Decision Making in Restrictive Practices

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Immunity and SDM

Restrictive Practices (RP)

- There is no authorisation framework to approve the use of RP in aged care.
- There is uncertainty about who can consent to RP on behalf of a CR without capacity.
- RP are being used without consent or not being used due to the absence of a decision-maker.

Reform Across Australia

- The 1 July 2021 changes to the QoCP exposed the uncertainty and lack of uniformity.
- The Cth, State and Territories are working towards reforming local laws.
- This could involve adoption of an authorisation framework or a clearer consent model.
- 2 year period to implement reforms in SDM laws.

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Immunity

- Immunity for criminal or civil liability for use of RP.
- Provided to an AP of RACS or STRC & any individual involved in use of RP.
- If: Informed Consent given by RPSDM (excluding RPA) **and** RP used in compliance with the QoCP.

No Immunity

- Consent given by the CR or by a person or body authorised to consent to the use of RP according to State or territory law (RPA) – Eg. PoA or Guardian appointed with RP function.
- The consent was not informed consent.
- Consent was not given by an RPSDM.
- The QoCP requirements for RP were not complied with.

Consequences

- Assault or unlawful deprivation of liberty – criminal law offences.
- Intentional or negligent tort compensation claim.
- Practically more likely - Breach of Responsibilities, QoCP and Quality Standards.
- Probable ACQSC will now focus on informed consent.

Restrictive Practices
Substitute Decision-maker

Exposure Draft

- **RPSDM Hierarchy**
  - Restrictive practices authority (RPA)
  - Restrictive practices nominee (RPN)
  - Partner
  - Prior carer – relative or friend
  - Relative or friend
  - Medical Treatment Authority (MTA)

RPSDM Hierarchy - Restrictive practices authority

An individual or body that, under the law of the State or Territory in which the care recipient is provided with aged care, has been appointed in writing (other than by the care recipient) as an individual or body that can give informed consent to the use of the restrictive practice in relation to the care recipient if the care recipient lacks capacity to give that consent.

RPSDM Hierarchy - Restrictive practices authority

- Another individual or body appointed to give informed consent to the use of restrictive practices according to the State or Territory.
- Exposure draft ‘appointed in writing (other than by the care recipient)…’.
- Unclear whether RPA includes a person appointed as the PoA (or similar) or whether the PoA could be taken as the RPN.
- It is unclear whether an Attorney can consent to the use of RP in many cases.
- A PoA is not recognised in the QoCP hierarchy.

Restrictive Practices Authority

State/territory	Person authorised to provide informed consent for the use of restrictive practices
Victoria	**Guardian (possibly)** Subject to application for an order that a represented person comply with a guardian's decisions. 2015 VCAT decision considered that a guardian with decision making authority regarding accommodation could consent to a represented person living in a locked facility.
NSW	**Guardian** Only a guardian appointed by NCAT with a restrictive practices function. NCAT may also impose conditions on the restrictive practices function i.e that the authorised person comply with the requirements under the Principles.
Queensland	**EPOA or Guardian (possibly)** The Public Advocate (QLD) has noted that an attorney for personal matters under an enduring power of attorney, and a guardian appointed by the QCAT, may have such power, however this is far from certain.

Restrictive Practices Authority

State/territory	Person authorised to provide informed consent for the use of restrictive practices
South Australia	**SDM, Person Responsible or Guardian** SDM or 'person responsible' for chemical, environmental or mechanical restraint, but only if the restrictive practices are provided by or under the supervision of a registered health practitioner. If the practices are not provided by, or supervised by, a health practitioner a guardian will need to be appointed to give consent pursuant to SACAT's power to make a special powers order.
ACT	**EPOA (possibly) or Guardian** In a recent decision, ACAT determined that an enduring power of attorney appointment authorised the EPOA to provide informed consent for environmental restraint. ACAT did not make a determination in respect of chemical restraint.
Tasmania	**Guardian or Person Responsible (chemical)** A guardian appointed by the TASCAT with a restrictive practices power or an enduring guardian with full powers or a specific restrictive practice power can make decisions about the use of restrictive practices. A Person Responsible can give consent to medical treatment (including use of chemical restraints).

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Restrictive Practices Authority

State/territory	Person authorised to provide informed consent for the use of restrictive practices
Western Australia	**Person Responsible (possibly) or Guardian (possibly)** Depending on circumstances, ''Person responsible' may provide consent if the restrictive practice is a 'treatment decision'. Otherwise, a guardian or an enduring guardian, with plenary authority or a guardian or an enduring guardian, with limited authority including the authority to make decisions regarding restrictive practices may need to be appointed.

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RPSDM Hierarchy

- Restrictive practices authority (RPA)
- Restrictive practices nominee (RPN)
- Partner
- Prior carer – relative or friend
- Relative or friend
- Medical Treatment Authority (MTA)

RPSDM Hierarchy - Restrictive practices nominee

An individual:

(a) who has been nominated by the care recipient, in accordance with this section, as an individual who can give informed consent to the use of the restrictive practice in relation to the care recipient if the care recipient lacks capacity to give that consent; and

(b) who has agreed, in writing, to act as a restrictive practices nominee for the restrictive practice in relation to the care recipient (and has not withdrawn that agreement); and

(c) who has capacity to act as a restrictive practices nominee for the restrictive practice in relation to the care recipient.

AP Responsibility - Preventing coercion and duress

An approved provider must take reasonable steps to ensure that:

(a) a care recipient to whom the approved provider provides aged care is not subject to coercion or duress in making a nomination under section 5A; and

(b) an individual nominated under section 5A is not subject to coercion or duress in agreeing as mentioned in paragraph 5A(1)(b), or in withdrawing that agreement.

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AP Responsibility - Assisting CR

If a care recipient nominates an individual under section 5A, the approved provider of the aged care service through which aged care is provided to the care recipient must assist the care recipient to:

(a) notify the individual of the nomination; and

(b) give the individual a copy of the nomination; and

(c) seek the individual's agreement as mentioned in paragraph 5A(1)(b).

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AP Responsibility – Keeping records

If a care recipient nominates an individual under section 5A, the approved provider of the aged care service through which aged care is provided to the care recipient must keep a record of:

(a) the nomination; and

(b) whether the individual has agreed as mentioned in paragraph 5A(1)(b); and

(c) if the individual has agreed as mentioned in paragraph 5A(1)(b)—whether the individual has withdrawn that agreement.

RPSDM Hierarchy - Partner

If the care recipient has a partner:

(a) with whom the care recipient has a close continuing relationship; and

(b) who has agreed, in writing, to act as a restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient (and has not withdrawn that agreement); and

(c) who has capacity to act as a restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient

RPSDM Hierarchy - Relative or friend

If care recipient has a relative or friend:

(a) who, immediately before the care recipient entered aged care of a kind specified in section 15DA, was a carer for the care recipient on an unpaid basis; and

(b) who has a personal interest in the care recipient's welfare on an unpaid basis; and

(c) with whom the care recipient has a close continuing relationship; and

(d) who has agreed, in writing, to act as a restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient (and has not withdrawn that agreement); and

(e) who has capacity to act as a restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient.

RPSDM Hierarchy - Relative or friend

If care recipient has a relative or friend:

(a) who has a personal interest in the care recipient's welfare on an unpaid basis; and

(b) with whom the care recipient has a close continuing relationship; and

(c) who has agreed, in writing, to act as a restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient (and has not withdrawn that agreement); and

(d) who has capacity to act as a restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient.

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RPSDM Hierarchy - Medical treatment authority

Means an individual or body that, under the law of the State or Territory in which the care recipient is provided with aged care, has been appointed in writing (other than by the care recipient) as an individual or body that can give informed consent to the provision of medical treatment (however described) to the care recipient if the care recipient lacks capacity to give that consent.

AP Responsibility

From 1 Jan 2023, record in BSP:

(i) which item of the table in subsection 5B(1) applies for the restrictive practice in relation to the care recipient, and why that item applies; and

(ii) the name of that restrictive practices substitute decision-maker for the restrictive practice in relation to the care recipient.

Recommendations

- Where possible obtain informed consent from the CR or an RPA to avoid any need to rely upon the immunity.
- Develop procedures and forms for obtaining RPSDM information, authority and agreement.
- Encourage nominating an RPN or MTA.
- Consider legal advice about: the Power of Attorney or need for a Guardian.
- Tighten assessment, compliance and record-keeping.

ACQSC Interim Position – Redundant?

In the absence of an RPSDM in accordance with State Law, and before appointment of SDM, ACQSC will consider the particular circumstances of each matter including whether:

- QoCP requirements otherwise complied with;
- Best efforts made to find an SDM but there is no available SDM or significant delay until one appointed to provide consent to RP;
- Demonstrated attempts made to consult with someone with a close personal, ongoing relationship with the affected consumer (partner, family member, carer [unpaid except in the form of a carers benefit] or [if there is not a person with a close, personal, ongoing relationship] an independent advocate); and
- A Serious Incident Response Scheme notification has been made by the provider.

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Informed Consent

Informed Consent Capacity

- Determine whether the AP must obtain informed consent or the prescriber.
- For AP, assess whether the CR has capacity to decide.
- If **no**, decide who has RPSDM authority and capacity.
- Capacity considers the ability of the person to understand the nature and consequences of the decision.
- For prescriber, the onus for getting informed consent is with them and the AP need only be satisfied that informed consent obtained.

Informed Consent

QoCP s15FA(1)(f)

- Informed consent to use of RP given by CR or RPSDM
- Exposure Draft – will now include:

‘and how it is to be used (including its duration, frequency and intended outcome).’.

Informed Consent Chemical Restraint

QoCP s15FC(1)(a)

AP satisfied that the health practitioner has:

- Assessed CR as posing risk of harm
- Assessed use of chemical restraint as necessary
- Prescribed medication to use as chemical restraint

Exposure Draft – will now include:

- Obtained informed consent to the prescribing of the medication to use as chemical restraint
- AP does <u>not</u> need to verify the consent is from an <u>RPSDM</u>

Informed Consent

- Been provided with the relevant information.
- Opportunity to review the info and ask questions about the use of RP.
- Decision made about the use of RP.
- Support and assistance includes:
  - Written information
  - Communicating in a way they understand

Informed Consent Information

- The reason for the RP.
- Why RP is being proposed.
- How RP will be used, monitored and evaluated.
- The material risks and benefits of RP.
- The alternatives to RP.

Documenting Informed Consent

AP must document consultation about use (initial and ongoing) of RP and the giving of informed consent by the CR or SDM (s15HC(1)(f)(g) & 15HE(d)(e)).

From 1 Jan 2023 AP must also document in the BSP:

- the name of the RPDSM, which item in the hierarchy applies and why.
- informed consent was given about the use of RP as well as how it is to be used (including its duration, frequency and intended outcome).
- whether use of the RP was in accordance with the informed consent.

Hot Spots in Non-Compliance

Hot Spots in Non-Compliance

- Keypad locks / exit doors
- Beds against walls
- Psychotropic medications
- Restraint?
- Review period
- Behaviour Support Plan requirements
- Lo lo beds

Mitigating Risk

- ❑ Check your policy is up to date
- ❑ Check your consent forms
- ❑ Check prescriptions for psychotropics, especially PRN. Look out for words like “agitation” as opposed to “anxiety”
- ❑ Get clear instructions from GP whether the medication is being prescribed as a restraint
- ❑ *BSPs:* check they cover what they need (QoCPs)
- ❑ Beds against the wall
- ❑ Assess whether stops resident getting out
- ❑ Risk assessments
- ❑ Lo lo beds: why is it being used?

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Future Hot Spots in Non-Compliance?

- Surveillance devices - CCTV
- Sensor mats and alarms

Applying for Guardianship

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Considerations: Other Strategies

Step 1. Consider other strategies and take appropriate steps.

- Alternatives to RP
- QoCP Hierarchy

Considerations: Capacity

Step 2. Confirm that the resident lacks decision making capacity.

- If this is not the case, VCAT can’t act. Can only make order if:
  - does not have decision-making capacity;
  - is in need of a guardian; and
  - an order will promote their personal and social wellbeing.
- Medical evidence/report - there is a template form that you can use.
- If you can’t get the report completed, other evidence may suffice:
  - ACAT
  - Evidence from your staff
- Can also issue “summons” for medical file.

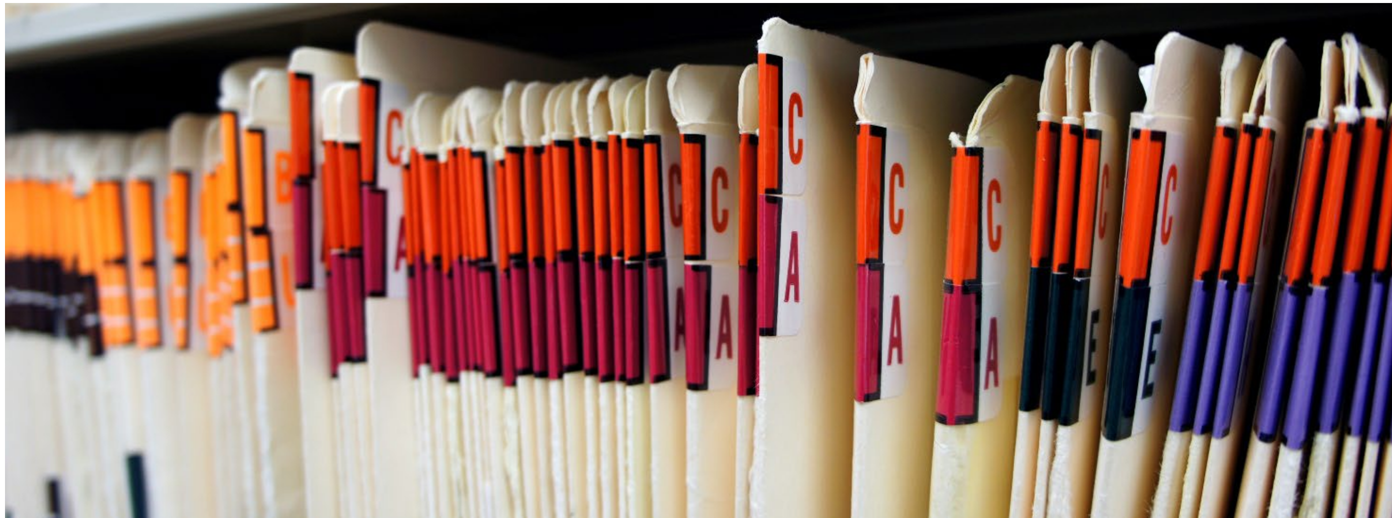
Considerations: Evidence

Step 3. Collate your evidence, consider if you need to do anything else before you submit your case.

- Do you have good records (eg. incident reports)?
- Does the evidence show you have complied with the requirements of the QoCP before deciding to use RP?
- What further evidence do you need?
  - Medical advice and reports
  - Notes of family conferences and evidence the advice was provided/explained to the family
  - Evidence that other strategies are not working
  - Impacting on the resident, other residents and / or staff
  - Evidence why another RACS is better (eg MSU)
- How should you present the evidence?

Considerations: evidence from 3rd party?

- Will you need to issue a “summons” for any records (eg GP report, medical file, records from previous facility)
- This process can take a while. Once the records arrive, you need to apply to see them and you may not get access (eg if they are very sensitive) but they will be there for the Tribunal to see
- You can also issue a summons for witnesses to attend to give evidence (eg GP). This isn’t normally required. Similar process



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Considerations: nature of application

- Decide what orders you want.
  - Appointment of guardian (personal/medical/RP power)
  - Revoke existing power of attorney?
- Decide **who** you want to be the decision-maker (if anyone).
  - Usually best to stay neutral on this (ie ask VCAT to choose)
  - Will usually be Office of the Public Advocate
- Decide who will give evidence on your behalf. Who knows the matter best and is happy to present? Can have more than one person.

Considerations - is the matter urgent?

- Consider whether the application is urgent or not – VCAT can make an urgent order for a short time period if there's an **immediate risk of harm to someone's health, welfare or property.**
- If urgent, email/write to letter Tribunal re urgency, follow up if you don't hear. Speak to the OPA.

Application Process

- Online form:
  - https://www.vcat.vic.gov.au/case-types/guardians-and-administrators
- You should submit a medical report about the resident's capacity (use the template form) when you submit the application where possible.
- Don't need all your evidence but you do need a brief and **clear** statement of the reasons why you are making the application, eg.

  "We are making the application because we are concerned that the POA is not making decisions that promote the resident's wellbeing in relation to x…Attempts to resolve this directly with the POA have been unsuccessful and this is impacting the resident in the following ways...

What happens after you submit?

- You will need to nominate the resident's family members and give them a copy of the application (VCAT will do this too).
  - Doesn't just include decision-makers (eg. POA), includes other family and interested parties.
- VCAT should list the matter within 30 days.
- May be a hearing by phone.
- Call VCAT if unsure.

Preparing for the VCAT hearing

- Submit your evidence **prior** to the hearing where possible (by email is fine).
- As the applicant, you are responsible for presenting the case so it is important to be prepared.
- Provide a list of the documents and put them in chronological order. There is no special format required, just think about how to make it as easy as possible for the Tribunal to understand.
- Think about who will present your case/give evidence.
- You may want to put in a “witness statement” however a letter is just as effective.
- *Remember* - anything you send to VCAT also needs to go to the other parties (electronic copies are fine). If you don’t distribute the material, it can hold up or delay the proceedings.

Managing the family during this process: key tips

- Warn the family of your intention to apply to the Tribunal before you actually do.
- If the need for an application can be resolved by using the RPDSM hierarchy, consider whether the application should go ahead.
- Note, you can always make another application if you withdraw it and things deteriorate again.

What will happen at the hearing

- The Tribunal member will give an overview of what they need to consider at the outset.
- Tribunal hearings are informal and there is no set format (unpredictable).
  - Sometimes they may separate the parties to hear from them separately, other times everyone stays in the room.
  - Sometimes you will be asked to give a summary of your case, sometimes you won't. This is why putting in evidence in earlier is a good idea.
- Tribunal may make orders on the day. Follow up if you don't get a copy of these.

What VCAT Needs to Decide

- No longer consider “best interests”; consider whether order will “best promote the proposed person’s personal and social wellbeing”.
- **VCAT must consider:**

(a) The will and preference of the resident (as far as can be ascertained)

(b) Whether decisions in relation to the personal or financial matters could be made informally or through negotiation or mediation

(c) The wishes of primary carer and relatives

(d) The desirability of preserving relationships that are important to the resident

After the Hearing

- Make sure you take any steps required of you (eg providing information to the Tribunal or family).
- If you are not happy with the outcome, consider whether you want to ask for “re-hearing” (there are time limits).
- The new decision-maker will contact you.
- Follow up if need to.
- Provide the new decision-maker with anything that helps them to make the decision you are hoping for (may be the same as what you gave to VCAT, may be new evidence).

Dealing with Guardians and Administrators

- Mixed experience:
  - Can be frustrating (especially administrators)
  - Can be difficult to recover debt
- Keeping the pressure up.
- Consider other legal action to protect your position.
- You may still need to take action to recover unpaid fees
  - Remember, administrators are there to act in the interests of the resident, not your organisation
  - May still need to consider terminating the resident's tenure
- Sometimes family dynamics make it difficult for OPA.

Take home points

- VCAT process can be achieving an outcome that is best for all.
- The hearings are informal and there are “winners and losers”. The focus is on the welfare of the resident.
- There can be a lot of work involved (especially for guardianship applications) and you need to be prepared.
- The process can take some time. Come prepared, make sure you share your case with all parties.
- Be prepared to be flexible on the day, there is no fixed order for how things work.
- Sometimes you “win” when you lose and vice versa.
- May not be the best approach to achieve your outcome.

Questions

Disclaimer & Russell Kennedy Contacts

Today's presentation is intended as **general commentary only** and should not be regarded as legal advice.

If you require specific advice on the topics discussed, please contact the presenters directly:

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