This following information explains how NCAT's Guardianship Division makes guardianship orders with a restrictive practices function.

**Role of NCAT’s Guardianship Division**

The NSW Civil and Administrative Tribunal (NCAT) can make a guardianship order for a person with a disability who is incapable of making personal and lifestyle decisions for themselves.

NCAT can appoint a guardian to make decisions in specific areas, for example accommodation and health care. These decision making areas are called the functions of the guardian. One function that NCAT may appoint a guardian with is ‘restrictive practices’.

**Restrictive practices**

The Guardianship Act 1987 does not define restrictive practices. A restrictive practice generally involves physically restraining a person or limiting their freedom of movement or access to objects. Restrictive practices usually arise in the context of managing challenging behaviour.

Using medication to chemically restrain a person is also a restrictive practice. However, this is generally not covered by a restrictive practices function as consent for the medication should be obtained under the medical consent provisions in the Guardianship Act 1987.

Restrictive practices should only be used in the context of a holistic response to the person’s needs, and in particular, to the factors that may be causing the behaviour. The restrictive practice aims to control or contribute towards changing the behaviour.

Why is a practice unlawful without the consent of a guardian?

Many restrictive practices are what the law calls assault, false imprisonment or detinue.

**Assault** is the application of force to a person, for example a hit, holding someone down or dragging them. Also, doing something that makes a person fear they are going to be assaulted, for example raising a fist.

**False imprisonment** is confining a person to a particular space, for example locking a person in a house or room or using a tray table to keep the person in a chair. However, stopping a person going into a particular space, for example locking the kitchen, is unlikely to amount to false imprisonment.

**Detinue** is withholding a person’s possessions, for example refusing to hand over a knife belonging to the person. However, refusing to hand over a knife belonging to an accommodation service does not amount to detinue.

Legal defences

Assault, false imprisonment and detinue are unlawful unless a legal defence exists:

- **Informed consent** - by the person with a full understanding and comprehension of the situation.
- **Consent by a guardian** - with a restrictive practices function.
- **Self-defence** - Where you believed on reasonable grounds that it was necessary self-defence to do what you did. For example, holding the arms of a person who is about to hit you or someone else, but not if there is a clear opportunity to get away.
- **Necessity** - Where you believed on reasonable grounds that it was necessary to do what you did to avoid death or serious harm. For example, grabbing someone who is about to walk in front of a car; taking a lighter from someone who is about to start a fire in their bedroom.

“Duty of care” is not a defence but action taken for this purpose may be covered by self-defence or necessity.

**Applying to NCAT**

When should I apply for a guardian in relation to a restrictive practice?

There are situations where NCAT has generally seen a need for a guardian because of the doubtful lawfulness of a practice that is being used to manage challenging behaviour:
- Physical restraint, for example holding a person down when they are aggressive.
- Mechanical restraints, for example a tray table or lap belt to stop a person taking other people's food or splints to stop self-injurious behaviour.
- Confining a person to a specific place like a room or courtyard, for example in response to aggression.
- Locking premises to keep a person out of trouble with the law.
- Preventing a person from accessing their own possessions, for example to stop the person self-harming with a knife.
- Using aversives, for example putting pepper on a person's hand to stop them biting themselves.

You should also consider an application in other situations where you think a guardian may be needed to protect the person. The restrictive practice might be aimed at managing behaviour, avoiding accidental injury to the person or another purpose. You might think a guardian is needed because of one of the following factors:

- The practice may be unlawful without the consent of a guardian.
- There is disagreement about the use of the practice, between the person and others or between family and service providers.
- The practice is experimental or risky or of doubtful benefit to the person.

The focus of an application must be the best interest of the person.

The application should be focused on planned or regularly used restrictive practices, not one off responses to crises.

**How to apply for guardianship with a restrictive practices function**

The application form sets out the information and reports that should be included with the application for a guardian.

If you are seeking a restrictive practices function, you should make that clear in the application and provide:

- A summary of the person’s history, current circumstances and skills.
- A summary of data on challenging behaviour.
- An assessment of the person’s lifestyle and skills and the causes/functions of the behaviour.
- A medical report outlining the person’s health and that an assessment has ruled out medical causes of the behaviour.
- The behaviour plan and any related plan including both positive elements and restrictive practices. Positive approaches include improving the person’s environment, skills development/maintenance and preventative measures to reduce the likelihood of challenging behaviour.
- Details of alternative approaches that have been tried to address the situation.
- Details of medications used in relation to the behaviour, including a report from the prescribing doctor who should usually be a relevant specialist.
- Information on when and how the behaviour plan will be reviewed.
- Information on other relevant circumstances listed below in “Granting a guardian a restrictive practices function.”

In urgent situations, NCAT may consider making a short order where not all of the information is available, with an expectation that full information will be provided at a review hearing.

**Tribunal hearing**

**Granting a guardian a restrictive practices function**

NCAT considers all of the circumstances including whether the practice would be unlawful in the absence of the consent of a guardian. If the practice is unlawful, that alone may result in a restrictive practices function.

**Other relevant circumstances may include:**

1. The views of the person and others, including how the person reacts to the restriction.

2. The context:
   a. Does the person have a fulfilling lifestyle?
   b. Has a skilled professional assessed the behaviour and developed positive behaviour strategies?
   c. Do the strategies address the causes of the behaviour?
   d. Will the strategies be implemented and monitored?

3. The restriction:
   a. What is the nature and degree of the restriction?
b. What is the purpose of the restriction?
For example, is it for behaviour change or to keep the person safe or healthy?
c. Is the restriction addressing a clear risk to the person?
d. Is the practice being used partly for the benefit of others?
e. Is it only used as a last resort?
f. Have other non-restrictive approaches been tried?
g. Does the practice involve risks for the person?
h. Is there a danger that the restriction will be abused?
i. When restricted, does the person have a comfortable and fulfilling environment?
j. Will the use of the practice be reduced?
k. Does it conform to current accepted standards of practice?

4. Does the person have a strong independent advocate, such as a family member?
5. Are there other monitoring and review mechanisms?
6. Is a guardian needed anyway in relation to other issues?

NCAT determines each application on its merits and concludes whether a practice is restrictive and decides whether a guardian needs to be appointed to consent to it. NCAT will not necessarily appoint a guardian because an agency’s policy says that a guardian is needed in relation to certain practices.

Witnesses who should participate at the hearing
- The person and any family or other advocate.
- The professional who has assessed the behaviour and developed the behaviour strategies.
- A service worker who has day to day contact with the person, for example a key support worker.
- A service manager.
- Others as relevant.

Orders about restrictive practices
The guardian’s role is to give or withhold consent to the restrictive practice. The guardian can only consent if this is in the best interests of the person.

NCAT usually includes a condition saying that the guardian may only consent to a restrictive practice if positive approaches are also being used to address the person's behaviour and needs.

Consent to medical treatment
Psychotropican medication is sometimes used to address challenging behaviour. This may be to treat a diagnosed mental illness or it may be chemical restraint. In either case, consent is required under Part 5 of the Guardianship Act 1987 and the medication is only permissible if it is needed in the person’s interests.

If the person is unable to consent to the medication, consent is usually needed from a ‘person responsible’.

Who is a ‘person responsible’
A person responsible is the first person identified in the list below:
1. A guardian (including an enduring guardian) who has the function of medical and dental consent.
2. The spouse or de facto spouse.
3. An unpaid carer.
4. A relative or friend.

For more information read the Guardianship Division’s ‘Person responsible’ fact sheet.

When is NCAT’s consent required?
In some situations, the consent of NCAT is required rather than a person responsible:
- Where there is no person responsible.
- Where the patient is objecting.
- Any medical treatment involving an aversive stimulus.
- Androgen reducing medication for the purpose of behavioural control.
- Psychotropic medication in dosages, combinations or durations outside accepted modes of treatment.

Please see the fact sheet on medical and dental consent for more information about the types of treatment and who may provide consent.

Where medication is being used to address challenging behaviour, it should usually be accompanied by positive approaches to the behaviour. This is important if the medication is being used as chemical restraint. A person responsible or NCAT will need evidence of positive approaches before giving consent.
Resources

Tribunal decisions
Do a database search for ‘restrictive practice’ in NCAT Guardianship Division decisions available on the NSW Caselaw website www.caselaw.nsw.gov.au

Australian Psychological Society
Evidence-based guidelines to reduce the need for restrictive practices in the disability sector is available on Australian Psychology Society website www.psychology.org.au

Ageing, Disability and Home Care (ADHC)

Department of Health Ageing and Aged Care
Decision-making Tool: Supporting a Restrain Free Environment in Residential Aged Care handbook is available for download from the Department’s website www.agedcare.health.gov.au

NSW Health
Working with People with Challenging Behaviours in Residential Aged Care Facilities guideline is available for download from the NSW Health website www.health.nsw.gov.au

NSW Public Guardian

Contact NCAT
1300 006 228 | www.ncat.nsw.gov.au
Interpreter Service (TIS) 13 14 50
National Relay Service for TTY users 13 36 77

For more information and assistance visit the NCAT website or contact NCAT’s Guardianship Division on (02) 9556 7600 or 1300 006 228.