A Balancing Act: Does the role given to guardians by the South Australian model for authorising restrictive practices allow guardians to perform their roles as intended?

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I Introduction

Since the creation of modern guardianship laws in the 1980s, guardians have had an important role in supporting people with mental incapacity in a way that emphasises their wishes and protects their rights, while ensuring their care needs are met. More recently, guardians have been key decision-makers in the authorisation of restrictive practices. This essay will consider whether the role given to guardians in the authorisation of restrictive practices in South Australia aligns with the purpose of their involvement in the life of the person under their guardianship. First, this paper will explore restrictive practices and their regulation in South Australia. The role of guardians will then be discerned through an analysis of the law of guardianship and its evolution. Finally, their roles in the authorisation process will be compared with their overarching role to determine if the two are compatible. The role of guardians in the South Australian authorisation model ultimately conflicts with their overarching role to promote the wishes, rights and care of the person under their guardianship.

II Restrictive Practices

Restrictive practices are “any practice or intervention that has the effect of restricting the rights or freedoms of a person with disability.”[1] The National Disability Insurance Scheme (“NDIS”) has defined five broad categories of restraint: seclusion, chemical, mechanical, physical, and environmental.[2] These practices were most often used in institutions or hospitals[3] as one of the “safest and most effective”[4] ways to de-escalate behaviours of concern. More recent evidence shows that most behaviours of concern that give rise to a perception of the need to use restraints can be adequately

[1] NDIS Quality and Safeguards Commission*, Regulated restrictive practices*, (Web Page, 2020) <https://www.ndiscommission.gov.au/regulated-restrictive-practices>.

[2] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) s 6.

[3] Carli Friedman and Caitlin Crabb, ‘Restraint, Restrictive Intervention, and Seclusion of People with Intellectual and Developmental Disabilities.’ (2018) 56(3) *Intellectual and Developmental Disabilities* 171.

[4] Ibid, 171.

addressed by staff equipped to implement early intervention and support.[5] This usually involves the use of positive behaviour support plans, which are prepared by behavioural experts, to identify triggers and reduce behaviours of concern through non-restrictive interventions.[6] Thus, it is now more widely accepted that restraints are to be used as a last resort,[7] only for immediate control of dangerous or potentially dangerous situations.[8]

A Issues with Restrictive Practices

Restrictive practices pose significant risks for all involved.[9] Use of restrictive practices has previously resulted in physical or emotional harm, for both the person on whom the restraint is used and the person performing the restraint. Occasionally, it has also resulted in the death of the person with disability.[10] Restraints have been historically used for inappropriate reasons, such as for the convenience of staff or family, or due to inadequate staffing and resources. It is also recognised that some uses of restrictive practices can amount to unlawful and arbitrary infringements on the rights of persons with disability.[11]

Despite these concerns, there is a long history of unregulated use of restrictive practices in Australia.[12] Where regulation has been implemented, practice does not always align with the proposition that restraints are only to be used as a last resort. For example, Victoria's Restrictive Interventions Data System ("RIDS") has recorded all incidents of restrictive practices in Victorian government-funded services since 2008. A recent analysis of RIDS has shown that 90-95% of recorded restraints in Victoria since 2008 have been chemical, while 8-12% of recorded incidents have been either physical, mechanical, or seclusion, and many incidents have involved the use

[5] Ben Richardson, Lynne S. Webber, and Frank Lambrick, 'Factors associated with long term use of restrictive interventions,' (2020) 45(2) *Journal of Intellectual and Developmental Disability* 164, explaining findings of Webber, Major et al. 'Providing positive behaviour support to improve a client's quality of life.' (2017) 20(4) *Learning Disability Practice,* 36-41.

[6] Michael Williams, John Chesterman and Richard Laufer, 'Consent versus scrutiny: Restricting liberties in post-Bournewood Victoria', (2018) 21 *Journal of Law and Medicine* 641, 658.

[7] Richardson, Webber, and Lambrick, n 5, 159.

[8] Sheryl Parke, Lucy Hunn, Tracey Holland et. al. 'Restrictive interventions: A service evaluation', (2019) 22(5) *Medical Health Practice* 20, 21.

[9] Friedman and Crabbe, n 3, 172.

[10] Friedman and Crabbe, n 3, 172.

[11] Williams, Chesterman and Laufer, n 6, 647.

[12] Kim Chandler, Ben White and Lindy Willmott, 'Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Rights-based Approach (Part One)' (2018) 25(3) *Psychiatry, Psychology and Law* 465, 466.

of more than one restraint.[13] Furthermore, there is often a lack of systematically implemented safeguards to reduce reliance on restrictive practices.[14]

Growing recognition of the threat restrictive practices pose to the rights of people with disability has led to an understanding that many of these authorisation schemes may offend the principle of legality.

B Principle of Legality

The principle of legality is a principle of statutory interpretation that arises when the relevant legislation engages fundamental rights or freedoms. Legislation that governs the use of restrictive practices clearly engage the rights to liberty and security of the person[15], and the right to freedom from torture and cruel, inhuman or degrading treatment of punishment.[16] To abrogate these rights, legislation should contain "unmistakable and unambiguous language"[17] to that effect; "Courts should not impute [such] an intention."[18] Historically, however, many schemes have authorised restrictive practices through guardian consent. Often, there is a lack of clear language which confers this power to guardians; it is instead considered part of their plenary or ancillary powers to allow them to perform their guardianship responsibilities effectively.[19]

In response to this concern, the NDIS Quality and Safeguards Commission ("NDIS Commission") has taken responsibility for defining and regulating the use of restrictive practices. Under the *National Disability Insurance Scheme (Restrictive Practices and*

[13] Richardson, Webber and Lambrick, n 5, 159.
[14] Kim Chandler, Ben White and Lindy Willmott, 'What role for adult guardianship in authorizing restrictive practices,' (2017) 43(2) *Monash University Law Review* 492, 526.
[15] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 14.
[16] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 15.
[17] *Coco v The Queen* (1994) 179 CLR 427, 237 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[18] Ibid.
[19] Nick O'Neill and Carmelle Pesiah, 'The functions of a guardian,' in Nick O'Neill and Carmelle Pesiah (eds), *Capacity and the Law*, (Sydney University Press, 2019) ch 7, 42.

Behaviour Support) Rules 2018 (Cth) ("NDIS Rules"), states are responsible for the creation of processes for the lawful authorisation of restrictive practices.[20]

III AUTHORISING RESTRICTIVE PRACTICES IN SOUTH AUSTRALIA

South Australia has recently enacted the *Disability Inclusion (Restrictive Practices – NDIS) Amendment Act 2021* (SA) ("RP Act") to govern registered NDIS providers' use of restrictive practices in South Australia. The RP Act operates concurrently with existing schemes for the authorisation of restrictive practices. These continue to provide for authorisation where the RP Act does not apply, for example, for non-NDIS disability service providers. The most relevant Acts for ascertaining the role of guardians in the overall South Australian authorisation model are the *Guardianship and Administration Act 1993* (SA) ("GA Act") and the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ("Consent Act").

A DISABILITY INCLUSION ACT 2018[21]

Under the RP Act, restrictive practices are only to be authorised by the Senior Authorising Officer[22] (a public servant) or an Authorised Program Officer (an employee of the NDIS provider).[23] Applications for the use of restrictive practices are to be made by NDIS providers and should include a positive behaviour support plan.[24] If granted, the NDIS provider is to issue a written notice of the authorisation to the person and their guardian.[25] There is also provision for a person aggrieved by the decision to apply for its review.[26]

B GUARDIANSHIP AND ADMINISTRATION ACT 1993

The GA Act provides an authorisation scheme for the use of seclusion, detention, and other restrictive practices that involve the use of force (such as physical restraint).[27] To use these restraints, an appointed guardian must apply to the South Australian

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[20] See, eg. *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) s 12(1)(c). See also the *Bilateral Agreement between the Commonwealth of Australia and the State of South Australia on the National Disability Insurance Scheme* (25 May 2018) cl 34.
[21] *Disability Inclusion Act 2018* (SA).
[22] *Disability Inclusion Act 2018* (SA) s 23I.
[23] *Disability Inclusion Act 2018* (SA) s 23L.
[24] See, eg. *Disability Inclusion Act 2018* (SA) s 23O(1).
[25] See, eg. *Disability Inclusion Act 2018* (SA) s 23O(8).
[26] *Disability Inclusion Act 2018* (SA) ss 23Y and 23Z.
[27] *Guardianship and Administration Act 1993* (SA) s 32.

Civil and Administrative Tribunal ("SACAT") for the appropriate special powers.[28] Authorisation to use these restraints will then pass to service providers the subject of the order, with no further consent from guardians required.

Current interpretations[29] of the GA Act also provide that when SACAT appoints guardians with lifestyle, medical, or restrictive practices[30] delegations, they are authorised to make decisions about restrictive practices (not including those that require section 32 powers). Once this authorisation is given, service providers can request consent from these guardians to use restrictive practices on behalf of the person they make decisions for. As the RP Act provides that restrictive practices authorised under its processes can be used without consent or despite refusal of consent[31], it is unlikely that consent will be requested where authorisation is obtained under this Act.

C CONSENT TO MEDICAL TREATMENT AND PALLIATIVE CARE ACT 1995 (SA)

The Consent Act authorises 'persons responsible'[32], including guardians, to consent to the use of certain restraints (most commonly chemical) on behalf of a person with mental incapacity, subject to certain conditions.[33] It is unlikely that this will operate where the authorisation process provided for by the RP Act has been used.

D ROLE OF GUARDIANS IN AUTHORISING RESTRICTIVE PRACTICES

Under the RP Act, guardians' roles likely include being consulted during the creation of the positive behaviour support plan[34]; receiving a written notice of any restrictive practices used[35]; applying for review of a decision[36], and; applying to SACAT for special powers orders as according to the GA Act.[37] This may amount to implied consent.

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[28] *Guardianship and Administration Act 1993* (SA) s 32.
[29] See *Re KF; Re ZT; Re WD* [2019] SACAT 37 [73].
[30] See *Re KF; Re ZT; Re WD* [2019] SACAT 37 [142].
[31] *Disability Inclusion Act 2018* (SA) s 23M(5).
[32] See *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14.
[33] See *Re KF; Re ZT; Re WD* [2019] SACAT 37 [75].
[34] See *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) r 20(3)(e).
[35] See *Disability Inclusion Act 2018* (SA) s 23N(8).
[36] See *Disability Inclusion Act 2018* (SA) ss 23Y and 23Z.
[37] *Disability Inclusion Act 2018* (SA) s 23F(3). See also *Guardianship and Administration Act 1993* (SA) s 32.

Guardians have a more complex role where the RP Act does not apply. They continue to be required to apply to SACAT for special powers according to the GA Act. They must consent to the use of other restrictive practices by signing or otherwise approving a positive behaviour support plan; participate in the regular review of special powers orders at SACAT[38]; and, if they are effectively a 'guardian' under an informal arrangement, they will be required to apply to SACAT for a relevant guardianship order to consent to restrictive practices.

IV ROLE OF GUARDIANS IN SOUTH AUSTRALIA

A HISTORICAL OVERVIEW

Guardianship initially gave the Crown custody of a person with a mental incapacity and their lands in medieval England under *de praerogativa regis*.[39] Over time, guardianship was moved to the Court's jurisdiction under the *parens patriae* power,[40] under which 'committees' of estate, or person, or both, with the legal authority to care for the person[41] could be established. It was commonly held that committees of person and estate were appointed "for the benefit of those with decision-making disabilities and not for the benefit of others."[42]

As understanding around mental incapacity and impaired decision-making continued to evolve, state governments began to establish Guardianship Boards to "take people into guardianship… only when it was satisfied, after a hearing, that the required conditions had been satisfied."[43] A later review of Guardianship Boards found that these systems "inappropriately restricted and undervalue[d]" the contributions and "role[s] of families and carers."[44]

As a result, and as part of a larger movement "towards deinstitutionalisation and the growing recognition of the rights of people with disability,"[45] the GA Act was created.

[38] *Guardianship and Administration Act 1993* (SA) s 57(1)(a).
[39] Nick O'Neill and Carmelle Pesiah, 'The development of modern guardianship,' in Nick O'Neill and Carmelle Pesiah (eds), *Capacity and the Law*, (Sydney University Press, 2019) ch 5, 2.
[40] *In re W.M.* (1903) 3 SR (NSW) 522.
[41] *Ex parte Tomlinson, Broadhurst* (1812) 35 ER 22.
[42] Nick O'Neill and Carmelle Pesiah, 'Guardianship,' in Nick O'Neill and Carmelle Pesiah (eds), *Capacity and the Law*, (Sydney University Press, 2019) ch 6, 88.
[43] O'Neill and Pesiah, n 39, 11.
[44] O'Neill and Pesiah, n 39, 14.
[45] Chandler, White and Willmott, n 14, 496.

The GA Act established a new Guardianship Board (now SACAT) without the role of guardian, creating the Public Advocate as an independent statutory body to be the guardian of last resort, and to promote the interests of people with disability at a systemic level. Guardianship was largely moved to private actors to "interfere as little as possible in the lives of adults with decision-making disabilities, consistent with acting in their best interests."[46] Thus, a component of the guardians' contemporary role is to make decisions with a focus on the rights of the person with disability, and support efforts to build their capacity to live "as normal a life as possible, and in the community rather than in institutions."[47]

B TEXT OF THE GUARDIANSHIP AND ADMINISTRATION ACT 1993

The GA Act also established principles to guide decisions made either on behalf of, or in relation to, a person with mental incapacity.[48] In summary, decision-makers are to consider:

- The wishes of the person in the matter if he or she were not mentally incapacitated ("stand in the shoes of"[49] the person for whom they are making the decision)[50];
- The present wishes of the person[51];
- The adequacy of existing informal arrangements for the care of the person[52] and;
- Whether the decision being made is the one that is least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care.[53]

The GA Act continues to emphasise the need for guardians to make decisions with the person's wishes and rights in mind, balanced with the need for his or her care. For example, section 31A requires guardians to find the person's advanced care directive

[46] O'Neill and Pesiah, n 42, 84.
[47] Chandler, White and Willmott, n 14, 497. See also see Terry Carney, 'The Limits and the Social Legacy of Guardianship in Australia' (1989) 18 *Federal Law Review* 231, 232
[48] *Guardianship and Administration Act 1993* (SA) s 5.
[49] Office of the Public Advocate, 'Substitute Decision Making', *Making Decisions for Others* (Web Page, 2021) <http://www.opa.sa.gov.au/making_decisions_for_others/substitute_decision_making>.
[50] *Guardianship and Administration Act 1993* (SA) s 5(a).
[51] *Guardianship and Administration Act 1993* (SA) s 5(b).
[52] *Guardianship and Administration Act 1993* (SA) s 5(c).
[53] *Guardianship and Administration Act 1993* (SA) s 5(d).

(if one exists) and give effect to it,[54] to promote their wishes. Section 32 highlights the need to accurately balance the protection of the person's rights and their proper care, by making SACAT the appropriate decision-maker in authorising detention.[55] Guardians also have a role in advocating for the person under their guardianship.[56] The GA Act intends to ensure that guardians are able to exercise the historical role of courts and committees of person, by conferring all powers held by guardians "at law or in equity."[57]

C Powers 'in law or at equity'

Guardians hold a wide range of powers 'in law or at equity', as evidenced by the possible guardianship orders SACAT is empowered to make. This includes orders to decide accommodation, health care and lifestyle.[58] More recently, these orders can also be limited to decisions about services, advocacy, access, and restrictive practices.[59] SACAT may also make an order for full guardianship.

The limits on guardianship powers were most recently considered in South Australia in the case of *Public Advocate v C, B*.[60] This case was brought on behalf of a protected person under the Public Advocate's (SA) guardianship who was kept in a locked ward. The guardianship order made in respect of this person conferred accommodation and health decision-making power, and no special power order had been made to allow detention. The Court found that, historically, guardians had exclusive custody of the person under their guardianship "to the extent that the order provides."[61] They are also able to exercise "some control of the liberty of the person."[62] However, where the GA Act has imposed limitations on this power, particularly by virtue of section 32, it is important for guardians to consider the rationale of these limitations in exercising their powers.[63] The Court also quoted the case of *McLaughlin v Fosbery*[64] to demonstrate

[54] *Guardianship and Administration Act 1993* (SA) s 31A.
[55] *Guardianship and Administration Act 1993* (SA) s 32(1)(b).
[56] *Guardianship and Administration Act 1993* (SA) s 55.
[57] *Guardianship and Administration Act 1993* (SA) s 31.
[58] *Re NPP* [2018] SACAT 48. See also South Australian Civil and Administrative Tribunal, *Types of guardianship orders*, (Web Page) <http://www.sacat.sa.gov.au/get-started/guardianship/types-of-guardianship-orders>.
[59] *Re KF; Re ZT; Re WD* [2019] SACAT 37 [142].
[60] (2019) 133 SASR 353.
[61] Ibid, 364 [41].
[62] Ibid, 362.
[63] Ibid, 367 [56].
[64] (1904) 1 CLR 546.

that powers of guardianship are conferred under the condition that the appointed guardian "carefully provide[s] for the person… and in all things demean[s] himself as the careful and faithful grantee of the person."[65]

The analysis of the scope of guardians' powers here is consistent with Schedule 1 of the *COVID-19 Emergency Response Act 2020* (SA) ("COVID Act") which conferred 'additional powers' to guardians during the pandemic.[66] The additional powers were identical to those listed in section 32 of the GA Act, allowing circumvention of the requirement for the authorisation of certain restrictive practices by SACAT. It is important to note that conferral of these powers to guardians was viewed as an extraordinary measure falling outside the scope of guardians' usual authority. It is significant that these powers were not continually extended to guardians by the RP Act, as it shows that authorisation of these restrictive practices is not intended to be part of a guardian's ongoing role.

SACAT matters have also discussed the scope of guardianship powers. *Re KF*[67] was particularly significant in being the first matter to thoroughly consider the South Australian restrictive practices regulation scheme. Senior Member Rugless noted that guardianship orders are "an incursion on the rights… of an adult to make self-determined decisions"[68] and that, wherever possible, it is important for orders by the Tribunal and decisions by guardians to preserve the rights of the adult to make such decisions.[69] As a result of the discussion about a person's rights, especially to make self-determined decisions, SACAT introduced more specific, limited guardianship orders.[70] This shows a preference for guardians' power to be as limited as possible to protect the rights and autonomy of adults with mental incapacity, consistent with the analyses of legislation and case law above.

However, it should be noted that being able to make 'best interests' decisions as contrary to the wishes of the person under guardianship is an 'essential'[71] to a guardian's role. While it is a significant part of a guardian's role to ensure that the

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[65] *McLaughlin v Fosbery* (1904) 1 CLR 546.
[66] *COVID-19 Emergency Response Act 2020* (SA) Sch 1 cl 10.
[67] *Re KF; Re ZT; Re WD* [2019] SACAT 37.
[68] Ibid [19].
[69] Ibid [26].
[70] Ibid [139].
[71] *AMT v COT & GSZ* [2017] SACAT 2 [73].

wishes of the person under their guardianship are given paramount consideration, and that their right to self-determined decision-making is upheld wherever possible, SACAT continues to recognise that guardians are important in ensuring the proper care and protection of a person, sometimes contrary to their wishes.[72]

V Guardianship as intended?

Guardians' roles have evolved in accordance with common understandings of the rights of people with disability, and mental capacity. The contemporary role of guardians, a blend of their historical role with modern concerns, is to make decisions with or for the person with a view to build their capacity to make decisions and independence, while protecting their rights and ensuring their proper care. The roles conferred to guardians by the South Australian authorisation scheme fall under the broad categories of oversight and consent. The alignment of those roles with the guardian's overarching role will now be discussed.

A Consent

South Australian guardians' role in consent has been reduced by the RP Act. However, their role in applying for section 32 powers implies the need for their consent. Furthermore, outside of the scope of the RP Act, their consent is still required as part of the exercise of guardianship powers for lifestyle, health, or restrictive practices orders.[73] Consent, rather than state authorisation, is consistent with the intention to deinstitutionalise guardianship. It is also consistent with the notion of 'exclusive custody,'[74] which intended for guardians to have the sole decision-making ability insofar as their guardianship order allowed. South Australia's consultation for the RP Act also recognised that those in the disability community advocated for a role for consent.[75]

However, there are three key issues with requiring guardians to consent to restrictive practices. First, it has been recognised that a guardian's role to make decisions for a

[72] *Re NPP* [2018] SACAT 48 [33].
[73] See *Re KF; Re ZT; Re WD* [2019] SACAT 37 [73], [77].
[74] *McLaughlin v Fosbery* (1904) 1 CLR 546.
[75] Department of Human Services (SA), 'Draft Disability Inclusion (Restrictive Practices-NDIS) Amendment Bill Consultation Report, *Restrictive Practices Legislation* (Consultation Report, 2021) 3 <https://dhs.sa.gov.au/__data/assets/pdf_file/0011/100406/FINAL-REPORT_Draft-Disability-Inclusion-Restrictive-Practices-NDIS-Amendment-Bill-Consultation-Report.pdf>.

person is distinct from restraining them.[76] The decision to implement restraints require the decision-maker to balance several, possibly competing interests that they usually do not need to consider.[77] This is inconsistent with guardians' appointment for the person's interests, not for the interests of others[78], and with legislation that often puts those balancing decisions in the hands of a court or Tribunal.[79]

Furthermore, this may cause an assumption that "the right guardians can provide regular review of practices"[80] and "a greater degree of safeguards"[81] than they are truly able to provide. Despite this assumption, most guardians do not have the expertise to deeply scrutinise[82] a matter involving such "complex clinical questions."[83] Guardians' understanding of restrictive practices and the positive behaviour support plan is largely guided, and limited, by service providers and clinicians.

Finally, requiring consent from guardians often leads to the formalisation of informal arrangements for the purpose of granting consent to restrictive practices. This directly contradicts the principle requiring respect for informal arrangements.[84] It is also inconsistent with the intention of modern-day guardianship to recognise and respect the role of families and carers in a person with mental incapacity's life. Guardians should have a greater role in oversight, rather than consent, in the authorisation of restrictive practices to ensure that they can perform their overarching role more effectively.

B Oversight: Consultation and review

Guardians' role in overseeing the authorisation process, from their ability to be consulted during the formation of the positive behaviour support plan, to their receipt of written notices regarding the use of restrictive practices, and their ability to appeal decisions, is consistent with the guardian's principal function. Specifically, these roles are consistent with the overarching capacity-building role of the guardian. The positive behaviour support plan is intended to address, through less invasive means, the same

[76] Chandler, White and Willmott, n 14, 521.
[77] Ibid 524.
[78] Ibid.
[79] See, eg., *Guardianship and Administration Act 1993* (SA) s 32.
[80] *SDF* [2013] NSWGT 1 (17 January 2013) [19].
[81] Chandler, White and Willmott, n 14, 511.
[82] Williams, Chesterman and Laufer, n 6, 656.
[83] Chandler, White and Willmott, n 14, 526.
[84] *Guardianship and Administration Act 1993* (SA) s 5(c).

behaviours of concern that give rise to the use of restrictive practices. If included in its formation, guardians will be afforded the opportunity to take a proactive part in the implementation of processes which aim to increase a person with mental incapacity's independence and freedom from restraint.

This role is similarly consistent with their role in advocating for the best care for the person under their guardianship[85], and for the application of the 'least restrictive' principle[86], because of the opportunity to raise concerns and suggestions throughout the process. However, as previously discussed, their ability to advocate for less restrictive practices may be limited.

Their role in this area could be strengthened by improving an existing mechanism. Guardians should be empowered to understand the rights of the person the subject of the restrictive practices, and to understand their own role in this process. This can be achieved by ensuring that the current entitlement of written notice[87] is edited to include clear instructions about the boundaries of a guardian's role with particular respect to restraint. The notice should also be provided in a form, manner and language that the person can understand, and provide references to independent information about restrictive practices and guardianship, such as from the NDIS or the Public Advocate.

VI CONCLUSION

Guardianship has an increasingly important role in the deinstitutionalisation and capacity-building of people with impaired mental incapacity. As key supporters and advocates for the wishes, rights, and care of people with disability, guardians should be empowered with information and understanding of restrictive practices and their role in its authorisation. However, regulation of these harmful practices is sorely needed, with a vision to reduce their use throughout the sector. There is also a need to balance the regulation scheme with the complex law around the right to freedom and security of person, a role best suited for the state. For this reason, the recent amendments to the *Disability Inclusion Act 2018* (SA) are important for the future of guardianship law. However, its scope should be expanded to ensure state

[85] Office of the Public Advocate, 'Guardianship', *What we do* (Web Page, 2021) <http://www.opa.sa.gov.au/what_we_do/guardianship>.
[86] See *Guardianship and Administration Act 1993* (SA) s 5(c).
[87] *Disability Inclusion Act 2018* (SA) s 23N(8)(b) and 23O(8)(b).

authorisation and regulation of all restrictive practices, and guardians should have a clearer oversight, rather than consent, role in the process. Unless those changes are made, guardians’ role in the South Australian restrictive practices authorisation scheme will “dilute the razor-sharp focus needed on the rights, interests and welfare of the adults concerned and put at risk this essential feature of guardianship regimes.”[88]

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[88] Chandler, White and Willmott, n 14, 524.

BIBLIOGRAPHY

A ARTICLES/BOOKS/REPORTS

Carney, Terry, ‘The Limits and the Social Legacy of Guardianship in Australia’ (1989) 18 *Federal Law Review* 231

Chandler, Kim, Ben White and Lindy Willmott, ‘Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Rights-based Approach (Part One)’ (2018) 25(3) *Psychiatry, Psychology and Law* 465, 466.

Chandler, Kim, Ben White and Lindy Willmott, ‘What role for adult guardianship in authorizing restrictive practices,’ (2017) 43(2) *Monash University Law Review* 492, 526.

Friedman, Carli, and Caitlin Crabb, ‘Restraint, Restrictive Intervention, and Seclusion of People with Intellectual and Developmental Disabilities.’ (2018) 56(3) *Intellectual and Developmental Disabilities* 171.

O’Neill, Nick and Carmelle Pesiah (eds), *Capacity and the Law* (Sydney University Press, 2019)

Parke, Sheryl, Lucy Hunn, Tracey Holland et. al. ‘Restrictive interventions: A service evaluation’, (2019) 22(5) *Medical Health Practice* 20, 21.

Richardson, Ben, Lynne S. Webber, and Frank Lambrick, ‘Factors associated with long term use of restrictive interventions,’ (2020) 45(2) *Journal of Intellectual and Developmental Disability* 164

Williams, Michael, John Chesterman and Richard Laufer, ‘Consent versus scrutiny: Restricting liberties in post-Bournewood Victoria’, (2018) 21 *Journal of Law and Medicine* 641, 658

B Cases

AMT v COT & GSZ [2017] SACAT 2

Coco v The Queen (1994) 179 CLR 427

Ex parte Tomlinson, Broadhurst (1812) 35 ER 22

In re W.M. (1903) 3 SR (NSW) 522

McLaughlin v Fosbery (1904) 1 CLR 546

Public Advocate v C, B (2019) 133 SASR 353

SDF [2013] NSWGT 1 (17 January 2013)

Re NPP [2018] SACAT 48

Re KF; Re ZT; Re WD [2019] SACAT 37

C Legislation

Consent to Medical Treatment and Palliative Care Act 1995 (SA)

COVID-19 Emergency Response Act 2020 (SA)

Disability Inclusion Act 2018 (SA)

Guardianship and Administration Act 1993 (SA)

National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth)

D Treaties

Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

E Other

Bilateral Agreement between the Commonwealth of Australia and the State of South Australia on the National Disability Insurance Scheme (25 May 2018)

Department of Human Services (SA), 'Draft Disability Inclusion (Restrictive Practices-NDIS) Amendment Bill Consultation Report, *Restrictive Practices Legislation* (Consultation Report, 2021) 3 <https://dhs.sa.gov.au/__data/assets/pdf_file/0011/100406/FINAL-REPORT_Draft-Disability-Inclusion-Restrictive-Practices-NDIS-Amendment-Bill-Consultation-Report.pdf>

NDIS Quality and Safeguards Commission, *Regulated Restrictive Practices* (Web Page, 2020) <https://www.ndiscommission.gov.au/regulated-restrictive-practices>

Office of the Public Advocate, 'Guardianship', *What we do* (Web Page, 2021) <http://www.opa.sa.gov.au/what_we_do/guardianship>.

Office of the Public Advocate, 'Substitute Decision Making', *Making Decisions for Others* (Web Page, 2021) <http://www.opa.sa.gov.au/making_decisions_for_others/substitute_decision_making>

South Australian Civil and Administrative Tribunal, *Types of guardianship orders*, (Web Page) <http://www.sacat.sa.gov.au/get-started/guardianship/types-of-guardianship-orders>