



## Guardianship Regulation 2016 (repeal of Guardianship Regulation 2010 – commencement date of 2016 Regulation 1 September 2016)

### Proposed changes and NCAT Comments

Provision in Act	Text	Existing Regulation	Proposed Regulation	NCAT comment
		<b>Part 1 Preliminary</b>	<b>Part 1 Preliminary</b>	
		<p>Clause 3 (1) In this Regulation:</p> <p><b>drug of addiction</b> means a substance that is specified in Schedule Eight of the Poisons List under the <i>Poisons and Therapeutic Goods Act 1966</i>.</p> <p><b>restricted substance</b> means a substance that is specified in Schedule Four of the Poisons List under the <i>Poisons and Therapeutic Goods Act 1966</i>.</p> <p><b>simple sedation</b> means a technique in which the use of a drug or drugs produces a state of depression of the central nervous system enabling treatment to be carried out,</p>	<p>Clause 3 – 2 definitions moved from this clause</p> <p>Definition of drug of addiction moved to Clause 10 (now Major Medical treatment existing clause 11)</p> <p>Definition of simple sedation moved to clause 11 – major dental treatment (existing clause 12)</p> <p>Restricted substance remains in clause 3</p>	



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		and in which:  verbal contact with the patient is maintained throughout the period of sedation, and the drugs and techniques used have a margin of safety wide enough to render unintended loss of consciousness unlikely.		
		<b>Part 2 – Enduring Guardian</b>	<b>Part 2 – Enduring Guardian</b>	
Section 5 - classes of eligible witnesses to an enduring guardianship appointment	(iv) a person (or a person belonging to a class of persons) <b>prescribed by the regulations</b> for the purposes of this subparagraph	Clause 4 For the purposes of paragraph (a) (iv) of the definition of <b>eligible witness</b> in section 5 of the Act, the following classes of persons are prescribed: (a) overseas-registered foreign lawyers within the meaning of Part 2.7 of the <i>Legal Profession Act 2004</i> ,  (b) a person: (i) who is employed, in a Division of the Government Service, to enable the NSW Trustee and Guardian or the Office of the Public Guardian to	Clause 4 – minor changes to definition of eligible witness  <b>4 Eligible witnesses</b> (1) For the purposes of paragraph (a) (iv) of the definition of <b>eligible witness</b> in section 5 of the Act, the following persons or classes of persons are prescribed: (a) foreign lawyers within the meaning of <b>the Legal Profession Uniform Law (NSW)</b> ,  (b)the Public Guardian,  (c) a person: (i) who is employed in the Public Service to enable the Public Guardian to exercise the Public Guardian’s functions, and (ii) who has completed an	It is noted that the broadening of the class of witnesses allows greater accessibility to the public.  Suggest that “foreign lawyers” be “a foreign lawyer” as per section 6 of the <i>Legal Profession Uniform Law (NSW)</i> .  Note that the Public Guardian or its employees may be called as witnesses before the Tribunal if the Enduring Guardianship instrument is



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		<p>exercise its functions, and (ii) who has completed an approved course of study, and and iii) who has been approved by the Chief Executive Officer of the NSW Trustee and Guardian for the purposes of this paragraph.</p> <p>For the purposes of this clause:</p> <p><b>approved course of study</b> means a course of study approved by the Minister by order published in the Gazette.</p>	<p>approved course of study, and (iii) who has been approved by the Public Guardian for the purposes of this paragraph,</p> <p>(d) a person: (i) who is employed in the Public Service to enable the NSW Trustee and Guardian to exercise its functions, and (ii) who has completed an approved course of study, and (iii) who has been approved by the Chief Executive Officer of the NSW Trustee and Guardian for the purposes of this paragraph.</p> <p>(2) For the purposes of this clause: <b>approved course of study</b> means a course of study approved by the Minister by order published in the Gazette.</p>	<p>reviewed.</p>
Section 6C – form for appointment of enduring guardian	<p>(1) An instrument does not operate to appoint a person as an enduring guardian unless:</p> <p>(a) it is in or to the effect of the form <b>prescribed by the regulations ...</b></p>	<p>Clause 5 and Form 1 in Schedule 1</p>	<p>Clause 5 and Form 1 in Schedule 1– minor change in form to reflect definition above (i.e. overseas registered foreign lawyer now foreign lawyer)</p>	<p>Signature line for certificate of witness should include ‘the Public Guardian’ as well as ‘ approved employee of ... the Office of the Public Guardian’</p> <p>P11 of Notes on Form 1 should refer to the ‘NSW Civil and Administrative Tribunal’ [NB this is in two places in the notes]</p>
Section 6H – form for revocation of appointment of	<p>(b) the instrument is in or to the effect of the form</p>	<p>Clause 6 and Form 2 in Schedule 1</p>	<p>Clause 6 and Form 2 in Schedule 1 minor change in form to reflect definition above (i.e. overseas</p>	<p>P 11 Form 2 Signature line for certificate of witness should include ‘the Public Guardian’</p>



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enduring guardian	<b>prescribed by the regulations, and...</b>		registered foreign lawyer now foreign lawyer)	as well as ' approved employee of ... the Office of the Public Guardian'.
Section 6HB – form for resignation of enduring guardian	(2) A written notice resigning an appointment as an enduring guardian must:  (a) be in or to the effect of the <b>form prescribed by the regulations</b> , and	Clause 7 and Form 3 in Schedule 1	Clause 7 and Form 3 in Schedule 1  minor change in form to reflect definition (i.e. overseas registered foreign lawyer now foreign lawyer)	P 12` Form 3 Signature line for certificate of witness should include 'the Public Guardian' as well as ' approved employee of ... the Office of the Public Guardian'  P12 of Notes on Form 3 should refer to the 'NSW Civil and Administrative Tribunal' [NB this is in two places in the notes]
Section 6O (5) – recognition of enduring guardians appointed in other states or territories	5) In this section: <i>Interstate enduring guardian</i> means a person who is appointed as a guardian by an instrument (or an instrument belonging to a class of instruments) <b>prescribed by the regulations</b> that is made under a law of a State or Territory (other than New South Wales).	Clause 8 For the purposes of the definition of <b>interstate enduring guardian</b> in section 6O (5) of the Act, the following instruments are prescribed: (a) an enduring power of attorney made under the <i>Powers of Attorney Act 2006</i> of the Australian Capital Territory,  (b) an enduring power of attorney made under Part 2 of Chapter 3 of the <i>Powers of Attorney Act 1998</i> of Queensland, (c) an advance health directive made under Part 3	Clause 8 – updated to reflect new laws in the Northern Territory and updating information about parts of the law from South Australia and in particular clauses 8 (d) and (e) as SA legislation repealed.  Proposal is to replace for the purposes of the definition of interstate enduring guardian, by an advance care directive.  For the purposes of the definition of <b>interstate enduring guardian</b> in section 6O (5) of the Act, the following instruments are prescribed: (a) an enduring power of attorney made under the <i>Powers of</i>	



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		<p>of Chapter 3 of the <i>Powers of Attorney Act 1998</i> of Queensland,</p> <p>(d) a medical power of attorney made under Division 3 of Part 2 of the <i>Consent to Medical Treatment and Palliative Care Act 1995</i> of South Australia,</p> <p>(e) an appointment of an enduring guardian made under Part 3 of the <i>Guardianship and Administration Act 1993</i> of South Australia,</p> <p>(f) an appointment of an enduring guardian made under Division 5A of Part 4 of the <i>Guardianship and Administration Act 1986</i> of Victoria,</p> <p>(g) an enduring power of attorney (medical treatment) made under Part 2 of the <i>Medical Treatment Act 1988</i> of Victoria,</p> <p>(h) an appointment of an enduring guardian made under Part 5 of the <i>Guardianship and Administration Act 1995</i> of Tasmania,</p>	<p><i>Attorney Act 2006</i> of the Australian Capital Territory,</p> <p>(b)an enduring power of attorney or an advance health directive made under Chapter 3 of the <i>Powers of Attorney Act 1998</i> of Queensland,</p> <p>(c) an enduring power of attorney made under Part 3 of the <i>Powers of Attorney Act 2014</i> of Victoria,</p> <p>(d) an enduring power of attorney (medical treatment) made under Part 2 of the <i>Medical Treatment Act 1988</i> of Victoria,</p> <p>(e) an instrument of appointment of an enduring guardian made under Part 5 of the <i>Guardianship and Administration Act 1995</i> of Tasmania,</p> <p>(f) an instrument of appointment of an enduring guardian made under Part 9A of the <i>Guardianship and Administration Act 1990</i> of Western Australia,</p> <p><b>(g)an advance care directive made under Part 3 of the <i>Advance Care Directives Act 2013</i> of South Australia,</b></p> <p><b>(h)an advance personal plan made under Part 2 of the <i>Advance Personal Planning Act</i> of the Northern Territory,</b></p> <p><b>(i) an enduring power of attorney made under Part III of</b></p>	



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		<p>(i) an appointment of an enduring guardian made under Part 9A of the <i>Guardianship and Administration Act 1990</i> of Western Australia,</p> <p>(j) an instrument of a similar nature to an instrument specified in paragraphs (a)–(i) that was made before the provisions in the relevant paragraph came into force and that is taken to be made under those provisions, or otherwise remains in force, by virtue of a savings or transitional provision made in relation to those provisions.</p>	<p><b>the Powers of Attorney Act of the Northern Territory,</b></p> <p>(j) an instrument of a similar nature to an instrument specified in paragraphs (a)–(i) that was made before the provisions in the relevant paragraph came into force and that is taken to be made under those provisions, or otherwise remains in force, by virtue of a savings or transitional provision made in relation to those provisions.</p>	
		<b>Part 3 Medical and dental treatment</b>	<b>Part 3 Medical and dental treatment</b>	
Section 33(1) definition of <i>special medical treatment</i>	(c) any other kind of treatment <b>declared by the regulations</b> to be special treatment for the purposes of this Part...	<p>Clause 9</p> <p>For the purposes of paragraph (c) of the definition of <b><i>special treatment</i></b> in section 33 (1) of the Act, the following medical treatment is declared to be special</p>	<p>Clause 9</p> <p>No change</p>	Query whether “vasectomy” and “tubal occlusion” need to be listed as prescribed special treatments as they are already captured by s33(1)(a) of the Act.



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		treatment: (a) any treatment that is carried out for the purpose of terminating pregnancy, (b) any treatment in the nature of a vasectomy or tubal occlusion, (c) any treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.		
Section 45(3)(b) restrictions on the Tribunal's power to give consent	(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) <b>prescribed special treatment (other than special treatment of a kind specified in paragraph (a) of that definition),</b> the Tribunal may give consent to the	Clause 10 – Experimental special medical treatment	Moved to new Clause 14  No change save for the word one being replace with number 1	Suggest the use of plain English and a better (more user-friendly) lay-out of clause 10 could be adopted, perhaps in a table or in sub-groups.



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	<p>carrying out of the treatment if it is satisfied that:</p> <p>(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</p> <p>(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.</p>			
<p>Section 33(1) definition of <i>major treatment</i></p>	<p><i>major treatment</i> means treatment (other than special treatment or treatment in the course of a clinical trial) that is <b>declared by the</b></p>	<p>Clause 11 Major medical treatment</p>	<p>Clause 10 – Major Medical Treatment No change to sub-clause (1)</p> <p>Added new sub-clause (2) definition of drug of addiction Moved from clause 3 - definitions</p>	





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	<b>regulations</b> to be major treatment for the purposes of this Part.			
Section 33(1) definition of <i>major treatment</i>		Clause 12 Major dental treatment	Clause 11 – Major dental treatment No change to sub-clause (1)  Added new sub-clause (2) definition of simple sedation Moved from clause 3 - definitions	
Section 40(4) consents given by persons responsible	<b>(4) The regulations may make provision for the manner and form</b> in which:  (a) requests under this section shall be made, and  (b) consents under this section shall be given.	Clause 13 Requests for consent to carrying out of medical or dental treatment	Clause 12 - Requests for consent to carrying out of medical or dental treatment  No change from current wording	
Section 40(4) consents given by persons responsible		Clause 14 Consents to the carrying out of medical or dental treatment	Clause 13 - Consents to the carrying out of medical or dental treatment	
Section 48 Clinical Records	<b>The regulations may make provision for or with respect to the keeping of</b>	Clause 15 Clinical records	Clause 15 – Clinical records  No change	.



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	records of medical or dental treatment carried out on a patient to whom this Part applies.			
		<b>Part 4 Miscellaneous</b>	<b>Part 4 Miscellaneous</b>	
Section 48A Corresponding laws	In this Part, corresponding law means a law in force in another State, a Territory, another country or part of another country that is <b>declared by the regulations</b> to be a corresponding law for the purposes of this Part.	Clause 16 – Corresponding laws	Clause 16 – Corresponding laws  No change	
Section 80A Administrative review by Tribunal of guardianship decisions of Public Guardian	(1) An application may be made to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of a decision of the Public Guardian that:	Clause 17 – Administrative review by Tribunal of guardianship decisions of Public Guardian	Clause 17 – Administrative review by Tribunal of guardianship decisions of Public Guardian  No change	



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	<p>(a) is made in connection with the exercise of the Public Guardian's functions under this Act as a guardian, and</p> <p>(b) is of a class of decision <b>prescribed by the regulations</b> for the purposes of this section.</p>			
Section 98 service of notices	<p>(1) Any notice or other instrument required or authorised by this Act to be served on a person is sufficiently served if the notice or other instrument is:</p> <p>(a) delivered personally to the person,</p> <p>(b) left with a person who is apparently of or above the age of 16 years at, or sent by prepaid post to, the</p>	Clause 18 – Service of notices and other instruments	<p>Clause 18 – Service of notices and other instruments</p> <p>No change</p>	Query whether section and clause remains relevant noting the existence of Part 4 of the Civil and Administrative Tribunal Rules 2014.



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	<p>address last known to the Director-General of the person on whom the notice or other instrument is to be served, or</p> <p>(c) where no address of the person is known to the Director-General, published or otherwise dealt with <b>as may be prescribed by the regulations.</b></p> <p>(2) If such a notice or instrument is:</p> <p>(a) sent by post as referred to in subsection (1) (b), it shall be deemed to have been served at the time it would be delivered in the ordinary course of post, or</p> <p>(b) published or otherwise dealt with as referred to</p>			



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	in subsection (1) (c), it shall be deemed to have been served at <b>such time as may be prescribed by the regulations.</b>			
		Clause 19 Savings	Clause 19 – Savings  Updated to 2010 Regulation (from 2005) No change to provision	