



New South Wales

Guardianship Regulation 2010

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*.

PETER PRIMROSE, MLC
Minister for Disability Services

Explanatory note

The object of this Regulation is to remake, with some amendments, the provisions of the *Guardianship Regulation 2005*, which is repealed on 1 September 2010 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation includes a new provision prescribing certain classes of persons as eligible witnesses and amends the classes of medical treatment that are declared to be special treatment for the purposes of Part 5 of the *Guardianship Act 1987*.

This Regulation also makes provision with respect to the following:

- (a) the forms for appointing or revoking, and for resigning as, an enduring guardian,
- (b) the recognition of instruments of other jurisdictions that appoint enduring guardians,
- (c) the treatment that is special medical treatment or major medical treatment,
- (d) the making of requests for consent to medical or dental treatment and the giving of consent to such treatment,
- (e) the keeping of clinical records in relation to the carrying out of such treatment,
- (f) the laws of other jurisdictions that are corresponding laws,
- (g) the review by the Administrative Decisions Tribunal of the Public Guardian's decisions,
- (h) the service of notices and other instruments,
- (i) savings and formal matters.

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Explanatory note

This Regulation is made under the *Guardianship Act 1987*, including sections 5 (definition of *eligible witness*), 6C (1) (a), 6H (2) (b), 6HB (2) (a), 6O (5) (definition of *interstate enduring guardian*), 33 (1) (definitions of *major treatment* and *special treatment*), 40 (4), 45 (3) (b), 48, 48A (definition of *corresponding law*), 80A (1) (b), 98 (1) (c) and (2) (b) and 108 (the general regulation-making power).

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Clause 1 Guardianship Regulation 2010

Part 1 Preliminary

Guardianship Regulation 2010

under the

Guardianship Act 1987

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Guardianship Regulation 2010*.

2 Commencement

This Regulation commences on 1 September 2010 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *Guardianship Regulation 2005* which is repealed on 1 September 2010 by 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 Eight of the Poisons List under the *Poisons and Therapeutic Goods Act 1966*.

restricted substance means a substance that is specified in Schedule Four of 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) In this Regulation, a reference to a Form is a reference to a Form set out in Schedule 1.

(3) Notes included in this Regulation (other than in Schedule 1) do not form part of this Regulation.

Part 2 Enduring guardians

4 Eligible witnesses

- (1) For the purposes of paragraph (a) (iv) of the definition of *eligible witness* 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 *Legal Profession Act 2004*,
 - (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 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.
- (2) For the purposes of this clause:
approved course of study means a course of study approved by the Minister by order published in the Gazette.

5 Appointment of enduring guardian

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

6 Revocation of appointment of enduring guardian

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

7 Resignation of appointment as enduring guardian

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

8 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) an enduring power of attorney made under the *Powers of Attorney Act 2006* of the Australian Capital Territory,

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Part 2 Enduring guardians

- (b) an enduring power of attorney made under Part 2 of Chapter 3 of the *Powers of Attorney Act 1998* of Queensland,
- (c) an advance health directive made under Part 3 of Chapter 3 of the *Powers of Attorney Act 1998* of Queensland,
- (d) 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,
- (e) an appointment of an enduring guardian made under Part 3 of the *Guardianship and Administration Act 1993* of South Australia,
- (f) an appointment of an enduring guardian made under Division 5A of Part 4 of the *Guardianship and Administration Act 1986* of Victoria,
- (g) an enduring power of attorney (medical treatment) made under Part 2 of the *Medical Treatment Act 1988* of Victoria,
- (h) an appointment of an enduring guardian made under Part 5 of the *Guardianship and Administration Act 1995* of Tasmania,
- (i) an appointment of an enduring guardian made under Part 9A of the *Guardianship and Administration Act 1990* of Western Australia,
- (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.

Part 3 Medical and dental treatment

9 Special medical treatment

For the purposes of paragraph (c) of the definition of *special treatment* in section 33 (1) of the Act, the following medical treatment is declared to be special 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.

10 Experimental special medical treatment to which Tribunal may consent

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

- (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.

11 Major medical treatment

For the purposes of the definition of *major treatment* in section 33 (1) of the Act, the following medical treatment (not including any special treatment) is declared to be major treatment:

- (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

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Part 3 Medical and dental treatment

- (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).

12 Major dental treatment

For the purposes of the definition of *major treatment* in section 33 (1) of the Act, the following dental treatment is declared to be major treatment:

- (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,

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

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

- (1) For the purposes of section 40 (4) (a) of the Act, a request for consent to the carrying out of minor medical 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) For the purposes of section 40 (4) (a) of the Act, a request for consent to the carrying out of major medical or dental 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) the consent relates to the carrying out of major treatment, or
 - (b) the person whose consent is sought requires written confirmation.

14 Consents to the carrying out of medical or dental treatment

- (1) For the purposes of section 40 (4) (b) of the Act, a consent to the carrying out of minor medical or dental treatment is to be given in writing. However, the consent may be given 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) For the purposes of section 40 (4) (b) of the Act, a consent to the carrying out of major medical or dental 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 relates to the carrying out of major treatment, or
 - (b) the person who requested consent requires written confirmation.

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Part 3 Medical and dental treatment

15 Clinical records

- (1) For the purposes of section 48 of the Act, 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 the 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.

Part 4 Miscellaneous

16 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:

- (a) *Guardianship and Administration Act 1986* of Victoria,
- (b) *Guardianship and Administration Act 1993* of South Australia,
- (c) *Adult Guardianship Act* of the Northern Territory,
- (d) *Aged and Infirm Persons' Property Act* 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.

17 Review by ADT of guardianship decisions of Public Guardian

For the purposes of section 80A (1) (b) of the Act, 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.

18 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.

19 Savings

Any act, matter or thing that, immediately before the repeal of the *Guardianship Regulation 2005*, had effect under that Regulation, continues to have effect under this Regulation.

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Schedule 1 Forms

Schedule 1 Forms

(Clauses 5–7)

Form 1 Appointment of enduring guardian

I [*insert name, address and occupation*], appoint [*insert the name, address and occupation of each proposed enduring guardian*] to be my enduring guardian(s).

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

The death, resignation or incapacity of any of my joint enduring guardians does/does not terminate the appointment of each of my other joint enduring guardians.

I authorise my enduring guardian(s) 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*),
- (e) [*insert any additional functions*]

I place the following limits on the authority of my enduring guardian(s): [*insert any limits*]

The functions of my enduring guardian(s) must be exercised in accordance with the following directions: [*insert any directions*]

Signature:

Date:

AND if a person signs this instrument on another person's behalf

[*insert name and address of the person who signs the document*]

Acceptance by enduring guardian

I accept my appointment as enduring guardian.

Name:

Signature:

Date:

Certificate of witness

I, [*insert name, address and occupation*] certify that:

- (a) [*insert name of person appointing enduring guardian*] appeared to understand the effect of this instrument and in my presence:
 - (i) executed the instrument voluntarily, or
 - (ii) voluntarily instructed [*insert name of person signing on behalf of person appointing enduring guardian*] to sign the instrument on his or her behalf and that person executed the instrument in my presence, and

(b) *[insert name of person accepting appointment as enduring guardian]* appeared to understand the effect of this instrument and in my presence executed the instrument voluntarily.

Signature:

Date:

Australian legal practitioner/Registrar of the Local Court/overseas-registered foreign lawyer/justice of the peace/approved employee of NSW Trustee and Guardian or the Office of the Public Guardian

Note. Important information

An enduring guardianship appointment is an important document. It allows someone else to make medical and lifestyle decisions on your behalf. You should get legal or medical advice (or both) before you sign it.

It is important that you trust the person you appoint as your enduring guardian to make appropriate lifestyle decisions on your behalf. It is recommended you inform this person of your wishes about lifestyle decisions and involve them in discussions about your views or goals. If these change, it is important to let your enduring guardian know.

An enduring guardian can only make lifestyle decisions such as health decisions. You should make an enduring Power of Attorney if you want someone to make financial decisions on your behalf if you lose capacity.

If you appoint more than one enduring guardian, you should indicate whether the enduring guardians are to act jointly, severally or jointly and severally. Enduring guardians who are appointed jointly are only able to make decisions if they all agree about the decision. Enduring guardians who are appointed severally or jointly and severally are able to make decisions independently of each other.

If you appoint an alternative enduring guardian, they will only have authority to act as your guardian if the first appointed enduring guardian/s dies, resigns or becomes incapacitated.

Each enduring guardian must sign their acceptance on the appointment for it to be effective.

If someone signs the appointment on your behalf, they must be at least 18 years old. They must not be the person being appointed as an enduring guardian. They cannot also witness the execution of the appointment.

If you marry after you appoint an enduring guardian then the appointment will automatically be revoked (unless you married your enduring guardian).

Your enduring guardian can resign at any time, by giving you notice in writing. If you have lost capacity to make decisions at that time then your enduring guardian can only resign with the approval of the Guardianship Tribunal.

Enduring guardianship appointments are not automatically accessible on any public register. Therefore, it is important that key people are aware of the appointment so they can contact the enduring guardian if required. You should provide a copy of the enduring guardianship appointment to your enduring guardian and keep a copy in a safe place. You should also let close friends or family know about it and give a copy to your solicitor, doctor and health service provider.

For further information about enduring guardianship, contact the NSW Trustee and Guardian, the Office of the Public Guardian or the Guardianship Tribunal.

Form 2 Revocation of appointment of enduring guardian

I, *[insert name, address and occupation]* revoke the appointment of *[insert the name each enduring guardian]* 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:

Date:

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Schedule 1 Forms

AND if a person signs this instrument on another person's behalf

[insert name and address of the person who signs the document]

Certificate of witness

I, *[insert name, address and occupation]* certify that *[insert name of person revoking appointment]* appeared to understand the effect of this instrument and in my presence:

- (a) executed the instrument voluntarily, or
- (b) voluntarily instructed *[insert name of person signing on behalf of person revoking appointment]* to sign the instrument on his or her behalf and that person executed the instrument in my presence.

Signature:

Date:

Australian legal practitioner/Registrar of the Local Court/overseas-registered foreign lawyer/justice of the peace/approved employee of NSW Trustee and Guardian or the Office of the Public Guardian

Form 3 Notice of resignation as enduring guardian

I, *[insert your name, address and occupation]* resign my appointment as an enduring guardian of *[insert the name and address of the person who appointed the enduring guardian]*.

Signature:

Date:

AND if a person signs this instrument on another person's behalf

[insert name and address of the person who signs the document]

Certificate of witness

I, *[insert name, address and occupation]* certify that *[insert name of enduring guardian]* appeared to understand the effect of this instrument and in my presence:

- (a) executed the instrument voluntarily, or
- (b) voluntarily instructed *[insert name of person signing on behalf of enduring guardian]* to sign the instrument on his or her behalf and that person executed the instrument in my presence.

Signature:

Date:

Australian legal practitioner/Registrar of the Local Court/overseas-registered foreign lawyer/justice of the peace/approved employee of NSW Trustee and Guardian or the Office of the Public Guardian

Note. An enduring guardian can resign at any time by giving written notice in this form to the person who appointed the enduring guardian. However, an enduring guardian for a person who has lost the capacity to make personal decisions may only resign with the approval of the Guardianship Tribunal.

For further information contact the Guardianship Tribunal.