Law Council
OF AUSTRALIA

Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021

Senate Standing Committee on Community Affairs

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Table of Contents

About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
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The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the National Elder Law and Succession Law Committee and its Federal Litigation and the National Human Rights Committee in developing this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Senate Standing Committee on Community Affairs (**Committee**) in relation to its inquiry into the Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (**Bill**).

2. The Law Council welcomes the Australian Government's efforts in the Bill to implement legislative amendments in response to recommendations made by the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) with respect to restrictive practices, in particular.[1] It also welcomes the broader, substantial announcements in the recent Federal Budget 2021-2022 which are intended to give effect to Royal Commission's recommendations, many of which reflect key calls made by the Law Council in its submissions to that body.[2]

3. Given the tight timeframes for the current inquiry, the Law Council's analysis and recommendations should be considered preliminary.

4. Schedule 1 to the Bill would amend the *Aged Care Act 1997* (Cth) (**the Aged Care Act**) to empower the *Quality of Care Principles 2014* (**Quality of Care Principles**) to regulate restrictive practices in relation to aged care recipients. The Quality of Care Principles are a legislative instrument made by the Minister under section 96-1 of the Aged Care Act.

5. The amendments proposed to be made by Schedule 1 respond to recommendation 17 of the Royal Commission report.[3] Noting this, in the time available, the Law Council has focused on Schedule 1 to the Bill in this submission. Brief comments on Schedule 2 – which provides for home care assurance reviews, but does not appear to respond directly to a recommendation of the Royal Commission – are set out at the end of the submission.

6. As amended by the Schedule 1 to the Bill, the Aged Care Act would:

    - *require* key elements of the regulatory regime for restrictive practices – including some mandatory requirements relating to the use of restrictive practices – to be set out in the Quality of Care Principles; and

    - *permit* the Minister, as a discretionary matter, to set out in the Quality of Care Principles other aspects critical to the operation of the regulatory scheme, including exceptions to those mandatory requirements, as the Minister sees fit.

7. In light of these discretionary powers, and the importance of the subject matter, the Law Council considers that its ability to provide submissions on the Bill would be enhanced by an opportunity to review an exposure draft of the instrument to amend the Quality of Care Principles to regulate the use of restrictive practices.

8. The Law Council understands that the urgency associated with this Bill may arise from the fact that Part 4A of the Quality of Care Principles, which regulates the use of physical

[1] *Royal Commission into Aged Care Quality and Safety*, (Final Report: Care, Dignity and Respect, 26 February 2021).
[2] Law Council of Australia, *Aged Care Quality and Safety*, Submission to the Royal Commission into Aged Care Quality and Safety, 29 July 2020.

and chemical restraints, will be repealed under a self-executing provision[4] at the start of 1 July 2021 – the day on which Schedule 1 to the Bill would commence.[5]

9. As such, the Law Council recommends that:

   - the Committee seek an extension to the timeframes for the making of submissions to the Committee on the Bill and for the Committee to report on the Bill;

   - an exposure draft of the relevant instrument to amend the Quality of Care Principles be released for consultation; and

   - amendments be made to the Quality of Care Principles to extend the operation of Part 4A of the Quality of Care Principles to accommodate any extended timeframe to enable consideration of an exposure draft.

10. In relation to Schedule 1 to the Bill itself, in summary, the Law Council recommends that:

    - amendments be made to the Bill to include chemical restraints within the definition of 'restrictive practice' and impose mandatory requirements in relation to the use of such restraints;

    - consideration be given to making clear in the Bill how far the responsibilities of the approved aged care providers extend with respect to the actions of various persons or entities who may engage in restrictive practices;

    - the definition of 'restrictive practice', including its open-ended and uncertain references to restrictions on 'rights', be replaced with the Law Council's proposed definition at [44], below. This would ensure that the definition focuses on actions which are factually verifiable;

    - in addition to this revised definition, the Schedule should include an explicit objective of ensuring that the human rights of older persons are respected, protected and fulfilled, specifically referencing the human rights listed in pages 4-7 of the Explanatory Memorandum;

    - in relation to the use of restrictive practices when necessary in an emergency (**emergency situations**):
      - that as recommended in the Royal Commission report,[6] the existence of emergency situations be a threshold circumstance in which a prohibition on the use of a restrictive practice is lifted, rather than a possible basis to exempt a provider from a mandatory requirement which would otherwise apply to the use of a restrictive practice;

      - if that recommendation is not adopted, the Bill be amended to either itself mandate, or require the Quality of Care Principles to mandate:

        - the confined circumstances in which a provider is exempt from a mandatory requirement which would otherwise apply to the use of a restrictive practice in an emergency situation;

[4] Subsection 15J(1) of the Quality of Care Principles.
[5] Item 2 of the table in subclause 2(1) of the Bill.

        - some mandatory limits on the use of restrictive practices, even in emergency situations, to give effect to rights which are absolute – such as freedom from torture;

        - reporting of all uses of restrictive practices;

- the Bill be amended to better account for circumstances where:

    - a person either consents to a restrictive practice which may have a beneficial effect or is unlikely to be harmful, and where all of the currently prescribed safeguards are unnecessary; or

    - where the person presents a serious and imminent risk to another person's safety and is unable or unwilling to consent, despite reasonable efforts to obtain that consent being made in the circumstances.

Amendments relating to restrictive practices

Overview of the measures in the Bill

11. Schedule 1 to the Bill would amend the Aged Care Act to:

- provide for a new concept of a 'restrictive practice' in relation to a care recipient;

- require that the Quality of Care Principles limit the circumstances in which a restrictive practice may be used (**safeguards**);

- permit the Quality of Care Principles to deal with other matters in relation to restrictive practices, including providing that a requirement specified in those Principles does not apply to the use of a restrictive practice emergency situations; and

- make it a responsibility of an approved aged care provider to ensure a restrictive practice in relation to a care recipient is only used in the circumstances set out in the Quality of Care Principles; and

- make it a reportable incident to use a restrictive practice in relation to the residential care recipient other than in circumstances set out in the Quality of Care Principles.

12. This submission focusses on two aspects of the Bill in relation to restrictive practices, comparing each to the recommendations of the Royal Commission report:

- the definition of 'restrictive practice'; and
- the limits on the use of restrictive practices, particularly in emergency situations.

Definition of 'restrictive practice' in the Bill

13. Clause 3 of Schedule 1 to the Bill would insert the following definition of a restrictive practice into the Aged Care Act (emphasis in original):

> 54-9 Restrictive practice in relation to a care recipient
>
> (1) A ***restrictive practice*** in relation to a care recipient is any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.

(2) Without limiting subsection (1), the Quality of Care Principles may provide that a practice or intervention is a ***restrictive practice*** in relation to a care recipient.

14. The definition in subsection (1) differs in several respects from the working definition used by the Royal Commission report, which was:[7]

Restrictive practices are activities or interventions, either physical or pharmacological, which restrict a person's free movement or ability to make decisions.

15. In particular, the definition in the Bill:

- unlike the definition contained in the Royal Commission report, does not define a restrictive practice as a restriction on a person's 'ability to make decisions'; and

- instead defines a restrictive practice as a restriction on a person's 'rights' – a term which is not used in the definition contained in the Royal Commission report, while recognising that the Royal Commission clearly intended to ensure that respecting, protecting and fulfilling the rights of older persons should lie at the heart of reforms to the Aged Care Act.[8]

16. There are points to make about each of these differences.

Application to chemical restraints

17. The Royal Commission report clearly understood restrictive practices to include restrictions on a person's ability to make decisions and pharmacological activities or interventions. It appears to have envisaged that the reference to restrictions on a person's 'ability to make decisions' in its definition of a 'restrictive practice' would capture chemical restraints – that is, 'psychotropic medicines, which are capable of affecting the mind, emotions and behaviours of a person'.[9]

18. The current definition of 'restrictive practice' in the Bill may not so clearly apply to chemical restraints as intended by the Royal Commission. The Explanatory Memorandum for the Bill does not explicitly address the regulation of chemical restraints, although impliedly suggests that they would be a kind of restrictive practice.[10]

19. Further, the Royal Commission report recommended that chemical restraints only be used if 'prescribed by a doctor who has documented the purpose of the prescription'[11] – this requirement is not captured in the definition of restrictive practices in the Bill.

20. Accordingly, the Law Council recommends the Bill be amended to:

- ensure that 'restrictive practice' is defined to include chemical restraints – this could be done by extending the current definition to restrictions on a person's 'ability to make decisions' by reference to pharmacological activities or interventions which impact on this ability;

- require the Quality of Care Principles to prohibit the use of practices which have that effect unless 'prescribed by a doctor who has documented the purpose of the

[7] *Royal Commission into Aged Care Quality and Safety*, (no 2), vol 2, 97.
[8] Ibid, vol 3A, 15.
[9] Ibid, vol 2, 98.
[10] Explanatory Memorandum, Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (Cth), 10.
[11] *Royal Commission into Aged Care Quality and Safety*, (no 2), vol 3A, 109.

prescription' as an additional safeguard to the broader safeguards set out in proposed paragraphs 54-10(1)(a)-(g) (further discussed below).

Recommendation

- **The Bill be amended to ensure that 'restrictive practice' is defined to include chemical restraints and include safeguards specific to the use of such restraints.**

Rights

21. The term 'rights' in the definition of 'restrictive practice' is not itself defined, and a question may arise as to the nature and substance of the rights which are reflected here.

22. The Explanatory Memorandum does not address this issue directly. The Statement of Compatibility with Human Rights contained within the Explanatory Memorandum addresses a number of rights said to be engaged by the Bill. However, the Statement suggests that these rights are supported by the mandatory safeguards imposed on the use of restrictive practices in proposed paragraphs 54-10(1)(a)-(g), rather than by the use of the term 'rights' itself.[12]

23. As the Explanatory Memorandum notes, the definition of 'restrictive practice' in subsection 54-9(1) aligns with the definition under the National Disability Insurance Scheme.[13] The definition of restrictive practice in section 9 of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) provides:

> ***restrictive practice*** means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability.

24. It is notable that the NDIS Act provides a scheme for recognising the rights of persons with disability – the objects of the NDIS Act include to give effect to Australia's obligations relating to human rights under certain international treaties,[14] and section 4 of the NDIS Act articulates several rights of persons with disabilities as general principles guiding actions under that Act. Those provisions would assist to give content and clarity to the 'rights' which may be picked up in the definition of 'restrictive practice' in the NDIS Act.

25. In contrast, there is not, presently, any scheme in the Aged Care Act for recognising 'rights'.

26. It is a principle of the rule of law that the law be certain and clear.[15] As the Bill and the Aged Care Act are currently framed, without any codification of the human rights which are intended to be given effect through the operation of the Aged Care Act, the content of the proposed law lacks clarity and certainty.

27. Here, there may be confusion in practice, in that the Aged Care Act already permits the Minister to specify 'rights and responsibilities of care recipients' in the *User Rights Principles 2014* (**User Rights Principles**).[16] However, such rights are generally referred to in the Aged Care Act as 'user rights' or rights 'specified in the User Rights

[12] Explanatory Memorandum (n 14), 4-8.
[13] Explanatory Memorandum (n 14), 1.
[14] Paragraphs 3(1)(a) and (i) of the NDIS Act.
[15] Law Council of Australia, *Policy Statement – Rule of Law Principles*, March 2011, Principle 1, https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf.
[16] Paragraphs 56-1(m), 56-2(k) or 56-3(l) of the Aged Care Act.

Principles'.[17] There is a Charter of Agreed Care Rights prescribed in Schedule 1 to the User Rights Principles; however, this Charter appears designed to give content to certain 'user rights' for the purposes of certain provisions of the Aged Care Act.[18] Further, proposed paragraph 54-10(1)(g) appears to distinguish between the rights referred to in the definition of 'restrictive practice' and user rights.

28. As such, the Law Council considers that use of the word 'rights' in proposed subsection 54-9(1) and proposed paragraph 54-10(1)(g) are inconsistent and raise two different concepts. The former is a broader' 'human rights' concept of rights that does (at least, yet) not clearly exist under the Aged Care Act and the latter refers to 'User Rights' and consumer rights.

29. What is a 'right' (ie, a human right) for the purpose of the definition of 'restricted practice' will be, consistent with the principles of statutory interpretation, determined in light of the scope, subject matter and purpose of the Aged Care Act, and the context in which the term is used. Ultimately, it would be for a court to determine which 'rights' are reflected in the definition in any particular case.

30. That does not assist aged care providers seeking to comply with obligations relating to restrictive practices. It may not be clear to a provider on each occasion whether an activity or intervention may constitute a restriction on 'rights'. This may be a matter of dispute between agreed care providers and care recipients and their families.

31. Legislation is generally presumed not to violate the rules of international law.[19] In particular, if there is any ambiguity in an Act that purports to be giving effect to an international agreement, the courts will adopt that interpretation which best facilitates the operation of the agreement.[20] If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[21] However, if an Act is clear, the courts must give effect to it even though it is inconsistent with established rules of international law.[22]

32. The Bill's Explanatory Memorandum indicates that the Bill is intended to give effect to particular human rights recognised under international law – that is, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, the right to liberty and security of the person, the right to an adequate standard of living, the right to protection from exploitation, violence and abuse, the right to health and the right to privacy.[23]

33. The Royal Commission report recommended that the new Aged Care Act, to commence by no later than 1 July 2023 should enshrine the human rights of older people who are seeking or receiving aged care. Specifically, that the new Act:[24]

[17] See, for example, paragraph 3-4(b), section 53-1, the Table of Divisions in section 55-1, paragraphs 56-1(f),(k),(l) and (m).
[18] See sections 9, 19 and 23AD of the User Rights Principles.
[19] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J.
[20] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; 110 ALR 97 at 123 (Brennan, Deane and Dawson JJ).
[21] *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) CLR 273 at 287; 128 ALR 353 at 362 (Mason CJ and Deane J).
[22] *Polites v Commonwealth* (1945) 70 CLR 60.
[23] Explanatory Memorandum to the Bill, 4-8.
[24] *Royal Commission into Aged Care Quality and Safety*, (no 2), vol 3A, 18.

specify a list of rights of people seeking and receiving aged care, and should declare that the purposes of the Act include the purpose of securing those rights and that the rights may be taken into account in interpreting the Act and any instrument made under the Act.

34. In its submission to the Royal Commission, the Law Council strongly supported a reframing of the federal legislation to better recognise the inherent human rights of older persons, noting that the current focus on consumer or user rights is problematic.[25] It therefore supports the Royal Commission's above recommendation.

35. However, without this broader reform yet having occurred, the current open-ended reference to 'rights' in the Bill's definition of 'restrictive practice' remains unclear and may be misunderstood by providers and aged care recipients alike.

36. The Law Council considers that if the term 'rights' is to be used in the Aged Care Act to connote human rights in the current context (pending the broader reforms envisaged by the Royal Commission), it should be buttressed by a list of human rights sought to be secured under the Aged Care Act, as indicated in the Explanatory Memorandum. This would be similar to the approach taken in the NDIS Act. This would give clarity to aged care providers as to the circumstances in which an action may restrict a person's rights. This could occur as part of the stated objectives of this Schedule, rather than constituting the definition itself. It would inform the operation of the restrictive practices scheme as a whole.

37. The Law Council further considers that the law would be clearer if the definition of 'restrictive practice' referred to actions which had some factually verifiable basis – as it would if confined to actions which restricted movement or ability to make decisions (to use the Royal Commission Report construction). It might be less clear when a person's 'rights' have been restricted, particularly when that term is not defined and may invite a degree of subjectivity in its application.

Whose restrictive practice?

38. The Law Council notes that the definition in proposed subsection 54-9(1) does not itself make clear who may engage in a restrictive practice and the context in which such practices be employed, in order for the practices to be caught by the definition. All that is required is that the practice be 'in relation to a care recipient'. Accordingly, a question may be raised on the face of that definition: a practice engaged in by who?

39. However, the definition needs to be read in context. In particular, the definition is given content in a compliance sense by the proposed insertion by the Bill of paragraph (f) into subsection 54-1(1) of the Aged Care Act.

40. Subsection 54-1(1) sets out the 'responsibilities of an approved provider in relation to the quality of the aged care that the approved provider provides'. Proposed paragraph 54-1(1)(f) would state that if the provider provides aged care of a kind specified in the Quality of Care Principles to care recipients (ie residential care services, home care services, and certain flexible care services), it would be a responsibility of the aged care provider 'to ensure a restrictive practice in relation to those recipients is only used in the circumstances set out in those Principles'.

41. Notably though, proposed paragraph 54-1(1)(f) also does not explicitly limit the responsibility of an aged care provider to restrictive practices employed by the aged care provider itself. This may be implied by the chapeau to subsection 54-1(1) – which provides that the responsibilities of approved providers relate to the 'quality of the aged

[25] Law Council of Australia (no 1).

care that the *approved provider* provides' (my emphasis). However, unlike proposed paragraph 54-1(1)(f), other paragraphs in subsection 54-1(1) are directed to the care and services provided by approved providers.[26]

42. The Law Council considers that it may be possible to read the responsibility of approved providers in proposed paragraph 54-1(1)(f) as encompassing practices of other persons or entities towards care recipients, when those practices take place in the context of an approved provider's care of a care recipient. For example, this may include a practice performed by a third party contractor, volunteer or family member while the care recipient is receiving residential care services in an approved provider's premises.

43. The Law Council recommends consideration be given to making clear in the Bill whether only restrictive practices engaged in by care providers are regulated. This could be done by amending the definition of 'restrictive practice' in subsection 54-9(1) or the directing the responsibility of approved providers in paragraph 54-1)(1)(f) to the care and services that provider provides.

Recommendation

- **Consideration be given to making clear in the Bill how far the responsibilities of the approved aged care providers extend with respect to the actions of various persons or entities who may engage in restrictive practices. .**

Recommended definition

44. In light of the above, the Law Council recommends the following definition of 'restrictive practice' replace the present definition in proposed subsection 54-9(1):

> *restrictive practices are practices, activities or interventions, either physical or pharmacological, , which restrict a person's free movement or ability to make decisions.*

45. Further, the Law Council recommends adding 'activities' to 'practices' and 'interventions' in the definition. This is because 'practice' (which may be understood to be a 'habitual action or carrying on')[27] and 'intervention' (which may be understood to be coming in or between so as to prevent or modify a result),[28] may not capture ad hoc actions, which are neither habitual nor intended to be inhibiting or modifying, but nevertheless restrict a person's movement or ability to make decisions.

46. Whether or not this proposed definition or the definition currently in the Bill is used, the Law Council further recommends that the Schedule include an explicit objective of ensuring that the human rights of older persons are respected, protected and fulfilled, referencing the specific human rights listed in pages 4-7 of the Explanatory Memorandum – consistent with the approach taken in the NDIS Act.

Recommendation

- **Consideration be given to adopting the Law Council's proposed definition of 'restrictive practice'.**

[26] For example, paragraphs 54-1(1)(a) and (c) of the Aged Care Act.
[27] Melbourne Oxford University Press, *The Australian Concise Oxford Dictionary,* ed J.B. Sykes (seventh edition, 1987).
[28] Ibid.

- **Consideration be given to including an explicit objective of ensuring that the human rights of older persons are respected, protected and fulfilled in the operation of the scheme to regulate the operation of restrictive practices.**

Expanding the definition in a legislative instrument

47. Proposed subsection 54-9(2) would empower the Minister in the Quality of Care Principles to, without limiting the definition in subsection 54-9(1) of the Aged Care Act, provide that a practice or intervention is a restrictive practice.

48. The reference to 'without limiting' suggests that the Minister could not limit the scope of the definition in subsection 54-9(1) of the Aged Care Act. However, the Minister does not appear to be confined to only prescribe matters within the scope of the definition in subsection 54-9(1). That is, subsection 54-9(2) would appear to allow for either: a clarification of how the definition in subsection 54-9(1) of the Aged Care Act applies in relation to a particular action, *or* an expansion beyond the definition in the Act.

49. This construction is consistent with the explanation of the intended operation of subsection 54-9(2) by the Explanatory Memorandum for the Bill, which relevantly states:[29]

> In effect, subsection 54-9(2) enables the Quality of Care Principles to provide clarification, or set out additional concepts, regarding what is a restrictive practice.
>
> …
>
> The Bill will enable the Quality of Care Principles to specifically refer to other practices and interventions that will be considered restrictive practices. This will allow some flexibility in responding to any newly emerging concerns about practices or interventions that are considered restrictive and may be inappropriate and/or harmful in a residential aged care setting. This will enable any emerging concerns about such practices to be addressed in a timely manner and one which is reflective of the priority accorded to protecting aged care residents.
>
> Including matters in delegated legislation will allow for responsiveness in relation to the regulation of restrictive practices in aged care.

50. Further, subsection 54-9(2) does not confine or limit the scope of the matters that the Quality of Care Principles may provide to be restrictive practices – it would only be limited by the general principle that delegated legislation not be inconsistent with primary legislation. This is contrary to the principle of the rule of law that 'the scope of that delegated authority should be carefully confined'.[30]

51. This approach gives rise to the risk of divergent (possibly inconsistent) definitions in the Act and Quality of Care Principles – which may generate some confusion as to the definition which applied in any particular scenario, which is inconsistent with the principle of the rule of law that the law be certain and clear.

52. The Law Council acknowledges this power is intended to be beneficial for aged care recipients, as the purpose of regulating restrictive practices is to protect such persons. Further, the Law Council agrees it is useful for the law to remain relevant in the light of evolving social norms and community values. However, the Law Council considers these objectives could be best achieved by providing for a single definition in the Aged Care which captures the essential nature

[29] Explanatory Memorandum (n 14), 13.
[30] Law Council of Australia (no 15), Principle 6a.

of a restrictive practice, with the power of the Minister in the Quality of Care Principles limited to merely clarifying the application of that definition to certain actions, rather than expanding on it.

Recommendation

- **The power enabling the Minister to expand the definition of 'restrictive practice' in the Quality of Care Principles be reframed so that the Minister may only clarify the application of the definition of restrictive practices set out in the Aged Care Act, rather than expand on it.**

Limits on the use of restrictive practices

53. The Bill provides for the regulation of restrictive practices in the Quality of Care Principles – by requiring the Minister to include certain matters in the Principles[31] and empowering the Minister to include other aspects on a discretionary basis.[32]

54. The Bill permits a more extensive use of restrictive practices than recommended by the Royal Commission report.

55. The Royal Commission recommended that:

    (a) the use of restrictive practices be prohibited unless:

        (i) recommended by an independent expert as part of a behaviour support plan; or

        (ii) necessary in an emergency to avert the risk of immediate personal harm; and

    (b) if subject to an exemption in (a), only to be used in certain limited circumstances;

    (c) if used under the exemption in (a)(ii), there be a report of the restraint to be provided with reference to the additional requirements as soon as practicable after the restraint starts to be used.[33]

56. In contrast, the Bill:

    (a) *requires* that the Quality of Care Principles impose requirements restricting the use of restrictive practices to certain limited circumstances (similar to the circumstances in [49(b)]);[34]

    (b) *permits* the Quality of Care Principles to specify that one of those requirements does not apply to the use of a restrictive practice in emergency situations;[35]

    (c) *requires* the Quality of Care Principles to 'make provision for, or in relation to, the monitoring and review of the use of a restrictive practice in relation to a care recipient';[36] and

[31] Subsection 54-10(1) of the Aged Care Act.
[32] Subsections 54-10(2) and (3) of the Aged Care Act.
[33] *Royal Commission into Aged Care Quality and Safety*, (no 3) vol 3A, 109.
[34] Paragraphs 54-10(1)(a)-(g) of the Aged Care Act.
[35] Subsection 54-10(2) of the Aged Care Act.
[36] Paragraph 54-10(1)(h) of the Aged Care Act.

(d) *permits* the Quality of Care Principles to specify other circumstances in which a restrictive practice may be used.[37]

57. The Explanatory Memorandum for the Bill indicates that the Quality of Care Principles will also require aged care providers 'to create behaviour support plans to inform the use of restrictive practices on a care recipient', although that is not clear on the face of the Bill.[38]

Emergency situations

58. The Law Council makes the following comments and recommendations about the manner in which the Bill addresses emergency situations.

59. Firstly, the phrase 'necessary in an emergency' is broad and subjective – opinions may differ as to whether an action or intervention is necessary or the situation in question is 'an emergency'. The Law Council considers that:

- an objective test be used – 'reasonably necessary';
- it be made clear that the necessity may only arise 'to avert the risk of physical harm'; and
- the term 'emergency' be defined.

60. Secondly, proposed subsection 54-10(2) provides the Minister with a broad discretion to turn off the otherwise mandatory requirements applying to the use of restrictive practices if 'necessary in an emergency'.

61. It is a principle of the rule of law that 'the scope of that delegated authority should be carefully confined'.[39] However, there are no limits on the circumstances in which such an exception may be prescribed – ostensibly, the Minister is able to exempt a provider for complying with all requirements in such a situation.

62. Thirdly, the Bill does not give effect to the recommendation in the Royal Commission Report that there be a report of the restraint to be provided as soon as practicable after the restraint starts to be used.[40] The Bill requires the Quality of Care Principles to provide for 'the monitoring and review of the use of a restrictive practice', but does not dictate the nature or frequency of that review.

63. Fourthly, the Bill does not impose any threshold controls on the use of restrictive practices in emergency situations. It is conceivable that the Quality of Care Principles could override *all* requirements for certain emergency situations, which would leave the application of the restrictive practice unregulated under the Aged Care Act.

64. Proposed subsection 54-10(2) is a significant power, which has the ability to unpick the mandatory requirements imposed by the Aged Care Act which are designed to protect the well-being of care recipients.

65. The Law Council recommends:

(a) that the existence of emergency situations should be a threshold circumstance in which a prohibition on the use of a restrictive practice is lifted, rather than a possible basis to exempt a provider from a mandatory requirement which would

[37] Subsection 54-10(3) of the Aged Care Act.
[38] Explanatory Memorandum, (no 11), 10.
[39] Law Council of Australia (no 15), Principle 6a.
[40] *Royal Commission into Aged Care Quality and Safety*, (no 3) vol 3A, recommendation 17(1)(a)(i), 109.

otherwise apply to the use of a restrictive practice (as recommended in the Royal Commission report);

(b) if (a) is not adopted, the Bill be amended to either itself mandate, or require the Quality of Care Principles to mandate:

- the confined circumstances in which a provider is exempt from a mandatory requirement which would otherwise apply to the use of a restrictive practice in an emergency situation;
- some mandatory limits on the use of restrictive practices, even in emergency situations, to give effect to rights which are absolute – such as freedom from torture;
- reporting of all uses of restrictive practices;

(c) if (a) and (b) are not adopted, the opportunity to review an exposure draft of an instrument to amend the Quality of Care Principles following passage of this Bill, before it is registered as a legislative instrument.

Recommendations

- **The Bill require greater control be applied to the use of restrictive practices in emergency situations.**

Issue of consent

66. Under the current drafting of restrictive practices in the Bill (and under the Law Council's proposed drafting), a vast range of activities may amount to a restriction on person's restriction of movement and thus amount to a restrictive practice, including:

- locked doors or keypad operating doors that limit a resident's access to parts of the care service or to leave the care service; or
- installing bed rails or pushing one side of the bed against a wall at the request of the care recipient to minimise the risk of falling out or because that is what they are used to in terms of how their bed was set up at their home.

67. In each case, obtaining informed consent is just one of a number of mandatory requirements to the use of the restrictive practice.

68. To use the second example, a resident may agree (ie consent to) that, for their own comfort or safety, to have a side of a bed pushed against a wall – that is, its intended effect may be beneficial and it is unlikely to cause any harm. However, under the current drafting in the Bill, such a practice could only be used 'as a last resort' and 'for the shortest time, necessary to prevent harm to the care recipient or other persons'.

69. The Law Council therefore considers that there are certain categories of conduct which – notwithstanding that they may restrict a care recipient's freedom of movement – are undertaken at their request, and may be either beneficial, or are unlikely to cause harm. Consideration should be given either to providing that such actions should either not be considered a restrictive practice, or should not be subject to all of the mandatory requirements which currently apply. It would be preferable to provide for this in primary legislation.

70. Conversely, the Law Council notes that the situation may occur where a resident is violent (that is, that the person presents a serious and imminent risk to another person's safety) due to their personal circumstances and all forms of strategies have been considered. Under the amendments, if the resident (or their legal personal representative or guardian) refuses (or is simply unwilling due to being frozen with indecision) to provide consent then paragraph 54-10(1)(f) appears to mean the ability to apply a restraint is not available.

71. Similarly, the Law Council recommends consideration be given to circumstances in which a person presents a serious and imminent risk to another person's safety, and consent is unable to be obtained. In these circumstances, it may necessary to accept that 'reasonable attempts to obtain consent have failed and all other circumstances (risk to other residents etc) warrant the use of a restraint'.

Recommendations

- **the Bill be amended to better account for circumstances where:**
  - **a person either consents to a restrictive practice which may have a beneficial effect or is unlikely to be harmful, and where all of the currently prescribed further safeguards are unnecessary, or**
  - **the person presents a serious and imminent risk to another person's safety and the person (or their legal representative or guardian in the case where a person lacks capacity) is unable or unwilling to consent, despite reasonable efforts to obtain that consent being made in the circumstances.**

Lawfulness of restrictive practices

72. Finally, the Law Council considers that it would be preferable to include an additional mandatory requirement that the use of restrictive practices not be an offence. This could, for example, provide an explicit link to the torture offences in Division 274 of the Criminal Code, scheduled to the *Criminal Code Act 1995* (Cth), underlining that the freedom from torture is absolute.

Home care assurance reviews

73. In the time available, the Law Council has not had an opportunity to fully consider Schedule 2, which provides for home care assurance reviews.

74. It appears to the Law Council that the amendments made by this Schedule do not respond to any particular recommendation of the Royal Commission report and are effectively an interim measure to provide greater regulatory oversight of home care arrangements, which the Royal Commission considered was underdeveloped and not strong.[41]

75. The reforms proposed essentially operate to make the link between payments made for care to the actual expenditure incurred towards that care. As a matter of concept, the Royal Commission did seek to align payments for care services to the actual delivery of care. That is, there is not scope for a margin or profit element. The reforms take the current 'funding' nature of the Aged Care Act to a 'grant to be acquitted' form of funding.

[41] *Royal Commission into Aged Care Quality and Safety*, (no 2), vol 2, 226.

76. The Law Council considers this to be a fundamental shift in the principle of funding care services that meet specified standards under the current Aged Care Act. They may be premature to consider prior to the whole Act being reviewed and the final funding envelope for providers being determined.