

Annexure 1. Reform Perspectives

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This opinion was provided by Professor Ann O’Connell as part of Aged Care Justice’s Education Project on Restrictive Practices.

The Project was called *Reducing Serious Incidences of Restrictive Practices in Aged Care Settings through Legal Education and Access to Legal Services* and the education materials can be found [here](#).

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Reform of Restrictive Practices in Aged Care by Ann O’Connell

Despite the calls from 3 separate Royal Commissions, and reports from numerous bodies, including the Australian Law Reform Commission, and the significant amount of legislative reform, there are still a number of areas where attention is needed in relation to the use of restricted practices – the lack of consistency in dealing with restrictive practices across sectors and across jurisdictions, and problems with the consent-based model adopted for use of restrictive practices in aged care.

Lack of consistency

As a result of the Royal Commissions on aged care and on disability, there are now two very different models of regulation of use of restrictive practices in those sectors (see below). In addition, the Victorian Royal Commission on Mental Health Services introduced a different model that only applies in Victoria. It has been noted that there are no frameworks relating to the use of restrictive practices in various other settings such as in education, general health and in the justice system.¹

In relation to aged care, the Commonwealth accepts that the law relating to consent and substitute decision-making is governed by State and Territory law. As discussed above, the laws relating to substitute decision-making as they apply to the use of restrictive practices is unclear. The complex interim measure setting out a hierarchy of SDMs is also unclear and has been criticised for ‘regularising’ the use of restrictive practices.² Those measures are due

¹ See for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report Vol 6, p 439ff.

² Chesterman, Are we regulating or regularising Aged Care Restrictive Practices?, *Australian Ageing Agenda*, 14 December 2022 <https://www.australianageingagenda.com.au/contributors/opinion/are-we-regulating-or-regularising-aged-care-restrictive-practices/> Nb Dr Chesterman is the Public Advocate for Queensland and was previously Deputy Public Advocate in Victoria.

to be repealed in December 2026 and although some jurisdictions have indicated that they are considering the issue,³ only Victoria has introduced specific legislation.⁴

Problems with the consent-based model

The model adopted by the Commonwealth government to regulate the use of restrictive practices in aged care has been described as ‘consent-based’.⁵ This can be contrasted with the models adopted in relation to disability services and, in Victoria, in relation to mental health services.

In disability services, the relevant facility must appoint an Authorised Program Officer (APO)⁶ appointed by a disability service provider or a registered NDIS provider and whose appointment is approved by the Senior Practitioner.⁷ An APO must agree to comply with the requirements for use of restrictive practices, undertake any necessary training requirements and comply with directions from the Senior Practitioner.⁸

In mental health services, the use of restrictive practices may only be authorised by an ‘authorised psychiatrist’⁹ and all restrictive interventions must be reported to the Chief Psychiatrist.¹⁰ The appointment of an authorised psychiatrist must be notified to the Chief Psychiatrist.¹¹ The Chief Psychiatrist has issued guidelines governing the use of restrictive interventions.¹²

In both cases the decision about the use of restrictive practices is made by a person with expertise in the relevant area and with knowledge of the consequences of using, or of not using the practice. By contrast it has been noted that a SDM – usually a family member – is unlikely to have such knowledge or expertise.¹³

The Aged Care Quality and Safety Royal Commission did recommend that restrictive practices:

³ Queensland: see Chesterman, More Work Needed on Aged Care Bill, *Australian Ageing Agenda*, 22 January 2024 <https://www.australianageingagenda.com.au/contributors/opinion/more-work-needed-on-aged-care-bill/>; Victoria: ‘Substitute Decision Making and Restrictive Practices in Residential Aged Care’, Consultation Paper, February 2024 <https://accpa.asn.au/extlink/vic/Consultation-Paper-Substitute-Decision-Making-and-Restrictive-Practices-in-Residential-Aged-Care.pdf>.

⁴ *Aged Care Restrictive Practices Substitute Decision-maker Act 2024* (Vic).

⁵ Chesterman, Who Approves the Use of Restrictive Practices in Australia? The Case for a Uniform Authorisation Process, in *The Future of Mental Health, Disability and Criminal Law*, Wilson et als (eds), Routledge 2023.

⁶ *Disability Act 2006* (Vic) s 135.

⁷ *Ibid*, s 132ZJ.

⁸ *Ibid*, s 132ZO.

⁹ *Mental Health and Wellbeing Act 2022* (Vic) s 132.

¹⁰ *Ibid*, s 138.

¹¹ *Ibid*, s 328.

¹² Chief Psychiatrist Guideline on Restrictive Interventions: <https://www.health.vic.gov.au/chief-psychiatrist/chief-psychiatrists-restrictive-interventions>

¹³ Chesterman, Who Approves the Use of Restrictive Practices in Australia? The Case for a Uniform Authorisation Process, in *The Future of Mental Health, Disability and Criminal Law*, Wilson et als (eds), Routledge 2023, p 79.

“be prohibited unless recommended by an independent expert, accredited for the purpose by the Quality Regulator, as part of the behaviour support plan lodged with the Quality Regulator and reviewed quarterly by the expert with reports on implementation of the behaviours support plan being provided to the Quality Regulator on a monthly basis”.¹⁴

This part of the recommendation has not been implemented. The Aged Care Quality and Safety Commission has appointed a Senior Practitioner, Behaviour Support who commenced in May 2023, but the role appears to be largely educative.¹⁵

Other criticisms of the consent model are that there are very few safeguards such as witnessing requirements,¹⁶ although it is noted that the Victorian legislation on RPSDMs does include witness requirements. The interim consent model also appears to be inconsistent with more recent approaches to substitute decision-making that stress the importance of making the decision that the care recipient would have made if they had capacity.¹⁷

¹⁴ Royal Commission on Aged Care Quality and Safety, Final Report, 2021, Rec 17(a)(i).

¹⁵ See <https://www.agedcarequality.gov.au/sites/default/files/media/rb-2023-22-regulation-of-restrictive-practices.pdf>

¹⁶ Chesterman, Are we regulating or regularising Aged Care Restrictive Practices?, *Australian Ageing Agenda*, 14 December 2022 <https://www.australianageingagenda.com.au/contributors/opinion/are-we-regulating-or-regularising-aged-care-restrictive-practices/>

¹⁷ Ibid.