunal, the request does not disclose grounds for a review. Further, under proposed section 16 (2A) (which is inserted by Schedule 1 [15]), the Tribunal is empowered to make a guardianship order that specifies that it will not be reviewed on expiry, but only if the order relates solely to the taking of one or more specific decisions or actions on behalf of the person under guardianship and the Tribunal is satisfied that there is no need for the order to continue after the decisions or actions have been taken.

Proposed section 25B specifies the persons who are entitled to request a review of a guardianship order.

Proposed section 25C specifies the action that the Tribunal may take on reviewing a guardianship order.

Financial management

Schedule 1 [27] inserts proposed Part 3A (Financial management), containing proposed sections 25D–25U.

Proposed section 25D provides definitions for the purpose of the proposed Part. Schedule 1 [3] (in part) amends section 3 (1) so as to insert a definition of the estate of a person. Although the concept is introduced in proposed Part 3A, the term is to be used elsewhere in the Act as well.

Proposed section 25E empowers the Tribunal to make financial management orders—that is, orders that the whole or part of a person's estate (that is, the property and affairs of the person) be subject to management under the *Protected Estates Act 1983*.

Proposed section 25F specifies the circumstances in which a financial management order may be made.

Proposed section 25G sets out the grounds on which such an order may be made.

Proposed section 25H provides for the making of interim financial management orders.

Proposed section 25I deals with applications for financial management orders. An application may be made by 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.

Proposed section 25J permits the making of an application for a financial management order even if the person the subject of the application has been the subject of a previous application.

Proposed section 25K provides that the Tribunal does not have jurisdiction to make a financial management order in certain circumstances (for example, in relation to a person in respect of whose estate there is in force an order made under the *Protected Estates Act 1983* or the *Mental Health Act 1990*).

Proposed section 25L allows the Tribunal to refer a proceeding relating to a person's capability to manage his or her affairs to the Supreme Court, but only with the concurrence of that Court.

Proposed section 25M provides for the management under the *Protected Estates Act 1983* of the property and affairs of a person in respect of whom a financial management order is made.

Proposed section 25N provides for the review of a financial management order.

Proposed section 25O allows the Tribunal to refuse to review a financial management order in certain circumstances.

Proposed section 25P specifies the action the Tribunal is to take on reviewing a financial management order.

Proposed section 25Q provides for the disposal of the estate the subject of a financial management order if that order is revoked or varied, or the appointment of a particular person as manager of the estate is revoked under proposed section 25U.

Proposed section 25R specifies the persons who are entitled to request a revocation or variation of a financial management order.

Proposed section 25S provides for the review of the appointment of a manager under a financial management order.

Proposed section 25T allows the Tribunal to refuse to review the appointment of such a manager in certain circumstances.

Proposed section 25U specifies the action the Tribunal may take on reviewing such an appointment.

Medical and dental treatment of person under guardianship

Schedule 1 [28] inserts in section 33 (1) a definition of *clinical trial* as a species of medical and dental treatment for the purposes of Part 5 (Medical and dental treatment) of the Act. Schedule 1 [29], [30] and [31] make consequential amendments.

At present, section 44 (2) (a) requires the Board, in considering an application for consent to the carrying out of medical or dental treatment on patients to whom Part 5 applies (that is, patients who are of or above the age of 16 years and are not capable of giving consent to the carrying out of medical or dental treatment on themselves), to have regard to the views (if any) of (among other persons) the *person responsible* for the patient concerned and any guardian of the person who has responsibility for making decisions with respect to such treatment. As such a guardian is one of the persons in the hierarchy of *persons responsible*, Schedule 1 [34] omits provision concerning the views of the guardian.

Schedule 1 [35] inserts proposed sections 45AA and 45AB. Proposed section 45AA empowers the Tribunal to give consent, in certain circumstances, to the participation in clinical trials of patients to whom Part 5 applies. The Tribunal may give the consent only if it is satisfied that (among other things) the drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition from which the patients suffer, that the trial will not involve any known substantial risk to the patients (or, if there are existing treatments for the relevant condition, will not involve material risk greater than the risks associated with those treatments), that it is in the best interests of a person with that condition that he or she undergo the trial and that the trial has been approved by an appropriate ethics committee.

Proposed section 45AB allows the Tribunal to delegate to the *person responsible* for a patient to whom Part 5 applies the function of granting consent to that particular patient's taking part in a clinical trial once the Tribunal has satisfied itself as to the appropriateness of the trial for people suffering from a particular condition.

At present, section 46A permits the Tribunal to authorise a guardian of a patient to whom Part 5 applies to override the patient's objection to the carrying out of certain medical or dental treatment on the patient if it is satisfied that the patient has, on a previous occasion, objected to the carrying out of similar treatment on the patient. Schedule 1 [36] amends section 46A to require, instead, that the Tribunal be satisfied that any objection of the patient will arise because of the patient's lack of understanding of the nature of, or reason for, the treatment.

Section 35 makes it an offence for a person to carry out medical or dental treatment on a patient to whom Part 5 applies unless the treatment is authorised as provided in that section. Schedule 1 [33] ensures that the relevant penalty for the offence (imprisonment for 7 years—the same penalty as for carrying out unauthorised *special treatment*, as defined, on such a patient) is provided for the offence of carrying out an unauthorised clinical trial on such a patient.

Reciprocal arrangements with other jurisdictions

Schedule 1 [37] inserts a proposed new Part 5A (Reciprocal arrangements), containing proposed sections 48A and 48B.

Proposed section 48A inserts a definition of *corresponding law* for the purpose of the proposed Part.

Proposed section 48B allows a person appointed as a guardian or the manager of another person's property and affairs under a corresponding law to be recognised as such in New South Wales and to exercise functions in New South Wales as if the person had been appointed under the *Guardianship Act 1987*.

Amendments relating to proceedings of the Tribunal

Section 51 provides that the Tribunal is to be constituted by no fewer than 3 and no more than 5 members for the purpose of exercising its functions. Schedule 1 [38] inserts proposed section 51A, which permits the Tribunal to be constituted by fewer than 3 members when exercising its functions for the purpose of specified procedural matters (such as the granting of leave to appear in a proceeding and the withdrawal of an application to the Tribunal) or when giving consent to the carrying out of *minor medical or dental treatment* (but not *major treatment*, *special treatment* or treatment by way of a *clinical trial*).

Schedule 1 [39] omits provisions relating to the procedure of the Tribunal in proceedings before it under the *Protected Estates Act 1983*. There will be no such proceedings under the Act as amended.

Schedule 1 [40], [41], [43] and [44] ensure that the provisions restricting the publication of the names of certain persons to whom proceedings before the Tribunal relate, and the right of appearance of those persons, extend to persons in respect of whose estate a financial management order is made and persons in respect of whom an application or request under the proposed Parts 2 (Appointment of enduring guardians) and 3A (Financial management) is made.

Schedule 1 [42] inserts proposed section 57A, which allows the Tribunal to join as a party to proceedings before it any person who, in the opinion of the Tribunal, should be a party to the proceedings.

At present, section 60 allows the member presiding at a sitting of the Tribunal to compel the attendance of witnesses before (and the production of documents to) the Tribunal, to require that a witness give evidence on oath and to administer the oath. Schedule 1 [45] amends section 60 so as to widen the category of members who may carry out those functions to include the President and Deputy President of the Tribunal and any member who is a legal practitioner of at least 7 years' standing who is nominated in writing by the President.

Section 63 currently allows the Minister to determine the allowances and expenses payable to a witness. Schedule 1 [46] amends that section to provide that the determination may, instead, be made by the President of the Tribunal.

Section 66 requires the Tribunal to attempt to conciliate a matter. Schedule 1 [48] amends that section so as to remove that requirement in cases where the Tribunal considers that conciliation is not possible (or appropriate).

At present, section 68 (1) provides that decisions of the Tribunal are to be (among other things) "in the form of an instrument in writing that includes the reasons for the decision". Schedule 1 [51] repeals and re-enacts that subsection and inserts proposed subsections (1A)–(1C). The section as amended allows the Tribunal to make an order orally at a hearing, which order takes effect immediately, unless it provides otherwise or is stayed in consequence of an appeal. The section also requires the Tribunal to confirm the decision in writing to each party to the proceedings as soon as practicable. The Tribunal must also provide each party with written reasons for the decision, unless the decision concerns a procedural matter specified in proposed section 51A (1) (b) or is an adjournment under section 64 (2). However, written reasons for those decisions must be provided if a party to the proceedings requests them or an appeal against the decision is lodged.

Schedule 1 [49] amends section 67 to specify the time allowed for lodging an appeal against a decision of the Tribunal concerning procedural matters specified in proposed section 51A (1) (b) and adjournments under section 64 (2).

Miscellaneous amendments

Schedule 1 [8] inserts proposed sections 3B–3F.

Proposed section 3B provides that notes in the Act are explanatory only and do not form part of the Act.

Proposed section 3C makes it clear that a guardianship order can be made in respect of a person who is a patient within the meaning of the Mental Health Act 1990, but that any such order is effective only to the extent that it is consistent with any determination or order made under that Act in respect of the person. Schedule 1 [24] makes a consequential amendment.

As well as setting out the meaning of *persons responsible* (as referred to earlier in this Explanatory Note), section 3A (which is repealed by Schedule 1 [7]) currently gives examples of the circumstances in which a person is to be regarded as *having the care of another person* and specifies the circumstances in which a person is a *close friend or relative* of another person for the purposes of the Act. Proposed section 3D and 3E re-enact the matter relating to persons who *have the care of another person* and *close friend or relative*. The sole change to that matter is an addition to the category of persons who are not to be regarded as a *close friend or relative* of another person. The additional category is persons who have a financial interest in any services that they provide to the other person.

As explained under the heading “Terms”, proposed section 3F specifies the persons who are “parties” for the purposes of various proceedings before the Tribunal.

Schedule 1 [52] requires the Tribunal to furnish an annual report on its work and activities to the Minister, who must cause the report to be tabled in both Houses of Parliament.

Schedule 1 [50] provides that the Tribunal is not liable for any costs relating to any of its orders or decision against which an appeal is made, or to the appeal itself. This provision is similar to section 21 (1) of the *Protected Estates Act 1983*.

Schedule 1 [53] omits a regulation-making power in relation to the original Part 2 of the Act (which has been repealed).

Schedule 1 [54] is a formal provision giving effect to the Schedule of savings and transitional provisions inserted by Schedule 1 [55].

Schedule 2 Amendment of Protected Estates Act 1983

Schedule 2 [1], [2] and [19] are Consequential on the Guardianship Board's change of name to the Guardianship Tribunal.

Schedule 2 [3] and [20] are consequential on the *Disability Services Act 1993*, which changed the name of the *Disability Services and Guardianship Act 1987* to the *Guardianship Act 1987*.

Schedule 2 [4], [7]–[10], [14], [16], [17], [18] and [22] are consequential on the proposed insertion of Part 3A (Financial management) in the *Guardianship Act 1987*.

Schedule 2 [5] expands the meaning of estate for the purposes of the Act in view of the Guardianship Tribunal's power under proposed section 25E of the *Guardianship Act 1987* to exclude a specified part of a person's estate from a financial management order made in respect of the estate. Schedule 2 [21] amends section 76 (Powers of attorney) in view of that proposed power so as to provide that the Guardianship Tribunal may make orders to the effect that any existing power of attorney is to remain in force in respect of so much of the estate as is under the control of the protected person concerned.

Schedule 2 [6] repeals the statutory right of the Guardianship Tribunal to refer certain inquiries to the Protective Commissioner.

Schedule 2 [11] amends section 21 to remove the right to appeal under the *Protected Estates Act 1983* against a financial management order made by the Guardianship Tribunal. Since that Tribunal will make such orders under proposed Part 3A (Financial management) of the *Guardianship Act 1987*, appeals against those orders will also be made under that Act. Schedule 2 [12] and [13] make consequential amendments.

Schedule 2 [15] inserts proposed section 23A, which makes it clear that a protected person (within the meaning of the *Protected Estates Act 1983*) has no power to deal with so much of his or her estate as is committed to the management of another person under the *Protected Estates Act 1983* or the *Guardianship Act 1987*. However, the manager of the estate may authorise the protected person to deal with a specified part of the estate.

Schedule 3 Amendment of other Acts

Schedule 3 amends the *Services (Complaints, Appeals and Monitoring) Act 1993* and the *Statutory and Other Offices Remuneration Act*

1975 as a consequence of the Guardianship Board's change of name. The second of the amendments to the *Mental Health Act 1990* is made for the same reason.

Schedule 3 also amends the *Medical Practice Act 1992* and the *Minors (Property and Contracts) Act 1970* in consequence of the change of name of the *Disability Services and Guardianship Act 1987* to the *Guardianship Act 1987*. The first of the amendments to the *Mental Health Act 1990* is made for the same reason.