

Report snapshot¹

In this report the committee has examined the following legislative instrument for compatibility with human rights. The committee's full consideration is set out at the page numbers indicated.

Quality of Care Amendment (Restrictive Practices) Principles 2022

Advice to
Parliament

Consent to the use of restrictive practices in aged care

[pp. 3-23](#)

Rights of persons with disability; equal recognition before the law; equality and non-discrimination; access to justice; effective remedy

This legislative instrument amends the Quality of Care Principles 2014 to specify a hierarchy of persons who can give consent on behalf of persons in aged care to the use of restrictive practices, if the care recipient is deemed to lack capacity to give consent.

Setting out who can consent to the use of restrictive practices on behalf of a care recipient engages and may promote and limit a number of human rights, limiting in particular the rights of persons with disabilities, including the right of persons with disabilities to consent to medical treatment. Further, specifying persons who may consent for the purposes of granting immunity from all civil and criminal liability to those who rely on that consent, engages and may limit the rights of persons with disabilities to equal recognition before the law, equality and non-discrimination, and access to justice and has implications for the right to an effective remedy.

The committee acknowledges the minister's advice that this instrument seeks to resolve issues raised by some jurisdictions about who can consent to the use of a restrictive practice and are intended as an interim arrangement until state and territory guardianship and consent laws can be amended, or until late 2024. The committee's mandate is to assess the compatibility of Commonwealth legislation with Australia's international human rights obligations, and as such is required to consider whether the consent arrangements for the use of restrictive practices are compatible with these human rights. However, as much of the detail is left to the states and territories it is difficult for the committee to fully assess this.

The committee is concerned that the consent arrangements in this instrument are highly complex and much depends on aged care providers understanding the complex hierarchy and understanding the interplay between this legislation and relevant state and territory laws.

The committee considers this instrument risks being incompatible with a range of human rights, particularly the rights of persons with disability, noting that there is no requirement to provide for supported, rather than substitute, decision-making; much depends on unknown safeguards in state and territory legislation; there is

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 3 of 2023 – Quality of Care Amendment (Restrictive Practices) Principles 2022*; [2023] AUPJCHR 26.

some uncertainty for providers as to the applicable law in their jurisdiction; and there is a broad-ranging immunity from liability.

The committee has [recommended](#) some amendments to this legislative instrument. However, the committee considers its concerns are broader than what is set out in this instrument, and considers further consideration should be given as to whether the consent model to the use of restrictive practices is the best approach to protect the rights of aged care residents. It has recommended that extensive consultation be undertaken to consider these broader issues. It also considers the issue of substituted consent to the use of restrictive practices in aged care would benefit from a broad ranging inquiry, and noted that the Parliament may wish to consider referring these issues to a relevant policy committee.

The committee draws these human rights concerns to the attention of the Minister for Aged Care and the Parliament.