Seclusion

Introduction

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

The use and application of restrictive practices is a significant issue in aged care. ACJ has created 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 include dedicated Fact Sheets for the legal community. They contain information on chemical, physical, mechanical, environmental restraint and seclusion, in residential care and home care.

Restrictive practices are regulated both by the laws of the Commonwealth and the State and Territories. The Fact Sheets apply to Victorian residential aged care services, delivered under the *Aged Care Act 2024* (Cth). [1] The use of restrictive practices in aged care settings is complex, involving issues of decision-making capacity, substitute decision making and restriction of freedom.

Background

The Royal Commission into Aged Care Quality and Safety in their Final Report released in March 2021, warned 'inappropriate use of 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 *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 requiring informed consent from the Resident or a substitute decision maker, with exceptions for emergency situations. Since the commencement of the *Aged Care Act 2024* (Cth) on 1 November 2025, the Principles have been replaced by the *Aged Care Rules 2025* (Cth).

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.

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[1] *The Aged Care Act 2024* (Cth) came into force on 1 November 2025 replacing the to the *Aged Care Act 1997* (Cth).

[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).*

The Victorian Government introduced the *Aged Care Restrictive Practices (Substitute Decision-maker) Act 2024* (Vic) which came into force on 1 July 2025, which provides a restrictive practices substitute decision maker hierarchy applicable to Victoria.[4]

SECLUSION

This fact sheet applies to residential aged care services delivered by Victorian aged care providers (**Providers**) under the Commonwealth *Aged Care Act 1997* (Cth).

1.0 What is seclusion?

Seclusion is a practice or intervention that is, or that involves, the solitary confinement of a Resident in a room or a physical space at any hour of the day or night where voluntary exit is prevented or not facilitated; or it is implied that voluntary exit is not permitted; in order to influence the care recipient's behaviour.[5]

Seclusion is a type of restrictive practice as it restricts the rights or freedom of movement of the Resident.[6]

It may involve locking a Resident in their room or other part of the facility, directing a Resident to a specific area within the facility with the Resident believing they are not allowed to leave, or when Residents and staff all leave an area but the Resident is unable to leave and is left on their own.

2.0 Seclusion and provider obligations

Providers considering using seclusion must abide by the requirements set out in the *Aged Care Rules 2025*, which include that seclusion;

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;[7]

b) cannot be used unless alternative strategies are considered and used to the extent possible, and documented in the Resident's Behaviour Support Plan;[8]

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;[9] and

d) complies with the Resident's Behaviour Support Plan, the Aged Care Quality Standards, and is not inconsistent with the Statement of Rights.[10]

e) Informed consent to the use of the restraint has been obtained[11], except in an emergency.[12]

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[4] *Aged Care Restrictive Practices (Substitute Decision-maker) Act 2024* (Vic).
[5] *Aged Care Rules 2025* (Cth) 17(5)(6).
[6] *Aged Care Act 2024* (Cth) s 17(1) def'n of 'restrictive practice'.
[7] *Aged Care Rules 2025* (Cth) r 162-15(1)(a).
[8] Ibid rr 162-15(1)(b)-(c).
[9] Ibid rr162-15(1)(d)-(e).
[10] Ibid rr 162-15(1)(h)-(j).
[11] Ibid r 162-15(1)(f).
[12] Ibid r 162-15(2).

To use seclusion the Provider must be satisfied that an approved health practitioner,[13] 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 seclusion is necessary.[14]

3.0 Seclusion 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 seclusion.[15]

b) The alternative strategies that must be used before using seclusion.[16]

c) Details of the seclusion, including duration, frequency and intended outcome, and how it is to be monitored, including the escalation process.[17]

d) Any engagement with persons other than the health practitioner in relation to the use or assessment of the seclusion (for example, dementia support specialists).[18]

e) A record of the informed consent obtained by the Provider from the Resident or their substitute decision maker, for the use of the seclusion.[19]

4.0 Provider duties when using seclusion

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.[20]

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).[21]

c) Consider whether an alternative strategy can be used, and restrictive practice reduced or stopped.[22]

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[13] An 'approved health practitioner' is defined as a medical practitioner, nurse practitioner or registered nurse: *Aged Care Rules 2025* s 5-5 def'n of 'approved health practitioner'.
[14] *Aged Care Rules 2025* (Cth) r 162-20(1)(a).
[15] Ibid r 162-55(a).
[16] Ibid r 162-55(c).
[17] Ibid r 162-55(b).
[18] Ibid r 162-20(b)(i)-(iii).
[19] Ibid r 162-55(h).
[20] Ibid r 162-30(a)-(b)
[21] Ibid r 162-30(b)-(d).
[22] Ibid r 162-30(d).

5.0 Informed consent for seclusion

A decision to use seclusion requires informed consent by the individual receiving the restraint, or if they lack capacity, by a substitute decision-maker.[23] 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 seclusion. Informed consent requires the decision-maker to be provided information on the reasons for the use of the seclusion, the risks and benefits, the timeframe and intended outcomes, and any alternative options.[24]

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.[25]

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'.[26]

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.[27]The LCA Guide is available online.[28]

If determining capacity is an issue in relation to seclusion, 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, the *Aged Care Restrictive Practices (Substitute Decisionmaker) Act 2024* (Vic) provides a hierarchy of restrictive practice substitute decision-makers (**RPSDMs**), which came into effect on 1 July 2025.

Aged Care Justice has developed a dedicated legal fact sheet on this legislation which explains the hierarchy of **RPSDMs** and the process for their appointment.

The Fact Sheet can be found here.

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[23] Ibid r 162-15(f).
[24] 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
[25] *Gibbons v Wright* (1954) 91 CLR 423.
[26] 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.
[27] Law Institute of Victoria, Capacity Guidelines and Toolkit (2020): https://www.liv.asn.au/itemdetail?iProductCode=9780980556261&srsltid=AfmBOopEP6j3pbOFEm8U_PhZAjSO5kF95HlIKm2odohvM3P9ZE8NFcr0
[28] See fn 26.

6.0 How is seclusion used in an emergency?

seclusion 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.[29] The seclusion 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.[30]

7.0 Unlawful use of seclusion

The 'inappropriate' use of a restrictive practice is a reportable incident under the Serious Incident Reporting Scheme, which requires the Provider to self-report.[31]

Unauthorised use of seclusion 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. The Aged Care Quality and Safety Commission (**ACQSC**) has powers to deal with unauthorised use of restrictive practices including suspension and cancelling of registration[32] and banning orders against Providers and staff members.[33]

8.0 If seclusion has been applied inappropriately, what can you do?

- Make a complaint to the Provider
- Make a complaint to the ACQSC.
- Contact ACJ for a free legal consultation.

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[29] *Aged Care Rules 2025* (Cth) r 162-15(2)-(3).

[30] Ibid r 162-35.

[31] *Aged Care Act 2024* (Cth) s 16.

[32] Ibid div 5.

[33] Ibid pt 11.

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

Email: info@agedcarejustice.org.au

Phone: 0417 234 415

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

DISCLAIMER: This fact sheet is for general information purposes only and does not represent legal advice. As it is not intended to be comprehensive in relation to the topic, other inclusions or exemptions may apply. The law and policy referred to in this document was in force on the 01/11/2025. Scenarios are fictional.