



26 August 2021

The Hon Greg Hunt MP  
Minister for Health and Aged Care  
Parliament House  
CANBERRA ACT 2600

Via email: [Minister.Hunt.DLO@health.gov.au](mailto:Minister.Hunt.DLO@health.gov.au)

CC: [rezana.berman@health.gov.au](mailto:rezana.berman@health.gov.au); [RegOrds@health.gov.au](mailto:RegOrds@health.gov.au)

Dear Minister,

**Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021  
[F2021L00923]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Significant impact on personal rights and liberties***

***Matters more appropriate for parliamentary enactment***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument has a significant impact on personal rights and liberties.

The instrument amends the Quality of Care Principles 2014 (principal instrument) to set out requirements for the use of restrictive practices in relation to aged care recipients in residential aged care.

Item 9 of Schedule 1 to the instrument inserts new Part 4A into the principal instrument. New Part 4A appears to set out a number of key matters for the purposes of regulating the use of restrictive practices. For example, new Division 2 prescribes certain actions as restrictive practices for the purpose of subsection 54-9(2) of the *Aged Care Act 1997* (Aged Care Act). These include the use of chemical, physical, environmental and mechanical restraints, and the use of solitary confinement practices. Divisions 3 and 4 further provide for the circumstances in which these restrictive practices may be used on aged care recipients and additional responsibilities for approved providers relating to restrictive practices.

The committee considers that significant matters, such as regulating the use of restrictive practices in residential aged care, are more appropriately enacted via primary legislation. Where significant matters are nevertheless left to delegated legislation, the committee would expect a sound justification to be provided.

In this instance, the explanatory statement notes that amendments have recently been made to the Aged Care Act by the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* (Amending Act) to regulate the use of restrictive practices in the aged care sector. However, the explanatory statement does not address why it is considered necessary and appropriate to prescribe the circumstances in which restrictive practices may be used by delegated legislation, rather than including the matters in the Amending Act.

While the committee acknowledges that section 54-10 of the Aged Care Act sets out some requirements in relation to the use of restrictive practices that must be included in the principal instrument, the committee's scrutiny concerns with regard to inclusion of these matters in delegated legislation are heightened, noting the potentially significant impact of the inappropriate use of restrictive practices on a particularly vulnerable group of people within the community. In this regard, the committee emphasises that full parliamentary consideration would facilitate greater scrutiny of these important measures.

**The committee therefore requests your advice as to:**

- **why it is considered necessary and appropriate to regulate the use of restrictive practices in residential aged care in delegated legislation; and**
- **why it was not considered appropriate to include the matters prescribed in this instrument in the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021*.**

### ***Conferral of discretionary powers***

#### ***Clarity of drafting***

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers on a person. In addition, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

The instrument sets out certain exemptions to the requirements for approved providers when an 'emergency' exists. For example, subsection 15FA(2) provides that the requirements set out in paragraphs 15FA(1)(a), (b), (c), (f) and (g) do not apply to the use of restrictive practices in relation to an aged care recipient if the use of the restrictive practice is necessary in an emergency. Section 15GB further provides for alternative responsibilities for approved providers in an emergency.

The explanatory statement to the instrument explains the word 'emergency' in new subsection 15FA(2) is 'not defined, and therefore is defined by its ordinary meaning'. However, in the absence of further information, it is unclear what the 'ordinary meaning' of emergency would be. Additionally, the explanatory statement notes that the term is undefined as 'this will provide the Aged Care Quality and Safety Commission the ability to question the circumstances in which emergency use of restraint was activated, including whether consent had been obtained from the care recipient's restrictive practices substitute decision-maker'. In this regard, it appears that this may enable the Aged Care Quality and Safety Commission (the Commission) to exercise some

discretion in determining whether an emergency occurred. However, it is unclear what factors will be considered in exercising this discretion, who will exercise the power on behalf of the Commission, and whether any limitations or safeguards apply in relation to the exercise of this power.

**In light of the matters outlined above, the committee requests your advice as to:**

- **what circumstances may constitute an ‘emergency’ in the context of subsection 15FA(2);**
- **the scope of the powers that the Aged Care Quality and Safety Commission may exercise under the instrument to determine whether an emergency occurred, including:**
  - **who will be exercising these powers and whether they are required to possess any particular qualifications, skills or experience; and**
  - **what factors they must consider in making this determination;**
- **the nature and source of any limitations or safeguards on the exercise of the discretionary power to determine whether an emergency occurred, including whether they are set out in law or policy.**

### ***Clarity of drafting***

As noted above, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Paragraph 15FA(1)(i) provides that an aged care provider may use a restrictive practice if it ‘is not inconsistent’ with the Charter of Aged Care Rights (the Charter) set out in Schedule 1 to the User Rights Principles 2014. However, the explanatory statement explains that this requirement is to ensure the use of the restrictive practice ‘is consistent’ with the Charter. In the absence of further information in the explanatory statement, it is unclear what ‘not inconsistent with’ means in the context of paragraph 15FA(1)(i) and whether this differs from requiring that the practice ‘is consistent with’ the Charter. The committee is concerned that requiring that the use of restrictive practices is ‘not inconsistent with’ the Charter is a lower threshold for aged care providers to comply with, than requiring the practices to be consistent with the Charter.

**The committee therefore requests your advice as to the meaning of ‘not inconsistent with’ in the context of paragraph 15FA(1)(i).**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **9 September 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**