

# Substitute Consent what the law says

Part 5 NSW Guardianship Act 1987



**Public Guardian**  
Justice & Attorney General



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## About this booklet

The subject of this booklet is the legal process for seeking and giving (or withholding) consent to medical and dental treatment for people who lack the capacity to consent for themselves. The booklet is primarily a resource for medical and dental practitioners and ‘persons responsible’. It provides information to medical practitioners about the legal requirement to seek consent from patients prior to giving treatment. It also provides information to those who are able to give consent to treatment for people who lack the capacity to consent for themselves, known as the person responsible.

For ease of reading, the term ‘practitioner’ refers to both medical and dental practitioners, and ‘treatment’ refers to both medical and dental treatment.

## Valid Consent

A medical or dental practitioner has a professional and legal responsibility to seek consent from their patients before any treatment is given. Patients have a right to give or withhold consent to any treatment proposed by the practitioner.

To obtain valid consent a practitioner must tell the patient:

- the general nature and effects of the proposed treatment
- the risks associated with the proposed treatment
- the general nature, effects, benefits and risks of alternative treatments (or of not giving treatment)

Most patients are capable of understanding the treatment information provided by practitioners and are able communicate whether or not they consent to the treatment.

If practitioners believe a patient is not capable of giving a valid consent to treatment, they have a legal responsibility, in most circumstances, to seek and obtain consent from a substitute decision maker, know as the person responsible. (See page 5 for further information).

## Substitute Consent and the law

Part 5 of the *NSW Guardianship Act 1987 (Act)* and the *NSW Guardianship Regulation 2010 (Regulation)* apply to all residents of NSW who are 16 years and older and who are incapable of consenting to treatment. The *Act* states that a person cannot give valid treatment consent if they do not understand the general nature and effect of the treatment or cannot communicate consent to the treatment.

Before Part 5 of the *Act* was adopted, practitioners in NSW had no way of obtaining a valid consent before treating a patient who was incapable of giving consent. The adoption of the *Act* affords legal protection to practitioners by providing a mechanism in which they can:

- obtain valid consents to treat patients
- perform some treatments without obtaining consent
- override the objections of patients in certain circumstances

The *Act* also provides protection to people with decision-making impairments, protection that is supported by a range of penalties that can be imposed upon practitioners who fail to seek substitute consent in the appropriate circumstances.

The intention of the *Act* is to ensure that any person with a decision-making impairment is not deprived of necessary treatment merely because of that impairment. The *Act* also states that any treatment that is provided should promote and maintain the person's health and wellbeing.

## Valid consent and the person responsible

In the past, practitioners may have sought consent for treatment from the patient's next of kin or power of attorney, but such consent had no legal effect. The *Act* has replaced the common usage term 'next of kin' with the term 'person responsible'. Practitioners are legally obliged to seek consent from the person responsible as required.

A person responsible takes on the role as a result of their relationship with the person who has lost capacity. The person responsible is authorised to consent to minor and major medical consents on behalf of the person who does not have the capacity to consent themselves.

Many people who are incapable of consenting to treatment have a person responsible from whom practitioners can seek consent. The *Guardianship Act* sets out a hierarchy of persons responsible. The hierarchy, in order of priority, is:

1. a guardian (including an enduring, private or public guardian) who has been appointed with a medical and dental consent function
2. a spouse, de facto spouse or same sex partner who has a close and continuing relationship with the person
3. the carer or person who arranges care regularly and is unpaid (the carer's pension does not count as payment)
4. the carer of the person before they went into residential care, or
5. a close friend or relative

A person identified as being a person responsible can decline, in writing, to exercise the function of person responsible. A medical practitioner or other qualified person can certify, in writing, that the person identified as person responsible is not capable of consenting on the patient's behalf. In both these cases, the next person in the hierarchy becomes person responsible.

# Medical and dental treatment: definitions and categories

## Definition of treatment

Medical treatment is defined in the *Act* as any medical or surgical procedure, operation or examination and any other prophylactic, palliative or rehabilitative care normally carried out by, or under the supervision of, a medical practitioner.

Dental treatment is defined in the *Act* as any dental procedure, operation or examination normally carried out by, or under the supervision of, a dental practitioner.

The following procedures are not considered to be medical treatment as defined by the *Act*, and so are not covered by the *Act*:

- any non-intrusive examination made for diagnostic purposes, including a visual examination of the mouth, throat, nose, eyes or ears
- first-aid medical or dental treatment
- the administration of over the counter pharmaceutical drugs for the purpose, and in accordance with the dosage level, recommended by the manufacturer

## Categories of treatment

The legislation divides treatment into five broad categories - urgent, minor, major, special, and objections - and identifies who can provide substitute consent for each category.

The table below describes what the different categories of medical and dental treatment are and who can provide a valid consent.

What is <i>urgent</i> treatment? <sup>1</sup>	Who can consent? <sup>1</sup>
<p>Treatment that is required to:</p> <ul style="list-style-type: none"> <li>■ save a person’s life</li> <li>■ prevent serious damage to a person’s health</li> <li>■ alleviate significant pain or distress</li> </ul>	<p>No consent needed if the practitioner deems the treatment to be urgent</p>
What is <i>minor</i> treatment? <sup>2</sup>	Who can consent? <sup>4</sup>
<ul style="list-style-type: none"> <li>■ Treatment involving sedation (but not general anaesthetic) for: <ul style="list-style-type: none"> <li>a) management of fractured or dislocated limbs</li> <li>b) endoscopes inserted through an orifice, not penetrating the skin</li> </ul> </li> <li>■ Administration of restricted substances that affect the central nervous system: <ul style="list-style-type: none"> <li>a) but are not major treatments</li> <li>b) when used for analgesic, antipyretic, antiparkinsonian, antihistaminic, antiemetic, antinauseant or anticonvulsant purposes or</li> <li>c) when used PRN less than three times a month or</li> <li>d) for sedation in minor procedures when such medications are used only once</li> </ul> </li> <li>■ <i>Not</i> special treatment, major treatment or treatment in the course of a clinical trial<sup>3</sup></li> </ul>	<p>The person responsible</p> <p>If there is no person responsible or the person responsible cannot be located, the practitioner can treat but must certify in the patient’s record that:</p> <ol style="list-style-type: none"> <li>1. the treatment is necessary and will promote the patient’s health and wellbeing, and</li> <li>2. the patient is not objecting to the treatment</li> </ol>

What is <i>major</i> treatment? <sup>2</sup>	Who can consent?
<ul style="list-style-type: none"> <li>■ Treatment other than special treatment or treatment in the course of a clinical trial<sup>3</sup></li> <li>■ Any treatment that involves the administration of a long-acting injectable hormonal substance for the purpose of contraception or menstrual regulation</li> <li>■ Any treatment that involves the administration of a drug of addiction</li> <li>■ Any treatment that involves the administration of a general anaesthetic or other sedation, but not treatment involving:               <ul style="list-style-type: none"> <li>a) sedation used to facilitate the management of fractured or dislocated limbs or</li> <li>b) 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</li> </ul> </li> <li>■ Any treatment used for the purpose of eliminating menstruation</li> <li>■ Any treatment that involves the administration of a restricted substance for the purpose of affecting the central nervous system, but not a treatment:               <ul style="list-style-type: none"> <li>a) involving a substance that is intended to be used for analgesic, antipyretic, antiparkinsonian, anticonvulsant, antiemetic, antinauseant or antihistaminic purposes; or</li> <li>b) that is to be given only once; or</li> </ul> </li> </ul>	<p>The person responsible</p> <p>If there is no person responsible or the person cannot be located, consent must be sought from the Guardianship Tribunal</p> <p>Requests and consent must be in writing or, if not practicable, confirmed in writing at a later time</p>

What is <i>major</i> treatment? <sup>2</sup>	Who can consent?
<ul style="list-style-type: none"> <li>c) that is a PRN treatment (that is, given when required, according to the patient's needs) given up to 3 times a month; or</li> <li>d) given for sedation in minor medical procedures</li> <li>■ Any treatment that involves a substantial risk to the patient (that is, a risk that amounts to more than a mere possibility) of: <ul style="list-style-type: none"> <li>a) death; or</li> <li>b) brain damage; or</li> <li>c) paralysis; or</li> <li>d) permanent loss of function of any organ or limb; or</li> <li>e) permanent and disfiguring scarring; or</li> <li>f) exacerbation of the condition being treated; or</li> <li>g) an unusually prolonged period of recovery; or</li> <li>h) a detrimental change of personality; or</li> <li>i) a high level of pain or stress</li> </ul> </li> <li>■ Any treatment involving testing for the human immuno-deficiency virus (HIV)</li> <li>■ Any dental treatment involving the administration of a general anaesthetic or simple sedation<sup>5</sup></li> <li>■ Any dental treatment intended, or likely, to result in the removal of all teeth<sup>5</sup></li> <li>■ Any dental treatment likely to result in the patient's ability to chew food being significantly impaired for an indefinite or prolonged period<sup>5</sup></li> </ul>	<p>The person responsible</p> <p>If there is no person responsible or the person cannot be located, consent must be sought from the Guardianship Tribunal</p> <p>Requests and consent must be in writing or, if not practicable, confirmed in writing at a later time</p>

What is <i>special and special experimental treatment</i> ? <sup>6</sup>	Who can consent?
<p>Special treatment:</p> <ul style="list-style-type: none"> <li>■ Any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or</li> <li>■ Any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned; or</li> <li>■ Any treatment that is carried out for the purpose of terminating pregnancy; or</li> <li>■ Any treatment in the nature of a vasectomy or tubal occlusion; or</li> <li>■ Any treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise</li> </ul> <p>Special experimental treatment:</p> <ul style="list-style-type: none"> <li>■ 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</li> <li>■ Any treatment that involves the use of androgen reducing medication for the purpose of behavioural control</li> </ul>	<p>The Guardianship Tribunal only</p>
What is a <i>clinical trial</i> ? <sup>6</sup>	Who can consent?
<ul style="list-style-type: none"> <li>■ A trial of drugs or techniques that necessarily involves the carrying out of medical and dental treatment on the participants in the trial</li> </ul>	<p>The Guardianship Tribunal only</p>

What is <i>objection to treatment</i> ? <sup>7</sup>	Who can consent?
<p>A patient who cannot give a valid consent to their own treatment is, nevertheless, considered to be objecting to treatment if they indicate or have previously indicated, by whatever means, that they do not want the treatment carried out and have not withdrawn their objection</p>	<p>If a practitioner considers that a patient should receive the treatment, the practitioner must seek consent from the Guardianship Tribunal to override a patient's objection to treatment<sup>8</sup></p> <p>A guardian who has been given the authority in a guardianship order from the Guardianship Tribunal to override the patient's objections may consent to the treatment despite the patient's objections, but only if satisfied that the proposed treatment is manifestly in the best interests of the patient<sup>9</sup></p> <p>Exceptions to the above are:</p> <ul style="list-style-type: none"> <li>■ Consent is not required if the treatment is urgent (see Urgent category above)</li> <li>■ A patient's objection can be disregarded by the treating practitioner if:<sup>10</sup> <ul style="list-style-type: none"> <li>■ the treatment is not special treatment; and</li> <li>■ the patient has minimal or no understanding of what the treatment entails; and</li> <li>■ the treatment will cause the patient no distress; or</li> <li>■ if it will cause the patient some distress, the distress is likely to be reasonably tolerable and only transitory</li> </ul> </li> </ul>

1 *Guardianship Act 1987*, Section 37(1)

2 *Guardianship Regulation 2010*, Sections 11 and 12

3 *Guardianship Act 1987*, Section 33(1)

4 *Guardianship Act 1987*, Section 37(2)(3)

5 *Guardianship Regulation 2010*, Sections 9 and 12

6 *Guardianship Act 1987* Section 33 (1); *Guardianship Regulation 2010*, Sections 9 and 10

7 *Guardianship Act 1987*, Section 33(3)

8 *Guardianship Act 1987*, Section 37(1)

9 *Guardianship Act 1987*, Section 46A

10 *Guardianship Act 1987*, Section 46(4)

# Seeking treatment consent: when, who and how?

## Assessing capacity and consent

Most people with disabilities can take responsibility for their own health care, ask questions, understand explanations and provide a valid consent to treatment. Others may be able to give a valid consent for minor treatment but not for major treatment. Still others may be able to answer questions and appear to understand but may not fully comprehend the issues discussed.<sup>1</sup>

It is each practitioner's responsibility to assess, for each treatment proposal, the patient's capacity to provide a valid consent. This assessment may be assisted by insight from others who know the person well. If the practitioner decides that the person with the disability is unable to provide consent to treatment, substitute consent must be sought from the person responsible or the Guardianship Tribunal. Information about how to do that is discussed below.

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<sup>1</sup> Capacity Toolkit, NSW Government, Attorney General's Department, Sydney, 2008.

## Consent from the person responsible

Practitioners have a legal responsibility to give the person responsible the same information they would provide the patient for whom they are proposing treatment. A person responsible must be told:

- the particular condition requiring treatment
- the general nature and effect of each course of treatment
- the nature and degree of any significant risks associated with each course of treatment or no treatment
- the alternative courses of treatment that are available in relation to that condition
- the reasons why the particular course of treatment is proposed

When considering a request for consent to a proposed treatment, a person responsible must have regard to the views (if any) of the patient. There are some medical treatments that a person responsible cannot consent to. (See special medical treatment on page 10 and objection to treatment on page 11). A person responsible can provide consent to a particular treatment or treatment plan. Consent will usually be for a specified duration and may have conditions attached.

## Consent from the Public Guardian

If the Public Guardian is the patient's person responsible consent can be sought by:

- contacting the Public Guardian with information necessary to enable the Public Guardian to understand the nature and effect of the proposed treatment
- providing this information in writing where required (see categories of treatment pages 6 to 11). The Public Guardian has a standard form the practitioner may choose to use
- waiting for the Public Guardian to give consent

If the proposed treatment is major and needs to be carried out quickly, a request can be made over the phone but must be confirmed in writing as soon as possible.

The Guardianship Tribunal and the Public Guardian provide after-hours telephone services. See page 16 for contact details.

Practitioners should be aware it is an offence for a person to carry out medical or dental treatment on a patient to whom the Guardianship Act applies (that is, a patient who is 16 years and over and who is incapable of consenting to their own treatment) unless:

- a consent for the treatment has been obtained in accordance with the Guardianship Act 1987 NSW, or
- the carrying out of the treatment is authorised by the Guardianship Act and no consent is required

A conviction in relation to minor or major treatment carries a maximum penalty of one years imprisonment and/or a fine of up to \$10,000.

A conviction concerning special\* treatment carries a maximum penalty of seven years imprisonment.

*\*See page 10 for descriptions*

## Consent from the Guardianship Tribunal

If substitute consent is required for a person who does not have a person responsible, or where the person responsible does not have authority to provide consent, a treating practitioner must:

- complete a consent to medical and dental treatment application form (available from hospital administration, the Guardianship Tribunal or the Tribunal's website)
- fax or mail the application to the Guardianship Tribunal

The Guardianship Tribunal will convene a hearing and contact the treating practitioner who has made the application (the applicant). The Guardianship Tribunal will then:

- give or refuse consent at the hearing and advise the applicant
- send a written copy of the decision (Order and Reasons for Decision) to the applicant and patient

## Palliative care

A person responsible can make decisions about treatment, including treatment that is part of a palliative care plan. Persons responsible and doctors need to be aware of any advance care directives (ACD) a patient may have made when they had capacity.

When dealing with palliative care decisions, practitioners should refer to *Guidelines for end-of-life care and decision making* (NSW Health 2005). Other relevant NSW Health documents include *CPR - Decisions relating to No Cardiopulmonary Resuscitation Orders* (NSW Health 2008) and *Using Advance Care Directives* (NSW Health 2005). The Public Guardian has a position statement, *End-of-life care decisions and people under guardianship* (2009).

## Contact details

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