

Guardianship Regulation 2026

Regulatory Impact Statement



How to make a submission

Interested organisations and individuals are invited to make a submission on the proposed Guardianship Regulation 2026.

Submissions can be made via the NSW Government's Have Your Say website:

<https://www.haveyoursay.nsw.gov.au/guardian-reg-remake>

The closing date for submissions is Wednesday 1 July 2026.

The *Guardianship Act 1987* and the Guardianship Regulation 2016 can be accessed at www.legislation.nsw.gov.au

Please note that submissions may be made public.

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1. Terminology

Decisionmakers appointed by the tribunal or court

A **guardian** is a person who can make personal decisions on behalf of another person about issues including living arrangements, services and medical and dental treatment. A guardianship order is made by the NSW Civil and Administrative Tribunal (**NCAT**) or the Supreme Court to appoint a guardian when it is determined that a person does not have capacity to make their own decisions.

A guardianship order must be periodically reviewed to determine whether it is still appropriate to continue to have effect.

Personally appointed decision-makers

An **enduring guardian** is a person who is appointed by another person (the principal) on their own behalf while they have capacity to make decisions. An enduring guardianship appointment becomes active if the principal subsequently does not have capacity to make their own decisions.

Enduring guardians can make personal decisions, including about living arrangements, services and medical and dental treatments.

2. Review of the Regulation

What is the Regulation about?

The *Guardianship Act 1987* (**the Act**) provides for a system of appointment and regulation of guardianship and financial management for people who require decision-making assistance. Decision makers appointed under the Act must make decisions in accordance with the principles of the Act, with paramount consideration given to the person's welfare and interests.

The Act authorises the making of Regulations under various sections, as listed in Appendix 1.

The Guardianship Regulation 2016 (**the current Regulation**) sets out matters including:

- Categories of people who can witness the appointment of enduring guardians.
- Categorisation of particular medical and dental treatments for the purposes of consent requirements under the Act, as well as the process for requesting and providing such consent.
- The decisions made by the Public Guardian that can be subject to review by NCAT under the *Administrative Decisions Review Act 1997*.
- Notices and other miscellaneous mechanisms to support the operation of the Act.
- Recognition of corresponding laws in other Australian states and territories and New Zealand including appointments of decision makers.
- Forms for the appointment, resignation and revocation of enduring guardians.

Why is the Regulation being reviewed?

The *Subordinate Legislation Act 1989* provides for regulations to have a limited life. In most cases, regulations are automatically repealed after five years. When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the need for the regulation. The agency must then make a decision about whether the regulation should be remade. The results of this review are required to be published in a Regulatory Impact Statement (**RIS**) with submissions invited from the public.

The current Regulation will lapse on 1 September 2026. If the current Regulation lapses and no instrument is made to take its place, the Act will continue without any accompanying regulation to support and operationalise its provisions.

3. Approach taken in this Regulatory Impact Statement

The RIS first considers the objectives of the Guardianship Regulation 2026 (**the proposed Regulation**) and then examines the following options:

- allowing the current Regulation to lapse
- remaking the current Regulation without change
- remaking the current Regulation with amendments

This RIS proposes that the current Regulation be **remade with amendments**. The proposed Regulation at **Attachment A** would implement the preferred option.

This consultation process focuses on the proposed Regulation. Matters dealt with under the Act are beyond the scope of this consultation process.

4. Objectives of Regulatory Proposal

The objective of the proposed Regulation is to repeal and remake the current Regulation with amendments. The Regulation supports the NSW guardianship system by providing supporting requirements for matters such as the appointment of enduring guardians, the recognition of interstate guardians and consent requirements for medical and dental treatments.

The proposed Regulation makes amendments to address issues identified by stakeholders. The proposed amendments would:

- update to references to NSW and interstate legislation,
- amend the categorisation of particular medical treatments, thereby amending the consent requirements for these, and
- update the form for the appointment of an enduring guardian to the option to cover the use of restrictive practices.

The proposed Regulation is divided into four Parts and one Schedule:

- **Part 1** contains general machinery provisions such as the name of the Regulation, commencement and key definitions.
- **Part 2** sets out the definition of *eligible witness* for the purposes of appointing enduring guardians under the Act, prescribes the forms for the appointment, revocation and resignation of enduring guardians, and references to interstate and New Zealand legislation for interjurisdictional recognition of enduring guardians.
- **Part 3** provides further detail about the definitions of *special medical treatment*, *major medical treatment* and *major dental treatment*, requirements for requesting and consenting to medical or dental treatment, and record-keeping for such treatment.
- **Part 4** lists the corresponding laws in interstate and New Zealand legislation to support the Act's reciprocal arrangements provisions, the decisions made by the Public Guardian that can be subject to review by NCAT, the service of notices under the Act, and savings provisions.
- **Schedule 1** contains the forms for the appointment, revocation or resignation of enduring guardians.

The content of the proposed Regulation is outlined in further detail below, along with an explanation of the intended changes from the current Regulation.

Part 2 – Enduring guardians

Under the Act, an adult may appoint a person as to act as their enduring guardian. Part 2 of the proposed Regulation sets out additional requirements related to the appointment, revocation, resignation and recognition of enduring guardians. These provisions:

- Provide categories of person who can witness the appointment of an enduring guardian, in addition to those set out in the Act (section 4).
- Prescribe the forms for the appointment (section 5), revocation (section 6) and resignation (section 7) of a person as an enduring guardian.
- Prescribe instruments of appointment of substitute decision makers in the legislation of other Australian states and territories, and New Zealand, for the purposes of the Act's recognition of enduring guardians appointed in these jurisdictions (section 8).

Changes to the categories of people who may witness the appointment of enduring guardians and updates to the recognition of interstate enduring guardians

Section 4 of the proposed Regulation sets out categories of persons who can witness the appointment of an enduring guardian, in addition to eligible witnesses set out in the Act. Under section 4, foreign lawyers and staff of the NSW Trustee and Guardian who have completed an approved course of study and approved to perform this function by their Chief Executive Officer.

The proposed Regulation does not include employees of Service NSW from the prescribed eligible witnesses to enduring guardian appointments. This change from the current Regulation intends to ensure eligible witnesses have the relevant knowledge and experience to perform this function. Staff of the NSW Trustee and Guardian have experience and expertise in guardianship matters. This, in combination with specific training in this area makes them well suited to witnessing appointments of enduring guardians. By contrast, the work of Service NSW is general in nature and does not involve specialist knowledge or experience of guardianship matters.

The proposed Regulation updates the references to interstate legislation to account for legislative developments in other jurisdictions. This will ensure continued interjurisdictional recognition of enduring guardianship appointments.

Part 3 – Medical and dental treatment

Part 5 of the Act provides a framework for regulating consent to medical and dental treatments on people who are aged 16 years or older and who are not able to provide their own consent. The Act sets out different consent requirements for major medical treatment and special medical treatment. Either a person's guardian or NCAT can consent to major medical treatment, while only NCAT can consent to special medical treatment.

Part 3 of the proposed Regulation provides operational detail for this consent framework. These provisions:

- Declare particular treatments as *special treatment*, including treatments for the termination of pregnancy, treatments that render a person infertile and treatments that involve the use of an aversive stimulus (section 9).
- Declare particular treatments as *major treatment*, including treatments involving the use of drugs of addiction, general anaesthetics and restricted substances affecting the central nervous system (section 10).
- Declare particular dental treatments as *major treatment*, including treatments involving the administration of anaesthetic or sedation or likely to result in the removal of all teeth (section 11).
- Provide further requirements for requests for consent for different categories of medical or dental treatment (section 12).
- Provide further requirements for the giving of consent for different categories of medical or dental treatment (section 13).

- Declare particular treatments as *prescribed special treatment* (section 14).
- Provide requirements for the keeping of records by a person who carries out medical or dental treatment based on consent given under the Act (section 15).

Changes to the content of “major treatment”

The proposed Regulation includes changes to the types of treatment listed under *major treatment*.

The proposed Regulation clarifies that the use of general anaesthetic is always major treatment. This would promote the policy intent to activate the consent requirements for major treatment where general anaesthetic is administered. This would also recognise the significance of such treatments and promote consistency in consent requirements for these.

The proposed Regulation does not include treatment involving testing for the human immuno-deficiency virus (HIV) as major treatment, a change from the current Regulation. Classifying HIV treatment as major treatment creates unnecessary barriers to testing for HIV and subsequent timely healthcare.

Part 4 – Miscellaneous

The provisions in Part 4 of the proposed Regulation:

- Declare particular laws of other Australian states and territories and of New Zealand to be *corresponding laws* for the purposes of the Act’s provisions on recognition of guardians and financial managers under corresponding laws (section 16).
- Provide that all decisions made by the Public Guardian in connection with the exercise of its functions under the Act are prescribed for the purposes of the availability of administrative review under the *Administrative Decisions Review Act 1997* (section 17).
- Provide further detail on the manner in which notices or other instruments under the Act must be made (section 18).
- Provide for savings of acts, matters or things that had effect immediately prior to the repeal of the former Guardianship Regulation 2016 (section 19).

The proposed Regulation will update references to corresponding laws of other jurisdictions in section 16 to ensure these continue to be accurate and enable interjurisdictional recognition of guardians and financial managers.

Schedule 1 – Forms

Schedule 1 of the proposed Regulation prescribes the forms that must be used for the appointment, revocation or resignation of an enduring guardian:

- Form 1 is for the appointment of an enduring guardian, and includes options for the appointer to authorise their enduring guardian to exercise particular functions as they choose.
- Form 2 is for the revocation of the appointment of an enduring guardian.
- Form 3 is for the resignation of the appointment of an enduring guardian.

The proposed Form 1 includes an additional option to grant an enduring guardian the function of consenting to the use of restrictive practices. This invites the appointer to consider whether this function should be granted to their enduring guardian.

A restrictive practice is any practice or intervention that has the effect of restricting a person’s rights or freedom of movement e.g. locked doors to prevent a person from freely leaving a place. Commonwealth aged care services and the National Disability Insurance Scheme require a guardian or enduring guardian to consent to the use of a restrictive practice where a person cannot provide their own consent.

5. Options for the Regulation

Three options are considered in this RIS:

1. Allow the current Regulation to lapse
2. Remake the current Regulation without change.
3. Remake the current Regulation with amendments.

An evaluation of each option is set out below.

Allow the Regulation to lapse

This Option is **not recommended**.

If the Regulation is permitted to lapse without replacement, this will result in significant costs in the form of gaps in the regulatory framework.

Without the Regulation, there would be barriers to operationalising the regulatory framework including:

- What amounts to major treatment for the purposes of medical treatment consents would be undefined, as the Act defines this by reference to the Regulation. This would frustrate the purpose of providing for a mechanism for consent to medical treatment for people who are unable to personally provide it.
- The absence of prescribed forms would prevent the appointment, revocation or resignation of an enduring guardian, as sections 6C(1)(a), 6H(2)(b) and 6HB(2)(a) require these to be made in the form, or the effect of the form, prescribed by regulations.
- The categories of people who can witness the appointment of an enduring guardian would be reduced, which would limit these categories to those set out under section 5 of the Act.
- The provisions which allow recognition of guardians under corresponding laws in other jurisdictions would be inoperative. This may necessitate new guardianship appointments in NSW for guardianship arrangements to operate in NSW, which would carry additional time and resource demands for appointers and NCAT.

Under this option, the effectiveness of the guardianship system in NSW would be significantly compromised.

Legislative amendments would be necessary to continue important operations of the Act. While this would have the benefit of enabling Parliamentary scrutiny of all provisions, it would create a greater administrative burden than remaking the Regulation, and would remove the flexibility enabled by including these mechanisms in subordinate legislation.

The Department of Communities and Justice (**the Department**) considers that the costs of this option outweigh the benefits.

Remake the current Regulation without change

This option is **not recommended**.

This option would mean that the current Regulation would continue in its present form to support the operation of the Act. This would maintain the status quo. There would be no need to educate stakeholders (e.g. guardians, financial managers, people subject to guardianship or financial management, NSW Trustee and Guardian staff, service providers and members of the public) about changes to the regulatory framework.

However, remaking the current Regulation without any changes would not enable the regulatory framework to be updated to ensure cross-references are accurate and to remain fit-for purpose. On balance, the Department considers that the costs of this option outweigh the benefits.

Remake the current Regulation with amendments

This is the preferred option.

This option would preserve aspects of the current Regulation that effectively support the operation of the Act and make amendments to update the Regulation.

Under this option, the proposed Regulation would preserve the majority of existing provisions and make the following substantive amendments:

- Clauses 8 and 16 to refer accurately to reflect relevant legislation in other jurisdictions
- Clause 10(1)(c) to clarify that the use of general anaesthetic always amounts to major medical treatment for the purposes of the Act's consent requirements
- Clause 10(1)(g) to remove HIV testing from the category of major medical treatment
- Schedule 1 to include consenting to the use of restrictive practices in the standard form for the appointment of an enduring guardian.

There would also be other minor editorial amendments aligned with current drafting conventions, including to renumber and restructure the current Regulation.

The Department considers that remaking the current Regulation with amendments will bring about the greatest net benefit and the least net cost to the community.

6. Consultation

The NSW Trustee and Guardian, the NSW Civil and Administrative Tribunal, the NSW Ministry of Health, the NSW Mental Health Review Tribunal and the NSW Department of Customer Service were consulted during the drafting of the proposed Regulation, and they have also been sent a copy of this RIS.

Copies of this RIS and the proposed Regulation will be provided directly to:

- Council for Intellectual Disability
- Dementia Australia
- Seniors Rights Service
- Intellectual Disability Rights Service
- ANZ Society of Geriatric Medicine
- Australian Medical Association
- Australian Dental Association
- The Benevolent Society
- Brain Injury Australia
- Carers NSW
- Council on the Ageing Australia
- Deafblind Australia
- Disability Council NSW
- Independent Living Centre NSW
- Mental Health Coordinating Council
- Multicultural Disability Advocacy Association of NSW
- Royal Australian College of General Practitioners
- Royal Australian and New Zealand College of Psychiatrists
- Mental Health Coordinating Council

- Synapse – Australia’s Brain Injury Organisation
- National Disability Services
- People with Disability Australia
- First People’s Disability Network
- NSW Ageing and Disability Commission
- Aboriginal Affairs NSW
- Equality Australia
- ACON
- Supreme Court of NSW
- Law Society of NSW
- The Bar Association
- NSW Ombudsman
- Legal Aid NSW
- NSW Mental Health Review Tribunal
- Mental Health Commission of NSW

Appendix 1 – Provisions in the Guardianship Act 1987 that authorise the making of regulations

Provision	Power
3(1)	Prescribed class of premises identified as exempt premises for the purposes of certain provisions.
5	Prescribed persons or class of persons who are eligible witnesses for the purpose of witnessing enduring guardianship instruments.
6C(1)(a)	Prescribed form of instrument to be used in appointing an enduring guardian.
6H(2)(b)	Prescribed form of instrument to be used in revoking the appointment of an enduring guardian.
6HB(2)(a)	Prescribed form for a written notice of resignation of an appointment as an enduring guardian.
6O(5)	Prescribed instruments made under state or territory law which may be used to appoint interstate enduring guardians.
33(1)(c)	Declaration of acts to deemed medical or dental treatment or treatment for the purposes of Part 5 of the Act.
33(1)(g)	Declaration that a kind of treatment is not to be deemed treatment for the purposes of Part 5 of the Act.
33(1)	Declarations that a treatment is major treatment or special treatment for the purposes of Part 5 of the Act.
35(1A)	Prescribing special treatments for which the offence of carrying out unauthorised treatment under the Act does not apply.
40(4)	Prescribed manner in which requests for treatment shall be made and the manner in which consents to treatment shall be given.
48	Keeping of records of medical or dental treatment carried out under the provisions of the Part 5 of the Act.
48A and 48B(7)	Declaration that a law is 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.
77	Prescribed person or class of persons for the purpose of delegation of the functions conferred or imposed on the Public Guardian by or under any law.
78(1)	Prescribed person or class of persons to whom the functions exercised by the Public Guardian under Part 5 of the Act may be delegated.
80A(1)	Prescribed classes of decision made by the Public Guardian for which an application for review under the <i>Administrative Decisions Review Act 1997</i> may be made to NCAT.
98(1)(c)	Prescribed means for sufficient service of notice or other instrument where no address of the person is known.
98(2)(b)	Prescribed time for deemed service when means of service utilised by section 98(1)(c).
108	Other matters necessary or convenient to be prescribed for the operation of the Act.
Schedule 3, Part 1	Provisions of a savings or transitional nature consequent on the enactment of particular Acts.

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