

Changes to the Consent Act

Proposed changes to the *Consent to Medical Treatment and Palliative Care Act 1995* (Consent Act)

Why do we need to change the Consent Act?

Health practitioners, especially staff in emergency departments, may need to assess or treat patients who exhibit behaviours which create a risk of harm to themselves or other people.

These patients may have impaired decision making capacity and are not able to consent to their own treatment.

The use of restrictive practices may be required to prevent harm to the patient or others during assessment and treatment.

There is currently no express legal authority for staff to use restrictive practices to enable them to assess and treat the patient in situations where the patient presents a risk of harm to themselves or others and cannot provide consent.

Presentations to hospitals often do not fit the express powers under the existing pieces of legislation described below. Examples of situations that do not fit include:

- When a patient's condition is the result of intoxication from drugs or alcohol.
- When a patient's condition is the result of delirium.
- When a patient's condition is the result of an acute short term brain injury.

In what clinical situations might these changes apply?

Examples of situations where staff may need to use restrictive practices include:

- A person is intoxicated with crystal methamphetamine is displaying aggressive and erratic behaviour in a busy emergency department where other patients, including children and elderly people are also being treated. This person may need to be forcibly removed from other patients and held while being assessed and treated.
- An older patient is suffering from a urinary tract infection which has led to delirium. Health practitioners need to hold the person to safely insert the IV line, then use a restraint device to stop the person from repeatedly pulling out their IV line and hitting out at staff attending.
- A person presents after a recent brain injury and is aggressive, confused and resisting treatment.

In the above examples there is no mental illness as defined under the *Mental Health Act 2009* and the mental incapacity may be short term and therefore the approach under the *Guardianship and Administration Act 1993* is not appropriate.

What are restrictive practices?

Restrictive practices, in relation to a patient, include:

- Sedation through the use of medication.
- Restraining patients through holding the patient.
- Restraining patients through using a mechanical device.

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- Seclusion of the patient on his or her own, in an area from which the patient cannot leave of their own will.
- Confinement in an area from which the patient cannot leave of their own will.

What is the current legal framework for the use of restrictive practices, and what are the gaps?

- The *Mental Health Act 2009* (MHA) has express powers for the use of restrictive practices.
 - However, this Act applies only if the person has, or appears to have a mental illness and other criteria are met.
- The *Guardianship and Administration Act 1993* (GAA Act) has express powers for the use of restrictive practices for someone who does not have decision making capacity and is under a guardianship order.
 - However, the powers may only be used for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person. The powers under the GAA Act are appropriate where the patient needs their long term medical and personal affairs overseen.
 - The GAA Act does not provide an immediate option for staff to meet their duty of care requirements to provide for the care and safety of patients, because a guardianship order must first be made by the South Australian Civil and Administrative Tribunal (SACAT).
 - An existing guardian may need to apply for additional powers to use restrictive practices under s32.
 - In order to have a guardianship order lifted, the patient and relevant SA Health staff must appear before SACAT.
- The *Advance Care Directive Act 2013* (ACD) allows for a person with capacity to record on their ACD that they will allow the use of restrictive practices in certain circumstances.
 - However, currently this is rarely included in an ACD, and not all people have an ACD
- Common law may allow for health practitioners to use the defence of necessity if they are charged with assault or false imprisonment as a result of using restrictive practices. This is a defence only and means that the health practitioners must be exposed to criminal charges before they can try to rely on the defence of necessity.

What are the proposed changes to the Consent Act?

The proposed changes include:

- Provisions to enable authorised persons to use restrictive practices and provide medical treatment without consent in strictly limited circumstances.
- The following criteria must be met before an authorised person may use their powers:
 - the patient is displaying behaviour that constitutes a risk of harm to themselves, other people or property; and
 - the patient has impaired decision making capacity and is unable to consent to treatment; and
 - the use of restrictive practices is necessary to minimise the risk of harm or prevent further harm or to enable the patient to be examined or assessed and treated.

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- Authorised persons are medical practitioners or a class of persons to be appointed by the Minister. Authorised persons will have the power to:
 - transport the person;
 - use restrictive practices, physical, or mechanical on the patient as reasonably required in the circumstances,
 - restrain the patient by administering a drug (if authorised under the *Controlled Substances Act 1984*);
 - seclude a patient on their own in an area from which the patient cannot leave;
 - confine the patient in an area from which they cannot leave of their own volition
 - search the patients clothes and possessions and take possession of anything that may be used to harm themselves, others or property.
- Authorised persons will also have the power to provide some treatment without consent to the patients that are the subject of restrictive practices.
- Authorised persons will be limited to treating the particular medical condition/s that are reasonably believed to be the cause of the risk of harm and any issues arising from the harm. This may include a gash from falling over or a broken hand from punching a wall for example. (These proposed changes do not impact current practice with regard to managing ongoing illnesses or conditions).
- The definition of medical practitioners will be extended to include those prescribed by regulation. This will allow for nurse practitioners, advance practice nurses, and SA Ambulance Officers to be prescribed under the regulations. This change recognises that the the role and scope of practice of nurse practitioners, advance practice nurses and SA Ambulance Officers has changed since the Consent Act was first drafted in 1995. These professionals now provide a wide range of treatment that is not always directly supervised by a doctor and they need to be captured under the wider provisions of the Consent Act including allowing them to be appointed as authorised persons for the purposes of using restrictive practices to protect and treat patients who do not have decision-making capacity.

How is the patient protected?

Authorised persons may only exercise their powers for as long as reasonably necessary, and up to a maximum period of 24 hours, whichever is lesser. Children will only be allowed to be restrained up to a maximum of 12 hours.

Each time the proposed powers are used the patient must be given a statement of rights and a form prescribed by the Chief Executive of SA Health must be filled out. The use of these powers will be monitored in line with the reporting and monitoring processes that apply to the use of all restrictive practices across SA Health.

All use of restrictive practices must be reported into the patient incident module of the Safety Learning System.

Guidelines for the use of restrictive practices must also be published which will provide much of the detail about how the power to use restrictive practices may be applied by authorised medical practitioners.

What do the proposed changes mean in practice?

In practice, the overall use of restraint is not likely to increase as a result of the proposed changes. The frequency of these situations occurring should not change. The proposal aims to clarify the powers of staff in relation to ensuring the health and safety of patients and others.

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SA Health is committed to minimising, or eliminating the use of restrictive practices where possible. SA Health policy (below) will still govern healthcare workers in their decision-making about how and whether to use restrictive practices.

The use of restrictive practices must be a last resort and the least restrictive option must be selected. Restrictive practices are only used after alternative strategies have failed. In these situations workers with expertise will apply and monitor the restraint, and support the recovery of the patient afterwards, in order to reduce harm.

It is the responsibility of all SA Health staff to minimise or eliminate the use of restrictive practices where possible. Restrictive practices are potentially harmful non-therapeutic interventions, and their use can be avoided by positive changes to the provision of assessment, treatment, care and support.

What about the 2017 Consultation?

A similar proposal to amend the Consent Act was the subject of consultation in 2017. The Consent to Medical Treatment and Palliative Care (Restrictive Practices) Amendment Bill 2017 was prepared under the previous government and was the subject of wide consultation at that time.

Unfortunately Parliament was prorogued in December 2017 in preparation for the March 2018 election before the Bill could be introduced and the proposed changes were not able to be progressed at that time. The submissions made on the 2017 Bill are acknowledged and have been considered in the drafting of the current Bill. However those who provided feedback in the last consultation are encouraged to do so again.

References:

[Minimising Restrictive Practices SA Health Policy Directive](#)

[Restraint and Seclusion in Mental Health Services SA Health Policy Guideline](#)

[Chief Psychiatrist Standards and Policies](#)

[The Consent to Medical Treatment and Health Care SA Health Policy Guideline](#)

[Providing medical assessment and treatment where consent cannot be obtained SA Health Policy Directive](#)

For more information

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