

## Guardianship Application Process

(Implementation Guide to GL2017\_013 *the Guardianship Application Process for Adult Inpatients of NSW Health Facilities*)

**Policy Number** 2.019

**Policy Function** Leadership and Management

**Issue Date** 28 September 2018

**Summary** This policy provides direction on the implementation of Ministry of Health guideline GL2017\_013 *The Guardianship Application Process for Adult Inpatients of NSW Health*.

**Responsible Officer** Executive Director Clinical Operations

**Applicable Sites**

- Administration Centres
- Community Sites (e.g. Court Liaison Service, Community Integration Team, etc.)
- Health Centres (Adult Correctional Centres or Police Cells)
- Health Centres (Juvenile Justice Centres)
- Long Bay Hospital
- Forensic Hospital

**Previous Issue(s)** New policy

**Change Summary** N/A – New Policy

**TRIM Reference** POLJH/2019

**Authorised by** Chief Executive, Justice Health & Forensic Mental Health Network

## 1. Preface

The Guardianship Division of the *New South Wales Civil and Administrative Tribunal* (NCAT), hereafter referred to as the GD, hears applications about people who need assistance to make informed decisions regarding aspects of their lives, including where they live, what medical treatment they will receive and the management of their finances. The role of the GD is to determine whether a person requires a legally-appointed substitute decision maker and who that should be.

## 2. Policy Content

### 2.1 Mandatory Requirements

#### 2.1.1 Legal Framework

All applications to the GD must be made in accordance with the [Guardianship Act 1987](#). All staff must observe the principles of the [Guardianship Act 1987](#) which state that everyone who works with people with disabilities under the Act has a duty to:

- give the person's welfare and interests paramount consideration;
- ensure that the person's freedom of decision and freedom of action is restricted as little as possible;
- encourage the person to live as normal a life as possible in the community;
- take the person's view into consideration;
- recognise the importance of preserving family relationships and cultural and linguistic environments;
- encourage the person to be as self-reliant as possible in matters relating to their personal, domestic and financial affairs;
- protect the person from neglect, abuse and exploitation; and
- encourage the community to apply and promote these principles.

#### 2.1.2 Policy Framework

All staff should refer to Ministry of Health guideline [GL2017\\_013](#) *The Guardianship Application Process for Adult Inpatients of NSW Health Facilities*. The guideline does not address guardianship applications for persons who are under 16 years of age.

Guidance is also provided by the Ministry of Health Information Bulletin [IB2017\\_001](#) *The Guardianship Application Process for Adult Inpatients of NSW*, which recommends that applications to NCAT for guardianship orders should be made in the name of the Local Health District (LHD) or Specialty Network, including Justice Health and Forensic Mental Health Network (JH&FMHN), rather than in the name of an individual health professional. This represents a change from the previous practice of health professionals, typically social workers (SW), lodging applications in their own name. The primary purpose of this change is to protect individuals from any adverse consequences of being named as a party to Tribunal proceedings.

### 2.2 Implementation - Roles & Responsibilities

Refer to sections [3.3](#), [3.4](#) and [3.5](#).

## 3. Procedure Content

### 3.1 Types of Applications

The GD deals with the following types of applications most relevant to NSW Health: guardianship, financial management, review of existing power of attorney and/or enduring guardianship orders, consent to medical and dental treatment.

Before appointing a guardian, the GD must have evidence of the following:

1. **Disability:** the person must have some form of impairment or disability that impacts upon their ability to make informed decisions, such as mental illness, cognitive impairment, brain injury or dementia.
2. **Incapacity:** formal assessments and reports demonstrate that the person lacks capacity to make their own informed decisions in one or more areas.
3. **Need:** there are current concerns which warrant the person having a guardian appointed and there are no informal means by which the decision can be made.

#### 3.1.1 Guardianship Applications

The GD can appoint a guardian to make personal or lifestyle decisions on behalf of a person aged 16 years and over with decision-making impairment.

#### 3.1.2 Financial Management Applications

The GD can appoint a financial manager or review an enduring power of attorney on behalf of a person who is 16 years of age or over with decision-making impairment. This may be considered in the following circumstances:

- There is evidence of undue influence.
- There are concerns that enduring power of attorney forms or other documents were completed when the person lacked capacity.
- There is evidence of abuse or significant risk of financial exploitation.
- The person has significant income and assets in NSW that need management.
- There are pending financial contracts or payments to be arranged for essential services.

**Note:** Financial management orders can be intrusive and restrictive, and more supportive financial arrangements should be trialled first. (Refer to the [NSW Department of Justice Capacity Toolkit](#) 2017, [section 6 Assisted decision-making](#)).

#### 3.1.3 Consent to Medical and Dental Treatment

For most medical and dental treatment, the individual's 'person responsible' can give or refuse consent. However, the person responsible cannot give consent if the person is objecting to the treatment. Refer to [s33A](#) of the [Guardianship Act 1987](#) for the definition of 'person responsible.' In this situation, or if there is no person responsible, an application can be made to the GD for NCAT to provide consent.

There is no need to obtain consent from the person responsible (or the GD) where:

- the treatment is needed to save the person's life, prevent serious injury, or alleviate significant pain and distress; or
- the proposed treatment is minor, the person is not objecting, consent cannot be obtained from the person responsible and the treatment is necessary for the person's health and wellbeing.

Refer to NCAT Factsheet: [Consent to Medical or Dental Treatment](#), 2016.

Applications must be completed and submitted by the treating medical team (which should include the primary treating medical officer (MO)) on behalf of JH&FMHN. Health professionals, including SW, must not complete applications for consent to medical and dental treatment.

### 3.2 Capacity

The starting point in considering capacity must always be that a patient has capacity. Everyone has the right to make decisions affecting their lives and to have those decisions respected, even when clinicians do not agree with the decision a patient makes. A health professional should only consider challenging the presumption of capacity if there are concerns that the patient's disability could impact on their decision-making ability and there are significant risks with the decisions that the patient was making (or were made by others on their behalf).

Before conducting a capacity assessment, clinicians should ensure that all options are provided to the patient to support their independent decision-making. Refer to the [NSW Department of Justice Capacity Toolkit](#) 2017, [section 6](#) *Assisted decision-making*.

### 3.3 Forensic Hospital (FH)

#### 3.3.1 Psychiatrist/psychiatry registrar is responsible for:

- documenting the patient's current mental state in the health record prior to any formal capacity testing;
- determining the patient's capacity to make informed decisions, aided by the [NSW Department of Justice Capacity Toolkit](#) 2017 and evidence provided by the multidisciplinary team (MDT);
- submitting applications and reports in relation to consent for medical and dental treatment to the GD within 7 days of the decision that an application to the GD is required; and
- attending the hearing, if required, in person or via audio-visual link/teleconference.

#### 3.3.2 Social Worker (SW) is responsible for the following:

If it is decided that the patient lacks capacity, [GL2017 013](#) identifies that the SW (in consultation with the MDT) is responsible for:

- exploring whether decision-making arrangements exist;
- considering any conflict of interest issues and the capacity of substitute decision makers; and
- assessing the risk to the patient regarding the decision(s) in question and the need for a guardian.

Discussion should also include the patient, wherever possible, the designated carer/principal care provider and any other stakeholders.

Where the SW is applying on behalf of JH&FMHN, s/he is responsible for:

- coordinating the guardianship/financial management application process, noting that the applicant is JH&FMHN, not an individual SW;
- completing application forms within 7 days of the decision that guardianship is required;
- prompting colleagues to complete and submit all reports to NCAT within 7 days of the decision that a NCAT application was necessary;
- completing the SW report template (where required) and submitting this to NCAT within 7 days of the decision that a NCAT application was necessary;
- submitting the application and reports together to NCAT;
- ensuring that the patient has been provided with all reports, served with the Notice of Hearing and encouraged to discuss any concerns or questions;
- ensuring that all involved parties, including family and carers, have been served with the application and reports (as outlined in NCAT Factsheet – [Information for Applicants: Appointment of a financial manager and/or guardian](#));
- facilitating engagement with the hearing by the patient (via teleconference), family, carers and any other stakeholders;
- attending the hearing in person, if possible, or via audio-visual link/teleconference; and
- filing the NCAT determinations and any orders in the health record.

Where the SW has not made an application on behalf of JH&FMHN, s/he should assist the appointed applicant (e.g. a family member) by providing information and advice.

### 3.4 Long Bay Hospital

As directed in section [2.1.2](#), the applicant is JH&FMHN, not an individual clinician.

#### 3.4.1 Aged Care Rehabilitation Unit (ACRU)

- The patient's treating MO is responsible for the same functions described in section [3.3.1](#).
- The Coordinator Specialist Mental Health Services for Older People (SMHSOP) and Nursing Unit Manager (NUM) ACRU may initiate, complete and submit guardianship applications for forensic and custodial patients with age-related mental health problems, in consultation with the MDT, the patient, wherever possible, the designated carer/principal care provider and any other stakeholders.
- NCAT may also contact the Corrective Services NSW (CSNSW) Manager Offender Services and Programs (MOSP) or Senior Services and Programs Officer (SAPO) at the relevant centre to facilitate applications and hearings. Refer to CSNSW *Custodial Operations Policy and Procedures* section [21.11 Boards and Tribunals](#).

#### 3.4.2 Mental Health and Medical Subacute Units (MHU and MSU)

- The patient's treating MO is responsible for the same functions described in section [3.3.1](#).
- The MO may also initiate and submit guardianship applications to the GD, following a capacity assessment which confirms that the patient lacks decision-making capacity.

JH&FMHN staff should contact CSNSW Statewide Disability Services (SDS) at [sds@justice.nsw.gov.au](mailto:sds@justice.nsw.gov.au) for advice in relation to guardianship enquiries for patients in LBH. If applications are made for LBH patients, staff should also notify [sds@justice.nsw.gov.au](mailto:sds@justice.nsw.gov.au).

### 3.5 Custodial Mental Health (CMH)

As directed in section [2.1.2](#), the applicant is JH&FMHN, not an individual clinician.

- CMH clinicians may lodge guardianship applications for forensic patients under case management, following a capacity assessment which confirms that the patient lacks decision-making capacity.
- The Coordinator SMHSOP may submit applications for patients with age-related mental health conditions.

JH&FMHN staff should contact [sds@justice.nsw.gov.au](mailto:sds@justice.nsw.gov.au) for advice in relation to guardianship enquiries for patients under CMH case management.

## 4. Definitions

### Must

Indicates a mandatory action requirement.

### Should

Indicates a recommended action that needs to be followed unless there are sound reasons for taking a different course of action.

## 5. Legislation and Related Documents

### Legislation

[Disability Discrimination Act 1992](#) (Cth)

[Disability Inclusion Act 2014](#)

[Guardianship Act 1987](#)

[Mental Health Act 2007](#)

[Mental Health \(Forensic Provisions\) Act 1990](#)

### NSW Ministry of Health Policy Directives and Guidelines

[GL2017 013](#) *The Guardianship Application Process for Adult Inpatients of NSW Health Facilities*

[IB2017 001](#) *The Guardianship Application Process for Adult Inpatients of NSW*

[PD2005 406](#) *Consent to Medical Treatment – Patient Information*

[PD2017 044](#) *Interpreters – Standard Procedures for Working with Health Care Interpreters*

### JH&FMHN Policies and Procedures

[1.192](#) *Primary Agency for Forensic Patients in Custody*

[1.443](#) *Custodial Mental Health Referral and Case Management Policy*

Other

[NSW Civil and Administrative Tribunal](#)

[NSW Department of Justice Capacity Toolkit 2017](#)

[NSW Civil and Administrative Tribunal Fact Sheets: Guardianship Division](#)

*Custodial Operations Policy and Procedures* section [21.11](#) *Boards and Tribunals*.