

Determining whether to consent to proposed medical or dental treatment

This policy applies where the Public Guardian has been appointed as a person's guardian, and has the authority to consent to medical and dental treatment. This policy addresses the Public Guardian's role and responsibilities as outlined in Part 5 of the NSW Guardianship Act 1987.

PROMOTING ACCESS

People with disabilities have the right to the same range of medical, dental and allied health care services available to other members of the community. The Public Guardian is committed to people under guardianship having access to the health services and treatment they require, irrespective of their age, degree or nature of disability, socio-economic status, cultural background, where they live, gender or sexual orientation.

Many of the people under the guardianship of the Public Guardian are highly vulnerable. The Public Guardian will advocate for the person's rights to necessary treatment and services.

The Public Guardian notes the National Health and Medical Research Council statement that

"there is a community recognition that patients are entitled to make their own decisions about their medical treatment. These decisions will need to be based on information and advice given by the doctor".¹

The Guardianship Act imposes a similar expectation in relation to the information practitioners will give to persons responsible or guardians in the process of seeking medical or dental consent.

The Public Guardian shares the view that all members of the community should be free to make their own health care decisions, through providing or withholding consent to proposed medical or dental treatment. For adults who cannot provide their own consent, consent should be provided by an appropriate legal authority including a person responsible, or a guardian appointed by the Guardianship Tribunal.

Definitions

Part 5 of NSW Guardianship Act identifies who can lawfully provide substitute consent to medical and dental treatment on behalf of a person who cannot consent for her/himself. Part 5 and its associated regulations detail the obligations on medical and dental practitioners when seeking consent for treatment, and the obligations on guardians and persons responsible in responding to these requests.

UNDER THE GUARDIANSHIP ACT:

Medical treatment means an intervention or treatment (including any medical or surgical procedure, operation, examination, and any prophylactic, palliative or rehabilitative care) normally carried out by, or under the supervision of a medical practitioner.

Dental treatment means an intervention or treatment (including any dental procedure, operation or examination) normally carried out by, or under the supervision of a dentist.

Actions and interventions not covered by these definitions include:

- non-intrusive examinations for diagnostic purposes (such as visual examinations of the mouth, throat, nasal cavity, eyes or ears);
- first-aid treatment;
- administration of medications that do not require a prescription and are normally self-administered (providing these medications are administered for the purposes of, and in accordance with, the recommended dose ranges noted in the manufacturer's instructions).²

These actions or interventions do not require substitute consent under Part 5 of the Guardianship Act.

RELEVANT LEGISLATION:

NSW GUARDIANSHIP ACT 1987:

Part I Section 3A - Persons Responsible

Part I Section 4 - General Principles require that:

- the welfare and interests of the person should be given paramount consideration;
- the freedom of decision and freedom of action of the person should be restricted as little as possible;
- the views of the person should be taken into consideration;
- the person should be protected from neglect, abuse and exploitation;
- the importance of preserving the family relationships and the cultural and linguistic environments of the person should be recognised.

PART 5 - MEDICAL & DENTAL TREATMENT:

Section 33A - Person responsible.

Section 46A - Power of guardian to override patient's objection to treatment when authorised by the Tribunal.

Section 32 (a) - seeks "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".

Section 32 (b) - seeks "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".

GUARDIANSHIP ACT REGULATIONS

Part 2 Medical & Dental Treatment, Sections 7 - 10

MENTAL HEALTH ACT 1990

Chapter 6 Care & Treatment Outside Hospitals

Chapter 7 Medical or Therapeutic Treatments Relating to Mental Illness or Given To Patients

POSITION STATEMENT

Consent to treatment

When appointed as a person's guardian, with a medical and dental consent authority, the Public Guardian has the responsibility for determining whether to consent to proposed treatment when the person is not able to do so for her/himself. In deciding whether to provide or withhold consent, the Public Guardian aims to ensure that the person with a disability:

- is not deprived of treatment due to an inability to consent for her/himself;
- only receives treatment that promotes or maintains his/her health and well-being.

The Public Guardian is required to consider each proposal in line with the General Principles of the Guardianship Act. The Public Guardian must always consider whether the treatment is in the best interests of the person.

Providing information

To decide whether to provide or withhold consent, the Public Guardian must be given sufficient information about the proposed treatment so that an informed decision can be made. Part 5 of the Guardianship Act identifies the information a treating practitioner is required to give a patient in seeking consent to a proposed treatment.

Just as practitioners must obtain a valid consent from competent patients before commencing most treatment, valid consent must also be sought for patients who lack the capacity to consent. The information required by the Public Guardian, when asked to consent on a person's behalf, is therefore consistent with the standard of information required by a competent person.

Where treatment is proposed for a person under guardianship of the Public Guardian, and where the Public Guardian has been given a medical and dental consent authority, relevant information should be

provided to the Public Guardian. This information should be provided with sufficient time to allow the Public Guardian to meet the requirements of the Act in relation to seeking the views of the person under guardianship, where possible, and the views of others important in the person's life.

Exchanging Information

The Public Guardian is committed to working closely with medical, dental and other health care practitioners to provide timely decisions regarding consent to treatment. The Public Guardian will continue to work closely with practitioners and health care services in advocating for people under guardianship to have access to the health care and treatment required to meet their individual needs.

The Public Guardian has clear responsibilities in relation to providing or withholding consent to medical and dental treatment. It is in the context of open and respectful working relationships with practitioners that the Public Guardian seeks information about proposed treatment and the person's medical condition, and will share relevant information about a person's circumstances or needs. This information is required by the Public Guardian to ensure that consent is being given in the interests of the person under guardianship.

The Public Guardian recognises the importance of open communication between staff within the Office of the Public Guardian and practitioners seeking consent. The Public Guardian agrees that the process of providing or withholding consent "is essentially an issue of good communication." 4

The Public Guardian will:

- seek the information required to provide or withhold consent;
- provide advice to medical and dental practitioners about their responsibilities in seeking consent for proposed treatments.

As outlined in the Guardianship Act, the Public Guardian recognises that the primary responsibility for seeking consent rests with the treating practitioner.

What is a valid consent?

To be valid, a consent needs to include a number of elements.

Capacity - the person must be able to "*understand and appreciate the general nature and consequences of the procedure/treatment.*"⁵ The person must also be able to communicate with consistency, but not necessarily verbally, that they are providing or withholding their consent.

Volition - the consent must be freely given and the person must not be pressured into providing consent.

Adequate information - sufficient information must be provided (by the practitioner to the patient to enable him/her to come to a "reasoned decision".⁶

Specificity - the consent given by the person must be specific to the particular treatment proposed.

When the Public Guardian, or any other guardian or person responsible, considers a request for substitute consent to medical or dental treatment, certain information must be provided by the practitioner in order for a valid consent to be provided or withheld. This information includes:

- why it is believed the person with a disability cannot provide his/her own consent;
- the particular condition requiring treatment and the proposed treatment for which consent is sought;
- the alternative courses of treatment, if any, available for this condition;
- the general nature and effect of the proposed and alternative treatments;
- the nature and degree of the significant risks associated with the proposed and alternative treatments;
- why the proposed treatment is regarded as the most appropriate option;
- the likely outcome if the treatment were not provided.

Seeking valid consent

Before most⁷ medical or dental treatments can be provided to a person, the treating practitioner should obtain a valid consent from either:

- the person;
- or
- the person's substitute decision-maker either a guardian appointed by the Guardianship Tribunal, an enduring guardian, a person responsible or from the Guardianship Tribunal itself where, in the opinion of the practitioner, the person lacks the capacity to provide his/her own consent.

All medical and dental practitioners have a common law duty of care to their patients, and this involves a duty to warn.⁸ In addition to this duty, practitioners also have obligations in relation to patients who are subject to the provisions of Part 5 of the Guardianship Act, that is patients who are unable to provide their own consent to medical or dental treatment.

The NSW Health has stated that, "it is a general rule that no procedure or treatment may be undertaken without the consent of the patient". Therefore undertaking such treatment "were it not defensible on the grounds that the patient had (provided) consent, is *prima facie* an assault".⁹ In NSW this situation applies equally to a person with cognitive disabilities who cannot provide his/her own consent to treatment. Substitute consent should be sought from that patient's person responsible or guardian.

Failure of a practitioner to obtain a valid consent from her/his patient (or the patient's substitute decision-maker) may expose that practitioner to allegations of a breach of their common law duty of care to the patient.

Where substitute consent is not sought for the treatment of a person who lacks the capacity to consent, a practitioner may be exposed to allegations of a breach of her/his obligations in relation to Part 5 of the Guardianship Act. The penalties for offences in respect of Part 5 include fines and/or imprisonment.

References

1. National Health & Medical Research Council, *General Guidelines for Medical Practitioners on Providing Information to Patients* (Australian Government Publishing Service, 1994), i) Foreword, Richard Smallwood - Chair, Health Care Committee.
2. *Guardianship Act (1987)*, section 33
3. Breen, K., et al, *Ethics, Law & Medicine* (Sydney, Allen & Unwin, 1997), p31
4. NSW Health Department, *Consent to Medical Treatment - Circular 92/21* (Legal Branch, March 1993), p.5, section 5a
5. Op. cit., p5 section 5c
6. The exceptions to this general rule include:
urgent treatment required to save a person's life, or to prevent serious damage to their health, or to prevent or alleviate significant pain or distress;
treatments authorised by statute (such as the treatment of persons who are subject to the provisions of the Mental Health Act 1990) treatments authorised by a Court Order.
7. The duty a practitioner bears to her/his patient to disclose the material risks (relevant to that particular person) related to a treatment or procedure, is outlined and discussed in the judgement of the High Court of Australia in *Rogers v. Whitaker* (1992) 109 ALR 625.
8. NSW Health Department, *Consent to Medical Treatment - Circular 92/21* (Legal Branch, March 1993), p.5, section 4

OTHER RELATED OPG POSITION STATEMENTS

Determining whether to consent to the use of restraint on an elderly person in a care facility
Valuing the cultural, linguistic and religious background of the person under guardianship