



New South Wales

Guardianship Regulation 2005

under the

Guardianship Act 1987

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Guardianship Act 1987*.

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Minister for Disability Services

Explanatory note

This Regulation makes provision for general matters under the *Guardianship Act 1987* (*the Act*). In particular, the Regulation:

- (a) prescribes the form of instrument by which a person is appointed as an enduring guardian, the instrument that revokes such an appointment and the instrument by which a person may resign as an enduring guardian, and
- (b) prescribes certain instruments made under the laws of other States and Territories to enable persons appointed under those instruments to be recognised in this State as enduring guardians, and
- (c) declares certain treatment to be medical treatment, and certain other treatment to be dental treatment, for the purposes of Part 5 of the Act, and
- (d) declares certain treatment to be special medical treatment, and certain other medical treatment to be major medical treatment, for the purposes of Part 5 of the Act, and
- (e) provides for the keeping of clinical records in relation to the carrying out of such treatment, and
- (f) declares certain laws to be corresponding laws for the purposes of Part 5A of the Act (which provides for the recognition of guardians and managers appointed under such laws), and
- (g) 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 reviewable by the Administrative Decisions Tribunal.

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Explanatory note

This Regulation replaces the *Guardianship Regulation 2000* which is repealed on 1 September 2005 under section 10 (2) of the *Subordinate Legislation Act 1989* and is remade without any changes in substance.

This Regulation is made under the *Guardianship Act 1987*, in particular section 108 (the general regulation-making power).

This Regulation is made in connection with the staged repeal of statutory rules under Part 3 of the *Subordinate Legislation Act 1989*.

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Clause 1 Guardianship Regulation 2005

Part 1 Preliminary

Guardianship Regulation 2005

under the

Guardianship Act 1987

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Guardianship Regulation 2005*.

2 Commencement

This Regulation commences on 1 September 2005.

Note. This Regulation replaces the *Guardianship Regulation 2000* which is repealed on 1 September 2005 under section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

drug of addiction means a substance that is specified in Schedule 8 to the Poisons List under the *Poisons and Therapeutic Goods Act 1966*.

restricted substance means a substance that is specified in Schedule 4 to the Poisons List under the *Poisons and Therapeutic Goods Act 1966*.

simple sedation 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, and in which:

- (a) verbal contact with the patient is maintained throughout the period of sedation, and
- (b) the drugs and techniques used have a margin of safety wide enough to render unintended loss of consciousness unlikely.

the Act means the *Guardianship Act 1987*.

(2) Notes in the text of this Regulation do not form part of this Regulation.

Part 2 Enduring guardians

4 Appointment of enduring guardian

For the purposes of section 6C (1) (a) of the Act, the form set out in Schedule 1 is the prescribed form of instrument appointing a person as an enduring guardian.

5 Revocation of appointment of enduring guardian

For the purposes of section 6H (2) (b) of the Act, the form set out in Schedule 2 is the prescribed form of instrument revoking the appointment of a person as an enduring guardian.

6 Resignation of appointment as enduring guardian

For the purposes of section 6HB (2) (a) of the Act, the form set out in Schedule 3 is the prescribed form for a written notice of resignation of an appointment as an enduring guardian.

7 Interstate enduring guardians

For the purposes of the definition of *interstate enduring guardian* in section 6O (5) of the Act, the following instruments are prescribed:

- (a) a power of attorney created under Division 2.2 of Part 2 of the *Medical Treatment Act 1994* of the Australian Capital Territory,
- (b) an enduring power of attorney created under section 12 of the *Powers of Attorney Act 1956* of the Australian Capital Territory,
- (c) an enduring power of attorney made under Part 2 of Chapter 3 of the *Powers of Attorney Act 1998* of Queensland,
- (d) an advance health directive made under Part 3 of Chapter 3 of the *Powers of Attorney Act 1998* of Queensland,
- (e) a medical power of attorney made under Division 3 of Part 2 of the *Consent to Medical Treatment and Palliative Care Act 1995* of South Australia,
- (f) an appointment of an enduring guardian made under Part 3 of the *Guardianship and Administration Act 1993* of South Australia,
- (g) an appointment of an enduring guardian made under Division 5A of Part 4 of the *Guardianship and Administration Act 1986* of Victoria,
- (h) an enduring power of attorney (medical treatment) made under Part 2 of the *Medical Treatment Act 1988* of Victoria,
- (i) an appointment of an enduring guardian made under Part 5 of the *Guardianship and Administration Act 1995* of Tasmania.

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Part 3 Medical and dental treatment

Part 3 Medical and dental treatment

8 Special medical treatment

The following medical treatment is declared to be special treatment for the purposes of Part 5 of the Act:

- (a) any treatment that involves the administration of a drug of addiction (other than in association with the treatment of cancer or palliative care of a terminally ill patient) over a period or periods totalling more than 10 days in any period of 30 days,
- (b) any treatment that is carried out for the purpose of terminating pregnancy,
- (c) any treatment in the nature of a vasectomy or tubal occlusion,
- (d) any treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.

9 Experimental special medical treatment to which Tribunal may consent

The following medical treatment is prescribed special treatment for the purposes of section 45 (3) (b) of the Act:

- (a) 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,
- (b) any treatment that involves the use of androgen reducing medication for the purpose of behavioural control.

10 Major medical treatment

The following medical treatment (not including any special treatment) is declared to be major treatment for the purposes of Part 5 of the Act:

- (a) any treatment that involves the administration of a long-acting injectable hormonal substance for the purpose of contraception or menstrual regulation,
Note. An example of such a substance is medroxyprogesterone acetate, in suspension, commonly known as Depo-Provera.
- (b) any treatment that involves the administration of a drug of addiction,
- (c) any treatment that involves the administration of a general anaesthetic or other sedation, but not treatment involving:
 - (i) sedation used to facilitate the management of fractured or dislocated limbs, or

- (ii) sedation used to facilitate the insertion of an endoscope into a patient's body for diagnostic purposes unless the endoscope is inserted through a breach or incision in the skin or a mucous membrane,
- (d) any treatment used for the purpose of eliminating menstruation,
- (e) any treatment that involves the administration of a restricted substance for the purpose of affecting the central nervous system, but not a treatment:
 - (i) involving a substance that is intended to be used for analgesic, antipyretic, antiparkinsonian, anticonvulsant, antiemetic, antinauseant or antihistaminic purposes, or
 - (ii) that is to be given only once, or
 - (iii) that is a PRN treatment (that is, given when required, according to the patient's needs) that may be given not more than 3 times a month, or
 - (iv) given for sedation in minor medical procedures,
- (f) any treatment that involves a substantial risk to the patient (that is, a risk that amounts to more than a mere possibility) of:
 - (i) death, or
 - (ii) brain damage, or
 - (iii) paralysis, or
 - (iv) permanent loss of function of any organ or limb, or
 - (v) permanent and disfiguring scarring, or
 - (vi) exacerbation of the condition being treated, or
 - (vii) an unusually prolonged period of recovery, or
 - (viii) a detrimental change of personality, or
 - (ix) a high level of pain or stress,
- (g) any treatment involving testing for the human immuno-deficiency virus (HIV).

11 Major dental treatment

The following dental treatment is declared to be major treatment for the purposes of Part 5 of the Act:

- (a) any treatment involving the administration of a general anaesthetic or simple sedation,
- (b) any treatment intended, or likely, to result in the removal of all teeth,

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Part 3 Medical and dental treatment

- (c) any treatment likely to result in the patient's ability to chew food being significantly impaired for an indefinite or prolonged period.

12 Requests for consent to the carrying out of medical or dental treatment

- (1) A request under section 40 of the Act for consent to the carrying out of minor medical treatment or dental treatment is to be made in writing. However, the request may be made orally if:
 - (a) it is not practicable to make the request in writing, or
 - (b) the person whose consent is sought does not require it to be made in writing.
- (2) A request under section 40 of the Act for consent to the carrying out of major medical treatment is to be made in writing. However, the request may be made orally if it is not practicable to make the request in writing because of the need to provide the treatment quickly.
- (3) A person who requests a consent referred to in this clause must give written confirmation of the request to the person whose consent is sought if the request was made orally and:
 - (a) sought consent to major treatment, or
 - (b) the person whose consent is sought requires the written confirmation.

13 Consents to the carrying out of medical or dental treatment

- (1) A consent under section 40 of the Act to the carrying out of minor medical treatment or dental treatment is to be given in writing. However, the consent may be made orally if:
 - (a) it is not practicable to give the consent in writing, or
 - (b) the person by whom the treatment is to be carried out does not require it to be given in writing.
- (2) A consent under section 40 of the Act to the carrying out of major medical treatment is to be given in writing. However, the consent may be given orally if it is not practicable to do so in writing because of the need to provide the treatment quickly.
- (3) A person who gives an oral consent as referred to in this clause must give written confirmation of the consent to the person who requested the consent if:
 - (a) the consent related to the carrying out of major treatment, or
 - (b) the person who requested consent requires the written confirmation.

14 Clinical records

- (1) A person by whom medical or dental treatment is carried out pursuant to a consent given under Part 5 of the Act is to keep a written record of:
 - (a) the name and address of the person by whom the consent was given, and
 - (b) the date on which the consent was given, and
 - (c) the conditions (if any) on which the consent was given, and
 - (d) the nature of the treatment carried out,and if the consent was given in writing, is to keep a copy of the consent together with the written record.
- (2) A person by whom such a record is kept must allow the record, and any copy of consent kept with the record, to be inspected at any reasonable time by an authorised officer.
- (3) Nothing in this clause requires a person to retain a record of any medical or dental treatment carried out by the person for a period of more than 7 years after the date on which the treatment is carried out.

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Part 4 Reciprocal arrangements

Part 4 Reciprocal arrangements

15 Corresponding laws

For the purposes of the definition of *corresponding law* in section 48A of the Act, the following laws are declared to be corresponding laws for the purposes of Part 5A of the Act:

- (a) *Guardianship and Administration Act 1986* of Victoria,
- (b) *Guardianship and Administration Act 1993* of South Australia,
- (c) *Adult Guardianship Act 1988* of the Northern Territory,
- (d) *Aged and Infirm Persons' Property Act 1979* of the Northern Territory,
- (e) *Guardianship and Administration Act 1990* of Western Australia,
- (f) *Guardianship and Administration Act 1995* of Tasmania,
- (g) *Guardianship and Management of Property Act 1991* of the Australian Capital Territory,
- (h) *Guardianship and Administration Act 2000* of Queensland,
- (i) *Protection of Personal and Property Rights Act 1988* of New Zealand.

Part 5 Miscellaneous

16 Service of notices and other instruments

- (1) For the purposes of section 98 (1) (c) of the Act, a notice or other instrument may be published in a daily newspaper circulating generally throughout the Sydney Metropolitan Area.
- (2) For the purposes of section 98 (2) (b) of the Act, a notice or other instrument published in accordance with this clause is to be taken to have been served at the end of 7 days after it was published.

17 Review by ADT of guardianship decisions of Public Guardian

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

18 Savings provision

Any act, matter or thing that, immediately before the repeal of the *Guardianship Regulation 2000*, had effect under that Regulation, is taken to have effect under this Regulation.

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Schedule 1 Form of appointment of enduring guardian

Schedule 1 Form of appointment of enduring guardian

(Clause 4)

Appointment of one person as an enduring guardian (or appointment of 2 or more people as enduring guardians with the same functions)

I [*insert your name, address and occupation*], appoint [*insert the name, address and occupation of your proposed enduring guardian or, if you want to appoint more than one guardian with the same functions, insert the name, address and occupation of each of your proposed enduring guardians*] to be my guardian (or guardians) if because of a disability I am partially or totally incapable of managing my person.

I appoint my enduring guardians to act jointly/severally/jointly and severally.

The death, resignation or incapacity of one or more of my joint enduring guardians does not operate to terminate the appointment of any other of my joint enduring guardians.

Note. The above 2 sentences relate to the appointment of 2 or more people as enduring guardians. They may be crossed out if you are appointing only one enduring guardian.

If you want to appoint more than one enduring guardian and you want your enduring guardians to have the same functions, then you should fill out this form by inserting the names of all your proposed enduring guardians in the place indicated. Each person must sign this form to show that he or she accepts the appointment.

You should also indicate whether the enduring guardians are to act jointly, severally or jointly and severally. If you specify that they are to act jointly, they will only be able to act if they all agree on the course of action. If you specify that they are to act severally or jointly and severally, they will be able to act independently of each other. If you appoint the enduring guardians to act jointly, you may also specify that the death, resignation or incapacity of one of the joint enduring guardians will not terminate the appointment of the other joint enduring guardians.

However, if you want your enduring guardians to have different functions and to act separately, you should fill out a different form for each proposed enduring guardian.

(You need to put your initials beside any writing that you have crossed out.)

I authorise my enduring guardian (or each of my enduring guardians) to exercise the following functions:

- (a) to decide where I live,
- (b) to decide what health care I receive,
- (c) to decide what other kinds of personal services I receive,
- (d) to consent to the carrying out of medical or dental treatment on me (in accordance with Part 5 of the *Guardianship Act 1987*).

Note. You can cross out any or all of the above functions if you do not want your enduring guardian or enduring guardians to exercise any or all of them.

(You need to put your initials beside any writing that you have crossed out. If you cross out all of the functions, you need to list the functions that you want your enduring guardian or enduring guardians to exercise.)

If you would prefer, you can give your enduring guardian or enduring guardians power to exercise only part of any function.

I also authorise my enduring guardian (or each of my enduring guardians) to exercise the following additional functions: *[you can add any additional functions here or leave this blank by crossing it out and putting your initials beside it]*.

I require that my enduring guardian (or each of my enduring guardians) exercise his or her functions subject to the following directions: *[you can add any specific requirements or limitations here or leave this blank by crossing it out and putting your initials beside it]*.

I also appoint *[insert the name, address and occupation of your proposed alternative enduring guardian]* to be an alternative enduring guardian.

Note. If you appoint an alternative enduring guardian, he or she will be authorised to exercise the functions of your enduring guardian should the enduring guardian die, resign or become incapacitated. An alternative enduring guardian is not authorised to exercise those functions until (and unless) that happens. Cross the above statement out if you do not wish to appoint an alternative enduring guardian.

(You need to put your initials beside any writing that you have crossed out.)

Signature:

I directed *[insert the name and address of person signing on your behalf]* to sign this document on my behalf.

Note. The above details should be completed if a person signs this document on your behalf. A person can sign on your behalf if the person is at least 18 years of age, is not a witness to this instrument and is not being appointed as an enduring guardian or alternative enduring guardian. You should direct the person to sign on your behalf in the presence of the person who witnesses the signature. You can cross out the above statement if it is not applicable to you.

(You need to put your initials beside any writing that you have crossed out.)

Date:

Acceptance of appointment

I accept my appointment as enduring guardian/alternative enduring guardian.

Signature of enduring guardian/alternative enduring guardian (or of each guardian):

Date:

Note. Cross out anything that is not applicable to you.

(You need to put your initials beside any writing that you have crossed out.)

Certificate of witness

I, *[Name]* of *[Address]* being a NSW barrister/NSW solicitor/interstate legal practitioner/Registrar of a Local Court/prescribed person certify that:

- (a) I witnessed the execution of this instrument by or for *[insert the name or names of the persons concerned]*, and
- (b) this/these person(s) executed the instrument voluntarily and that each appeared to understand the effect of the instrument, and
- (c) the appointor in my presence instructed the person named in this instrument to sign the instrument on the appointor's behalf.

Signature of witness:

State or Territory where signatures witnessed (if witnessed outside New South Wales):

Date:

Note. A person may witness both the signatures of the appointor (the person appointing an enduring guardian) and appointees (the persons who are appointed as enduring guardians). However, where the signatures of the appointor and appointees are witnessed by different persons, each witness should sign a certificate in respect of the signatures they have witnessed. If an appointor has instructed another person

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Schedule 1 Form of appointment of enduring guardian

to sign the instrument on the appointor's behalf, the witness also needs to certify the matter referred to in paragraph (c). The witness should also cross out any other matter that is not applicable to the witness. (You need to put your initials beside any writing that you have crossed out.)

Schedule 2 Form of revocation of appointment of enduring guardian

(Clause 5)

Revocation of appointment of enduring guardian

I, *[insert your name, address and occupation]* revoke the appointment of *[insert the name of your enduring guardian or enduring guardians]* as my enduring guardian.

I understand that this revocation will not be effective unless the enduring guardian is or has been given written notice of the revocation.

Signature:

I directed *[insert the name and address of person signing on your behalf]* to sign this document on my behalf.

Note. The above details should be completed if a person signs this document on your behalf. A person can sign on your behalf if the person is at least 18 years of age, is not a witness to this instrument and is not your enduring guardian or alternative enduring guardian. You should direct the person to sign on your behalf in the presence of the person who witnesses the signature. You can cross out the above statement if it is not applicable to you.

(You need to put your initials beside any writing that you have crossed out.)

Date:

Certificate of witness

I, *[Name]* of *[Address]* being a NSW barrister/NSW solicitor/interstate legal practitioner/Registrar of a Local Court/prescribed person certify that:

- (a) I witnessed the execution of this instrument by or for the appointor revoking the appointment in my presence, and
- (b) the appointor executed the instrument voluntarily and appeared to understand the effect of the instrument, and
- (c) the appointor in my presence instructed the person named in this instrument to sign the instrument on his or her behalf.

Signature of witness:

State or Territory where signature witnessed (if witnessed outside New South Wales):

Date:

Note. If an appointor (the person appointing an enduring guardian) has instructed another person to sign the instrument on the appointor's behalf, the witness also needs to certify the matter referred to in paragraph (c). The witness should also cross out any other matter that is not applicable to the witness.

(You need to put your initials beside any writing that you have crossed out.)

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Schedule 3 Form of notice of resignation of appointment as enduring guardian or alternative enduring guardian

Schedule 3 Form of notice of resignation of appointment as enduring guardian or alternative enduring guardian

(Clause 6)

Notice of resignation of appointment of enduring guardian/ alternative enduring guardian

I, [*insert your name, address and occupation*] resign my appointment as an enduring guardian/alternative enduring guardian of [*insert the name and address of appointor*].

Note. You may resign your appointment as an enduring guardian or alternative enduring guardian by giving written notice to the person who appointed you. However, you may only do so if that person is not in need of a guardian at the time you give this notice. If the person is in need of a guardian at that time, you may resign only with the approval of the Guardianship Tribunal. You can cross out any matter that is not applicable to you.

(You need to put your initials beside any writing that you have crossed out.)

Signature:

I directed [*insert the name and address of person signing on your behalf*] to sign this document on my behalf.

Note. The above details should be completed if a person signs this document on your behalf. A person can sign on your behalf if the person is at least 18 years of age and is not a witness to this instrument. You should direct the person to sign on your behalf in the presence of the person who witnesses the signature. You can cross out the above statement if it is not applicable to you.

(You need to put your initials beside any writing that you have crossed out.)

Date:

Certificate of witness

I, [*Name*] of [*Address*] being a NSW barrister/NSW solicitor/interstate legal practitioner/Registrar of a Local Court/prescribed person certify that:

- (a) I witnessed the execution of this instrument by or for the person resigning the appointment in my presence, and
- (b) the person in my presence instructed the person named in this instrument to sign the instrument on his or her behalf.

Signature of witness:

State or Territory where signature witnessed (if witnessed outside New South Wales):

Date:

Note. If an appointee (the person who is appointed as an enduring guardian) has instructed another person to sign the instrument on the appointee's behalf, the witness also needs to certify the matter referred to in paragraph (b). The witness should also cross out any other matter that is not applicable to the witness.

(You need to put your initials beside any writing that you have crossed out.)

BY AUTHORITY
