Fact Sheet: Information for the legal community on restrictive practices in residential aged care in Victoria

Mechanical Restraint

Introduction

Aged Care Justice (ACJ) supports older Australians receiving aged care services, in residential care and home care, by providing information about legal rights, legal referral services, and promoting reform.

The use of restrictive practices is a significant issue in aged care. ACJ is creating Fact Sheets on restrictive practices with the aim of reducing serious incidences of restrictive practices in aged care settings through legal education and access to legal support. This project received funding through the Victorian Legal Services Board Grants Program. The collection of Fact Sheets are designed to support the aged care community and also include dedicated Fact Sheets for the legal community. They will contain information on chemical, mechanical, physical and environmental restraint, and mechanical restraint, in both residential care and home care.

Restrictive practices restrict rights or freedom of movement and are regulated by the laws of the Commonwealth and the State and Territories. The Fact Sheets apply to Victorian residential aged care services, delivered under the Commonwealth *Aged Care Act 1997* (Cth).[1] The use of restrictive practices in aged care settings is complex, involving definitional issues, legal obligations, issues of decision-making capacity and substitute decision-making.

Background

The Royal Commission into Aged Care Quality and Safety, in their Final Report released in March 2021, warned that 'unsafe and inhumane restrictive practices' can result in 'serious physical and psychological harm and, in some cases, death' and required 'immediate attention'.[2] In response, the Commonwealth Government made significant amendments to the *Aged Care Act 1997* and the *Quality of Care Principles 2014*[3], (**the Principles**), including that restrictive practices are only to be used as a last resort to prevent harm, after alternative strategies are explored, and require informed consent from the Resident or a substitute decision-maker, with exceptions for emergency situations.

The use of a restrictive practice is regulated by Commonwealth legislation, but State and Territory laws apply with respect to defining a person's capacity to consent to a restrictive practice and the appointment of a substitute decision-maker if it is determined that the resident (**Resident**) of an aged care facility (**Facility**) does not have decision-making capacity. As the laws in Victoria were unclear on who can be a substitute decision-maker, in 2022 the Commonwealth legislated a hierarchy of 'restrictive practice substitute decision makers' (**RPSDMs**)[4] to allow States and Territories time to make their own arrangements.

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[1] *The Aged Care Act 2024* (Cth) will come into force on 1 July 2025 and replace the 1997 Act.
[2] The Aged Care Royal Commission Final Report 'Care, Dignity and Respect' March 2021, Vol 2, 68.
[3] *Quality of Care Amendment (Restrictive Practices) Principles 2022*, sched 3 as amended by *Quality of Care Amendment (Restrictive Practices)*.
[4] *Quality of Care Principles 2014* ss 5A and 5B.

The Victorian Government has now enacted a new consent model for restrictive practices which will come into force on 1 July 2025. The legislation provides that RPSDM nominations made under Commonwealth legislation will continue to apply'.[5]

MECHANICAL RESTRAINT

This fact sheet provides information on the use of mechanical restraint in a residential aged care facility[6] by Victorian aged care providers (**Providers**) under the Commonwealth *Aged Care Act 1997* (Cth).[7] Residential aged care does not include a hospital or psychiatric facility.[8]

1.0 What is mechanical restraint?

Mechanical restraint is a practice or intervention that is, or that involves, the use of a device to prevent, restrict or subdue a care recipient's movement with the primary objective of influencing the behaviour of the Resident.[9]

Mechanical restraint is a 'restrictive practice' because its use restricts a person's rights or freedom of movement.[10] It is not considered a restrictive practice if the use of the device is for therapeutic or non-behavioural purposes[11], such as the use of a wheelchair for someone who is unable to walk, or splints or casts for injuries. Examples of mechanical restraint include tray tables, belts or harnesses.

2.0 Mechanical restraint and provider obligations

Providers considering using a mechanical restraint must abide by the requirements set out in the *Quality of Care Principles 2014*, which include that mechanical restraint;

a) is used as a last resort to prevent harm to the Resident or other persons, and after consideration of the likely impact on the Resident;[12]

b) cannot be used unless alternative strategies are considered and used to the extent possible, and documented in the Resident's Behaviour Support Plan;[13]

c) is used to the extent that it is necessary and in proportion to the risk of harm to the Resident or other persons; is in the least restrictive form, and for the shortest time necessary to prevent harm;[14] and

d) complies with the Resident's Behaviour Support Plan, the Aged Care Quality Standards, and is not inconsistent with the Charter of Aged Care Rights.[15]

e) Informed consent to the use of the restraint has been obtained[16], except in an emergency.[17]

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[5] *Aged Care Restrictive Practices (Substitute Decision-maker) Act 2024* (Vic), s 22. See also 'Department of Health Victoria', *Substitute decision making and restrictive practices in aged care* (Web page) <https://www.health.vic.gov.au/residential-aged-care/substitute-decision-making-and-restrictive-practices-in-aged-care>

[6] *Quality of Care Principles 2014* s 15DA.

[7] Under the *Aged Care Act 2024* the provisions will apply to 'registered providers' of aged care services, including home care.

[8] *Aged Care Act 1997* s 41-3.

[9] *Quality of Care Principles 2014* s 15E(4) def'n of 'mechanical restraint'.

[10] *Aged Care Act 1997* s 54-9 def'n of 'restrictive practice'.

[11] Ibid.

[12] *Quality of Care Principles 2014* s 15FA(1)(a).

[13] Ibid s 15FA(1)(c).

[14] Ibid s 15A(1)(e).

[15] Ibid s 15A(g), (h) and (i).

[16] Ibid 15FA(f).

[17] Ibid 15FA(2).

To use a mechanical restraint the Provider must be satisfied that an approved health practitioner,[18] with day-to-day knowledge of the Resident has:

a) assessed the Resident as posing a risk of harm to themselves or any other person; and,

b) assessed that the use of the mechanical restraint is necessary.[19]

3.0 Mechanical restraint and provider documentation

The Provider must document the following in the Resident's Behaviour Support Plan:

a) The Resident's behaviour and assessments relevant to the use of mechanical restraint.[20]

b) The alternative strategies that have been considered or used, including a record of any consultations with the Resident or their substitute decision maker discussing such strategies.[21]

c) Details of the mechanical restraint, including duration, frequency and intended outcome, and how it is to be monitored, including the escalation process.[22]

d) Any engagement with persons other than the health practitioner in relation to the use or assessment of the mechanical restraint (for example, dementia support specialists).[23]

e) A record of the informed consent obtained by the Provider from the Resident or their substitute decision maker, for the use of the mechanical restraint.[24]

4.0 Provider duties when using mechanical restraint

a) The Provider is required to monitor and review the use, effectiveness and impact of the restraint on the Resident, and document the reviews in the Resident's Behaviour Support Plan.[25]

b) Observe the Resident for signs of distress or harm, side effects, changes in mood or behaviour, such as ability to engage in activities of daily living, and changes in the ability to maintain independent function (to the extent possible).[26]

c) Consider whether an alternative strategy can be used, and restrictive practice reduced or stopped.[27]

5.0 Informed consent for mechanical restraint

A decision to use mechanical restraint requires informed consent by the individual receiving the restraint, or if they lack capacity, by a substitute decision-maker.[28] Informed consent is required for each authorised restrictive practice by the Resident or the substituted decision-maker. As a matter of general law, consent to the restrictive practice must be informed, voluntary, current and specific in relation to each proposed use of a mechanical restraint. Informed consent requires the decision-maker to be provided information on the reasons for the use of the mechanical restraint, the risks and benefits, the timeframe and intended outcomes, and any alternative options.[29]

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[18] An 'approved health practitioner' is defined as a medical practitioner, nurse practitioner or registered nurse: *Quality of Care Principles 2014* s 4. Under the *Health Practitioner Regulation National Law (Victoria) Act 2009*, a 'health practitioner' is defined as anyone who practices in any 'health profession', including Chinese medicine, dentistry and dental hygiene, chiropractic, paramedicine, pharmacy and podiatry.

[19] *Quality of Care Principles 2014* s 15FB(1)(a).

[20] Ibid s 15FB(1)(b).

[21] Ibid.

[22] Ibid s 15HB.

[23] Ibid.

[24] Ibid s 15HC(g).

[25] Ibid s 15GA(a).

[26] Ibid s 15GA(b) and (c).

[27] Ibid s 15GA(d).

[28] Ibid s 15FA(1)(f).

[29] Department of Health, Fact Sheet Restrictive Practices Consent: Frequently Asked Questions 1 June 2023: https://www.health.gov.au/resources/publications/consent-for-restrictive-practices-frequently-asked-questions

5.1 How is capacity determined?

Capacity is determined under State and Territory law. All persons over 18 years are presumed to have capacity and anyone alleging incapacity has the onus of proving it. At common law, the test is whether the person understands the 'nature and effect' of the transaction.[30] Courts have accepted that capacity (or incapacity) may not be absolute and may not be permanent. The Law Council of Australia (**LCA**) describes the task of determining capacity as 'task, time and content specific'.[31]

In the early stages of mental decline it may be difficult to identify with precision whether a Resident has capacity to consent to the use of restrictive practices. Some jurisdictions provide a 'Capacity Toolkit' or guidelines for assessing capacity. In Victoria, a guide is available for legal practitioners to purchase.[32] The LCA Guide is available online.[33] If determining capacity is an issue in relation to mechanical restraint, either an appropriately qualified medical practitioner or a determination by the Victorian Civil and Administration Tribunal (**VCAT**) can determine if the Resident has capacity to make their own decisions.

5.2 Who can be a restrictive practices substitute decision-maker?

In Victoria, it is uncertain if a person who has been appointed to make decisions on health or personal matters generally can make decisions regarding use of restrictive practices. In 2022, the Commonwealth implemented a temporary hierarchy of Restrictive Practices Substitute Decision Makers (**RPSDMs**).[34] Victoria has now enacted the *Aged Care Restrictive Practices (Substitute Decisionmaker) Act 2024* (Vic), providing a hierarchy of decision-makers, which will come into effect on 1 July 2025. Nominations under the Commonwealth interim arrangements are to be preserved.[35]

The order of the hierarchy in Victoria will be:

1. A person nominated in writing, and the nomination is witnessed by an authorised affidavit taker (for example a lawyer);
2. The spouse or domestic partner of the Resident;
3. The primary carer of the Resident;
4. The oldest child of the Resident, followed by the other children in descending order of age if there are two or more adult children;
5. The oldest sibling of the Resident, followed by the other siblings of the Resident in descending order of age if there are two or more adult siblings.[36]

Applications may also be made to the VCAT to appoint a RPSDM.[37] If no person is available, VCAT may provide consent to the use of a restrictive practice.[38]

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[30] *Gibbons v Wright* (1954) 91 CLR 423.
[31] Law Council of Australia, Best Practice Guide for Legal Practitioners on Assessing Mental Capacity (2023) 4: https://lawcouncil.au/resources/policies-and-guidelines/best-practice-guides-for-legal-practitioners-in-relation-to-elder-financial-abuse-and-assessing-mental-capacity.
[32] Law Institute of Victoria, Capacity Guidelines and Toolkit (2020): https://www.liv.asn.au/itemdetail?iProductCode=9780980556261&srsltid=AfmBOopEP6j3pbOFEm8U_PhZAjSO5kF95HlIKm2odohvM3P9ZE8NFcr0
[33] See fn 31.
[34] *Quality of Care Principles 2014* s 5B.
[35] *Aged Care Restrictive Practices (Substitute Decision-maker) Act 2024* (Vic), ss 7 and 8.
[36] Ibid s 9.
[37] Ibid s 10.
[38] Ibid s 22.

6.0 How is mechanical restraint used in an emergency?

Mechanical restraint can be used in an emergency as necessary, such as in a dangerous situation that is unanticipated and requires immediate action. It does not require informed consent or compliance with the Resident's Behaviour Support Plan.[39] The mechanical restraint must be in the least restrictive form, for the shortest period possible and documented. The Provider must inform the RPSDM as soon as practicable after the event, and document the Resident's behaviour, information on alternatives considered or used, why the restraint was necessary, and the care provided.[40]

7.0 Unlawful use of mechanical restraint

The *Aged Care Act 1997* provides that if a restrictive practice is used in accordance with the Principles, Providers and authorised individuals are not subject to any criminal or civil liability in relation to the restrictive practice.[41] Non-compliance with the Principles is a reportable incident by the Provider.[42]

Unauthorised use of mechanical restraint may give rise to civil or criminal actions for assault or false imprisonment in severe cases. The affected person may seek an injunction from the courts to prevent the restraint from happening or continuing.[43]

8.0 If a mechanical restraint has been applied unlawfully, what can a person do?

- Make a complaint to the Provider, referencing the Principles which outline the requirements for applying restrictive practices.
- Make a complaint to the ACQSC.
- Contact ACJ for a free legal consultation.

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[39] *Quality of Care Principles 2014* s 15FA(2) and (3).

[40] Ibid s 15GB(a) and (b).

[41] *Aged Care Act 1997* s 54-11.

[42] *Quality of Care Principles 2014* s 15NF.

[43] *Aged Care Quality and Safety Commission Act 2018* (Cth) ss 63R, 7B and 74GB.

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Contact Aged Care Justice if you would like a free legal consultation:

Email: info@agedcarejustice.org.au

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