Minimising Restrictive Practices In Health Care Toolkit

TOOL 5
Legal information about restrictive practices

The purpose of this tool is to provide additional information for clinicians and managers about legal requirements and the guidance that is provided in relevant Acts.

The information presented here is of a general nature and is not intended to be legal advice.

It is acknowledged that there are also ethical, practical, and professional considerations in determining the difference between the circumstances in which restraint or seclusion may be justified or positively required, and potentially unacceptable or abusive restraint.

Legal Considerations

Any restrictive practices should be applied with due consideration of any relevant legislation. This means that one of the following three conditions apply to the situation. In all situations, as soon as practicable, the person's medical practitioner should review the consumer and provide written approval, including stating the authority if applicable. When there is a threatening situation, there is frequently a duress call or Code Black call made. The emergency response teams should include a senior clinician who can provide approval and establish the consumer's decision-making capacity and authority for the use of restrictive practice.

1. Consent can be provided:

- by the consumer who has capacity to do so, to enable the safe provision of treatment *(Consent to Medical Treatment and Palliative Care 1995)*
- Consent for the restraint has been provided by either the consumer or if they are unable to do so, by a third party who has authority to do so. Third parties, such as Substitute Decision-Maker, Person Responsible or parent of a young person may have the authority to consent to medical treatment, but do not necessarily have the authority to consent to restrictive practices, for example guardians may need to apply for an order under section 32(1) (c) of the *Guardianship and Administration Act 1993*.

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Legal information about restrictive practices

2. There is legal authority to restrain to provide treatment, carry an order into effect, or maintain safety:

> 2.1 under the *Guardianship and Administration Act 1993* (section 32) a guardian can seek extra powers from the South Australian Civil and Administrative Tribunal to authorise the use of restrictive practices, to enforce treatment and/or accommodation, that is to prevent the person from leaving. (See also Information sheet 11 - Section 32 powers (Guardianship and Administration Act 1993 from the Office of the Public Advocate)

> 2.2 under the *Mental Health Act 2009*:

- If a consumer is taken under section 56 (or section 57) care and control, restraint can used by the Authorised Officer (or Police Officer) invoking the care and control powers.
- If a consumer is subject to a Community Treatment Order and is non-compliant with that order, a mental health clinician or medical practitioner may issue a Patient Transport Request for the person to be transported to a place for treatment, and an Authorised Officer (or Police Officer) may use section 56 (or 57) care and control, including the use of restraint by the officer invoking the care and control powers, to carry out that transport and treatment.
- If a consumer is subject to an Inpatient Treatment Order and is in a Treatment Centre or in the company of Treatment Centre staff, then Treatment Centre staff may use section 34 and 34A care and control powers, including the use of restraint and/or confinement, to provide treatment, maintain safety or carry the order into effect.
- If a consumer is subject to an Inpatient Treatment Order and is absent without leave from a Treatment Centre, a director of a treatment centre, medical practitioner or mental health clinician may issue a Patient Transport Request for the person to be transported to the Treatment Centre, and an Authorised Officer (or Police Officer) may use section 56 (or 57) care and control, including the use of restraint by the officer invoking the care and control powers, to carry out that transport.

Further information is available:

- Section 56 – Care and Control, Fact Sheet – Mental Health Act 2009 SA Health Office of the Chief Psychiatrist and Mental Health Policy
- Authorised Officers - Fact Sheet – Mental Health Act 2009 SA Health Office of the Chief Psychiatrist and Mental Health Policy.

> 2.3 under the *South Australian Public Health Act 2011* (section 73, 74, 75, 77) (for example for communicable diseases) the use of reasonable force is described in situations where there is physical resistance to these medical procedures. For further information please refer to Code for the Case Management of Behaviours that present a risk for HIV transmission DO151 SA Chief Public Health Officer protocol 2013-2018

> 2.4 the provision of health care for people who are in police custody, are juvenile offenders or prisoners, or detained refugees is covered by different Acts and regulations. The Prisoners Care and Treatment in SA Health Services Policy Directive (PDF 295 KB) informs medical professionals of their rights and responsibilities when treating prisoners within SA Health.

3. There is an immediate need and duty to protect people and property present from imminent harm.

> Where a consumer in a public health facility is exhibiting challenging behaviour and is posing an immediate and serious risk of harm to themselves or another person, it will be lawful to restrain the consumer or other individual to prevent the harm, or further harm, eventuating. The intent of the restraint is as a means of self-defence or defence of others.

However, any use of restraint should be reasonable in the circumstances and use the minimum amount of force or sedation for the shortest duration required in response to the threat or risk of harm.

> There may be emergency situations where, because of extreme resistive, combative or aggressive behaviour, it is not possible to assess decision-making capacity, obtain consent or safely physically assess the consumer without the interim or temporary application of restraint.

In these cases the restraint is used to ensure safety of all people during the assessment and initial treatment. As with all use of restraint, efforts are made to ensure minimal force and least restriction, including sedation are used, and for the shortest duration.

Immediately after the consumer is safely restrained a clinical assessment should be undertaken by a medical officer, or ambulance officer/paramedic in the case of SAAS, to identify and treat the underlying conditions that may have caused this behaviour, and other illness or injury that present an imminent risk to life or health (as defined by the *Consent to Medical Treatment and Palliative Care Act 1995 SA*).

Once the physical assessment is complete, the restraint should be removed unless the consumer continues to be a danger to them self or others, there remains an overriding necessity to protect the consumer and other people from harm, or the assessment indicates that emergency treatment is required. The next steps should be pursued without delay. These may be, for example:

- applying for an order from South Australian Civil and Administrative Tribunal (SACAT) or
- obtaining third party consent for treatment, or
- taking the person into care and control or placing them under a mental health treatment order

> Under common law the defence of necessity could possibly be raised in circumstances when hospital staff prevent an incompetent patient from leaving a health service, if;
  - there was a serious threat or imminent danger to the health or life of the patient
  - there were no other means of avoiding the threat of danger to the patient other than by restraining and detaining them, and
  - the restraint was proportionate to the threat.

> In accordance with the Code of Ethics for the South Australian Public Sector, and common law, a healthcare provider must reasonably ensure that no harm comes to a consumer (patient) under the provider's care. Health professionals have obligations and duties to provide good care (*The Civil Liability Act 1936* and *Health Practitioners Regulation National Law Act 2010*).

> Under the *Work Health and Safety Act 2012* there is a duty to protect any person from exposure to hazards and risks that arise from work, and to ensure that the health and safety of members of the public is not placed at risk.

Legal rights

Any person who has decision-making capacity under the *Consent to Medical Treatment and Palliative Care Act 1995*, has the right to refuse a medical assessment and/or treatment. In these circumstances, the health practitioner must not proceed with treatment, authorise any restrictive practices in order to provide that treatment, or prevent the patient from leaving.

> The use of restraint and seclusion is a significant restriction on individual freedom and may contravene a person's basic human rights under *Convention for the Rights of People with a Disability 2006* (ratified by Australia in 2008) and the *United Nations Principles for the Protection of Persons with a Mental Illness, 1991*.

> Consumer's rights are protected in legislation by the *Aged Care Act 1997 and Children's Protection Act 1993*. The SA Charter of Health and Community Services Rights, SA Strategy to safeguard the rights of older South Australians 2014-2021 and Child safe environments policy directive require that rights are upheld.

A request to not use restraint or seclusion that has been documented in an Advance Care Directive can be over-ridden by other Acts, including the *Mental Health Act 2009* and *Consent to Medical Treatment and Palliative Care Act 1995*, if the risk of not using it is deemed unacceptable.

It is unlikely but possible that a health practitioner who uses force and/or restrains someone without consent or legal authority may be charged with assault or unlawful imprisonment if the patient makes a complaint to South Australian Police. A defence to these charges may be based on the defence of necessity. Clear and comprehensive documentation of the consumer's behaviours, the level and type(s) of threat, circumstances, unsuccessful alternative strategies, clinical rationale and attempts to minimise restriction, harm and pain are therefore important.

Other relevant legislation and additional considerations

> Section in the *Criminal Law Consolidation Act 1935* (SA) are relevant to the use of restraint, care and treatment of prisoners and detained refugees.

> SA legislation provides a defence to people who use force to prevent a suicide *Criminal Law Consolidation Act 1935* (SA) s 13A.

> Division 2, s15 and 15A of the *Criminal Law Consolidation Act 1935* (SA) allows a person to defend themselves and property, and for someone (such as a security officer) to defend you on your behalf if someone is trying to physically harm you.

> The *Public Intoxication Act 1984* allows for police to be called to remove a person and take them to the cells, the person's usual place of residence and or to a sobering up unit.

> Even a mildly delirious or intoxicated patient may lack the level of capacity required to comprehend, retain and weigh information about a medical procedure with profound consequences. (Legal and ethical aspects of refusing medical treatment after a suicide attempt: the Wooltorton case in the Australian context. Ryan CJ and Callaghan S, Med J Aust 2010; 193 (4): 239-242.).

- In an emergency situation, an assessment is required to determine the person's capacity to consent. If a person is incapable of consenting and a medical practitioner is of the opinion that the person needs treatment to meet an imminent risk to life or health (an emergency), then treatment can lawfully be provided:
  - if, to the best of the medical practitioner's knowledge, the person has not previously refused to consent to the treatment (including in advance) and
  - (only) if reasonably practicable to do so, the medical practitioner has made reasonable inquiries to determine if a person has an Advance Care Directive which relates to the current situation or condition.

  If the person has given an Advance Care Directive appointing a Substitute Decision- Maker, and the medical practitioner is aware of this, that person's consent should be sought (section 13 of the *Consent to Medical Treatment and Palliative Care Act 1995*). This Act does not refer to the use of restraint.

  Despite a refusal of particular medical treatment in an Advance Care Directive, medical practitioners can lawfully provide treatment without consent in an emergency, only if the medical practitioner is of the opinion that the refusal was not intended by the person to apply to the current condition or circumstance. This may be the case if the refusal is ambiguous, and there is no time to clarify the Advance Care Directive provision/s or the person's condition, or to discuss it with someone close to the person. The reasons should be clearly documented in the patient's medical notes. (SA Health Advance Care Directives Policy Directive)
- There are requirements for the use of occupant restraints &/or seatbelts to facilitate safe patient transport under the SA *Road Traffic Act*, Australian Road Rules (Sect 265 & 266) and Civil Aviation Safety Regulations 1998 (refer section 4.13). Sect 267(6) of the Australian Road Rules should not be interpreted to apply in this circumstance.
- Where a patient is under arrest or a prisoner of SA Police or Department of Correctional Services there may be requirements for restraint, an obligation to public safety and maintaining custody.

For further information

Further information and advice should be sought, in the first instance from senior clinicians or management at each health service.

Readers who require additional information are referred to the Acts, Regulations and Rules on the South Australian Legislation website http://www.legislation.sa.gov.au/index.aspx.

If a health practitioner or manager requires further information or advice in relation to this area they are encouraged to contact the Legal, Governance and Insurance Services, Department for Health and Ageing's via mailto:Healthlegalrequests@health.sa.gov.au.

For all SA Health policies and guidelines, refer to the SA Health website.

Further information about indemnity for health professionals; civil claims or criminal proceedings; and negligence, disciplinary or misconduct matters is available in

- Providing medical assessment and or treatment where patient consent cannot be obtained policy directive
- Prevention and responding to challenging behaviour policy directive, Tool 1 Quick guide to policy and legal information relating to challenging behaviour

The Office of the Public Advocate has a number of relevant documents including

- Information sheet 11 - Section 32 powers (Guardianship and Administration Act 1993) describes special powers that guardians can seek from the Board to provide special protection for people under guardianship and/or the community
- Guardian Consent for Restrictive Practices in Residential Aged Policy (March 2015)
- Guardian Consent for Restrictive Practices in Disability Settings Policy (July 2014)

The Prisoners Care and Treatment in SA Health Services Policy Directive (PDF 295 KB) has been developed to inform medical professionals of their rights and responsibilities when treating prisoners within SA Health who are in the custody of the Department for Correctional Services (DCS). The policy promotes not only an agreed escalation process with DCS, but also offers general information in relation to the treatment of prisoner patients in the care of SA Health, particularly the role of the SA Prison Health Service, and the mental health treatment service options available for prisoners. It does not apply to juvenile offenders in custody of the Department of Communities and Social Inclusion.

For more information

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