

SOUTH AUSTRALIA

GUARDIANSHIP AND ADMINISTRATION ACT 1993

This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at 21 April 1994.

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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GUARDIANSHIP AND ADMINISTRATION ACT 1993

being

Guardianship and Administration Act 1993 No. 61 of 1993
[Assented to 27 May 1993]¹

as amended by

Guardianship and Administration (Approved Treatment Centres) Amendment Act 1994 No. 8 of 1994
[Assented to 21 April 1994]

¹ Act not in operation at the date of this reprint.

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *For the legislative history of the Act see Appendix 2. Entries appearing in the Appendix in bold type indicate the amendments incorporated since the last reprint.*

An Act to provide for the guardianship of persons unable to look after their own health, safety or welfare or to manage their own affairs and for the management of the estates of such persons; and for other purposes.

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Guardianship and Administration Act 1993*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears—

"**administration order**" means a full or limited administration order under this Act appointing an administrator of the whole or a part of a person's estate;

"**administrator**" means a person appointed as an administrator under an administration order;

"**authorised witness**" means—

(a) a justice of the peace¹; or

(b) a commissioner for taking affidavits in the Supreme Court; or

(c) a clergyman;

"**dental treatment**" means treatment or procedures carried out by a dentist in the course of dental practice;

"**dentist**" means a person who is registered on the general register or specialist register under the *Dentists Act 1984*;

"**enduring guardian**" means a person appointed as an enduring guardian under Part 3;

"**guardian**" means a person appointed as a guardian under a guardianship order;

"**guardian appointed under this Act**" means an enduring guardian or a guardian appointed under a guardianship order;

"**guardianship order**" means an order under this Act placing a person under full or limited guardianship;

"**the Health Commission**" means the South Australian Health Commission;

¹ Section 34 of the *Oaths Act 1936* provides that where provision is made by an Act for the attestation of an instrument by a justice, the provision is complied with if the witness is a justice, a proclaimed postmaster, a proclaimed bank manager or a proclaimed member of the Police Force.

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"medical practitioner" means a person who is registered on the general register under the *Medical Practitioners Act 1983*;

"medical treatment" means treatment or procedures administered or carried out by a medical practitioner in the course of medical or surgical practice and includes the prescription or supply of drugs;

"mental incapacity" means the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of—

- (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or
- (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever;

"mentally incapacitated person" means a person with a mental incapacity;

"person to whom the proceedings relate", in relation to any proceedings before the Board or a court, means the person who has or is alleged to have a mental incapacity or mental illness, or the protected person, as the case may be;

"prescribed treatment" means—

- (a) termination of pregnancy;
- (b) sterilisation;
- (c) any other medical treatment prescribed by the regulations;

"property" means any legal or equitable interest in real or personal property;

"protected person" means the person the subject of a guardianship or administration order (or both) under this Act;

"the Public Advocate" means the person holding or acting in the office of Public Advocate under this Act;

"putative spouse" means a person who is a putative spouse within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

"recognised advocate" means a person who is, by instrument in writing, recognised by the Board as a person who is qualified to act as an advocate in proceedings before the Board for the person to whom the proceedings relate;

"relative" of a person means—

- (a) a spouse;
- (b) a parent;
- (c) a person (not being a guardian appointed under this Act) who acts *in loco parentis* in relation to the person;
- (d) a brother or sister of or over 18 years of age;

(e) a son or daughter of or over 18 years of age;

"**spouse**" includes a putative spouse;

"**sterilisation**" means any treatment given to a person that results in, or is likely to result in, the person being infertile.

(2) For the purposes of this Act, a woman who has ceased to menstruate will be regarded as being infertile.

Note: For definition of divisional penalties (and divisional expiation fees) see Appendix 2.

Interaction of this Act with other Acts

4. Subject to any express provision of this Act or the provisions of any other Act, this Act is in addition to, and does not derogate from, any other Act.

Principles to be observed

5. Where a guardian appointed under this Act, an administrator, the Public Advocate, the Board or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to this Act or pursuant to powers conferred by or under this Act—

- (a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and
- (b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and
- (c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and
- (d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.

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**PART 2
ADMINISTRATION**

DIVISION 1—THE GUARDIANSHIP BOARD

Establishment and constitution of the Board

6. (1) The *Guardianship Board* is established.

(2) Subject to this section, the Board will be constituted in relation to the hearing of any proceedings or the conduct of any other business of the following members:

- (a) the President or a Deputy President; and
- (b) a member of the panel constituted under section 8(1) and selected by the President or a Deputy President to be a member of the Board for the purpose of the hearing of those proceedings or the conduct of that business; and
- (c) a member of the panel constituted under section 8(2) and selected by the President or a Deputy President to be a member of the Board for the purpose of those proceedings or that business.

(3) Members who constitute the Board for the purpose of hearing appeals from decisions or orders under the *Mental Health Act 1993* will sit exclusively in that jurisdiction.

(4) In selecting members from the panel constituted under section 8(1) for the purposes of an appeal or other proceedings under the *Mental Health Act 1993*, the President or Deputy President must select a psychiatrist.

(5) The regulations may provide that, in relation to the exercise of specified functions, or in relation to matters of a specified class, the Board may be constituted of the President, a Deputy President or a member of a panel, sitting alone and, where the regulations so provide, the Board may be constituted accordingly.

(6) A member of a panel who has a personal interest or a direct or indirect pecuniary interest in a matter before the Board is disqualified from participating in the hearing of the matter.

(7) If a member of a panel on the Board dies or is for any other reason unable to continue with any proceedings before the Board, the Board constituted of the President or Deputy President who is presiding over the proceedings and the other panel member may, if the President or Deputy President so determines, continue and complete the proceedings.

(8) The Board, separately constituted in accordance with this section, may sit simultaneously for the purpose of hearing and determining separate proceedings or conducting separate business of the Board.

President and Deputy Presidents

7. (1) There will be—

- (a) a President of the Board; and
- (b) such number of Deputy Presidents of the Board as the Minister thinks necessary or desirable for the purpose of the Board performing its functions properly and expeditiously.

(2) The President and Deputy Presidents will be appointed by the Governor on terms and conditions fixed by the Governor.

(3) The President and Deputy Presidents will be appointed for a term of office of five years and, on expiry of any such term, will be eligible for reappointment.

(4) A person is not eligible for appointment as the President or a Deputy President unless he or she is—

(a) a magistrate; or

(b) a legal practitioner of not less than five years' standing (which may include legal practice in another State or Territory); or

(c) a person who has retired from judicial or magisterial office held in this State or any other State or Territory.

(5) If the President is absent or unable to act, a Deputy President nominated by the Minister may act in the office of President.

Panels

8. (1) The Governor may establish a panel consisting of persons from such professions as the Governor thinks relevant.

(2) The Governor may establish a panel consisting of persons with expertise in representing or promoting the interests of mentally incapacitated persons or with expertise in such other fields as the Governor thinks relevant.

(3) A member of a panel will be appointed for a term of office, not exceeding three years, specified in the instrument of appointment and, subject to subsection (4), will be eligible for reappointment on the expiry of any such term.

(4) A person cannot hold office as a member of a panel for more than two terms if those terms are consecutive, except that an appointment for a third consecutive term of office may be made if it is only for the purposes of the completion of part-heard proceedings.

(5) The Governor may make appointments from time to time for the purpose of maintaining or increasing the membership of panels established under this section.

Vacancies in office of President or Deputy President or on panels

9. (1) The Governor may remove the President, a Deputy President or a member of a panel from office for—

(a) mental or physical incapacity to carry out official duties satisfactorily; or

(b) neglect of duty; or

(c) dishonourable conduct.

(2) A person ceases to be the President, a Deputy President or a member of a panel if the person—

(a) dies; or

(b) completes a term of office and is not reappointed; or

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- (c) resigns by notice in writing addressed to the Minister; or
- (d) is removed from office under subsection (1).

Allowances and expenses

10. A member of the Board or a panel is entitled to such allowances and expenses as the Governor may from time to time determine.

Validity of acts of the Board

11. An act or proceeding of the Board is not invalid only by virtue of a vacancy in the membership of, or a defect in the appointment of a person to, the Board or a panel from which members of the Board are drawn.

Decisions of the Board

12. (1) In any proceedings before the Board under this Act or any other Act where the Board is constituted of two or more members—

- (a) the President or Deputy President will preside; and
- (b) any question of law or procedure will be determined by the President or Deputy President and any other question by unanimous or majority decision of the members.

(2) Where the Board is constituted of a panel member sitting alone, any question of law that arises must be referred to the President or a Deputy President for decision and any decision made on such a reference is a decision of the Board.

(3) The Board must act according to equity and the substantial merits of the case without regard to technicalities or legal forms and is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.

Board may appoint assistants

13. The Board may, for the purpose of any particular proceedings, appoint such person or persons to assist it in conducting (but not determining) those proceedings as the Board thinks fit.

Powers and procedures of the Board

14. (1) The Board may, for the purposes of proceedings before the Board (whether under this Act or any other Act)—

- (a) by summons signed on behalf of the Board by a member of the Board or the Registrar, require the attendance of a person before the Board; or
- (b) by summons signed on behalf of the Board by a member of the Board or the Registrar, require the production to the Board of any relevant books, papers or documents; or
- (c) inspect any books, papers or documents so produced and retain them for such reasonable period as it thinks fit and makes copies of any of them or any of their contents; or
- (d) require any person to make an oath or affirmation to answer truthfully all questions put by a member of the Board, or a person assisting or appearing before the Board, relating to a matter before the Board; or
- (e) require any person appearing before the Board to answer any relevant questions put by a member of the Board or by a person assisting or appearing before the Board.

- (2) Subject to subsection (3), a person who—
- (a) has been served with a summons to appear before the Board and fails, without reasonable excuse, to attend in obedience to the summons; or
 - (b) has been served with a summons to produce books, papers or documents and fails, without reasonable excuse, to comply with the summons; or
 - (c) wilfully insults the Board, any member of the Board or a person assisting the Board, or disrupts the proceedings of the Board; or
 - (d) refuses to be sworn or to affirm, or to answer any relevant question when required to do so by the Board,

is guilty of an offence.

Penalty: Division 5 fine.

(3) A person who appears as a witness before the Board or produces books, papers or documents to the Board has the same protection as a witness in proceedings before the District Court.

(4) Subject to subsection (5), the Board must give the following persons reasonable notice of the time and place of the hearing of the proceedings:

- (a) the applicant; and
- (b) the person to whom the proceedings relate; and
- (c) the Public Advocate; and
- (d) such other persons as the Board believes have a proper interest in the matter.

(5) The Board is not obliged to give notice of proceedings to a person whose whereabouts cannot, after reasonable enquiries, be ascertained.

(6) The Board—

- (a) must give the applicant and the person to whom the proceedings relate a reasonable opportunity to call or give evidence, to examine or cross-examine witnesses and to make submissions to the Board; and
- (b) must give any other person—
 - (i) to whom notice of the proceedings was given; or
 - (ii) who satisfies the Board that he or she has a proper interest in the matter,a reasonable opportunity to make submissions to the Board.

(7) Notwithstanding subsections (4) and (6), the Board may in any proceedings, if satisfied that urgent action is required, make an order on an interim basis without complying with those subsections.

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(8) An order made under subsection (7) has effect for such period, not exceeding seven days, as the Board may direct.

(9) A person is entitled to appear before the Board—

(a) personally or by counsel; or

(b) if he or she is the person the subject of the proceedings—

(i) by the Public Advocate; or

(ii) except where the proceedings are appeal proceedings—by a recognised advocate; or

(c) with the leave of the Board, by any other representative.

(10) Subject to subsection (11), hearings before the Board are open hearings.

(11) In any proceedings before the Board, the Board has an absolute discretion—

(a) to direct that no person other than—

(i) the person to whom the proceedings relate and any person representing him or her in the proceedings; and

(ii) witnesses or persons making submissions (while giving evidence or making those submissions); and

(iii) officers of the Board or persons assisting the Board,

be present in the room while the proceedings are being heard; or

(b) to direct that a particular person (other than a person referred to in paragraph (a)) not be present in the room while the proceedings are being heard.

(12) The Board may make a determination in any proceedings in the absence of a party to the proceedings if satisfied that the party was given reasonable opportunity to appear but failed to do so.

(13) The Registrar must, on the request of a person who has a right of appeal against a decision of the Board, or who satisfies the Registrar that he or she has a proper interest in the matter, furnish the person with a written statement of the Board's reasons for that decision, but only if the request is made within three months of the date of the decision.

Board may require reports

15. (1) The Board may require the person the subject of proceedings before the Board to submit to the Board within a specified time a psychiatric or psychological report as to his or her mental capacity or a medical report as to his or her health or any aspect of it.

(2) If a person refuses or fails to comply with a requirement made under subsection (1) or is incapable of complying with such a request, the Public Advocate, a person authorised by the Minister for the purpose or a member of the police force may enter any place where the person is reasonably believed to be and apprehend the person, using only such force as is reasonably necessary for the purpose, and take the person to a psychiatrist, psychologist or medical practitioner nominated by the Board for examination and assessment, the cost of which will be borne by the Board.

(3) The powers under subsection (2) cannot be exercised except on the authority of a warrant issued by the President of the Board or a Deputy President of the Board.

(4) A warrant cannot be issued under subsection (3) unless the person issuing it is satisfied, on information given on oath—

- (a) that reasonable grounds exist for suspecting that the person to whom the warrant relates has a mental incapacity; and
- (b) that a warrant is reasonably required in the circumstances.

(5) The person executing a warrant under this section may be accompanied by such assistants as he or she considers necessary or desirable in the circumstances.

(6) A person must not hinder or obstruct a person executing a warrant under this section, or a person accompanying that person.

Penalty: Division 5 fine.

Annual report by Board

16. (1) The Board must, not later than 30 September in each year, furnish the Minister with a report on the performance by the Board of its functions during the year ending on the previous 30 June.

(2) A report furnished under this section must include prescribed particulars of all warrants issued under this Act by the President or Deputy Presidents during the year.

(3) The Minister must, within 12 sitting days of receiving a report under subsection (1), cause a copy of the report to be laid before each House of Parliament.

DIVISION 2—THE REGISTRAR

The Registrar

17. (1) There will be a Registrar of the Board.

(2) The Registrar will be a Public Service employee or a Health Commission employee.

(3) The Registrar is the executive officer of the Board and—

- (a) has the powers and functions conferred or assigned by this Act or any other Act; and
- (b) may, with the approval of the President of the Board, exercise the jurisdiction of the Board in relation to matters of a prescribed class.

(4) Where the Registrar exercises the jurisdiction of the Board in respect of a matter, the Registrar may, and must if the President so directs, refer the matter to the Board for determination by the Board.

DIVISION 3—THE PUBLIC ADVOCATE

The Public Advocate

18. There will be a Public Advocate.

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Appointment of Public Advocate

19. (1) The Governor may, by notice published in the *Gazette*, appoint a person to be the Public Advocate.

(2) Subject to this Act, the terms and conditions of appointment and employment (including salary and allowances) of the Public Advocate will be as determined by the Governor.

Term of office of Public Advocate, etc.

20. (1) The Public Advocate will be appointed for a term of office of five years and, on the expiration of a term of office, is eligible for reappointment.

(2) The office of Public Advocate becomes vacant if the Public Advocate—

- (a) dies; or
- (b) completes a term of office and is not reappointed; or
- (c) resigns by notice in writing to the Governor; or
- (d) is removed from office by the Governor under subsection (3).

(3) The Governor may remove the Public Advocate from office for—

- (a) mental or physical incapacity to carry out official duties satisfactorily; or
- (b) neglect of duty; or
- (c) dishonourable conduct.

General functions of Public Advocate

21. (1) The functions of the Public Advocate are—

- (a) to keep under review, within both the public and the private sector, all programmes designed to meet the needs of mentally incapacitated persons;
- (b) to identify any areas of unmet needs, or inappropriately met needs, of mentally incapacitated persons and to recommend to the Minister the development of programmes for meeting those needs or the improvement of existing programmes;
- (c) to speak for and promote the rights and interests of any class of mentally incapacitated persons or of mentally incapacitated persons generally;
- (d) to speak for and negotiate on behalf of any mentally incapacitated person in the resolution of any problem faced by that person arising out of his or her mental incapacity;
- (e) to give support to and promote the interests of carers of mentally incapacitated persons;
- (f) to give advice on the powers that may be exercised under this Act in relation to mentally incapacitated persons, on the operation of this Act generally and on appropriate alternatives to taking action under this Act;
- (g) to monitor the administration of this Act and, if he or she thinks fit, make recommendations to the Minister for legislative change;

- (h) to perform such other functions as are assigned to the Public Advocate by or under this Act or any other Act.

(2) In performing his or her functions the Public Advocate is not subject to the control or direction of the Minister.

Public Advocate may raise matters with the Minister and the Attorney-General

22. (1) The Public Advocate may, at any time, raise with the Minister and the Attorney-General any concerns he or she may have over any matter arising out of or relating to the performance of his or her functions under this Act or any other Act.

(2) If the Public Advocate so requests, the Attorney-General must cause a report of any matter raised by the Public Advocate under subsection (1) to be laid as soon as practicable before both Houses of Parliament.

(3) The annual report furnished by the Public Advocate under this Act must include a summary of any matters raised by the Public Advocate under subsection (1).

Delegation by Public Advocate

23. (1) The Public Advocate may delegate any of his or her powers or functions under this or any other Act to any Public Service employee or Health Commission employee who has been assigned to assist the Public Advocate in the performance of his or her functions.

(2) A delegation under this section—

(a) must be by instrument in writing; and

(b) may be conditional or unconditional; and

(c) is revocable at will; and

(d) does not derogate from the power of the Public Advocate to act in any matter.

Annual report

24. (1) The Public Advocate must, not later than 30 September in each year, furnish the Minister with a report on the performance by the Public Advocate of his or her functions during the year ending on the previous 30 June.

(2) A report furnished under this section must include prescribed particulars of all applications made by the Public Advocate for the issue of a warrant under this Act during the year.

(3) The Minister must, within 12 sitting days of receiving a report under subsection (1), cause a copy of the report to be laid before each House of Parliament.

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**PART 3
POWER TO APPOINT AN ENDURING GUARDIAN**

Appointment of enduring guardian

25. (1) A person of or over 18 years of age may, by instrument in writing, appoint a person as his or her enduring guardian.

(2) An instrument is not effective to appoint an enduring guardian unless—

- (a) it is in the form set out in the schedule or in a form to similar effect; and
- (b) it has endorsed on it an acceptance in the form or to the effect of the acceptance set out in the schedule signed by the person appointed as the enduring guardian; and
- (c) it is witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate set out in the schedule.

(3) A person is not eligible to be appointed as an enduring guardian unless he or she is of or over 18 years of age.

(4) A person is not eligible to be appointed an enduring guardian if he or she is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the medical care or treatment of the appointee and, if a person who is validly appointed as an enduring guardian becomes so responsible or involved, the appointment lapses.

(5) Subject to the conditions (if any) stated in the instrument, an instrument appointing an enduring guardian—

- (a) authorises the appointee to exercise the powers at law or in equity of a guardian if the person who makes the appointment subsequently becomes mentally incapacitated; and
- (b) authorises the appointee, in that event, to consent to or refuse to consent to the medical treatment of the person except where the person has a medical agent who is reasonably available and willing to make a decision in the matter.

(6) The powers conferred by an instrument appointing an enduring guardian must, unless the Board approves otherwise, be exercised in accordance with any lawful directions contained in the instrument.

Revocation of appointment by Board

26. (1) The Board may, on an application under this section, revoke the appointment of an enduring guardian if—

- (a) the guardian seeks revocation of the appointment; or
- (b) the Board is satisfied that the guardian—
 - (i) is not willing or able to act in that capacity; or
 - (ii) has, in that capacity, acted in an incompetent or negligent manner or contrary to the principles stated by this Act.

(2) An application under this section may be made by—

- (a) the mentally incapacitated person; or

- (b) the Public Advocate, on his or her own initiative, or at the request and on behalf of the mentally incapacitated person; or
- (c) the enduring guardian; or
- (d) a relative or medical agent of the mentally incapacitated person; or
- (e) an administrator of the mentally incapacitated person's estate; or
- (f) any other person who satisfies the Board that he or she has a proper interest in the welfare of the mentally incapacitated person.

Special powers to place and detain, etc., mentally incapacitated person

27. Section 32 applies, with such modifications as may be necessary, to and in relation to an enduring guardian and the mentally incapacitated person with respect to whom he or she is empowered to act.

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**PART 4
ORDERS FOR GUARDIANSHIP OR ADMINISTRATION**

DIVISION 1—INVESTIGATIONS

Investigations by Public Advocate

28. (1) The Public Advocate must, if the Board so directs after an application has been lodged with the Board for an order under this Part, investigate the affairs of the person the subject of the application.

(2) On completing an investigation carried out at the direction of the Board, the Public Advocate must furnish the Board with a copy of the report of the investigation.

(3) The Board may receive the copy of the report in evidence and may have regard to the matters contained in the report.

DIVISION 2—GUARDIANSHIP ORDERS

Guardianship orders

29. (1) If the Board is satisfied, on an application made under this Division—

- (a) that the person the subject of the application has a mental incapacity; and
- (b) that the person the subject of the application does not have an enduring guardian; and
- (c) that an order under this section should be made in respect of the person,

the Board may, by order, place the person under—

- (d) the limited guardianship; or
- (e) if satisfied that an order under paragraph (d) would not be appropriate, the full guardianship,

of such person or persons as the Board considers, in all the circumstances of the case, to be the most suitable for the purpose.

(2) A limited guardianship order is an order by which the Board specifies the particular aspects of the protected person's care or welfare that are to be the responsibility of the appointed guardian or guardians.

(3) A guardian must be a natural person.

(4) The Public Advocate may be appointed as the guardian, or one of the guardians, of the person, but only if the Board considers that no other order under this section would be appropriate.

(5) A person who cares for the protected person on a professional basis cannot be appointed as a guardian of the person.

(6) A guardianship order may be subject to such conditions or limitations (including a limitation as to the duration of the order) as the Board thinks fit and specifies in the order.

Variation or revocation of guardianship order

30. The Board may, on an application made under this Division, by order—

- (a) vary a guardianship order; or
- (b) revoke a guardianship order.

Powers of guardian

31. A person appointed as a guardian under this Part has and may exercise, subject to the terms of the Board's order, all the powers a guardian has at law or in equity.

Special powers to place and detain, etc., protected persons

32. (1) The Board, on application made by a guardian at the time of his or her appointment under this Part, or at any subsequent time—

- (a) may, by order, direct that the protected person reside—
 - (i) with a specified person or in a specified place; or
 - (ii) with such person or in such place as the guardian from time to time thinks fit, according to the terms of the Board's order; and
- (b) may, by order, authorise the detention of the protected person in the place in which he or she will so reside; and
- (c) may, by order, authorise the persons from time to time involved in the care of the protected person to use such force as may be reasonably necessary for the purpose of ensuring the proper medical treatment, day-to-day care and well-being of the person.

(2) The Board cannot make an order under subsection (1) unless it is satisfied that, if such an order were not to be made and carried out, the health or safety of the protected person or the safety of others would be seriously at risk.

(3) Nothing in this section empowers the placement or detention of a protected person in—

- (a) a correctional institution or any other place in which persons charged with or convicted of offences may be detained; or
- (b) any part of an approved treatment centre under the *Mental Health Act 1993* that is set aside for the treatment of persons with a mental illness.

(4) While an order for the placement or detention of a protected person is in force under this section—

- (a) the guardian or a member of the police force may enter any premises and take the protected person, or cause him or her to be taken, using only such force as is reasonably necessary for the purpose, to the place in which he or she is to be placed or detained, and any person who assists the guardian or member of the police force in the matter incurs no liability for doing so; and
- (b) the person in charge of the premises in which a protected person is being detained pursuant to the order may take, or cause to be taken, such action as is reasonably necessary for the purpose of preventing the protected person from leaving the premises or for bringing the person back should he or she leave without lawful authority or excuse; and

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(c) any person who takes any such action under paragraph (b) in good faith and with the authority of the person in charge of the premises incurs no liability for doing so.

(5) The Board may, on an application under this Division, vary or revoke an order under this section.

(6) Where a member of the police force has reasonable cause to believe that a person who is being detained in any place pursuant to powers conferred under this section is unlawfully at large, the member may, without warrant, enter any place in which he or she believes on reasonable grounds that the protected person may be and apprehend the person, using only such force as is reasonably necessary for the purpose, and may return the person to the place in which he or she is being so detained.

(7) A person who, without lawful authority or excuse, removes a person who is being detained in any place pursuant to powers conferred under this Act from that place, or aids or abets the person unlawfully to leave that place, is guilty of an offence.

Penalty: Division 5 fine.

Applications under this Division

33. (1) An application under this Division (other than under section 32(1)) may be made by—

- (a) the person to whom the proceedings relate; or
- (b) the Public Advocate, on his or her own initiative, or at the request and on behalf of the person to whom the proceedings relate; or
- (c) a relative, guardian or medical agent of the person; or
- (d) an administrator of the person's estate; or
- (e) any other person who satisfies the Board that he or she has a proper interest in the welfare of the person.

(2) Applications under this Division must be made in the manner and form determined by the Board.

Reciprocal guardianship arrangements

34. (1) If the Minister is satisfied that the laws of another State or a Territory of the Commonwealth relating to the guardianship of persons with a mental incapacity correspond sufficiently with this Act, the Minister may enter into arrangements with the relevant Minister in that State or Territory for the administration of guardianship orders made in respect of mentally incapacitated persons who wish to enter this State from that State or Territory or to enter that State or Territory from this State.

(2) If such an arrangement exists, a guardianship order made in the other State or Territory has, while the person to whom it relates is in this State, force and effect according to its terms as if it had been made under this Act.

DIVISION 3—ADMINISTRATION ORDERS

Administration orders

35. (1) If the Board is satisfied, on an application made under this Division—

- (a) that the person the subject of the application has a mental incapacity; and

- (b) that an order under this section should be made in respect of the person, the Board may, by order, appoint an administrator, or administrators, of—
 - (c) a specified part of the person's estate (a "limited administration order"); or
 - (d) if satisfied that an order under paragraph (c) would not be appropriate, the whole of the person's estate (a "full administration order").
- (2) Any of the following may be appointed as an administrator under this section:
- (a) the Public Trustee;
 - (b) a trustee company under the *Trustee Companies Act 1988*;
 - (c) any natural person who the Board considers suitable to act as administrator of the person's estate.
- (3) The Public Trustee may only be appointed as a sole administrator under this section.
- (4) An administration order—
- (a) may be subject to such conditions or limitations (including a limitation as to the duration of the order) as the Board thinks fit and specifies in the order; and
 - (b) may confer such further powers (beyond those conferred by this Act) on the administrator as the Board thinks necessary or desirable for the proper administration of the estate and specifies in the order.

Variation or revocation of administration order

36. The Board may, on an application made under this Division, by order—

- (a) vary an administration order; or
- (b) revoke an administration order.

Applications under this Division

37. (1) An application for an order under this Division may be made by—

- (a) the person the subject of the application; or
- (b) the Public Advocate, on his or her own initiative, or at the request and on behalf of the person the subject of the application; or
- (c) a relative, guardian appointed under this Act or medical agent of the person; or
- (d) an administrator of the person's estate; or
- (e) any other person who satisfies the Board that he or she has a proper interest in the welfare of the person.

(2) Applications under this Division must be made in the manner and form determined by the Board.

Copy of order must be forwarded to Public Trustee

38. The Board must, on making an order under this Division, cause a copy of the order to be forwarded to the Public Trustee.

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Powers and duties of administrator

39. (1) Where an administrator is appointed under this Division—

- (a) the estate the subject of the order does not vest in the administrator but, subject to this Act, he or she has the control and management of it;
- (b) the administrator has the duties and obligations of and is accountable as a trustee in relation to the estate and the protected person.

(2) Subject to this Act and the terms of the administration order, an administrator may—

- (a) sell, either by public auction or private contract, any property, or interest in property, of the protected person; or
- (b) purchase or otherwise acquire as an investment any property (being an authorised trustee investment) on behalf of the protected person, whether as a sole proprietor, joint tenant or tenant in common; or
- (c) pay any amount necessary to provide proper accommodation for the protected person and, in appropriate circumstances, for a spouse or dependent child of the protected person; or
- (d) take on lease or concur in taking on lease any property on behalf of the protected person; or
- (e) lease or concur in the leasing of any property of the protected person; or
- (f) insure any property of the protected person; or
- (g) pay all rates, taxes, insurance premiums or other outgoings payable in respect of the protected person's property; or
- (h) surrender any policy of life assurance vested in the protected person; or
- (i) grant powers of attorney to any person in or out of the State to do any act or thing with respect to the property that the administrator has power to do under this section; or
- (j) institute or defend, in the administrator's own name or in the name of the protected person, any action, suit or other proceeding relating to the protected person's estate and suffer judgment to go by default, or consent to any judgment, decree, or order in the action, suit or proceeding, upon such terms as he or she thinks fit; or
- (k) compromise any claims or demands made against or by or on behalf of the protected person or his or her estate, upon such terms as the administrator thinks fit; or
- (l) submit or join in the submission of any claim or dispute to arbitration, and take any action necessary to facilitate the arbitration of any claim or dispute; or
- (m) take criminal proceedings concerning the property; or
- (n) demand and receive all money payable or belonging to the protected person and take any action necessary to recover that money; or
- (o) apply money belonging to the protected person (whether income or capital) in or towards the payment of any debt, obligation or liability of the protected person, or incurred by the administrator in the exercise of powers or duties under this Division; or

- (p) discharge any mortgage over the protected person's property; or
- (q) surrender, assign or otherwise dispose of, with or without consideration, any onerous property; or
- (r) surrender or concur in surrendering any lease on behalf of the protected person; or
- (s) accept a surrender of any lease on behalf of the protected person; or
- (t) perform contracts entered into by the protected person; or
- (u) exercise the powers of a proprietor under the *Real Property Act 1886* in relation to any land, or interest in land, of the protected person; or
- (v) lodge a caveat in respect of any land under the provisions of the *Real Property Act 1886* in which the administrator claims that the protected person has an interest; or
- (w) apply, in the administrator's discretion, and in such manner and to such extent as he or she thinks fit, any property for the maintenance or benefit of the protected person, the maintenance of the spouse of the protected person, or for the maintenance, education or advancement of the children or grandchildren of the protected person, or for the payment of the expenses of his or her funeral; or
- (x) take up any rights to the issue of new shares to which the protected person becomes entitled (whether an authorised trustee investment or not); or
- (y) carry on any trade or business of the protected person; or
- (z) repair any of the property or expend money in the improvement of any property of the protected person by way of building or otherwise; or
- (za) apply for and, if granted, undertake administration for the use and benefit of the protected person during his or her incapacity where the protected person would, but for that incapacity, be entitled to a grant of probate or administration; or
- (zb) execute any instruments for the purposes of exercising his or her powers under this section; or
- (zc) exercise any other powers conferred on the administrator by or under this Act or any other Act.

(3) The regulations—

- (a) may prescribe limits as to the amount of money that can be expended by an administrator in the exercise of any particular power under this section; and
- (b) may provide that any such limit can be exceeded only with the approval of the Board.

(4) An administrator cannot sell, lease (except for a period not exceeding two years) or otherwise dispose of any real property or purchase, take on lease (other than for the accommodation of the protected person) or otherwise acquire any real property, without the approval of the Board.

(5) Nothing in this section obliges an administrator to convert any property into an authorised trustee investment.

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Administrator's access to wills and other records

40. (1) Subject to the terms of his or her appointment, an administrator is entitled to view, and take an extract from or copy of, any will or other testamentary disposition of the protected person and any records relating to the protected person's property.

(2) A person who has the custody or control of a document referred to in subsection (1) must allow the administrator access to it.

Penalty: Division 7 fine.

(3) An administrator must not, except with the authority of the Board, disclose the contents of a will or other testamentary disposition to which he or she has had access pursuant to this section to any person other than the protected person.

Penalty: Division 6 fine.

Power of administrator to continue to act after death, etc., of protected person

41. (1) Notwithstanding the death of the protected person or the revocation of the administrator's appointment, an administrator may continue to exercise his or her powers under this Division until he or she is notified or becomes aware of the death or revocation.

(2) Notwithstanding that an administrator has been notified or has become aware of the death of the protected person, he or she may pay the funeral expenses of the protected person out of the estate.

(3) The Board may, by notice in writing addressed to the administrator, authorise the exercise of powers by the administrator for a further period, not exceeding two months after the death of the protected person, subject to such limitations and conditions as the Board may specify in the notice.

(4) An authorisation under subsection (3) is revoked upon the grant of probate or letters of administration in respect of the protected person's will or estate.

Power of administrator to avoid dispositions and contracts of protected person

42. (1) Subject to this section—

(a) a disposition of property made by a person while his or her estate is subject to administration under this Division; or

(b) a contract entered into by a person while his or her estate is subject to administration under this Division,

is voidable at the option of the administrator.

(2) A transaction cannot be avoided by an administrator under subsection (1) if the other party to the transaction did not know and could not reasonably be expected to have known that the person with whom he or she dealt had a mental incapacity.

(3) The Board may, by order, exempt a disposition of property or contract from the operation of this section if the Board is satisfied that to do so would be for the benefit of the protected person and that he or she has an adequate understanding of the nature of the transaction.

(4) Nothing in this section affects the law relating to testamentary dispositions.

Where administration has disturbed entitlements of beneficiaries, the Supreme Court has power to intervene

43. (1) Where at the death of a protected person or former protected person who died leaving a will it appears that, in consequence of any dealing with the estate by an administrator, the share of any beneficiary in that estate under the will has been affected, the Supreme Court may, on application by an interested person, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the estate having been subject to administration under this Division.

(2) An order made by the Court under subsection (1) operates and takes effect as if it had been made by a codicil to the will of the protected person or former protected person executed immediately before his or her death.

(3) The Court must, on making an order under subsection (1), direct that a certified copy of the order be made on the probate (or letters of administration) of the will and may, for the purpose, require the production of the relevant document.

(4) An application under this section must be made within six months from the date of the grant in this State of probate or letters of administration unless the Court, after hearing such of the persons affected as the Court thinks necessary, extends the time for making the application.

(5) An extension of time granted under subsection (4) may be granted—

(a) on such conditions as the Court thinks fit; and

(b) whether or not the time for making an application under this section has expired.

(6) An application for extension of time must be made before the final distribution of the estate.

(7) A distribution of any part of the estate made before an application for extension of time will not be disturbed by reason of the application or any order made on the application.

(8) This section does not apply in respect of the will of a person who died before 1 January 1985.

Reporting requirements for private administrators

44. (1) An administrator of a protected person's estate (other than the Public Trustee) must provide the Board and the Public Trustee, at such times as the Board determines, with a statement of the accounts of the estate, showing—

(a) the assets and liabilities of the estate; and

(b) the income and expenditure of the estate over a specified period; and

(c) such other particulars relating to the estate as the Public Trustee may require.

(2) An administrator who fails, without reasonable excuse, to furnish a statement in accordance with subsection (1) is guilty of an offence.

Penalty: Division 6 fine.

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- (3) A statement under this section must—
- (a) be in a form approved by the Public Trustee; and
 - (b) be verified by the statutory declaration of the administrator and supported by such other evidence (if any) as the Board or the Public Trustee may require.
- (4) The Public Trustee must examine and report to the Board on the statement of accounts and—
- (a) may cause the accounts to be audited at the cost of the protected person's estate; and
 - (b) may, if of the opinion that the administrator, in making any expenditure in the exercise, or purported exercise, of his or her powers as administrator, did not act in good faith or with reasonable care, recommend to the Board the disallowance of that item of expenditure; and
 - (c) may report on any other matter pertaining to the administration of the estate that the Public Trustee thinks ought to be drawn to the attention of the Board.
- (5) The Board, after considering a recommendation for the disallowance of an item of expenditure and hearing the administrator and any other person the Board thinks fit on the matter—
- (a) may approve the item of expenditure; or
 - (b) if satisfied that, in making the expenditure, the administrator had not acted in good faith or with reasonable care in the exercise of his or her powers as administrator, may disallow the item of expenditure.
- (6) Where the Board disallows an item of expenditure pursuant to subsection (5), the administrator is personally liable to the protected person for the amount of the expenditure and to the Public Trustee for such of the costs and expenses incurred by the Public Trustee in relation to the disallowance as are allowed by the Board.
- (7) The Board must allow the protected person or, if the protected person does not, in the opinion of the Board, have the mental capacity to comprehend the contents, such other person or persons as the Board thinks appropriate, to have access to and to take a copy of—
- (a) a statement of accounts furnished by an administrator under this section; and
 - (b) if those accounts are audited, the accounts as so audited; and
 - (c) the Public Trustee's report on the statement of accounts.

Reporting by Public Trustee

45. (1) If the Public Trustee is the administrator of a protected person's estate, the Public Trustee must, at intervals determined by the Board, furnish the Board with a statement of the accounts of the estate, showing—

- (a) the assets and liabilities of the estate; and
- (b) the income and expenditure of the estate over a specified period; and
- (c) such other particulars relating to the estate as the Board may require.

(2) The Board may, by notice in writing addressed to the Public Trustee, disallow any item of expenditure shown in the statement of accounts if the Board is satisfied that the Public Trustee, in making the expenditure, had not acted with reasonable care in the exercise of powers as an administrator.

(3) Where the Board disallows an item of expenditure pursuant to subsection (2), the Crown is liable to the protected person for the amount of the expenditure.

(4) The Board must allow the protected person or, if the protected person does not, in the opinion of the Board, have the mental capacity to comprehend the contents, such other person or persons as the Board thinks appropriate, to have access to and to take a copy of a statement of accounts furnished under this section.

Remuneration of professional administrators

46. (1) Subject to subsection (3), an administrator who carries on a business of or including the administration of estates (whether under this Act or otherwise) is entitled to remuneration out of the estate of the protected person for the work involved in administering that estate (whether the work was or is performed before or after the commencement of this Act) if the Board so determines.

(2) The rate of remuneration will be the prescribed rate unless the Board thinks good reason exists for fixing some other higher or lower rate in relation to any particular estate and orders accordingly.

(3) Before fixing a higher rate of remuneration in relation to the estate of a protected person, the Board must consider any representations made by the Public Advocate on behalf of the protected person.

(4) Nothing in subsection (1) affects the right of the Public Trustee or a trustee company to recover charges and expenses in accordance with any other applicable law.

Registration of administration orders

47. (1) An administration order may be registered under the *Registration of Deeds Act 1935* as an instrument affecting the title to any land in which the protected person has a legal or equitable estate or interest.

(2) A memorandum of an administration order may, on application to the Registrar-General in a manner and form determined by the Registrar-General, be entered in the register book in relation to any land in which the protected person has an estate or interest registered under the *Real Property Act 1886*.

Reciprocal administration powers with certain states

48. (1) The Minister may, by notice in the *Gazette*—

(a) declare any country, state or territory to be a reciprocal state for the purposes of this section;

(b) vary or revoke any notice under this section.

(2) If an authority invested by the laws of any reciprocal state with the custody or administration of the estate of a person with a mental incapacity—

(a) certifies in writing to the Public Trustee that the person has property in this State; and

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- (b) by instrument in writing authorises the Public Trustee to administer that property within this State,

the Public Trustee has and may exercise in respect of that property all the powers that could be exercised if he or she were the administrator of the estate of that person.

(3) Where it appears to the administrator of the estate of a protected person that the protected person has property in a reciprocal state, the administrator may, by instrument in writing directed to the authority of that reciprocal state who is or may be invested by its laws with the custody or administration of the estates of persons (however described under those laws) who have a mental incapacity—

- (a) certify that he or she has the control and management of the estate of the protected person; and
 - (b) authorise the authority to administer the property of the protected person that is in the reciprocal state.
- (4) An administrator may revoke or vary an authority given under subsection (3).

DIVISION 4—PROVISIONS APPLICABLE TO GUARDIANS AND ADMINISTRATORS APPOINTED UNDER THIS PART

Withdrawal of applications

49. Nothing in this Act will be taken to prohibit a person from withdrawing an application made by him or her under this Part at any time prior to a final determination being made on it by the Board.

Criteria for determining suitability for appointment

50. (1) In determining the suitability of a person for appointment as a guardian or administrator, the Board must have regard to—

- (a) whether the potential appointee and the protected person would be incompatible;
- (b) whether there is some existing family arrangement or relationship that should be preserved or should not be disturbed;
- (c) whether the potential appointee would be competent to discharge the functions of guardian or administrator under the order and would do so in accordance with the principles stated by this Act;
- (d) whether the potential appointee would be readily available for discharging those functions;
- (e) whether any conflict of interest would arise from the appointment;
- (f) such other matters as the Board considers relevant.

(2) The fact that a proposed appointee is related to the protected person by blood or marriage will not, of itself, be taken to give rise to a conflict of interest.

Consent to appointment

51. A person (other than the Public Advocate or the Public Trustee) cannot be appointed as a guardian or an administrator unless he or she consents to the appointment.

Joint appointments

52. If more than one guardian is appointed in respect of a protected person or more than one administrator is appointed, all the guardians, or all the administrators, as the case may require, must, subject to the order of appointment, concur in every act done or decision made in relation to the protected person, or to the protected person's estate.

Commencement of orders

53. An order of the Board is operative on and from the day on which it is made unless the Board specifies in the order that it is to operate from some future specified date.

Termination of appointment

54. (1) The appointment of a person as a guardian or administrator terminates if—

- (a) the person dies; or
- (b) the Board revokes the guardianship or administration order on an application under Division 2 or 3; or
- (c) the Board revokes his or her appointment on an application under Division 2 or 3.

(2) The Board may, on an application made under Division 2 or 3, revoke the appointment of a guardian or an administrator—

- (a) if the guardian or administrator seeks revocation of his or her appointment; or
- (b) if the Board is satisfied that the guardian or administrator—
 - (i) is not willing or able to act in that capacity; or
 - (ii) is not a suitable person to act in that capacity in respect of the protected person; or
 - (iii) has, in that capacity, acted in an incompetent or negligent manner or contrary to the principles stated by this Act; or
 - (iv) has committed an offence against this Act or an offence involving dishonesty.

Board must give statement of appeal rights

55. (1) On making any decision or order under this Act in relation to a person, the Board must cause the person to be given a written statement of—

- (a) the effect of the decision or order; and
- (b) his or her rights of appeal against the decision or order; and
- (c) the procedures for instituting any such appeal.

(2) Wherever possible, the statement should be in the language with which the person is the most familiar.

(3) If the person is illiterate, or too disturbed to read and comprehend the statement, the Board must cause such steps (if any) as may be practicable in the circumstances to be taken to have the information contained in the statement conveyed to the person.

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Restriction of testamentary capacity of protected person

56. (1) The Board may direct that any testamentary provisions by a protected person be made only after compliance with such precautions as the Board thinks fit to direct.

(2) If, after the Board has given a direction under subsection (1), the protected person makes a testamentary provision otherwise than in accordance with that direction, the testamentary provision is ineffectual.

(3) Except as provided by subsection (2), nothing in this section affects the law relating to testamentary dispositions.

Review of Board's orders

57. (1) The Board must review the circumstances of a protected person—

(a) in the case of a protected person who is being detained in any place pursuant to an order of the Board—within six months of the making of the order and thereafter at intervals of not more than one year; and

(b) in any other case—at intervals of not more than three years,

for the purpose of ascertaining whether the order or orders to which the person is subject under this Act are still appropriate.

(2) The Board may conduct a review in such manner as it thinks fit.

(3) The Board must, on completion of a review, revoke the order or orders to which the protected person is subject unless the Board is satisfied that there are proper grounds for the order or orders remaining in force.

(4) If the Board is satisfied that there are proper grounds for an order remaining in force, the Board may, by order, vary the terms of the order.

PART 5
CONSENT TO MEDICAL AND DENTAL TREATMENT OF MENTALLY
INCAPACITATED PERSONS

Application of this Part

58. This Part applies in relation to a person who, by reason of his or her mental incapacity, is incapable of giving effective consent, whether or not he or she is a protected person.

Consent of certain persons is effective

59. (1) Where it is proposed to give medical or dental treatment (not being prescribed treatment) to a person to whom this Part applies, the consent of the appropriate authority to the treatment will be taken to be a consent given by the person and to have the same effect for all purposes as if the person were capable of giving effective consent.

(2) For the purposes of subsection (1), the appropriate authority is—

(a) if a guardian has been appointed in respect of the person under any Act or law, his or her powers as guardian have not been limited so as to exclude the giving of such consent and he or she is reasonably available and is willing to make a decision as to consent—the guardian;

(b) in any other case—

(i) a relative of the person; or

(ii) the Board, on application by—

(A) a relative of the person; or

(B) the medical practitioner or dentist proposing to give the treatment; or

(C) any other person who the Board is satisfied has a proper interest in the matter.

(3) Where medical or dental treatment (not being prescribed treatment) is given to a person to whom this Part applies in the following circumstances it will be taken that an effective consent was given to the treatment:

(a) treatment given with the purported consent of the person, if the medical practitioner or dentist did not know and could not reasonably be expected to have known that the person was incapable of giving effective consent;

(b) treatment given with the purported consent of a person who represented to the medical practitioner or dentist that he or she was the appropriate authority for the purposes of giving consent, if the medical practitioner or dentist did not know and could not reasonably be expected to have known that the person was not the appropriate authority for giving consent.

Person must not give consent unless authorised to do so under this Part

60. A person who is not the appropriate authority to give consent to the medical or dental treatment of a person to whom this Part applies is guilty of an offence if he or she, knowing that he or she is not the appropriate authority or being recklessly indifferent as to whether or not he or she is the appropriate authority—

(a) gives any such consent; or

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- (b) represents to a medical practitioner or dentist that he or she is the appropriate authority to give such a consent.

Penalty: Division 5 fine or division 5 imprisonment.

Prescribed treatment not to be carried out without Board's consent

61. (1) Except where prescribed circumstances exist for the purposes of section 62, a medical practitioner must not give prescribed treatment to a person to whom this Part applies—

- (a) without the Board's consent; and
- (b) otherwise than in accordance with the regulations.

Penalty: Division 5 fine or division 5 imprisonment.

(2) The Board cannot consent to a sterilisation unless—

- (a) it is satisfied that it is therapeutically necessary for the sterilisation to be carried out on the person; or
- (b) it is satisfied—
- (i) that there is no likelihood of the person acquiring at any time the capacity to give an effective consent; and
- (ii) that the person is physically capable of procreation; and
- (iii) that—
- (A) the person is, or is likely to be, sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or
- (B) in the case of a woman, cessation of her menstrual cycle would be in her best interests and would be the only reasonably practicable way of dealing with the social, sanitary or other problems associated with her menstruation,

and has no knowledge of any refusal on the part of the person to consent to the carrying out of the sterilisation, being a refusal that was made by the person while capable of giving effective consent and that was communicated by the person to a medical practitioner.

(3) The Board cannot consent to a termination of pregnancy unless it is satisfied—

- (a) that the carrying out of the termination would not constitute an offence under the *Criminal Law Consolidation Act 1935*; and
- (b) that there is no likelihood of the woman acquiring the capacity to give an effective consent within the period that is reasonably available for the safe carrying out of the termination,

and has no knowledge of any refusal on the part of the woman to consent to the termination, being a refusal that was made while capable of giving effective consent and that was communicated by her to a medical practitioner.

(4) The Board cannot consent to the carrying out of any other prescribed treatment unless it is satisfied as to prescribed matters.

(5) Before consenting to the carrying out of any prescribed treatment in relation to a person to whom this Part applies, the Board must, if it thinks it appropriate to do so, allow such of the person's parents whose whereabouts are reasonably ascertainable a reasonable opportunity to make submissions to the Board on the matter, but the Board is not required to do so if of the opinion that to do so would not be in the best interests of the mentally incapacitated person.

(6) A decision of the Board to give consent under this section has no force or effect until the period for appeal against the decision has expired or, if an appeal has been instituted, until the appeal is dismissed or withdrawn.

Emergency medical or dental treatment of persons unable to consent

62. (1) Where medical or dental treatment is given in prescribed circumstances by a medical practitioner or a dentist to a person to whom this Part applies, the person will be taken to have consented to the treatment and the consent has the same effect for all purposes as if the person were capable of giving effective consent.

(2) Prescribed circumstances exist for the purposes of subsection (1) if—

(a) the medical practitioner or dentist giving the treatment—

(i) is of the opinion that the treatment is necessary to meet imminent risk to the person's life or health; and

(ii) has no knowledge of any refusal on the part of the person to consent to the treatment, being a refusal made by the person while capable of giving effective consent and communicated by the person to the medical practitioner or dentist or some other medical practitioner or dentist; and

(b) the opinion of the medical practitioner or dentist referred to in paragraph (a) is, unless it is not reasonably practicable to do so having regard to the imminence of the risk to the person's life or health, supported by the written opinion of one other medical practitioner or dentist; and

(c) the appropriate authority for giving consent to the treatment is not reasonably available or, if available, has been requested to give consent but—

(i) has failed to respond to the request; or

(ii) where the person to be treated is under the age of 16 years—has refused to give consent.

Board's consent must be in writing

63. (1) Any consent given by the Board under this Part must be in writing.

(2) In any legal proceedings, a document purporting to be signed by a member of the Board on behalf of the Board and to be the consent of the Board given under this Part is, in the absence of proof to the contrary, proof of the consent of the Board and of the validity of that consent.

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**PART 6
APPEALS AND CASES STATED**

DIVISION 1—REVIEW OF REGISTRAR DECISIONS AND CASES STATED

Decisions of the Registrar are subject to review

64. (1) Where the Registrar makes a decision or order in exercising the jurisdiction of the Board, a party to the proceedings may, within one month of the date of the decision or order, apply to the Board for a review of the decision or order.

(2) Subject to subsection (3), a decision or order of the Registrar continues to operate notwithstanding the right to have it reviewed or the institution of a review.

(3) The operation of a decision or order of the Registrar against which a review has been instituted may, on application, be suspended by the Registrar or the Board, if either thinks special reason exists for doing so.

(4) The Board, on reviewing a decision or order under this section, may, by order, confirm, vary or set aside the decision or order.

Case may be stated to Supreme Court

65. The Board or the Administrative Appeals Court may state a case on any question of law for the opinion of the Supreme Court.

DIVISION 2—APPEALS TO THE ADMINISTRATIVE APPEALS COURT

Constitution of Administrative Appeals Court

66. (1) The Administrative Appeals Court will, in exercising its jurisdiction under this Act, sit with assessors selected under this section.

(2) The Governor will establish a panel of persons to act as assessors, being persons whose expertise is, in the opinion of the Governor, appropriate to the jurisdiction of the Court under this Act.

(3) The Governor will establish a panel of persons to act as assessors, being persons with expertise in representing or promoting the interests of mentally incapacitated persons or with expertise in such other fields as the Governor thinks relevant.

(4) A person appointed to a panel under this section—

(a) will be appointed to office for such term, not exceeding three years, as is specified in the instrument of appointment; and

(b) will hold office on such other terms and conditions as the Governor may determine; and

(c) subject to subsection (5), is, on the expiration of a term of office, eligible for reappointment.

(5) A person cannot hold office as a member of a panel for more than two terms if those terms are consecutive, except that an appointment for a third consecutive term of office may be made if it is only for the purposes of the completion of part-heard proceedings.

(6) Subject to subsection (7), where proceedings are brought before the Administrative Appeals Court under this Act, the judicial officer who is to preside at those proceedings will select a member from each of the panels to sit with him or her as assessors.

(7) A member of a panel who has a personal interest or a direct or indirect pecuniary interest in a matter before the Court is disqualified from participating in the hearing of the matter.

(8) In selecting a member from the panel established under subsection (2) for the purposes of an appeal against a decision or order of the Board under the *Mental Health Act 1993*, the judicial officer must select a psychiatrist.

(9) If an assessor dies or is for any other reason unable to continue with any proceedings under this Act, the Court constituted of the judicial officer who is presiding at those proceedings and the other assessor may, if the judicial officer so determines, continue and complete the proceedings.

Appeal from decisions of the Board

67. (1) If—

- (a) the applicant in proceedings before the Board (whether under this Act, the *Mental Health Act 1993* or any other Act); or
- (b) the person to whom those proceedings relate; or
- (c) the Public Advocate; or
- (d) any person who gave evidence before or made submissions to the Board in those proceedings; or
- (e) any other person who satisfies the Board or the Administrative Appeals Court that he or she has a proper interest in the matter,

is dissatisfied with a decision, direction or order of the Board made in those proceedings, he or she may—

- (f) in the case of a decision or order for or affirming the detention of a person or relating to the giving of consent to a sterilisation or a termination of pregnancy—appeal to the Administrative Appeals Court against the decision or order;
- (g) in any other case—with the leave of the Board or the Court, appeal to the Administrative Appeals Court against the decision, direction or order.

(2) Notwithstanding subsection (1), a right of appeal does not lie against—

- (a) a decision of the Board not to authorise publication of a report of proceedings before the Board; or
- (b) a decision or order made by the Registrar in exercising the jurisdiction of the Board.

(3) An application for leave to appeal under this section must be instituted—

- (a) within 28 days of the making of the decision, direction or order the subject of the application; or
- (b) within 28 days of being furnished, pursuant to a request made within seven days of the making of the decision, direction or order, with the reasons for the decision, direction or order; or
- (c) within seven days of leave to appeal being refused by the Board,

whichever is the later.

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(4) An appeal against an order of the Board for or affirming the detention of a person or relating to the giving of consent to a sterilisation must be instituted—

- (a) within 28 days of the making of the order; or
- (b) within 28 days of being furnished, pursuant to a request made within seven days of the making of the order, with the reasons for the order,

whichever is the later.

(5) An appeal against a decision or order of the Board made on an application for the Board's consent to a termination of pregnancy must be instituted within two working days of the decision or order being made.

(6) The Court may, if satisfied that it is just and reasonable in the circumstances to do so, dispense with the requirement that an appeal or application for leave to appeal be instituted within the period stipulated by subsection (3), (4) or (5).

(7) The Court must notify the Board of the lodging of an application for leave to appeal or of the institution of an appeal to the Court and the Board must then furnish the Court with—

- (a) such records or transcripts of evidence given in the original proceedings as the Board may have; and
- (b) copies of any written submissions made to the Board or reports furnished to the Board in the proceedings; and
- (c) a copy of the Board's reasons for the decision, direction or order appealed against.

(8) The Court must hear and determine proceedings under this section as expeditiously as is reasonably practicable and must give priority to hearing and determining appeals against decisions or orders relating to an application for consent to a termination of pregnancy or relating to the detention of any person.

(9) The person to whom the proceedings relate is (if he or she is not the appellant) a party to the proceedings.

(10) Subject to subsection (11), the Court must give the parties to proceedings reasonable notice of the time and place of the hearing of the proceedings.

(11) The Court is not obliged to give notice of proceedings to a party whose whereabouts cannot, after reasonable enquiry, be ascertained.

(12) A party is entitled to appear before the Court—

- (a) personally or by counsel; or
- (b) with the leave of the Court, by any other representative.

(13) Subject to subsection (14), hearings before the Court are open hearings.

(14) In any proceedings before the Court, the Court has an absolute discretion—

(a) to direct that no person other than—

(i) the parties to the proceedings and any person representing them in the proceedings; and

(ii) witnesses (while giving evidence); and

(iii) officers of the Court,

be present in the room while the proceedings are being heard; and

(b) to direct that a particular person (not being a person referred to in paragraph (a)) not be present in the room while the proceedings are being heard.

(15) The Court may make a determination in any proceedings in the absence of a party to the proceedings if satisfied that the party was given reasonable opportunity to appear but failed to do so.

(16) On the conclusion of proceedings the Court must furnish the parties and the Board with a written statement of the reasons for its decision.

Powers of Court on appeal

68. (1) The Court may, on hearing an appeal, exercise one or more of the following powers, according to the nature of the case:

(a) dismiss the appeal; or

(b) affirm, vary or quash the decision, direction or order appealed against; or

(c) substitute, or make in addition, any decision, direction or order that could be made by the Board; or

(d) remit the subject matter of the appeal to the Board for further hearing or for rehearing; or

(e) subject to subsection (2), make any further or other order as to costs, in accordance with a prescribed scale, or any other matter that the case requires.

(2) The Court may make orders for costs against a party to the proceedings only if the Court is satisfied that the institution of the proceedings, or the party's conduct in relation to the proceedings, was frivolous, vexatious or calculated to cause delay.

Method of conducting appeal

69. An appeal to the Administrative Appeals Court is to be conducted as a review of the decision, direction or order appealed against on the evidence given in the original proceedings and on such further evidence as may, with the leave of the Court or pursuant to the request of the Court, be presented to it.

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DIVISION 3—APPEALS TO THE SUPREME COURT

Appeals from decisions of Administrative Appeals Court

70. (1) Subject to subsection (2), a party to proceedings before the Administrative Appeals Court who is dissatisfied with a decision, direction or order of the Court in those proceedings may, with the leave of that Court or the Supreme Court, appeal to the Supreme Court against the decision, direction or order.

(2) The following decisions or orders are not appealable to the Supreme Court:

- (a) a decision to refuse leave to appeal to the Administrative Appeals Court;
- (b) a decision or order made in relation to an application for consent to a termination of pregnancy;
- (c) a decision not to authorise publication of a report of proceedings before the Court;
- (d) a decision or order made on an appeal against a decision of the Board in the exercise of its appellate jurisdiction under the *Mental Health Act 1993*.

(3) An appeal under this section must be instituted within the prescribed period—

- (a) of the making of the decision, direction or order appealed against; or
- (b) of being furnished with the reasons for the decision, direction or order,

whichever is the later, but the Supreme Court may, if it is satisfied that it is just and reasonable in the circumstances to do so, dispense with the requirement that the appeal should be so instituted.

(4) The Supreme Court may, on the hearing of the appeal, exercise one or more of the following powers, according to the nature of the case:

- (a) dismiss the appeal; or
- (b) affirm, vary or quash the decision, direction or order appealed against; or
- (c) substitute, or make in addition, any decision, direction or order that could be made by the Board; or
- (d) remit the subject matter of the appeal to the Board for further hearing or for rehearing; or
- (e) make any further or other order as to costs, or any other matter, that the case requires.

(5) No order for costs can be made against an appellant if he or she is the person to whom the order or decision appealed against relates.

Method of conducting appeal

71. An appeal to the Supreme Court is to be conducted as a review of the decision, direction or order appealed against on the evidence that was reviewed by or presented to the Administrative Appeals Court and on such further evidence as may, with the leave of the Supreme Court, be presented to it.

DIVISION 4—GENERAL PROVISIONS

Operation of orders pending appeal

72. (1) Subject to subsection (2), a decision, direction or order of the Board or Administrative Appeals Court against which a right of appeal lies continues to operate notwithstanding that right of appeal or the institution of an appeal.

(2) The operation of a decision, direction or order against which an appeal has been instituted may, on the application of the appellant, be suspended by the body that made it or by the appellate court pending determination of the appeal, if the body or court thinks special reason exists for doing so.

Representation upon appeals

73. (1) In every appeal or application for leave to appeal to the Administrative Appeals Court or Supreme Court under this Part, the person to whom the proceedings relate is entitled to be represented by counsel in accordance with this section.

(2) If a person chooses to be represented by counsel pursuant to this section, he or she is entitled to be represented by a legal practitioner provided pursuant to a scheme established by the Minister for the purposes of this section, being a legal practitioner—

- (a) chosen by the person himself or herself; or
- (b) in default of the person making a choice, chosen by such person or authority as the scheme contemplates.

(3) A legal practitioner (not being an employee of the Crown or a statutory authority) who represents a person pursuant to this section is entitled to receive fees for his or her services from the Health Commission, in accordance with a prescribed scale, and cannot demand or receive from any other person any further fee for those services.

(4) Nothing in this section derogates from the right of the person to whom the proceedings relate to engage counsel at his or her own expense, or to appear personally or by a representative pursuant to any other provision of this Act.

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**PART 7
MISCELLANEOUS**

Board may give advice, direction or approval

74. (1) A guardian or administrator appointed under this Act may apply to the Board for advice or direction on the exercise of his or her powers under this Act or any other Act or law or as to the scope of those powers or for approval to the taking of any action for which the approval of the Board is required.

(2) An application under this section—

(a) need not be served on any person; and

(b) may be determined by the Board *ex parte*,

unless the Board directs otherwise.

(3) A direction given by the Board under this section is binding on the applicant and any other joint guardian or administrator.

Administrators and guardians to keep each other informed

75. Where both a guardian and an administrator have been appointed under this Act in respect of the same person, each must endeavour to keep the other informed of decisions or actions of a substantial nature taken in pursuance of powers under this Act.

Illtreatment or neglect of person with mental incapacity

76. A person having the oversight, care or control of a person with a mental incapacity who illtreats or wilfully neglects that person is guilty of an offence.

Penalty: Division 5 fine or division 5 imprisonment.

Offences in relation to certain certificates and reports

77. (1) A medical practitioner, psychologist or member of any other health profession who signs any certificate or report for the purposes of this Act without having seen and personally examined the person to whom the certificate or report relates is guilty of an offence.

Penalty: Division 4 fine.

(2) A medical practitioner, psychologist or member of any other health profession who wilfully certifies that a person has a mental incapacity, not believing the person to have a mental incapacity, or who wilfully makes any other false or misleading statement in a certificate or report given under or for the purposes of this Act is guilty of an offence.

Penalty: Division 5 fine or division 5 imprisonment.

(3) A person who, not being a medical practitioner, psychologist or member of another health profession, signs any certificate or report for the purposes of this Act in which he or she describes himself or herself as, or pretends to be a medical practitioner, psychologist or member of some other health profession or otherwise purports to act under this Act in such a capacity, is guilty of an offence.

Penalty: Division 5 fine or division 5 imprisonment.

(4) A person who by fraudulent means procures or attempts to procure the making of a guardianship or administration order under this Act in respect of a person who does not have a mental incapacity is guilty of an offence.

Penalty: Division 5 fine or division 5 imprisonment.

Medical practitioner, psychologist or other health professional cannot act under this Act in respect of a relative

78. A medical practitioner, psychologist or member of any other health profession cannot sign any certificate or report under this Act in respect of a person to whom he or she is related by blood or marriage or who is his or her putative spouse.

Improper inducement to appoint enduring guardian

79. (1) A person who, by dishonesty or undue influence, induces another to execute an instrument appointing an enduring guardian under this Act is guilty of an offence.

Penalty: Division 2 imprisonment.

(2) A person convicted or found guilty of an offence against this section forfeits any interest that that person might otherwise have had in the estate of the person improperly induced to execute the instrument.

Duty to maintain confidentiality

80. (1) A person engaged in the administration of this Act who divulges any personal information relating to a person in respect of whom any proceedings under this Act have been taken (being information obtained in the course of that administration) is guilty of an offence.

Penalty: Division 5 fine.

(2) Subsection (1) does not prevent a person from—

- (a) divulging information if authorised or required to do so by law or by his or her employer; or
- (b) divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates.

(3) A guardian or administrator is not to be taken as being engaged in the administration of this Act.

Prohibition of publication of reports of proceedings

81. (1) Subject to subsection (2), a person must not publish a report of any proceedings under this Act.

Penalty: Division 5 fine.

(2) The body or court before which proceedings under this Act are heard may, on application by a person who it is satisfied has a proper interest in the matter, authorise the publication of a report of those proceedings.

(3) A person who publishes a report pursuant to an authorisation given under subsection (2) must not disclose any information in the report that identifies, or could tend to identify, the person to whom the proceedings relate.

Penalty: Division 5 fine.

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Service of notices

82. A notice required to be given to any person under this Act may be given personally or by post or facsimile transmission addressed to the person at his or her last known principal place of residence or business.

Protection from liability

83. (1) A person engaged in the administration of this Act incurs no liability for an honest act or omission in the exercise or discharge, or purported exercise or discharge, by the person or by a body of which he or she is a member, of a power, function or duty under this Act.

(2) A liability that would, but for subsection (1), lie against a person lies instead against the Crown.

(3) A guardian or administrator is not to be taken as being engaged in the administration of this Act.

Evidentiary provisions

84. In any legal proceedings, a document purporting to be signed by the Registrar and to be a copy of an order of the Board made under this Act or any other Act will, in the absence of proof to the contrary, be taken to be evidence of the order.

Regulations

85. The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

Expiry of Act

86. This Act will expire on the third anniversary of its commencement.

SCHEDULE

Instrument Appointing an Enduring Guardian

1. I [here insert name, address and occupation], appoint [here insert name, address and occupation of guardian] to be my guardian.

2. I authorise my guardian, in the event that I become mentally incapacitated—

(a) to exercise the powers at law or in equity of a guardian; and

(b) to consent or refuse to consent to my medical treatment (unless I have a medical agent who is reasonably available and willing to make a decision in the matter).

3. I require my guardian to observe the following conditions in exercising, or in relation to the exercise of, the powers conferred by this instrument:

[here set out any conditions to which the powers are subject]

4. This is an appointment of an enduring guardian made under the *Guardianship and Administration Act 1993*.

.....
[signature]

Acceptance of Appointment

I [here set out name, address and occupation of guardian] accept appointment as a guardian under this instrument and undertake to exercise the powers conferred honestly and in accordance with the principles set out in the *Guardianship and Administration Act 1993*.

.....
[signature]

Witness's certificate

I [here set out name and address of the witness and the qualification by virtue of which the witness is an authorised witness under the *Guardianship and Administration Act 1993*] certify:

(a) that the signatories to this instrument signed it freely and voluntarily in my presence; and

(b) both appeared to understand its effect.

.....
[signature]

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APPENDIX 1

LEGISLATIVE HISTORY

Section 32(3): amended by 8, 1994, s. 2

Note-

Principal Act came into operation 6 March 1995: *Gaz.* 2 March 1995, p. 734

APPENDIX 2

DIVISIONAL PENALTIES AND EXPIATION FEES

At the date of assent to this Act divisional penalties and expiation fees are, as provided by section 28A of the *Acts Interpretation Act 1915*, as follows:

Division	Maximum imprisonment	Maximum fine	Expiation fee
1	15 years	\$60 000	—
2	10 years	\$40 000	—
3	7 years	\$30 000	—
4	4 years	\$15 000	—
5	2 years	\$8 000	—
6	1 year	\$4 000	\$300
7	6 months	\$2 000	\$200
8	3 months	\$1 000	\$150
9	-	\$500	\$100
10	-	\$200	\$75
11	-	\$100	\$50
12	-	\$50	\$25

Note: This appendix is provided for convenience of reference only.