

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Quality of Care Amendment (Restrictive Practices) Principles 2024

Purpose

The purpose of the *Quality of Care Amendment (Restrictive Practices) Principles 2024* (Amending Principles) is to extend the timeframe of arrangements in the Commonwealth aged care legal framework that allow for certain individuals or bodies to be authorised to provide informed consent to the use of a restrictive practice. These arrangements apply in relation to a care recipient where the laws of the State or Territory in which the recipient receives aged care may not otherwise authorise an individual or body to provide consent on behalf of a care recipient and will only apply where the care recipient lacks capacity to make an informed decision themselves. The Instrument amends the *Quality of Care Amendment (Restrictive Practices) Principles 2022* (QCA Principles).

The Amending Principles aim to continue to strengthen protections for care recipients from abuse associated with the unregulated use of restrictive practices, reduce the risk of unwarranted use of restrictive practices, and reduce the risk of harm to care recipients.

The Amending Principles also extend consequential amendments needed to ensure the effective operation of the alternative consent arrangements, and to ensure that immunity arrangements introduced by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* continue to apply in appropriate, limited circumstances.

The Amending Principles are a legislative instrument for the purposes of the *Legislation Act 2003*.

Background

Context

On 1 December 2022, legislative amendments made to the *Quality of Care Principles 2014* (Quality Principles) through the QCA Principles established a hierarchy of persons or bodies who could be authorised as restrictive practices substitute decision makers to provide consent to the use of a restrictive practice on behalf of a care recipient without capacity to consent.

An amendment was also made by the QCA Principles to the *Aged Care Act 1997* (Aged Care Act) to include an immunity provision, providing immunity from civil and criminal liability to aged care providers that rely on the Commonwealth hierarchy in obtaining informed consent (and meet all other requirements for the use of the restrictive practice under the Quality Principles).

Prior to the introduction of the QCA Principles, the Quality of Care Principles only specified as a restrictive practices substitute decision-maker a person or body authorised under state or territory law to give consent to the use of restrictive practices. The QCA Principles were intended to address 'unexpected outcomes' as in many jurisdictions it is unclear if the relevant state or territory laws can provide the necessary authorisation.

These interim provisions in the QCA Principles were implemented to provide state and territory jurisdictions time to update their respective guardianship or consent legislation to include a formal mechanism to appoint a restrictive practices' substitute decision maker. The interim provisions were to be subsequently repealed by the commencement of Schedule 3 of the QCA Principles on 1 December 2024, described in the QCA Principles as *"The day after the end of the period of 2 years beginning on the day this instrument is registered"*, noting that the QCA Principles were registered on 1 December 2022.

Current State

Since the commencement of the QCA Principles, the Department of Health and Aged Care (Department) has met regularly with all state and territory jurisdictions to monitor the progress of their jurisdictional establishment of arrangements for the authorisation of substituted consent for the use of restrictive practices.

Through this consultation, some state and territory jurisdictions have indicated that they will not have arrangements in place ahead of the interim provisions being repealed on 1 December 2024. The extension provided by the Amending Principles enables the state and territory jurisdictions to consider the updates to their respective guardianship or consent legislation in the context of aged care, as well as recommendations made in the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission).

The Government will continue to engage with states and territories on this issue once the interim arrangements are repealed on 1 December 2026, including offering continued collaboration to investigate options to establish clear arrangements for the provision of substituted consent for the use of restrictive practices.

Reasons for Extension

The Amending Principles extend the interim provisions introduced by the QCA Principles on 1 December 2022 by a further two years so that the interim provision continues to operate until 1 December 2026.

It is essential that mechanisms remain available to ensure protections to the physical and mental health of individuals receiving aged care services by allowing for restrictive practices to be used in limited circumstances where informed consent is provided, and where the use will prevent harm to the individual and/or others. Where an individual receiving aged care services does not have the capacity to provide informed consent to the use of a restrictive practice, it is important that an appropriate person or body is able to provide informed consent on behalf of the individual.

Impact

The extension of the interim Commonwealth provisions will necessitate the continuation of the immunity provision in the Aged Care Act, first introduced in December 2022 through the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*. This provision provides immunity from civil and criminal liability for providers that rely on the Commonwealth hierarchy in obtaining informed consent (where all other requirements for the use of a restrictive practice as outlined in the Principles have been met).

The immunity provision is not intended to provide a broad immunity to negligence in respect of the use of a restrictive practice.

Authority

Section 96-1 of the Aged Care Act provides that the Minister has the power to make instruments providing for matters that are required or permitted, or necessary or convenient, in order to give effect to the relevant Part or section of the Aged Care Act.

The Quality Principles are made under section 96-1 of the Aged Care Act and set out matters for the purposes of Part 4.1 of *the Aged Care Act*. Paragraph 54-1(1)(f) in Part 4.1 of the Aged Care Act requires that if an approved provider provides a kind of care specified in the Quality Principles to care recipients, they have a responsibility to ensure a restrictive practice is only used in circumstances as set out in the Quality Principles.

Subsection 54-10(1A) of the Aged Care Act also provides that the Quality Principles made for the purposes of paragraph 54-1(1)(f) may make provision for, or in relation to, the persons or bodies who may give informed consent to the use of a restrictive practice in relation to a care recipient if the care recipient lacks capacity to give that consent.

Further, paragraph 54-11(2)(a) of the Aged Care Act provides that a protected entity is not subject to any civil or criminal liability for, or in relation to, the use of a restrictive practice in relation to a care recipient if informed consent was given by a person or body specified in the Quality Principles made for the purposes of that paragraph of the *Aged Care Act*.

The Quality Principles specify these persons or bodies and contain the existing requirements to give effect to the arrangements set out in subsection 54-10(1A) and section 54-11 of the Aged Care Act.

The Amending Principles amends the QCA Principles to extend the requirements giving effect to the arrangements set out in subsection 54-10(1A) and section 54-11 of the *Aged Care Act*.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue an instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Commencement

The Instrument commences on the day after the Instrument is registered.

Consultation

The Department has consulted the Aged Care Quality and Safety Commission (Commission) in relation to this Instrument to ensure that the amendment is operationally effective and appropriate.

Impact Analysis

The Amending Principles should not result in any more than a minor change in behaviour or impact for people, businesses or community organisations in the aged care sector, and an Impact Analysis was not sought from the Office of Impact Analysis.

This decision was informed, in part, by the assessment of the QCA Principles, undertaken by the then-Office of Best Practice Regulation. Which determined that the amendments made by the QCA Principles were unlikely to have more than a minor regulatory impact, and that a Regulatory Impact Statement was not required in relation to the QCA Principles (Reference OBPR22-01498).

Details of the *Quality of Care Amendment (Restrictive Practices) Principles 2024*

Section 1 provides that the name of the Amending Principles is the *Quality of Care Amendment (Restrictive Practices) Principles 2024*.

Section 2 sets out the commencement dates for Schedule 1 and the Amending Principles as a whole. Item 1 of the table in subsection 2(1) provides that the whole of the instrument commences the day after the Instrument is registered.

Section 3 provides that the Amending Principles are made under the Aged Care Act.

Section 4 provides that each instrument that is specified in a Schedule to the Amending Principles is amended or repealed as set out in the applicable items in that Schedule, and any other item in that Schedule has effect according to its terms.

Schedule 1 – Amendments

Quality of Care Amendment (Restrictive Practices) Principles 2022

Item 1 – Subsection 2(1) (table item 4, column 2)

Item 1 substitutes “2” with “4” in Subsection 2(1) (table item 4, column 2) of the QCA Principles.

This will extend the commencement of Schedule 3 of the QCA Principles until 1 December 2026, allowing the interim provisions to be repealed by that Schedule to continue until that date.

Item 2 – Schedule 3 (heading)

Item 2 substitutes “2” with “4” in Schedule 3 (heading) of the QCA Principles.

This a consequential amendment, to ensure that the title of Schedule 3 is consistent with the amended commencement date for Schedule 3.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Quality of Care Amendment (Restrictive Practices) Principles 2024

This legislative instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The *Quality of Care Amendment (Restrictive Practices) Principles 2024* (Amending Principles) extend the timeframe of arrangements in the Commonwealth aged care legal framework that allow for certain individuals or bodies to be authorised to provide informed consent to the use of a restrictive practice. These arrangements apply in relation to a care recipient where the laws of the State or Territory in which the recipient receives aged care may not otherwise authorise an individual or body to provide consent on behalf of a care recipient and will only apply where the care recipient lacks capacity to make an informed decision themselves. The Instrument amends the *Quality of Care Amendment (Restrictive Practices) Principles 2022* (QCA Principles).

The Amending Principles aim to continue to strengthen protections for care recipients from abuse associated with the unregulated use of restrictive practices, reduce the risk of unwarranted use of restrictive practices, and reduce the risk of harm to care recipients.

The Amending Principles extend consequential amendments needed to ensure the effective operation of the alternative consent arrangements, and to ensure that immunity arrangements introduced by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* continue to apply in appropriate, limited circumstances. The Government will monitor these arrangements over the next two years and does not intend to continue the arrangements.

The Amending Principles are a legislative instrument for the purposes of the *Legislation Act 2003*.

Human rights implications

The Amending Principles engage the following rights:

- the right not to be subjected to cruel, inhuman or degrading treatment under Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 15 of the *Convention on the Rights of Persons with Disabilities* (CRPD), and Articles 1 and 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);
- the right to security of the person and freedom from arbitrary detention under Article 9 of the ICCPR and Article 14 of the CRPD; and
- the right to health under Article 12 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR), and Article 25 of the CRPD.

Right not to be subjected to cruel, inhuman or degrading treatment

The Amending Principles engage the right not to be subjected to cruel, inhuman or degrading treatment outlined in Article 7 of the ICCPR and Article 15 of the CRPD, and Articles 1 and 2 of the CAT. The Amending Principles introduce arrangements that allow for certain individuals or bodies to consent to the use of a restrictive practice.

The Amending Principles provide clarity regarding alternative arrangements for the provision of consent to the use of a restrictive practice where state and territory laws may be unclear, or where an application for a restrictive practices' substitute decision maker in the relevant state or territory tribunal is facing an unreasonable delay.

The Amending Principles aim to ensure that approved aged care providers can request and obtain consent to the use of restrictive practices when required. Without clear consent arrangements, there is a heightened risk that a restrictive practice may be used without the appropriate consent being obtained. The Amending Principles are designed to ensure the QCA Principles original policy intent can be achieved, which is that if a care recipient is not able to consent to the use of restrictive practices, consent should be sought from an appropriate person who is clearly authorised to provide that consent.

These amendments sit alongside the robust and extensive existing requirements under the *Quality of Care Principles 2014* (Quality Principles). These requirements afford care recipients protections to ensure that restrictive practices are only ever to be used:

- as a last resort to prevent harm to the care recipient
- to the extent necessary
- for the shortest time
- in the least restrictive form.

Furthermore, approved providers must have tried alternative methods prior to use of restrictive practices and are required to regularly monitor and review any use of restrictive practices, and any consideration or use is required to be documented in the recipient's behaviour support plan.

The Aged Care Quality and Safety Commission (Commission) has a suite of resources available, including training, to support approved providers in meeting their obligations under the Aged Care Act 1997 including the use of restrictive practices and informed consent. Guidance is also available from other sources including Capacity Australia, Dementia Australia and Dementia Services Australia.

The Amending Principles necessarily have to take into account the rights of the care recipient that are the subject of a restrictive practice as well as the rights of other care recipients and persons, including those with disability. This is consistent with the UNCRPD.

Restrictive practices are intended to be used only where necessary to prevent harm to aged care recipients and others (including other care recipients) and should not be used to subject an individual to cruel, inhuman or degrading treatment.

Right to security of the person and freedom from arbitrary detention

Article 9 of the ICCPR and Article 14 of the CRPD provide for the right to liberty and security of the person, which requires that an individual not be subjected to arrest and detention, except as provided for by law (provided the law itself and the manner of its execution are not arbitrary).

This right is engaged because the Amending Principles relate to the authority to provide consent to the use of restrictive practices which may, in some circumstances, amount to detention. However, it is not intended that any detention as a result of the use of a restrictive practice be arbitrary and the interim arrangements are aimed at limiting the use of restrictive practices to certain circumstances, including as a last resort to protect the care recipient and others from harm, and with the required consent from one of the specified persons (where the care recipient lacks the requisite capacity).

The Amending Principles promote this right by reinforcing existing safeguards that seek to ensure that restrictive practices are not used in an arbitrary manner. If clear consent arrangements and requirements exist at the Commonwealth level in circumstances where State or Territory legislation does not empower anyone to consent to the use of restrictive practices, then the risk of a restrictive practice being used in relation to a care recipient without consent from an authorised person is reduced. Further, if a person authorised under these new consent arrangements does not consent to restrictive practices being used, then an approved provider cannot use restrictive practices. These requirements reduce the risk of restrictive practices being used arbitrarily or without consent. The combination of the existing requirements and the Amending Principles will ensure that restrictive practices are only used as a necessary and proportionate response in particular circumstances.

Right to health

The Amending Principles also promote the right to health under Article 12 of the ICESCR and Article 25 of the CRPD by ensuring there are mechanisms available to provide greater protections in relation to the physical and mental health of individuals receiving aged care. The Amending Principles facilitate this by allowing for restrictive practices to be used in circumstances where consent is provided and the use will prevent harm to the care recipient and others. This may include, for example, circumstances where mechanical restraints, such as bed rails, are used to reduce the risk of a care recipient falling out of their bed overnight.

The Amending Principles address limitations with current consent arrangements and provide alternative arrangements so restrictive practices are able to be used in necessary circumstances, in accordance with the Quality Principles. This promotes the right to health by allowing for necessary interventions that reduce the risk of harm to care recipients and others in residential aged care.

Conclusion

The Amending Principles are consistent with human rights because they promote the protection of human rights of aged care recipients by implementing measures to ensure greater protection from cruel, inhuman or degrading treatment. To the extent these amendments limit the human rights discussed above, the limitations are not impermissible, serve a legitimate objective, and are reasonable, necessary and proportionate to protect other rights and vulnerable individuals.

Minister for Aged Care, the Hon Anika Wells MP