

## Policy statement about requests for consent from the Public Guardian to apply restrictive practices to an aged care recipient

### Role of the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office established to protect the rights and interests of adults with impaired decision-making capacity, among other things. The statutory powers and functions of the Public Guardian are contained in *the Public Guardian Act 2014* and the *Guardianship and Administration Act 2000*.<sup>1</sup>

The functions of the Public Guardian include acting as a substitute decision-maker of last resort, protecting adults from neglect, exploitation and abuse by exercising wide investigative powers, and providing visiting and individual advocacy to protect their rights, access to services, independence and choice. It also means supporting them to raise formal complaints with relevant agencies.

The Queensland Civil and Administrative Tribunal (QCAT) may appoint the Public Guardian as guardian for an adult only if there is no other appropriate person available for appointment for the matter. The Public Guardian can only be appointed to make personal decisions, which may include giving or withholding informed consent for an aged care provider to use 'restrictive practices' on a care recipient, as defined in section 15E of the *Quality of Care Principles 2014* (Cth).<sup>2</sup>

### Policy statement

For a person receiving aged care services (a care recipient), a restrictive practice is any practice or intervention that has the effect of restricting their rights or freedom of movement.<sup>3</sup> Each of the following is a restrictive practice in relation to a care recipient:

- chemical restraint
- environmental restraint
- mechanical restraint
- physical restraint
- seclusion.<sup>4</sup>

The use of restrictive practices in residential aged care is a significant limitation of a person's human rights.

Due to the significant nature of restrictive practices, the Public Guardian does not generally support the practice of QCAT appointing the Public Guardian to make decisions about consenting to restrictive practices in aged care, under an interim order.<sup>5</sup> Interim orders are routinely made without a hearing involving a thorough investigation of the adult's decision-making capacity and with minimal or no engagement with the adult subject to the proceedings.

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<sup>1</sup> Part 5B of the *Guardianship and Administration Act 2000* (Qld) does not apply to restrictive practices in aged care.

<sup>2</sup> *Guardianship and Administration Act 2000* s 12; NJ [2022] QCAT 283.

<sup>3</sup> *Aged Care Act 1997* (Cth) s 54.9.

<sup>4</sup> *Quality of Care Principles 2014* (Cth) s 15E.

<sup>5</sup> *Guardianship and Administration Act 2000* (Qld) s 129.

As an active party to QCAT proceedings, the Public Guardian will advocate for a full hearing by QCAT (rather than a hearing for an interim order) in most circumstances, and seek to ensure that consideration of all requirements of the *Guardianship and Administration Act*, and the *Human Rights Act 2019* is undertaken to determine whether a decision-maker should be appointed to provide or withhold consent for an aged care provider to use restrictive practices on the care recipient.

The *Guardianship and Administration Act 2000* acknowledges:<sup>6</sup>

- An adult's right to make decisions is fundamental to the adult's inherent dignity;
- The right to make decisions includes the right to make decisions with which others may not agree;
- The capacity of an adult to make decisions may differ according to –
  - The type of decision to be made, including, for example, the complexity of the decision to be made; and
  - The support available from members of the adult's existing support network;
- The right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- An adult with impaired capacity has a right to adequate and appropriate support for decision-making.

When making a decision for an adult, an OPG guardian must apply:

- The General Principles of the *Guardianship and Administration Act 2000*, including a structured decision-making framework<sup>7</sup>
- The *Human Rights Act 2019*
- OPG's '[Human Rights Act 2019 – Decision-making framework for the performance of the Public Guardian's functions and powers](#)' and '[Structured Decision-Making Framework](#)'.

The starting point for all decisions is to recognise and preserve, to the greatest extent practicable, the adult's right to make their own decision, and if possible, to support the adult to make a decision.

The adult should be consulted on a decision regarding the proposed use of a restrictive practice, and if they are unable to be consulted, steps should be taken to identify their will and preference by other means before making a substitute decision. The adult should be able to choose whether to be assisted with decision-making support by a particular person, and to cease being supported at any time.

Wherever possible a guardian should visit the adult to consult with them and to observe the circumstances of any existing or proposed restrictive practices.

OPG is not the regulator of approved aged care providers and aged care services and will not oversee or determine compliance with the *Quality of Care Principles 2014* through giving or withholding consent to the use of restrictive practices in aged care settings. However, if OPG suspects an adult may be at risk of harm from a provider's non-compliance with the *Quality of Care Principles 2014*, OPG will determine on a case-by-case basis whether protective action or referral to the Aged Care Quality and Safety Commission is required.

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<sup>6</sup> *Guardianship and Administration Act 2000* (Qld) s 5.

<sup>7</sup> *Guardianship and Administration Act 2000* (Qld) s 11B-11C.

The Public Guardian requires the approved aged care provider to provide a signed declaration of its compliance with the relevant *Quality of Care Principles 2014* when applying for consent to use restrictive practices on a care recipient.

### **Relevant authority to provide, or refuse to provide, consent**

Restrictive practices are applied for the primary purpose of influencing a person's behaviours of harm. Restrictive practices do not include, for example, use of medication prescribed to treat:

- a diagnosed mental disorder
- a physical illness or condition
- end of life care.<sup>8</sup>

The health care of an adult, is care or treatment of, or a service or procedure:

- to diagnose, maintain, or treat the adult's physical or mental condition; and
- carried out by, or under the direction of, a health provider.<sup>9</sup>

Consequently, use of restrictive practices is not a health care matter.

An OPG guardian will only consider whether to provide consent for the use of restrictive practices when appointed by QCAT for decisions relating to an adult's personal matters, and where the appointment specifically relates to the use of restrictive practices in aged care.

A restrictive practice used to influence behaviours of harm is not a health care matter and a general QCAT appointment to make decisions for health care matters is not considered to be sufficient authority to decide to give or withhold consent for the use of a restrictive practice in aged care. Further, the Public Guardian does not have authority as a Statutory Health Attorney to make a decision to give or withhold consent for the use of a restrictive practice in aged care.<sup>10</sup>

An OPG guardian's role in decision-making for a care recipient may be limited or conditional based on directions given by QCAT.

### **Making a decision to provide or refuse consent**

When considering a request for consent to the use of restrictive practices, it is first acknowledged that the use of any restrictive practice limits the care recipient's human rights. OPG's focus is therefore on ensuring that restrictive practices are only used as a last resort and in the least restrictive way. The use of restrictive practices should also be reduced or eliminated over time.

An OPG guardian will seek comprehensive information to satisfy themselves whether a limitation on the care recipient's human rights is reasonable and demonstrably justifiable<sup>11</sup> for their specific circumstances. Consent will only be considered by an OPG guardian if the proposed restrictive practice/s are demonstrated to be reasonable and justifiable and, for example:

- To respond to or prevent a behaviour likely to cause harm.
- As a last resort, after less restrictive options have been exhausted.
- To be implemented with the goal to reduce and eliminate use.
- Used in conjunction with other non-restrictive supports.

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<sup>8</sup> *Quality of Care Principles 2014* (Cth) s 15E.

<sup>9</sup> *Guardianship and Administration Act 2000* (Qld) sch 2, s 5(1).

<sup>10</sup> *Quality of Care Principles 2014* (Cth) s 5B.

<sup>11</sup> *Human Rights Act 2019* (Qld) s 13.

- Used in the least restrictive way for the shortest amount of time.
- Based on recent assessments by an expert in behavioural support in aged care.
- Supported by the information and evidence required by the *Quality of Care Principles 2014*.

Consent for use of restrictive practices will be decided on a case-by-case basis, however if consent is provided by a guardian, consent for the use of chemical restraint will be provided for a maximum of three months, and all other restraints for a maximum of six months.

As outlined earlier, the Public Guardian does not generally support the practice of QCAT appointing the Public Guardian to make decisions about consenting to restrictive practices in aged care under an interim order. In circumstances where an approved age care provider is not yet able obtain consent but believes the use of restrictive practices is immediately necessary, the approved aged care provider should consider the relevant provisions of the *Quality of Care Principles 2014* and seek advice from the Aged Care Quality and Safety Commission.

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