

Decision-making principles for treatment and interventions – Mental Health and Wellbeing Act 2022

Interim Chief Psychiatrist's guidance – September 2023

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Context

The *Mental Health and Wellbeing Act 2022* (the Act) includes specific decision-making principles to promote the rights of people subject to compulsory assessment and treatment and restrictive interventions.

Anyone making a decision or exercising a power in respect of the care or treatment of a patient under Chapters 3 or 4 of the Act must give proper consideration to the decision-making principles for treatment and interventions (decision-making principles) in the making of that decision or exercise of that power (s 84).

This sits alongside obligations on mental health and wellbeing service providers to give proper consideration to the mental health and wellbeing principles of the Act (Part 1.5). Public authorities (including all public mental health services) are also obligated to give proper consideration to rights protected under the *Charter of Human Rights and Responsibilities Act 2006*.

Purpose of this interim guidance

The Act allows for the Chief Psychiatrist to prepare guidelines to assist clinical mental health service providers in meeting their obligations under the decision-making principles in line with the Act.

In making such guidelines the Chief Psychiatrist is required to consult with consumers, carers, the Mental Health and Wellbeing Commission and members of the workforce.

This interim guidance is intended to assist people to understand how they can give effect to the decision-making principles ahead of the guidelines being made. It is the basis for consulting on the guidelines.

Mental health and wellbeing service providers may use this interim guidance to develop local policies and procedures relating to decision-making principles.

The decision-making principles for treatment and interventions

The Act sets out five decision-making principles (ss 79–83).

Care and transition to less restrictive support principle

Compulsory assessment and treatment should promote the person's recovery and transitioning them to less restrictive treatment, care and support. To this end, a person who is subject to compulsory assessment or treatment is to receive comprehensive, compassionate, safe and high-quality mental health and wellbeing services (s 79).

Consequences of compulsory assessment and treatment and restrictive interventions principle

Compulsory assessment and treatment or restrictive interventions significantly limit a person's human rights and may cause possible harm including:

- seriously distressing the person
- disrupting the person's relationships, living arrangements, work or study (s 80).

No therapeutic benefit to restrictive interventions principle

Restrictive interventions offer no inherent therapeutic benefit to a person (s 81).

Balancing of harm principle

Compulsory assessment and treatment or restrictive interventions are not to be used unless the serious harm or deterioration to be prevented is likely to be more significant than the harm to the person that may result from their use (s 82).

Autonomy principle

The will and preferences of a person are to be given effect to the greatest extent possible in all decisions about assessment, treatment, recovery and support. This includes when those decisions relate to compulsory assessment and treatment (s 83).

What is proper consideration?

Proper consideration is the same consideration that public authorities must give to the Charter of Human Rights and Responsibilities Act. What this means in practice will vary according to the context.

In circumstances where a decision is urgent or needs to be made under pressure, what is 'proper consideration' will be different from circumstances where there is more time for a decision or where the impact of the decision may be particularly significant.

In urgent situations – for example, when responding to an immediate risk – it will be necessary to rely on what is already known and to follow procedures that have been informed by the principles. This does not prevent all reasonable efforts to gain information on a consumer's views and preferences in anticipation of an urgent situation arising – for example, having a safety plan in place.

When there is more time, proper consideration is likely to be informed by a team approach supported by resources including fact sheets, care planning processes, Lived Experience resources and engagement. It might also be informed by ongoing communication and collaboration across various disciplines with the person receiving care and their families, carers and supporters. If you were asked to show that you have given proper consideration you could refer to activities and information gained across a range of points along the continuum of care.

Proper consideration does not mean that individual decisions must be informed by legal advice (although for some very complex decisions it may be required) or that a sophisticated formula or process must be followed. Consideration of the principles should be more than a formality or tick box.

Decision-makers should:

- understand which decision-making principles apply to a decision they are making
- think about how that principle may apply
- have considered and balanced the matters at hand and documented these decisions
- make all possible efforts to communicate with and understand the consumer's views and preferences, which may change over time.

In a practical sense, this may require gathering information and considering how it applies to a particular context including:

- the consumer's views and preferences, which may include considering information from a person's advance statement of preferences or communicated by a nominated support person (note that witness requirements in the new Act have been eased – any adult can now witness either an advance statement of preferences or the nomination of a nominated support person)
- seeking information from ongoing informal supports (such as family, carers and supporters) and from other professional supports (such as a person's general practitioner, private psychiatrist or multidisciplinary team members).

The appendix sets out examples of good practice that may be followed when making a decision in line with each of the decision-making principles. It also includes examples of the service-level enablers that will assist decision-makers to meet their obligations.

How should proper consideration be documented?

Just as 'proper consideration' will vary according to the decision being made and the context, so will the documentation of those decisions.

Documentation is important to record how a decision was reached and may be relied on if an explanation for the decision-making process is required – for example, if a complaint is made to the Mental Health and Wellbeing Commission.

Proper consideration does not require detailed or lengthy documentation but should be recorded as soon as possible. Notes should indicate:

- which principles were considered relevant
- what information about the person, their preferences and circumstances were considered in relation to those principles (including an advance statement of preferences)
- the perspectives of a nominated support person, families, carers/supporters, the person's general practitioner and other supports
- how that information was weighed and how it contributed to the decision.

If a decision was urgent, it must be reflected in the documentation. If the least restrictive option is not adopted, notes should explain why.

The approach to documentation must be what is reasonable in the circumstances. There is no prescribed or required form to document these considerations.

What can a service provider do to support decision-makers to give proper consideration to the decision-making principles?

The obligation to give proper consideration to the decision-making principles rests with the person who has authority to make a decision or exercise a power in respect to the care or treatment of a consumer. But there are a range of ways in which a service provider may support decision-makers to comply with this obligation. For example:

- prominent display of the decision-making principles
- checklists reminding decision-makers of this obligation, along with other factors to consider for each specific decision highlighting that consumers should feel respected and be treated with dignity no matter what treatment is being applied
- reflection on the principles in individual treatment and care planning
- discussion of principles as a routine part of case conferences and review with an emphasis on the personal impact of the decision on the consumer and their family, carers and supporters
- ensuring policies and procedures reflect the decision-making principles and support consideration and documentation of those principles
- providing regular refresher training to staff on the human rights framework underpinning the Mental Health and Wellbeing Act, including perspectives on people with lived and living experience of the mental health system
- recognising that families, carers and supporters also feel the impacts of how their loved one is receiving treatment, especially if this has caused them further harm or trauma.

The appendix sets out service-level enablers to assist in giving effect to each of the decision-making principles.

Further information

An electronic copy of the *Mental Health and Wellbeing Act 2022* is on the [Victorian legislation and parliamentary documents website](http://www.legislation.vic.gov.au) <www.legislation.vic.gov.au>.

Further information about the *Mental Health and Wellbeing Act 2022* is in the [online handbook](https://www.health.vic.gov.au/mental-health-and-wellbeing-act-handbook) <https://www.health.vic.gov.au/mental-health-and-wellbeing-act-handbook> on the Department of Health website.

Appendix: Examples of good practice and service-level support

Care and transition to less restrictive support principle (s 79)

Compulsory assessment and treatment are to be provided with the aim of promoting the person's recovery and transitioning them to less restrictive treatment, care and support.

To this end, a person who is subject to compulsory assessment or treatment is to receive comprehensive, compassionate, safe and high-quality mental health and wellbeing services.

Approach to this principle will vary on how well the person is known and the urgency of the intervention.

Examples of good practice

- Understand that recovery and least restriction mean different things to different people. Make efforts to understand what this means to the person involved. This should, for example, involve:
 - taking a supported decision-making approach
 - discussions with carers, families and supporters
 - referring to the person's advance statement of preferences
 - consulting the person's nominated support person to establish the person's views and preferences and personal experience of treatments and interventions.
- Understand what previous treatments have been tried, what has been effective and if there have been adverse reactions. Give priority to a person's views and preferences on treatment and the reasons they hold those views.
- Ensure consumers have access to lived experience peer support workers.
- If a person must receive compulsory treatment, use the opportunity while an order is in place to try less restrictive approaches to treatment as a step-down towards ensuring the person can transition to voluntary treatment and care as soon as possible.
- Ensure planning for discharge from a compulsory order begins as soon as the order is made.

Service support

- There are processes in place to ensure a comprehensive handover (for example, from a person who has made an assessment order to an authorised psychiatrist who will consider whether a temporary treatment order should be made).
- There are processes to ensure the advance statement of preferences is accessed and nominated support people are contacted and included in the supported decision making wherever possible, including providing supports to address their needs in their caring role.
- There are processes to ensure information from other staff who may have greater knowledge of the person and their individual circumstances is considered.

Consequences of compulsory assessment and treatment and restrictive interventions principle (s 80)

The use of compulsory assessment and treatment or restrictive interventions significantly limits a person's human rights and may cause possible harm including—

- (a) serious distress experienced by the person; and
- (b) the disruption of the relationships, living arrangements, education or employment of the person.

Examples of good practice

- How the decision will affect the person is prioritised. For example:
 - Will the decision affect relationships with the person's families, carers and supporters?
 - Will study be disrupted by an admission or by a choice of treatment?
 - Will the proposed treatment, admission or order affect a person's ongoing employment?
 - Will the decision affect a person's ability to attend to cultural obligations (including a First Nations person's ability to attend to sorry business), and will the person's dignity, autonomy, and ability to self-determine and regulate their own life be severely affected?
- Efforts should be made to minimise/mitigate disruption and to address immediate issues. For example, to ensure that where the person has children or dependents, including pets, arrangements are in place for them to be looked after and supported.
- Considering the particular experiences, including trauma history, of a person and how particular restrictive interventions may affect them given this history.

Service support

- A culture of seeking out an advance statement of preferences and nominated support people is promoted, and processes are in place to ensure this happens.
- There are processes in place to identify circumstances that may need particular attention. For example, if the person has caring responsibilities for others.
- Processes are in place to work constructively with the non-legal mental health advocacy service to ensure consumers' views are heard and considered.

No therapeutic benefit to restrictive interventions principle (s 81)

The use of restrictive interventions on a person offers no inherent therapeutic benefit to the person.

Examples of good practice

- Recognise the significant harm that can result from using restrictive interventions including an experience of trauma or retraumatisation.
- Ensure restrictive interventions are never used as a routine part of a person's treatment or as a planned approach to managing behaviours of concern.
- Develop an individualised treatment and care plan.
- Ensure that from the start of a person's admission, efforts are made to identify and reduce factors that may increase a person's distress.
- Ensure lessons from past experiences are considered and inform approaches to care and support.
- Establish supports and strategies to prevent situations from escalating to a point where restrictive interventions may be required.

Service support

- Ensure staff are trained in de-escalation protocols and that lived experience peer support is embedded and offered as part of the multidisciplinary team before and during times of distress.
- Embed Safewards across the service.
- Implement procedures that ensure a relational approach to care that addresses concerns before they escalate.
- Ensure outcomes of reviews of restrictive interventions inform future practice and staff development and include consumer and family/carer input into the review.

Balancing of harm principle (s 82)

Compulsory assessment and treatment or restrictive interventions are not to be used unless the serious harm or deterioration to be prevented is likely to be more significant than the harm to the person that may result from their use.

Examples of good practice

- Recognise that balancing risk will be influenced by a range of factors including the person's strengths and supports and their responsibilities.
- Staff should be aware of the person's trauma experiences and actively consider potential for that trauma to be compounded or for new trauma to occur.
- Enquiry, consideration and empathetic understanding of what is potentially harmful from the consumer's point of view should be applied.
- Decision making should include considering the likelihood of risks as well as potential impacts on the person of the decision being made such as exacerbating trauma.
- Consideration is given to the broad range of risks associated with a decision. This may include, for example, recognising that:
 - distress caused by a decision to provide compulsory treatment or use restrictive interventions may significantly impact on the willingness of a person to engage with service supports in the future
 - disruption to social networks, housing, employment or education can compound a person's psychological distress.
- Consider other approaches that can minimise risk including consulting with carers, families and other supports to understand their capacity to assist in providing support and mitigating risk.
- Consider the harm of not providing compulsory treatment. This may include serious deterioration and psychological distress as well as harm to self, physical health, others, financial, reputational, housing and relationships.
- Recognise that mental illness is sometimes just one of a number of risk factors for serious harm. Weigh up the impact of treatment of the mental illness alongside these other risk factors.

Service support

- Ensure staff are supported to balance harms even where this may involve a degree of risk.
- Ensure services and workforces can safely (for the consumer, staff and others) provide the recommended interventions/treatment.
- Engage consumers in a discussion about their view of their risk and the service conditions so there is an opportunity for 'dignity of risk' to be applied in their situation.

Autonomy principle (s 83)

The will and preferences of a person are to be given effect to the greatest extent possible in all decisions about assessment, treatment, recovery and support, including when those decisions relate to compulsory assessment and treatment.

Examples of good practice

- Apply supported decision-making practices and principles at every opportunity.
- Recognise a consumer may understand their illness/risk of relapse and associated risks and choose not to have treatment, with full awareness of potential consequences.
- Recognise that even a person who is very unwell can express their preferences and have them considered.
- Ensure the consumer's choice is maximised where possible, even when they are on a compulsory order.
- Ensure (as required by the Act) consent is always sought for treatment, even when a person is subject to a compulsory order. However, consent given in a compulsory environment should not be used as a justification for later harms caused by the treatment.
- Consider every opportunity to try the person's preferred approach, even where that may involve a degree of risk.
- Give priority and weight to understanding the reasons behind a person's preferences. For example, is resistance to treatment about concerns about side effects or previous experience?
- Recognise and respect the cultural background of the person, ensuring care plans are tailored to their specific needs. Do not make assumptions based on cultural stereotypes or biases.
- Consider the consumer's advance statement of preferences.
- Provide opportunities for the consumer's nominated support person and families, carers and supporters to assist the consumer to express their will and preferences.
- If a person's views and preferences are overridden, a fair and justifiable reason needs to be communicated to the person in a way they can understand.

Service support

- Ensure there are processes to ensure advance statements of preference are accessed and nominated supported people are contacted and included in the process.
- Develop processes to encourage consumers to make advance statements of preference and support them to include their views about potential impacts of any future compulsory treatment and how these impacts can be mitigated.
- Ensure the service culture supports the autonomy of all those on compulsory orders.