

FIRST PRINT

GUARDIANSHIP (AMENDMENT) BILL 1993

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Guardianship Act 1987 ("the Principal Act"):

- to reform the provisions of that Act relating to consents to the carrying out of medical and dental treatment on persons with disabilities who are unable to make their own decisions as to that treatment and the procedures for obtaining those consents; and
- to prescribe further circumstances in which medical or dental treatment may be carried out on such persons without consent; and
- to extend the categories of persons who can make decisions for persons with disabilities; and
- to make other changes of a minor, ancillary or consequential nature.

The Principal Act, before its amendment by the Disability Services Act 1993, was known as the Disability Services and Guardianship Act 1987.

The Bill also amends the Protected Estates Act 1983 to remove restrictions as to the circumstances in which the Guardianship Board can exercise its power to order the estate of a person to be subject to management under that Act.

Clause 1 specifies the short title of the proposed Act.

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

Clause 3 gives effect to Schedule 1 (which contains amendments to the Principal Act).

Clause 4 gives effect to Schedule 2 (which contains amendments to the Protected Estates Act 1983).

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987**Persons responsible**

Proposed section 3A replaces and extends the existing definition of "person responsible" in section 3 of the Principal Act and will enable a close friend or relative to exercise the functions conferred by that Act on a person responsible for another person (other than a child) when no other person is available to exercise those functions. The proposed section will also empower the Guardianship Board to issue guidelines, not inconsistent with the definition, as to the circumstances in which a person may be regarded as a close friend or relative. It also includes a provision designed to assist in determining, for the purposes of the Principal Act, when a person is to be regarded as being in the care of another person. (See Schedule 1 (1) and (2).)

Appointment of guardians

An amendment is being made to make it clear that 2 or more persons may be appointed under limited guardianship orders to be guardians to act concurrently in respect of a person. (See Schedule 1 (3).)

Consents to medical and dental treatment

A definition of "medical or dental treatment" is to replace the existing definitions of "medical treatment" and "dental treatment" in section 33 of the Principal Act. The definition of "special treatment" is being extended to cover any new kind of treatment that has not yet gained the full support of medical practitioners or dentists specialising in the area of practice concerned. (See Schedule 1 (4).)

Division 2 of Part 5 of the Principal Act (Medical and dental treatment) is to be replaced by a new Division 2. (See Schedule 1 (5).) The major departures from the existing Division are as follows:

- a guardian of a patient will be able to consent to continuing or further special treatment if the Board has conferred on the guardian authority to do so (see proposed section 36 (2));
- it will be possible for medical or dental treatment to be administered to a person under guardianship not only by a medical practitioner or dentist but also by a person acting under the supervision of a medical practitioner or dentist (see proposed section 37);
- it will also be possible for medical or dental treatment (other than special treatment) to be carried out on a patient to whom that Part applies, without the consent of the Board or person responsible, in order to prevent the patient from suffering or continuing to suffer significant pain or distress (see proposed section 37 (1));
- a medical practitioner or dentist will, subject to compliance with certain conditions, be able to carry out minor medical or dental treatment on a patient if there is no person responsible for the patient or if the person responsible for the patient cannot be found or is unwilling to act (see proposed section 37 (2)).

Section 41 of the Principal Act (Consents given by the Public Guardian) is to be repealed because, in future, the Public Guardian will have no role under Part 5 of the Principal Act. Consequential amendments are being made to sections 43, 44 and 46 of the Principal Act. (See Schedule 1 (6), (8), (9) and (12).)

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An amendment to section 42 of the Principal Act will enable the Guardianship Board, on receiving an application for consent to the carrying out of medical or dental treatment that has already started, to order the treatment to be discontinued pending the outcome of the determination of the application or, if the treatment has not already started, to order the treatment to be postponed. (See Schedule 1 (7).)

At present, section 45 of the Principal Act places restrictions on the Board's power to give consent to the carrying out of medical or dental treatment on a patient. In the case of special treatment, consent may be given only to save the patient's life or to prevent serious damage to the patient's health. The replacement section will enable the Board to give consent for any new kind of special treatment that has not yet gained the full support of medical practitioners or dentists specialising in the area of practice concerned, if the Board is satisfied that:

- the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient; and
- in so far as the National Health and Medical Research Council has prescribed relevant guidelines—those guidelines have been or will be complied with.

(See Schedule 1 (10).)

Under proposed section 45A, the Guardianship Board will, when considering an application for consent to the carrying out of special medical or dental treatment on a patient to whom Part 5 of the Principal Act applies, be empowered to confer on a guardian of the patient authority to consent to the continuation of the treatment or to the carrying out of further treatment of a similar nature. The Board will also be empowered to impose conditions or give directions as to the exercise of such an authority. (See Schedule 1 (11).)

Section 46 of the Principal Act (Effect of consent) is amended to provide for a patient's objection to proposed medical or dental treatment to be nullified if the patient has minimal or no understanding of what the treatment entails and either the treatment will cause the patient no distress or, if it will cause the patient some distress, it is likely that the distress will be transitory and reasonably tolerable. (See Schedule 1 (12).)

Under proposed section 46A, the Guardianship Board will be authorised to confer on the guardian of a patient to whom Part 5 of the Principal Act applies authority to override the patient's objection to the carrying out of medical or dental treatment. At present the Board must deal with such objections. However, the Board will be able to confer such an authority on the guardian only if satisfied that the patient has on previous occasions objected to the carrying out of treatment of a similar nature. The guardian will not be able to override the patient's objection unless satisfied that the proposed treatment is manifestly in the best interests of the patient. (See Schedule 1 (13).)

SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT 1983

Financial management orders

Under section 17A of the Protected Estates Act 1983 the Guardianship Board can order the estate of a person to be subject to management under that Act only where the Board is considering an application for a guardianship order in relation to the person or the person is already subject to a guardianship order. Under the amended section, the

Guardianship (Amendment) 1993

Board will be able to order the estate of a person to be subject to management under the 1983 Act irrespective of whether an application for a guardianship order has been made in respect of the person. Also under the amended section, the Board will, in an appropriate case (and with the concurrence of the Supreme Court), be able to refer to that Court any proceedings before the Board relating to a person's capability to manage his or her affairs. (See Schedule 2 (1).)

Proposed section 17B deals with applications for orders under section 17A of the Protected Estates Act 1983. (See Schedule 2 (2) and also Schedule 1 (14).)

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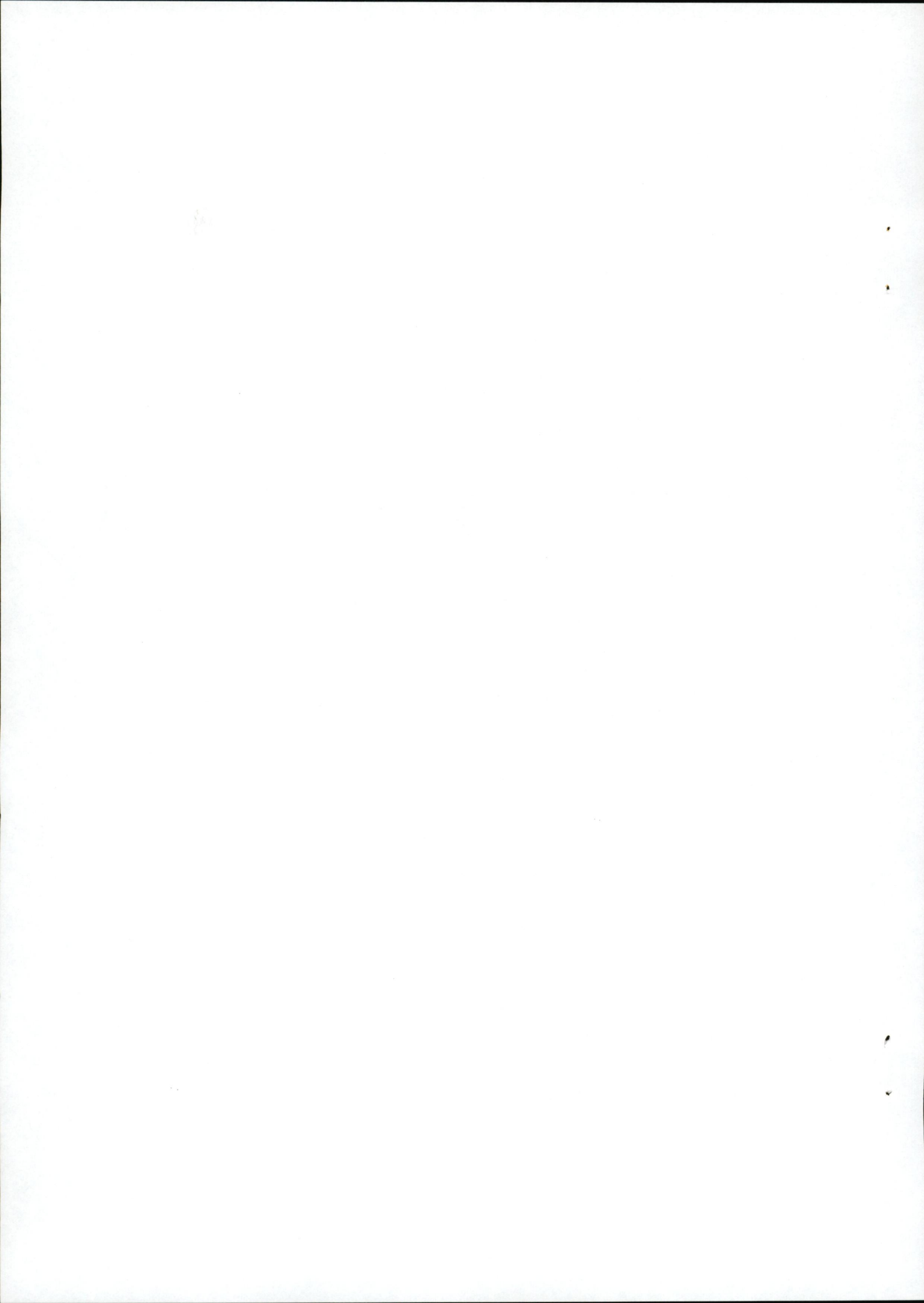


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SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987

SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT 1983



GUARDIANSHIP (AMENDMENT) BILL 1993

NEW SOUTH WALES



No. , 1993

A BILL FOR

An Act to amend the Guardianship Act 1987 with respect to consents to medical and dental treatment for persons with disabilities and for other purposes; and to amend the Protected Estates Act 1983.

Guardianship (Amendment) 1993

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Guardianship (Amendment) Act 1993.

Commencement

- 5 2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Guardianship Act 1987 No. 257

3. The Guardianship Act 1987 is amended as set out in Schedule 1.

Amendment of Protected Estates Act 1983 No. 179

- 10 4. The Protected Estates Act 1983 is amended as set out in Schedule 2.
-

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987

(Sec. 3)

(1) Section 3 (**Definitions**):

- 15 (a) From section 3 (1), omit the definition of “person responsible”, insert instead:

“person responsible” has the meaning given by section 3A;

- (b) Omit section 3 (5).

(2) Section 3A:

- 20 After section 3, insert:

Persons responsible

3A. (1) For the purposes of this Act, the “**person responsible**” for another person (not being a child) means:

- 25 (a) if the other person is under guardianship—the guardian of the other person; or

- (b) if:

- paragraph (a) does not apply; and

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

- the other person has a spouse (not being a person who is himself or herself under guardianship) with whom the other person has a close, continuing relationship, 5

the spouse; or
 - (c) if:
 - paragraphs (a) and (b) do not apply; and
 - subject to subsections (3) and (4), a person has the care of the other person, 10

the person who has care of the other person; or
 - (d) if:
 - paragraphs (a), (b) and (c) do not apply; and
 - the other person has a close friend or relative, that friend or relative; or 15
 - (e) if the other person is in the care of the Director-General under section 13—the person who was the responsible person for the other person immediately before the other person came to be in the care of the Director-General. 20
- However, in Part 5 (Medical and dental treatment), “**person responsible**” for another person means the Director-General if the other person is in the care of the Director-General under section 13. 25
- (2) For the purposes of this Act, “**person responsible**” for a child means a person responsible for the child within the meaning of the Children (Care and Protection) Act 1987. However, in Part 5 of this Act, “**person responsible**” for a child means the Minister or the Director-General if the child is in the care of the Minister or Director-General under Part 5 or 6 of that Act. 30
- (3) The circumstances in which a person is to be regarded as having the care of another person include (but are not limited to) the case where the person, otherwise than for remuneration (whether from the other person or any other source), on a regular basis: 35
- (a) provides domestic services and support to the other person; or

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(b) arranges for the other person to be provided with such services and support.

5 (4) A person who resides in an institution (such as a hospital, nursing home, group home, boarding-house or hostel) at which he or she is cared for by some other person is not, merely because of that fact, to be regarded as being in the care of that other person, and remains in the care of the person in whose care he or she was immediately before residing in the institution.

10 (5) A person is a close friend or relative of another person for the purposes of this section if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare. However, a person is not to be regarded as such a friend or relative if the person is receiving remuneration (whether from the person or some other source) for any services that he or she performs for the other person in relation to the person's care.

15 (6) The President of the Board may issue guidelines, not inconsistent with subsection (5), specifying the circumstances in which a person is to be regarded as a close friend or relative of another person.

20 (7) In this section, "remuneration" does not include a carer's pension.

(3) Section 16 (**Guardianship orders**):

After section 16 (2), insert:

30 (3) Two or more guardians of a person, each with different functions, may be appointed under one or more limited guardianship orders. In that case, a reference to the guardian of the person is a reference to whichever of those guardians has the relevant function.

(4) Section 33 (**Definitions**):

35 (a) Omit section 33 (1), insert instead:

(1) In this Part:

"medical or dental treatment" or "treatment" means:

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

- (a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by or under the supervision of a medical practitioner; or 5
- (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist; or 10
- (c) any other act declared by the regulations to be treatment for the purposes of this Part,
- but does not include:
- (d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or 15
- (e) first-aid medical or dental treatment; or
- (f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (being a drug for which a prescription is not required and which is normally self-administered); or 20
- (g) any other kind of treatment that is declared by the regulations not to be treatment for the purposes of this Part; 25
- “major treatment”** means treatment (other than special treatment) that is declared by the regulations to be major treatment for the purposes of this Part; 30
- “minor treatment”** means treatment that is neither special treatment nor major treatment;
- “special treatment”** means:
- (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or 35
- (b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned; or 40

Guardianship (Amendment) 1993

 SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

5 (c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part.

(b) Omit section 33 (4).

(5) Part 5, Division 2:

Omit the Division, insert instead:

Division 2—Medical and dental treatment

10 **Offences**

35. (1) A person must not carry out medical or dental treatment on a patient to whom this Part applies unless:

- 15 (a) consent for the treatment has been given in accordance with this Part; or
- (b) the carrying out of the treatment is authorised by this Part without any such consent; or
- (c) the treatment is carried out in accordance with an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons.

20 Maximum penalty:

- in the case of special treatment (on conviction on indictment)—imprisonment for 7 years; or
 - in the case of minor or major treatment (on summary conviction)—imprisonment for 1 year or 10 penalty units, or both.
- 25

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

Who may give consent

30 36. (1) Consent to the carrying out of medical or dental treatment on a patient to whom this Part applies may be given:

- (a) in the case of minor or major treatment—by the person responsible for the patient; or
- 35 (b) in any case—by the Board.

(2) The guardian of a patient may also consent to the carrying out of continuing or further special treatment if the Board has previously given consent to the carrying out of the

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

treatment and has authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature. 5

When treatment may be carried out without any such consent

37. (1) Medical or dental treatment may be carried out on a patient to whom this Part applies without consent given in accordance with this Part if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency: 10

- (a) to save the patient's life; or
- (b) to prevent serious damage to the patient's health; or
- (c) except in the case of special treatment—to prevent the patient from suffering or continuing to suffer significant pain or distress. 15

(2) Minor treatment may (subject to subsection (3)) also be carried out on a patient to whom this Part applies without any consent given in accordance with this Part if: 20

- (a) there is no person responsible for the patient; or
- (b) there is such a person but that person either cannot be contacted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment. 25

(3) The medical practitioner or dentist carrying out, or supervising the carrying out of, minor treatment in accordance with subsection (2) is required to certify in writing in the patient's clinical record that:

- (a) the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being; and 30
- (b) the patient does not object to the carrying out of the treatment.

(6) Section 41 (Consents given by the Public Guardian): 35
Omit the section.

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(7) Section 42 (**Applications to the Board**):

Omit section 42 (3), insert instead:

5 (3) Whenever such an application is made for consent to the carrying out of medical or dental treatment and the treatment cannot be carried out without that consent, the Board may, by order:

10 (a) direct the person who is to carry out the treatment not to start the treatment; or

(b) if the treatment has already started—direct the person who is carrying out the treatment to discontinue it, until the Board has determined the application.

15 (4) A person who, without lawful excuse, fails to comply with such an order is guilty of an offence.

Maximum penalty (subsection (4)): 5 penalty units.

(8) Section 43 (**Service of applications**):

(a) After “the patient;” wherever occurring, insert “and”.

20 (b) From section 43 (1) (c), omit “located; and”, insert instead “located.”.

(c) Omit section 43 (1) (d).

(9) Section 44 (**Board may give consent**):

25 From section 44 (2) (a) (iv), omit “the Public Guardian”, insert instead “any guardian of the patient who has responsibility for making decisions with respect to the carrying out of medical or dental treatment on the patient”.

(10) Section 45:

Omit the section, insert instead:

Restrictions on Board’s power to give consent

30 45. (1) The Board must not give consent to the carrying out of medical or dental treatment on a patient to whom this Part applies unless the Board is satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient’s health and well-being.

35 (2) However, the Board must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:

Guardianship (Amendment) 1993

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(a) to save the patient's life; or
 (b) to prevent serious damage to the patient's health,
 or unless the Board is authorised to give that consent under
 subsection (3). 5

(3) In the case of:

(a) special treatment of a kind specified in paragraph (b)
 of the definition of that expression in section 33 (1); or
 (b) prescribed special treatment (other than special 10
 treatment of a kind specified in paragraph (a) of that
 definition),

the Board may give consent to the carrying out of the
 treatment if it is satisfied that:

(c) the treatment is the only or most appropriate way of 15
 treating the patient and is manifestly in the best
 interests of the patient; and

(d) in so far as the National Health and Medical Research
 Council has prescribed guidelines that are relevant to
 the carrying out of that treatment—those guidelines 20
 have been or will be complied with as regards the
 patient.

(11) Section 45A:

After section 45, insert:

**Consents to continuing or further special treatment by a
 patient's guardian with authority of the Board** 25

45A. (1) The Board may, when giving consent to the
 carrying out of special treatment on a patient to whom this
 Part applies, confer on the guardian of the patient authority to
 consent: 30

(a) to the continuation of the treatment; or
 (b) to the carrying out on the patient of further special
 treatment of a similar nature.

(2) The Board may only confer such an authority at the
 request or with the consent of the guardian. 35

(3) The Board may at any time:

(a) impose conditions or give directions as to the exercise
 of such an authority; or

Guardianship (Amendment) 1993

 SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(b) revoke such an authority.

5 (4) If the guardian has an authority conferred under this section, any person may request the guardian for the guardian's consent to the carrying out of the relevant treatment.

(5) In considering a request, a guardian must have regard to:

- 10 (a) the views (if any) of the patient; and
 (b) the objects of this Part.

(12) Section 46 (**Effect of consent**):

(a) In section 46 (2), after "person responsible for", insert ", or the guardian of,".

15 (b) From section 46 (2) (a), omit "by whom the proposed treatment is to be carried out", insert instead "carrying out or supervising the proposed treatment".

(c) Omit section 46 (3), insert instead:

20 (3) A consent given by the guardian of the patient has effect despite any objection made by a patient to the carrying out of the treatment if the guardian has consented to that treatment in accordance with the authority of the Board under section 46A.

25 (4) For the purposes of this section, an objection by a patient to that carrying out of proposed medical or dental treatment is to be disregarded if:

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

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

Guardianship (Amendment) 1993

 SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(13) Section 46A:

After section 46, insert:

Power of guardian to override patient's objection to treatment when authorised by the Board 5

46A. (1) The Board may confer on the guardian of a patient to whom this Part applies authority to override the patient's objection to the carrying out on the patient of major or minor treatment. 10

(2) The Board may confer such an authority only at the request or with the consent of the guardian and only if it is satisfied that the patient has on previous occasions objected to similar treatment being carried out on the patient.

(3) The Board may at any time: 15

(a) impose conditions or give directions as to the exercise of such an authority; or

(b) revoke such an authority.

(4) The guardian may exercise such an authority only if satisfied that the proposed treatment is manifestly in the best interests of the patient. 20

(14) Section 53 (**Procedure at sittings of the Board**):

Omit section 53 (2), insert instead:

(2) The provisions of this Act, the regulations and the rules of the Board relating to proceedings before the Board apply to proceedings before the Board under the Protected Estates Act 1983. 25

 SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES
 ACT 1983

(Sec. 4) 30

(1) Section 17A (**Guardianship Board may make management orders**):

(a) Omit section 17A (1), insert instead:

(1) The Board may:

(a) on an application made in accordance with section 17B; or 35

Guardianship (Amendment) 1993

SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT
1983—*continued*

- (b) on making a guardianship order under Part 3 of the
Guardianship Act 1987,
- 5 consider a person's capability to manage his or her own
affairs and, if satisfied that the person is not capable of
managing those affairs, may order that the estate of the
person be subject to management under this Act.
- (b) After section 17A (2), insert:
- 10 (3) The Board has no jurisdiction to make an order under
this section in respect of a person if the question as to the
person's capability to manage his or her own affairs is before
the Court.
- 15 (4) The Board may, if it considers it appropriate to do so
and with the concurrence of the Court, refer a proceeding
relating to a person's capability to manage his or her affairs
to the Court.
- (2) Section 17B:
- After section 17A, insert:
- 20 **Application to the Guardianship Board for a
management order**
- 25 17B. (1) An application for an order under section 17A (1)
may be made by any person who claims to have a genuine
concern for the welfare of the person who is the subject of
the application.
- (2) An application must specify:
- (a) the applicant's interest in the matter; and
- 30 (b) the grounds on which it is claimed that a person named
in the application is not capable of managing his or her
own affairs.
- (3) The applicant must, as soon as practicable after making
an application, arrange for a copy of the application to be
served on:
- 35 (a) the person referred to in subsection (2) (b); and
- (b) if there is a person responsible for that person (within
the meaning of the Guardianship Act 1987)—the
person responsible; and
- (c) the Protective Commissioner.

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SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT
1983—*continued*

(4) The copy of the application so served must be endorsed with a notice specifying the time, date and place set down for hearing the application.

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(5) A failure to serve a copy of the application in accordance with this section does not vitiate a decision of the Board on the application.

(6) The proceedings of the Board in relation to the application are regulated by the Guardianship Act 1987.

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GUARDIANSHIP (AMENDMENT) BILL 1993
SECOND READING SPEECH - LEGISLATIVE COUNCIL
THE HON VIRGINIA CHADWICK MLC

I MOVE THAT THIS BILL BE READ A SECOND TIME.

MR PRESIDENT, I AM PLEASED TO INTRODUCE THIS LEGISLATION WHICH REPRESENTS A FURTHER POSITIVE ENHANCEMENT FOR THE WELL-BEING OF PEOPLE WITH DISABILITIES, THEIR FAMILIES AND CARERS.

THE DISABILITY SERVICES AND GUARDIANSHIP ACT WAS PASSED IN 1987 WITH THE SUPPORT OF ALL MAJOR PARTIES AND WITH WIDE COMMUNITY SUPPORT.

THE ACT WAS PROCLAIMED AND CAME INTO EFFECT IN AUGUST 1989. IT WAS SEEN THEN, AND STILL IS SEEN, AS PROGRESSIVE, INNOVATIVE LEGISLATION TO PROTECT THE RIGHTS OF PEOPLE WITH DISABILITIES. AMONG OTHER THINGS, THE ACT ESTABLISHED AN ADULT GUARDIANSHIP SYSTEM FOR PEOPLE WITH DISABILITIES IN NSW, AND INTRODUCED A SCHEME FOR CONSENTS TO MEDICAL AND DENTAL TREATMENT ON BEHALF OF ADULTS WHO ARE INCAPABLE OF CONSENTING FOR THEMSELVES. IT IS THIS SCHEME THAT IS THE SUBJECT OF THE PRESENT BILL.

THE SCHEME HAS NOW BEEN IN PLACE FOR SOME THREE AND A HALF YEARS AND IS CONSIDERED TO HAVE BEEN HIGHLY SUCCESSFUL.

I AM TOLD THAT IT IS BEING HELD UP AS A MODEL FOR OTHER JURISDICTIONS IN AUSTRALIA AND HAS ATTRACTED GREAT INTEREST OVERSEAS.

AS WITH ALL NEW LEGISLATION, HOWEVER, PARTICULARLY LEGISLATION DEALING WITH COMPLEX HUMAN ISSUES AND VULNERABLE PEOPLE, OPPORTUNITIES HAVE BECOME APPARENT FOR IMPROVEMENT AND FINE-TUNING ON THE BASIS OF PRACTICAL EXPERIENCE AND IMPLEMENTATION.

THE GUARDIANSHIP BOARD, CHARGED WITH THE OVERSIGHT OF THIS SCHEME, HAS PROPOSED A PACKAGE OF CHANGES, CONTAINED IN THIS BILL, DESIGNED TO MAKE THE LEGISLATION WORK MORE SMOOTHLY AND EFFECTIVELY FOR PEOPLE WITH DISABILITIES AND THOSE WHO CARE FOR THEM.

MR PRESIDENT, THESE AMENDMENTS ARE INTRODUCED FOLLOWING EXTENSIVE COMMUNITY CONSULTATIONS.

IN NOVEMBER 1991 THE GUARDIANSHIP BOARD ISSUED A CONSULTATIVE PAPER ON ITS PROPOSALS FOR AMENDMENTS TO THE MEDICAL AND DENTAL CONSENT PROVISIONS, TO OVER 150 ORGANISATIONS AND INDIVIDUALS.

THESE INCLUDE REPRESENTATIVE MEDICAL BODIES, HOSPITALS, GOVERNMENT DEPARTMENTS AND OFFICIALS, MEMBERS OF THE JUDICIARY AND THE LEGAL PROFESSION, DISABILITY WORKERS AND COMMUNITY REPRESENTATIVES.

OVER 60 WRITTEN SUBMISSIONS WERE RECEIVED AT THE BOARD AND, IN ADDITION, COMMUNITY CONSULTATION MEETINGS WERE HELD.

THE RESPONSES RECEIVED WERE OVERWHELMINGLY SUPPORTIVE OF THE BOARD'S PROPOSALS, WITH SOME MAKING SUGGESTIONS FOR FURTHER IMPROVEMENT OR CLARIFICATION.

THIS BILL IS THE RESULT OF THAT PROCESS.

MR PRESIDENT, THE AMENDMENTS PUT FORWARD BY THE GOVERNMENT DO NOT CHANGE THE UNDERLYING PHILOSOPHY OR APPROACH OF THE MEDICAL CONSENTS SCHEME.

THEY WILL MAKE THE PROCESSES FOR GAINING CONSENT SIMPLER AND LESS BUREAUCRATIC, WHILST RETAINING AND ENHANCING THE SAFEGUARDS FOR PATIENTS.

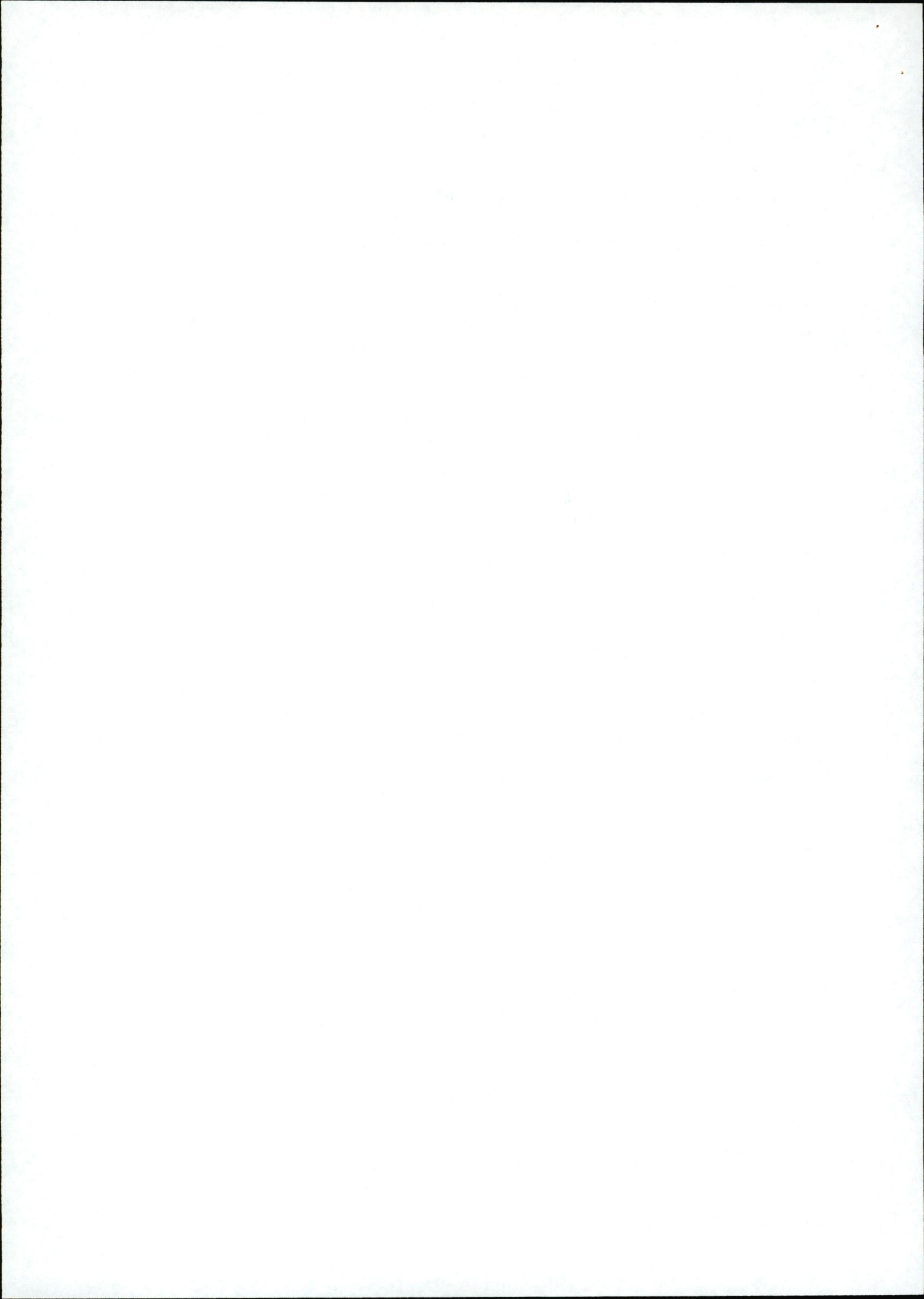
CONSENT WILL BE EASIER TO OBTAIN FOR UNCONTROVERSIAL TREATMENTS WHEREAS CONTROVERSIAL TREATMENTS WILL REQUIRE GREATER JUSTIFICATION AND THE CONSENT OF THE GUARDIANSHIP BOARD.

THE AMENDED SYSTEM WILL ALLOW GREATER INVOLVEMENT BY FAMILY MEMBERS AND CLOSE FRIENDS IN CONSENTING TO UNCONTROVERSIAL TREATMENTS FOR THEIR RELATIVES OR FRIENDS WHO CANNOT CONSENT FOR THEMSELVES.

THIS SYSTEM SHOULD SIGNIFICANTLY REDUCE THE NUMBER OF APPLICATIONS FOR MEDICAL CONSENT BEING MADE TO THE PUBLIC GUARDIAN, AND TO THE BOARD.

THE AMOUNT OF PAPERWORK REQUIRED IN OBTAINING CONSENTS WILL BE REDUCED, WITH RESULTANT BENEFITS TO MEDICAL PRACTITIONERS AND OTHER HEALTH PROFESSIONALS.

AT THE SAME TIME, PATIENTS WILL CONTINUE TO RECEIVE THE PROTECTIONS THAT THE CURRENT SYSTEM PROVIDES.



IN FACT, WITH THE HIGHER LEVELS OF COMPLIANCE THAT CAN BE EXPECTED WITH THE IMPROVED SYSTEM, PROTECTION OF PATIENTS WILL BE SIGNIFICANTLY ENHANCED.

MR PRESIDENT, I WOULD LIKE TO OUTLINE THE PROPOSALS IN MORE DETAIL. FIRST, I SHOULD BRIEFLY EXPLAIN THE CURRENT SCHEME.

PART 5 OF THE DISABILITY SERVICES AND GUARDIANSHIP ACT 1987 DEALS WITH CONSENTS TO MEDICAL AND DENTAL TREATMENT FOR PEOPLE WHO LACK THE CAPACITY TO CONSENT TO THEIR OWN TREATMENT. THAT IS, WHO CANNOT UNDERSTAND THE NATURE AND EFFECT OF THE TREATMENT PROPOSED FOR THEM, BECAUSE OF A DISABILITY OR SOME OTHER REASON.

IT ALSO REFLECTS A NUMBER OF PRINCIPLES.

THE FIRST PRINCIPLE IS THAT PEOPLE SHOULD NOT BE DEPRIVED OF NECESSARY TREATMENT MERELY BECAUSE THEY LACK THE CAPACITY TO CONSENT TO THAT TREATMENT FOR THEMSELVES.

THE SECOND PRINCIPLE IS THAT MEDICAL OR DENTAL TREATMENT ADMINISTERED TO SUCH PEOPLE SHOULD BE ADMINISTERED ONLY FOR THE PURPOSE OF PROMOTING AND MAINTAINING THEIR HEALTH AND WELL BEING.

PART 5 ALSO PROVIDES PROTECTION TO MEDICAL AND DENTAL PRACTITIONERS WHO DELIVER MEDICAL AND DENTAL TREATMENT IN ACCORDANCE WITH THE ACT, PROVIDED THEY ARE NOT NEGLIGENT WHEN ADMINISTERING THAT TREATMENT.

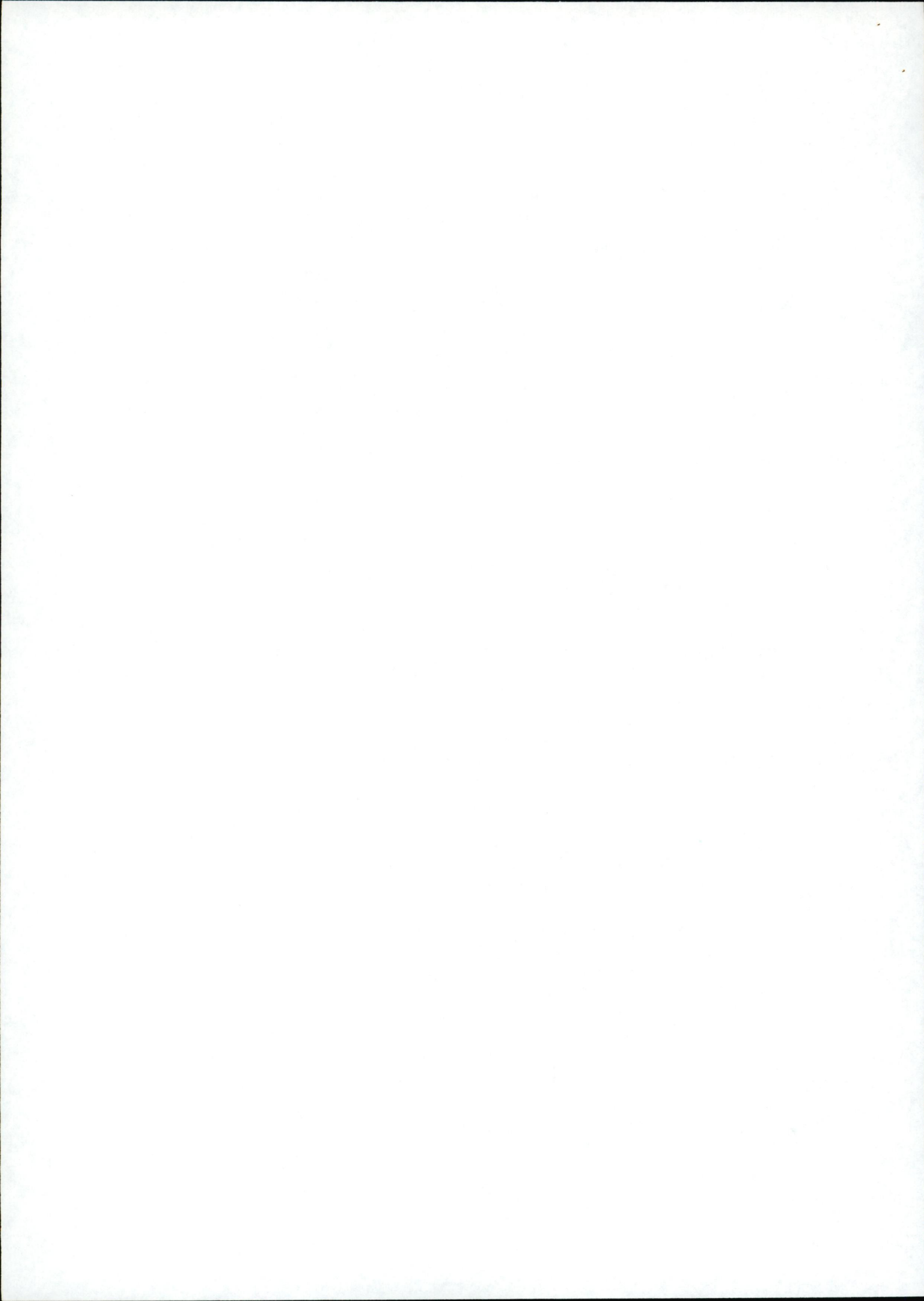
THE ACT ESTABLISHES A HIERARCHY OF SUBSTITUTE DECISION-MAKERS CALLED "PERSONS RESPONSIBLE" WHO CAN GIVE VALID SUBSTITUTE CONSENTS FOR PEOPLE WHO ARE UNABLE TO GIVE THEIR OWN CONSENTS.

THE HIERARCHY OF "PERSONS RESPONSIBLE" IS THE PATIENT'S:

- GUARDIAN (IF THERE IS ONE) OR
- SPOUSE OR DE FACTO SPOUSE
(IF THERE IS ONE) OR
- DIRECT UNPAID CARER (IF THERE IS ONE)

IF THERE IS NO "PERSON RESPONSIBLE" THEN EITHER THE GUARDIANSHIP BOARD, OR THE PUBLIC GUARDIAN IS THE SUBSTITUTE DECISION-MAKER.

PART 5 ALSO PROVIDES FOR 5 CATEGORIES OF TREATMENT:



THE 1ST IS TREATMENT THAT IS URGENTLY NECESSARY TO SAVE A PERSON'S LIFE OR TO PREVENT SERIOUS DAMAGE TO THEIR HEALTH. IN THESE CIRCUMSTANCES A DOCTOR OR A DENTIST MAY ADMINISTER THE TREATMENT WITHOUT FIRST OBTAINING CONSENT FROM A SUBSTITUTE DECISION-MAKER.

THE 2ND IS SPECIAL MEDICAL TREATMENT, TO WHICH ONLY THE GUARDIANSHIP BOARD CAN CONSENT.

THE 3RD IS MAJOR MEDICAL TREATMENT. "PERSONS RESPONSIBLE" AND THE GUARDIANSHIP BOARD IS THE SUBSTITUTE DECISION-MAKER FOR THAT TREATMENT.

THE 4TH AND 5TH CATEGORIES ARE MINOR MEDICAL TREATMENT AND DENTAL TREATMENT. "PERSONS RESPONSIBLE" AND THE PUBLIC GUARDIAN ARE THE SUBSTITUTE DECISION-MAKERS FOR THESE TREATMENTS.

IF A PATIENT OBJECTS TO NON-URGENT TREATMENT THEN ONLY THE GUARDIANSHIP BOARD MAY CONSENT TO THE TREATMENT.

MR SPEAKER, THE TWO MOST SIGNIFICANT AMENDMENTS TO PART 5 ARE FIRSTLY, TO THE DEFINITION OF "PERSON RESPONSIBLE" AND SECONDLY TO THE CONSENT PROVISIONS CONCERNING MINOR MEDICAL TREATMENT.

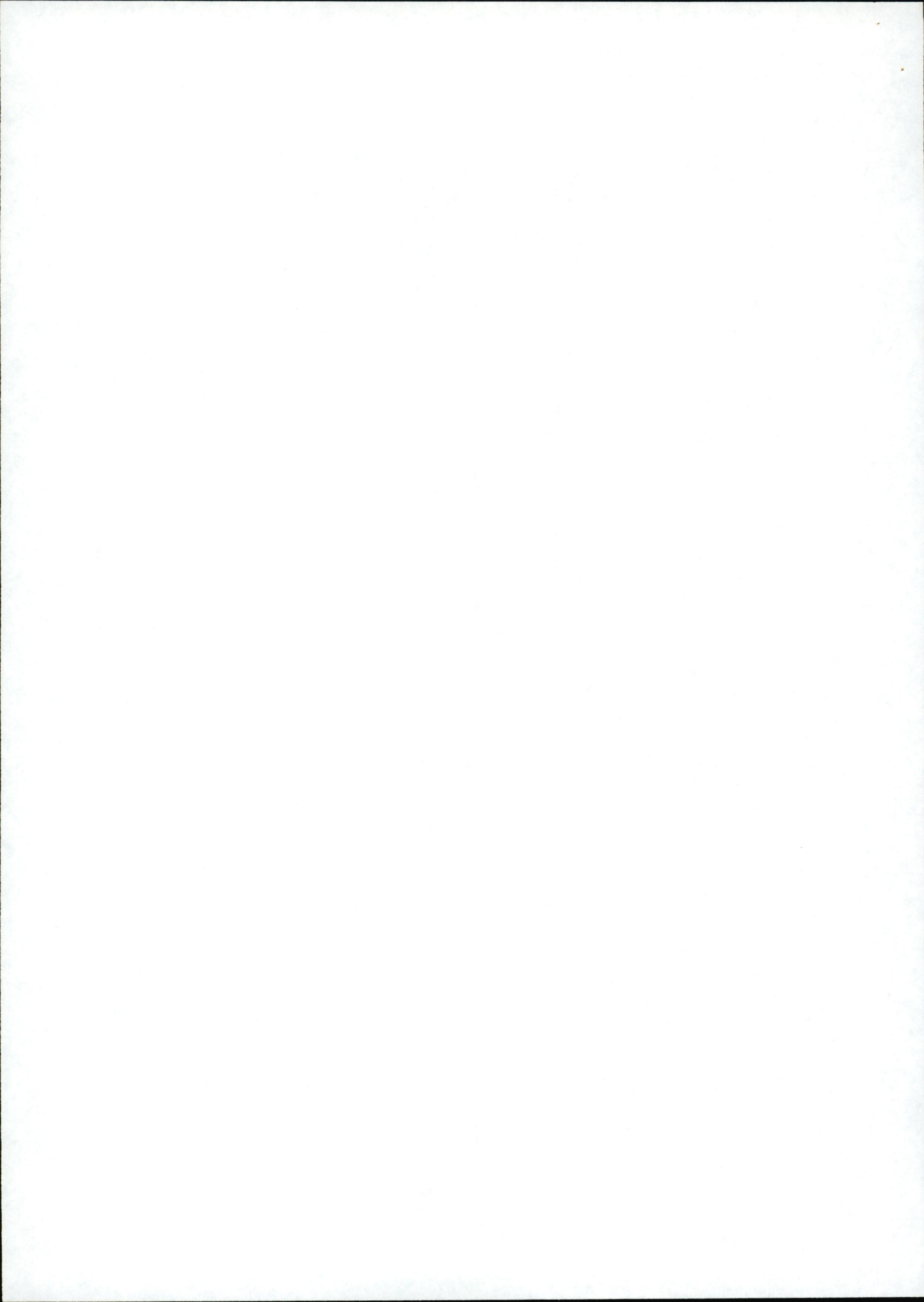
ANOTHER CATEGORY, "CLOSE FRIEND OR RELATIVE" IS ADDED TO THE CATEGORIES OF "PERSONS RESPONSIBLE".

THIS WILL ALLOW FAMILY MEMBERS AND SIGNIFICANT OTHERS TO BE SUBSTITUTE DECISION-MAKERS WITHOUT HAVING TO APPLY TO THE GUARDIANSHIP BOARD TO BE APPOINTED GUARDIANS.

AT PRESENT, FAMILY MEMBERS MUST BE SPOUSES OR DIRECT CARERS BEFORE THEY CAN TAKE ON THIS ROLE AUTOMATICALLY.

THIS AMENDMENT WOULD, FOR INSTANCE, ALLOW THE PARENT OF A PREVIOUSLY HEALTH YOUNG MAN WHO HAS SUSTAINED A SEVERE BRAIN INJURY TO BE THE "PERSON RESPONSIBLE" WITHOUT THE NEED FOR AN APPLICATION TO THE BOARD TO BE APPOINTED GUARDIAN FOR MEDICAL PURPOSES.

SIMILARLY, THE AMENDMENT WOULD ENABLE AN ADULT SON OR DAUGHTER TO ACT AS "PERSON RESPONSIBLE" FOR A PARENT WHO HAS PREVIOUSLY MANAGED INDEPENDENTLY BUT WHO HAS NOW BECOME INCAPACITATED AS THE RESULT OF A STROKE.



MR PRESIDENT, IT IS VERY APPARENT THAT THE AMENDMENT IS A STRONG ACKNOWLEDGMENT OF THE ROLE PLAYED BY FAMILY MEMBERS, INCLUDING PARENTS, SIBLINGS AND OTHER INVOLVED PERSONS.

FURTHER, THE RE-DEFINITION OF CARER, TO INCLUDE PEOPLE WHO PROVIDE OR ARRANGE SERVICES AND SUPPORT FOR PERSONS WITH DISABILITIES, OTHER THAN ON A PAID BASIS, WILL ALSO FURTHER ACKNOWLEDGE THE ROLE OF CARERS. AGAIN IT WILL HAVE THE IMPORTANT EFFECT OF MINIMISING "BUREAUCRACY" AND ENSURING THAT FAMILY MEMBERS AND OTHERS WHO ARE WELL POSITIONED TO BE INVOLVED IN DECISION-MAKING FOR PEOPLE WHO CANNOT CONSENT FOR THEMSELVES, HAVE EVERY OPPORTUNITY TO DO SO.

MR PRESIDENT, I ADD FOR THE BENEFIT OF THOSE WHO MAY EXPRESS CONCERNS REGARDING THE AUTHORITY VESTED IN THESE SUBSTITUTE DECISION-MAKERS, THAT THE GUARDIANSHIP BOARD IS ABLE TO REVIEW THE ACTIONS OF A GUARDIAN OR "PERSON RESPONSIBLE" IF THEY ARE CALLED INTO QUESTION. AS WELL, THERE ARE CERTAIN CIRCUMSTANCES, AS PREVIOUSLY OUTLINED, WHERE ONLY THE GUARDIANSHIP BOARD CAN CONSENT TO TREATMENT.

WITH MINOR TREATMENTS IT IS PROPOSED THAT, IN CIRCUMSTANCES WHERE THERE IS NO "PERSON RESPONSIBLE" (A LESS LIKELY SCENARIO NOW IN VIEW OF THE EXPANDED DEFINITION OF "PERSON RESPONSIBLE"), OR WHERE THE PERSON RESPONSIBLE CANNOT BE FOUND OR IS UNWILLING TO ACT, AND THE PATIENT DOES NOT OBJECT TO THE PROPOSED TREATMENT, THEN THE DOCTOR OR DENTIST MAY PROCEED TO TREAT.

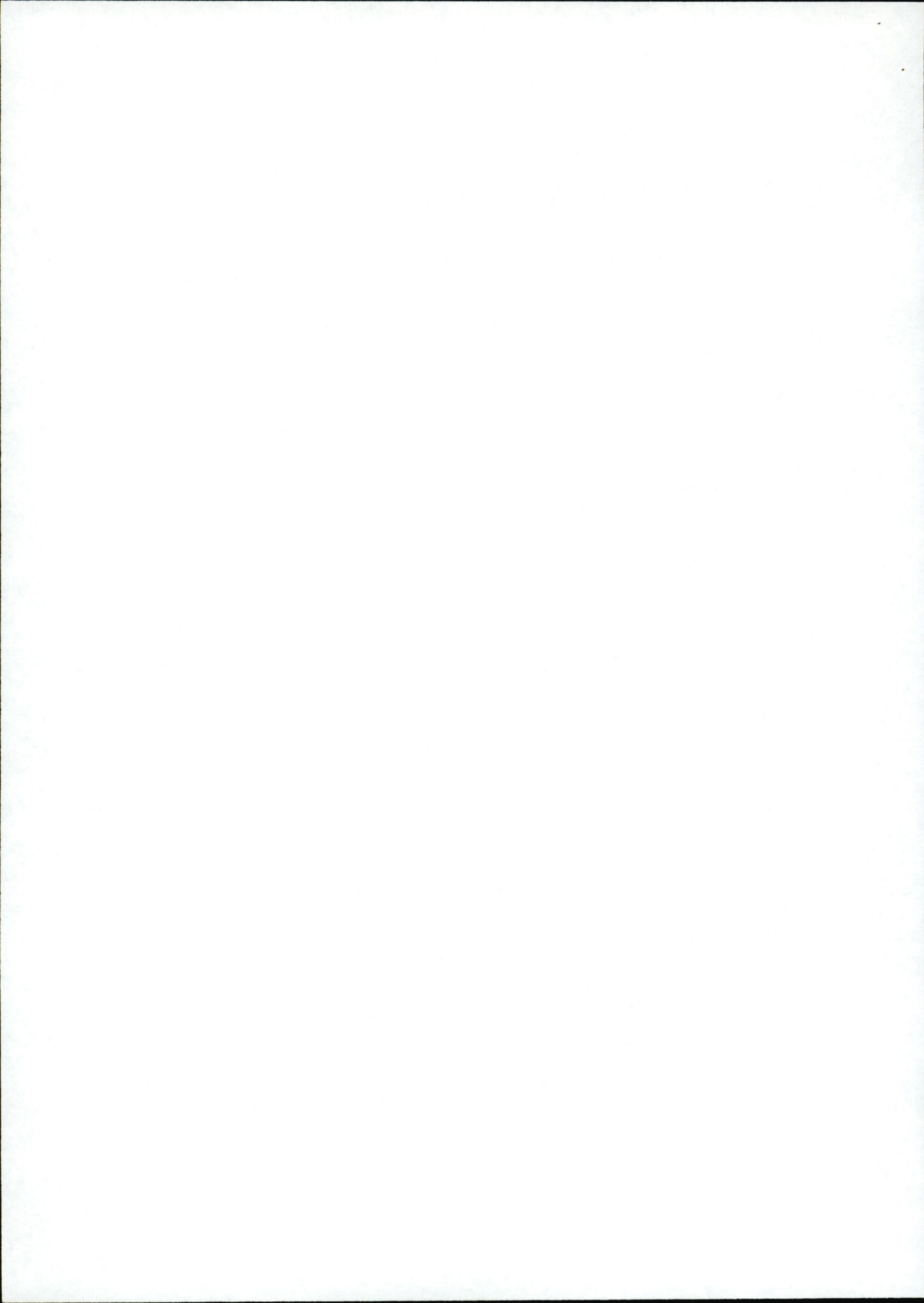
THE DOCTOR OR DENTIST MUST BE SATISFIED THAT THE PATIENT IS INCAPABLE OF GIVING CONSENT AND THAT THE TREATMENT IS BOTH NECESSARY AND THE MOST APPROPRIATE IN THE CIRCUMSTANCES.

AS I HAVE ALREADY SAID, THIS CONSENT CAN ONLY BE GIVEN IN RELATION TO MINOR MEDICAL AND DENTAL TREATMENTS.

AT PRESENT THE PUBLIC GUARDIAN IS EMPOWERED TO GIVE A CONSENT IN THESE CIRCUMSTANCES.

THIS HAS BEEN FOUND TO BE A TIME CONSUMING, EXCESSIVELY BUREAUCRATIC PROCESS THAT HAS BEEN A CAUSE OF WIDESPREAD NON-COMPLIANCE AND GENERALLY OF A LITTLE PATIENT BENEFIT.

AGAIN, MR PRESIDENT, I WOULD POINT OUT THAT COMPLIANCE UNDER THIS LEGISLATION DOES NOT RELIEVE MEDICAL PRACTITIONERS FROM THEIR DUTY OF CARE OR ANY OTHER LIABILITY THEY MAY NORMALLY FACE.



THE AMENDMENT HAS ALSO THE VERY POSITIVE EFFECT OF PLACING THE DOCTOR, OR DENTIST, UNDER A STATUTORY DUTY TO CERTIFY IN WRITING IN THE PATIENT'S CLINICAL RECORD, THAT THE TREATMENT IS NECESSARY AND IS THE FORM OF TREATMENT THAT WILL MOST SUCCESSFULLY PROMOTE THE PATIENT'S HEALTH AND WELL BEING.

I AM INFORMED THAT THIS PROVISION HAS THE ENDORSEMENT OF BOTH THE PUBLIC GUARDIAN AND THE MEDICAL PROFESSION AND, BECAUSE IT IS EXPECTED TO INCREASE COMPLIANCE LEVELS, OF CONSUMER GROUPS ALSO.

THERE ARE A NUMBER OF OTHER AMENDMENTS TO PART 5 DESIGNED TO CLARIFY AND STREAMLINE THE LEGISLATION AND TO MINIMISE EXCESSIVE 'BUREAUCRACY' IN NON-CONTROVERSIAL AREAS.

THE DEFINITION OF "MEDICAL TREATMENT" IS RE-CAST TO EXCLUDE NON-INTRUSIVE EXAMINATIONS, AS WELL AS TRIVIAL AND FIRST-AID TREATMENTS AND "OVER THE COUNTER" MEDICATIONS.

DENTAL TREATMENT IS NOW DIVIDED INTO "MAJOR" AND "MINOR" TREATMENTS. PREVIOUSLY ALL DENTAL TREATMENT HAD BEEN DEALT WITH IN THE SAME WAY AS "MINOR" TREATMENT.

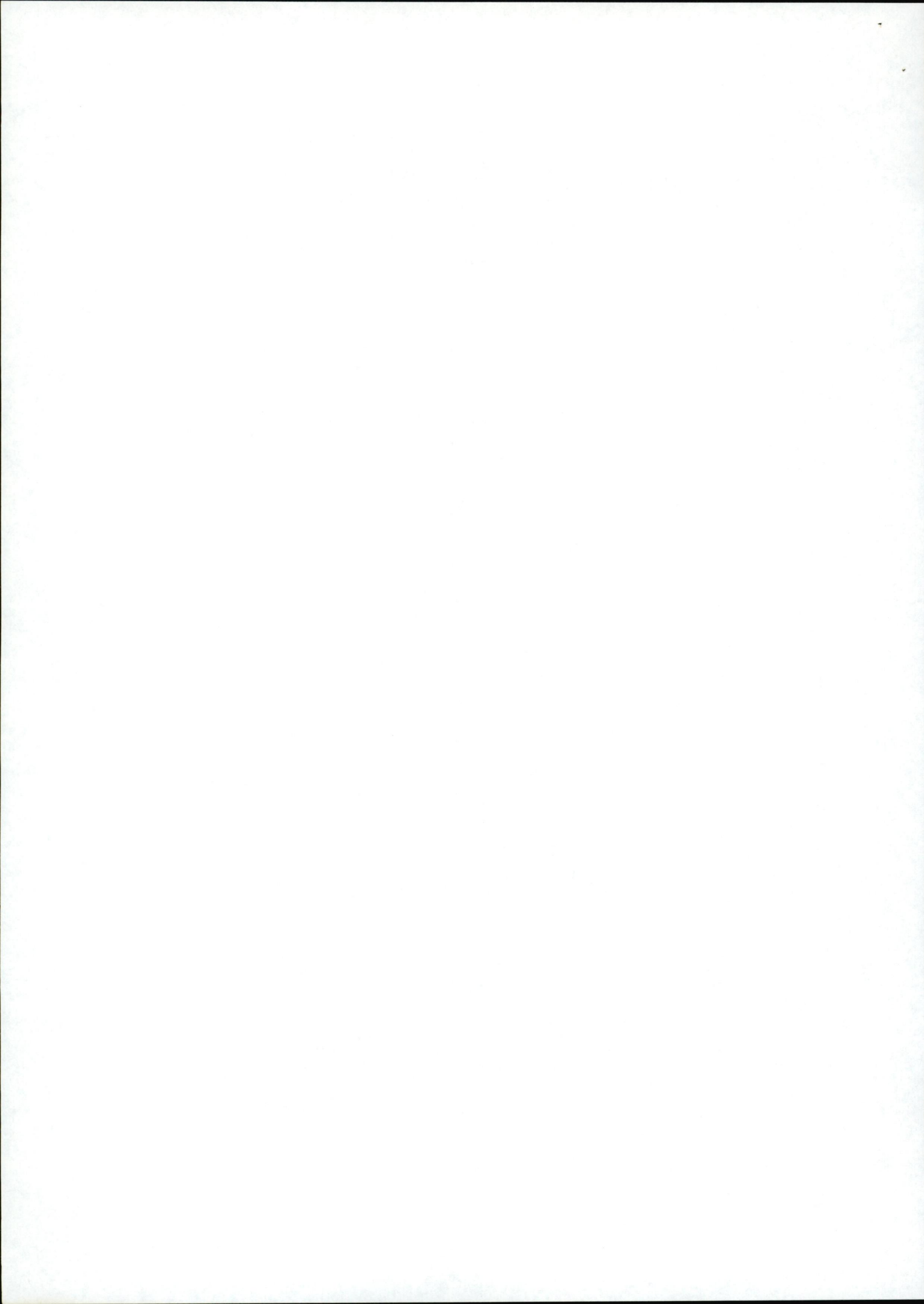
THE AMENDMENT WILL ENSURE THAT THE DIFFERENT TYPES OF DENTAL TREATMENT RECEIVE APPROPRIATE LEVELS OF RESPONSE.

IN RELATION TO URGENT TREATMENTS, TREATMENTS WHICH IN THE CIRCUMSTANCES CAN BE GIVEN WITHOUT CONSENT, THE AMENDMENT MAKES IT CLEAR THAT THIS INCLUDES CASES THAT ARE URGENTLY NECESSARY TO PREVENT SIGNIFICANT PAIN AND DISTRESS.

THE AMENDMENTS ALSO CLARIFY THAT TREATMENT CARRIED OUT UNDER THE SUPERVISION OF A MEDICAL PRACTITIONER, BUT NOT ADMINISTERED BY THAT PRACTITIONER IS TREATMENT WITHIN THE SCHEME OF THE ACT.

A MOST COMMON EXAMPLE, IS WHERE NURSES AND CARERS ADMINISTER MEDICATION PRESCRIBED BY AND UNDER THE DIRECTION OF A TREATING DOCTOR.

THE DEFINITION OF SPECIAL MEDICAL TREATMENT IS EXTENDED TO COVER ANY KIND OF MEDICAL OR DENTAL TREATMENT, THE USE OF WHICH HAS NOT YET GAINED THE SUPPORT OF A SUBSTANTIAL NUMBER OF DOCTORS OR DENTISTS SPECIALISING IN THE AREA OF PRACTICE CONCERNED.



THIS AMENDMENT HAS THE EFFECT OF EXTENDING THE BOARD'S SCRUTINY TO ALL TREATMENTS OF THIS KIND AND, NOT AS IS PRESENTLY THE CASE, ONLY TO THOSE WHICH ARE OUTSIDE THE GUIDELINES OF THE NATIONAL HEALTH AND MEDICAL RESEARCH COUNCIL.

THE GUARDIANSHIP BOARD WILL BE ABLE TO GIVE CONSENT TO SUCH TREATMENTS ONLY WHERE THE TREATMENT IS MANIFESTLY IN THE BEST INTERESTS OF THE PATIENT AND REPRESENTS THE MOST APPROPRIATE ALTERNATIVE FORM OF TREATMENT.

AN AMENDMENT IN RELATION TO "OBJECTIONS TO TREATMENT" WILL CLARIFY THAT "OBJECTIONS" DO NOT INCLUDE INVOLUNTARY RESISTANCE; THAT IS, A REFLEX RESPONSE, OR WHERE THE PATIENT CLEARLY HAS NO COMPREHENSION OF WHAT IS PROPOSED AND WILL NOT BE UNDULY DISTRESSED IF TREATMENT PROCEEDS.

THIS DOES NOT OBTVIATE THE NEED FOR CONSENT, BUT MEANS THAT SUCH SITUATIONS DO NOT NEED TO COME BEFORE THE BOARD.

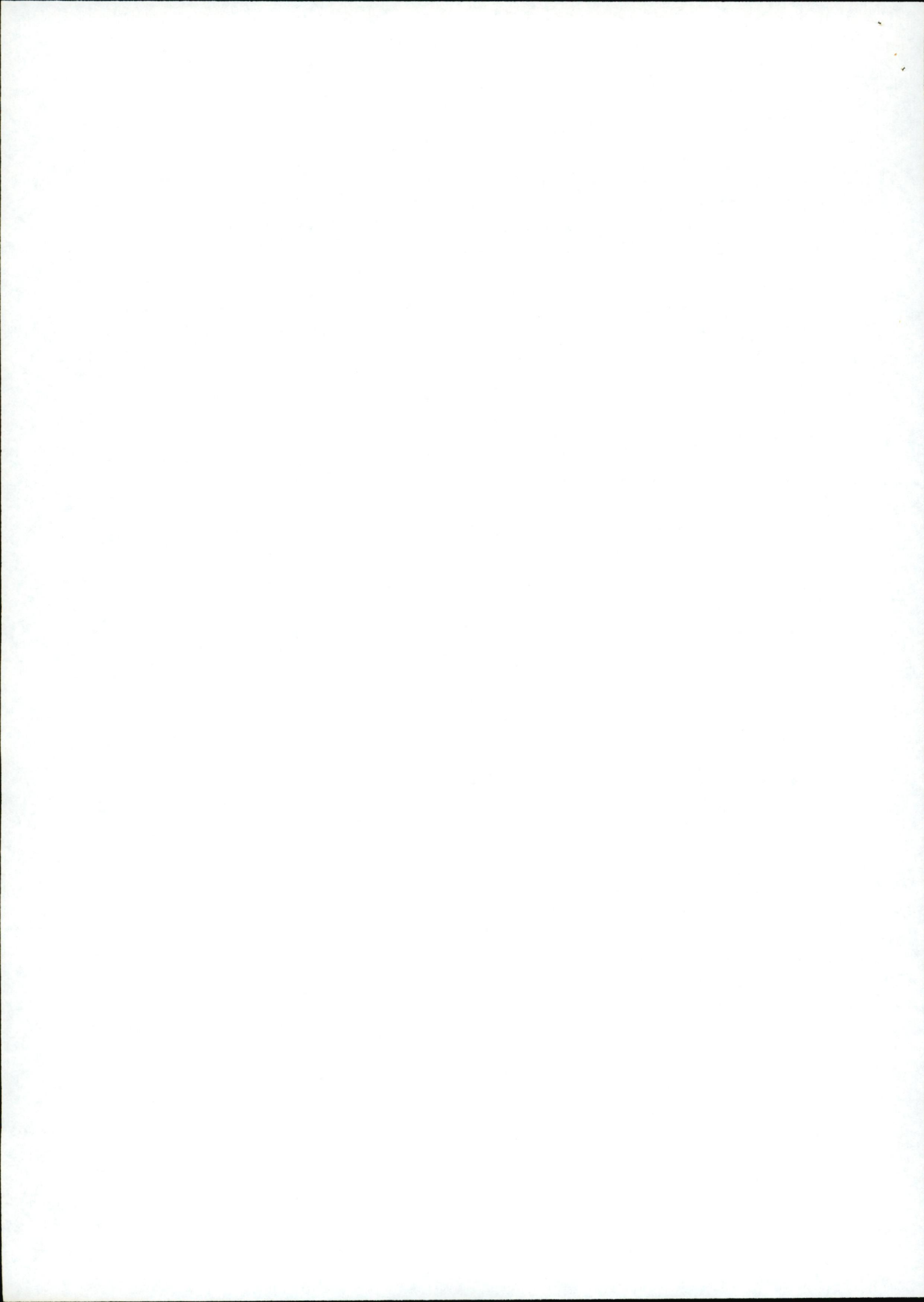
THE AMENDMENT ALSO PROVIDES THAT THE BOARD, HAVING SCRUTINISED AND APPROVED TREATMENT IN THE FACE OF AN INCOMPETENT PATIENT'S OBJECTION IN A PARTICULAR CASE, COULD AUTHORISE A GUARDIAN TO CONSENT TO ONGOING ADMINISTRATION OF THE TREATMENT FOR THAT PATIENT, BUT ONLY WHERE THE ONGOING TREATMENT WAS MANIFESTLY NECESSARY IN THE PATIENT'S INTERESTS.

FINALLY, THE AMENDMENTS WILL ALLOW THE BOARD WHEN GIVING CONSENT TO SPECIAL MEDICAL TREATMENT OF AN ONGOING NATURE, TO EMPOWER THE GUARDIAN TO CONSENT TO THE CONTINUATION OF THE TREATMENT OR TO THE CARRYING OUT OF TREATMENT OF A SIMILAR NATURE, BUT SUBJECT TO ANY CONDITIONS OR DIRECTIONS THE BOARD MAY IMPOSE.

THE FINAL AMENDMENT IS IN RELATION TO THE GUARDIANSHIP BOARD'S POWERS TO DEAL WITH APPLICATIONS FOR FINANCIAL MANAGEMENT UNDER THE PROTECTED ESTATES ACT 1983.

PRESENTLY THE PROTECTED ESTATES ACT EMPOWERS THE GUARDIANSHIP BOARD TO CONSIDER THE MAKING OF A FINANCIAL MANAGEMENT ORDER ONLY WHERE THE BOARD IS CONSIDERING A GUARDIANSHIP APPLICATION OR HAS MADE A GUARDIANSHIP ORDER IN RELATION TO THAT PERSON.

AS I HAVE ALREADY SAID, AN EFFECT OF THE FOREGOING AMENDMENTS WILL BE TO REMOVE THE NEED FOR MANY GUARDIANSHIP APPLICATIONS.



AN UNINTENDED CONSEQUENCE OF THIS IS THAT THE BOARD WOULD HAVE NO POWER TO MAKE MANAGEMENT ORDERS IN RELATION TO THESE PEOPLE, BECAUSE OF THE JURISDICTIONAL BARRIERS IN THE PROTECTED ESTATES ACT.

THE AMENDMENT TO THE PROTECTED ESTATES ACT REMOVES THESE BARRIERS AND PERMITS THE GUARDIANSHIP BOARD TO CONSIDER APPLICATIONS FOR FINANCIAL MANAGEMENT WHETHER OR NOT A GUARDIANSHIP ORDER HAS BEEN MADE, OR AN APPLICATION IS BEING CONSIDERED.

THIS DOES NOT INCREASE THE BOARD'S POWERS, BUT MAKES THE SAME POWERS EXERCISABLE IN MORE CASES.

THE FINANCIAL MANAGEMENT JURISDICTION IS ONE THAT THE GUARDIANSHIP BOARD HAS EXERCISED SINCE ITS INCEPTION, AND IT PROVIDES AN EFFICIENT AND ECONOMICAL RESOURCE TO PERSONS OF LIMITED FUNDS.

AT THE SAME TIME, THE BOARD WILL HAVE A NEW POWER TO REFER ANY SUCH PROCEEDINGS TO THE SUPREME COURT, IF THE BOARD CONSIDERS IT APPROPRIATE AND THE SUPREME COURT ACCEPTS THE REFERRAL.

MR PRESIDENT, IN CONCLUSION, THE ESSENCE OF THE AMENDMENTS PROPOSED IN THIS BILL IS FINE-TUNING OF THE GUARDIANSHIP ACT AND THE PROTECTED ESTATES ACT ARISING FROM EXPERIENCE OF THE GUARDIANSHIP BOARD, THE PUBLIC GUARDIAN AND OTHERS OPERATING UNDER THAT LEGISLATION DURING THE LAST THREE AND A HALF YEARS.

THE AMENDMENTS HOWEVER ARE IMPORTANT AS THEY WILL MAKE THE LEGISLATION WORK BETTER IN THE INTERESTS OF PEOPLE WITH DISABILITIES AND THOSE RESPONSIBLE FOR THEIR HEALTH CARE.

MY COLLEAGUE, THE MINISTER FOR COMMUNITY SERVICES AND ASSISTANT MINISTER FOR HEALTH, WILL BE ASKING THE GUARDIANSHIP BOARD TO MONITOR THESE CHANGES AND ALSO, AFTER COMMUNITY CONSULTATION, TO REPORT TO HIM ON ANY AMENDMENTS TO THE LEGISLATION GENERALLY, THAT COULD IMPROVE THE WAY IT WORKS FOR THE BENEFIT OF PEOPLE WITH DISABILITIES IN THIS STATE.

FOLLOWING THE PASSAGE OF THE BILL, THERE WILL BE A NEED TO PREPARE REGULATIONS BEFORE PROCLAMATION, AND THE GOVERNMENT IS ANXIOUS FOR THIS TO HAPPEN AS QUICKLY AS POSSIBLE.

MR PRESIDENT, I COMMEND THESE AMENDMENTS TO THE HOUSE.

GUARDIANSHIP (AMENDMENT) ACT 1993 No. 26

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Guardianship Act 1987 No. 257
4. Amendment of Protected Estates Act 1983 No. 179

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987

SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT 1983

GUARDIANSHIP (AMENDMENT) ACT 1993 No. 26

NEW SOUTH WALES



Act No. 26, 1993

An Act to amend the Guardianship Act 1987 with respect to consents to medical and dental treatment for persons with disabilities and for other purposes; and to amend the Protected Estates Act 1983. [Assented to 8 June 1993]

Guardianship (Amendment) Act 1993 No. 26

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Guardianship (Amendment) Act 1993.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Guardianship Act 1987 No. 257

3. The Guardianship Act 1987 is amended as set out in Schedule 1.

Amendment of Protected Estates Act 1983 No. 179

4. The Protected Estates Act 1983 is amended as set out in Schedule 2.
-

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987

(Sec. 3)

(1) Section 3 (**Definitions**):

- (a) From section 3 (1), omit the definition of “person responsible”, insert instead:

“person responsible” has the meaning given by section 3A;

- (b) Omit section 3 (5).

(2) Section 3A:

After section 3, insert:

Persons responsible

3A. (1) For the purposes of this Act, the “**person responsible**” for another person (not being a child) means:

- (a) if the other person is under guardianship—the guardian of the other person; or

- (b) if:

- paragraph (a) does not apply; and

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

- the other person has a spouse (not being a person who is himself or herself under guardianship) with whom the other person has a close, continuing relationship,

the spouse; or

(c) if:

- paragraphs (a) and (b) do not apply; and
- subject to subsections (3) and (4), a person has the care of the other person,

the person who has care of the other person; or

(d) if:

- paragraphs (a), (b) and (c) do not apply; and
- the other person has a close friend or relative, that friend or relative; or

(e) if the other person is in the care of the Director-General under section 13—the person who was the responsible person for the other person immediately before the other person came to be in the care of the Director-General.

However, in Part 5 (Medical and dental treatment), “**person responsible**” for another person means the Director-General if the other person is in the care of the Director-General under section 13.

(2) For the purposes of this Act, “**person responsible**” for a child means a person responsible for the child within the meaning of the Children (Care and Protection) Act 1987. However, in Part 5 of this Act, “**person responsible**” for a child means the Minister or the Director-General if the child is in the care of the Minister or Director-General under Part 5 or 6 of that Act.

(3) The circumstances in which a person is to be regarded as having the care of another person include (but are not limited to) the case where the person, otherwise than for remuneration (whether from the other person or any other source), on a regular basis:

(a) provides domestic services and support to the other person; or

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(b) arranges for the other person to be provided with such services and support.

(4) A person who resides in an institution (such as a hospital, nursing home, group home, boarding-house or hostel) at which he or she is cared for by some other person is not, merely because of that fact, to be regarded as being in the care of that other person, and remains in the care of the person in whose care he or she was immediately before residing in the institution.

(5) A person is a close friend or relative of another person for the purposes of this section if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare. However, a person is not to be regarded as such a friend or relative if the person is receiving remuneration (whether from the person or some other source) for any services that he or she performs for the other person in relation to the person's care.

(6) The President of the Board may issue guidelines, not inconsistent with subsection (5), specifying the circumstances in which a person is to be regarded as a close friend or relative of another person.

(7) In this section, "**remuneration**" does not include a carer's pension.

(3) Section 16 (**Guardianship orders**):

After section 16 (2), insert:

(3) Two or more guardians of a person, each with different functions, may be appointed under one or more limited guardianship orders. In that case, a reference to the guardian of the person is a reference to whichever of those guardians has the relevant function.

(4) Section 33 (**Definitions**):

(a) Omit section 33 (1), insert instead:

(1) In this Part:

"**medical or dental treatment**" or "**treatment**" means:

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

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

but does not include:

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

“major treatment” means treatment (other than special treatment) that is declared by the regulations to be major treatment for the purposes of this Part;

“minor treatment” means treatment that is neither special treatment nor major treatment;

“special treatment” means:

- (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or
- (b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned; or

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

- (c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part.
- (b) Omit section 33 (4).
- (5) Part 5, Division 2:
Omit the Division, insert instead:

Division 2—Medical and dental treatment

Offences

35. (1) A person must not carry out medical or dental treatment on a patient to whom this Part applies unless:

- (a) consent for the treatment has been given in accordance with this Part; or
- (b) the carrying out of the treatment is authorised by this Part without any such consent; or
- (c) the treatment is carried out in accordance with an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons.

Maximum penalty:

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

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

Who may give consent

36. (1) Consent to the carrying out of medical or dental treatment on a patient to whom this Part applies may be given:

- (a) in the case of minor or major treatment—by the person responsible for the patient; or
- (b) in any case—by the Board.

(2) The guardian of a patient may also consent to the carrying out of continuing or further special treatment if the Board has previously given consent to the carrying out of the

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

treatment and has authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature.

When treatment may be carried out without any such consent

37. (1) Medical or dental treatment may be carried out on a patient to whom this Part applies without consent given in accordance with this Part if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency:

- (a) to save the patient's life; or
- (b) to prevent serious damage to the patient's health; or
- (c) except in the case of special treatment—to prevent the patient from suffering or continuing to suffer significant pain or distress.

(2) Minor treatment may (subject to subsection (3)) also be carried out on a patient to whom this Part applies without any consent given in accordance with this Part if:

- (a) there is no person responsible for the patient; or
- (b) there is such a person but that person either cannot be contacted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment.

(3) The medical practitioner or dentist carrying out, or supervising the carrying out of, minor treatment in accordance with subsection (2) is required to certify in writing in the patient's clinical record that:

- (a) the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being; and
- (b) the patient does not object to the carrying out of the treatment.

(6) Section 41 (**Consents given by the Public Guardian**):

Omit the section.

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(7) Section 42 (**Applications to the Board**):

Omit section 42 (3), insert instead:

(3) Whenever such an application is made for consent to the carrying out of medical or dental treatment and the treatment cannot be carried out without that consent, the Board may, by order:

- (a) direct the person who is to carry out the treatment not to start the treatment; or
- (b) if the treatment has already started—direct the person who is carrying out the treatment to discontinue it, until the Board has determined the application.

(4) A person who, without lawful excuse, fails to comply with such an order is guilty of an offence.

Maximum penalty (subsection (4)): 5 penalty units.

(8) Section 43 (**Service of applications**):

- (a) After “the patient;” wherever occurring, insert “and”.
- (b) From section 43 (1) (c), omit “located; and”, insert instead “located.”.
- (c) Omit section 43 (1) (d).

(9) Section 44 (**Board may give consent**):

From section 44 (2) (a) (iv), omit “the Public Guardian”, insert instead “any guardian of the patient who has responsibility for making decisions with respect to the carrying out of medical or dental treatment on the patient”.

(10) Section 45:

Omit the section, insert instead:

Restrictions on Board’s power to give consent

45. (1) The Board must not give consent to the carrying out of medical or dental treatment on a patient to whom this Part applies unless the Board is satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient’s health and well-being.

(2) However, the Board must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(a) to save the patient's life; or
(b) to prevent serious damage to the patient's health,
or unless the Board is authorised to give that consent under
subsection (3).

(3) In the case of:

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

the Board may give consent to the carrying out of the
treatment if it is satisfied that:

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

(11) Section 45A:

After section 45, insert:

**Consents to continuing or further special treatment by a
patient's guardian with authority of the Board**

45A. (1) The Board may, when giving consent to the
carrying out of special treatment on a patient to whom this
Part applies, confer on the guardian of the patient authority to
consent:

- (a) to the continuation of the treatment; or
(b) to the carrying out on the patient of further special
treatment of a similar nature.

(2) The Board may only confer such an authority at the
request or with the consent of the guardian.

(3) The Board may at any time:

- (a) impose conditions or give directions as to the exercise
of such an authority; or

Guardianship (Amendment) Act 1993 No. 26

SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(b) revoke such an authority.

(4) If the guardian has an authority conferred under this section, any person may request the guardian for the guardian's consent to the carrying out of the relevant treatment.

(5) In considering a request, a guardian must have regard to:

- (a) the views (if any) of the patient; and
- (b) the objects of this Part.

(12) Section 46 (**Effect of consent**):

- (a) In section 46 (2), after "person responsible for", insert ", or the guardian of,".
- (b) From section 46 (2) (a), omit "by whom the proposed treatment is to be carried out", insert instead "carrying out or supervising the proposed treatment".
- (c) Omit section 46 (3), insert instead:

(3) A consent given by the guardian of the patient has effect despite any objection made by a patient to the carrying out of the treatment if the guardian has consented to that treatment in accordance with the authority of the Board under section 46A.

(4) For the purposes of this section, an objection by a patient to that carrying out of proposed medical or dental treatment is to be disregarded if:

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

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

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SCHEDULE 1—AMENDMENT OF GUARDIANSHIP ACT 1987—
continued

(13) Section 46A:

After section 46, insert:

Power of guardian to override patient's objection to treatment when authorised by the Board

46A. (1) The Board may confer on the guardian of a patient to whom this Part applies authority to override the patient's objection to the carrying out on the patient of major or minor treatment.

(2) The Board may confer such an authority only at the request or with the consent of the guardian and only if it is satisfied that the patient has on previous occasions objected to similar treatment being carried out on the patient.

(3) The Board may at any time:

- (a) impose conditions or give directions as to the exercise of such an authority; or
- (b) revoke such an authority.

(4) The guardian may exercise such an authority only if satisfied that the proposed treatment is manifestly in the best interests of the patient.

(14) Section 53 (**Procedure at sittings of the Board**):

Omit section 53 (2), insert instead:

(2) The provisions of this Act, the regulations and the rules of the Board relating to proceedings before the Board apply to proceedings before the Board under the Protected Estates Act 1983.

**SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES
ACT 1983**

(Sec. 4)

(1) Section 17A (**Guardianship Board may make management orders**):

(a) Omit section 17A (1), insert instead:

(1) The Board may:

- (a) on an application made in accordance with section 17B; or

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SCHEDULE 2—AMENDMENT OF PROTECTED ESTATES ACT
1983—*continued*

(b) on making a guardianship order under Part 3 of the Guardianship Act 1987,

consider a person's capability to manage his or her own affairs and, if satisfied that the person is not capable of managing those affairs, may order that the estate of the person be subject to management under this Act.

(b) After section 17A (2), insert:

(3) The Board has no jurisdiction to make an order under this section in respect of a person if the question as to the person's capability to manage his or her own affairs is before the Court.

(4) The Board may, if it considers it appropriate to do so and with the concurrence of the Court, refer a proceeding relating to a person's capability to manage his or her affairs to the Court.

(2) Section 17B:

After section 17A, insert:

Application to the Guardianship Board for a management order

17B. (1) An application for an order under section 17A (1) may be made by any person who claims to have a genuine concern for the welfare of the person who is the subject of the application.

(2) An application must specify:

- (a) the applicant's interest in the matter; and
- (b) the grounds on which it is claimed that a person named in the application is not capable of managing his or her own affairs.

(3) The applicant must, as soon as practicable after making an application, arrange for a copy of the application to be served on:

- (a) the person referred to in subsection (2) (b); and
- (b) if there is a person responsible for that person (within the meaning of the Guardianship Act 1987)—the person responsible; and
- (c) the Protective Commissioner.

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(4) The copy of the application so served must be endorsed with a notice specifying the time, date and place set down for hearing the application.

(5) A failure to serve a copy of the application in accordance with this section does not vitiate a decision of the Board on the application.

(6) The proceedings of the Board in relation to the application are regulated by the Guardianship Act 1987.

*[Minister's second reading speech made in—
Legislative Assembly on 21 April 1993
Legislative Council on 18 May 1993]*

