

Guardianship Act 1987 No 257

[1987-257]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Previously named**
Disability Services and Guardianship Act 1987
- **Editorial note**
The Parliamentary Counsel's Office is progressively updating certain formatting styles in versions of NSW in force legislation published from 29 July 2019. For example, colons are being replaced by em-rules (em-dashes). Text of the legislation is not affected.

This version has been updated.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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Guardianship Act 1987 No 257



New South Wales

An Act with respect to the guardianship of persons who have disabilities; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Guardianship Act 1987*.

2 Commencement

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

3 Definitions

(1) In this Act—

authorised officer, in relation to any provision of this Act, means—

- (a) an employee who is declared to be an authorised officer for the purposes of that provision, or
- (b) an employee who belongs to a class of employees who are declared to be authorised officers for the purposes of that provision,

by an order in force under subsection (3).

child means a person who is under the age of 18 years.

Department means the Department of Family and Community Services.

employee means a Public Service employee who is employed to enable the Tribunal to exercise its functions in the Guardianship Division of the Tribunal.

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.

exempt premises means—

- (a) the premises of—
 - (i) a government school or non-government school within the meaning of the [Education Act 1990](#),
 - (ii) a private health facility licensed under the [Private Health Facilities Act 2007](#) or a nursing home within the meaning of the [Public Health Act 2010](#),
 - (iii) a mental health facility within the meaning of the [Mental Health Act 2007](#),
 - (iv) a statutory health corporation or affiliated health organisation under the [Health Services Act 1997](#), or
 - (v) a public hospital or health service under the control of a local health district constituted under the [Health Services Act 1997](#),
- (b) any premises belonging to a class of premises prescribed by the regulations, or
- (c) in relation to any provision of this Act, any premises declared to be exempt premises for the purposes of that provision by an order in force under subsection (4).

guardian means a person who is, whether under this Act or any other Act or law, a guardian of the person of some other person (other than a child who is under the age of 16 years), and includes an enduring guardian.

guardianship order means an order referred to in section 14.

NSW Trustee means the NSW Trustee and Guardian constituted under the [NSW Trustee and Guardian Act 2009](#).

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.

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

premises includes any land, building, vehicle or vessel.

proprietor, in relation to premises, means—

- (a) if the premises are not leased—the owner, or (if there is more than one owner) any of the owners, of the premises, or
- (b) if the premises are leased—the lessee, or (if there is more than one lessee) any of the lessees, who is entitled to immediate possession of the premises.

Public Guardian means the Public Guardian referred to in section 77.

Secretary means the Secretary of the Department.

spouse means—

- (a) the person to whom a person is legally married (including the husband or wife of a person), or
- (b) a de facto partner,

but where more than one person would so qualify as a spouse, means only the last person so to qualify.

Note—

“De facto partner” is defined in section 21C of the [Interpretation Act 1987](#).

Tribunal means the Civil and Administrative Tribunal.

Note—

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) In this Act, a reference to a person who has a disability is a reference to a person—
 - (a) who is intellectually, physically, psychologically or sensorily disabled,
 - (b) who is of advanced age,
 - (c) who is a mentally ill person within the meaning of the [Mental Health Act 2007](#), or
 - (d) who is otherwise disabled,and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.
- (3) For the purposes of the definition of **authorised officer** in subsection (1), the Minister may, by order published in the Gazette—
 - (a) declare any employee to be an authorised officer, or
 - (b) declare any class of employees to be authorised officers,for the purposes of any provision of this Act.
- (4) For the purposes of paragraph (c) of the definition of **exempt premises** in subsection (1), the Minister may, by order published in the Gazette, declare any premises to be exempt premises for the purposes of any provision of this Act.
- (5) (Repealed)
- (6) In this Act—

- (a) a reference to a function includes a reference to a power, authority and duty, and
- (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

3A (Repealed)

3B Notes

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

3C Relationship with [Mental Health Act 2007](#)

- (1) A guardianship order may be made in respect of a patient within the meaning of the [Mental Health Act 2007](#).
- (2) The fact that a person under guardianship becomes a patient within the meaning of the [Mental Health Act 2007](#) 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 2007](#) 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 2007](#) 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 Division Head of the Guardianship Division 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, if the relationship between the person and the spouse is close and continuing,
 - (d) the person, if any, who has care of the person to whom the application relates,
 - (d1) the enduring guardian, if any, 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 44 of the *Civil and Administrative Tribunal Act 2013*.
- (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, if the relationship between the person and the spouse is close and continuing,

- (d) the person who has care of the person the subject of the order,
 - (d1) the enduring guardian, if any, of the person the subject of the order,
 - (e) the guardian appointed under the order,
 - (e1) the Public Guardian,
 - (f) any person whom the Tribunal has joined as a party under section 44 of the *Civil and Administrative Tribunal Act 2013*.
- (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,
 - (c) the person who appointed the enduring guardian,
 - (d) the spouse, if any, of the person who appointed the enduring guardian, if the relationship between the person and the spouse is close and continuing,
 - (e) the person, if any, who has care of the person who appointed the enduring guardian,
 - (e1) the Public Guardian,
 - (e2) the NSW Trustee,
 - (f) any person whom the Tribunal has joined as a party under section 44 of the *Civil and Administrative Tribunal Act 2013*.
- (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, if the relationship between the person and the spouse is close and continuing,
 - (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 NSW Trustee,

- (g) any person whom the Tribunal has joined as a party under section 44 of the *Civil and Administrative Tribunal Act 2013*.
- (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, if the relationship between the person and the spouse is close and continuing,
 - (d) the person, if any, who has care of the protected person,
 - (d1) the person, if any, appointed attorney by the person to whom the relevant financial management order relates under a power of attorney (whether in force or suspended),
 - (e) the person appointed as the manager of the estate concerned,
 - (f) the NSW Trustee,
 - (g) any person whom the Tribunal has joined as a party under section 44 of the *Civil and Administrative Tribunal Act 2013*.
- (8) In this section, **financial management order** and **protected person** have the same meanings as in Part 3A.

4 General principles

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles—

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

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.

eligible signer, in relation to a notice or other instrument, means a person who—

- (a) is at least 18 years of age, and
- (b) is not a witness to the notice or other instrument, and
- (c) in the case of an instrument appointing an enduring guardian or revoking an appointment—is not an appointee or substitute enduring guardian.

eligible witness means a person who—

- (a) is any of the following—
 - (i) an Australian legal practitioner,
 - (ii) (Repealed)
 - (iii) a registrar of the Local Court,
 - (iv) a person (or a person belonging to a class of persons) prescribed by the regulations for the purposes of this subparagraph, and
- (b) in the case of an instrument appointing an enduring guardian or revoking an appointment—is not an appointee or substitute enduring guardian.

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—
 - (a) the person is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the provision of any of the following services for fee or reward to the person making the appointment—
 - (i) medical services (whether provided in a hospital, at home or otherwise),
 - (ii) accommodation,
 - (iii) any other services to support the person making the appointment in his or her activities of daily living, or
 - (b) the person is the spouse, parent, child, brother or sister of a person of the kind referred to in paragraph (a).
- (3) However, if a person who is validly appointed as an enduring guardian becomes responsible for or involved in the provision for fee or reward of a service to the appointor of the kind referred to in subsection (2) (a), the appointment does not lapse.

6C Method of appointment

- (1) 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 signed—
 - (i) by the appointor, or
 - (ii) if the appointor instructs—by an eligible signer who signs for the appointor in the appointor's presence, and
 - (c) it is endorsed with the appointee's acceptance of the appointment, and

- (d) the execution of the instrument by the appointor and appointee is witnessed by one or more eligible witnesses, and
 - (e) each witness certifies that the person or persons whose execution of the instrument is witnessed executed the instrument voluntarily in the presence of the witness and appeared to understand the effect of the instrument, and
 - (f) if the instrument is signed for the appointor by an eligible signer—the person who witnesses the signature certifies that the appointor, in the witness's presence, instructed the signer to sign the instrument for the appointor.
- (2) Without limiting subsection (1) (b) (i), an instrument is signed by the appointor if the appointor affixes his or her mark to the instrument.
- (3) If an eligible signer signs an instrument on behalf of an appointor as provided by subsection (1) (b) (ii), the appointor is taken to have signed the instrument for the purposes of this Act (including subsection (1) (e)).
- (4) For the purposes of subsection (1) (d)—
- (a) the execution of the instrument by or for the appointor and by the appointee may be witnessed by the same person or by different persons, and
 - (b) the execution of the instrument by or for the appointor does not need to be witnessed at the same time and place as the execution of the instrument by the appointee.

6D Appointment of 2 or more enduring guardians

- (1) An instrument appointing an enduring guardian may appoint 2 or more such guardians to act jointly, severally or jointly and severally.
- (2) If an instrument appoints 2 or more enduring guardians to act both jointly and severally—
- (a) the appointees are authorised to act jointly or severally at their discretion in relation to the appointor except as otherwise provided by the instrument of appointment, and
 - (b) a vacation in the office of one enduring guardian does not terminate the appointment of any other enduring guardian unless the instrument of appointment provides otherwise.
- (3) Without limiting subsection (1), an instrument appointing more than one enduring guardian may confer different functions on each appointee. In any such case—
- (a) each appointee is taken to have been appointed to act severally, and
 - (b) a reference in this Act to the enduring guardian is a reference to whichever of the

appointees has the relevant function.

- (4) An instrument appointing 2 or more enduring guardians to act jointly may provide that the death, resignation or incapacity of one or more appointees does not operate to terminate the appointment of any other appointee.
- (5) For the purposes of this Act, an instrument that makes provision of the kind referred to in subsection (4) is taken to have appointed an appointee to act severally if each other appointee has died, resigned or become incapacitated.
- (6) A person who was appointed by an instrument executed by an appointor as a joint enduring guardian where that instrument does not make provision of the kind referred to in subsection (4) may apply to the Tribunal for an order confirming his or her appointment as an enduring guardian if each other appointee has died, resigned or become incapacitated.
- (7) The Tribunal may confirm the appointment of a person as an enduring guardian under subsection (6) only if the Tribunal is satisfied that the appointor did not intend the appointment to terminate if one or more of the other joint enduring guardians died, resigned or became incapacitated.
- (8) If the Tribunal confirms the appointment of a person as an enduring guardian under subsection (6), the instrument appointing the person is taken to have appointed the person to act severally if each other appointee has died, resigned or become incapacitated.

6DA Substitute enduring guardians

- (1) An instrument of appointment of an enduring guardian (the ***original enduring guardian***) may appoint another person to be a substitute enduring guardian of the appointor.
- (2) The instrument of appointment does not operate to appoint a person as a substitute enduring guardian unless it is endorsed with the person's acceptance of the appointment.
- (3) A substitute enduring guardian has (and may exercise) the functions of an original enduring guardian only—
 - (a) if the original enduring guardian dies, or
 - (b) if the original enduring guardian resigns, or
 - (c) during any incapacity of the original enduring guardian.
- (4) If 2 or more original enduring guardians are appointed by the instrument of appointment, the substitute enduring guardian—

- (a) is taken to have been appointed as a substitute enduring guardian for each of the original enduring guardians unless the instrument of appointment provides otherwise, and
 - (b) if the original enduring guardians were appointed jointly and all of them have died, resigned or become incapacitated—section 6D operates in relation to that substitute enduring guardian as if he or she had been appointed as an original enduring guardian by the instrument of appointment and was the only remaining original enduring guardian.
- (5) A reference in a provision of this Act (other than this section) to an enduring guardian is to be read as a reference to the substitute enduring guardian while that person has, and may exercise, the functions of an original enduring guardian.

6E Functions of enduring guardians

- (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).
- (2A) For the purpose of exercising a function that an appointee is authorised to exercise by an instrument appointing the appointee as an enduring guardian, the appointee has the same right of access to information about the appointor as the appointor has.
- (2B) Nothing in the *Privacy and Personal Information Protection Act 1998* prevents a public sector agency (within the meaning of that Act) from disclosing information about an appointor to an appointee if the agency is satisfied that the disclosure of the information would assist the appointee to exercise his or her functions as an enduring guardian.
- (2C) Nothing in subsection (2A) affects the operation of the *Health Records and Information Privacy Act 2002* in relation to the disclosure of health information about

an appointor to an appointee.

Note—

Section 7 of the *Health Records and Information Privacy Act 2002* (when read with section 8 of that Act) provides that a guardian of an individual may do any act authorised, permitted or required by that Act on behalf of an individual who is incapable of doing that act. An individual is incapable of doing an act for the purposes of section 7 if the individual is incapable, by reason of age, injury, illness or physical or mental impairment, of understanding the general nature and effect of the act or communicating the individual's intentions with respect to the act. If the individual is capable of doing the act, then the guardian may not do the act on behalf of the individual unless expressly authorised to do so.

- (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 is in or to the effect of the form prescribed by the regulations, and
- (c) the instrument is signed—
- (i) by the appointor, or
- (ii) if the appointor instructs—by an eligible signer who signs for the appointor in the appointor's presence, and

- (c1) the execution of the instrument is witnessed by an eligible witness, and
 - (c2) the eligible witness certifies that the appointor executed the instrument voluntarily in the presence of the witness and appeared to understand the effect of the instrument, and
 - (c3) if the instrument is signed for the appointor by an eligible signer—the eligible witness certifies that the appointor, in the witness’s presence, instructed the signer to sign the instrument for the appointor, and
 - (d) written notice of the revocation is given to the appointee.
- (3) Without limiting subsection (2) (c) (i), an instrument is signed by the appointor if the appointor affixes his or her mark to the instrument.
- (4) If an eligible signer signs an instrument on behalf of an appointor as provided by subsection (2) (c) (ii), the appointor is taken to have signed the instrument for the purposes of this Act (including subsection (2) (c2)).

6HA Automatic revocation of appointment by marriage of appointor

The appointment of a person as an enduring guardian is revoked if the appointor marries or remarries a person (other than the appointee) after the date on which the person was appointed as an enduring guardian.

Note—

See section 6HC for certain appointments taken not to have been revoked on the recognition of same sex marriages.

6HB Resignation of appointment by appointee

- (1) An appointee may resign the appointee’s appointment as an enduring guardian—
- (a) if the appointor is not in need of a guardian—by giving written notice to that effect to the appointor, or
 - (b) if the appointor is in need of a guardian—with the approval of the Tribunal.
- (2) A written notice resigning an appointment as an enduring guardian must—
- (a) be in or to the effect of the form prescribed by the regulations, and
 - (b) be signed—
 - (i) by the appointee, or
 - (ii) if the appointee instructs—by an eligible signer who signs for the appointee in the appointee’s presence, and
 - (c) be witnessed by an eligible witness, and

- (d) if the notice is signed for the appointee by an eligible signer—contain, or have annexed to it, a certificate signed by the eligible witness that certifies that the appointee, in the witness's presence, instructed the signer to sign the notice for the appointee.
- (3) Without limiting subsection (2) (b) (i), a notice is signed by the appointee if the appointee affixes his or her mark to the notice.
- (4) If an eligible signer signs a notice on behalf of an appointee as provided by subsection (2) (b) (ii), the appointee is taken to have signed the notice for the purposes of this Act.
- (5) The provisions of this section apply to the resignation of a substitute enduring guardian appointed as provided by section 6DA in the same way as they apply to the resignation of an appointee.

6HC Certain appointments not revoked on recognition of same sex marriages

- (1) This section applies to an appointment of a person as an enduring guardian that—
 - (a) was made by a person who at the time of making the appointment was party to a marriage that had been solemnised and that marriage was a recognised same sex marriage on the recognition day, and
 - (b) was in force immediately before the recognition day, and
 - (c) was revoked by the operation of section 6HA on the recognition day because of the recognised same sex marriage of the person who made the appointment.
- (2) An appointment to which this section applies is taken not to have been revoked by the operation of section 6HA.
- (3) However, subsection (2) does not apply if the appointment to which this section applies was made by a person who made a subsequent appointment on or after the recognition day but only from the day on which that subsequent appointment was made.
- (4) Anything done or omitted to be done by a person, whose appointment as an enduring guardian is an appointment to which subsection (2) applies, that would have been lawful if this section applied at the time concerned, is taken to be (and always to have been) lawful.
- (5) In this section—
 - recognised same sex marriage*** means a marriage that—
 - (a) was solemnised before the recognition day, and
 - (b) was recognised in Australia as valid on the recognition day because of Part 5 of

Schedule 1 to the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* of the Commonwealth, and

(c) would not have been recognised apart from that Part.

recognition day means the day on which Part 5 of Schedule 1 to the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* of the Commonwealth commenced.

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 deal with the matter as provided by subsection (3) (or both), 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) The Tribunal may, if it considers that it is in the best interests of the appointor to do so, deal with a review as if any of the following applications had been made in respect of the appointor—
- (a) an application for a guardianship order under Part 3,
 - (b) an application for a financial management order under Part 3A,
 - (c) applications for both such orders.
- (4) The Tribunal may confirm the appointment (or purported appointment) of a person as an enduring guardian under subsection (1) (b) even where—
- (a) the instrument that purported to appoint the person as an enduring guardian was not executed in accordance with the requirements of this Part, or
 - (b) the person purporting to make the appointment announced his or her intention to make the appointment but became incapacitated before an instrument making the appointment could be executed in accordance with the requirements of this Part,
- if the Tribunal is satisfied that the confirmation of the appointment (or purported appointment) reflects the appointment that the person making the appointment intended to make at the time it was purportedly made.
- (5) The confirmation of the appointment of an enduring guardian under subsection (1) (b) has effect as if an instrument of appointment had been executed in accordance with the requirements of this Part by the appointor in the terms confirmed by the Tribunal.

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 a guardian, 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.

6MA Substitution of enduring guardians by Tribunal

- (1) The Tribunal may, 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 an appointor, appoint a person as a substitute enduring guardian of the appointor if the appointee has died, resigned or become incapacitated.
- (2) The Tribunal may appoint a person under subsection (1) only if—
 - (a) the person is eligible to be appointed as an enduring guardian under this Part, and
 - (b) the Tribunal is satisfied that—
 - (i) the appointor is in need of an enduring guardian, and
 - (ii) the person has a close personal relationship with the appointor, and
 - (iii) the person is capable of carrying out the functions of an enduring guardian.
- (3) An appointment of a person under this section has effect as if the appointor had appointed the person as a substitute enduring guardian as provided by section 6DA.
- (4) The provisions of sections 6J and 6K apply to an appointment made under this section in the same way as they apply to an appointment made under an instrument of appointment.

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.

6O Recognition of enduring guardians appointed in other States and Territories

- (1) An instrument appointing an interstate enduring guardian has effect in this State as if it were an instrument appointing an enduring guardian made under, and in compliance with, this Part, but only to the extent that the functions it confers under the law of the State or Territory in which it was made could validly have been conferred by an instrument appointing an enduring guardian made under this Part.
- (2) In particular, an instrument to which subsection (1) applies—
 - (a) has effect in this State subject to any limitations on the functions it confers that apply to it under the law of the State or Territory in which it was made, and
 - (b) does not operate to confer any function on an enduring guardian in this State that cannot be conferred on an enduring guardian by or under this Part.
- (3) A document signed by an Australian legal practitioner that certifies that an instrument appointing an interstate enduring guardian was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings where the appointment is in issue and is prima facie evidence of the matter so certified.
- (4) Subsections (1)–(3) apply to an instrument appointing an interstate enduring guardian even if, at the time it was made, it was not an instrument appointing an enduring guardian within the meaning of this section.
- (5) In this section—

interstate enduring guardian means a person who is appointed as a guardian by an instrument (or an instrument belonging to a class of instruments) prescribed by the regulations that is made under a law of a State or Territory (other than New South Wales).

Part 3 Guardianship orders

Division 1 Preliminary

7 Definitions

In this Part—

continuing guardianship order means a guardianship order (whether plenary or limited) that is specified to be continuing, as referred to in section 16 (1) (b).

guardian, in relation to a person under guardianship, means the person for the time being appointed by a guardianship order as the guardian of that person's person.

limited guardianship order means a guardianship order (whether continuing or temporary) that is specified to be limited, as referred to in section 16 (1) (c).

person under guardianship means a person in respect of whom a guardianship order is in force.

plenary guardianship order means a guardianship order (whether continuing or temporary) that is specified to be plenary, as referred to in section 16 (1) (c).

temporary guardianship order means a guardianship order (whether plenary or limited) that is specified to be temporary, as referred to in section 16 (1) (b).

8 Jurisdiction of the Supreme Court not affected

- (1) Nothing in this Part limits the jurisdiction of the Supreme Court with respect to the guardianship of persons.
- (2) This section does not affect the operation of section 22 (Termination of Supreme Court orders).

Division 2 Applications for guardianship orders

9 Applications

- (1) An application for a guardianship order in respect of a person may be made to the Tribunal—
 - (a) by the person,
 - (b) (Repealed)
 - (c) by the Public Guardian, or
 - (d) by any other person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person.
- (2) An application may not be made in respect of a person who is under the age of 16 years.

- (3) An application shall specify the grounds on which it is alleged that the person is a person in need of a guardian.

10 Service of applications

- (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) Before conducting a hearing into the application, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will conduct the hearing to be served on each party to the proceedings.
- (2) Failure to serve a copy of an application, or a notice, in accordance with this section does not vitiate the decision of the Tribunal on the application.

11 Removal of persons pursuant to order of the Tribunal

- (1) If an application for a guardianship order has been made with respect to a person—
 - (a) the Tribunal may, if it considers it to be appropriate in the circumstances of the case, make an order for the removal of the person from any premises, and
 - (b) an authorised officer or a member of the police force may, pursuant to the order, enter the premises, search the premises for the person and remove the person from the premises.
- (2) An authorised officer or a member of the police force may, for the purposes of entering and searching premises and removing a person pursuant to an order in force under this section, use all reasonable force.

12 Power of search and removal of persons

- (1) An employee or a member of the police force may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the issue of a search warrant if the employee or member of the police force has reasonable grounds for believing that there is in any premises a person who appears to be a person in need of a guardian and who—
 - (a) is being unlawfully detained against his or her will, or
 - (b) is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken.
- (2) An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an

employee or member of the police force named in the warrant—

- (a) to enter any premises specified in the warrant,
- (b) to search the premises for the person, and
- (c) to remove the person from the premises.

(3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.

(4) Without limiting the generality of section 71 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, a member of the police force or a medical practitioner, or both—

- (a) may accompany an employee executing a search warrant issued under this section, and
- (b) may take all reasonable steps to assist the employee in the exercise of the employee's functions under this section.

(5) An employee named in a search warrant, or a member of the police force, may, for the purpose of removing a person pursuant to the warrant, use all reasonable force.

13 Care of persons pending proceedings

(1) If an employee or member of the police force removes a person from any premises under section 11 or 12, the employee or member of the police force shall forthwith place the person in the care of the Secretary at a place approved by the Minister for the purposes of this section.

(1A) The Minister may delegate to the Secretary, or to any other person, the exercise of the Minister's function to approve the place in which a person may be placed in the care of the Secretary under this section.

(1B) The Secretary may delegate to any person the exercise of a function delegated to the Secretary by the Minister under subsection (1A).

(2) If a person has been removed from any premises under section 12 and placed in the care of the Secretary, the Secretary shall not keep the person in his or her care for more than 3 days unless the Secretary has, before the expiration of that period, made an application for a guardianship order in respect of the person.

Division 3 Guardianship orders

14 Tribunal may make guardianship orders

(1) If, after conducting a hearing into any application made to it for a guardianship order in respect of a person, the Tribunal is satisfied that the person is a person in need of a

guardian, it may make a guardianship order in respect of the person.

- (2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to—
- (a) the views (if any) of—
 - (i) the person, and
 - (ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and
 - (iii) the person, if any, who has care of the person,
 - (b) the importance of preserving the person's existing family relationships,
 - (c) the importance of preserving the person's particular cultural and linguistic environments, and
 - (d) the practicability of services being provided to the person without the need for the making of such an order.

15 Restrictions on Tribunal's power to make guardianship orders

- (1) A guardianship order shall not be made in respect of a person—
- (a) if the person is under the age of 16 years, or
 - (b) in the case of a person who is the subject of an order made by the Supreme Court, in the exercise of its jurisdiction with respect to the guardianship of persons—unless the Supreme Court consents to the making of the order, or
 - (c) in the case of a person who is the subject of an order made by the Children's Court in the exercise of its jurisdiction under section 79A of the *Children and Young Persons (Care and Protection) Act 1998*—unless the Children's Court consents to the making of the order.
- (2) A temporary guardianship order shall not be made in circumstances in which it is practicable to make a continuing guardianship order appointing a person other than the Public Guardian as the guardian of the person under guardianship.
- (3) A continuing guardianship order appointing the Public Guardian as the guardian of a person under guardianship shall not be made in circumstances in which such an order can be made appointing some other person as the guardian of the person.
- (4) A plenary guardianship order shall not be made in circumstances in which a limited guardianship order would suffice.

16 Guardianship orders

- (1) A guardianship order—
 - (a) shall appoint a person who is of or above the age of 18 years as the guardian of the person of the person under guardianship,
 - (b) shall specify whether the order is continuing or temporary,
 - (c) shall specify whether the order is plenary or limited, and
 - (d) may be made subject to such conditions as the Tribunal considers appropriate to specify in the order.
- (2) A limited guardianship order shall specify—
 - (a) the extent (if any) to which the guardian shall have custody of the person under guardianship, and
 - (b) which of the functions of a guardian the guardian shall have in respect of the person under guardianship.
- (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.

- (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 Guardians

- (1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that—

- (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,
 - (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
 - (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.
- (2) Subsection (1) does not apply to the appointment of the Public Guardian as the guardian of a person under guardianship.
- (3) If, at the expiration of the period for which a temporary guardianship order has effect, the Tribunal is satisfied—
- (a) that it is appropriate that a further guardianship order should be made with respect to the person under guardianship, and
 - (b) that there is no other person who it is satisfied is appropriate to be the person's guardian,
- the Tribunal may, in accordance with this Division, make a continuing guardianship order appointing the Public Guardian as the guardian of the person.
- (4) The Public Guardian shall be appointed as the guardian of a person the subject of a temporary guardianship order.

18 Term of guardianship orders

- (1) A continuing guardianship order has effect—
- (a) in the case of an initial order—for such period (not exceeding 1 year from the date when it was made) as the Tribunal may specify in the order, or
 - (b) in the case of an order that is renewed—for such period (not exceeding 3 years from the date when it was renewed) as the Tribunal may specify in the order.
- (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).
- (2) A temporary guardianship order has effect—
- (a) in the case of an initial order—for such period (not exceeding 30 days from the date when it was made) as the Tribunal may specify in the order, or
 - (b) in the case of an order that is renewed—for such period (not exceeding 30 days from the date when it was renewed) as the Tribunal may specify in the order.
- (3) A temporary guardianship order may be renewed only once.

19 Orders to be forwarded to the Public Guardian

If the Tribunal makes a continuing guardianship order appointing a person other than the Public Guardian as a guardian, it shall cause a copy of the order to be forwarded to the Public Guardian.

20 Alternative guardians

- (1) A continuing guardianship order (other than an order appointing the Public Guardian as a guardian) may appoint a person to be an alternative guardian of the person under guardianship.
- (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.
- (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.

21 Relationship of guardians to persons under guardianship

- (1) Subject to any conditions specified in the order, the guardian of a person the subject of a plenary guardianship order—
- (a) has custody of the person to the exclusion of any other person, and
 - (b) has all the functions of a guardian of that person that a guardian has at law or in

equity.

- (2) Subject to any conditions specified in the order, the guardian of a person the subject of a limited guardianship order—
 - (a) has custody of the person, to the exclusion of any other person, to such extent (if any) as the order provides, and
 - (b) has such of the functions of a guardian of that person's person, to the exclusion of any other person, as the order provides.
- (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.
- (3) Section 49 of the *Minors (Property and Contracts) Act 1970* does not apply to a person the subject of a plenary guardianship order.

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).

22 Termination of Supreme Court orders

On the making of a guardianship order in respect of a person the subject of an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons, the order made by the Supreme Court shall cease to have effect.

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.

23 Guardianship orders of no effect in certain circumstances

A guardianship order does not have effect in relation to a person while the person is—

- (a) (Repealed)
- (b) the subject of a subsequent order made by the Supreme Court, in the exercise of its jurisdiction with respect to the guardianship of persons, appointing a guardian of that person's person.

Division 4 Assessment and review of guardianship orders

Note—

A review by the Tribunal under this Division of a guardianship order it has made is not an internal appeal or an exercise of its

administrative review jurisdiction for the purposes of the *Civil and Administrative Tribunal Act 2013*. It is instead an exercise of the Tribunal's general jurisdiction.

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.

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, or

(d) renew, or renew and vary 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).

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 *NSW Trustee and Guardian Act 2009*.
- (2) The Tribunal may exclude a specified part of the estate from the financial management order.
- (3) (Repealed)

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), or
- (d) following (or in the course of) proceedings under section 36 of the *Powers of Attorney Act 2003* in respect of an enduring power of attorney given by the person, being proceedings in which it has decided not to make an order under that section.

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) or section 37 (1) of the *Powers of Attorney Act 2003*), 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 NSW Trustee, or
 - (a1) the person who is the subject of the application, 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) Before conducting a hearing into the application, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will conduct the hearing to be served on each party to the proceedings.
- (5) A failure to serve a copy of an application, or a notice, 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 *NSW Trustee and Guardian Act 2009* or the *Mental Health Act 2007* 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 NSW Trustee.
- (2) Despite section 61 of the *Civil and Administrative Tribunal Act 2013*, an order under subsection (1) (a) does not authorise the person appointed as manager to interfere in any way with the estate concerned unless—
 - (a) such directions of the Supreme Court as are relevant to the management of the estate have been obtained, or
 - (b) the NSW Trustee has, under Division 2 of Part 4.5 of the *NSW Trustee and Guardian Act 2009*, authorised the person to exercise functions in respect of the estate.
- (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 or authorisation by the NSW Trustee.

Division 2 Review and revocation of financial management orders

Note—

A review by the Tribunal under this Division of a financial management order it has made is not an internal appeal or an exercise of its administrative review jurisdiction for the purposes of the *Civil and Administrative Tribunal Act 2013*. It is instead an exercise of the Tribunal's general jurisdiction.

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—
 - (a) must vary, revoke or confirm the order, and
 - (b) if it considers it appropriate to do so—may take such action with respect to the appointment of the manager of the protected person's estate as the Tribunal could take on a review of such an appointment under Division 3.
- (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).

(3) In this section, **vary**, in relation to a financial management order, includes to exclude (or remove an exclusion of) a specified part of the protected person's estate from the order.

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 NSW Trustee,

(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

Note—

A review by the Tribunal under this Division of an appointment of a manager is not an internal appeal or an exercise of its administrative review jurisdiction for the purposes of the *Civil and Administrative Tribunal Act 2013*. It is instead an exercise of the Tribunal's general jurisdiction.

25S Review of appointment of manager

- (1) The Tribunal—
 - (a) may, on its own motion, and
 - (b) must, at the request of—
 - (i) the NSW Trustee, or
 - (ia) the protected person, 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.
- (1A) Without limiting subsection (1), the Tribunal may order that the appointment of a manager be reviewed within a specified time.
- (2) Subsection (1) applies even if the person appointed as manager is the NSW Trustee.
- (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.

Part 4 Directions to guardians

26 Applications

An application may be made to the Tribunal by the guardian of a person under guardianship for directions as to the exercise of the guardian's functions in respect of that person.

27 Service of applications

- (1) The applicant for directions in respect of a person under guardianship shall, as soon as practicable after the application has been made, cause a copy of the application to be served on—
- (a) the person, and
 - (b) the Public Guardian.
- (1A) Before conducting a hearing into the application, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will conduct the hearing to be served on each person on whom a copy of the application is required to be served under subsection (1).

- (2) Failure to serve a copy of an application, or a notice, in accordance with this section does not vitiate the decision of the Tribunal on the application.

28 Tribunal may give directions

- (1) After conducting a hearing into any application made by a guardian in respect of a person under guardianship, the Tribunal may give directions as to the exercise of the guardian's functions in respect of that person.
- (2) In considering such an application, the Tribunal shall have regard to—
- (a) the views (if any) of—
 - (i) the person under guardianship, and
 - (ii) the guardian,
 - (b) the importance of preserving the person's existing family relationships, and
 - (c) the importance of preserving the person's particular cultural and linguistic environments.
- (3) If the Tribunal gives a direction under this section, it shall cause a copy of the direction to be forwarded to the Public Guardian.

29 Restrictions on Tribunal's power to give directions

A direction shall not be given in respect of a person under guardianship who is the subject of an order made by the Supreme Court, in the exercise of its jurisdiction with respect to the guardianship of persons, unless the Supreme Court consents to the making of the direction.

30 Limitation of liability

No proceedings shall lie against the guardian of a person under guardianship for or on account of any act, matter or thing done or omitted to be done by the guardian in good faith and in accordance with a direction given under this Part.

31 Jurisdiction of the Supreme Court not affected

Nothing in this Part limits the jurisdiction of the Supreme Court with respect to the guardianship of persons.

Part 4A Adoption information directions

31A Definitions

In this Part—

adoption information action means an action that is required by the [Adoption Act 2000](#)

to be taken if a person with an entitlement to receive a birth certificate or prescribed information, or lodge a contact veto or advance notice request, under that Act is to receive the birth certificate or prescribed information or lodge the contact veto.

31B Applications

An application may be made to the Tribunal by any person for directions as to adoption information actions that may be taken by that or another person on behalf of a person who has a disability and who is unable because of that disability to take any such action.

31C Service of applications

- (1) The applicant for directions must, as soon as practicable after the application has been made, cause a copy of the application to be served on—
 - (a) the person who has a disability, and
 - (b) the Public Guardian.
- (1A) Before conducting a hearing into the application, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will conduct the hearing to be served on each person on whom a copy of the application is required to be served under subsection (1).
- (2) Failure to serve a copy of an application, or a notice, in accordance with this section does not vitiate the decision of the Tribunal on the application.

31D Tribunal may give directions

- (1) After conducting a hearing into any application made under this Part, the Tribunal may give directions as to the adoption information actions that may be taken on behalf of the person with a disability.
- (2) In considering such an application, the Tribunal is to have regard to—
 - (a) the views (if any) of—
 - (i) the person with a disability, and
 - (ii) the applicant, and
 - (b) the objects of the [Adoption Act 2000](#).
- (3) If the Tribunal gives a direction under this section, it is to cause a copy of the direction to be forwarded to the Public Guardian.

31E Restrictions on Tribunal's power to give directions

A direction is not to be given in respect of a person with a disability who is the subject of an order made by the Supreme Court, in the exercise of its jurisdiction with respect to the

guardianship of persons, unless the Supreme Court consents to the making of the direction.

31F Limitation of liability

No proceedings lie against any person for or on account of any act, matter or thing done or omitted to be done by the person in good faith and in accordance with the direction given under this Part.

31G Jurisdiction of the Supreme Court not affected

Nothing in this Part limits the jurisdiction of the Supreme Court with respect to the guardianship of persons.

Part 5 Medical and dental treatment

Division 1 Preliminary

32 Objects

The objects of this Part are—

- (a) to ensure that people are not deprived of necessary medical or dental treatment merely because they lack the capacity to consent to the carrying out of such treatment, and
- (b) to ensure that any medical or dental treatment that is carried out on such people is carried out for the purpose of promoting and maintaining their health and well-being.

33 Definitions

(1) In this Part—

clinical trial means a trial of drugs or techniques that necessarily involves the carrying out of medical or dental treatment on the participants in the trial.

medical or dental treatment or ***treatment*** means—

- (a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by or under the supervision of a medical practitioner, or
- (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist, or
- (c) any other act declared by the regulations to be treatment for the purposes of this Part,

(and, in the case of treatment in the course of a clinical trial, is taken to include the giving of placebos to some of the participants in the trial), but does not include—

- (d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears), or
- (e) first-aid medical or dental treatment, or
- (f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (being a drug for which a prescription is not required and which is normally self-administered), or
- (g) any other kind of treatment that is declared by the regulations not to be treatment for the purposes of this Part.

major treatment means treatment (other than special treatment or treatment in the course of a clinical trial) that is declared by the regulations to be major treatment for the purposes of this Part.

minor treatment means treatment that is not special treatment, major treatment or treatment in the course of a clinical trial.

person responsible has the meaning given by section 33A.

special treatment means—

- (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out, or
- (b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned, or
- (c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part,

but does not include treatment in the course of a clinical trial.

- (2) For the purposes of this Part, a person is incapable of giving consent to the carrying out of medical or dental treatment if the person—
 - (a) is incapable of understanding the general nature and effect of the proposed treatment, or
 - (b) is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out.
- (3) For the purposes of this Part, a person shall be taken to object to the carrying out of medical or dental treatment—
 - (a) if the person indicates (by whatever means) that he or she does not want the treatment to be carried out, or

(b) if the person—

- (i) has previously indicated, in similar circumstances, that he or she did not then want the treatment to be carried out, and
- (ii) has not subsequently indicated to the contrary.

(4) (Repealed)

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 having parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) for the child. However, the person responsible is the Minister if the child is in the care of the Minister or the Secretary if the child is in the care of the Secretary.
- (3) **Person responsible for person in care of Secretary** The **person responsible** for a person in the care of the Secretary under section 13 is the Secretary.
- (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 Secretary 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.

34 Application of Part

- (1) This Part applies to a patient—
 - (a) who is of or above the age of 16 years, and
 - (b) who is incapable of giving consent to the carrying out of medical or dental treatment.
- (2) In the event of an inconsistency between the provisions of this Part and the provisions of the *Mental Health Act 2007* or the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, the provisions of the *Mental Health Act 2007* or the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* prevail.

Division 2 Medical and dental treatment

35 Offences

- (1) A person must not carry out medical or dental treatment on a patient to whom this Part applies unless—
 - (a) consent for the treatment has been given in accordance with this Part, or
 - (b) the carrying out of the treatment is authorised by this Part without any such consent, or
 - (c) the treatment is carried out in accordance with an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons.

Maximum penalty—

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

- (1A) Subsection (1) (c) does not apply in the case of special treatment that is special treatment of the kind referred to in paragraph (a) of the definition of **special**

treatment in section 33 (1) or special treatment prescribed by the regulations for the purposes of this subsection.

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

36 Who may give consent

- (1) Consent to the carrying out of medical or dental treatment on a patient to whom this Part applies may be given—
- (a) in the case of minor or major treatment—by the person responsible for the patient, or
 - (b) in any case—by the Tribunal.
- (2) The guardian of a patient may also consent to the carrying out of continuing or further special treatment if the Tribunal has previously given consent to the carrying out of the treatment and has authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature.

37 When treatment may be carried out without any such consent

- (1) Medical or dental treatment may be carried out on a patient to whom this Part applies without consent given in accordance with this Part if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency—
- (a) to save the patient's life, or
 - (b) to prevent serious damage to the patient's health, or
 - (c) except in the case of special treatment—to prevent the patient from suffering or continuing to suffer significant pain or distress.
- (2) Minor treatment may (subject to subsection (3)) also be carried out on a patient to whom this Part applies without any consent given in accordance with this Part if—
- (a) there is no person responsible for the patient, or
 - (b) there is such a person but that person either cannot be contacted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment.
- (3) The medical practitioner or dentist carrying out, or supervising the carrying out of, minor treatment in accordance with subsection (2) is required to certify in writing in the patient's clinical record that—
- (a) the treatment is necessary and is the form of treatment that will most successfully

promote the patient's health and well-being, and

(b) the patient does not object to the carrying out of the treatment.

38, 39 (Repealed)

Division 3 Consents given otherwise than by the Tribunal

40 Consents given by persons responsible for patients

- (1) Any person may request a person responsible for a patient to whom this Part applies for that person's consent to the carrying out of medical or dental treatment on the patient.
- (2) Such a request shall specify—
 - (a) the grounds on which it is alleged that the patient is a patient to whom this Part applies,
 - (b) the particular condition of the patient that requires treatment,
 - (c) the alternative courses of treatment that are available in relation to that condition,
 - (d) the general nature and effect of each of those courses of treatment,
 - (e) the nature and degree of the significant risks (if any) associated with each of those courses of treatment, and
 - (f) the reasons for which it is proposed that any particular course of treatment should be carried out.
- (3) In considering such an application, the person responsible for the patient shall have regard to—
 - (a) the views (if any) of the patient,
 - (b) the matters referred to in subsection (2), and
 - (c) the objects of this Part.
- (4) The regulations may make provision for the manner and form in which—
 - (a) requests under this section shall be made, and
 - (b) consents under this section shall be given.

41 (Repealed)

Division 4 Consents given by the Tribunal

42 Applications to the Tribunal

- (1) Any person may apply to the Tribunal for consent to the carrying out of medical or dental treatment on a patient to whom this Part applies.
- (2) Such an application shall specify—
 - (a) the grounds on which it is alleged that the patient is a patient to whom this Part applies,
 - (b) the particular condition of the patient that requires treatment,
 - (c) the alternative courses of treatment that are available in relation to that condition,
 - (d) the general nature and effect of each of those courses of treatment,
 - (e) the nature and degree of the significant risks (if any) associated with each of those courses of treatment, and
 - (f) the reasons for which it is proposed that any particular course of treatment should be carried out.
- (3) Whenever such an application is made for consent to the carrying out of medical or dental treatment and the treatment cannot be carried out without that consent, the Tribunal may, by order—
 - (a) direct the person who is to carry out the treatment not to start the treatment, or
 - (b) if the treatment has already started—direct the person who is carrying out the treatment to discontinue it,until the Tribunal has determined the application.
- (4) (Repealed)

43 Service of applications

- (1) The applicant for consent shall, as soon as practicable after the application has been made, cause a copy of the application to be served on—
 - (a) the patient, and
 - (b) the person who is proposing that medical or dental treatment be carried out on the patient, and
 - (c) each person responsible for the patient who can reasonably be located.
 - (d) (Repealed)

- (1A) Before conducting a hearing into the application, the Tribunal must cause a notice specifying the date on which, and the time and place at which, the Tribunal will conduct the hearing to be served on each person on whom a copy of the application is required to be served under subsection (1).
- (2) Failure to serve a copy of an application, or a notice, in accordance with this section does not vitiate the decision of the Tribunal on the application.

44 Tribunal may give consent

- (1) If, after conducting a hearing into an application for consent to the carrying out of medical or dental treatment on a patient to whom this Part applies, the Tribunal is satisfied that it is appropriate for the treatment to be carried out, it may consent to the carrying out of the treatment.
- (2) In considering such an application, the Tribunal shall have regard to—
 - (a) the views (if any) of—
 - (i) the patient,
 - (ii) the person who is proposing that medical or dental treatment be carried out on the patient,
 - (iii) any persons responsible for the patient, and
 - (iv) (Repealed)
 - (b) the matters referred to in section 42 (2), and
 - (c) the objects of this Part.
- (3) Nothing in this section requires the Tribunal to consider an application relating to a patient if it is not satisfied that the applicant has a sufficient interest in the health and well-being of the patient.

45 Restrictions on Tribunal's power to give consent

- (1) The Tribunal must not give consent to the carrying out of medical or dental treatment on a patient to whom this Part applies unless the Tribunal is satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient's health and well-being.
- (2) However, the Tribunal must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary—
 - (a) to save the patient's life, or
 - (b) to prevent serious damage to the patient's health,

or unless the Tribunal is authorised to give that consent under subsection (3).

(3) In the case of—

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

the Tribunal may give consent to the carrying out of the treatment if it is satisfied that—

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

45A Consents to continuing or further special treatment by a patient's guardian with authority of the Tribunal

- (1) The Tribunal may, when giving consent to the carrying out of special treatment on a patient to whom this Part applies, confer on the guardian of the patient authority to consent—
 - (a) to the continuation of the treatment, or
 - (b) to the carrying out on the patient of further special treatment of a similar nature.
- (2) The Tribunal may only confer such an authority at the request or with the consent of the guardian.
- (3) The Tribunal may at any time—
 - (a) impose conditions or give directions as to the exercise of such an authority, or
 - (b) revoke such an authority.
- (4) If the guardian has an authority conferred under this section, any person may request the guardian for the guardian's consent to the carrying out of the relevant treatment.
- (5) In considering a request, a guardian must have regard to—
 - (a) the views (if any) of the patient, and
 - (b) the objects of this Part.

Division 4A Clinical trials

45AA Tribunal may approve clinical trials

- (1) The Tribunal may approve, in accordance with this section, a clinical trial as a trial in which patients to whom this Part applies may participate.
- (2) The Tribunal may give an approval under this section only if it is satisfied that—
 - (a) the drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition from which the patients suffer, and
 - (b) the trial will not involve any known substantial risk to the patients (or, if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments), and
 - (c) the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to patients who suffer from that condition even if those patients are not able to consent to taking part in the trial, and
 - (d) having regard to the potential benefits (as well as the potential risks) of participation in the trial, it is in the best interests of patients who suffer from that condition that they take part in the trial, and
 - (e) the trial has been approved by a relevant ethics committee and complies with any relevant guidelines issued by the National Health and Medical Research Council.
- (3) The fact that a clinical trial will or may involve the giving of placebos to some of the participants in the trial does not prevent the Tribunal from being satisfied that it is in the best interests of patients that they take part in the trial.
- (4) The Tribunal's approval of a clinical trial under this section does not operate as a consent to the participation in the trial of any particular patient to whom this Part applies. The appropriate consent must be obtained under Division 3 or 4 before any medical or dental treatment in the course of the trial is carried out on the patient.
- (5) In this section—

ethics committee means—

- (a) for so long as there is any relevant Institutional Ethics Committee registered by the Australian Health Ethics Committee established under the [National Health and Medical Research Council Act 1992](#) of the Commonwealth—an Institutional Ethics Committee so registered, or
- (b) in the absence of such a committee, an ethics committee established by—
 - (i) a local health district or a public hospital, or
 - (ii) a university, being an ethics committee concerned, wholly or partly, with

medical research, or

(iii) the National Health and Medical Research Council.

45AB Consent for participation in clinical trials in individual cases

- (1) If the Tribunal is satisfied as to the matters specified in section 45AA (2) in relation to a clinical trial, it may, by order, determine—
 - (a) that the function of giving or withholding consent for the carrying out of medical or dental treatment on patients in the course of the trial is to be exercised by the persons responsible for the patients (in which case Division 3 applies), or
 - (b) that the Tribunal is to exercise that function itself (in which case Division 4 applies).
- (2) Before making a determination referred to in subsection (1) (a), the Tribunal must be satisfied that the form for granting consent and the information available about the trial provide sufficient information to enable the persons responsible to decide whether or not it is appropriate that the patients should take part in the trial.

Division 5 General

46 Effect of consent

- (1) Subject to subsections (2) and (3), a consent given under this Part in respect of the carrying out of medical or dental treatment on a patient to whom this Part applies has effect—
 - (a) as if the patient had been capable of giving consent to the carrying out of the treatment, and
 - (b) as if the treatment had been carried out with the patient's consent.
- (2) A consent given by a person responsible for, or the guardian of, the patient has no effect—
 - (a) if the person carrying out or supervising the proposed treatment is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment, or
 - (b) if the proposed treatment is to be carried out for any purpose other than that of promoting or maintaining the health and well-being of the patient.
- (3) A consent given by the guardian of the patient has effect despite any objection made by a patient to the carrying out of the treatment if the guardian has consented to that treatment in accordance with the authority of the Tribunal under section 46A.
- (4) For the purposes of this section, an objection by a patient to the carrying out of

proposed medical or dental treatment is to be disregarded if—

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

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

46A Power of guardian to override patient's objection to treatment when authorised by the Tribunal

- (1) The Tribunal may confer on the guardian of a patient to whom this Part applies authority to override the patient's objection to the carrying out on the patient of major or minor treatment.
- (2) The Tribunal may confer such an authority only at the request or with the consent of the guardian and only if it is satisfied that any such objection will be made because of the patient's lack of understanding of the nature of, or reason for, the treatment.
- (3) The Tribunal may at any time—
 - (a) impose conditions or give directions as to the exercise of such an authority, or
 - (b) revoke such an authority.
- (4) The guardian may exercise such an authority only if satisfied that the proposed treatment is manifestly in the best interests of the patient.

47 Preservation of liability

Nothing in this Part relieves a person from liability in respect of the carrying out of medical or dental treatment on a patient to whom this Part applies, being a liability to which the person would have been subject—

- (a) had the patient been capable of giving consent to the carrying out of the treatment, and
- (b) had the treatment been carried out with the patient's consent.

48 Clinical records

The regulations may make provision for or with respect to the keeping of records of medical or dental treatment carried out on a patient to whom this Part applies.

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.

Part 6

49-76A (Repealed)

Part 7 The Public Guardian

77 Public Guardian

- (1) There is to be a Public Guardian.
- (2) The Public Guardian is to be the person employed in the Public Service as the Public Guardian.
- (3) The Public Guardian has the functions conferred or imposed on the Public Guardian by or under this or any other law.
- (4) The Public Guardian may delegate to a person, of a class of persons approved by the Minister or prescribed by the regulations, any of the Public Guardian's functions, other than this power of delegation.

78 Delegation

- (1) The Public Guardian may delegate—
 - (a) to any person employed in the Department, or
 - (b) to any other person prescribed by the regulations or belonging to a class of persons prescribed by the regulations,the exercise of any of the Public Guardian's functions under Part 5.
- (2) The Public Guardian may delegate to any person employed in the Department of Justice the exercise of any of the Public Guardian's functions, other than this power of delegation.

79 Information concerning the functions of the Public Guardian etc

The Public Guardian shall ensure that information is readily available to members of the public concerning—

- (a) the provisions of this Act with respect to—
 - (i) the appointment of guardians, and
 - (ii) the exercise by guardians of their functions as guardians,
- (b) the functions of the Public Guardian,
- (c) the rights of persons under this or any other Act or law in relation to the exercise by the Public Guardian of those functions, and
- (d) any practice or procedure followed by the Public Guardian in the exercise of those functions.

80 Reports

- (1) The Public Guardian shall submit to the Minister, at such times and in respect of such periods as the Minister directs, reports on the work and activities of the Public Guardian.
- (2) A report shall deal with such matters as the Minister directs and with such other matters as the Public Guardian considers appropriate to include in the report.

80A Administrative review by Civil and Administrative Tribunal of guardianship decisions of Public Guardian

- (1) An application may be made to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of a decision of the Public Guardian that—
 - (a) is made in connection with the exercise of the Public Guardian's functions under this Act as a guardian, and
 - (b) is of a class of decision prescribed by the regulations for the purposes of this section.
- (2) An application under this section may be made by—
 - (a) the person to whom the decision relates, or
 - (b) the spouse of the person, or
 - (c) the person who has the care of the person to whom the decision relates, or
 - (d) any other person whose interests are, in the opinion of the Civil and Administrative Tribunal, adversely affected by the decision.

Part 8

81-96 (Repealed)

Part 9 Miscellaneous

97 (Repealed)

98 Service of notices etc

- (1) Any notice or other instrument required or authorised by this Act to be served on a person is sufficiently served if the notice or other instrument is—
 - (a) delivered personally to the person,
 - (b) left with a person who is apparently of or above the age of 16 years at, or sent by prepaid post to, the address last known to the Secretary of the person on whom

the notice or other instrument is to be served, or

(c) where no address of the person is known to the Secretary, published or otherwise dealt with as may be prescribed by the regulations.

(2) If such a notice or instrument is—

(a) sent by post as referred to in subsection (1) (b), it shall be deemed to have been served at the time it would be delivered in the ordinary course of post, or

(b) published or otherwise dealt with as referred to in subsection (1) (c), it shall be deemed to have been served at such time as may be prescribed by the regulations.

(2A) Any notice required or authorised by this Act to be served on a person is sufficiently served if the notice is sent to the person by electronic means and received through an information system designated by or on behalf of the person as the system to be used for the purpose of receiving the notice.

(3) This section does not affect any other provision of this Act relating to the service of notices or other instruments.

99 (Repealed)

100 Limitation of personal liability

No matter or thing done by the Minister, the Secretary, the Public Guardian, an employee or any other person shall, if the matter or thing was done in good faith and with reasonable care for the purposes of executing this Act, subject the Minister, the Secretary, the Public Guardian, the employee or that other person personally to any action, liability, claim or demand.

101 Disclosure of information

A person shall not disclose any information obtained in connection with the administration or execution of this Act unless the disclosure is made—

(a) with the consent of the person from whom the information was obtained,

(b) in connection with the administration or execution of this Act or the *Civil and Administrative Tribunal Act 2013*,

(c) for the purposes of any legal proceedings arising out of this Act or the *Civil and Administrative Tribunal Act 2013* or of any report of any such proceedings,

(d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or

(e) with other lawful excuse.

Maximum penalty—10 penalty units or imprisonment for 12 months, or both.

102 Search warrants

- (1) An employee or a member of the police force may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the issue of a search warrant if the employee or member of the police force has reasonable grounds for believing that a provision of this Act or the regulations has been or is being contravened at any premises.
- (2) An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any employee or member of the police force named in the warrant—
 - (a) to enter the premises,
 - (b) to inspect the premises for evidence of a contravention of this Act or the regulations, and
 - (c) to observe and converse with any person apparently residing there.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) Without limiting the generality of section 71 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, a member of the police force—
 - (a) may accompany an employee executing a search warrant issued under this section, and
 - (b) may take all reasonable steps to assist the employee in the exercise of the employee's functions under this Act or the regulations.

103 Obstruction

A person shall not wilfully hinder, obstruct, delay, assault or threaten with violence any other person in the exercise of that other person's functions under this Act.

Maximum penalty—10 penalty units or imprisonment for 12 months, or both.

104 Person falsely representing to be an employee

A person who is not an employee must not—

- (a) assume or use the designation of an employee or falsely represent himself or herself to be officially associated in any capacity with the Tribunal, or
- (b) use, for any fraudulent purpose, any designation which that person previously held as an employee.

Maximum penalty—10 penalty units or imprisonment for 12 months, or both.

105 False or misleading statements

A person shall not, in any application under this Act or in connection with an inquiry made by an employee in relation to any such application—

- (a) make a statement, or
- (b) furnish information,

that the person knows to be false or misleading in a material particular.

Maximum penalty—5 penalty units.

106 Proceedings for offences

- (1) Except as provided by subsection (2), proceedings for an offence against this Act or the regulations shall be dealt with summarily before the Local Court.
- (2) Proceedings for an offence under section 35 (1) shall be dealt with on indictment.

107 Procedural matters

- (1) In the absence of proof to the contrary, the authority of the Minister, the Secretary, the Public Guardian or any employee to exercise any function conferred or imposed on the Minister, the Secretary, the Public Guardian or any such employee by or under this Act, or to take any proceedings for the purposes of this Act, shall be presumed.
- (2) An averment in any complaint or information made or laid under this Act—
 - (a) that any instrument, purporting to have been made, issued or granted under this Act and specified in the averment, was or was not, at a time or during a period so specified, in force under this Act and was or was not made, granted or issued subject to conditions so specified,
 - (b) that any employee has been appointed, authorised or directed, for the purposes of this Act or the regulations, by the Minister as stated in the averment,
 - (c) that any person was, on a date specified in the averment, a person under guardianship within the meaning of Part 3, or
 - (d) that any person was, on a date specified in the averment, an employee,shall be prima facie evidence of the facts averred.

107A Evidentiary certificates in relation to persons under guardianship

A certificate issued by the Public Guardian stating that, on a specified date or during a specified period, a specified person was or was not subject to a guardianship order is

admissible in any legal proceedings under this or any other Act and is evidence of the matters so certified.

108 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for or with respect to—
 - (a) (Repealed)
 - (b) the conditions to be imposed on guardianship orders under Part 3,
 - (c) (Repealed)
 - (d) the functions of the Public Guardian,
 - (e) (Repealed)
 - (f) the making of applications under this Act,
 - (g) the imposition, waiver and remission of fees and charges in relation to the making of applications,
 - (h) the giving of notices under this Act,
 - (i) the keeping of registers for the purposes of this Act, and
 - (j) the exemption of persons or bodies from the operation of the regulations.
- (2) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

109 Savings and transitional provisions

Schedule 3 has effect.

Schedules 1, 2 (Repealed)

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

Guardianship Amendment (Enduring Guardians) Act 2002

Guardianship and Protected Estates Legislation Amendment Act 2002, to the extent that it amends this Act

Guardianship Amendment Act 2007

NSW Trustee and Guardian Act 2009

any other Act that amends this Act

- (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.

1A References to Tribunal before establishment of NCAT

A reference to the Tribunal in a provision of this Schedule that was inserted before the establishment day (within the meaning of the *Civil and Administrative Tribunal Act 2013*) is a reference to the former Guardianship Tribunal.

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.

Part 3 Miscellaneous

8 Separate representation

The amendment made to section 51A by Schedule 1 to the *Statute Law (Miscellaneous Provisions) Act (No 2) 1999* extends to proceedings commenced, but not determined by the Tribunal, before the commencement of the amendment.

Part 4 Provisions consequent on enactment of **Guardianship Amendment (Enduring Guardians) Act 2002**

9 Definitions

In this Part—

amending Act means the *Guardianship Amendment (Enduring Guardians) Act 2002*.

existing appointment means any appointment of a person as an enduring guardian that was in force immediately before the commencement of this Part.

10 Application of amendments to existing appointments of enduring guardians

- (1) The following provisions of this Act (as inserted by the amending Act) extend to existing appointments—
 - (a) section 6D (6)–(8),
 - (b) section 6E (2A)–(2C),
 - (c) sections 6HA and 6HB,
 - (d) section 6K (4) and (5),
 - (e) section 6MA.
- (2) Section 6H (as amended by the amending Act) extends to the revocation of the appointment of enduring guardians made on or after the commencement of the

amendments concerned even if the original appointment was made before that commencement.

- (3) Section 6O (as inserted by the amending Act) extends to instruments made under a law of another State or Territory that were made before the commencement of that section and were still in force immediately before that commencement.

11 Amendment of sections 6C and 6H

The amendment of section 6C or 6H by the amending Act does not affect the continuing validity of any instrument executed in the form prescribed by the regulations for the purposes of section 6C (a) or 6H (2) (b) (i) of the Act as in force at the time the instrument was executed.

Part 5 Provisions consequent on enactment of [Guardianship and Protected Estates Legislation Amendment Act 2002](#)

12 Application of amendments

Subject to the regulations, an amendment made to this Act by the [Guardianship and Protected Estates Legislation Amendment Act 2002](#) does not apply to or in respect of any decision or order made under this Act before the commencement of the amendment.

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.

Part 7 Provisions consequent on enactment of *Courts and Crimes Legislation Amendment Act 2015*

17 Definition

In this Part—

amending Act means the *Courts and Crimes Legislation Amendment Act 2015*.

18 Substitute enduring guardians

A person appointed as an alternative enduring guardian before the day on which the amendment of section 6DA by the amending Act commences is taken, on and from that day, to have been appointed as a substitute enduring guardian.

19 Application of procedural amendments

Each of the following provisions, as amended, inserted or substituted by the amending Act, extends to proceedings commenced (but not determined) before the amendment, insertion or substitution of the provision concerned—

- (a) section 6K,
- (b) section 6MA,
- (c) section 25C,
- (d) section 25I,
- (e) section 25P,
- (f) section 25S.