

Version No. 073
Guardianship and Administration Act 1986
No. 58 of 1986

Version incorporating amendments as at 1 July 2010

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The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1 Purpose

The purpose of this Act is to enable persons with a disability to have a guardian or administrator appointed when they need a guardian or administrator.

2 Commencement

This Act comes into operation on a day or days to be proclaimed.

3 Definitions

(1) In this Act—

administration order means—

- (a) an order of the Tribunal appointing a person as an administrator of the estate of a person under section 46; or
- (b) a temporary order of the Tribunal under section 60;

S. 3(1) def. of *administration order* amended by No. 52/1998 s. 116(1)(a).

* * * * *

S. 3(1) def. of *Administrative Appeals Tribunal* repealed by No. 52/1998 s. 116(1)(b).

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S. 3(1) def. of *administrator* amended by Nos 55/1987 s. 57(2)(Sch. 4 item 1), 40/1999 s. 4(1)(b).

administrator means the person named as administrator in an administration order;

S. 3(1) def. of *appointor* inserted by No. 40/1999 s. 4(1)(a).

appointor means a person who appoints an enduring guardian under Division 5A of Part 4;

S. 3(1) def. of *Board* repealed by No. 52/1998 s. 116(1)(b).

* * * * *

S. 3(1) def. of *determination* amended by No. 52/1998 s. 116(1)(c).

determination in relation to the Tribunal, includes order, direction, consent, advice and approval;

S. 3(1) def. of *disability* substituted by No. 40/1999 s. 4(1)(c).

disability, in relation to a person, means intellectual impairment, mental disorder, brain injury, physical disability or dementia;

S. 3(1) def. of *division* repealed by No. 52/1998 s. 116(1)(b).

* * * * *

S. 3(1) def. of *domestic partner* inserted by No. 27/2001 s. 9(Sch. 7 item 2.1(a)), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 27.1).

domestic partner of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of

a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—

- (i) for fee or reward; or
- (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

emergency treatment means treatment under section 42A;

S. 3(1) def. of *emergency treatment* inserted by No. 40/1999 s. 4(1)(a).

enduring guardian means a person appointed as an enduring guardian under Division 5A of Part 4;

S. 3(1) def. of *enduring guardian* inserted by No. 40/1999 s. 4(1)(a).

* * * * *

S. 3(1) def. of *executive officer* repealed by No. 52/1998 s. 116(1)(b).

guardian means (except in section 58C(2))—

- (a) the Public Advocate, person or body named as a plenary guardian or limited guardian in a guardianship order; or
- (b) a person who becomes a guardian under section 35; or

S. 3(1) def. of *guardian* substituted by No. 40/1999 s. 4(1)(d), amended by No. 3/2006 s. 13.

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- (c) a person named as an enduring guardian in an instrument appointing such a guardian;

S. 3(1) def. of *guardianship order* amended by No. 52/1998 s. 116(1)(d).

guardianship order means—

- (a) an order of the Tribunal appointing a person as plenary guardian or limited guardian under section 22; or
- (b) an order of the Tribunal appointing a person as an alternative guardian under section 34; or
- (c) a temporary order of the Tribunal made under section 33;

S. 3(1) def. of *human research ethics committee* inserted by No. 3/2006 s. 4(1)(a).

human research ethics committee means—

- (a) a human research ethics committee established in accordance with the requirements of the National Statement; or
- (b) an ethics committee established under the by-laws of a public hospital, public health service, denominational hospital or multi-purpose service (within the meaning of the **Health Services Act 1988**);

S. 3(1) def. of *income* inserted by No. 45/1994 s. 32(1)(a).

income includes rents and profits;

S. 3(1) def. of *major medical procedure* repealed by No. 40/1999 s. 4(1)(e).

* * * * *

medical or dental 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 registered practitioner; or
- (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a registered practitioner; or
- (c) any other treatment not referred to in paragraphs (a) and (b) that is prescribed by the regulations to be medical or dental treatment for the purposes of this Act—

S. 3(1) def. of *medical or dental treatment* inserted by No. 40/1999 s. 4(1)(a), amended by No. 3/2006 s. 4(1)(b).

but does not include—

- (d) a special procedure; or
- (da) a medical research procedure; or
- (e) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or
- (f) first-aid treatment; or
- (g) the administration of a pharmaceutical drug for the purpose and in accordance with the dosage level—
 - (i) if the drug is one for which a prescription is required, recommended by a registered practitioner; or

- (ii) if the drug is one for which a prescription is not required and which is normally self-administered, recommended in the manufacturer's instructions or by a registered practitioner; or
- (h) any other kind of treatment that is prescribed by the regulations not to be medical or dental treatment for the purposes of this Act;

S. 3(1) def. of *medical research procedure* inserted by No. 3/2006 s. 4(1)(a).

medical research procedure means—

- (a) a procedure carried out for the purposes of medical research, including, as part of a clinical trial, the administration of medication or the use of equipment or a device; or
- (b) a procedure that is prescribed by the regulations to be a medical research procedure for the purposes of this Act—

but does not include—

- (c) any non-intrusive examination (including a visual examination of the mouth, throat, nasal cavity, eyes or ears or the measuring of a person's height, weight or vision); or
- (d) observing a person's activities; or
- (e) undertaking a survey; or
- (f) collecting or using information, including personal information (within the meaning of the **Information Privacy Act 2000**) or health information (within the meaning of the **Health Records Act 2001**); or

- (g) any other procedure that is prescribed by the regulations not to be a medical research procedure for the purposes of this Act;

* * * * *
S. 3(1) def. of *member* repealed by No. 52/1998 s. 116(1)(b).

National Statement means—

- (a) the National Statement on Ethical Conduct in Research Involving Humans published by the National Health and Medical Research Council in 1999 as in force from time to time; or
(b) any superseding document published by the National Health and Medical Research Council that covers the same subject matter;

S. 3(1) def. of *National Statement* inserted by No. 3/2006 s. 4(1)(a).

nearest relative in relation to a person means the spouse or domestic partner of that person or, where that person does not have a spouse or domestic partner, the relative of that person first listed in the following paragraphs who has attained the age of 18 years, the elder or eldest of two or more relatives described in any paragraph being preferred to either or any of those relatives regardless of sex—

S. 3(1) def. of *nearest relative* amended by No. 27/2001 s. 9(Sch. 7 item 2.1(b)).

- (a) son or daughter;
(b) father or mother;
(c) brother or sister;
(d) grandfather or grandmother;
(e) grandson or granddaughter;
(f) uncle or aunt;
(g) nephew or niece;

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S. 3(1) def. of
person responsible
inserted by
No. 40/1999
s. 4(1)(a).

person responsible has the meaning given by
section 37;

S. 3(1) def. of
President
repealed by
No. 52/1998
s. 116(1)(b).

prescribed means prescribed by the regulations;

* * * * *

S. 3(1) def. of
principal registrar
inserted by
No. 52/1998
s. 116(1)(e).

primary carer means any person who is primarily
responsible for providing support or care to a
person;

principal registrar means principal registrar of the
Tribunal;

S. 3(1) def. of
Public Trustee
repealed by
No. 55/1987
s. 57(2)(Sch. 4
item 2).

Public Advocate means the person appointed as
the Public Advocate under Part 3;

* * * * *

S. 3(1) def. of
registered practitioner
inserted by
No. 40/1999
s. 4(1)(a),
amended by
No. 41/2002
s. 3(1),
substituted by
Nos 97/2005
s. 182(Sch. 4
item 23),
13/2010
s. 51(Sch.
item 26).

registered practitioner means—

- (a) a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student); or
- (b) a person registered under the Health Practitioner Regulation National Law—
 - (i) to practise in the dental profession as a dentist (other than as a student); and

(ii) in the dentist division of that profession;

regulations means regulations made under this Act;

relevant human research ethics committee for a medical research procedure means the human research ethics committee responsible for approving the relevant research project;

S. 3(1) def. of *relevant human research ethics committee* inserted by No. 3/2006 s. 4(1)(a).

relevant research project for a medical research procedure means the research project for the purposes of which the procedure is, or is to be, carried out;

S. 3(1) def. of *relevant research project* inserted by No. 3/2006 s. 4(1)(a).

represented person means any person in respect of whom—

- (a) a guardianship order is in effect; or
- (b) an administration order is in effect; or
- (c) both a guardianship order and an administration order are in effect;

special procedure means—

- (a) any procedure that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or

S. 3(1) def. of *special procedure* inserted by No. 40/1999 s. 4(1)(a), amended by No. 3/2006 s. 4(1)(c).

* * * * *

- (c) termination of pregnancy; or
- (d) any removal of tissue for the purposes of transplantation to another person; or

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(e) any other medical or dental treatment that is prescribed by the regulations to be a special procedure for the purposes of Part 4A;

S. 3(1) def. of *spouse* inserted by No. 27/2001 s. 9(Sch. 7 item 2.1(a)).

spouse of a person means a person to whom the person is married;

S. 3(1) def. of *State Trust* inserted by No. 55/1987 s. 57(2)(Sch. 4 item 3), repealed by No. 45/1994 s. 32(1)(b).

* * * * *

S. 3(1) def. of *State Trustees* inserted by No. 40/1999 s. 4(1)(a).

State Trustees has the same meaning as in the **State Trustees (State Owned Company) Act 1994**;

S. 3(1) def. of *Tribunal* inserted by No. 52/1998 s. 116(1)(e).

Tribunal means Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**;

S. 3(1) def. of *working day* inserted by No. 3/2006 s. 4(1)(a).

working day means a day other than a Saturday, a Sunday or a public holiday appointed under the **Public Holidays Act 1993**.

S. 3(2) amended by No. 27/2001 s. 9(Sch. 7 item 2.2), substituted by No. 41/2002 s. 3(2).

- (2) A reference in the definition of *nearest relative* in subsection (1) to a person's brother or sister—
- (a) is a reference to a brother or sister whether of the full or half blood; and
 - (b) includes a reference to a person who was adopted by one or both of the first-mentioned person's parents.

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* * * * *

S. 3(3)
inserted by
No. 45/1994
s. 32(2),
substituted by
No. 40/1999
s. 4(2),
repealed by
No. 3/2006
s. 4(2).

(4) For the purposes of the definition of *domestic partner* in subsection (1)—

S. 3(4)
inserted by
No. 27/2001
s. 9(Sch. 7
item 2.3),
substituted by
No. 12/2008
s. 73(1)(Sch. 1
item 27.2).

- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
- (b) in determining whether persons who are not in a registered relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case; and
- (c) a person is not a domestic partner of another person only because they are co-tenants.

4 Objects of Act

(1) The objects of this Act are—

* * * * *

S. 4(1)(a)
repealed by
No. 52/1998
s. 116(2).

- (b) to provide for the appointment of a Public Advocate; and
- (c) to enable the making of guardianship orders and administration orders; and

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S. 4(1)(d)
amended by
No. 40/1999
s. 5.

(d) to ensure that persons with a disability and represented persons are informed of and make use of the provisions of this Act; and

S. 4(1)(e)
inserted by
No. 40/1999
s. 5.

(e) to provide for the appointment of enduring guardians; and

S. 4(1)(f)
inserted by
No. 40/1999
s. 5,
substituted by
No. 3/2006
s. 4(3).

(f) to provide for consent to special procedures, medical research procedures and medical and dental treatment on behalf of persons incapable of giving consent to those procedures or treatment; and

S. 4(1)(g)
inserted by
No. 40/1999
s. 5.

(g) to provide for the registration of interstate guardianship orders and administration orders.

(2) It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability are promoted; and
- (c) the wishes of a person with a disability are wherever possible given effect to.

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s. 5

* * * * *

**Pt 2 (Heading
and ss 5–13)
amended by
Nos 23/1994
s. 118(Sch. 1
item 23.1),
46/1998
s. 7(Sch. 1),
repealed by
No. 52/1998
s. 117.**

PART 3—THE PUBLIC ADVOCATE

14 The Public Advocate

- (1) There is to be appointed a Public Advocate.
- (2) Schedule 3 has effect with respect to the Public Advocate.

15 Functions of the Public Advocate

The functions of the Public Advocate are—

- (a) to promote, facilitate and encourage the provision, development and co-ordination of services and facilities provided by government, community and voluntary organisations for persons with a disability with a view to—
 - (i) promoting the development of the ability and capacity of persons with a disability to act independently; and
 - (ii) minimizing the restrictions on the rights of persons with a disability; and
 - (iii) ensuring the maximum utilization by persons with a disability of those services and facilities; and
 - (iv) encouraging the involvement of voluntary organizations and relatives, guardians and friends in the provision and management of those services and facilities; and
- (b) to support the establishment of organizations involved with persons with a disability, relatives, guardians and friends for the purpose of—
 - (i) instituting citizen advocacy programs and other advocacy programs; and

S. 15(b)
amended by
No. 40/1999
s. 6(1).

- (ii) undertaking community education projects; and
- (iii) promoting family and community responsibility for guardianship; and
- (c) to arrange, co-ordinate and promote informed public awareness and understanding by the dissemination of information with respect to—
 - (i) the provisions of this Act and any other legislation dealing with or affecting persons with a disability; and
 - (ii) the role of the Tribunal and the Public Advocate; and
 - (iii) the duties, powers and functions of guardians and administrators under this Act; and
 - (iv) the protection of persons with a disability from abuse and exploitation and the protection of their rights; and
- (d) to investigate, report and make recommendations to the Minister on any aspect of the operation of this Act referred to the Public Advocate by the Minister.

S. 15(c)(ii)
amended by
No. 52/1998
s. 118(1).

16 Powers and duties of the Public Advocate

- (1) The Public Advocate may—
 - (a) where appointed by the Tribunal be—
 - (i) a guardian (whether plenary or limited);
or
 - (ii) an alternative guardian (whether plenary or limited); and

S. 16(1)(a)
amended by
No. 52/1998
s. 118(2)(a).

S. 16(1)(a)(ii)
substituted by
No. 40/1999
s. 6(2)(a).

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s. 16

S. 16(1)(a)(iii)
repealed by
No. 40/1999
s. 6(2)(a).

* * * * *

S. 16(1)(b)
amended by
Nos 52/1998
s. 118(2)(a),
78/2000
s. 6(a).

(b) make an application to the Tribunal for the appointment of a guardian or administrator or the rehearing or reassessment of a guardianship order or an administration order; and

S. 16(1)(c)
repealed by
No. 52/1998
s. 118(2)(b).

* * * * *

S. 16(1)(d)
amended by
No. 52/1998
s. 118(2)(c).

- (d) submit a report to the Tribunal on any matter referred to the Public Advocate for a report by the Tribunal; and
- (e) seek assistance in the best interests of any person with a disability from any government department, institution, welfare organization or service provider; and
- (f) make representations on behalf of or act for a person with a disability; and
- (g) give advice to any person as to the provisions of this Act and in respect of applications for guardianship or administration; and
- (h) investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship; and

-
- (ha) for the purposes of—
- (i) an investigation under paragraph (h); or
 - (ii) the provision of a report under clause 35, 42 or 48 of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**—
require (subject to subsection (1A)) a person, government department, public authority, service provider, institution or welfare organisation to provide information; and
- (i) provide information for persons who are or propose to be guardians; and
- (j) report and make recommendations to the Tribunal on behalf of any person with a disability in any proceeding under the **Equal Opportunity Act 1995**; and
- (ja) make recommendations to the Tribunal with respect to guidelines proposed to be issued by the Tribunal about consent to a special procedure or medical research procedure and any other medical or dental treatment under Part 4A.
- (k) perform any other function and exercise any other power conferred on him or her by this or any other Act.
- (1A) It is a reasonable excuse for a person to refuse or fail to provide information that the person would otherwise be required under subsection (1)(ha) to provide if providing the information would tend to incriminate the person.

S. 16(1)(ha) inserted by No. 40/1999 s. 6(2)(b), substituted by No. 41/2002 s. 4(1).

S. 16(1)(j) amended by No. 42/1995 s. 223(Sch. 1 item 2), substituted by No. 52/1998 s. 118(2)(d).

S. 16(1)(ja) inserted by No. 40/1999 s. 6(2)(c), amended by No. 3/2006 s. 5.

S. 16(1)(k) inserted by No. 52/1998 s. 118(2)(d).

S. 16(1A) inserted by No. 41/2002 s. 4(2).

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Part 3—The Public Advocate

s. 17

S. 16(2)
amended by
No. 40/1999
s. 6(3)(a).

(2) Where the Public Advocate is appointed as the guardian of a represented person—

S. 16(2)(a)
amended by
No. 40/1999
s. 6(3)(b).

(a) the person for the time being holding the office or performing the functions of the Public Advocate is the guardian of that represented person; and

S. 16(2)(b)
amended by
No. 40/1999
s. 6(3)(c).

(b) the Public Advocate must use his or her best endeavours to find an appropriate person to be appointed as the guardian.

17 Staff of office of the Public Advocate

S. 17(1)
substituted by
No. 46/1998
s. 7(Sch. 1),
amended by
No. 108/2004
s. 117(1)
(Sch. 3
item 92.1).

(1) Any employees that are necessary to enable the functions of the Public Advocate to be properly carried out may be employed under Part 3 of the **Public Administration Act 2004**.

S. 17(2)
repealed by
No. 52/1998
s. 118(3)(a).

* * * * *

18 Delegation

S. 18(1)
amended by
No. 3/2006
s. 14(a).

(1) The Public Advocate may by an instrument of delegation delegate to an officer or employee employed in the office of the Public Advocate under section 17 any power, duty or function of the Public Advocate other than this power of delegation.

S. 18(1)(a)
repealed by
No. 3/2006
s. 14(b).

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Guardianship and Administration Act 1986
No. 58 of 1986
Part 3—The Public Advocate

s. 18A

* * * * *

S. 18(1)(b)
amended by
No. 40/1999
s. 6(4),
repealed by
No. 3/2006
s. 14(b).

- (2) The Public Advocate may with the approval of the Tribunal by instrument of delegation delegate any or all of the Public Advocate's powers and duties as guardian to an individual or organization specified in the instrument of delegation.

S. 18(2)
amended by
No. 52/1998
s. 118(3)(b)
(i)(ii).

18A Powers of inspection

S. 18A
inserted by
No. 51/2001
s. 5.

- (1) The Public Advocate is entitled to enter any premises on which an institution is situated and—
- (a) inspect those premises; and
 - (b) see any person who is a resident of those premises or who is receiving any service from the institution; and
 - (c) make enquiries relating to the admission, care, detention, treatment or control of any such person; and
 - (d) inspect any document relating to any such person or any record required to be kept under this Act, the **Health Services Act 1988**, the **Disability Act 2006** or the **Mental Health Act 1986**.
- (2) Subsection (1)(d) does not authorise the Public Advocate to inspect—
- (a) a person's medical records unless that person consents; or
 - (b) personnel records unless the person to whom they relate consents.
- (3) The person in charge and the members of staff or management of the institution must provide the Public Advocate with any reasonable assistance

S. 18A(1)(d)
amended by
No. 23/2006
s. 240(1).

s. 18A

that the Public Advocate requires to perform or exercise any power, duty or function under this section effectively.

- (4) A person in charge or a member of the staff or management of an institution must not—
- (a) unreasonably refuse or neglect to give assistance when required to do so under subsection (3); or
 - (b) refuse or fail to give full and true answers to the best of that person's knowledge to any questions asked by the Public Advocate in the performance or exercise of any power, duty or function under this section; or
 - (c) assault, obstruct or threaten the Public Advocate in the performance or exercise of any power, duty or function under this section.

Penalty: 25 penalty units.

- (5) In this section *institution* means any of the following—
- (a) a disability service provider within the meaning of section 3(1) of the **Disability Act 2006**;
 - (b) a designated public hospital or supported residential service within the meaning of the **Health Services Act 1988**;
 - (c) a residential service, residential institution or residential treatment facility within the meaning of section 3(1) of the **Disability Act 2006**;
 - (d) a mental health service within the meaning of Division 5 of Part 6 of the **Mental Health Act 1986**.

S. 18A(5)(a)
substituted by
No. 23/2006
s. 240(2)(a).

S. 18A(5)(c)
substituted by
No. 23/2006
s. 240(2)(b).

PART 4—GUARDIANSHIP ORDERS

Division 1—Application for guardianship order

19 Application for guardianship order

- (1) Any person may apply to the Tribunal for an order appointing—

S. 19(1)
amended by
No. 52/1998
s. 119(1).

- (a) a plenary guardian; or
(b) a limited guardian—

in respect of a person with a disability who has attained the age of 18 years or to take effect upon the person attaining the age of 18 years.

- (2) In addition to any other parties, the following are parties to a proceeding on an application under subsection (1)—

S. 19(2)
substituted by
No. 52/1998
s. 119(2).

- (a) the person in respect of whom the application is made; and
(b) the person proposed as guardian.

* * * * *

S. 19(3)
repealed by
No. 52/1998
s. 119(3).

20 Who is entitled to notice of an application?

Each of the following is entitled to notice of the making of an application for a guardianship order, notice of the hearing of the application and notice of any order made by the Tribunal in respect of the application—

S. 20
amended by
No. 33/1989
ss 4(a), 5(1),
substituted by
No. 52/1998
s. 120.

- (a) the nearest relative available of the person in respect of whom the application is made, not being—

- (i) the applicant; or
- (ii) the person proposed as guardian; or
- (iii) a person referred to in paragraph (d);
- (b) the primary carer of the person in respect of whom the application is made;
- (c) the Public Advocate;
- (d) any administrator of the estate of the person in respect of whom the application is made¹.

S. 21
amended by
No. 52/1998
s. 121(1)(a).

21 Date for hearing

The Tribunal must commence to hear an application under section 19 within 30 days after the day on which the application is received by the Tribunal.

Division 2—Appointment of guardian

22 Guardianship order

S. 22(1)
amended by
No. 52/1998
s. 121(1)(a).

- (1) If the Tribunal is satisfied that the person in respect of whom an application for an order appointing a guardian is made—
 - (a) is a person with a disability; and
 - (b) is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances; and
 - (c) is in need of a guardian—

the Tribunal may make an order appointing a plenary guardian or a limited guardian in respect of that person.

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- (2) In determining whether or not a person is in need of a guardian, the Tribunal must consider—
- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
 - (ab) the wishes of the proposed represented person, so far as they can be ascertained; and
 - (b) the wishes of any nearest relatives or other family members of the proposed represented person; and
 - (c) the desirability of preserving existing family relationships.
- (3) The Tribunal cannot make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made.
- (4) The Tribunal cannot make an order appointing a plenary guardian unless it is satisfied that a limited guardianship order would be insufficient to meet the needs of the person in respect of whom the application is made.
- (5) Where the Tribunal makes an order appointing a limited guardian in respect of a person the order made must be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.

S. 22(2)
amended by
No. 52/1998
s. 121(1)(a),
substituted by
No. 40/1999
s. 7.

S. 22(2)(ab)
inserted by
No. 3/2006
s. 15(a).

S. 22(3)
amended by
No. 52/1998
s. 121(1)(a).

S. 22(4)
amended by
No. 52/1998
s. 121(1)(a).

S. 22(5)
amended by
No. 52/1998
s. 121(1)(a).

23 Persons eligible as guardians

- (1) The Tribunal may appoint as a plenary guardian or limited guardian any person who has attained the age of 18 years and consents to act as guardian if the Tribunal is satisfied that that person—

S. 23(1)
amended by
No. 52/1998
s. 121(1)(a).

Guardianship and Administration Act 1986
No. 58 of 1986
Part 4—Guardianship Orders

s. 23

S. 23(2)
amended by
No. 52/1998
s. 121(1)(a).

S. 23(2)(a)
amended by
No. 3/2006
s. 15(b).

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- (a) will act in the best interests of the proposed represented person; and
 - (b) is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and
 - (c) is a suitable person to act as the guardian of the proposed represented person.
- (2) In determining whether a person is suitable to act as the guardian of a represented person, the Tribunal must take into account—
- (a) the wishes of the proposed represented person, so far as they can be ascertained; and
 - (b) the desirability of preserving existing family relationships; and
 - (c) the compatibility of the person proposed as guardian with the proposed represented person and with the administrator (if any) of the proposed represented person's estate; and
 - (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of guardianship of that person.
- (3) Where a parent or nearest relative of a proposed represented person is proposed as the guardian that person is not by virtue only of the fact that that person is a parent or nearest relative to be taken to be in a position where the person's interests conflict or may conflict with those of the proposed represented person.

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- (4) Where it appears to the Tribunal that—
- (a) the person in respect of whom the application is made is a person in respect of whom an order could be made under section 22; and
 - (b) no other person fulfils the requirements of subsection (1) for appointment as the guardian of that person—
- the Tribunal may appoint the Public Advocate as the plenary guardian or limited guardian of that person.
- (5) This section does not prevent the Tribunal from appointing persons (including the Public Advocate and any other person) as joint plenary guardians or joint limited guardians of the proposed represented person if—
- (a) each person fulfils the requirements of subsection (1); and
 - (b) the Tribunal considers it appropriate to do so.

S. 23(4)
amended by
No. 52/1998
s. 121(1)(a).

S. 23(5)
amended by
No. 52/1998
s. 121(1)(a).

S. 23(5)(b)
amended by
No. 52/1998
s. 121(1)(a).

Division 3—Powers and duties of guardian

24 Authority of plenary guardian

- (1) A guardianship order appointing a plenary guardian confers on the plenary guardian in respect of the represented person all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child.

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No. 58 of 1986
Part 4—Guardianship Orders

s. 24

- (2) Without limiting subsection (1) an order appointing a plenary guardian confers on the person named as plenary guardian the power—
- (a) to decide where the represented person is to live, whether permanently or temporarily; and
 - (b) to decide with whom the represented person is to live; and
 - (c) to decide whether the represented person should or should not be permitted to work and, if so—
 - (i) the nature or type of work; and
 - (ii) for whom the represented person is to work; and
 - (iii) matters related thereto; and
 - (d) except as otherwise provided in Part 4A, to consent to any health care that is in the best interests of the represented person; and
 - (e) to restrict visits to a represented person to such extent as may be necessary in his or her best interests and to prohibit visits by any person if the guardian reasonably believes that they would have an adverse effect on the represented person.

S. 24(2)(d)
amended by
No. 40/1999
s. 8(a)(b).

S. 24(2)(e)
inserted by
No. 40/1999
s. 8(b).

S. 24(3)
repealed by
No. 52/1998
s. 121(1)(b).

* * * * *

- (4) Where a decision is made, action taken, consent given or thing done by a plenary guardian under an order made under Division 2 the decision, action, consent or thing has effect as if it had been made, taken, given or done by the represented person and the represented person had the legal capacity to do so.

25 Authority of limited guardian

- (1) If the Tribunal makes an order under Division 2 appointing a limited guardian, the guardianship order confers on the person named as limited guardian such one or more of the powers and duties in respect of the represented person that are conferred on a plenary guardian under this Act as the Tribunal may specify in the order.

S. 25(1)
amended by
No. 52/1998
s. 121(1)(c)(i).

* * * * *

S. 25(2)
amended by
No. 52/1998
s. 121(1)(c)(i),
repealed by
No. 52/1998
s. 121(1)(c)(ii).

- (3) Where a decision is made, action taken, consent given or thing done by a limited guardian under an order of the Tribunal under Division 2, the decision, action, consent or thing has effect as if it had been made, taken, given or done by the represented person and the represented person had the legal capacity to do so.

S. 25(3)
amended by
No. 52/1998
s. 121(1)(c)(i).

26 Power to enforce guardianship order

- (1) If, having regard to the circumstances of the case, the Tribunal considers it appropriate to do so the Tribunal may—
- (a) when making a guardianship order under Division 2 or 4, specify in the order; or
- (b) at any time while a guardianship order under Division 2 or 4 is in force, make an order specifying—

S. 26(1)
amended by
No. 52/1998
s. 121(1)(d),
substituted by
No. 41/2002
s. 5(1).

that the person named as plenary guardian or limited guardian or another specified person is empowered to take specified measures or actions to ensure that the represented person complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.

S. 26(1A)
inserted by
No. 40/1999
s. 9,
amended by
No. 78/2000
s. 6(b).

- (1A) If the Tribunal makes an order under subsection (1) empowering a guardian or a specified person to take such measures or actions as are specified in the order, the Tribunal must hold a hearing to reassess that order as soon as practicable after the making of that order but within 42 days of making that order.
- (2) Where a guardian or other person specified in the order under subsection (1) takes any measure or action specified in the order in the belief that—
- (a) the measure or action is in the best interests of the represented person; and
 - (b) it is reasonable to take that measure or action in the circumstances—
- the guardian or other person is not liable to any action for false imprisonment or assault or any other action, liability, claim or demand arising out of the taking of that measure or action.
- (3) Subsection (1) does not limit section 24 or 25.

S. 26(3)
inserted by
No. 41/2002
s. 5(2).

27 Special powers in respect of persons with a disability

S. 27(1)
amended by
No. 52/1998
s. 121(1)(e).

- (1) If the Tribunal has received information on oath that a person with a disability in respect of whom an application has been made under section 19—
- (a) is being unlawfully detained against her or his will; or
 - (b) is likely to suffer serious damage to her or his physical, emotional or mental health or well-being unless immediate action is taken—

the Tribunal may by order empower the Public Advocate or some other person specified in the order to visit the person with a disability in the

company of a member of the police force for the purpose of preparing a report for the Tribunal.

- (2) If after receiving a report under subsection (1) the Tribunal is satisfied that subsection (1)(a) or (1)(b) applies the Tribunal may make an order enabling the person with a disability to be taken to a place specified in the order for assessment and placement until the application under section 19 is heard.
- (3) A member of the police force acting under an order made under subsection (1) may with such assistance as is necessary use such force as is reasonably necessary to enter the premises where the person with a disability is.
- (4) A person must not delay or obstruct a person who is acting under an order under this section.

S. 27(2)
amended by
Nos 52/1998
s. 121(1)(e),
40/1999 s. 10.

S. 27(4)
substituted by
No. 52/1998
s. 121(2).

Penalty: 20 penalty units.

28 Exercise of authority by guardian

- (1) A guardian must act in the best interests of the represented person.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible—
- (a) as an advocate for the represented person; and
 - (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community; and
 - (c) in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person; and

- (d) in such a way as to protect the represented person from neglect, abuse or exploitation; and
- (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.

29 Ancillary powers of guardian

A guardian may on behalf of a represented person sign and do all such things as are necessary to give effect to any power or duty vested in the guardian.

30 Guardian may seek advice

S. 30(1)
amended by
No. 52/1998
s. 121(3)(a)(i).

- (1) A guardian may apply for the advice of the Tribunal upon any matter relating to the scope of the guardianship order or the exercise of any power by the guardian under the guardianship order.

S. 30(2)
repealed by
No. 52/1998
s. 121(3)(a)(ii).

* * * * *

S. 30(3)
amended by
No. 52/1998
s. 121(3)(a)(iii).

- (3) The Tribunal may—
 - (a) approve or disapprove of any act proposed to be done by the guardian; and
 - (b) give such advice as it considers appropriate; and
 - (c) make any order it considers necessary.

S. 30(4)
amended by
No. 52/1998
s. 121(3)(a)(iii).

- (4) An action does not lie against a guardian on account of an act or thing done or omitted by the guardian under any order or on the advice of the Tribunal made or given under this section unless in representing the facts to the Tribunal the guardian has been guilty of fraud, wilful concealment or misrepresentation.

31 Notice of death of represented person

Where a represented person in respect of whom a guardian has been appointed, dies, the guardian must report the death in writing to the Tribunal without delay.

S. 31
amended by
No. 52/1998
s. 121(3)(b).

Division 4—Temporary orders

32 Application for temporary order

- (1) Any person may apply to the Tribunal for a temporary order appointing a guardian of a person in respect of whom an application could be made under section 19.
- (2) An application may be made under subsection (1) whether or not an application has been made to the Tribunal under section 19.
- (3) Each person who would be entitled to notice under section 20 of an application under section 19 is entitled to notice of the making of an application under this section, notice of the hearing of the application and notice of any order made by the Tribunal in respect of the application.

S. 32(1)
amended by
Nos 52/1998
s. 121(3)(c),
40/1999
s. 11(1).

S. 32(2)
amended by
No. 52/1998
s. 121(3)(c).

S. 32(3)
substituted by
No. 52/1998
s. 121(4).

* * * * *

S. 32(4)
amended by
No. 74/1987
s. 7(a),
repealed by
No. 52/1998
s. 121(5)(a).

33 Temporary order

- (1) If the Tribunal is satisfied that the person in respect of whom an application has been made under section 32—
 - (a) is a person with a disability; and
 - (b) is unable to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances; and

S. 33(1)
amended by
Nos 52/1998
s. 121(5)(b)(i),
40/1999
s. 11(2).

s. 34

(c) is in need of a guardian—

the Tribunal may make a temporary order appointing any person eligible to be appointed under section 23 as the plenary guardian or limited guardian of that person.

S. 33(2)
substituted by
No. 40/1999
s. 11(3).

(2) A temporary order—

(a) remains in effect for such period not exceeding 21 days as is specified in the order; and

(b) may be renewed once for a further period not exceeding 21 days.

S. 33(3)
amended by
Nos 52/1998
s. 121(5)(b)(i),
40/1999
s. 11(4).

(3) The Tribunal must hold a hearing to determine whether a guardianship order should be made under section 22 as soon as practicable after the making of a temporary order but within 42 days of making that order.

S. 33(4)
repealed by
No. 52/1998
s. 121(5)(b)(ii).

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Division 5—Appointment of alternative guardian

34 Appointment of alternative guardian

S. 34(1)
amended by
Nos 52/1998
s. 121(5)(c),
78/2000
s. 6(c),
41/2002 s. 6.

(1) When making or reassessing a guardianship order, or at any time when a guardianship order is in force, the Tribunal may make an order appointing an alternative guardian if—

(a) the person proposed as an alternative guardian has consented to act as guardian of the represented person in the event of the death, absence or incapacity of the original guardian; and

-
- (b) the Tribunal is satisfied that the persons to whom notice of the hearing of a guardianship order is given under section 20 have had sufficient notice of the willingness of the person proposed as alternative guardian to act as alternative guardian.
- (2) Section 23 (other than subsection (5)) applies to and in relation to the person proposed as alternative guardian as if that person were the proposed guardian.

S. 34(1)(b)
amended by
No. 52/1998
s. 121(5)(c).

35 Authority of alternative guardian

- (1) If an alternative guardian is appointed, the alternative guardian takes over the office of plenary guardian or limited guardian (as the case may be) without further proceedings immediately upon the death or during the period of absence or incapacity of the original guardian.
- (2) The alternative guardian must notify the Tribunal in writing of the death, absence or incapacity of the original guardian and send to the Tribunal evidence of the death, absence or incapacity of the original guardian.
- (3) Where an alternative guardian takes over the office of a guardian, the alternative guardian has the same powers and duties with respect to the represented person as the guardian had immediately before the guardian's death, absence or incapacity.

S. 35(2)
amended by
No. 52/1998
s. 121(5)(c).

s. 35A

Division 5A—Appointment of enduring guardian

Pt 4 Div. 5A
(Heading and
ss 35A–35E)
inserted by
No. 40/1999
s. 12.

35A Appointment of enduring guardian

S. 35A
inserted by
No. 40/1999
s. 12.

(1) A person who is of or over the age of 18 years may, by instrument in writing, appoint a person to be his or her enduring guardian.

S. 35A(1A)
inserted by
No. 41/2002
s. 7(1).

(1A) A person may, in the same instrument, also appoint a person to be an alternative enduring guardian.

S. 35A(1B)
inserted by
No. 41/2002
s. 7(1).

(1B) An alternative enduring guardian takes the place of, and has the same powers as, the original enduring guardian if that person is incapable of acting as the enduring guardian or is absent for a period.

(2) An instrument to appoint an enduring guardian is effective if—

S. 35A(2)(b)
amended by
No. 41/2002
s. 7(2)(a).

(a) it is in the form of, or to the effect of, Form 1 in Schedule 4; and

(b) it is endorsed with an acceptance in the form set out in Form 1 in Schedule 4 signed by the person appointed as the enduring guardian and the person appointed as the alternative enduring guardian (if any); and

S. 35A(2)(c)
amended by
No. 3/2006
s. 16(1)(a).

(c) the execution of the instrument by each of the appointor, the proposed enduring guardian and the proposed alternative enduring guardian (if any) is attested by two witnesses—

(i) neither of whom is a party to the instrument nor a relative to a party to it; and

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No. 58 of 1986
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s. 35A

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- (ii) neither of whom is the person appointed as the enduring guardian or alternative enduring guardian (if any); and
- (iii) both of whom have witnessed the execution of the instrument by the appointor, the proposed enduring guardian or the proposed alternative enduring guardian (as the case requires) in the presence of that person and each other; and
- (iv) one of whom is authorised by law to witness the signing of a statutory declaration.
- (2A) For the avoidance of doubt, it is not necessary—
- (a) for the same persons to witness the execution of the instrument by the appointor, the proposed enduring guardian and the proposed alternative enduring guardian (if any); or
- (b) for the appointor, the proposed enduring guardian and the proposed alternative enduring guardian to execute the instrument at the same time or in the presence of each other.
- (3) A person is not eligible to be appointed as an enduring guardian or alternative enduring guardian unless he or she is of or over the age of 18 years.
- (4) A person is not eligible to be appointed as an enduring guardian or alternative enduring guardian by another person if he or she is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the care or treatment of or provides accommodation to that other person.

S. 35A(2)(c)(ii)
amended by
No. 41/2002
s. 7(2)(b).

S. 35A(2)(c)(iii)
substituted by
No. 3/2006
s. 16(1)(b).

S. 35A(2A)
inserted by
No. 3/2006
s. 16(2).

S. 35A(3)
amended by
No. 41/2002
s. 7(3).

S. 35A(4)
amended by
No. 41/2002
s. 7(4).

s. 35B

S. 35A(5)
substituted by
No. 41/2002
s. 7(5).

- (5) If a person who was validly appointed as an enduring guardian or alternative enduring guardian becomes ineligible to be appointed because of subsection (4), that person's appointment lapses.

S. 35B
inserted by
No. 40/1999
s. 12,
amended by
No. 41/2002
s. 8.

35B Authority of enduring guardian

S. 35B(2)
amended by
No. 41/2002
s. 8.

- (1) An instrument appointing an enduring guardian authorises the person appointed to exercise the powers of a guardian in relation to the matters specified in that instrument relating to his or her person or circumstances if, and only to the extent that, the appointor subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of those matters.
- (2) If an instrument appointing an enduring guardian does not specify the matters in relation to which the person appointed may exercise the powers of a guardian, the instrument authorises that person to exercise the powers of a guardian under section 24 if, and only to the extent that, the appointor subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of the matters relating to his or her person or circumstances.
- (3) An instrument appointing an enduring guardian confers on the guardian in respect of the appointor all the powers and duties which the guardian would have if he or she were a parent and the appointor his or her child to the extent that the instrument authorises the guardian to exercise such powers and duties.
- (4) An enduring guardian cannot, on behalf of the appointor, consent to any special procedure.
- (5) An enduring guardian must exercise his or her authority in accordance with section 28.

35C Revocation of appointment by appointor

S. 35C
inserted by
No. 40/1999
s. 12.

(1) If a person appoints an enduring guardian or alternative enduring guardian, any earlier appointment of an enduring guardian or alternative enduring guardian (as the case may be) is revoked.

S. 35C(1)
substituted by
No. 41/2002
s. 9(1).

(2) The appointor of an enduring guardian or alternative enduring guardian may, by instrument in writing, revoke the appointment.

S. 35C(2)
amended by
No. 41/2002
s. 9(2).

(3) An instrument to revoke an appointment as enduring guardian or alternative enduring guardian is effective if—

S. 35C(3)
amended by
No. 41/2002
s. 9(3)(a).

(a) it is in the form of, or to the effect of, Form 2 in Schedule 4; and

(b) the execution of the instrument is attested by two witnesses—

(i) neither of whom is a party to the instrument nor a relative to a party to it; and

(ii) neither of whom is the person appointed as the enduring guardian or alternative enduring guardian (as the case may be); and

S. 35C(3)(b)(ii)
amended by
No. 41/2002
s. 9(3)(b).

(iii) both of whom have witnessed the instrument in the presence of the appointor and each other; and

(iv) one of whom is authorised by law to witness the signing of a statutory declaration.

s. 35D

35D Revocation of appointment by Tribunal

S. 35D
inserted by
No. 40/1999
s. 12.

S. 35D(1)
amended by
No. 41/2002
s. 10.

(1) The Tribunal may, on an application under this section and after a hearing, revoke the appointment of an enduring guardian or alternative enduring guardian if—

S. 35D(1)(a)
amended by
No. 41/2002
s. 10.

(a) the enduring guardian or alternative enduring guardian seeks revocation of the appointment; or

S. 35D(1)(b)
amended by
No. 41/2002
s. 10.

(b) the Tribunal is satisfied that the enduring guardian or alternative enduring guardian—

(i) is not able or willing to act in that capacity; or

(ii) has, in that capacity, not acted in the best interests of the appointor or has acted in an incompetent or negligent manner.

(2) An application may be made by—

(a) the Public Advocate; or

S. 35D(2)(b)
amended by
No. 41/2002
s. 10.

(b) the enduring guardian or alternative enduring guardian; or

(c) the administrator of the appointor's estate; or

(d) any other person who the Tribunal is satisfied has an interest in the person or in the estate of the person in respect of whom the application is made.

S. 35D(3)
amended by
No. 41/2002
s. 10.

(3) An appointment of an enduring guardian or alternative enduring guardian is not revoked if the appointor becomes a represented person.

35E Advice or direction of Tribunal

S. 35E
inserted by
No. 40/1999
s. 12.

- (1) An enduring guardian may apply to the Tribunal for an advisory opinion or directions on any matter or question relating to the scope of his or her appointment as such or the exercise of any power by the guardian under the instrument of appointment.
- (2) The Tribunal may—
 - (a) give an advisory opinion or any directions it considers necessary;
 - (b) vary the effect of the instrument appointing the enduring guardian;
 - (c) suspend for a specified period the authority, either generally or in respect of a specific matter, of an enduring guardian under an instrument of appointment;
 - (d) make any order it considers necessary.
- (3) The Tribunal of its own motion may direct, or give an advisory opinion to, an enduring guardian in respect of any matter.
- (4) An action does not lie against an enduring guardian on account of an act or thing done or omitted to be done by the guardian in accordance with any order, directions or advisory opinion of the Tribunal made or given under this section unless in representing the facts to the Tribunal the guardian has been guilty of fraud, wilful concealment or misrepresentation.

Guardianship and Administration Act 1986
No. 58 of 1986
Part 4—Guardianship Orders

s. 36

Pt 4 Div. 6
(Heading and
ss 36–42)
amended by
Nos 33/1989
s. 5(2),
23/1994
s. 118(Sch. 1
item 23.2),
52/1998
ss 121(5)(c),
122–124,
repealed by
No. 40/1999
s. 13.

* * * * *

PART 4A—MEDICAL AND OTHER TREATMENT

Pt 4A
(Heading and
ss 36–42O)
inserted by
No. 40/1999
s. 14.

Division 1—Preliminary

36 Persons to whom Part applies

New s. 36
inserted by
No. 40/1999
s. 14.

- (1) In this Part, *patient* means a person with a disability who—
- (a) is of or over the age of 18 years; and
 - (b) is incapable of giving consent, within the meaning of subsection (2), to the carrying out of a special procedure, a medical research procedure or medical or dental treatment, whether or not the person is a represented person.
- (2) For the purposes of paragraph (b) of the definition of *patient* in subsection (1), a person is incapable of giving consent to the carrying out of a special procedure, a medical research procedure or medical or dental treatment if the person—
- (a) is incapable of understanding the general nature and effect of the proposed procedure or treatment; or
 - (b) is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the proposed procedure or treatment.

S. 36(1)
amended by
No. 41/2002
s. 11.

S. 36(1)(b)
amended by
No. 3/2006
s. 6(1)(a).

S. 36(2)
amended by
No. 3/2006
s. 6(1)(a).

37 Person responsible

New s. 37
inserted by
No. 40/1999
s. 14.

S. 37(1)
amended by
No. 3/2006
s. 6(1)(b)(i).

(1) In this Part, *person responsible*, in relation to a patient and in relation to a proposed medical research procedure or proposed medical or dental treatment, means the first person listed below who is responsible for the patient and who, in the circumstances, is reasonably available and willing and able to make a decision under this Part—

S. 37(1)(b)
amended by
No. 3/2006
s. 6(1)(b)(ii).

(a) a person appointed by the patient under section 5A of the **Medical Treatment Act 1988**;

S. 37(1)(c)
amended by
No. 3/2006
s. 6(1)(b)(ii).

(b) a person appointed by the Tribunal to make decisions in relation to the proposed procedure or treatment;

S. 37(1)(d)
amended by
No. 3/2006
s. 6(1)(b)(ii).

(c) a person appointed under a guardianship order with power to make decisions in relation to the proposed procedure or treatment;

(d) a person appointed by the patient (before the patient became incapable of giving consent) as an enduring guardian with power to make decisions in relation to the proposed procedure or treatment;

S. 37(1)(e)
amended by
No. 3/2006
s. 6(1)(b)(iii).

(e) a person appointed in writing by the patient (being the person appointed last in time before the patient became incapable of giving consent) to make decisions in relation to medical research procedures that include the proposed procedure or medical or dental treatment which includes the proposed treatment;

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- (f) the patient's spouse or domestic partner; **S. 37(1)(f)**
amended by
No. 27/2001
s. 9(Sch. 7
item 2.4(a)).
- (g) the patient's primary carer;
- (h) the patient's nearest relative within the
meaning of paragraphs (a) to (g) of the
definition of *nearest relative* in section 3.
- (2) The circumstances in which a person is to be
regarded as having the care of a patient include,
but are not limited to, the case where the person,
other than wholly or substantially on a
commercial basis, regularly— **S. 37(2)**
amended by
No. 41/2002
s. 12(1).
- (a) provides domestic services and support to
the patient; or
- (b) arranges for the patient to be provided with
domestic services and support.
- (3) A patient who is cared for in an institution (such
as a hospital, community residential unit,
residential care service, supported residential
service or State funded residential care service
within the meaning of the **Health Services Act
1988**) at which he or she is cared for by some
other person is not, by reason only 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
being cared for in that institution.
- (4) For the purposes of this section, a reference to the
spouse or domestic partner of a patient— **S. 37(4)**
amended by
No. 27/2001
s. 9(Sch. 7
item 2.4(b)(i)).
- (a) is a reference to a spouse or domestic partner
who is not under guardianship and with
whom the patient has a close and continuing
relationship; and **S. 37(4)(a)**
amended by
No. 27/2001
s. 9(Sch. 7
item 2.4(b)(i)).
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Guardianship and Administration Act 1986
No. 58 of 1986
Part 4A—Medical and Other Treatment

s. 37

S. 37(4)(b)
repealed by
No. 27/2001
s. 9(Sch. 7
item 2.4(b)(ii)).

* * * * *

(5) If the person responsible for a patient is an agent appointed under section 5A of the **Medical Treatment Act 1988**, the powers the person may exercise as an agent under that Act are in addition to the powers the person may exercise under this Act.

S. 37(6)
inserted by
No. 41/2002
s. 12(2).

(6) For the purposes of subsection (1)(h), if the patient—

- (a) is likely to be capable, within a reasonable time, of giving consent to the carrying out of a special procedure or medical or dental treatment; and
- (b) objects to a relative referred to in paragraphs (a) to (g) of the definition of **nearest relative** in section 3(1) being involved in decisions concerning a special procedure to be carried out on the patient or the patient's medical or dental treatment—

that relative is taken not to be the nearest relative of the patient.

S. 37(7)
inserted by
No. 3/2006
s. 6(2).

(7) For the purposes of subsection (1)(h), if the patient—

- (a) is likely to be capable of giving consent to the carrying out of a medical research procedure, but not within a reasonable time as determined in accordance with section 42R(2); and
- (b) objects to a relative referred to in paragraphs (a) to (g) of the definition of "nearest relative" in section 3(1) being involved in decisions concerning the patient

that would include a medical research procedure being carried out on the patient—
that relative is taken not to be the nearest relative of the patient.

38 Best interests

New s. 38
inserted by
No. 40/1999
s. 14,
amended by
No. 41/2002
s. 13 (ILA
s. 39B(1)).

- (1) In this Part, for the purposes of determining whether any special procedure or any medical or dental treatment would be in the best interests of the patient, the following matters must be taken into account—
- (a) the wishes of the patient, so far as they can be ascertained; and
 - (b) the wishes of any nearest relative or any other family members of the patient; and
 - (c) the consequences to the patient if the treatment is not carried out; and
 - (d) any alternative treatment available; and
 - (e) the nature and degree of any significant risks associated with the treatment or any alternative treatment; and
 - (f) whether the treatment to be carried out is only to promote and maintain the health and well-being of the patient; and
 - (g) any other matters prescribed by the regulations.
- (2) For the purposes of subsection (1)(b), if the patient—
- (a) is likely to be capable, within a reasonable time, of giving consent to the carrying out of a special procedure or medical or dental treatment; and

S. 38(2)
inserted by
No. 41/2002
s. 13.

- (b) objects to—
- (i) a relative referred to in paragraphs (a) to (g) of the definition of *nearest relative* in section 3(1); or
 - (ii) another family member (other than the patient's spouse or domestic partner)—
being involved in decisions concerning a special procedure to be carried out on the patient or the patient's medical or dental treatment—

that relative or family member is taken not to be the nearest relative or a family member of the patient.

Division 2—Consent

39 Persons who may consent to medical or other treatment

- (1) Subject to Divisions 4 and 5, consent to the carrying out of a special procedure or medical or dental treatment on a patient may be given—
 - (a) in the case of a special procedure or any medical or dental treatment, by the Tribunal;
or
 - (b) in the case of any medical or dental treatment, by the person responsible for the patient.
- (2) Division 6 contains provisions for the giving of consent in relation to the carrying out of a medical research procedure on a patient.

New s. 39
inserted by
No. 40/1999
s. 14,
amended by
Nos 41/2002
s. 14, 3/2006
s. 6(3) (ILA
s. 39B(1)).

S. 39(2)
inserted by
No. 3/2006
s. 6(3).

40 Effect of consent

A consent given in accordance with this Part in respect of the carrying out of a special procedure, a medical research procedure or any medical or dental treatment on a patient has effect as if—

- (a) the patient had been capable of giving consent to the carrying out of the procedure or treatment; and
- (b) the procedure or treatment had been carried out with the consent of the patient.

New s. 40 inserted by No. 40/1999 s. 14, amended by Nos 41/2002 s. 15, 3/2006 s. 6(4)(a).

41 Refusal of medical treatment under the Medical Treatment Act 1988

A registered practitioner must not carry out any medical or dental treatment, medical research procedure or special procedure, (including any emergency treatment) under this Part that is medical treatment within the meaning of the **Medical Treatment Act 1988** if a refusal of that treatment is in force in accordance with that Act.

New s. 41 inserted by No. 40/1999 s. 14, amended by Nos 41/2002 s. 16, 3/2006 s. 6(4)(b).

42 Unlawful consent to medical or other treatment an offence

A person must not—

- (a) purport to give consent to the continuation of a special procedure or a further special procedure under section 42F, or to a medical research procedure or to any medical or dental treatment on behalf of a patient; or
- (b) represent to a registered practitioner that he or she is authorised to give such consent—

knowing that he or she is not authorised to give such consent or without reasonable grounds for believing that he or she is authorised to give such consent.

Penalty: 20 penalty units.

New s. 42 inserted by No. 40/1999 s. 14.

S. 42(a) amended by No. 3/2006 s. 6(4)(c).

Division 3—Emergency treatment

42A Emergency medical or dental treatment

S. 42A
inserted by
No. 40/1999
s. 14.

S. 42A(1)
amended by
No. 3/2006
s. 6(4)(d)(i).

(1) A registered practitioner may carry out, or supervise the carrying out of, a special procedure, a medical research procedure or medical or dental treatment on a patient without consent under this Part or authorisation under section 42T if the practitioner believes on reasonable grounds that the procedure or 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

S. 42A(1)(c)
amended by
No. 3/2006
s. 6(4)(d)(ii).

(c) in the case of a medical research procedure or medical or dental treatment, to prevent the patient from suffering or continuing to suffer significant pain or distress.

S. 42A(2)
amended by
No. 3/2006
s. 6(4)(e)(i)(ii).

(2) A registered practitioner who, in good faith, carries out, or supervises the carrying out, of a special procedure, a medical research procedure or medical or dental treatment in the belief on reasonable grounds that the requirements of this Division and, in the case of a medical research procedure, section 42Q have been complied with is not—

(a) guilty of assault or battery; or

(b) guilty of professional misconduct; or

-
- (c) liable in any civil proceedings for assault or battery; or
- (d) guilty of an offence against section 42G(1) or 42Y(1).
- (3) Nothing in this Division affects any duty of care owed by a registered practitioner to a patient.

S. 42A(2)(c) amended by No. 3/2006 s. 6(4)(e)(iii).

S. 42A(2)(d) inserted by No. 3/2006 s. 6(4)(f).

Division 4—Special procedures

42B Application for consent of Tribunal to special procedure

S. 42B inserted by No. 40/1999 s. 14.

- (1) An application for the consent of the Tribunal to the carrying out of any special procedure on a patient may be made by—
- (a) the person responsible for the patient; or
- (b) any person who, in the opinion of the Tribunal, has a special interest in the affairs of the patient.
- (2) If an application for consent is made under this Division, the patient is a party to the proceedings.
- (3) The Tribunal must give notice of an application, of the hearing of the application and of any order, directions or advisory opinion of the Tribunal in respect of the application to—
- (a) the Public Advocate; and
- (b) any other person whom the Tribunal considers has a special interest in the affairs of the patient.

s. 42C

S. 42C
inserted by
No. 40/1999
s. 14.

42C Guidelines for special procedures

The Tribunal may—

- (a) in consultation with the Public Advocate and the Secretary to the Department of Justice; and
- (b) with the approval of the Governor in Council—

issue and make available to members of the public guidelines specifying situations in which applications may be made to the Tribunal under this Division.

S. 42D
inserted by
No. 40/1999
s. 14,
amended by
No. 78/2000
s. 10(1).

42D Date for hearing

The Tribunal must commence to hear an application under this Division within 30 days after the day on which the application is received by the Tribunal.

S. 42E
inserted by
No. 40/1999
s. 14,
substituted by
Nos 41/2002
s. 17, 3/2006
s. 7.

42E Consent of Tribunal to special procedure

On hearing an application under this Division, the Tribunal may consent to the carrying out of a special procedure only if it is satisfied that—

- (a) the patient is incapable of giving consent; and
- (b) the patient is not likely to be capable, within a reasonable time, of giving consent; and
- (c) the special procedure would be in the patient's best interests.

42F Tribunal may confer authority to consent to continuing or further special procedure

S. 42F
inserted by
No. 40/1999
s. 14.

- (1) If the Tribunal consents to the carrying out of a special procedure on a patient, the Tribunal may confer on the person responsible for the patient authority to consent to—
 - (a) the continuation of the special procedure; or
 - (b) the carrying out of any further special procedure of a similar nature.
- (2) The Tribunal may confer an authority under this section only at the request, or with the consent, of the person responsible.
- (3) If a person on whom the Tribunal has conferred authority under this section ceases to be the person responsible, the Tribunal, on the application of the new person responsible, may confer authority under this section on that person.
- (4) The Tribunal may at any time—
 - (a) impose conditions or give directions as to the exercise of an authority under this section; or
 - (b) revoke that authority.
- (5) If the Tribunal confers an authority under this section, a person may request the consent of the person responsible to the carrying out of the special procedure.

s. 42G

S. 42G
inserted by
No. 40/1999
s. 14.

S. 42G(1)
amended by
No. 3/2006
s. 8(1)(a).

42G Special procedure without consent of Tribunal an offence

- (1) Subject to section 42A, a registered practitioner must not carry out, or supervise the carrying out of, any special procedure on a patient unless—
- (a) the Tribunal has consented to the carrying out of that procedure; or
 - (b) the person responsible with authority to consent to the continuation of the procedure or a further special procedure under section 42F has consented to the carrying out of that procedure.

Penalty: Imprisonment for 2 years or 240 penalty units or both.

- (2) A registered practitioner who, in good faith, carries out, or supervises the carrying out of, a special procedure on a patient in the belief on reasonable grounds that the requirements of this Division have been complied with and in reliance on—
- (a) a consent given by another person whom the registered practitioner believed on reasonable grounds was authorised to give such consent; or
 - (b) a purported consent given by another person whom the registered practitioner believed on reasonable grounds was authorised to give such consent but was not so authorised—

is not—

- (c) guilty of assault or battery; or
- (d) guilty of professional misconduct; or

(e) liable in any civil proceedings for assault or battery; or

S. 42G(2)(e) amended by No. 3/2006 s. 8(1)(b).

(f) guilty of an offence against subsection (1).

S. 42G(2)(f) inserted by No. 3/2006 s. 8(1)(c).

(3) Nothing in this Division affects any duty of care owed by a registered practitioner to a patient.

Division 5—Other medical or dental treatment

42H Consent of person responsible

S. 42H inserted by No. 40/1999 s. 14.

(1) The person responsible for a patient may consent to the carrying out of any medical or dental treatment.

Note

However, section 42HA affects whether the person responsible may consent to the carrying out of medical or dental treatment in certain circumstances.

Note to s. 42H(1) inserted by No. 41/2002 s. 18.

(2) In determining whether or not to consent to medical or dental treatment, the person responsible must act in the best interests of the patient.

42HA Consent if patient is likely to recover within a reasonable time

S. 42HA inserted by No. 41/2002 s. 19.

(1) This section applies despite anything else in this Part but does not apply to emergency treatment under section 42A.

(2) If a patient is likely to be capable, within a reasonable time, of giving consent to the carrying out of medical or dental treatment, the person responsible for the patient can only consent to the carrying out of the treatment, and a registered practitioner can only carry out that treatment, if—

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- (a) the registered practitioner reasonably believes, and states in writing in the patient's clinical records, that a further delay in carrying out the treatment would result in a significant deterioration of the patient's condition; and
 - (b) neither the registered practitioner nor the person responsible has any reason to believe that the carrying out of the treatment would be against the patient's wishes.
- (3) If the registered practitioner or person responsible has reason to believe that the carrying out of the treatment would be against the patient's wishes, the practitioner or person responsible may apply to the Tribunal for its consent to the carrying out of the treatment.
- (4) The Tribunal must—
- (a) give notice of the application and of any order, directions or advisory opinion made or given concerning the application to—
 - (i) the Public Advocate; and
 - (ii) any other person whom the Tribunal considers has a special interest in the patient's affairs, including the registered practitioner and person responsible for the patient; and
 - (b) start hearing the application within 14 days after the day on which the Tribunal received it.
- (5) The patient is a party to the proceeding on the application.
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- (6) On hearing the application, the Tribunal may consent to the carrying out of the medical or dental treatment, and a registered practitioner may carry out that treatment, if the Tribunal is satisfied that—
- (a) the patient is incapable of giving consent; and
 - (b) a further delay in carrying out the treatment would result in a significant deterioration of the patient's condition; and
 - (c) the treatment would be in the patient's best interests, having regard to the evidence (if any) of the patient's views about such treatment.

42I Person responsible may seek advice

- (1) The person responsible for a patient may apply to the Tribunal for directions or an advisory opinion on any matter or question relating to the scope or exercise of his or her authority to consent to medical or dental treatment on behalf of the patient.
- (2) The Tribunal must give notice to any person whom the Tribunal considers has a special interest in the affairs of the patient of the application, of the hearing of the application and of any order, directions or advisory opinion of the Tribunal in respect of the application.
- (3) The Tribunal may—
 - (a) give any directions or advisory opinion it considers necessary;
 - (b) make any order it considers necessary.

S. 42I
inserted by
No. 40/1999
s. 14.

s. 42J

- (4) The Tribunal of its own motion may direct, or give an advisory opinion to, the person responsible for a patient in respect of any matter.
- (5) An action does not lie against the person responsible for a patient on account of an act or thing done or omitted to be done by that person in accordance with any order, directions or advisory opinion of the Tribunal made or given under this section unless in representing the facts to the Tribunal that person has been guilty of fraud, wilful concealment or misrepresentation.

S. 42J
inserted by
No. 40/1999
s. 14.

42J Guidelines for medical or dental treatment

The Tribunal may—

- (a) in consultation with the Public Advocate and the Secretary to the Department of Justice;
and
- (b) with the approval of the Governor in Council—

issue and make available to members of the public guidelines specifying situations in which the person responsible for a patient may consent to medical or dental treatment in respect of the patient.

S. 42K
inserted by
No. 40/1999
s. 14.

42K Medical or dental treatment without consent of person responsible

- (1) Subject to section 41, a registered practitioner may carry out, or supervise the carrying out of, medical or dental treatment under this section without the consent of the person responsible if—
 - (a) the practitioner has made reasonable efforts—
 - (i) to ascertain whether there is a person responsible and, if so, who that person is; and

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- (ii) if the practitioner ascertains who the person responsible is, to contact that person to obtain his or her consent to the proposed treatment—
- but the practitioner has been unable to ascertain whether there is a person responsible or who that person is or to contact that person; and
- (b) the practitioner believes on reasonable grounds that the proposed treatment is in the best interests of the patient; and
- (c) the practitioner, before carrying out, or supervising the carrying out of, the medical or dental treatment, gives notice to the Public Advocate in accordance with subsection (2).
- (2) A notice referred to under subsection (1)(c) must include the following information—
- (a) the nature of the patient's condition;
- (b) the medical or dental treatment the registered practitioner proposes carrying out on the patient; and
- (c) that the practitioner believes on reasonable grounds that the proposed treatment is in the best interests of the patient; and
- (d) that despite reasonable efforts by the practitioner, the practitioner has been unable to ascertain whether there is a person responsible for the patient or, if there is a person responsible, the practitioner has been unable to ascertain who that person is or to contact that person.
- (3) A registered practitioner who carries out, or supervises the carrying out of, medical or dental treatment on a patient under this section must state
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s. 42L

in writing in the clinical records relating to that patient—

- (a) why the treatment is considered to be in the best interests of the patient; and
- (b) how the treatment is considered to promote or maintain the health and well-being of the patient.

S. 42L
inserted by
No. 40/1999
s. 14.

42L Medical or dental treatment if person responsible does not consent

- (1) Subject to section 41, a registered practitioner may carry out, or supervise the carrying out of, medical or dental treatment under this section if—
 - (a) the registered practitioner has consulted the person responsible for a patient; and
 - (b) the person responsible does not consent to the proposed medical or dental treatment; and
 - (c) the practitioner nevertheless believes on reasonable grounds that the proposed treatment is in the best interests of the patient; and
 - (d) the practitioner, within 3 days after the person responsible has communicated to the practitioner that he or she does not consent, gives to that person and the Public Advocate a statement under section 42M.
- (2) A registered practitioner must not carry out, or supervise the carrying out of, any medical or dental treatment under this section (other than emergency treatment)—
 - (a) if the person responsible does not apply to the Tribunal within 7 days after receiving a statement under section 42M, earlier than 7 days after giving the person responsible the statement; or

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- (b) if the person responsible applies to the Tribunal within 7 days after receiving a statement under section 42M, earlier than 14 days after giving the person responsible the statement; or
 - (c) if the Tribunal makes an order under section 42N that the treatment is not in the best interests of the patient; or
 - (d) if the person responsible appeals from an order of the Tribunal made under section 42N, before the determination of the appeal.
- (3) If the person responsible does not apply to the Tribunal in accordance with subsection (2)(a) and a registered practitioner carries out, or supervises the carrying out of, medical or dental treatment on a patient under this section, the practitioner must state in writing in the clinical records relating to that patient—
- (a) why the treatment is considered to be in the best interests of the patient; and
 - (b) how the treatment is considered to promote or maintain the health and well-being of the patient.

42M Statement by registered practitioner

- (1) A statement referred to in section 42L must be in writing and must be dated and signed by the registered practitioner.
- (2) A statement must state that—
 - (a) the person responsible for the patient has been informed about the nature of the patient's condition to an extent that would be sufficient to enable the patient, if he or she were able to consent, to decide whether or not to consent to the proposed treatment

S. 42M
inserted by
No. 40/1999
s. 14.

- generally or to treatment of a particular kind for that condition; and
- (b) the person responsible has not consented to the proposed treatment; and
 - (c) the registered practitioner believes on reasonable grounds that the proposed treatment is in the best interests of the patient; and
 - (d) unless the person responsible applies to the Tribunal and the Tribunal otherwise orders, the practitioner will, not earlier than 7 days after giving the statement to the person responsible, carry out the proposed treatment.
- (3) A statement must set out the procedures under the **Victorian Civil and Administrative Tribunal Act 1998** for making an application to the Tribunal.

S. 42N
inserted by
No. 40/1999
s. 14.

42N Application to Tribunal relating to medical or dental treatment

- (1) An application may be made to the Tribunal in relation to any matter, question or dispute under this Part relating to medical or dental treatment or relating to the best interests of a patient.
- (2) An application may be made by—
 - (a) a person responsible; or
 - (b) a person who, in the opinion of the Tribunal, has a special interest in the affairs of the patient, including a registered practitioner (if any).
- (3) If an application is made under this section, the patient is a party to the proceeding.

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- (4) The Tribunal must give notice of an application, of the hearing of the application and of any order of the Tribunal in respect of the application to—
- (a) the Public Advocate; and
 - (b) if the application is made after a statement has been given under section 42M, the registered practitioner who gave the statement; and
 - (c) any other person whom the Tribunal considers has a special interest in the affairs of the patient.
- (5) If the person responsible for a patient, after receiving a statement under section 42M, makes an application to the Tribunal—
- (a) the person responsible must apply to the Tribunal within 7 days after receiving the statement; and
 - (b) the Tribunal must hear and determine the application within 7 days after receiving it.
- (6) On an application under this section, the Tribunal—
- (a) may make an order that for matters relating to medical or dental treatment, either generally or of a particular kind, a person specified in the order is to be the person responsible;
 - (b) may appoint a person as guardian of the patient generally or for matters relating to the medical or dental treatment of a patient;
 - (c) may vary a guardianship order to make provision for matters relating to the medical or dental treatment of a patient;
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- (d) may revoke, suspend or vary an instrument appointing a person as the enduring guardian to the extent that the instrument relates to medical or dental treatment of a patient;
- (e) may make an order that any proposed medical or dental treatment is or is not in the best interests of the patient;
- (f) may make any orders or give any directions it considers necessary to resolve any conflict between persons relating to the best interests of a patient;
- (g) may make a declaration as to the validity or effect of any decision relating to medical or dental treatment;
- (h) may give an advisory opinion in relation to the best interests of a patient;
- (i) may make any other orders it considers to be in the best interests of the patient.

- (7) An application cannot be made, and the Tribunal cannot make any order, under this section in relation to a medical research procedure.

Note

Sections 42V, 42W and 42X provide for the Tribunal's jurisdiction in relation to medical research procedures.

S. 42N(7)
inserted by
No. 3/2006
s. 8(2).

42O Protection of registered practitioner

- (1) A registered practitioner who, in good faith, carries out, or supervises the carrying out of, medical or dental treatment on a patient in accordance with this Division in reliance on—
 - (a) a consent given by another person whom the registered practitioner believed on reasonable grounds was authorised to give such consent; or

S. 42O
inserted by
No. 40/1999
s. 14.

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- (b) a purported consent given by another person whom the registered practitioner believed on reasonable grounds was authorised to give such consent but was not so authorised—
is not—
- (c) guilty of assault or battery; or
 - (d) guilty of professional misconduct; or
 - (e) liable in any civil proceedings for assault or battery.
- (2) A registered practitioner who, in good faith, carries out, or supervises the carrying out of, medical or dental treatment on a patient in accordance with this Division without the consent of another person and in the belief on reasonable grounds that the requirements of this Division have been complied with is not—
- (a) guilty of assault or battery; or
 - (b) guilty of professional misconduct; or
 - (c) liable in any civil proceedings for assault or battery.
- (3) Nothing in this section affects any duty of care owed by a registered practitioner to a patient.

Division 6—Medical research procedures

Pt 4A Div. 6
(Heading and
ss 42P–42Z)
inserted by
No. 3/2006
s. 9.

42P Introduction and outline of Division

- (1) This Division contains provisions for the carrying out of a medical research procedure on a patient.

S. 42P
inserted by
No. 3/2006
s. 9.

Note

See section 36 for the definition of *patient*.

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- (2) In essence, this Division provides a 4 step process for authorising the carrying out of a medical research procedure on a patient, as follows—
- (a) step 1 is to determine whether the relevant research project is approved by the relevant human research ethics committee—see section 42Q;
 - (b) step 2 is to determine whether the patient is likely to recover the capacity to consent to the procedure within a reasonable time—see section 42R;
 - (c) step 3 is to seek the consent of the person responsible for the patient, which only applies where allowed by section 42R—see section 42S;
 - (d) step 4 is procedural authorisation, which only applies where allowed by section 42R and the person responsible cannot be ascertained or contacted—see section 42T.
- (3) Steps 2, 3 and 4 referred to in subsection (2) do not apply to the carrying out of a medical research procedure under section 42A.

Note

Section 42A provides for the carrying out of a medical research procedure without consent in emergency situations.

- (4) This Division also provides that—
- (a) the Tribunal has jurisdiction in various circumstances—see sections 42V, 42W and 42X;
 - (b) offences may be committed by registered practitioners who fail to comply with the Division—see section 42Y;
 - (c) registered practitioners who comply with the Division are protected from civil and criminal liability—see section 42Z.
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- (5) This Division is subject to section 41, which prohibits the carrying out of medical treatment if a refusal of that treatment is in force under the **Medical Treatment Act 1988**.

42Q Step 1—Approval of relevant research project

S. 42Q
inserted by
No. 3/2006
s. 9.

- (1) Step 1 is to determine whether the relevant research project has been approved by the relevant human research ethics committee.
- (2) A medical research procedure must not be carried out on a patient if the relevant research project has not been approved by the relevant human research ethics committee.
- (3) A medical research procedure must be carried out in accordance with the relevant human research ethics committee approval, including any conditions of that approval.

42R Step 2—Is patient likely to recover within a reasonable time?

S. 42R
inserted by
No. 3/2006
s. 9.

- (1) Step 2 is to determine whether the patient is likely to be capable, within a reasonable time, of giving consent to the carrying out of a medical research procedure.
- (2) The reasonable time is the time by which, given the nature of the relevant research project, the procedure would need to be performed on the patient, having regard to—
- (a) the medical or physical condition of the patient; or
 - (b) the stage of treatment or care; or
 - (c) other circumstances specific to the patient.
- (3) If a patient is likely to be capable, within a reasonable time as determined in accordance with subsection (2), of giving consent to the carrying out of a medical research procedure, a registered

practitioner must not carry out, or supervise the carrying out of, the procedure under the authority of a consent under section 42S or procedural authorisation under section 42T.

- (4) If a patient is not likely to be capable, within a reasonable time as determined in accordance with subsection (2), of giving consent to the carrying out of a medical research procedure, a registered practitioner may carry out, or supervise the carrying out of, the procedure under the authority of a consent under section 42S or procedural authorisation under section 42T.
- (5) Before, or as soon as practicable after, carrying out, or supervising the carrying out of, the medical research procedure, the registered practitioner must state his or her belief that, at the time of the procedure, the patient is or was not likely to be capable of giving consent within a reasonable time and the reason for that belief in writing in the patient's clinical records.

Note

This section does not apply to a medical research procedure under section 42A—see section 42P(3).

S. 42S
inserted by
No. 3/2006
s. 9.

42S Step 3—Consent of person responsible

- (1) Step 3 is to seek the consent of the person responsible for the patient to the carrying out of the medical research procedure on the patient.

Note

This section does not apply to a medical research procedure under section 42A—see section 42P(3).

- (2) The person responsible may consent to the carrying out of a medical research procedure on the patient.

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- (3) The person responsible may only consent to the carrying out of the procedure if he or she believes that the carrying out of the procedure would not be contrary to the best interests of the patient.
 - (4) The consent must be consistent with the requirements for consent, if any, specified in the relevant human research ethics committee approval for the relevant research project or the conditions of that approval.

42T Step 4—Procedural authorisation

S. 42T
inserted by
No. 3/2006
s. 9.

- (1) Step 4 is procedural authorisation for the carrying out of the medical research procedure on the patient, which applies only if the person responsible for the patient cannot be ascertained or contacted.

Note

This section does not apply to a medical research procedure under section 42A—see section 42P(3).

- (2) A registered practitioner may carry out, or supervise the carrying out of, a medical research procedure on a patient without the consent under section 42S of the person responsible for the patient if—
 - (a) the patient is not likely to be capable, within a reasonable time as determined in accordance with section 42R(2), of giving consent to the carrying out of the procedure; and
 - (b) steps that are reasonable in the circumstances have been taken—
 - (i) to ascertain whether there is a person responsible and, if so, who that person is; and

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- (ii) if the person responsible is ascertained, to contact that person to seek his or her consent to the proposed procedure under section 42S—
- but it has not been possible to ascertain whether there is a person responsible or who that person is or to contact that person; and
- (c) the practitioner believes on reasonable grounds that inclusion of the patient in the relevant research project, and being the subject of the proposed procedure, would not be contrary to the best interests of the patient; and
- (d) the practitioner does not have any reason to believe that the carrying out of the procedure would be against the patient's wishes; and
- (e) the practitioner believes on reasonable grounds that the relevant human research ethics committee has approved the relevant research project in the knowledge that a patient may participate in the project without the prior consent of the patient or the person responsible; and
- (f) the practitioner believes on reasonable grounds that—
- (i) one of the purposes of the relevant research project is to assess the effectiveness of the therapy being researched; and
- (ii) the medical research procedure poses no more of a risk to the patient than the risk that is inherent in the patient's condition and alternative treatment; and
- (g) the practitioner believes on reasonable grounds that the relevant research project is based on valid scientific hypotheses that
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- support a reasonable possibility of benefit for the patient as compared with standard treatment.
- (3) Before, or as soon as practicable after, the medical research procedure is carried out, the practitioner supervising the carrying out of the procedure (or, if there is no such person, the practitioner carrying out the procedure) must sign a certificate—
- (a) certifying as to each of the matters set out in subsection (2); and
 - (b) stating that the person responsible (if any) or the patient (if the patient gains or regains capacity) will be informed as required by subsection (4).
- (4) A registered practitioner involved in the relevant research project must inform the person responsible (if any) or the patient (if the patient gains or regains capacity) as soon as reasonably practicable of—
- (a) the patient's inclusion in the relevant research project; and
 - (b) the option to refuse consent for the procedure to be continued and withdraw the patient from future participation in the project without compromising the patient's ability to receive any available alternative treatment or care.
- (5) The registered practitioner supervising the carrying out of the procedure (or, if there is no such person, the registered practitioner carrying out the procedure) must—
- (a) forward a copy of the certificate referred to in subsection (3) to the Public Advocate and the relevant human research ethics committee as soon as practicable (and in any
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- event within 2 working days) after supervising the carrying out of, or carrying out, the procedure; and
- (b) ensure that the certificate is kept in the patient's clinical records.
- (6) If—
- (a) the medical research procedure is a procedure extending over a period exceeding one month after a copy of the certificate is forwarded to the Public Advocate and the relevant human research ethics committee under subsection (5); and
- (b) the registered practitioner supervising the carrying out of the procedure (or, if there is no such person, the registered practitioner carrying out the procedure) believes on reasonable grounds that—
- (i) the requirements of subsections (2)(b) and (8) (if applicable) have been met but the person responsible has not been able to be ascertained or contacted; and
- (ii) the patient has not gained or regained the capacity to consent—
- the practitioner must, at intervals of not more than one month while the procedure continues, sign a certificate, and forward a copy to the Public Advocate and the relevant human research ethics committee, certifying that each of the matters set out in subsection (2) continue to apply.
- (7) The registered practitioner supervising the carrying out of the procedure (or, if there is no such person, the registered practitioner carrying out the procedure) must ensure that each certificate under subsection (6) is kept in the patient's clinical records.
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- (8) If a medical research procedure is being carried out on a patient under the authority of this section, steps that are reasonable in the circumstances must continue to be taken (as the case requires)—
- (a) to ascertain whether there is a person responsible and, if so, who that person is; and
 - (b) if the person responsible is ascertained, to contact that person to seek his or her consent to the proposed procedure.

Note

If the person responsible is contacted and is willing and able to make a decision (see section 37), section 42S applies. If the patient gains or regains capacity to consent, his or her consent must be sought, as he or she will no longer be a person to which this Division applies.

42U Best interests

- (1) In this Division, for the purposes of determining whether a medical research procedure would or would not be contrary to the best interests of a patient, the following matters must be taken into account—
- (a) the wishes of the patient, so far as they can be ascertained; and
 - (b) the wishes of any nearest relative or any other family members of the patient; and
 - (c) the nature and degree of any benefits, discomforts and risks for the patient in having or not having the procedure; and
 - (d) any other consequences to the patient if the procedure is or is not carried out; and
 - (e) any other prescribed matters.

S. 42U
inserted by
No. 3/2006
s. 9.

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- (2) For the purposes of subsection (1)(b), if the patient—
- (a) is likely to be capable of giving consent to the carrying out of a medical research procedure, but not within a reasonable time as determined in accordance with section 42R(2); and
 - (b) objects to—
 - (i) a relative referred to in paragraphs (a) to (g) of the definition of *nearest relative* in section 3(1); or
 - (ii) another family member (other than the patient's spouse or domestic partner)—
being involved in decisions concerning the patient that would include a medical research procedure being carried out on the patient—
that relative or family member is taken not to be the nearest relative or a family member of the patient.

S. 42V
inserted by
No. 3/2006
s. 9.

42V Applications to Tribunal

- (1) An application may be made to the Tribunal in relation to any matter, question or dispute under this Division relating to the best interests of a patient.
- (2) An application may be made by—
 - (a) a person responsible; or
 - (b) a person who, in the opinion of the Tribunal, has a special interest in the affairs of the patient, including a registered practitioner (if any).

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- (3) Despite subsection (2)(b), a registered practitioner who is involved in the relevant research project cannot apply to the Tribunal in relation to a refusal of the person responsible for a patient to consent under section 42S to the carrying out of a medical research procedure on the patient.
 - (4) If an application is made under this section, the patient is a party to the proceeding.
 - (5) The Tribunal must give notice of an application, of the hearing of the application and of any order of the Tribunal in respect of the application to—
 - (a) the Public Advocate; and
 - (b) any other person whom the Tribunal considers has a special interest in the affairs of the patient.
 - (6) On an application under this section, the Tribunal—
 - (a) may make an order that for matters relating to medical research procedures, either generally or of a particular kind, a person specified in the order is to be the person responsible;
 - (b) may appoint a person as guardian of the patient generally or for matters relating to medical research procedures;
 - (c) may vary a guardianship order to make provision for matters relating to medical research procedures;
 - (d) may revoke, suspend or vary an instrument appointing a person as the enduring guardian to the extent that the instrument relates to medical research procedures;
 - (e) may make an order that any proposed medical research procedure is or is not contrary to the best interests of the patient;
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- (f) may make any orders or give any directions it considers necessary to resolve any conflict between persons relating to the best interests of a patient;
- (g) may make a declaration as to the validity or effect of any decision relating to medical research procedures;
- (h) may give an advisory opinion in relation to the best interests of a patient;
- (i) may make any other orders it considers to be in the best interests of the patient.

S. 42W
inserted by
No. 3/2006
s. 9.

42W Person responsible may seek advice

- (1) The person responsible for a patient may apply to the Tribunal for directions or an advisory opinion on any matter or question relating to the scope or exercise of his or her authority to consent to a medical research procedure on behalf of the patient.
- (2) The Tribunal must give notice to any person whom the Tribunal considers has a special interest in the affairs of the patient of the application, of the hearing of the application and of any order, directions or advisory opinion of the Tribunal in respect of the application.
- (3) The Tribunal may—
 - (a) give any directions or advisory opinion it considers necessary;
 - (b) make any order it considers necessary.
- (4) The Tribunal of its own motion may direct, or give an advisory opinion to, the person responsible for a patient in respect of any matter.

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- (5) An action does not lie against the person responsible for a patient on account of an act or thing done or omitted to be done by that person in accordance with any order, directions or advisory opinion of the Tribunal made or given under this section unless in representing the facts to the Tribunal that person has been guilty of fraud, wilful concealment or misrepresentation.

42X Guidelines for medical research procedures

S. 42X
inserted by
No. 3/2006
s. 9.

The Tribunal may—

- (a) in consultation with the Public Advocate and the Secretary to the Department of Justice; and
- (b) with the approval of the Governor in Council—

issue and make available to members of the public guidelines to assist the person responsible for a patient in determining whether or not to consent to medical research procedures in respect of the patient.

42Y Offences

S. 42Y
inserted by
No. 3/2006
s. 9.

- (1) Subject to section 42A, a registered practitioner must not carry out, or supervise the carrying out of, a medical research procedure on a patient unless—
 - (a) the carrying out of the procedure is allowed by section 42R and either the person responsible for the patient has given consent under section 42S or the procedure is authorised under section 42T; or
 - (b) the carrying out of the procedure is otherwise authorised by law.

Penalty: Imprisonment for 2 years or 240 penalty units or both.

s. 42Z

- (2) A registered practitioner must not sign a certificate under section 42T(3) or (6) that the practitioner knows to be false.

Penalty: 120 penalty units.

- (3) A registered practitioner must not carry out, or supervise the carrying out of, a medical research procedure on a patient unless the relevant research project has been approved by the relevant human research ethics committee.

Penalty: 240 penalty units.

S. 42Z
inserted by
No. 3/2006
s. 9.

42Z Protection of registered practitioner

- (1) A registered practitioner who, in good faith, carries out, or supervises the carrying out of, a medical research procedure on a patient in accordance with this Division in reliance on—
- (a) a consent given by another person whom the registered practitioner believed on reasonable grounds was authorised to give such consent; or
 - (b) a purported consent given by another person whom the registered practitioner believed on reasonable grounds was authorised to give such consent but was not so authorised—

is not—

- (c) guilty of assault or battery; or
- (d) guilty of professional misconduct; or
- (e) liable in any civil proceedings for assault or battery; or
- (f) guilty of an offence against section 42Y(1).

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- (2) A registered practitioner who, in good faith, carries out, or supervises the carrying out of, a medical research procedure on a patient in accordance with this Division without the consent of another person and in the belief on reasonable grounds that the requirements of this Division have been complied with is not—
- (a) guilty of assault or battery; or
 - (b) guilty of professional misconduct; or
 - (c) liable in any civil proceedings for assault or battery; or
 - (d) guilty of an offence against section 42Y(1).
- (3) Nothing in this section affects any duty of care owed by a registered practitioner to a patient.
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PART 5—ADMINISTRATION ORDERS

Division 1—Application for administration order

43 Application for administration order

S. 43(1)
amended by
No. 52/1998
s. 125(1).

(1) Any person may apply to the Tribunal for an order appointing an administrator in respect of the estate of a person with a disability who has attained the age of 18 years or to take effect upon the person attaining the age of 18 years.

S. 43(2)
amended by
No. 52/1998
s. 125(1).

(2) Where a person with a disability who has attained the age of 18 years does not reside in Victoria but has an estate the whole or part of which is in Victoria, any person may apply to the Tribunal for an order appointing an administrator in respect of so much of the estate as is in Victoria.

S. 43(3)
substituted by
No. 52/1998
s. 125(2).

(3) In addition to any other parties, the following are parties to a proceeding on an application under subsection (1)—

(a) the person in respect of whom the application is made; and

(b) the person proposed as administrator.

S. 43(4)
repealed by
No. 52/1998
s. 125(3).

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S. 44
amended by
Nos 55/1987
s. 57(2)(Sch. 4
items 4, 5),
74/1987 s. 8,
33/1989
ss 4(b), 5(3),
substituted by
No. 52/1998
s. 126.

44 Who is entitled to notice of an application?

Each of the following is entitled to notice of the making of an application for an order appointing an administrator, notice of the hearing of the application and notice of any order made by the Tribunal in respect of the application—

(a) the nearest relative available of the person in respect of whom the application is made;

- (b) the primary carer (if any) of the person in respect of whom the application is made;
- (c) the Public Advocate;
- (d) any guardian of the person in respect of whom the application is made;
- (e) any person who has advised the Tribunal of an interest in the person in respect of whom the application is made or in his or her estate.

45 Date for hearing

The Tribunal must commence to hear an application under section 43 within 30 days after the day on which the application is received by the Tribunal.

S. 45
amended by
No. 52/1998
s. 127(1)(a).

Division 2—Appointment of administrator

46 Appointment of administrator

(1) If the Tribunal is satisfied that—

- (a) the person in respect of whom an application for an order appointing an administrator is made—
 - (i) is a person with a disability; and
 - (ii) is unable to make reasonable judgments in respect of the matters relating to all or any part of her or his estate by reason of the disability; and
 - (iii) is in need of an administrator of her or his estate; and
- (b) in the case of an application in respect of a person who does not reside in Victoria, State Trustees has not been authorised under section 12 of the **State Trustee (State Owned Company) Act 1994** to collect, manage, sell or otherwise dispose of or

S. 46(1)
amended by
No. 52/1998
s. 127(1)(a).

S. 46(1)(b)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 6),
45/1994
s. 33(1),
40/1999
s. 24(a).

s. 47

administer any property in Victoria which forms part of the estate of the person in respect of whom the application is made—

the Tribunal may make an order appointing an administrator of that person's estate.

S. 46(2)
amended by
No. 52/1998
s. 127(1)(a),
substituted by
No. 3/2006
s. 17(1).

- (2) In determining whether or not a person is in need of an administrator of her or his estate, the Tribunal must consider—
- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
 - (b) the wishes of the person in respect of whom the application is made, so far as they can be ascertained.

S. 46(3)
amended by
No. 52/1998
s. 127(1)(a).

- (3) The Tribunal cannot make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made.

S. 46(4)
amended by
No. 52/1998
s. 127(1)(a).

- (4) Where the Tribunal makes an order appointing an administrator of a person's estate, the order made must be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.

47 Persons eligible as administrators

S. 47(1)
amended by
No. 52/1998
s. 127(1)(a).

- (1) The Tribunal may appoint as an administrator of the estate of a proposed represented person—

S. 47(1)(a)
amended by
No. 55/1987
s. 57(2)(Sch. 4
item 7),
repealed by
No. 40/1999
s. 15(1)(a).

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Guardianship and Administration Act 1986
No. 58 of 1986
Part 5—Administration Orders

s. 47

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- (c) any person who consents to act as administrator if the Tribunal is satisfied that—
- (i) the person will act in the best interests of the proposed represented person; and
 - (ii) the person is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and
 - (iii) the person is a suitable person to act as the administrator of the estate of the proposed represented person; and
 - (iv) the person has sufficient expertise to administer the estate or there is a special relationship or other special reason why that person should be appointed as administrator.
- (2) In determining whether a person is suitable to act as the administrator of the estate of a proposed represented person, the Tribunal must take into account—
- (a) the wishes of the proposed represented person, so far as they can be ascertained; and
 - (b) the compatibility of the person proposed as administrator with the proposed represented person and with the guardian (if any) of the proposed represented person; and

S. 47(1)(b)
repealed by
No. 40/1999
s. 15(1)(a).

S. 47(1)(c)
amended by
Nos 52/1998
s. 127(1)(a),
40/1999
s. 15(1)(b).

S. 47(2)
amended by
No. 52/1998
s. 127(1)(a).

S. 47(2)(a)
amended by
No. 3/2006
s. 17(2).

S. 47(2)(b)
amended by
No. 40/1999
s. 15(2).

Guardianship and Administration Act 1986
No. 58 of 1986
Part 5—Administration Orders

s. 47

S. 47(2)(c)
inserted by
No. 40/1999
s. 15(2).

(c) whether the person was a member of the Tribunal as constituted for a proceeding under this Act.

S. 47(2A)
inserted by
No. 40/1999
s. 15(3).

(2A) The Tribunal may appoint a person who was at any time a member of the Tribunal as constituted for a proceeding under this Act only if the Tribunal considers that in the circumstances it is appropriate for the person to act as an administrator.

(3) Where a parent or nearest relative of the proposed represented person is proposed as the administrator, that person is not by virtue only of the fact that that person is a parent or nearest relative to be taken to be in a position where the person's interests conflict or may conflict with those of the proposed represented person.

S. 47(4)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
items 8–10),
45/1994
s. 33(2),
52/1998
s. 127(1)(a),
40/1999
s. 15(4)(a)(b),
substituted by
No. 41/2002
s. 20.

(4) If the Tribunal makes an order—

(a) appointing State Trustees as administrator of the estate of a proposed represented person; and

(b) specifying that the administrator is to have powers and duties which are more limited than those referred to in Division 3A—

the Tribunal must give State Trustees a copy of the order as soon as practicable after it is made.

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S. 47(5)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 11),
52/1998
s. 127(1)(a),
repealed by
No. 40/1999
s. 15(5).

47A Remuneration of professional administrator

(1) An administrator other than an administrator who carries on a business of, or including, the administration of estates is not entitled to receive any fee, remuneration or other reward from the estate of a represented person for acting as administrator unless the Tribunal otherwise specifies in the administration order.

S. 47A
inserted by
No. 40/1999
s. 16.

(2) The remuneration to which an administrator who carries on a business of, or including, the administration of estates is entitled is to be approved by the Tribunal.

(3) Despite subsection (2), the remuneration approved by the Tribunal in respect of a licensed trustee company must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the Corporations Act.

S. 47A(3)
inserted by
No. 17/2010
s. 19.

(4) For the purposes of this section—

licensed trustee company has the same meaning as in section 601RAA of the Corporations Act.

S. 47A(4)
inserted by
No. 17/2010
s. 19.

47B Payment of costs and expenses to administrator or former administrator from estate

S. 47B
inserted by
No. 3/2006
s. 18.

(1) If, in any proceeding, a court or tribunal orders that an administrator pay any costs of the proceeding, the court or tribunal may order that the administrator pay, or be reimbursed for, all or part of those costs from the estate administered by the administrator.

(2) In any proceeding, a court or tribunal may order that an administrator be reimbursed for all or part of the administrator's costs of the proceeding from the estate administered by the administrator.

- (3) A court or tribunal may order that the costs incurred in administering an estate by a person appointed as an administrator (including the costs of any proceeding) may be paid out of, or reimbursed from, the estate, whether or not the appointment has been revoked or quashed.
- (4) An order referred to in subsection (3) may be made on an application under section 55 or otherwise, and for that purpose, a reference in section 55 to an administrator is taken to include a reference to a person whose appointment as an administrator has been revoked or quashed.

Division 3—Powers and duties of administrator

48 Power of administrator

S. 48(1)
amended by
No. 55/1987
s. 57(2)(Sch. 4
item 12),
substituted by
No. 45/1994
s. 34,
amended by
No. 52/1998
s. 127(1)(b)(i).

- (1) An administrator has the powers and duties conferred by this Division and such of the powers and duties referred to in Division 3A as the Tribunal may specify in the order.

S. 48(2)
repealed by
No. 52/1998
s. 127(1)(b)(ii).

* * * * *

S. 48(3)
amended by
No. 52/1998
s. 127(1)(b)(i).

- (3) Where a decision is made, action taken, consent given or thing done by an administrator under an order made by the Tribunal the decision, action, consent or thing has effect as if it had been made, taken, given or done by the represented person and the represented person had the legal capacity to do so.

-
- (4) Upon the death of a represented person any order appointing an administrator of that person's estate under this Act lapses and the law relating to the administration of a deceased person's estate applies accordingly.

49 Exercise of power by administrator

- (1) An administrator must act in the best interests of the represented person.
- (2) Without limiting subsection (1) an administrator acts in the best interests of the represented person if the administrator acts as far as possible—
- (a) in such a way as to encourage and assist the represented person to become capable of administering the estate; and
 - (b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

50 Ancillary powers of administrator

- (1) An administrator may on behalf of a represented person sign and do all such things as are necessary to give effect to any power or duty vested in the administrator.
- (2) This Act does not confer on an administrator the power to execute a will in the name of a represented person.

50A Power to make gifts

- (1) An administrator may make a gift of the represented person's property only if—
- (a) the gift's value is not more than what is reasonable in all the circumstances and, in particular, the represented person's financial circumstances; and

S. 50A
inserted by
No. 41/2002
s. 21.

- (b) the gift is—
- (i) to a relative or close friend of the represented person and is of a seasonal nature or for a special event (including, for example, a birth or marriage); or
 - (ii) a type of donation that the represented person made when he or she had the capacity to do so or might reasonably be expected to make.
- (2) The administrator or a charity with which the administrator has a connection is not precluded from receiving such a gift.
- (3) The administrator must notify (in writing) the Tribunal if the value of the gift, or total value of the gifts, of the represented person's property to the administrator, or a charity with which the administrator has a connection, is \$100 or more.

51 Powers of investment

S. 51(1)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 13),
45/1994
s. 36(1),
52/1998
s. 127(1)(c)(i),
40/1999
s. 24(a).

- (1) Except as provided in section 53 or any order of the Tribunal, an administrator other than State Trustees in respect of any part of the estate of the represented person of which the administrator is the administrator—
- (a) may for such period as the administrator thinks fit allow any part of the estate to remain invested in the manner in which it has been invested by the represented person; and
 - (b) may in the case of money deposited in an authorised deposit-taking institution within the meaning of the Banking Act 1959 of the Commonwealth re-deposit it after it becomes payable; and

S. 51(1)(b)
amended by
No. 11/2001
s. 3(Sch.
item 33).

(c) has and may exercise in relation to any part of the estate the same powers as the administrator would have if the administrator were a trustee of that part of the estate under the **Trustee Act 1958**.

S. 51(1)(c)
amended by
No. 104/1995
s. 6(Sch. 1
item 11(a)(i)).

* * * * *

S. 51(2)
repealed by
No. 104/1995
s. 6(Sch. 1
item 11(a)(ii)).

* * * * *

S. 51(3)
repealed by
No. 52/1998
s. 127(1)(c)(ii).

52 Restriction on powers of represented person to enter into contracts etc.

- (1) Where the Tribunal has made an administration order the represented person whilst a represented person or until the Tribunal revokes that order is, to the extent that the represented person's estate is under the control of the administrator, deemed incapable of dealing with, transferring, alienating or charging her or his money or property or any part thereof or becoming liable under any contract without the order of the Tribunal or the written consent of the administrator.
- (2) Every dealing, transfer, alienation or charge by any represented person in respect of any part of the estate which is under the control of the administrator is void and of no effect, and the money or property the subject of the dealing, transfer, alienation or charge is recoverable by the administrator in any court of competent jurisdiction.
- (3) This section does not render invalid any dealing, transfer, alienation or charge by any represented person made for adequate consideration with or to or in favour of any other person who proves that

S. 52(1)
amended by
No. 52/1998
s. 127(1)(d).

she or he acted in good faith and did not know or could not reasonably have known that the person was a represented person.

- (4) For the purpose of this section the acceptance of payment of the whole or any part of a debt is deemed to be a dealing with property.

53 Interest of represented person in property not to be altered by sale or other disposition of property

S. 53(1)
amended by
No. 52/1998
s. 127(1)(d).

- (1) A represented person and her or his heirs, executors, administrators, next of kin, devisees, legatees and assigns have the same interest in any money or other property arising from or received in respect of any sale, mortgage, exchange, partition or other disposition under the powers given to an administrator by an order of the Tribunal which have not been applied under those powers as she, he or they would have had in the property the subject of the sale, mortgage, exchange, partition or disposition if no sale, mortgage, exchange, partition or disposition had been made.

S. 53(2)
amended by
No. 52/1998
s. 127(1)(d).

- (2) For the purposes of this section money arising from the compulsory acquisition or purchase under any Act of property of a represented person is deemed to be money arising from the sale of that property under the powers given to an administrator by an order of the Tribunal.
- (3) An administrator who receives money or other property under this section must keep a separate account and record of the money or other property.

S. 53(4)
amended by
No. 104/1995
s. 6(Sch. 1
item 11(b)).

- (4) Money received by an administrator under this section may be invested in any manner in which trust funds may be invested under the **Trustee Act 1958**.

- (5) In this section and section 56 *next of kin* in relation to a represented person means any person who would be entitled to the property of the represented person or to any share thereof under any law for the distribution of the property of intestates if the represented person had died intestate.

54 Tribunal may open will

The Tribunal may either before or after the death of a represented person open and read any paper or writing which is purported or alleged to be the will of the represented person.

S. 54
amended by
No. 52/1998
s. 127(1)(d).

55 Administrator may seek advice

- (1) An administrator may apply for the advice of the Tribunal upon any matter relating to the scope of the administration order or the exercise of any power by the administrator under the administration order.

S. 55(1)
amended by
No. 52/1998
s. 127(1)(e)(i).

- (2) Without limiting subsection (1), the jurisdiction of the Tribunal includes jurisdiction in the case of an administration by State Trustees to approve, order or advise the commencement of proceedings by State Trustees acting in one capacity or on behalf of one represented person against State Trustees acting in another capacity or on behalf of another represented person.

S. 55(2)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 14),
52/1998
s. 127(1)(e)(i),
40/1999
s. 24(a).

* * * * *

S. 55(3)
amended by
No. 52/1998
s. 127(1)(e)(i),
repealed by
No. 52/1998
s. 127(1)(e)(ii).

- (4) The Tribunal may—

- (a) approve or disapprove of any act proposed to be done by the administrator; and

S. 55(4)
amended by
No. 52/1998
s. 127(1)(e)(i).

s. 56

- (b) give such advice as it considers appropriate;
and
- (c) make any order it considers necessary.

S. 55(4A)
inserted by
No. 41/2002
s. 22.

- (4A) The Tribunal may on its own initiative direct, or give an advisory opinion to, an administrator concerning any matter.

S. 55(5)
amended by
No. 52/1998
s. 127(1)(e)(i).

- (5) An action does not lie against an administrator on account of an act or thing done or omitted by the administrator under any order or on the advice of the Tribunal made or given under this section unless in representing the facts to the Tribunal the administrator has been guilty of fraud, wilful concealment or misrepresentation.

56 Application to the Tribunal by a creditor etc.

S. 56(1)
amended by
No. 52/1998
s. 127(1)(f)(i).

- (1) Any person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary carer or the Public Advocate or otherwise in any estate administered by an administrator may apply to the Tribunal upon any matter arising out of the administration of the estate by the administrator.

S. 56(2)
repealed by
No. 52/1998
s. 127(1)(f)(ii).

* * * * *

S. 56(3)
amended by
No. 52/1998
s. 127(1)(f)(i).

- (3) The Tribunal may make such order in relation to the application as the circumstances of the case may require.

57 Power to administrator to act until notice of discharge etc. received

S. 57(1)
amended by
No. 52/1998
s. 127(1)(g).

- (1) Where the Tribunal knows that a person has ceased to be a represented person, the Tribunal must without delay give notice of that fact to the administrator.

- (2) Until the administrator learns that a person has ceased to be a represented person or has died an administrator may exercise all or any of the powers given to the administrator by order of the Tribunal with respect to the estate of the represented person.
- (3) Upon notice being given under subsection (1) the represented person or the represented person's legal personal representative (as the case may be) is bound by and may take advantage of any act done on behalf of the represented person by the administrator within the powers conferred on the administrator by the Tribunal as if it had been done by the represented person and the represented person had the legal capacity to do so.

58 Accounts

- (1) The Tribunal may, at the time that it appoints an administrator under section 46 or such later time as the Tribunal determines, appoint a person to examine or audit the accounts of the estate of a represented person for a fee approved by the Tribunal and paid from that estate.
- (2) Unless the Tribunal otherwise directs, an administrator must lodge—
- (a) if the Tribunal has appointed a person under subsection (1) to examine or audit accounts, with that person; or
- (b) in any other case, with the Tribunal—
- on, or as soon as practicable after, the anniversary of the appointment of the administrator in each year, accounts of the administration of the estate of a represented person providing a full and true account of the assets and liabilities of that estate

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No. 58 of 1986
Part 5—Administration Orders

s. 58

and all receipts and disbursements in respect of that estate.

S. 58(2A)
inserted by
No. 40/1999
s. 17(1).

(2A) The Tribunal may require an administrator to lodge accounts at a time other than a time specified in subsection (2).

S. 58(2B)
inserted by
No. 40/1999
s. 17(1).

(2B) A person appointed under subsection (1) to examine or audit accounts must lodge with the Tribunal a report in relation to the accounts examined or audited.

S. 58(2C)
inserted by
No. 40/1999
s. 17(1).

(2C) A report under subsection (2B) may recommend the disallowance of any item in the accounts.

S. 58(3)
amended by
Nos 52/1998
s. 127(1)(h),
40/1999
s. 17(2).

(3) Where the Tribunal receives a report under subsection (2C) the Tribunal cannot make an order disallowing an item if the Tribunal is satisfied that the administrator acted in good faith and with reasonable care in the exercise of powers conferred on the administrator.

S. 58(4)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
items 17, 18),
52/1998
s. 127(1)(h),
40/1999
s. 17(3).

(4) Where any item is disallowed by the Tribunal the administrator is liable for the amount of the item disallowed.

S. 58(5)
amended by
No. 55/1987
s. 57(2)(Sch. 4
items 19, 20),
substituted by
No. 40/1999
s. 17(4).

(5) An administrator must, in respect of each estate administered by the administrator, pay to a person appointed under subsection (1) to examine or audit accounts an amount certified by that person as being the reasonable cost of examining or auditing the accounts.

S. 58(6)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 21),
52/1998
s. 127(1)(h),
40/1999
s. 17(5).

(6) The Tribunal may upon an application by the administrator and with the consent of the person appointed under subsection (1) to examine or audit accounts waive payment of the whole or part of the amount required to be paid under subsection (5).

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 Part 5—Administration Orders

s. 58AA

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					S. 58(7) amended by Nos 55/1987 s. 57(2)(Sch. 4 items 22, 23), 33/1989 s. 7(1)(a), 52/1998 s. 127(1)(i), repealed by No. 41/2002 s. 23.
*	*	*	*	*	S. 58(8) amended by No. 55/1987 s. 57(2)(Sch. 4 item 24), repealed by No. 33/1989 s. 7(1)(b).
*	*	*	*	*	S. 58(9) repealed by No. 33/1989 s. 7(1)(b).
*	*	*	*	*	S. 58(9A) inserted by No. 74/1987 s. 9, amended by No. 52/1998 s. 127(1)(i) (i)(ii), repealed by No. 41/2002 s. 23.
*	*	*	*	*	S. 58(10) repealed by No. 52/1998 s. 127(1)(k).

58AA Guardianship and Administration Fund

(1) There is to be established in the Public Account as part of the Trust Fund an account to be known as "The Guardianship and Administration Fund".

S. 58AA
 inserted by
 No. 41/2002
 s. 24.

s. 58AB

- (2) There is to be paid into the Fund—
 - (a) all fees prescribed under section 58A that are paid in respect of estates which are the subject of an administration order; and
 - (b) interest received from the investment of money in the Fund.
- (3) There is also to be paid into the Fund all money standing to the credit of the Guardianship and Administration Fund established by section 58(7) immediately before that provision was repealed.
- (4) Money standing to the credit of the Guardianship and Administration Fund may be invested in any manner in which trust funds may be invested under the **Trustee Act 1958**.
- (5) The Guardianship and Administration Fund is to be used to meet the costs and expenses of the Tribunal in respect of proceedings under this Act.
- (6) After this section commences, a reference in another Act or a statutory rule (within the meaning of the **Subordinate Legislation Act 1994**) to the Guardianship and Administration Fund established by section 58(7) of this Act is taken to be a reference to the Fund established by this section.

S. 58AB
inserted by
No. 41/2002
s. 24.

58AB Notice of death of represented person

An administrator must notify the Tribunal in writing without delay if the represented person dies.

S. 58A
inserted by
No. 33/1989
s. 7(2).

58A Power to make regulations setting fees

- (1) The Governor in Council may make regulations for or with respect to prescribing annual fees to be paid in respect of estates which are the subject of an administration order.

- (2) Regulations made under subsection (1)—
- (a) may prescribe fees in respect of a particular class or classes of estates only; and
 - (b) may prescribe different fees in respect of different classes of estates; and
 - (c) may authorise the Tribunal to waive fees in particular cases or classes of cases.

S. 58A(2)(c)
amended by
No. 52/1998
s. 127(1)(l).

- (3) Before the Governor in Council may make regulations under this section, the Minister must advise the Governor in Council that the Minister—

- (a) has consulted the President and the Public Advocate; and
- (b) is of the opinion that the fees to be charged in the proposed regulations will not result in an amount of fees being collected in any year that will exceed the amount required by the Tribunal and the Public Advocate to fulfil their estate administration functions under this Act in that year.

S. 58A(3)(b)
amended by
No. 52/1998
s. 127(1)(l).

* * * * *

S. 58A(4)
repealed by
No. 40/1999
s. 24(b).

Division 3A—Additional powers and duties of administrators

Pt 5 Div. 3A
(Heading and
ss 58B–58G)
inserted by
No. 45/1994
s. 35.

58B Powers and duties in relation to represented persons

S. 58B
inserted by
No. 45/1994
s. 35.

- (1) Subject to and in accordance with this Act and the administration order appointing an administrator in each case—

s. 58B

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- (a) the administrator has the general care and management of the estate of the represented person; and
 - (b) it is the duty of the administrator to take possession and care of, recover, collect, preserve and administer the property and estate of the represented person and generally to manage the affairs of the represented person and to exercise all rights statutory or otherwise which the represented person might exercise if the represented person had legal capacity; and
 - (c) the administrator in the name and on behalf of the represented person may generally do all acts and exercise all powers with respect to the estate as effectually and in the same manner as the represented person could have done if the represented person were not under a legal disability.
- (2) Without limiting subsection (1), an administrator may in the name and on behalf of a represented person—
- (a) collect, receive and recover income of and money due or which becomes due to and any compensation or damages for injury to the estate or person of the represented person; and
 - (b) invest any money in any security in which trustees may by law invest; and
 - (c) demise land at a rent and on conditions as the administrator thinks fit for any term not exceeding 5 years or, with the consent of the Tribunal, for any longer term; and

S. 58B(2)(c)
amended by
No. 52/1998
s. 127(1)(m).

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- (d) exercise to the extent and in the manner the administrator thinks proper any power of leasing vested in the represented person; and
 - (e) surrender any lease, accept any lease, accept the surrender of any lease or renew any lease; and
 - (f) bring land under the **Transfer of Land Act 1958**; and
 - (g) sell, exchange, partition or convert into money any property; and
 - (h) mortgage or charge any property; and
 - (i) pay any debts and settle, adjust or compromise any demand made by or against the estate and discharge any encumbrance on the estate; and
 - (j) carry on so far as appears desirable any trade, profession or business which the represented person carried on; and
 - (k) agree to any alteration of the conditions of any partnership into which any represented person has entered or to a dissolution and distribution of the assets of the partnership; and
 - (l) bring and defend actions and other legal proceedings in the name of the represented person; and
 - (m) execute and sign deeds, instruments and other documents; and
 - (n) complete any contract for the performance of which the represented person was liable, or enter into any agreement terminating liability; and
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s. 58C

S. 58B(2)(o)
amended by
No. 27/2001
s. 9(Sch. 7
item 2.5).

- (o) pay any sum for the maintenance of the represented person (and, in the event of his or her death, for funeral expenses) and for the maintenance of his or her spouse or domestic partner or any child, parent or other person dependent upon him or her and for the maintenance and education of his or her children as to the administrator seems expedient and reasonable; and
 - (p) do all matters necessary or incidental to the performance of any of the above-mentioned matters and apply any money from the estate which it is necessary to apply for the purposes of this Act.
- (3) An administrator may if it seems to be expedient and reasonable—
- (a) pay or cause to be paid to the represented person for the personal use of that person any amount of money standing to the credit of that person with the administrator; and
 - (b) give or cause to be given to the represented person for the personal use of that person any personal property which belongs to that person and is under the control of the administrator.

S. 58C
inserted by
No. 45/1994
s. 35.

58C Exercise of certain powers

- (1) If—
- (a) a power is vested in a represented person for that person's own benefit or the consent of a represented person is necessary to the exercise of a power; and
 - (b) the power or consent is in the nature of a beneficial interest in the represented person; and

-
- (c) it appears to the administrator to be for the benefit of the represented person that the power should be exercised or the consent given—

the administrator may on behalf and in the name of the represented person exercise the power or give the consent in any manner the administrator thinks fit.

- (2) If—

- (a) a power is vested in a represented person in the character of a trustee or guardian, or the consent of a represented person to the exercise of a power is necessary in the character of a trustee or guardian or as a check upon the undue exercise of the power; and

- (b) it appears to the administrator that the power should be exercised or the consent given—

the administrator may on behalf and in the name of the represented person exercise the power or give the consent in any manner the administrator thinks fit.

- (3) The exercise by an administrator under this section or the State Trust under section 33 of the **State Trust Corporation of Victoria Act 1987** as in force immediately before the commencement of section 24 of the **State Trustees (State Owned Company) Act 1994** or the Public Trustee under section 52 of the **Public Trustee Act 1958** as in force immediately before the commencement of section 33 of the **State Trust Corporation of Victoria Act 1987** of a power vested in a represented person to appoint a new trustee is to be taken to be the appointment of a new trustee within the meaning of section 45 of the **Trustee Act 1958**.

s. 58D

S. 58D
inserted by
No. 45/1994
s. 35.

58D Action upon a person ceasing to be a represented person

S. 58D(1)
amended by
No. 52/1998
s. 127(1)(m).

- (1) If an administrator has received notice from the Tribunal that a represented person has ceased to be a represented person or has died, the administrator must—
 - (a) pay or cause to be paid to that person or to that person's personal representative (as the case requires) all money standing to his or her credit with the administrator; and
 - (b) deliver to that person or to that person's personal representative (as the case requires) all property forming part of his or her estate and any documents relating to the estate.
- (2) Any payment made under subsection (1) is subject to the satisfaction of any amount due to the administrator and all costs, expenses and liabilities incurred by the administrator in respect of the administration of that person's estate.
- (3) The receipt of a person who has ceased to be a represented person or of that person's personal representative is an absolute discharge to an administrator despite any informality in the discharge or certification.

S. 58E
inserted by
No. 45/1994
s. 35.

58E Represented person entitled to inspection of accounts

Any person who has ceased to be a represented person or the personal representative of any represented person is entitled, before or after obtaining the restoration of all or any part of the estate from an administrator—

S. 58E(a)
amended by
No. 35/1996
s. 453(Sch. 1
item 37).

- (a) to examine and inspect or cause to be examined and inspected by a legal practitioner or other authorised agent all

books, accounts, notices and other documents in the custody of the administrator relating to the estate and to make or cause to be made copies or extracts; and

- (b) to have supplied to him or her or his or her legal practitioner or other authorised agent copies of or extracts from any book, account, notice or document; and
- (c) to have given to him or her or his or her legal practitioner or other authorised agent information respecting the estate as is reasonably requested and can be given by the administrator.

S. 58E(b)
amended by
No. 35/1996
s. 453(Sch. 1
item 37).

S. 58E(c)
amended by
No. 35/1996
s. 453(Sch. 1
item 37).

58F Sale of personal effects if unclaimed within 2 years from date of discharge

S. 58F
inserted by
No. 45/1994
s. 35.

- (1) All personal effects of any represented person in the possession of an administrator which are not claimed within 2 years after the date of ceasing to be a represented person may after public notice be sold by order of the administrator.
- (2) The proceeds are to be paid into the Consolidated Fund.

58G Power to open will

S. 58G
inserted by
No. 45/1994
s. 35.

An administrator may, either before or after the death of a represented person, open and read without order any paper or writing deposited with the administrator and purporting or alleged to be the will of the represented person.

Division 4—Temporary orders

59 Application for temporary order

S. 59(1)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 25),
52/1998
s. 127(1)(n),
40/1999
s. 18(1).

- (1) Any person may apply to the Tribunal for a temporary order appointing an administrator of the estate of a person in respect of whom an application could be made under section 43.

S. 59(2)
amended by
No. 52/1998
s. 127(1)(n).

- (2) An application may be made under subsection (1) whether or not an application has been made to the Tribunal under section 43.

S. 59(3)
substituted by
No. 52/1998
s. 127(2).

- (3) Each person who would be entitled to notice under section 44 of an application under section 43 is entitled to notice of the making of an application under this section, notice of the hearing of the application and notice of any order made by the Tribunal in respect of the application.

S. 59(4)
amended by
No. 74/1987
s. 7(a),
repealed by
No. 52/1998
s. 127(3)(a).

* * * * *

60 Temporary order

S. 60(1)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 27),
52/1998
s. 127(3)(b)(i),
40/1999
s. 18(2)(b).

- (1) If the Tribunal is satisfied that—
- (a) the person in respect of whom an application has been made under section 59—
 - (i) is a person with a disability; and
 - (ii) is unable to make reasonable judgments in respect of the matters relating to all or any part of her or his estate by reason of the disability; and
 - (iii) is in need of an administrator of her or his estate; and

(b) in the case of an application in respect of a person who does not reside in Victoria, State Trustees has not been authorised under section 12 of the **State Trustees (State Owned Company) Act 1994** to collect, manage, sell or otherwise dispose of or administer any property in Victoria which forms part of the estate of the person in respect of whom the application is made—

S. 60(1)(b) amended by Nos 55/1987 s. 57(2)(Sch. 4 item 26), 45/1994 s. 33(1), 40/1999 s. 18(2)(a).

the Tribunal may make an order appointing any person who may be appointed under section 47(1) as an administrator of that person's estate.

(2) A temporary order—

S. 60(2) substituted by No. 40/1999 s. 18(3).

(a) remains in effect for such period not exceeding 21 days as is specified in the order; and

(b) may be renewed once for a further period not exceeding 21 days.

(3) The Tribunal must hold a hearing to determine whether an administrator should be appointed under section 46 as soon as practicable after the making of a temporary order but within 42 days of making that order.

S. 60(3) amended by Nos 52/1998 s. 127(3)(b)(i), 40/1999 s. 18(4).

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S. 60(4) repealed by No. 52/1998 s. 127(3)(b)(ii).

s. 60A

Pt 6 (Heading)
amended by
No. 78/2000
s. 6(d).

PART 6—REHEARINGS AND REASSESSMENT OF ORDERS

Pt 6 Div. 1
(Heading and
ss 60A–60D)
inserted by
No. 78/2000
s. 7.

Division 1—Rehearings

S. 60A
inserted by
No. 78/2000
s. 7.

60A Application for rehearing

- (1) If the Tribunal makes an order in respect of an application under this Act (other than an interim order or a temporary order), a party or a person entitled to notice of the application may apply to the Tribunal for a rehearing of the application.
- (2) A person entitled to notice of the application who was not, or did not become, a party may apply for a rehearing only if the Tribunal gives leave.
- (3) Subsection (2) does not apply to the Public Advocate.

S. 60A(3A)
inserted by
No. 3/2006
s. 19.

- (3A) If the Tribunal makes an order on a reassessment under section 61 conducted on the Tribunal's own initiative, a party or a person entitled to notice of the reassessment may apply to the Tribunal for a rehearing of the reassessment, if the Tribunal gives leave.
- (4) An application for a rehearing, or for leave to apply for a rehearing, must be made within 28 days after the day of the order.
- (5) If the Tribunal gives oral reasons for making an order and a party then requests written reasons under section 117 of the **Victorian Civil and Administrative Tribunal Act 1998**, the day on which the written reasons are given to the party is deemed to be the day of the order for the purposes of subsection (4).

- (6) A person cannot apply for a rehearing of—
- (a) an application the order in respect of which was made by the Tribunal constituted by the President, whether with or without others; or
 - (b) an application under section 42V (except an application in respect of which an order is made under section 42V(6)(b) appointing a guardian generally); or
 - (c) an application under section 42I or 42N to the Tribunal relating to medical or dental treatment (except an application in respect of which an order is made under section 42N(6)(b) appointing a guardian generally); or
 - (d) an application for a rehearing or for leave to apply for a rehearing.

S. 60A(6)(b)
substituted by
No. 3/2006
s. 10(1).

60B Parties and notice

- (1) In addition to any other parties, the following are parties to a rehearing—
- (a) in the case of the rehearing of an application referred to in section 60A(1)—a party to the proceeding on that application;
 - (b) in the case of the rehearing of a reassessment referred to in section 60A(3A)—a party to the reassessment.
- (2) The following are entitled to notice of an application for a rehearing—
- (a) in the case of the rehearing of an application referred to in section 60A(1)—a person who was entitled to notice of the making of that application;

S. 60B
inserted by
No. 78/2000
s. 7,
substituted by
No. 3/2006
s. 20.

s. 60C

- (b) in the case of the rehearing of a reassessment referred to in section 60A(3A)—a person who was entitled to notice of the reassessment.

S. 60C
inserted by
No. 78/2000
s. 7.

60C Rehearing

- (1) On an application under section 60A, the Tribunal must rehear the matter and, for that purpose, the Tribunal has all the functions and powers that the Tribunal had with respect to the matter at first instance.
- (2) In determining a rehearing, the Tribunal may—
 - (a) affirm the order of the Tribunal at first instance; or
 - (b) vary the order of the Tribunal at first instance; or
 - (c) set aside the order of the Tribunal at first instance and make another order in substitution for it.

S. 60D
inserted by
No. 78/2000
s. 7.

60D Effect of first instance order pending rehearing

- (1) Subject to subsection (2), the making of an application for a rehearing does not affect the operation of any order to which the application relates or prevent the taking of action to enforce the order.
- (2) The Tribunal may make an order staying the operation of an order pending the determination of the rehearing of the application to which the order relates.

Division 2—Reassessment of orders

Pt 6 Div. 2
(Heading)
inserted by
No. 78/2000
s. 8(a).

61 Reassessment

S. 61
substituted by
No. 52/1998
s. 128.

- (1) The Tribunal must conduct a reassessment of a guardianship order or an administration order—
 - (a) within 12 months after making the order, unless the Tribunal orders otherwise; and
 - (b) in any case, at least once within each 3 year period after making the order unless the Tribunal orders otherwise.
- (2) The Tribunal may at any time conduct a reassessment of any order made by it under this Act.
- (3) A reassessment under this section may be conducted—
 - (a) on the Tribunal's own initiative; or
 - (b) on the application any person.
- (4) In addition to any other parties, the following are parties to a reassessment—
 - (a) the represented person; and
 - (b) the guardian or administrator (as the case may be).
- (5) The amendment to subsection (1)(b) made by section 25 of the **Guardianship and Administration (Amendment) Act 2002** applies to orders made before or after that amendment commences.

S. 61(1)
amended by
No. 78/2000
s. 8(b).

S. 61(1)(b)
substituted by
No. 41/2002
s. 25(1).

S. 61(2)
amended by
Nos 40/1999
s. 19, 78/2000
s. 8(b).

S. 61(3)
amended by
No. 78/2000
s. 8(b).

S. 61(4)
amended by
No. 78/2000
s. 8(b).

S. 61(5)
inserted by
No. 41/2002
s. 25(2).

s. 62

62 Who is entitled to notice of a reassessment?

S. 62
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 28),
33/1989
ss 4(c), 5(4),
substituted by
No. 52/1998
s. 128.

S. 62(1)
amended by
No. 78/2000
s. 8(b).

(1) Each of the following is entitled to notice of the making of an application for a reassessment under section 61, notice of the hearing of the reassessment and notice of any order made by the Tribunal in respect of the reassessment—

- (a) the nearest relative available of the represented person in respect of whom the application is made; and
- (b) the primary carer (if any) of the represented person in respect of whom the application is made; and
- (c) in the case of a reassessment of a guardianship order—
 - (i) the Public Advocate; and
 - (ii) any administrator of the estate of the represented person; and
- (d) in the case of a reassessment of an administration order, any guardian of the represented person.

S. 62(1)(c)
amended by
No. 78/2000
s. 8(b).

S. 62(1)(d)
amended by
No. 78/2000
s. 8(b).

S. 62(2)
amended by
No. 78/2000
s. 8(b).

(2) If the Tribunal conducts a reassessment on its own initiative, the Tribunal must give notice of the reassessment, at least 7 days before the proposed day of the hearing, to the parties and to the persons specified in subsection (1).

(2A) However, if the Tribunal conducts a reassessment on its own initiative and does not propose to amend, vary or replace the order—

S. 62(2A)
inserted by
No. 41/2002
s. 26(1).

(a) instead of giving notice under subsection (2), the Tribunal may give notice to the parties and the persons specified in subsection (1) that the party or person has 14 days from the date of the notice to request, in writing, a hearing of the reassessment; and

(b) if—

(i) any of the parties or persons request a hearing within that time, the Tribunal must give at least 7 days' notice of the hearing to each of the parties and persons; or

(ii) none of the parties or persons request a hearing within that time, the Tribunal is not required to hold a hearing of the reassessment.

(3) The Tribunal may, in a notice under subsection (2) or (2A)(b)(i), advise that a person to whom the notice is given (other than a party) is not required to attend the hearing if that person does not have any matters to raise with the Tribunal in relation to the reassessment.

S. 62(3)
amended by
Nos 78/2000
s. 8(b),
41/2002
s. 26(2).

(4) The amendments to this section made by section 26 of the **Guardianship and Administration (Amendment) Act 2002** only apply to applications for a reassessment made after the amendments commence.

S. 62(4)
inserted by
No. 41/2002
s. 26(3).

63 Order after reassessment

S. 63(1)
amended by
Nos 52/1998
s. 129(1)(a)(i),
78/2000
s. 8(b).

(1) Upon completing a reassessment the Tribunal may by order amend, vary, continue or replace the order subject to any conditions or requirements it considers necessary or revoke the order.

S. 63(2)
repealed by
No. 52/1998
s. 129(1)(a)(ii).

* * * * *

PART 6A—INTERSTATE ORDERS

Pt 6A
(Heading and
ss 63A–63G)
inserted by
No. 40/1999
s. 20.

63A Application of Part

S. 63A
inserted by
No. 40/1999
s. 20.

This Part applies to a guardianship order or an administration order made under a corresponding law of a participating State in respect of a person who—

- (a) resides in the participating State and proposes entering Victoria; or
- (b) has property situated in Victoria.

63B Definitions

S. 63B
inserted by
No. 40/1999
s. 20.

In this Part—

corresponding law means a law that, under an Order in force under section 63C, is declared to be a corresponding law for the purposes of this Part;

determining body, in relation to a participating State, means a court, tribunal, board or other body that is authorised under a corresponding law to make, revoke, amend or vary a guardianship order or an administration order;

interstate order means an order made under a corresponding law of a participating State;

participating State means a State in which a corresponding law is in force;

State includes Territory.

s. 63C

S. 63C
inserted by
No. 40/1999
s. 20.

63C Corresponding laws and orders

- (1) The Governor in Council on the recommendation of the Minister, by Order published in the Government Gazette, may declare that a law of another State is a corresponding law for the purposes of this Part.
- (2) An Order under subsection (1) in respect of a law of another State may include a declaration that an order under that law is substantially similar to a guardianship order or an administration order for the purposes of this Part.

S. 63D
inserted by
No. 40/1999
s. 20.

63D Ministerial agreements

The Minister may make an agreement with a Minister responsible for administering a corresponding law about any matter in connection with the administration of this Part or a corresponding law.

S. 63E
inserted by
No. 40/1999
s. 20.

63E Registration of interstate orders

S. 63E(1)
substituted by
No. 41/2002
s. 27.

- (1) The Tribunal may register an interstate order on the application of—
 - (a) a guardian or administrator of a represented person in a participating State; or
 - (b) the Public Advocate.
- (2) If the guardian in a participating State is a person who holds an equivalent position to the Public Advocate, the Tribunal may appoint the Public Advocate as the guardian of the represented person in this State if no other person fulfils the requirements of section 23 for appointment as the guardian of that person.

-
- (3) On registration of an interstate order, the Tribunal must notify the determining body which made the order that the order has been registered.
 - (4) An interstate order registered under this Part has the same force and effect according to its terms as a guardianship order or an administration order made under this Act.
 - (5) A guardianship order or an administration order made under this Act is not revoked in Victoria if that order is registered in a participating State.

63F Reassessment of interstate orders

S. 63F
inserted by
No. 40/1999
s. 20.

- (1) A registered interstate order may be reassessed by the Tribunal in accordance with Division 2 of Part 6.
- (2) The Tribunal may make any order that it is authorised to make under Division 2 of Part 6 in relation to an interstate order that has been registered under this Part, including an order appointing a new guardian or administrator.
- (3) The Tribunal must notify the determining body which made the interstate order as soon as practicable after the Tribunal makes an order under subsection (2).
- (4) An order made by the Tribunal under subsection (2) has no effect in the participating State in which the interstate order was made.
- (5) The revocation, amendment or variation of an interstate order by a determining body after the order is registered under this Part has no effect in Victoria.

S. 63F(1)
amended by
No. 78/2000
s. 8(c)(i)(ii).

S. 63F(2)
amended by
No. 78/2000
s. 8(d).

Guardianship and Administration Act 1986
No. 58 of 1986
Part 6A—Interstate Orders

s. 63G

S. 63G
inserted by
No. 40/1999
s. 20.

**63G Reciprocal arrangements under the State Trustees
(State Owned Company) Act 1994**

Nothing in this Part affects the operation of
section 12 of the **State Trustees (State Owned
Company) Act 1994**.

PART 7—GENERAL PROVISIONS

* * * * * **S. 64**
repealed by
No. 52/1998
s. 129(1)(b).

* * * * * **S. 65**
repealed by
No. 110/1986
s. 140(2).

66 Matters before a Court

(1) If in any civil proceedings before a Court the Court considers that a party may need to have a guardian or administrator or both appointed under this Act, the Court may refer the issue to the Tribunal for its determination. **S. 66(1)**
amended by
No. 52/1998
s. 129(1)(c).

(2) If a Court refers an issue to the Tribunal under subsection (1)— **S. 66(2)**
substituted by
No. 52/1998
s. 129(2).

(a) the referral is to be treated as if it were an application to the Tribunal for the making of a guardianship order or an administration order (as the case requires); and

(b) the prothonotary (in the case of a referral by the Supreme Court) or the principal registrar of the Court (in any other case) is to be taken to be the applicant.

(3) If in any civil proceedings before a Court it is adjudged or ordered that money be paid to a person with a disability (whether or not that person is a party to a cause or matter) the money—

(a) is to be paid into court; and

Guardianship and Administration Act 1986
No. 58 of 1986
Part 7—General Provisions

s. 66

S. 66(3)(b)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 29),
40/1999
s. 24(a).

(b) unless the Court otherwise orders is to be paid out to the administrator (if any) of the estate of that person or State Trustees.

S. 66(4)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 30),
40/1999
s. 24(a).

(4) If any money—

(a) is paid into court before or after the commencement of this section; and

(b) the money is being held in court on behalf of a person with a disability—

the Court may by order direct that the money be paid out to the administrator (if any) of the estate of that person or State Trustees.

(5) Where the Court adjudges or orders that property (whether real or personal) be delivered up or transferred to a person with a disability (whether or not that person is a party to a cause or matter), the Court—

S. 66(5)(a)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 31),
40/1999
s. 24(a).

(a) may order that the property be delivered up or transferred to the administrator (if any) of the estate of that person or State Trustees; and

S. 66(5)(b)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 31),
40/1999
s. 24(a).

(b) may give any directions for the service of the order on that administrator or State Trustees as it thinks fit.

Guardianship and Administration Act 1986
No. 58 of 1986
Part 7—General Provisions

s. 66

- (6) If an order under subsection (5) is served on an administrator or State Trustees, the administrator or State Trustees must accept delivery or transfer of the property to which the order relates and the acceptance of the property is a sufficient discharge to the person delivering or transferring the property.
- (7) A copy of any order made under this section must be given by the administrator or State Trustees (as the case may be) to the Tribunal and the Public Advocate.
- (8) An order of the Court under this section that money be paid out to an administrator (if any) of the estate of a person or State Trustees has effect as if it were an administration order.
- (9) In this section *Court* means—
- (a) the Supreme Court; or
 - (b) the County Court; or
 - (c) the Magistrates' Court.
- * * * * *

S. 66(6) amended by Nos 55/1987 s. 57(2)(Sch. 4 item 32), 40/1999 s. 24(a).

S. 66(7) amended by Nos 55/1987 s. 57(2)(Sch. 4 item 33), 52/1998 s. 129(1)(c), 40/1999 s. 24(a).

S. 66(8) amended by Nos 55/1987 s. 57(2)(Sch. 4 item 34), 40/1999 s. 24(a).

S. 66(9)(b) amended by No. 74/1987 s. 10.

S. 66(9)(c) inserted by No. 74/1987 s. 10, substituted by No. 57/1989 s. 3(Sch. item 89(a)).

S. 66(10)(11) repealed by No. 57/1989 s. 3(Sch. item 89(b)).

s. 67

New s. 67
inserted by
No. 3/2006
s. 21.

67 Effect of setting aside administration order on previous actions of administrator

- (1) An order of a court or tribunal (the *setting aside order*) that sets aside, or has the effect of setting aside, an administration order does not affect the validity of anything done in accordance with the administration order before the setting aside order takes effect.
- (2) Subsection (1) is subject to any order to the contrary by the court or tribunal making the setting aside order.

Ss 67–69
repealed by
No. 52/1998
s. 129(3)(a).

* * * * *

70 Immunity from suit

S. 70(1)
repealed by
No. 52/1998
s. 129(3)(b).

* * * * *

- (2) A person is not entitled to receive compensation from the Crown, the Treasurer of Victoria or the Minister in respect of any damage, loss or injury sustained by that person by reason of an act or omission of a guardian or an administrator under this Act.

S. 70(3)
repealed by
No. 55/1987
s. 57(2)(Sch. 4
item 35).

* * * * *

S. 71
amended by
No. 33/1989
s. 6,
repealed by
No. 52/1998
s. 129(3)(c).

* * * * *

Guardianship and Administration Act 1986
No. 58 of 1986
Part 7—General Provisions

s. 73

* * * * *

S. 72
substituted by
No. 33/1989
s. 5(5),
repealed by
No. 52/1998
s. 129(3)(c).

73 Judicial notice

All courts and persons acting judicially must take
judicial notice of—

* * * * *

S. 73(a)
repealed by
No. 52/1998
s. 129(3)(d).

(b) the signature of any person who is or has
been the Public Advocate or Acting Public
Advocate and of the fact that that person is
or was the Public Advocate or Acting Public
Advocate (as the case may be).

* * * * *

S. 74
repealed by
No. 52/1998
s. 129(3)(e).

* * * * *

Ss 75–78
repealed by
No. 31/1994
s. 4(Sch. 2
item 39).

79 Audit

* * * * *

S. 79(1)–(4)
repealed by
No. 31/1994
s. 4(Sch. 2
item 39).

(5) The Tribunal or the Public Advocate may engage
a registered company auditor to carry out any
inspections and audits that the Tribunal or the
Public Advocate considers to be necessary.

S. 79(5)
amended by
No. 52/1998
s. 129(3)(f).

s. 80

S. 80
amended by
Nos 52/1998
s. 129(3)(g),
3/2006 s. 10(2)
(ILA s. 39B(1)).

S. 80(2)
inserted by
No. 3/2006
s. 10(2).

80 General penalty

- (1) A person who contravenes any provision of this Act is guilty of an offence against this Act and liable if no penalty is expressly provided to a penalty of not more than 20 penalty units.
- (2) Subsection (1) does not apply to a contravention of section 42Q(2).

Note

Section 42Y(3) creates an offence relating to the matters covered in section 42Q(2).

81 Offences by bodies corporate

- (1) Where a person charged with an offence against this Act is a body corporate, any person who is concerned or takes part in the management of that body corporate may be charged with a like offence.
- (2) Where a body corporate is convicted of an offence against this Act a person charged pursuant to this section with the like offence may also be convicted of that offence and is liable to the penalty for that offence unless that person proves that the act or omission constituting the offence took place without that person's knowledge or consent.

S. 81A
inserted by
No. 40/1999
s. 21.

81A Supreme Court—Limitation of jurisdiction

It is the intention of sections 35E(4) and 42I(5) to alter or vary section 85 of the **Constitution Act 1975**.

82 Regulations

- (1) The Governor in Council may make regulations for or with respect to—

S. 82(1)(a)(b)
repealed by
No. 52/1998
s. 129(3)(h).

* * * * *

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- (c) prescribing forms to be used for the purposes of this Act; and
- (ca) prescribing any treatment—
- (i) to be medical or dental treatment for the purposes of this Act; or
 - (ii) not to be medical or dental treatment for the purposes of this Act; or
 - (iii) to be a special procedure for the purposes of Part 4A; and
- (cab) prescribing any procedure—
- (i) to be a medical research procedure for the purposes of this Act; or
 - (ii) not to be a medical research procedure for the purposes of this Act; and
- (cac) prescribing any matters to be taken into account in determining whether a medical research procedure would or would not be contrary to the best interests of a person to whom Part 4A applies; and
- (cb) prescribing any matters to be taken into account in determining whether a special procedure or medical or dental treatment would be in the best interests of a person to whom Part 4A applies; and
- (d) any matter or thing authorized or required to be prescribed or necessary to be prescribed for carrying this Act into effect.
- (2) Regulations under this Act—
- (a) may be of general or of specially limited application; and
 - (b) may differ according to differences in time, place or circumstance; and

S. 82(1)(ca)
inserted by
No. 40/1999
s. 22.

S. 82(1)(cab)
inserted by
No. 3/2006
s. 10(3).

S. 82(1)(cac)
inserted by
No. 3/2006
s. 10(3).

S. 82(1)(cb)
inserted by
No. 40/1999
s. 22.

Guardianship and Administration Act 1986
No. 58 of 1986
Part 7—General Provisions

s. 82

- (c) may impose a penalty not exceeding
10 penalty units for any contravention of the
regulations.
-

**PART 8—AMENDMENTS TO THE PUBLIC TRUSTEE
ACT 1958**

83 Principal Act

In this Part the **Public Trustee Act 1958** is referred to as the Principal Act.

* * * * *

S. 84
repealed by
No. 55/1987
s. 57(2)(Sch. 4
item 36).

85 Existing protected persons

(1) In this section—

Principal Act means the Principal Act as in force immediately before the commencement of section 84 of this Act or section 58(1) of the **State Trust Corporation of Victoria Act 1987** whichever occurs first;

S. 85(1) def. of
Principal Act
amended by
No. 55/1987
s. 57(2)(Sch. 4
item 37).

protected person means a protected person within the meaning of the Principal Act or a person in respect of whom an order has been made under section 54L of the Principal Act.

(2) The Principal Act continues to apply to and in respect of a protected person—

(a) who was an infirm person within the meaning of the Principal Act, until the State Trust seals a certificate in or to the effect of the Fifth Schedule of the Principal Act to the effect that the person is not or has ceased to be an infirm person; or

S. 85(2)(a)
amended by
No. 55/1987
s. 57(2)(Sch. 4
item 38).

(b) who was a patient within the meaning of the Principal Act, until the person ceases to be a patient within the meaning of the **Mental Health Act 1986**; or

S. 85(2)(b)
amended by
No. 49/1988
s. 199.

Guardianship and Administration Act 1986
No. 58 of 1986
Part 8—Amendments to the Public Trustee Act 1958

s. 85

- S. 85(2)(c)
amended by
No. 52/1998
s. 129(3)(i)(i).
- (c) in respect of whom an order is in force under section 54L of the Principal Act, until the Tribunal has made a determination under this section; or
- (d) who was a voluntary patient who had authorized the Public Trustee in accordance with section 48A of the Principal Act to administer his or her estate, until the person revokes the authority.
- S. 85(3)
amended by
No. 52/1998
s. 129(3)(i)(i).
- (3) The Tribunal must hold a hearing in respect of every protected person to determine whether a guardianship order or an administration order should be made in respect of that protected person or the estate of that protected person under this Act.
- S. 85(4)
amended by
No. 52/1998
s. 129(3)(i)(i).
- (4) A protected person may apply to the Tribunal to hold a hearing to determine whether a guardianship order or an administration order should be made in respect of that person or his or her estate.
- S. 85(5)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 39),
52/1998
s. 129(3)(i)(i).
- (5) The State Trust must provide such information and assistance to the Tribunal in relation to protected persons as is reasonably necessary to enable the Tribunal to carry out its function under this section.
- S. 85(6)
amended by
No. 52/1998
s. 129(3)(i)(i).
- (6) Notwithstanding anything to the contrary in the **Public Trustee Act 1958** or in any order made under that Act, upon the coming into effect of a determination of the Tribunal under this section in relation to a protected person, that person ceases to be a protected person.
- S. 85(7)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 40),
52/1998
s. 129(3)(i)(i).
- (7) The Tribunal must notify the State Trust of a determination under this section without delay.

Guardianship and Administration Act 1986
No. 58 of 1986
Part 8—Amendments to the Public Trustee Act 1958

s. 85

* * * * *

S. 85(8)
amended by
Nos 55/1987
s. 57(2)(Sch. 4
item 41),
52/1998
s. 129(3)(i)(i),
repealed by
No. 52/1998
s. 129(3)(i)(ii).

* * * * *

S. 86
repealed by
No. 55/1987
s. 57(2)(Sch. 4
item 42).

Pt 9 (Heading and s. 87) repealed by No. 45/1994 s. 36(2), new Pt 9 (Heading and s. 86) inserted by No. 40/1999 s. 23.

New s. 86 inserted by No. 40/1999 s. 23.

PART 9—TRANSITIONAL PROVISION

86 Enduring powers of attorney under the Instruments Act 1958

- (1) An enduring power of attorney under the **Instruments Act 1958** executed before the commencement of section 12 of the **Guardianship and Administration (Amendment) Act 1999** has effect on and after that commencement as if this Act had not been amended by that section.

S. 86(2) repealed by No. 75/2003 s. 8.

* * * * *

S. 86A inserted by No. 3/2006 s. 22.

86A Enduring guardians

An appointment of an enduring guardian made under this Act that was in force immediately before the commencement of sections 16 and 24 of the **Guardianship and Administration (Further Amendment) Act 2006** is not invalid on or after that commencement only because—

- (a) it was not executed in accordance with section 35A as amended by section 16 of the **Guardianship and Administration (Further Amendment) Act 2006**; or
- (b) it is not in the form of Form 1 in Schedule 4 as amended by section 24 of the **Guardianship and Administration (Further Amendment) Act 2006**.

87 Rehearings and reassessments under Part 6

New s. 87
inserted by
No. 78/2000
s. 9.

- (1) Division 1 of Part 6 (rehearings) applies to any application to the Tribunal that is made after the commencement of section 7 of the **Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000**.
- (2) Division 2 of Part 6 (reassessments) applies to an order of the Tribunal whether made before or after the commencement of section 8 of the **Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000**.
- (3) A review under section 61 as in force immediately before the commencement of section 8 of the **Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000** that was pending immediately before that commencement may be completed under Division 2 of Part 6 as if it were a reassessment.

88 Medical research procedures

S. 88
inserted by
No. 3/2006
s. 11.

- (1) This Act, as in force immediately before the commencement day, continues to apply on and after that day in relation to any consent or conferral of authority to consent to the carrying out of a special procedure, being a procedure carried out for the purposes of medical research, given by the Tribunal that was in force immediately before that day.
- (2) Despite anything to the contrary in paragraph (e) of section 42T(2), a registered practitioner is taken to have complied with that paragraph if he or she believes on reasonable grounds that the relevant human research ethics committee has given approval for the relevant research project before the commencement day in the knowledge that a patient may participate in the project without the prior consent of the patient.

Guardianship and Administration Act 1986
No. 58 of 1986
Part 9—Transitional Provision

s. 88

(3) In this section—

commencement day means the day on which section 11 of the **Guardianship and Administration (Further Amendment) Act 2006** comes into operation.

Guardianship and Administration Act 1986
No. 58 of 1986

Sch. 1

SCHEDULES

* * * * *

Sch. 1
amended by
Nos 42/1995
s. 224(Sch. 2
item 20.1(a)-
(c)), 46/1998
s. 7(Sch. 1),
repealed by
No. 52/1998
s. 129(3)(j).

* * * * *

Sch. 2
amended by
Nos 74/1987
s. 7(b)(c),
33/1989
s. 8(a)-(c),
repealed by
No. 52/1998
s. 129(3)(j).

Sch. 3

SCHEDULE 3

PROVISIONS WITH RESPECT TO THE PUBLIC ADVOCATE

1 The Public Advocate

(1) The Public Advocate—

- (a) is to be appointed by the Governor in Council; and
- (b) holds office for a period of 7 years; and

Sch. 3
cl. 1(1)(b)
amended by
No. 42/1995
s. 224(Sch. 2
item 20.2(a)).

(c) is entitled to be paid—

- (i) such remuneration as is from time to time fixed by the Governor in Council; and
- (ii) such travelling and other allowances as are from time to time fixed by the Governor in Council; and

(d) is not in respect of the office of Public Advocate subject to the **Public Administration Act 2004** (other than Part 5 of that Act).

Sch. 3
cl. 1(1)(d)
amended by
No. 46/1998
s. 7(Sch. 1),
substituted by
No. 108/2004
s. 117(1)
(Sch. 3
item 92.2).

(2) The Public Advocate ceases to hold office—

- (a) if the Public Advocate resigns in writing signed by the Public Advocate and the resignation is accepted by the Governor in Council; or

-
- (b) if the Public Advocate engages in any paid employment outside the duties of the office without the approval of the Governor in Council; or
 - (c) if the Public Advocate is removed from office under subclause (5).
 - (3) The Governor in Council may suspend or remove the Public Advocate from office.
 - (4) The Minister must cause to be laid before each House of Parliament a full statement of the grounds of suspension of the Public Advocate within 7 sitting days after the suspension if that House is then sitting or, if that House is not then sitting, within 7 sitting days after the next meeting of that House.
 - (5) The Public Advocate may be removed from office by the Governor in Council if each House of Parliament, within 7 sitting days after the day when the statement is laid before it, declares by resolution that the Public Advocate ought to be removed from office and, unless each House within that period so declares, the Governor in Council must remove the suspension and restore the Public Advocate to office.
 - (6) If the Public Advocate—
 - (a) becomes bankrupt; or
 - (b) is convicted of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence; or
 - (c) becomes incapable of performing the duties of the office of Public Advocate; or
 - (d) is removed from office under subclause (5) or resigns under subclause (2)(a); or
-

Sch. 3

Sch. 3
cl. 1(6)(e)
repealed by
No. 42/1995
s. 224(Sch. 2
item 20.2(b)).

* * * * *

(f) dies—

the office of the Public Advocate becomes vacant.

2 The Acting Public Advocate

(1) The Governor in Council may appoint an Acting Public Advocate during the temporary absence or the suspension of the Public Advocate and may at any time revoke the appointment.

Sch. 3
cl. 2(1A)
inserted by
No. 3/2006
s. 23.

(1A) The Attorney-General may appoint a person who—

- (a) has previously been appointed as Acting Public Advocate under subclause (1); and
- (b) has taken an oath or made an affirmation under clause 3—

as Acting Public Advocate during the temporary absence of the Public Advocate.

Sch. 3
cl. 2(1B)
inserted by
No. 3/2006
s. 23.

(1B) A person appointed under subclause (1A) is not required to take another oath or make another affirmation under clause 3.

Sch. 3
cl. 2(1C)
inserted by
No. 3/2006
s. 23.

(1C) The Attorney-General may at any time revoke an appointment under subclause (1A).

- (2) The Acting Public Advocate while so acting—
 - (a) has all the powers and duties and may exercise any of the functions of the Public Advocate; and

-
- (b) is entitled to be paid—
- (i) such remuneration as is from time to time fixed by the Governor in Council; and
 - (ii) such travelling and other allowances as are from time to time fixed by the Governor in Council; and
- (c) is not in respect of the office of Acting Public Advocate subject to the **Public Administration Act 2004** (other than Part 5 of that Act).

Sch. 3
cl. 2(2)(c)
amended by
No. 46/1998
s. 7(Sch. 1),
substituted by
No. 108/2004
s. 117(1)(Sch.
3 item 92.3)
(as amended
by No.
20/2005
s. 50(3)).

3 Oath or affirmation

The Public Advocate and any Acting Public Advocate must before taking office take an oath or make an affirmation to be administered by the Speaker of the Legislative Assembly that—

- (a) she or he will faithfully and impartially perform the duties of office; and
 - (b) she or he will not except in accordance with this Act divulge information received or obtained under this Act.
-

Sch. 4

Sch. 4
inserted by
No. 40/1999
s. 25.

SCHEDULE 4

INSTRUMENTS RELATING TO ENDURING GUARDIAN

Sch. 4 Form 1
amended by
Nos 78/2000
s. 10(2)(a)
(i)–(iv),
41/2002
s. 28(1)(a)–(c),
3/2006 s. 24.

FORM 1

APPOINTMENT OF ENDURING GUARDIAN

1. I (insert name, address and occupation of appointor), appoint (insert name, address and occupation of proposed guardian) to be my guardian.
2. I authorise my guardian if, and only to the extent that, I subsequently become unable by reason of a disability to make reasonable judgments in respect of any matters relating to my person or circumstances, to exercise the powers of a guardian under section 24 of the **Guardianship and Administration Act 1986**, being all the powers that a parent may exercise in respect of his or her child, including—
 - to decide where I am to live, whether permanently or temporarily;
 - to decide with whom I am to live;
 - to decide whether I should or should not be permitted to work and, if so—
 - the nature or type of work; and
 - for whom I am to work; and
 - matters related thereto; and
 - to consent to any health care that is in my best interests;
 - to restrict visitors to such extent as may be necessary in my best interests and to prohibit visits by any person if my guardian reasonably believes that visits by that person would have an adverse effect on me.

*(Delete any powers you do not wish your guardian to exercise. If you do not delete any powers, you will be deemed to have authorised your guardian to exercise the full powers of a guardian under section 24 of the **Guardianship and Administration Act 1986**.)*

but subject to the following limitations:

(List any limitations you wish to place on your guardian's powers)

3. I require my guardian to take into account the following wishes in exercising, or in relation to the exercise of, the powers conferred by this appointment—

(State wishes to be taken into account)

4. *(If applicable:)* I appoint (insert name, address and occupation of proposed alternative guardian) to be my alternative guardian in place of, and with the same powers as, my guardian appointed under paragraph 1 if that person is incapable of acting as my guardian or is absent for a period.

This is an appointment of an enduring guardian made under Division 5A of Part 4 of the **Guardianship and Administration Act 1986**.

.....
(Signature of appointor)

.....
(date)

CERTIFICATE OF WITNESSES

We (insert names, addresses and occupations of at least 2 witnesses) certify—

- (a) that the appointor has signed this instrument freely and voluntarily in our presence; and
(b) that the appointor appeared to understand the effect of this instrument.

.....
(Signature of witness authorised to witness the signing of statutory declarations)

.....
(date)

.....
(Signature of other witness)

.....
(date)

Note: An enduring guardian will be able to make decisions on your behalf on all health care and lifestyle matters you empower your enduring guardian to make. If you give your enduring guardian power to make decisions about your health care, your enduring guardian will be able to consent or withhold consent to medical or dental treatment on your behalf.

If your enduring guardian withholds consent to proposed medical or dental treatment, a practitioner may only provide the treatment if the practitioner believes on reasonable grounds that it is in your best interests to do so and if the practitioner gives your enduring guardian the opportunity to refer the matter to the Victorian Civil and Administrative Tribunal (the Tribunal) for determination.

Sch. 4

If you wish to appoint a person who can, unless the Tribunal otherwise determines, refuse medical treatment on your behalf, you will need to appoint a person as your agent under the **Medical Treatment Act 1988**.

If you are considering appointing an agent under the **Medical Treatment Act 1988**—

- you should ensure that you understand the rights and powers which an appointment under the **Medical Treatment Act 1988** confers on your agent; and
- you may wish to appoint the same person as your agent under the **Medical Treatment Act 1988** as the person you appoint as your enduring guardian, although you may choose a different person for each role; and

If you appoint or have already appointed a person as your agent under the **Medical Treatment Act 1988** and another person as your enduring guardian—

- the decision of your agent under the **Medical Treatment Act 1988** will have priority over the decision of your enduring guardian in relation to any proposed medical treatment; and
- your agent under the **Medical Treatment Act 1988** will be able to refuse to consent to medical treatment on your behalf in all circumstances regardless of any consent to the treatment that your enduring guardian may give or wish to give.

ACCEPTANCE OF APPOINTMENT

I, (insert name, address and occupation of proposed guardian) accept appointment as a guardian under this instrument and undertake to exercise the powers conferred honestly and in accordance with the provisions of the **Guardianship and Administration Act 1986**.

<i>(Signature of proposed guardian)</i>	<i>(date)</i>

CERTIFICATE OF WITNESSES

We (insert names, addresses and occupations of at least 2 witnesses) certify—

- (a) that the proposed guardian has signed this instrument freely and voluntarily in our presence; and
- (b) that the proposed guardian appeared to understand the effect of this instrument.

.....
(Signature of witness authorised to witness the signing of statutory declarations) (date)

.....
(Signature of other witness) (date)

(If applicable:) I, (insert name, address and occupation of proposed alternative guardian) accept appointment as an alternative guardian under this instrument and undertake to exercise the powers conferred honestly and in accordance with the provisions of the **Guardianship and Administration Act 1986**.

.....
(Signature of proposed alternative guardian) (date)

CERTIFICATE OF WITNESSES

We (insert names, addresses and occupations of at least 2 witnesses) certify—

- (a) that the proposed alternative guardian has signed this instrument freely and voluntarily in our presence; and
- (b) that the proposed alternative guardian appeared to understand the effect of this instrument.

.....
(Signature of witness authorised to witness the signing of statutory declarations) (date)

.....
(Signature of other witness) (date)

Sch. 4

Sch. 4 Form 2
amended by
Nos 78/2000
s. 10(2)(b)(i)
(ii), 41/2002
s. 28(2).

FORM 2

REVOCATION OF APPOINTMENT OF ENDURING GUARDIAN

1. I (insert name, address and occupation of appointor), revoke the appointment of (insert name, address and occupation of proposed guardian or alternative guardian) as my (insert guardian or alternative guardian, as applicable).
2. This revocation of appointment as an (insert enduring guardian or alternative enduring guardian, as applicable) is made under Division 5A of Part 4 of the **Guardianship and Administration Act 1986**.

.....
(Signature of appointor)

.....
(date)

CERTIFICATE OF WITNESSES

We (insert names, addresses and occupations of at least 2 witnesses) certify—

- (a) that the appointor has signed this instrument freely and voluntarily in our presence; and
- (b) that the appointor appeared to understand the effect of this instrument.

.....
(Signature of witness authorised to witness the signing
of statutory declarations)

.....
(date)

.....
(Signature of other witness)

.....
(date)

ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 28 November 1985

Legislative Council: 22 April 1986

The long title for the Bill for this Act was "A Bill to provide for the establishment of a Guardianship and Administration Board, to provide for the appointment of a Public Advocate, to amend the **Public Trustee Act 1958** and for other purposes."

The **Guardianship and Administration Board Act 1986** was assented to on 3 June 1986 and came into operation as follows:

Section 14 on 8 July 1986: Government Gazette 25 June 1986 page 2170;
Part 1, sections 5, 6, 15–18, 75–82, Schedule items 1 and 3 on 1 April 1987:
Government Gazette 25 March 1987 page 695; section 58 on 1 April 1987:
Government Gazette 1 April 1987 page 778; rest of Act on 14 July 1987:
Government Gazette 8 July 1987 page 1792.

The name of this Act was changed from the **Guardianship and Administration Board Act 1986** to the **Guardianship and Administration Act 1986** by Act No. 52/1998 section 115.

Guardianship and Administration Act 1986
No. 58 of 1986

Endnotes

2. Table of Amendments

This Version incorporates amendments made to the **Guardianship and Administration Act 1986** by Acts and subordinate instruments.

Supreme Court Act 1986, No. 110/1986

Assent Date: 16.12.86
Commencement Date: 1.1.87: s. 2
Current State: All of Act in operation

State Trust Corporation of Victoria Act 1987, No. 55/1987

Assent Date: 20.10.87
Commencement Date: 2.11.87: Government Gazette 28.10.87 p. 2925
Current State: All of Act in operation

Intellectually Disabled Persons' Services (Amendment) Act 1987, No. 74/1987

Assent Date: 24.11.87
Commencement Date: 24.11.87: Special Gazette (No. 50) 24.11.87 p. 1
Current State: All of Act in operation

Health Services Act 1988, No. 49/1988

Assent Date: 24.5.88
Commencement Date: S. 199 on 1.7.88: Government Gazette 29.6.88 p. 1896
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Guardianship and Administration Board (Amendment) Act 1989, No. 33/1989

Assent Date: 6.6.89
Commencement Date: 6.6.89: s. 2
Current State: All of Act in operation

Magistrates' Court (Consequential Amendments) Act 1989, No. 57/1989

Assent Date: 14.6.98
Commencement Date: S. 4(1)(a)–(e)(2) on 1.9.89: Government Gazette 30.8.89 p. 2210; rest of Act on 1.9.90: Government Gazette 25.7.90 p. 2217
Current State: All of Act in operation

Medical Practice Act 1994, No. 23/1994

Assent Date: 17.5.94
Commencement Date: Ss 1, 2 on 17.5.94: s. 2(1); rest of Act on 1.7.94: Government Gazette 23.6.94 p. 1672
Current State: All of Act in operation

Financial Management (Consequential Amendments) Act 1994, No. 31/1994

Assent Date: 31.5.94
Commencement Date: S. 4(Sch. 2 item 39) on 1.1.95: Government Gazette 28.7.94 p. 2055
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

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State Trustees (State Owned Company) Act 1994, No. 45/1994

Assent Date: 7.6.94
Commencement Date: Pt 1 (ss 1–3), s. 27 on 7.6.94: s. 2(1); rest of Act on 1.7.94: Special Gazette (No. 36) 23.6.94 p. 1
Current State: All of Act in operation

Equal Opportunity Act 1995, No. 42/1995

Assent Date: 14.6.95
Commencement Date: S. 224 on 5.10.95: Government Gazette 28.9.95 p. 2731; Sch. 2 items 20.1, 20.2, s. 223(Sch. 1 item 2) on 1.1.96: Government Gazette 21.12.95 p. 3571
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Trustee and Trustee Companies (Amendment) Act 1995, No. 104/1995

Assent Date: 5.12.95
Commencement Date: 1.1.96: s. 2
Current State: All of Act in operation

Legal Practice Act 1996, No. 35/1996

Assent Date: 6.11.96
Commencement Date: S. 453(Sch. 1 item 37) on 1.1.97: s. 2(3)
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Public Sector Reform (Miscellaneous Amendments) Act 1998, No. 46/1998

Assent Date: 26.5.98
Commencement Date: S. 7(Sch. 1) on 1.7.98: s.2(2)
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998, No. 52/1998

Assent Date: 2.6.98
Commencement Date: Ss 114–129 on 1.7.98: Government Gazette 18.6.98 p. 1512
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Guardianship and Administration (Amendment) Act 1999, No. 40/1999

Assent Date: 8.6.99
Commencement Date: Pt 1 (ss 1, 2) on 8.6.99: s. 2(1); rest of Act on 1.1.2000: s. 2(3)
Current State: All of Act in operation

Guardianship and Administration Act 1986
No. 58 of 1986

Endnotes

**Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000,
No. 78/2000**

Assent Date: 28.11.00
Commencement Date: Ss 6–10 on 28.11.00: s. 2(1)
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

**Statute Law Amendment (Authorised Deposit-taking Institutions) Act 2001,
No. 11/2001**

Assent Date: 8.5.01
Commencement Date: S. 3(Sch. item 33) on 1.6.01: s. 2(2)
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

Statute Law Amendment (Relationships) Act 2001, No. 27/2001

Assent Date: 12.6.01
Commencement Date: S. 9(Sch. 7 item 2) on 28.6.01: Government Gazette
28.6.01 p. 1428
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

**Community Visitors Legislation (Miscellaneous Amendments) Act 2001,
No. 51/2001**

Assent Date: 25.9.01
Commencement Date: S. 5 on 1.2.02: s. 2(2)
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

Guardianship and Administration (Amendment) Act 2002, No. 41/2002

Assent Date: 17.9.02
Commencement Date: Ss 3–28 on 1.1.03: s. 2(2)
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

Instruments (Enduring Powers of Attorney) Act 2003, No. 75/2003

Assent Date: 21.10.03
Commencement Date: S. 8 on 1.4.04: Government Gazette 19.2.04 p. 333
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

Public Administration Act 2004, No. 108/2004 (as amended by No. 20/2005)

Assent Date: 21.12.04
Commencement Date: S. 117(1)(Sch. 3 item 92) on 5.4.05: Government
Gazette 31.3.05 p. 602
Current State: This information relates only to the provision/s
amending the **Guardianship and Administration
Act 1986**

Guardianship and Administration Act 1986
No. 58 of 1986

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Health Professions Registration Act 2005, No. 97/2005

Assent Date: 7.12.05
Commencement Date: S. 182(Sch. 4 item 23) on 1.7.07: s. 2(3)
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Guardianship and Administration (Further Amendment) Act 2006, No. 3/2006

Assent Date: 7.3.06
Commencement Date: Ss 4–11, 13–24 on 15.7.06: Government Gazette 6.7.06 p. 1391
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Disability Act 2006, No. 23/2006

Assent Date: 16.5.06
Commencement Date: S. 240 on 1.7.07: s. 2(3)
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Relationships Act 2008, No. 12/2008

Assent Date: 15.4.08
Commencement Date: S. 73(1)(Sch. 1 item 27) on 1.12.08: s. 2(2)
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Statute Law Amendment (National Health Practitioner Regulation) Act 2010, No. 13/2010

Assent Date: 30.3.10
Commencement Date: S. 51(Sch. item 26) on 1.7.10: s. 2(2)
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Trustee Companies Legislation Amendment Act 2010, No. 17/2010

Assent Date: 11.5.10
Commencement Date: S. 19 on 11.5.10: Special Gazette (No. 171) 11.5.10 p. 1
Current State: This information relates only to the provision/s amending the **Guardianship and Administration Act 1986**

Endnotes

3. Explanatory Details

¹ S. 20(d): Section 72 of the **Victorian Civil and Administrative Tribunal Act 1998** provides that the applicant must give notice to the other parties as well as to other persons entitled to notice.