Dementia Australia

Support. Change. Prevention.

Dementia Australia, COTA and OPAN

What needs to change?

- Restrictive practices limit a person's rights and freedom. They must only be used as a last resort, in the least restrictive way and for the shortest possible time.
- Temporary legal protections for aged care providers under section 163 of the Aged Care Act 2024 should end as planned on 1 December 2026.
- The current process for deciding who can consent to restrictive practices needs reform. It does not always reflect who the person trusts, their wishes, culture, family or kinship relationships.
- People must be supported to make their own decisions wherever possible. A diagnosis of dementia, disability, age, communication differences, distress or disagreement must not automatically be treated as an inability to make a decision.

What is the Joint Statement recommending?

- Allow the temporary section 163 immunity to end on 1 December 2026 and provide clear guidance about accountability and people's rights.
- Put supported decision-making first, including accessible information, communication support and involvement of people the person trusts.
- Narrow the default list of substitute decision makers and remove rules that give priority based on age.
- Provide independent review, authorisation and independent advocacy for serious, prolonged, repeated, disputed or escalating use of restrictive practices.
- Strengthen dementia-capable care, workforce education, clinical review and other alternatives to restrictive practices.

If actioned, what impact could these recommendations have?

- People living with dementia could have greater protection of their rights, dignity, autonomy and freedom.
- People could be better supported to make and communicate their own decisions, with their will, preferences, culture and communication needs taken into account.

- Aged care providers would have greater incentive to prevent restrictive practices through appropriate staffing, training, clinical review, communication support and dementia-capable care.
- People living with dementia could have better access to complaints, independent advocacy, review and remedies when their rights are breached.

How has Dementia Australia advocated for this position?

- Developed a joint position statement with Older Persons Advocacy Network (OPAN) and COTA Australia calling for stronger safeguards, supported decision-making and accountability for restrictive practices in aged care.
- Called for older people, including people living with dementia, their supporters and representative organisations to have a meaningful role in shaping future changes to the consent framework.

Joint position statement on restrictive practices in aged care

The approaching end of section 163 immunity and the reforms still required

OPAN, COTA Australia, and Dementia Australia welcome the approaching end of the temporary immunity in section 163 of the Aged Care Act 2024 from 1 December 2026. It will strengthen accountability for the use of restrictive practices but must be matched by reform of the consent framework.

Our position

Restrictive practices limit a person's rights and freedom of movement, including liberty, bodily integrity, autonomy, dignity, equality and freedom from violence, coercion and abuse. They must be used only as a last resort, in the least restrictive form and for the shortest possible time, after alternatives have been tried.

Section 162 requires prescribed providers to comply with the restrictive practices requirements in the Aged Care Rules 2025. Section 163 provides conditional immunity from civil or criminal liability when a restrictive practice is used in relation to a person who lacks capacity to consent and the requirements are met before 1 December 2026. Introduced as a temporary response to gaps in state and territory law, that immunity should end as intended.

In an October 2024 a joint letter to the Minister for Aged Care, OPAN, Dementia Australia and COTA Australia warned that the substitute decision-making arrangements required urgent reform (Appendix A).

What the sunset means for older people

For older people, especially people living with dementia or other cognitive impairment, the end of the immunity will shift the framework away from exceptional protection for providers and towards accountability for restrictions on the person.

- Stronger accountability when a restrictive practice is unlawful, lacks valid consent, exceeds what is necessary or is used before less restrictive alternatives have been exhausted.
- Greater incentive for providers to prevent restrictive practices through adequate staffing, training, dementia-capable care, clinical review, communication support, pain assessment and positive behaviour support.
- Better access to complaints, regulatory action, legal review and remedy when rights are breached.

Government, regulators and providers must ensure that the change does not lead to blanket risk avoidance, inappropriate transfer of responsibility to families, refusal of care or withdrawal of services from people with complex needs. Greater accountability must produce better care and safeguards, not exclusion.

The remaining consent framework must be reformed

The end of section 163 immunity will not fix the consent pathway. Where no relevant state or territory appointee exists and there is no clear appointment mechanism, or an application faces significant delay, section 6-20 of the Aged Care Rules 2025 provides a hierarchy of potential restrictive practices substitute decision-makers. It includes a nominee, partner, unpaid carer, relative or friend, and a medical treatment authority. In some cases, the eldest eligible person takes precedence.

OPAN and Dementia Australia seek clarification on whether the Government intends to extend this interim hierarchy beyond 1 December 2026. If an extension is proposed, the Government should explain its rationale and extension duration, the process and timetable for amending the Rules, and what consultation has occurred or is planned.

Older people, including people living with dementia, their supporters and representative organisations must have a meaningful opportunity to shape any proposed changes. An extension must not delay the reforms needed to protect older people's rights and strengthen supported decision-making.

The hierarchy must be limited and reframed. Relationship category, age and availability do not establish trust, knowledge of the person's wishes, freedom from conflict or ability to

understand the consequences of authorising a restriction. The hierarchy may also fail to reflect Aboriginal and Torres Strait Islander kinship, culturally diverse families, chosen families and other relationships of trust.

The framework must begin with the older person. Capacity must be presumed and assessed for the particular decision at the time it is required. Dementia, disability, age, communication difference, distress or disagreement must not be treated as incapacity. Accessible information, communication assistance, time, supported decision-making and involvement of trusted people must come first.

Use the registered supporter framework as the organising approach

OPAN, COTA Australia, and Dementia Australia support the registered supporter framework as the organising approach. It helps an older person access information, understand options, express their will and preferences, and communicate decisions. This starts with support to decide and better recognises chosen family, kinship, culture and communication needs.

A registered supporter helps the person decide; registration does not itself authorise substitute consent. If consent is required, it must come from someone with clear legal authority or an independent authorisation process.

The Rules should require providers to identify and involve the registered supporter at the outset and document support to decide. Where substitute consent is lawfully required, the person's chosen nominee should be prioritised. The default hierarchy should be substantially narrowed, age-based precedence removed and providers prevented from choosing an informal decision-maker for convenience.

Consent alone is not sufficient

Consent cannot make an unnecessary, disproportionate or poorly implemented restrictive practice acceptable. A family member or friend should not bear sole responsibility for authorising a serious restriction without independent information and advice.

Serious, prolonged, recurring, disputed or escalating practices should require independent authorisation or prompt review. The older person must be offered independent advocacy, and their will and preferences, culture, communication needs and response to the practice must be documented. Objection, resistance or distress must trigger immediate review.

Further work is required

Before 1 December 2026, governments, regulators and providers should take the following action.

Required action	What must change
Allow section 163 immunity to end	Do not extend section 163 or recreate the immunity elsewhere. Publish guidance on the effect of its end, accountability and remedies for both providers and older people. including people living with dementia, their supporters and representative organisations
Clarify the future of the interim hierarchy	Confirm whether the hierarchy will be extended and explain the rationale, duration, amendment process and consultation arrangements. Involve older people and their representative organisations in shaping any changes.
Reform the consent pathway	Put supported decision-making and chosen relationships first; integrate registered supporters; narrow the default hierarchy; remove age-based precedence; and distinguish support from substitute authority.
Provide independent authorisation and advocacy	Create an expedited pathway where no authorised decision-maker is available. Require independent scrutiny and offer advocacy for serious, prolonged, disputed, recurring or escalating practices.
Strengthen prevention	Fund dementia-capable care, positive behaviour support, workforce education, clinical review, suitable environments and evidence-based alternatives. Restrictive practices must not compensate for inadequate staffing, training or unmet needs.
Improve oversight and transparency	Require registers covering all forms of restraint and seclusion; prescribed consent, review and reauthorisation timeframes; define emergency use and cessation; audit compliance; and publish disaggregated data, complaints, adverse outcomes and reduction targets.
Complete nationally consistent reform	Set public milestones to resolve gaps in state and territory law and assess whether a single Commonwealth authorisation model would provide clearer, more equal protection.

Conclusion

The approaching end of section 163 immunity is an important accountability milestone, but not the end of reform. Older people need a framework that prevents restrictive practices, supports their decisions, recognises the people they trust and provides independent scrutiny when liberty is at stake.

The test is whether the person's rights, will and preferences have been respected; the causes of distress addressed; less restrictive alternatives exhausted; and effective review and remedy made available.

OPAN, COTA Australia, and Dementia Australia call on governments, regulators and providers to use the remaining time to deliver a consent framework grounded in supported decision-making, better care and clear accountability.

Appendix A

Joint letter to the Minister for Aged Care dated 20 October 2024

The Hon Anika Wells MP
Minister for Aged Care and Minister for Sport
Australian Parliament House

20th October 2024

Dear Minister,

We write to you regarding the proposed two-year extension of the current restrictive practice substitute decision making hierarchy and indemnity for aged care providers.

It is our understanding that Government has formed the view that the consent hierarchy and indemnity needs to be extended until December 2026 as State and Territory Governments have not completed the work to explicitly develop consent to restrictive practices within state and territory legislation.

The Interim Measures and Current Aged Care Approach

Our organisations were involved in consultations on these interim measures in 2020/21. We were assured at the time that they were required to enable states and territories sufficient time to enact appropriate Restrictive Practice Substitute Decision-Making (RPSDM) models to provide consent to restrictive practices and for these to be incorporated into their respective Guardianship and Administration legislative instruments. The hierarchy, along with a limited liability waiver for aged care providers were scheduled to cease on 1 December 2024.

If the approach is to remain exclusively for aged care (as the recently introduced Victorian legislation suggests), then we question why a State or Territory led approach is necessary given the singular role of the Commonwealth in regulating aged care.

Impact of the Current Provisions

The current provisions mean that older people in aged care do not receive the same protections as other people subject to restrictive practices in other settings. This includes comparable access to independent professional advice, use of non-restrictive behaviour support practices and regular review as to whether continued use of restrictive practices remains appropriate.

Continuation of the current approach will further the distress expressed by older people and their families in relation to the inappropriate use of restrictive practice in aged care.

We are collectively agreed that older people should have the same rights and protections as any other member of the Australian community in relation to restrictive practices. The current approach to restrictive practices, as detailed in the new rights based legislation, does not afford older people these rights and protections.

OPAN Older Persons Advocacy Network
Dementia Australia
COTA For older Australians

Consent for the implementation of a restrictive practice is one of the most significant decisions for a person to make as a substitute decision making for another individual. It not only has a significant impact, and infringement, on the individual's rights but has potential risk to that person's health, wellbeing and freedom of movement. There are limited times when this right is constrained due to the balance of risk for the individual, and others around them but this must only occur as a last resort. Informed consent is paramount in these situations.

Obligations under the United Nations Convention on the Rights of Persons with Disability and other international treaties and conventions means when the person's right to consent to a restrictive practice is overridden, this is done with appropriate oversight, protections, monitoring and review. Concerns with the restrictive practice provisions have been noted by the Joint Parliamentary Committee on Human Rights in their report on the review of previous legislation and of the Bill for the Aged Care Act 2024 as well as the Commonwealth ombudsman.

Implementation of the Statement of Rights under the new Aged Care Act will enhance an individual's rights. Upholding these rights must be the aim with any restrictive practice framework.

We believe the hierarchy and indemnity provisions should be removed because:

- The current aged care provisions, consent process or monitoring approach do not provide the same level of protections to older people in aged care as is available to other Australians in mental health, disability, juvenile justice and correctional settings;
- There is a lack of enforcement around environmental restrictive practices with inappropriate assignment of individuals into a locked ward within a facility without the necessary behavioural support plans and restrictive practice consents in place prior to the individual being transferred. It is currently too easy for a provider to place an individual in a dementia ward/behavioural support unit and more rigour around recognising environmental restraint and seclusion as a form of restrictive practice is required today.
- There is no support for education of members of the hierarchy of substitute consent providers on their role and function or provides sufficient safeguards and oversight in relation to these decision makers.
- There is a need for greater access to independent professional advice for the restrictive practice decision maker and more intensive resources to improve oversight by the Aged Care Quality and Safety Commission of the use of restrictive practices (including proactive monitoring of consent practices and their frequency, and enhanced education strategies for people providing consent and aged care providers).

The fundamental risk is that without an authorisation model, education or appropriate independent behavioural support specialist input, the person consenting is not aware of their responsibilities, their legal obligations and the health and other risks of the practice when providing consent.

If Government determines that the regime will continue we are seeking the following actions to ensure rights are upheld and greater protection is provided for aged care residents:

Clearer guarantees that the hierarchy and its related immunity provisions cease upon state/territory legislation coming into force.

1. An amended approach to the regulations around the consent hierarchy to ensure the hierarchy (and associated immunity provisions in section 163) cease upon commencement of a relevant State and Territory law and that it be sunset in its entirety no later than 1 December 2026.
2. If S/T laws are to be limited to aged care alone, explore all avenues for Commonwealth to regulate one law for the authorisation / consent to restrictive practices.

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Stronger regulation to improve provider practice

3. Inclusion within the Rules of:
   a. a requirement of all aged care providers to hold a register of restrictive practices which is reviewed and audited by the Aged Care Quality and Safety Commission.
   b. a definition of what constitutes an emergency in the context of use of restrictive practices, with a clear timeframe for cessation once the immediate risk has passed (we note the Ombudsman also commented what constitutes an 'emergency' may be subjective and proposed that an 'emergency' should be clearly defined)
4. Enhanced functions within the Aged Care Quality and Safety Commission to provide oversight, monitoring, review and education in relation to the prevention of and limitations on use of restrictive practices.
5. Reestablishment of the advisory group structures on restrictive practices in aged care to consider any additional monitoring and oversight.

Independent advice, support and education for older people and their restrictive practice decision makers to improve informed consent outcomes

6. In order to ensure informed consent, development and implementation of consistent information provision and education to people providing substituted decision-making consent to restrictive practices on their roles and responsibilities, behaviour support plan expectations, and alternate approaches, prior to being able to provide consent for a restrictive practice.
7. Funding appropriate specialist clinical and behavioural input on a consultant liaison basis, by experts trained and accredited in dementia care and positive behaviour support to provide professional input to any behaviour support plan.

Ensuring all staff in the residential aged care sector receive appropriate dementia training and training in behavioural support planning will further reduce the use of restrictive practices. We would be available to discuss the proposed approaches with the Department or your office at your convenience.

Yours sincerely

Craig Gear OAM
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Patricia Sparrow
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