



DEPARTMENT OF JUSTICE

Regulatory Impact Statement

Guardianship Regulation 2016

February 2016

TITLE OF REGULATORY PROPOSAL: *Guardianship Regulation 2016*

PROPONENT: Department of Justice

RESPONSIBLE MINISTER: The Hon Gabrielle Upton, Attorney General

RELEVANT ACT: *Guardianship Act 1987*

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Attachment: Proposed Draft *Guardianship Regulation 2016*

1. INTRODUCTION

This document is a Regulatory Impact Statement (**RIS**) for the proposed *Guardianship Regulation 2016* (**the proposed Regulation**). The proposed Regulation relates to the *Guardianship Act 1987* (**the Act**).

Before a Regulation is made, the responsible Minister must ensure (as far as is reasonably practicable) that a RIS is prepared covering the substantive matters to be dealt with by the proposed Regulation and that a formal process of review is undertaken before the proposed Regulation is made.

The purpose of a RIS is to ensure that the economic and social costs of any Regulation are fully considered and that the option which produces the greatest net benefit to the community is chosen.

The current stage of the review and consultation process involves seeking comments from the community and key stakeholders on the Public Exhibition Draft of the proposed Regulation and this RIS.

Consultation must be undertaken with appropriate community representatives, relevant interest groups and interested members of the public likely to be affected by the proposed Regulation.

2. HOW TO MAKE A SUBMISSION

Submissions about the proposed Regulation can be made to:

By mail: Executive Director, Justice Strategy & Policy
 Department of Justice
 GPO Box 31
 SYDNEY 2001

By email: policy@justice.nsw.gov.au

If you would like to provide comments in an alternative format, please call the Diversity Services on (02) 8688 8460 or 8688 7507. For people who have a speech or hearing impairment, please contact us via the National Relay Service on 133 677.

All submissions will be treated as public and may be published, unless the submission indicates that it is to be treated as confidential.

Closing date for submissions: **14 June 2016**

3. BACKGROUND

3.1 *Guardianship Act 1987* – Purpose and Principles

The Act was passed in 1987 with the support of all major parties and wide community support.

The Act established an adult guardianship system for people with disabilities in NSW, and introduced a scheme for consent to medical and dental treatment on behalf of adults who are incapable of consenting for themselves.

The principles set out in section 4 of the Act require paramount consideration be given to the welfare and interests of persons with a disability and that their right of freedom of decision and freedom of action should be restricted as little as possible. Equally, a fundamental principle is that such persons should be protected from abuse, exploitation and neglect.

The objects of Part 5 of the Act, dealing with consent to medical and dental treatment, are set out in section 32 as follows:

- (a) to ensure that people are not deprived of necessary medical or dental treatment merely because they lack the capacity to consent to the carrying out of such treatment, and
- (b) to ensure that any medical or dental treatment that is carried out on such people is carried out for the purpose only of promoting and maintaining their health and well-being.

3.2 Regulation Making Power

The Act authorises the making of Regulations in the following sections:

Section 3	Prescribed class of premises identified as exempt premises for the purposes of certain provisions.
Section 5	Prescribed persons or class of persons who are eligible witnesses for the purpose of witnessing enduring guardianship instruments.
Section 6C(1)(a)	Prescribed form of instrument to be used in appointing an enduring guardian.
Section 6H(2)(b)	Prescribed form of instrument to be used in revoking the appointment of an enduring guardian.
Section 6HB(2)(a)	Prescribed form for a written notice of resignation of an appointment as an enduring guardian.

Section 6O(5)	Prescribed instruments made under interstate law which may be used to appoint interstate enduring guardians as defined in this section.
Section 33(1)(c)	Declare acts to be medical or dental treatment or treatment for the purposes of Part 5 of the Act.
Section 33(1)(g)	Declare any kind of treatment not to be treatment for the purposes of the Act.
Section 33(1)	Declare a treatment to be major treatment.
Section 33(1)	Declare any other kind of treatment to be special treatment.
Section 40(4)	Prescribed manner in which requests for treatment shall be made and manner in which consents to treatment shall be given.
Section 48	Keeping of records of medical and dental treatment carried out under the provisions of the Act.
Section 48A & 48B(7)	Declare a law to be a corresponding law for the purposes of Part 5A of the Act which provides for recognition in NSW of guardians and financial managers appointed outside NSW.
Section 77	Prescribed person or class of persons for the purpose of delegation of the functions inferred or imposed on the Public Guardian by or under any law.
Section 78	Prescribed person or class of persons to whom the functions exercised by the Public Guardian under Part 5 of the Act may be delegated.
Section 80A	Prescribed classes of decision made by the Public Guardian for which an application for review may be made to the Civil and Administrative Tribunal.
Section 98(1)(c)	Prescribed means for sufficient service of notice or other instrument where no address of the person is known.
Section 98(2)(b)	Prescribed time for deemed service when means of service utilised by section 98(1)(c).
Section 108	Other matters necessary or convenient for the operation of the Act.

3.3 Existing Regulation

The provisions of the existing Regulation relate primarily to Part 2 of the Act (concerning the appointment of enduring guardians) and Part 5 of the Act (which deals with medical and dental treatment).

Clauses 1 and 2 deal with formal matters of citation and commencement.

The existing provisions to be re-inserted with minor amendments are as follows:

Clause 3 is the definitions clause and provides the meaning for the current following terms:

- *drug of addiction*
- *restricted substance*
- *simple sedation*
- *the Act*

Clause 8 identifies which instruments are prescribed instruments for the purposes of the definition of “*interstate enduring guardian*” pursuant to section 6O(5) of the Act.

Clause 9 declares certain medical treatment to be special treatment pursuant to section 33(1) of the Act as follows:

- any treatment that is carried out for the purpose of terminating pregnancy
- any treatment in the nature of a vasectomy or tubal occlusion
- any treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.

Clause 10 declares certain medical treatment to be prescribed special treatment for the purposes of section 45(3)(b) of the Act as follows:

- any treatment that involves the administration to a patient of one or more restricted substances for the purpose of affecting the central nervous system of the patient, but only if the dosage levels, combinations or the numbers of restricted substances used or the duration of the treatment are outside the accepted mode of treatment for such a patient
- any treatment that involves the use of androgen reducing medication for the purpose of behavioural control.

Clause 11 declares certain medical treatment to be major treatment pursuant to section 33(1) of the Act including:

- any treatment that involves the administration of a long-acting injectable hormonal substance for the purpose of contraception or menstrual regulation
- any treatment that involves the administration of a drug of addiction
- any treatment that involves the administration of a general anaesthetic or other sedation, except as specifically excluded

- any treatment used for the purpose of eliminating menstruation
- any treatment that involves the administration of a restricted substance for the purpose of affecting the central nervous system, except as specifically excluded
- any treatment that involves a substantial risk to the patient of death, brain damage, paralysis, a high level of pain or stress or other defined risks.
- any treatment involving testing for the human immuno-deficiency virus (HIV).

Clause 12 declares the following dental treatment to be major treatment pursuant to section 33(1) of the Act:

- any treatment involving the administration of a general anaesthetic or simple sedation
- any treatment intended, or likely, to result in the removal of all teeth
- any treatment likely to result in the patient's ability to chew food being significantly impaired for an indefinite or prolonged period

3.4 Previous Guardianship Regulations

Regulations have been made under the Act in 1987, 1995, 2000, 2005 and 2010.

The remake of the Regulation was postponed in 2015. The *Guardianship Regulation 2010* will be repealed as a result of the operation of the *Subordinate Legislation Act 1989* on 1 September 2016. The *Subordinate Legislation Act 1989* provides for the automatic five-yearly repeal of Regulations that are made after 1 September 1990.

The proposed Regulation will take the place of the *Guardianship Regulation 2010*.

4. OBJECTIVES OF THE PROPOSED REGULATION

The objective of the proposed Regulation is to remake the Regulation in the same terms as the existing Regulation, with minor administrative amendments.

The existing Regulation serves the following purposes:

1. It enables the effective and efficient operation of an enduring guardianship system in NSW.

By prescribing the classes of person who are eligible witnesses for the purposes of section 5 of the Act to witness the appointment, revocation or resignation of an enduring guardian, the accessibility of enduring guardianship appointments for NSW citizens is enhanced. The existing Regulation prescribes the necessary forms to allow enduring guardianship appointments to be made, revoked or resigned (see Schedules 1, 2 and 3).

The existing Regulation also allows appointors to give effect to the provisions of Part 2 of the Act with regard to enduring guardianship appointments, and prescribes those interstate enduring guardianship instruments which will be automatically effective in NSW. This promotes a consistent system of substitute decision-making across Australian States and Territories.

2. It gives effect to the provisions of Part 5 of the Act with regard to the treatment of persons who are incapable of giving consent themselves. The objectives are consistent with the objects of Part 5 of the Act, outlined earlier in this RIS.

The classification of a treatment as 'major' or 'special' under the existing Regulation ensures that substitute consent must be obtained in conformity with the requirements of the Act. Treatment classified as major treatment includes those treatments which have a potential for serious harm. Where a person is incapable of giving their own consent, the Act provides for the protection of their interests by ensuring that consent can only be given on their behalf if the proposed treatment will promote their health and well-being.

For treatments which are declared to be special treatment, a greater level of scrutiny and safeguard is provided as the Act requires that consent for such treatment can only be given by the Guardianship Division of the NSW Civil and Administrative Tribunal. The Tribunal is bound by the provisions in the Act regarding consent to special treatment which impose strict requirements to ensure that the welfare and best interests of the person are given paramount consideration.

It is proposed that the existing Regulation be remade with only minor changes to update the interstate enduring guardianship instruments that are recognised in NSW for the purposes of the Act. This would enable the continued operation of provisions

which facilitate medical and personal substitute decision making for people with cognitive disabilities in NSW. However, feedback is welcomed throughout the consultation process about any other changes that would enhance the operation of the Regulation.

5. OPTIONS TO ACHIEVE OBJECTIVES

This RIS examines three options, relating to the objectives of the proposed Regulation, together with the costs and benefits associated with the adoption of each. The options are

- Allow the existing Regulation to lapse, or
- Address the matters dealt with in the proposed Regulation through the Act, or
- Remake the proposed Regulation.

5.1 No Action – Allow the Existing Regulation to Lapse

Allowing the automatic repeal of the existing Regulation would mean that the medical consent provisions of Part 5 of the Act and the enduring guardianship provisions of Part 2 of the Act would become ineffective. This would result in the frustration of the objects of Part 5 of the Act and would prevent members of the community from making, revoking or resigning enduring guardianship appointments.

This option would involve considerable social cost. The medical and dental treatment of people incapable of giving consent would be compromised.

Members of the community would be unable to appoint an enduring guardian or to revoke an appointment. This would be a significant restriction on the ability of competent adult citizens to make effective, legally binding instruments which reflect their choices about who they would prefer to make substitute decisions for them in the event they lose mental capacity.

The lack of recognition of interstate enduring guardianship appointments in NSW would be detrimental to Australians who move to NSW from other States or Territories with an enduring guardianship appointment.

The provisions which allow recognition of guardians and managers appointed under corresponding law would also be inoperative. This may require the formal appointment of a guardian by the NSW Civil and Administrative Tribunal, and use of additional resources.

Administrative review of relevant Public Guardian decisions would be unable to take place as the class of decision which may be reviewed is prescribed in the Regulations. On these grounds, it is proposed that this option not be adopted.

5.2 Address the matters dealt with in the proposed Regulation through the Act

Addressing the regulatory matters in question through the Act rather than in the proposed Regulation would result in additional costs being incurred when future amendments to the Act may be required.

A possible benefit of this option may be a small reduction in the amount of subordinate legislation and providing an opportunity for Parliamentary scrutiny of the provisions. However, it should also be noted that the Legislative Review Committee has been established to examine and report on subordinate legislation. An additional layer of scrutiny is provided by Parliament itself which has the ability to pass a resolution disallowing a Regulation that has been made.

The costs of this option significantly exceed the likely benefits. Accordingly, it is not proposed to adopt this option.

5.3 Remake the Proposed Regulation (preferred option)

The details of the cost/benefit analysis for this option are set out in the next section of this RIS. On the basis of that analysis, it is proposed that this option be adopted.

The existing provisions to be re-inserted with amendment are as follows:

- Definitions (Clause 3 – existing Clause 3)
The definition of ‘drug of addiction’ and ‘simple sedation’ are moved to Clauses 10 and 11 respectively.
- Interstate enduring guardians (Clause 8 – existing Clause 8)
Relevant interstate instruments are updated.
- Major Medical Treatment (Clause 10 – existing Clause 11)
The definition of ‘drug of addiction’ is included in this Clause.
- Major Dental Treatment (Clause 11 – existing Clause 12)
The definition of ‘simple sedation’ is included in this Clause. In the definition which states that simple sedation:
Means a technique in which the use of a drug or drugs procedure produces a state of depression of the central nervous system enabling treatment to be carried out, and in which:
(b) the drugs and techniques used have a margin of safety wide enough to render unintended loss of consciousness unlikely.
The words “drugs and” have been removed from the sentence because they are included at the beginning of the definition.

6. COSTS AND BENEFITS OF PROPOSED OPTION

6.1 Costs and benefits of Part 1 – Preliminary

Clause 1, 2, 3 and **Clause 19** of the proposed Regulation provide for formal matters of citation, commencement, interpretation and savings.

Costs/Benefits

These provisions are of a formal machinery nature and carry no associated costs or benefits.

6.2 Costs and benefits of Part 2 – Enduring Guardians

Clause 4 of the proposed Regulation prescribes the classes of person who are eligible witnesses for the purposes of section 5 of the Act and are therefore able to witness the appointment, revocation or resignation of an enduring guardian.

Cost/Benefit

The costs and benefits of having more persons or classes of persons prescribed as eligible witness are as follows:

- The inclusion of overseas lawyers enables NSW citizens or their proposed enduring guardians who reside overseas to have their enduring guardianship instruments witnessed appropriately. In some cases, a person may wish to appoint a family member who resides overseas as their enduring guardian. The benefit of continuing to include overseas lawyers as an eligible witness is that it will facilitate the execution of enduring guardianship appointments and promote the scheme of planned substitute decision making in NSW. There are no costs associated with this provision.
- The inclusion of approved employees of the Office of the Public Guardian or the NSW Trustee and Guardian in this category continues to enhance the accessibility and affordability of enduring guardianship appointments for NSW citizens.
- Approved employees of the Office of the Public Guardian or the NSW Trustee and Guardian will only be able to perform the role of eligible witness if they have completed a course of study approved by the Attorney General and have been approved by the Chief Executive Officer of the NSW Trustee and Guardian to witness the instruments. This provides a safeguard to ensure that these classes of persons will have the training and skills required to appropriately carry out their role as an eligible witness. There are minimal costs associated with this provision.

Clauses 5-7 of the proposed Regulation together with **Forms 1, 2 and 3** of **Schedule 1** prescribe the forms to be used when an enduring guardian is appointed, when the appointment is revoked or when an enduring guardian resigns.

Cost/Benefit

There is significant benefit in the continued prescription of forms to ensure the appointment, revocation or resignation of enduring guardianship is made validly. There is no significant cost associated with having a prescribed form in each circumstance.

Clause 8 of the proposed Regulation identifies which instruments are prescribed instruments made under interstate law so that enduring guardians appointed by those instruments can be recognised as interstate enduring guardians in NSW whose appointments have effect in this State. This means that a person who has appointed an enduring guardian in another State or Territory does not need to make another appointment under NSW law when they move to NSW.

The changes to this clause of the Regulation are made to include legislation from the Northern Territory and to update the South Australian provisions.

Clauses 8(d) and (e) of the existing Regulation need to be removed as these parts of South Australian legislation have been repealed. These provisions are proposed to be replaced for the purposes of the definition of interstate enduring guardian, by an advance care directive made under Part 3 of the *Advance Care Directives Act 2013* (SA).

The provisions from the Northern Territory proposed to be included for the purposes of the definition of interstate enduring guardian, are:

- an advance personal plan made under Part 2 of the *Advance Personal Planning Act* (NT)
- an enduring power of attorney made under Part 3 of the *Powers of Attorney Act* (NT)

Cost/Benefit

There is significant social benefit in continuing to provide a means by which appointments made by people in other States or Territories can be recognised in NSW without the need for them to make new appointments which involve additional formality, time and the need for appropriate witnessing of the documentation by legal practitioners or Registrars of Local Courts.

There is a further benefit of these provisions as they enable enduring guardians who have been appointed in other States or Territories to make decisions in NSW without the need to apply to the Guardianship Tribunal or the Supreme Court for a formal guardianship order in circumstances where the person who made the original appointment no longer has capacity. This avoids the additional expense and resources which are involved in conducting a hearing for a guardian to be appointed.

There is no significant cost associated with the recognition provisions.

6.3 Costs and benefits of Part 3 - Medical and Dental Treatment

Clause 9 of the proposed Regulation provides for the declaration of particular treatment as special treatment or prescribed special treatment.

Section 33(1) of the Act provides that special treatment means treatment which is declared by the Regulations to be special treatment. The effect of sections 35 and 36 of the Act is that special treatment or prescribed special treatment may not be provided without the consent of the Guardianship Division of the Civil and Administrative Tribunal.

Costs/Benefits

A social benefit is gained from the classification of certain treatments as special treatment. The Act provides significant safeguards to ensure that such treatments may only be given where it is clearly in the best interests of the person. There is an economic cost in the associated hearings of the Tribunal and in the time and resources of health professionals. However, there is a need for both the inclusion of the current treatments and the need for the scrutiny of such treatments by the Tribunal. The associated cost is offset by the protection gained for persons incapable of giving consent to the carrying out of medical or dental treatment.

Clauses 10 and 11 of the proposed Regulation provide for the declaration of particular treatment as major medical treatment and major dental treatment.

Section 33(1) of the Act provides that major treatment means treatment which is declared by the Regulations to be major treatment. The combined effect of sections 35 and 36 of the Act is that a major treatment, unlike a minor treatment, cannot be given without consent from the *person responsible* for the patient or from the Tribunal.

Costs/Benefits

The benefit of declaring certain, more serious treatments, as major treatment is that it ensures that substitute consent must be sought. Generally the consent will be sought from *person responsible* and there is no need for an application to be made to the Tribunal, along with the associated administrative costs. In the cases where an application is required to be made to the Tribunal, the associated cost is again offset by the protection gained for persons incapable of giving consent to the carrying out of medical or dental treatment.

Clauses 12-15 provide for the circumstances in which a request for consent and the giving of consent can be done orally or in writing, and for the keeping of a clinical record of the consent obtained and the treatment given.

Section 40(2) provides for the matters which a request for consent to treatment must specify and section 40(3) provides for the matters the *person responsible* must take into account when considering such a request.

Section 40(4) of the Act provides for Regulations to be made with respect to the manner and form in which a request for consent to treatment may be made to a *person responsible* and the manner and the form in which consent may be given by a *person responsible*. Section 48 provides for the keeping of records of medical and dental treatment.

Costs/Benefits

The provisions provide for the manner and form in which requests for consent and consent may be made. There are no associated costs with these provisions. Furthermore, the provisions provide certainty about when consent is required to be provided in writing.

The provisions require documentation with respect to the obtaining of consent under Part 5 of the Act and for a clinical record of the consent to be kept. These formal provisions provide a mechanism to enable the checking of compliance and as such they represent a degree of protection persons incapable of giving consent. The requirement of making a clinical record places no undue burden or extra costs on health practitioners as the making of such a record would be done in the course of good medical and dental practice.

6.4 Costs and benefits of Part 4 – Miscellaneous

Clause 16 identifies the laws which are currently recognised as corresponding laws under section 48A of the Act.

Section 48B provides for the recognition in NSW of guardians and financial managers appointed in any State, Territory or country under a law that is declared to be a corresponding law under the Regulation.

Costs/Benefits

Sections 48A and 48B provide for the recognition in NSW of guardians and financial managers appointed under similar legislation in other States and Territories of Australia and New Zealand. This allows for substitute decision-makers who have been appointed by a formal process outside NSW, to apply to the Tribunal for recognition of his or her status of an appointment made under a corresponding law.

The recognition of a guardian or financial manager appointed under a corresponding law is achieved at considerably less cost than would be involved in the making of an initial application and the conduct of a hearing before the Tribunal.

Clause 17 provides that all decisions made by the Public Guardian in connection with the exercise of the Public Guardian's functions as a guardian under the Act are prescribed decisions for the purposes of section 80A of the Act.

Section 80A of the Act allows certain parties to apply to the NSW Civil and Administrative Tribunal for a review of prescribed decisions made by the Public Guardian.

Costs/Benefits

This provision allows certain parties to apply to the Tribunal for a review of any decision made by the Public Guardian in the exercise of their functions as a guardian under the Act.

There is a benefit in providing a mechanism of external review for those who are aggrieved with decisions of the Public Guardian. This promotes transparency and accountability in decision making by the Public Guardian and assists in ensuring that decisions are made after considering all relevant information and to promote the best interests of the person with a disability.

Given the relatively small number of review applications, there are no significant costs to the Public Guardian or the Tribunal which arise as a result of enabling all decisions of the Public Guardian to be reviewed by the Tribunal.

Clause 18 provides for the purposes of sections 98(1)(c) and 98(2)(b) of the Act, that service of a notice or other instrument is effected by publishing it in a daily newspaper circulated generally throughout the Sydney Metropolitan Area and service is effected at the end of 7 days after publication.

The Tribunal is required under sections 14(2) and 44(2) to take into account the views of the person the subject of an application for guardianship or application for consent to treatment. All reasonable attempts to notify a person/s affected by the proceedings must be made by the Tribunal to make it most likely that such persons will have the opportunity to express their views and to attend the hearing.

Section 98 of the Act specifies the manner in which the Tribunal is to serve documents or instruments on a person. The Tribunal is required to deliver or send by post documents to a person. However if no address is known, section 98(1)(c) allows for the Regulation to specify alternative options.

Costs/Benefits

There is no significant social cost. The provisions of the Act ensure that the effecting of notice by publishing in a newspaper is an action that occurs only where no address of the person/s is known. It enables the Tribunal to clearly know when it can consider that a document or instrument has been served on a person in a situation where that party cannot be contacted. A small cost to the Tribunal may arise when this provision is utilised, however the benefit of certainty with respect to service outweighs this minor cost.

7. CONSULTATION

Comments and submissions are now sought on the proposed Regulation and RIS. Targeted stakeholders will be invited to provide comments. Information about the proposed Regulation and how to make a submission will be published in the Government Gazette, in the Government Notices section of the Sydney Morning Herald and the Daily Telegraph and on the Department of Justice website. Copies of the material will be supplied to any person on request.

Copies of this statement will be forwarded directly to the following key stakeholders:

AIDS Council of NSW (ACON)
Aged and Community Services (NSW)
Alzheimer's Australia
ANZ Society of Geriatric Medicine
Australian Medical Association
Australian Dental Association (NSW)
Avant Mutual Group Ltd
Benevolent Society
Brain Injury Association
Carers NSW
Community Relations Commission of NSW
Council for Intellectual Disability
Council on the Ageing (COTA NSW)
Deaf Blind Association NSW
Disability Council NSW
Independent Living Centre NSW
Intellectual Disability Rights Service
Law Society of NSW
Leading Aged Services Australia (NSW-ACT)
Legal Aid NSW
MDA National
Mental Health Coordinating Council (MHCC)
Multicultural Disability Advocacy Association of NSW

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NSW Council for Intellectual Disability

NSW Ministerial Advisory Committee on the Ageing (MACA)

NSW Department of Family and Community Services- Ageing Disability & Home
Care

NSW Department of Health

NSW Justices Association

NSW Medical Services Committee

NSW Public Guardian

NSW Trustee & Guardian

Office for Ageing (NSW)

People With Disability Australia Inc

Royal Australian College of General Practitioners (RACGP)

Royal Australian and New Zealand College of Psychiatrists (RANZCP)

The Aged-Care Rights Service (TARS)