

Community Support and Services Committee

Report No. 39, 57th Parliament

Subordinate legislation tabled between 23 August and 12 September 2023

1 Aim of this report

This report summarises the committee’s findings following its examination of the subordinate legislation within its portfolio areas, tabled between 23 August and 12 September 2023. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, its consistency with fundamental legislative principles (FLP),¹ its compatibility with human rights, and its lawfulness.

It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA), and the human rights certificates with the *Human Rights Act 2019* (HRA).

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
120	Disability Services Amendment Regulation 2023	12 September 2023	30 November 2023

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

3 Committee consideration of the subordinate legislation



The committee identified potential human rights issues in relation to Disability Services Amendment Regulation 2023, however the committee was ultimately satisfied that the subordinate legislation is consistent with fundamental legislative principles and compatible with human rights.

The committee considers that:

- the explanatory notes tabled with the subordinate legislation noted in this report comply with the requirements of s 24 of the LSA
- the human rights certificate tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with the HRA
- no issues of FLP were identified.

The committee acknowledges that the Disability Services Amendment Regulation 2023 (SL No. 120) poses a degree of risk in relation to human rights; however on balance, it is satisfied that the subordinate legislation is compatible with human rights.

4 Disability Services Amendment Regulation 2023

SL No. 120 amends the authorisation framework for the administration of restrictive practices in residential aged care (RAC) facilities. An unintended consequence of the *Disability Services and Other*

¹ Fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. These principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament. *Legislative Standards Act 1992*, s 4.

Legislation (Worker Screening) Amendment Act 2020 (WS Amendment Act), passed in December 2020, was that it revoked RAC workers' authorisation to administer restrictive practices in RAC facilities. SL No. 120 restores the previous framework.

The National Disability Insurance Scheme Quality and Safeguards Commission provides the following definition of 'restrictive practices':

A restrictive practice means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. Under the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 certain restrictive practices are subject to regulation. A restrictive practice is a regulated restrictive practice if it is or involves seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.²

The purpose of part 6 of the *Disability Services Act 2006* (DS Act) is to protect the rights of adults with an intellectual or cognitive disability. Regulating the use of restrictive practices by relevant service providers is one such protection.³

The Disability Services Amendment Regulation 2023 (SL No. 120) provides amendments to the Disability Services Regulation 2017 (DS Regulation). The explanatory notes advise the policy objectives for SL No. 120 are to:

- exempt approved providers under the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act) from the requirement to comply with part 6 of the *Disability Services Act 2006* (DS Act) in the provision of services which include National Disability Insurance Scheme (NDIS) supports or services to an adult in RAC; and
- update several provisions that were inadvertently not updated following amendments to defined terms made by the WS Amendment Act.⁴

The exemption is intended to reinstate authorisations for RAC workers that were inadvertently revoked in the WS Amendment Act.⁵ The explanatory notes advise that changes to the definition of 'disability services' in the WS Amendment Act had the unintended consequence of invalidating an exemption for Queensland RAC workers.⁶ The exemption, when in effect, gave authorisation to approved aged care workers to use restrictive practices in disability and NDIS settings.⁷

SL No. 120 amends the DS Regulation to reinstate this authorisation.⁸ The explanatory notes state that these amendments 'will mitigate the significant and potentially adverse operational impacts on RAC providers from having to immediately comply with a second authorisation framework'.⁹

SL No. 120 also updates several provisions to ensure consistent terminology between the DS Regulation and the DS Act.¹⁰

² Australian Government, NDIS Quality and Safeguards Commission, *Understanding behaviour support and restrictive practices - for providers*, <https://ndiscommission.gov.au/providers/understanding-behaviour-support-and-restrictive-practices-providers>

³ DS Act, s 139; See also *Guardianship and Administration Act 2000*, pt 5B.

⁴ SL No. 120, explanatory notes, p 1.

⁵ Under s 12(2) of the *Disability Services Act 2006* the amendment changed the definition of disability services, so that 'disability services do not include NDIS supports or services'.

⁶ SL No. 120, explanatory notes, p 3.

⁷ SL No. 120, explanatory notes, p 1.

⁸ Section 12(a) of the Amendment Regulation now reads 'the service provider is providing disability services or NDIS supports or services to an adult'. Section 13(2)(c) now reads 'the type of disability services or NDIS supports or services provided by the service provider'.

⁹ Explanatory notes, p 3.

¹⁰ Following the WS Amendment Act, changes to defined terms were not simultaneously updated in the DS Regulation. See SL No. 120, explanatory notes, p 3: 'Clause 5 amends section 16, heading, and section 16(1) by omitting "non-government" in "funded non-government service provider".'

The committee notes that there is a tension between SL No. 120 and human rights; specifically, rights to protection from cruel, inhuman or degrading treatment; freedom of movement, privacy, liberty and security of person; and humane treatment when deprived of liberty.

SL No. 120 exempts certain providers from the requirements of part 6 of the DS Act because otherwise they would be subject to overlapping regulatory frameworks. The human rights certificate describes this amendment as the correction of a ‘technical oversight, to ensure approved providers under the ACQSC Act continue to be temporarily exempted from the requirement to comply with part 6 of the Act in the provision of services which include NDIS supports or services to an adult in RAC as originally intended’.¹¹

The human rights certificate states that the purpose of the limitation on human rights is:

... to mitigate the significant and potentially adverse operational impacts on RAC providers from having to immediately comply, without any transitional period, with two overlapping authorisation regimes.¹²

According to the human rights certificate, reinstatement of the exemption was considered the most appropriate approach because there will likely be reform of Queensland’s authorisation framework as a result of the recent independent Positive Behaviour Support and Restrictive Practices Review, undertaken by Griffith University and commissioned by the former Department of Communities, Disability Services and Seniors.¹³ It was deemed that this approach balances the need for NDIS participants in RAC to receive the same level of regulatory protection as NDIS participants in other settings with the need to support the orderly transition of RAC providers to Queensland’s authorisation framework.¹⁴ In addition, if the exemption were not reinstated, RAC providers would have to comply with two overlapping authorisation regimes.¹⁵

The human rights certificate concludes that any limitations are reasonable and compatible with human rights.¹⁶ The committee concurs, finding SL No. 120 only limits human rights to an extent that is reasonable and demonstrably justifiable.

5 Recommendation

The committee recommends that the Legislative Assembly notes this report.



Mr Chris Whiting MP

Acting Chair

November 2023

Community Support and Services Committee

Chair Ms Corrine McMillan MP, Member for Mansfield

Deputy Chair Mr Stephen Bennett MP, Member for Burnett

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Dr Mark Robinson MP, Member for Oodgeroo Mr Robert Skelton MP, Member for Nicklin

¹¹ SL No. 120, human rights certificate, pp 2-3.

¹² SL No. 120, human rights certificate, pp 4-5.

¹³ SL No. 120, human rights certificate, pp 2, 5; Policy Innovation Hub, Griffith University, *Final Report: Independent review of Queensland’s regulatory framework for positive behaviour support and restrictive practices*, November 2020.

¹⁴ SL No. 120, human rights certificate, p 5.

¹⁵ SL No. 120, human rights certificate, pp 6-7.

¹⁶ SL No. 120, human rights certificate, p 3.