Fact Sheet: Who can make decisions on the use of restrictive practices in residential aged care in Victoria?

1.0 Introduction

Aged Care Justice (**ACJ**) supports older Australians receiving aged care services, in residential care and home care, by providing information about legal rights, providing legal referral services and promoting reform. The use of restrictive practices is a significant issue in aged care.

ACJ has created a range of 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 is designed to support the aged care community and include dedicated Fact Sheets for legal organisations.

Restrictive practices restrict rights or freedom of movement and are regulated by the laws of the Commonwealth dealing with aged care. The Fact Sheets apply to residential aged care services in Victoria, delivered under the Commonwealth *Aged Care Act 1997* (Cth).[1] The Facts Sheets contain information on different types of restrictive practices – chemical, mechanical, physical and environmental restraint, and seclusion.

The use of restrictive practices is regulated by Commonwealth legislation, but State and Territory laws apply with respect to determining a person's capacity to consent to a restrictive practice and the appointment of a restrictive practices substitute decision-maker (**RPSDM**) if it is determined that the resident (**Resident**) of an aged care facility (**Facility**) does not have decision-making capacity.

Restrictive practices are regulated under the *Aged Care Act 1997* (Cth) and *Quality of Care Principles 2014* (Cth).[3] A new *Aged Care Act 2024* (Cth) is due to commence on 1 November 2025. The provisions dealing with restrictive practices in residential aged care, including under the draft *Aged Care Rules 2025*, are the same.

2.0 Background

The Royal Commission into Aged Care Quality and Safety 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*, including that the use of a restrictive practice requires informed consent, with exceptions for emergency situations.

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[2] TheRoyal Commission into Aged Care Quality and Safety, Final Report, March 2021.

[3] *Quality of Care Principles*, as amended in 2021.

As the laws in Victoria were unclear on who could be a substitute decision-maker in these circumstances, in 2022 the Commonwealth legislated a hierarchy of RPSDMs[4] to allow States and Territories time to make their own arrangements.

The Victorian Government has now enacted the *Aged Care Restrictive Practices Substitute Decision-maker Act 2024* (Vic) (**the SDM Act**) which came into force on 1 July 2025. The SDM Act contains provisions as to who can act as a RPSDM in Victoria.

3.0 Substitute Decision-Making and Restrictive Practices

This Fact Sheet provides information on who can be appointed as a RPSDM to provide consent or refusal to the use of a restrictive practice in residential aged care, when a Resident lacks capacity to make their own decisions.

3.1 Obtaining Consent to the Use of a Restrictive Practice

There are a number of requirements that must be met by a Facility in order to use a restrictive practice in residential aged care (see Fact Sheets for more information). Some of the requirements include ensuring that the practice is used as a last resort to prevent harm to the Resident or other persons;[5] the practice is used only to the extent necessary and in proportion to the risk of harm;[6] and, that informed consent to the use of the practice has been obtained,[7] except in an emergency.[8]

3.2 Informed Consent

Except in an emergency, informed consent by the Resident, or their RPSDM if it is determined the Resident does not have decision-making capacity, is required to use a restrictive practice. 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 restrictive practice. Informed consent requires the decision-maker to be provided with information on the reasons for the use of the restrictive practice, the risks and benefits, the timeframe and intended outcomes, and any alternative options.[9]

3.2 Decision-Making Capacity

Adults are assumed to have capacity unless proven otherwise. This can change over time, and Residents should be supported to make their own decisions. Determining a person's capacity can be difficult – it may be appropriate to obtain an assessment by a suitably qualified medical practitioner. The SDM Act provides a definition of decision-making capacity and guidance on determining decision-making capacity but only for the purpose of determining whether a decision under the SDM Act is valid e.g., a nomination of an RP Nominee.

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[4] *Quality of Care Principles 2014 cl 5B.*

[5] *Quality of Care Principles 2014* cl 15FA(1)(a).

[6] Ibid cl 15A(1)(e).

[7] Ibid cl 15FA(1)(f).

[8] Ibid cl 15FA(2).

[9] 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

3.3 Definition of Decision-Making Capacity

Under the SDM Act, a Resident has decision-making capacity to make decisions on matters relevant to the SDM Act, if they can do the following:

- **understand** the information relevant to the decision and the effect of the decision;
- **retain** that information to the extent necessary to make the decision;
- **use or weigh** that information as part of the process of making the decision;
- **communicate** the decision, and their views and needs in relation to the decision in some way, including by speech, gestures or other means.[10]

A Resident is taken to understand information relevant to a decision if they understand an explanation of the information given to them in a way that is appropriate to their circumstances, whether by using modified language, visual aids or any other means.[11]

3.4 Determining Decision-Making Capacity

In determining whether a Resident has decision-making capacity, regard must be had to the following:

a) a Resident may have decision-making capacity to make some decisions and not others;
b) if a Resident does not have decision-making capacity for a particular decision, it may be temporary rather than permanent;
c) it should not be assumed that a Resident does not have decision-making capacity based on their appearance or because they have made a decision that others view as unwise;
d) a Resident has decision-making capacity if it is possible for them to make a decision with practical and appropriate support.[12]

Examples of practical support include using information or formats tailored to the specific needs of the Resident, communicating or assisting in the communication of the Resident's decision, giving the Resident additional time and discussing the matter with them, or using technology that alleviates the effects of the Resident's disability.[13]

4.0 Identifying who can be a substitute decision-maker under the SDM Act

When it has been determined that a Resident cannot make their own decisions, the SDM Act contains a hierarchy of RPSDMs.[14] A person must be an eligible adult to be an RPSDM, meaning they cannot be; an employee or agent of the Facility providing care; involved in the preparation of the Resident's Behaviour Support Plan; currently subject to a family violence intervention order in which the Resident is an affected family member; or have a current conviction for an offence against the Resident.[15]

The order of the hierarchy is as follows:

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[10] *Aged Care Restrictive Practices Substitute Decision-maker Act 2024* (Vic) s 4(1)(a)-(d).

[11] Ibid s 4(3).

[12] Ibid s 4(4)(a)-(d).

[13] Ibid s 4(4)(d).

[14] Ibid ss 7-10.

[15] Ibid s 5(6).

1. Restrictive Practices Nominee

The first person in the hierarchy who can make decisions on the use of restrictive practices is a person nominated in writing by the Resident while the Resident had decision-making capacity, known as an RP Nominee.[16] An authorised affidavit taker must sign, date, and witness the nomination.[17] While not essential, a Resident may provide their thoughts on the use of restrictive practices as a guide.[18] A person who makes a nomination may revoke that nomination if the person has decision-making capacity at the time of the revocation and understands the nature and effect of the revocation.[19]

The Victorian Civil and Administrative Tribunal (**VCAT**) may make orders that declare a nomination validly made or validly revoked or set aside a nomination if not validly made.[20] The Victorian Health Department has provided optional nomination and revocation forms, click here to view.[21] If there is no RP Nominee, or the person is unwilling or unable to provide informed consent, the SDM Act provides for a hierarchy of temporary decision-makers.[22]

2. Temporary RPSDM

The following is the list of persons that can be a Temporary RPSDM and provide informed consent to a restrictive practice if there is no RP Nominee. The person must be an eligible adult in a close and continuing relationship with the Resident and be reasonably available, willing, and able to make restrictive practices decisions.[23]

The hierarchy is as follows:

1. the spouse or domestic partner of the Resident;
2. the primary carer of the Resident;
3. the oldest child of the Resident, followed by the other children in descending order of age if there are two or more adult children;
4. the older parent of the Resident;
5. the younger parent of the Resident;
6. 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.

The above appointments are temporary and end when the restrictive practices decision in relation to which the Temporary RPSDM is appointed is made, which means that consent must be obtained each time a restrictive practice is to be used.

The appointment will also end if:

- a Resident regains decision-making capacity and nominates an RP Nominee, or
- a person who was previously nominated by the Resident is now able and willing to become the substitute decision-maker, or
- when a person who is higher in the above hierarchy becomes able and willing to act, or
- if the temporary substitute decision-maker becomes unable or unwilling.[24]

If there is no RP Nominee or Temporary RPSDM that is able and willing to act, then an application can be made to VCAT to appoint a person as the RPSDM.[25]

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[16] Ibid s 5. A person nominated as a RPSDMunder the *Quality of Care Principles*, whose nomination was in force immediately before the commencement of the SDM Act, is considered an RP Nominee under the Victorian Act: s 22.
[17] Ibid s 5(4)(a)-(b).
[18] Ibid s 5(2)(d).
[19] Ibid s 6.
[20] Ibid s 12 (3)(a)-(c).
[21] Department of Health, Victoria, How to nominate a restrictive practices substitute decision-maker in aged care: Nomination and Revocation Forms 7 July 2025: https://www.health.vic.gov.au/substitute-decision-making-restrictive-practices/nominate-restrictive-practices-substitute-decision-maker-tier-1-aged-care
[22] Ibid s 8.
[23] Ibid s 8(2).
[24] Ibid s 8(3).
[25] Ibid s 9.

3. VCAT Appointment of a RPSDM

An application can be made to VCAT to appoint a RPSDM when there is no RP Nominee, or no person in the hierarchy of temporary decision-makers that is willing and able to be an RPSDM.[26]

The application to VCAT can only be made by an eligible adult who has an ongoing personal or professional relationship with the Resident.[27] Examples given in the SDM Act are a Resident's family member, close friend, former carer, general practitioner, lawyer, or accountant or a trustee or a director of a trust in which the Resident is a beneficiary. The SDM Act does not allow for VCAT to make decisions on matters related to the use of restrictive practices, including whether they are clinically required, or how a RPSDM makes restrictive practices decisions.[28]

4. VCAT as a RPSDM

If there is no RP Nominee or Temporary RPSDM who is willing and able to act, and no application to VCAT for the appointment of one, then VCAT can act as an RPSDM.[29] An application can be made by an aged care provider for VCAT to consent to the use of a restrictive practice, provided the restrictive practice is set out in the Resident's Behaviour Support Plan.[30] A consent operates for the period of time expressed in the consent and may be subject to any conditions VCAT considers appropriate.[31]

When determining whether to consent to the use of the restrictive practice, VCAT must have regard to any statement of preferences and values prepared by the Resident in a previous nomination of an RPSDM, or any preferences and values expressed by the Resident or inferred from the Resident's life.[32]

5.0 Safeguards

Criminal penalties apply for dishonestly influencing nominations or making false statements about substitute decision-makers. Corporate officers can be held responsible for failing to prevent offences related to restrictive practices nominations. Unauthorised use of restrictive practices may be considered assault or false imprisonment and may give rise to civil or criminal actions in severe cases. A person may seek an injunction from the courts to prevent the restraint from happening or continuing.

What you can do if a Resident is being unlawfully restrained

- Make a complaint to the Facility
- Make a complaint to the Aged Care Quality and Safety Commission
- Contact ACJ if you are unsure of the Resident's rights and would like a free legal consultation

[26] Ibid s 9(2)(b).
[27] Ibid s 9(2)(a).
[28] Ibid.
[29] Ibid s 10.
[30] Ibid s 10(1).
[31] Ibid s 10(2)-(3).
[32] Ibid s 10(4).

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

Email: info@agedcarejustice.org.au

Fill out our Get Help Form

Website: **www.agedcarejustice.org.au**