

Explanatory Statement

Aged Care Act 1997

Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019

Authority

Section 96-1 of the *Aged Care Act 1997* (**Aged Care Act**) provides the Minister may, by legislative instrument, make Quality of Care Principles providing for matters required or permitted by Part 4.1 of the Aged Care Act, or necessary or convenient to give effect to Part 4.1 of the Aged Care Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides where an Act confers a power to make, grant or issue any 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.

Purpose

The *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019* (**Amending Principles**) amend the *Quality of Care Principles 2014* (**Quality of Care Principles**) to provide that the Minister must ensure that there is a review of the operation of the Quality of Care Principles, relating to physical and chemical restraint. The review must consider the effectiveness of the Quality of Care Principles in minimising the use of physical restraints and chemical restraint by approved providers in relation to consumers in the period 1 July 2019 to 30 June 2020.

The Amending Principles also:

- repeal Part 4A of the Quality of Care Principles at the start of 1 July 2021;
- clarify that the use of restraint must be a measure of last resort; and
- reference state and territory legislation that regulates prescribers.

Background

Since 1 July 2019, the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (**the Principles**) require residential aged care providers to satisfy a number of conditions before physical and chemical restraint may be used.

These new requirements, for the first time, put explicit obligations on residential aged care providers in respect of the use of restraint. The regulatory changes require providers to satisfy a number of conditions before restraint can be used, including assessment by an approved health practitioner (for physical restraint) or assessment by a medical practitioner or nurse practitioner who has prescribed the medication (for chemical restraint).

The Principles complement those state and territory laws which protect individuals from interference with their personal rights and liberties. For example, medical practitioners and nurse practitioners are responsible for obtaining informed consent before prescribing medicines, including psychotropics and benzodiazepines. This obligation is set out in the codes of conduct, which apply to these professions, and is regulated by the professional boards.

The new requirements have attracted significant interest, including through the Royal Commission into Aged Care Quality and Safety (**Royal Commission**). In its Interim Report entitled '*Neglect*', the Royal Commission acknowledged that the "*drivers behind the use of restrictive practices are complex*" and made a number of preliminary observations in respect of the use of restrictive practices in aged care.

The Amending Instrument will require a review of the operation of Part 4A of the Quality of Care Principles and consideration of the effectiveness of this Part in minimising the use of physical and chemical restraint by approved providers in relation to consumers in the period 1 July 2019 to 30 June 2020.

This review will also provide an opportunity to consider any recommendations from various scrutiny and review bodies about appropriate amendments to the Quality of Care Principles, as well findings by the Royal Commission into Aged Care Quality and Safety.

Consultation

During the development of the Principles, the Department of Health consulted with the following key stakeholders:

- representatives of residential aged care providers and their peak bodies;
- consumer peak bodies;
- the Aged Care Quality and Safety Commission;
- the Australian Commission on Safety and Quality in Health Care;
- the Australian Nursing and Midwifery Federation;
- academics with expertise in aged care clinical practice; and,
- the Department of Social Services.

The review of the Principles will also provide an opportunity for additional consultation with stakeholders about minimising the use of physical and chemical restraint by approved providers in relation to consumers.

Regulation Impact Statement

The Office of Best Practice Regulation has advised that no Regulatory Impact Statement is required (OBPR ID 25859).

Details

The details of the Amending Instrument are set out in Attachment A to this explanatory statement.

The Amending Instrument commences the day after the last day on which a resolution disallowing the Principles, or a provision of the Principles could be passed by either House of Parliament. However, the provisions do not commence at all if such a resolution is passed.

The Amending Instrument is a legislative instrument for the purpose of the *Legislation Act 2003*.

ATTACHMENT A

Details of the *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019*

Section 1 Name

Section 1 provides for the instrument to be referred to as the *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 (the Amending Principles)*.

Section 2 Commencement

This section provides that the Amending Principles commence the day after the last day on which a resolution disallowing the *Quality of Care Amendment (Use of Restraints) Principles 2019 (the Principles)* or a provision of that instrument could be passed by either House of Parliament as referred to in section 42 of the *Legislation Act 2003*.

However, the Amending Provisions do not commence at all if the Principles, or a provision of the Principles, is disallowed or taken to have been disallowed on or before that last day.

Section 3 Authority

Section 3 provides that the Amending Principles are made under the *Aged Care Act 1997 (the Aged Care Act)*.

Section 4 Schedules

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 the Schedule concerned, and any other item in a Schedule to the Amending Principles has effect according to its terms.

Schedule 1—Amendments

Quality of Care Principles 2014

Item 1. Part 4A (heading)

Item 1 repeals the heading to Part 4A “Minimising the use of physical and chemical restraint” and substitutes it with the heading “Physical or chemical restraint to be used only as a last resort”.

Item 2. Section 15F (heading)

Item 2 repeals the heading to section 15F “Use of physical restraint” and substitutes it with “Physical restraint to be used only as a last resort”.

Item 3. Section 15G (heading)

Item 3 repeals the heading to section 15G “Use of chemical restraint” and substitutes it with “Chemical restraint to be used only as a last resort”.

Item 4. At the end of subsection 15G(1)

Item 4 inserts two notes at the end of subsection 15G(1).

Regulation of Medical Practitioners and Nurse Practitioners

Note 1 refers to the codes of appropriate professional practice which apply to medical practitioners and nurse practitioners. These codes of conduct are included for information but are not incorporated by reference.

Before prescribing medicines, including antipsychotics and benzodiazepines, medical practitioners and nurse practitioners are responsible for obtaining informed consent.

Both of these professions are regulated by their respective boards; the Medical Board of Australia (**MBA**) and the Nursing and Midwifery Board of Australia (**NMBA**). Their role includes setting of standards and codes to provide guidance to their professions about what is expected of their practice. All registration standards, codes and guidelines developed by a National Board are admissible in proceedings under the National Law.

In line with the provisions of the National Law, the MBA and NMBA have each published a code of conduct to set the professional expectations for their respective professions. The MBA's *Good medical practice: a code of conduct for doctors in Australia* and the NMBA's *Code of conduct for nurses* set the expectations of the MBA and NMBA for a range of topics including: communication with patients and/or their carers; gaining informed consent; and the use of scheduled medicines.

In 2019, the MBA's code could be viewed on their website <https://www.medicalboard.gov.au> and NMBA's code could be viewed on their website: <https://www.nursingmidwiferyboard.gov.au>.

Both codes of conduct require practitioners to comply with relevant legislation administered by states and territories, including medicines and poisons legislation which governs the prescribing, dispensing and administration of scheduled medicines.

Consent to the prescribing of medication

Note 2 refers to the state and territory legislation, which deals with who can consent to the prescribing of medication for a consumer who cannot consent because of any physical or mental incapacity. This legislation is included for information but is not incorporated by reference.

The applicable legislation, at the time of making the Amending Principles, for each state and territory is set out in Table 1. This table also provides details of relevant organisations who may be able to provide additional information:

Table 1.

State	Legislation	Relevant organisations
ACT	<i>Guardianship and Management of Property Act 1991</i> <i>Guardianship and Management of Property Regulation 1991</i> <i>Guardianship and Management of Property (Fees) Determination 1992</i> <i>Guardianship and Management of Property (Fees) Determination 2019</i>	Public Trustee and Guardian (ACT) ACT Civil and Administrative Tribunal Public Advocate (ACT)
NSW	<i>Guardianship Act 1987</i> <i>Guardianship Regulations 2016</i>	Public Guardian (NSW) NSW Civil and Administrative Tribunal NSW Trustee and Guardian
NT	<i>Adult Guardianship Act 2016</i> <i>Guardianship of Adults Regulations 2016</i>	NT Civil and Administrative Tribunal Office of the Public Guardian (NT)
QLD	<i>Guardianship and Administration Act 2000</i> <i>Guardianship and Administration Regulation 2012</i>	Office of the Public Guardian (QLD) Public Advocate (QLD) QLD Civil and Administrative Tribunal
SA	<i>Consent to Medical Treatment and Palliative Care Act 1995</i> <i>Consent to Medical Treatment and Palliative Care Regulations 2014</i> <i>Guardianship and Administration Act 1993</i> <i>Guardianship and Administration Regulations 2015</i>	Office of the Public Advocate SA Civil and Administrative Tribunal
TAS	<i>Guardianship and Administration Act 1995</i> <i>Guardianship and Administration Regulations 2017</i> <i>Guardianship and Administration (Corresponding Law) Notice 2014</i> <i>Guardianship and Administration (Corresponding Law) Notice 2011</i>	Office of the Public Guardian (TAS) Guardianship and Administration Board
VIC	<i>Guardianship and Administration Act 1986</i> <i>Guardianship and Administration Board (Application) Regulations 1994</i> <i>Guardianship and Administration Board (Fees) Regulations 1996</i> <i>Guardianship and Administration (Fees) Regulations 2008</i> <i>Guardianship and Administration (Fees) Regulations 2019</i> <i>Guardianship and Administration (Fees) (Interim) Regulations 2007</i>	Office of the Public Advocate (VIC) VIC Civil and Administrative Tribunal
WA	<i>Guardianship and Administration Act 1990</i> <i>Guardianship and Administration Regulations 2005</i>	State Administrative Tribunal Office of the Public Advocate (WA)

While every effort has been made to verify the accuracy of this information, legislation may change from time to time. The table does not capture relevant policy directives or other guidance information. The table is an overview only, and further information can be sought from the relevant state or territory jurisdiction.

Item 5. At the end of Part 4A

Item 5 adds two sections at the end of Part 4A of the *Quality of Care Principles 2014* (**Quality of Care Principles**); section 15H 'Review of this Part' and section 15J 'Repeal of this Part and associated definitions on 1 July 2021'.

15H Review of this Part

Section 15H provides that the Minister must ensure that there is a review of the operation of Part 4A Quality of Care Principles. The review must consider the effectiveness of Part 4A in minimising the use of physical restraints and chemical restraints by approved providers of residential aged care in relation to consumers in the period 1 July 2019 to 30 June 2020.

The review must make provision for consultation, and be completed by 31 December 2020.

A written report of the review must be prepared and a copy of the report published on the internet. The report must also be tabled in each House of Parliament within 15 sitting days of that House after the report is given to the Minister.

15J Repeal of this Part and associated definitions on 1 July 2021

Section 15J provides that Part 4A of the Quality of Care Principles is repealed at the start of 1 July 2021. It also repeals definitions associated with Part 4A, that is, 'approved health practitioner', 'chemical restraint', 'physical restraint', and 'restraint'.

The review of Part 4A will include a review of section 15J. The purpose of reviewing section 15J is to provide protections for consumers in residential care, should the review recommend amendments to Part 4A, as opposed to a repeal of this Part.

Statement of Compatibility with Human Rights

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

Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019

The Instrument is compatible with the 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 legislative instrument

The *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 (Amending Principles)* amends the *Quality of Care Principles 2014 (Quality of Care Principles)* to provide that the Minister must ensure that there is a review of the operation of Part 4A of the Quality of Care Principles. The review must consider the effectiveness of Part 4A in minimising the use of physical restraints and chemical restraints by approved providers of residential aged care in relation to consumers in the period 1 July 2019 to 30 June 2020.

The Amending Principles also repeal Part 4A of the Quality of Care Principles at the start of 1 July 2021.

Human rights implications

The Amending Principles engage the following rights:

- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the protection from exploitation, violence and abuse; and
- the prohibition on torture, cruel, inhuman or degrading treatment or punishment.

Right to the enjoyment of the highest attainable standard of physical and mental health

The right to health is the right to the enjoyment of the highest attainable standard of physical and mental health. It is contained in Article 12 of the International Covenant on Economic Social and Cultural Rights (**ICESCR**).

While ICESCR contains no definition of health, the UN Committee on Economic Social and Cultural Rights has stated that the right to health is not to be understood as a right to be healthy. According to the Committee, the right contains both freedoms and entitlements. The freedoms include the right to control one's health and body, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.

The Amending Principles promote the right to health, as it will review the legislative framework that protects vulnerable, older Australians from the unregulated use of physical or chemical restraint.

Additionally, the Amending Principles will review section 15J which repeal the Principles at the start of 1 July 2021. This will allow the review to consider whether to recommend amendments to the Principles instead of a repeal. The review of section 15J will preserve the current arrangements until 1 July 2021, while data and evidence is evaluated to consider the effectiveness the existing legislative framework.

Protection from exploitation, violence and abuse

The Amending Principles engage the right to protection from exploitation, violence and abuse, which is contained in Article 20 of the International Covenant on Civil and Political Rights (**ICCPR**) and Article 16 of the Convention on the Rights of Persons with Disabilities (**CRPD**).

Article 20 of the ICCPR requires States to outlaw vilification of persons on national, racial or religious grounds amounting to incitement to discrimination, hostility or violence. Australia has made a reservation in relation to Article 20 to the effect that the Commonwealth and the states have legislated with respect to the subject matter of the article in matters of practical concern in the interests of public order, and that the right is reserved not to introduce any further legislation on these matters.

Article 16 of the CRPD requires States to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

Part 4A of the Quality of Care Principles is intended to protect aged care consumers from exploitation, violence and abuse associated with the unregulated use of chemical and physical restraint.

Article 16 of the CRPD also requires 'independent authorities' to monitor 'facilities and programmes designed to service persons with disabilities'. Consistent with this obligation, the Aged Care Quality and Safety Commission independently accredits, assesses and monitors residential care services, including with respect to providers' obligations to minimise the use of physical and chemical restraints. The Commission also resolves complaints about residential aged care services.

Prohibition on torture, cruel, inhuman or degrading treatment or punishment

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is contained in Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), Article 7 of the International Covenant on Civil and Political Rights (**ICCPR**), and Article 15 of the CPRD.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The CAT applies where the perpetrator is a public official or person acting in an official capacity. It was implemented in Australia by the *Crimes (Torture) Act 1988* and then the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*.

As such, approved providers operate in a context that is different from a custodial or other similar situation in which the Convention would apply. In order to consider the application of the Convention, one needs to consider the terms of the Convention itself. It defines torture as a person in an official capacity inflicting severe pain or suffering on a person as a means of obtaining information or a confession, punishing a person for an act committed, or intimidating or coercing someone on discriminatory grounds.

Such a situation seems unlikely to arise, as approved providers are generally private entities. Aged care services are not staffed by persons acting in an official capacity, let alone persons acting in an official capacity to inflict severe pain or suffering on a person as a means of obtaining information or a confession, punishing a person for an act committed, or intimidating or coercing someone on discriminatory grounds within the terms of the CAT.

Should such a circumstance arise it is notable that it would already be criminalised by the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*.

International Covenant on Civil and Political Rights

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Quality of Care Principles put specific obligations on residential aged care providers in respect of the use of physical and chemical restraint. The purpose of such obligations is to provide that restraint must be a strategy of last resort.

The review of Part 4A of the Quality of Care Principles will consider, among other matters, whether the regulatory framework is sufficiently effective to meet Australia's international obligations. The Amending Instrument will repeal Part 4A on 1 July 2021. Therefore, the use of restraint will continue to be regulated while the review is being conducted.

The Human Rights Committee also noted that “enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training” concerning the ban on torture and the treatment prohibited by Article 7.

While the Amending Instrument and Part 4A of the Quality of Care Principles do not specifically refer to training, they are just one component of a suite of reforms aimed at improving the quality and safety of aged care. For example, the Department of Health has worked with stakeholders to develop a single set of Aged Care Quality Standards (**the Standards**) and a single Charter of Aged Care Rights (**the Charter**).

Under the Standards, aged care facilities are required to demonstrate that their workforce is recruited, trained, equipped and supported to deliver the outcomes required by the Standards. In addition, the Standards require aged care services to deliver safe and effective personal and clinical care which is best practice, tailored to each consumer’s needs and optimises their health and well-being.

The Commission has developed ‘*Guidance and resources for providers to support the Standards*’. The Commission has also released a ‘*Regulatory Bulletin*’ and ‘*Scenarios involving physical and/or chemical restraint*’ to help providers to understand issues and their responsibilities around minimising the use of restraint. All documents are available for download on the Commission’s website.

Convention on the Rights of Persons with Disabilities

Article 15 of the CRPD, provides that States have an obligation to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities being subjected to torture or/and other cruel, inhuman or degrading treatment or punishment.

The UN Committee on the Rights of Persons with Disabilities has previously recommended that Australia take immediate steps to end practices where persons with disabilities are subjected to *unregulated* behaviour modification or restrictive practices such as chemical and physical restraints in various environments.

The purpose of Part 4A is to minimise the use of physical and chemical restraint. In limited circumstances, and as a last resort, restraint may be necessary to prevent serious harm to an individual or others. For example, the use of antipsychotics and benzodiazepines may be appropriate in circumstances, such as the uncommon psychotic variants of dementia with a risk of self-harm. The primary purpose of restrictive practices must be to respond to the person’s behaviour of concern to protect that person, or others from harm.

In addition, the Quality of Care Principles include a range of safeguards to promote a restraint-free environment and to ensure that no one is subjected to inhuman or degrading treatment. These safeguards aim to regulate the use of restraint in Commonwealth aged care law, and provide appropriate limitations on the use of restraint. The Amending Instrument will require a review to evaluate whether such safeguards are sufficient, and make recommendations for reform if necessary.

Conclusion

The Amending Principles are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It promotes the consumer's rights to the enjoyment of the highest attainable standard of physical and mental health, and to protection from exploitation, violence and abuse and is consistent with Australia's international obligations to prohibit torture, cruel, inhuman or degrading treatment or punishment.

**The Hon Richard Colbeck
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Minister for Sport and Youth**