



Australian Capital Territory

# Guardianship and Management of Property Amendment Act 2001

2001 No 78

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# Guardianship and Management of Property Amendment Act 2001

2001 No 78

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An Act to amend the *Guardianship and Management of Property Act 1991*

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*Notified under the Legislation Act 2001 on 24 September 2001  
(see [www.legislation.act.gov.au](http://www.legislation.act.gov.au))*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

## **1 Name of Act**

This Act is the *Guardianship and Management of Property Amendment Act 2001*.

## **2 Commencement**

This Act commences on the day it is notified in the Gazette.

## **3 Act amended**

This Act amends the *Guardianship and Management of Property Act 1991*.

*Note* The Act is amended in the body of the Act and in schedule 1.

## **4 New part 1A**

*after section renumbered as 3, insert*

# **Part 1A                      Important concepts and principles**

## **4 What are a person's *interests*?**

A person's *interests* include the following:

- (a) protection of the person from physical or mental harm;
- (b) prevention of the physical or mental deterioration of the person;
- (c) the ability of the person to—
  - (i) look after himself or herself; and
  - (ii) live in the general community; and
  - (iii) take part in community activities; and

- (iv) maintain the person's preferred lifestyle (other than any part of the person's preferred lifestyle that is harmful to the person);
- (d) promotion of the person's financial security;
- (e) prevention of the wasting of the person's financial resources or the person becoming destitute.

## **5 Principles to be followed by decision-makers**

- (1) This section applies to the exercise by a person (the *decision-maker*) of a function under this Act in relation to a person with impaired decision-making ability (the *protected person*).
- (2) The *decision-making principles* to be followed by the decision-maker are the following:
  - (a) the protected person's wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person's interests;
  - (b) if giving effect to the protected person's wishes is likely to significantly adversely affect the person's interests—the decision-maker must give effect to the protected person's wishes as far as possible without significantly adversely affecting the protected person's interests;
  - (c) if the protected person's wishes cannot be given effect to at all—the interests of the protected person must be promoted;
  - (d) the protected person's life (including the person's lifestyle) must be interfered with to the smallest extent necessary;
  - (e) the protected person must be encouraged to look after himself or herself as far as possible;

- (f) the protected person must be encouraged to live in the general community, and take part in community activities, as far as possible.
- (3) Before making a decision, the decision-maker must consult with the primary carer of the protected person, unless doing so would, in the decision-maker's opinion, adversely affect the protected person's interests.
- (4) Subsection (3) does not limit the consultation that the decision-maker may carry out.

## **6 When does someone have impaired decision-making ability?**

For this Act, a person has *impaired decision-making ability* if the person's decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness.

## **5 Sections 7 and 8**

*substitute*

## **7 Appointment and powers of guardians**

- (1) This section applies if the tribunal is satisfied that—
  - (a) someone has impaired decision-making ability in relation to a matter relating to the person's health or welfare; and
  - (b) while the person has the impaired decision-making ability—
    - (i) there is, or is likely to be, a need for a decision in relation to the matter; or
    - (ii) the person is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the person's health, welfare or property; and
  - (c) if a guardian is not appointed—

- (i) the person's needs will not be met; or
- (ii) the person's interests will be significantly adversely affected.

*Note* See s 8B in relation to appointment of a guardian for a child.

- (2) The tribunal may, by order, appoint a guardian for the person, with the powers that the tribunal is satisfied are necessary or desirable to make decisions for the person in accordance with the decision-making principles.

*Note* The powers that may be given to a guardian are restricted under s 7B.

- (3) The powers that may be given to a person's guardian include the following powers:
  - (a) to decide where, and with whom, the person is to live;
  - (b) to decide what education or training the person is to receive;
  - (c) to decide whether the person is to be allowed to work;
  - (d) if the person is to be allowed to work—to decide the nature of the work, the place of employment and the employer;
  - (e) to give, for the person, a consent required for a medical procedure or other treatment (other than a prescribed medical procedure);
  - (f) to bring or continue legal proceedings for or in the name of the person.

## **7A Appointment of guardians under direction**

If the Supreme Court gives a direction under the *Crimes Act 1900*, section 428J (Nature and conduct of a special hearing), the tribunal must appoint a guardian for the accused with power to make an election mentioned in that section.

## **7B Restriction on powers of guardians**

The powers that may be given to a person's guardian do not include the power to discipline the person or the power to do any of the following things for the person:

- (a) vote in an election;
- (b) make a will or other testamentary instrument;
- (c) consent to the adoption of a child;
- (d) give a consent to a marriage;
- (e) give a consent required for a prescribed medical procedure for the person.

## **8 Appointment and powers of managers**

- (1) This section applies if the tribunal is satisfied that—
  - (a) someone has impaired decision-making ability in relation to the person's financial matters or a matter affecting the person's property; and
  - (b) while the person has the impaired decision-making ability—
    - (i) there is, or is likely to be, a need for a decision in relation to the matter; or
    - (ii) the person is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the person's health, welfare or property; and
  - (c) if a manager is not appointed—
    - (i) the person's needs will not be met; or
    - (ii) the person's interests will be significantly adversely affected.
- (2) The tribunal may, by order, appoint a manager to manage all, or a stated part of, the person's property, with the powers that the



tribunal is satisfied are necessary or desirable to allow the manager to make decisions in relation to the property, in accordance with the decision-making principles.

*Note* The tribunal's power to appoint a manager is restricted under s 8A.

- (3) The powers that may be given to a person's manager are the powers that the person would have if the person were legally competent to exercise powers in relation to the person's property.

### **8A Restriction on power to appoint manager outside ACT**

- (1) The tribunal may appoint a manager for property in the ACT of someone (the *protected person*) who lives outside the ACT only if—
  - (a) the tribunal is satisfied that it is impracticable for a manager for the property to be appointed in the jurisdiction (the *other jurisdiction*) where the protected person lives; or
  - (b) an order appointing a manager for the property under the law of the other jurisdiction cannot be registered under section 12 (Recognition of interstate etc guardians and managers).

- (2) For this section:

*jurisdiction* means a State, another Territory or a foreign country.

### **8B May a guardian or manager be appointed for a child?**

- (1) The tribunal may appoint a guardian or manager for a person who is a child.
- (2) However, the order appointing the guardian or manager does not take effect until the person becomes an adult.

## **6 Section 10 (3)**

*substitute*

- (3) Someone (other than the community advocate or public trustee) may be appointed as a guardian or manager only if the tribunal is satisfied that the person will follow the decision-making principles and is otherwise suitable for appointment.

## **7 Powers to be least restrictive Section 11, new note**

*insert*

*Note* Also, the guardian or manager should exercise the powers in accordance with the decision-making principles (see s 5).

## **8 Section 14**

*substitute*

### **14 Restrictions on manager about property**

- (1) Unless the tribunal, on application, orders otherwise—
- (a) a manager of a person's property must not enter into a transaction in relation to the property if the interests of the manager are in conflict, or may conflict, with the interests of the person; and
  - (b) a manager of a person's property must keep the manager's property separate from the person's property.
- (2) Subsection (1) (b) does not apply to property owned jointly by the manager and person.

## Schedule 1 Minor amendments

(see s 3)

### [1.1] Section 1

*substitute*

#### 1 Name of Act

This Act is the *Guardianship and Management of Property Act 1991*.

### [1.2] New section 2A

*insert*

#### 2A Dictionary

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain words and expressions used in this Act, and includes references (*signpost definitions*) to other words and expressions defined elsewhere in this Act or in other legislation.

For example, the signpost definition ‘*trustee company*—see the *Trustee Companies Act 1947*, section 3 (Interpretation).’ means that the expression ‘trustee company’ is defined in that section and the definition applies to this Act.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see *Interpretation Act 1967*, s 11F and s 11G).

### [1.3] Section 4, definition of *prescribed medical procedure*

*renumber paragraphs when Act next republished under Legislation Act 2001*

**[1.4] Section 4, definitions of *Crimes Act*, *doctor*, *guardian*, *manager*, *member* (1<sup>st</sup> definition), *non-regenerative tissue*, *property* and *trustee company***

*omit*

**[1.5] Section 4, remaining definitions**

*relocate to dictionary*

**[1.6] Section 4, remainder**

*omit*

**[1.7] Section 5, heading**

*substitute*

**5 Limits on finding impaired decision-making ability**

**[1.8] Section 5**

*relocate to division 2.1 and renumber as section 6A*

**[1.9] Section 6**

*renumber as section 3*

**[1.10] Section 9**

*omit*

a natural person

*substitute*

an individual

**[1.11] Section 10 (4) (d) and 12 (1)**

*omit*

resides

*substitute*

lives

**[1.12] Section 16 (2)**

*substitute*

- (2) A guardian or manager must not, without reasonable excuse, contravene a direction.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

**[1.13] Section 24 (1A)**

*renumber as section 24 (2)*

**[1.14] Section 26 (2)**

*substitute*

- (2) A person must not, without reasonable excuse, contravene subsection (1).

Maximum penalty: 20 penalty units.

**[1.15] Section 26 (4)**

*substitute*

- (4) A manager must not, without reasonable excuse, contravene a direction.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

**[1.16] Section 36 (3)**

*omit*

legal practitioner

*substitute*

lawyer

**[1.17] Section 36A (1)**

*omit*

an inquiry (the

*substitute*

an inquiry (a

**[1.18] Section 40**

*omit*

legal practitioner

*substitute*

lawyer

**[1.19] Section 43 (2) (b)**

*omit*

therein

*substitute*

in the order

**[1.20] Section 48 (2)**

*substitute*

- (2) A person must not, without reasonable excuse, contravene an order.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

**[1.21] Section 49 (4)**

*substitute*

- (4) A person must not contravene subsection (1) or (2).

Maximum penalty (subsection (4)): 50 penalty units, imprisonment for 6 months or both.

**[1.22] Section 50 (2) (e)**

*omit*

Part 8 of the Crimes Act

*substitute*

the *Crimes Act 1900*, part 8 (Aiding and abetting, accessories, attempts, incitement and conspiracy),

**[1.23] Section 53 (2)**

*substitute*

- (2) A person must not knowingly give false evidence to the tribunal in an inquiry.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

**[1.24] Section 58 (1)**

*omit*

- (1)

**[1.25] Section 58 (2)**

*omit*

**[1.26] Section 58, new note**

*insert*

*Note* The power to exercise a function also includes the powers necessary and convenient to exercise the function (see *Interpretation Act 1967*, s 25B).

**[1.27] Section 72 (3)**

*substitute*

- (3) A person who has notice of an order under this section must not act contrary to the order.

Maximum penalty (subsection (3)): 50 penalty units, imprisonment for 6 months or both.

**[1.28] Section 73**

*substitute*

**73 Acts and omissions of representatives**

- (1) For this section:

*representative* means—

- (a) for a corporation—an executive officer, employee or agent of the corporation; or  
(b) for an individual—an employee or agent of the individual.

*state of mind*, of a person, includes—

- (a) the person's knowledge, intention, opinion, belief or purpose; and  
(b) the person's reasons for the intention, opinion, belief or purpose.



- (2) This section applies to a prosecution for any offence against this Act.
- (3) If it is relevant to prove a person's state of mind about an act or omission, it is enough to show—
  - (a) the act was done or omission made by a representative of the person within the scope of the representative's actual or apparent authority; and
  - (b) the representative had the state of mind.
- (4) An act done or omitted to be done on behalf of a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by the person, unless the person proves the person could not, by the exercise of reasonable diligence, have prevented the act or omission.
- (5) An individual who is convicted of an offence cannot be punished by imprisonment for the offence if the individual would not have been convicted of the offence without subsection (3) or (4).

#### **74 Criminal liability of officers of corporation**

- (1) If a corporation commits an offence against this Act, an executive officer of the corporation—
  - (a) commits the offence; and
  - (b) is liable, on conviction, to a penalty not exceeding the maximum penalty that may be imposed for the commission of the offence by an individual.
- (2) It is a defence to a prosecution for an offence against subsection (1) that—
  - (a) the defendant exercised due diligence to prevent the corporation from doing the act or making the omission alleged

to constitute the offence or an element of the offence committed by the corporation; or

- (b) an officer or employee of the corporation occupying the defendant's position could not reasonably have been expected to know of the contravention; or
  - (c) the corporation would not have been found guilty of the offence because of its being able to establish a defence available to it under this Act.
- (3) An executive officer may, under subsection (1), be prosecuted for and convicted of an offence whether or not the corporation has been prosecuted for or convicted of the offence.

### [1.29] Dictionary

*insert*

## Dictionary

(see s 2A)

***decision-making principles***—see section 5 (Principles to be followed by decision-makers).

***executive officer***, of a corporation, means a person, by whatever name called and whether or not the person is a director of the corporation, who is concerned with, or takes part in, the corporation's management.

***guardian*** means someone who is a guardian under any of the following sections:

- section 7 (Appointment and powers of guardians);
- section 7A (Appointment of guardians under direction);
- section 12 (Recognition of interstate etc guardians and managers);
- section 32 (Surviving or substitute guardians etc).

***impaired decision-making ability***, for a person—see section 6.

***manager*** means a person who is a manager under any of the following sections:

- section 8 (Appointment and powers of managers);
- section 12 (Recognition of interstate etc guardians and managers);
- section 32 (Surviving or substitute guardians etc).

***non-regenerative tissue***—see the *Transplantation and Anatomy Act 1978*, section 4 (1) (Interpretation).

***primary carer*** includes a family member or friend who is primarily responsible for providing support or care to a person other than completely or substantially on a commercial basis.

*Note* Property is defined in the *Interpretation Act 1967*.

***trustee company***—see the *Trustee Companies Act 1947*, section 3 (Interpretation).

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## Endnotes

### Act amended

- 1 Republished as in force on 31 March 2000 (Republication No 4). See also Act 2000 No 17.

*[Presentation speech made in Assembly on 3 May 2001]*

I certify that the above is a true copy of the Guardianship and Management of Property Amendment Bill 2001 which was passed by the Legislative Assembly on 23 August 2001.

M J McRae  
Clerk of the Legislative Assembly

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