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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**AGED CARE AND OTHER LEGISLATION AMENDMENT
(ROYAL COMMISSION RESPONSE NO. 1) BILL 2021**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Health and Aged Care), the
Hon Greg Hunt MP

AGED CARE AND OTHER LEGISLATION AMENDMENT (ROYAL COMMISSION RESPONSE NO. 1) BILL 2021

OUTLINE

The Aged Care and Other Legislation Amendment (Royal Commission Response No.1) Bill 2021 will make urgent amendments to the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act) to implement three measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety (Royal Commission), and in the case of restrictive practices, in response to the *Independent Review of Legislation Provisions Governing the use of Restraint in Residential Aged Care*. These legislative amendments deliver the first stage of aged care reform developed to respond to the Royal Commission's final report, *Final Report: Care, Dignity and Respect* (final report).

Amendments relating to restrictive practices

The purpose of Schedule 1 of the Bill is to amend the Aged Care Act and the Quality and Safety Commission Act to further strengthen legislation on the use of restrictive practices in aged care.

The Bill defines the term 'restrictive practices' in the Aged Care Act in alignment with the definition applied under the National Disability Insurance Scheme, bringing practice into line with the disability sector. The new definition strengthens protections for care recipients from abuse associated with the unregulated use of restrictive practices.

The Bill also expands the Aged Care Quality and Safety Commissioner's ability to respond to breaches of approved providers' responsibilities in relation to restrictive practices.

Amendments relating to home care assurance reviews

Schedule 2 of the Bill amends the Aged Care Act to allow the Secretary to conduct reviews (assurance reviews) to assure the arrangements for the delivery and administration of home care are effective and efficient. Assurance reviews will inform the continuous improvement of home care policy and the education of approved providers in relation to home care and home care services.

Amendments relating to the Aged Care Financing Authority

Schedule 3 of the Bill removes the requirement for the Minister for Aged Care to establish a committee known as the Aged Care Financing Authority (ACFA).

Financial Impact Statement

There will be a low expense to the Government of \$20.2 million over five years from 2020-2021.

Regulation Impact Statement

Consistent with the Office of Best Practice Regulation's Regulatory Impact Statement (RIS) requirements, the Department certified that a package of independent reviews undertook a process and analysis equivalent to a RIS in regards to the restrictive practices amendments. The certification and list of reviews are available at the end of this explanatory memorandum.

Statement of Compatibility with Human Rights

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

AGED CARE AND OTHER LEGISLATION AMENDMENT (ROYAL COMMISSION RESPONSE NO. 1) BILL 2021

This Bill 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 Bill

The purpose of the Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 is to provide urgent amendments to the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act) in response to the Royal Commission into Aged Care Quality and Safety (Royal Commission).

The Bill provides the first stage of aged care reform in response to the Royal Commission's final report, strengthens the Australian Government's ongoing commitment to ensuring senior Australians get the high quality and safe aged care services they deserve.

The amendments introduced by Schedule 1 of the Bill will strengthen the responsibilities under the Aged Care Act on approved providers of aged care of a type specified in the *Quality of Care Principles 2014* (Quality of Care Principles) by including enhanced safeguards and conditions on the use of restrictive practices. The Bill undertakes to emphasise person-centred care in relation to the use of restrictive practices through inserting a new definition of 'restrictive practice' and requiring the Quality of Care Principles to provide legislative detail on the requirements approved providers are to comply with prior to, during, and after the use of restrictive practices.

The Bill will also enhance compliance of approved providers by including civil penalties for those providers who fail to comply with compliance notices produced by the Aged Care Quality and Safety Commissioner (Commissioner) in relation to a breach of restrictive practice responsibilities under the Aged Care Act.

Schedule 2 of the Bill amends the Aged Care Act to empower the Secretary to conduct reviews (assurance reviews) to assure the arrangements for the delivery and administration of home care are effective and efficient. Assurance reviews will inform the continuous improvement of home care policy and the education of approved providers in relation to home care and home care services.

The Secretary, or appropriate delegate, will be able to issue 'notices to give' and 'notices to attend' to approved providers that are corporations to collect information in relation to an assurance review. Approved providers that are corporations will be required to provide all reasonable facilities and assistance to the Secretary, and persons assisting the Secretary, in their performance of the reviews. Failure to comply with these notices or provide reasonable assistance will incur civil penalties. The Secretary will also be able to request that a person (or approved provider that is not a

corporation) to provide any information or documents that are relevant to an assurance review. The person is not required to comply with the request.

The Secretary or persons assisting the Secretary may prepare and publish reports on assurance reviews, dealing with findings, conclusions or recommendations made as a result of the reviews. The report may be published where no identifying personal information is included. The Secretary may publish information on providers who do not comply with notices to produce information or provide reasonable assistance. The assurance reviews will provide transparency for consumers and increased program oversight for the Government.

Human rights implications

The Bill engages the following human rights:

- the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment - Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), Articles 1 and 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and Article 15 of the *Convention on the Rights of Persons with Disabilities* (CRPD)
- the right to liberty and security of person - Article 9 of the ICCPR and Article 14 of the CRPD
- the right to an adequate standard of living – Article 11(1) of the *International Covenant on Economic Social and Cultural Rights* (ICESCR) and Article 28 of the CRPD
- the right to protection from exploitation, violence and abuse –Article 16 CRPD
- the right to health – Article 12 of the IESCR and Article 25 of the CRPD
- the right to privacy – Article 17 of the ICCPR.

Right not to be subjected to cruel, inhuman or degrading treatment

This Bill engages the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment found in Article 7 of the (ICCPR) and Article 15 of the (CRPD) by imposing responsibilities in relation to the use of restrictive practices. These obligations ensure that appropriate consideration is given by providers to the personal rights and liberties of care recipients prior to administering restrictive practices, and will act to prevent inhuman treatment and aim to positively engage the care recipient in the process.

Specifically, the Bill ensures providers use restrictive practices only:

- as a last resort to prevent harm after alternative best practice strategies have been explored, applied and documented, except in an emergency
- after considering the likely impact of the use of the practice on the care recipient
- to the extent necessary and proportionate to the risk of harm to the aged care recipient or other persons
- where the restrictive practice is the least restrictive form, and for the shortest time necessary to prevent harm to the care recipient or other persons
- if informed consent to the use of the practice is given
- in accordance with the Charter of Rights and the Aged Care Quality Standards

- if care recipients are monitored whilst the restrictive practice is in use and the use and effectiveness is documented.

These requirements will ensure that restrictive practices are only used as a necessary and proportionate response to the circumstances and ensures the rights of care recipients are given primary consideration and protection.

Right to liberty and security of person

Article 9 of the ICCPR and Article 14 of the CRPD provide for the right to personal liberty, which requires that an individual not be subject to arrest and detention, except as provided for by law, and provided that the law itself and the manner of its execution are not arbitrary. This Bill supports the right to liberty through providing for adequate safeguards to be put in place to ensure that the use of restrictive practices is not exercised in an arbitrary manner. In alignment with section 6 of the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, the Bill will define restrictive practices, ensuring that there is clear articulation of the kinds of restrictive practice provided for by law under further amendments to the Quality of Care Principles. Further, clarity of the use of restrictive practices will prevent arbitrary use and ensure care recipients' rights and liberties are at the forefront of the decision making process.

Right to an adequate standard of living

The Bill engages the right to an adequate standard of living under Article 11(1) of ICESCR and Article 28 of the CRPD. The Bill strengthens the regulation of restrictive practices and promotes the right to an adequate standard of living by taking steps to reduce the instance of inappropriate use of restrictive practices occurring in aged care.

As recommended by the Royal Commission, the Bill establishes civil penalties for approved providers who fail to comply with a written notice produced by the Commissioner. This will ensure that compliance action can be taken against providers who unlawfully use restrictive practices, thereby adding an additional layer to the protections for aged care recipients and providing improvement of living conditions, where applicable.

Protection from exploitation, violence and abuse

This Bill ensures appropriate measures are implemented to prevent the exploitation and abuse of aged care recipients, in line with Article 16 of the CRPD. The Bill promotes this right by ensuring procedures in place require the effective monitoring of the safety and wellbeing of care recipients, and emphasising restrictive practices are to be a last resort, with appropriate consideration given to the likely impact of the restrictive practice on the care recipient.

Additionally, the Bill acknowledges there may be limited situations where it is appropriate to use restrictive practices to ensure the safety of the care recipient and others in the workplace, such as staff and volunteers, or the safety of other aged care recipients. Where restrictive practices are used, providers must ensure they only use them as a last resort and only following the employment of alternative behaviour supports, unless the use of a restrictive practice is necessary in an emergency.

Right to health

The Bill also engages the right to health under Article 12 of the ICESCR and Article 25 of the CRPD. These articles refer to the right of individuals to the highest attainable standard of physical and mental health and the Bill promotes the right to health by providing greater protections to the physical and mental health of individuals receiving aged care of kind specified in the Quality of Care Principles. It does this by providing for strengthened regulation of restrictive practices in accordance with the Quality of Care Principles, and by specifying the practice must only be used as a last resort, except in the case of an emergency.

Right to privacy

The protection against arbitrary or unlawful interference with privacy is contained in Article 17 of the ICCPR. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks.

Although the United Nations Human Rights Committee has not defined ‘privacy’, it should be understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

The right to privacy under Article 17 can be permissibly limited in order to achieve a legitimate objective and where the limitations are lawful and not arbitrary. The term ‘unlawful’ in Article 17 of the ICCPR means that no interference can take place except as authorised under domestic law. Additionally, the term ‘arbitrary’ in Article 17(1) of the ICCPR means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The Committee has interpreted ‘reasonableness’ to mean that any limitation must be proportionate and necessary in the circumstances.

The home care assurance reviews measure promotes the right to privacy by engaging the existing secrecy provisions under the Aged Care Act in relation to the collection, use and disclosure of protected information, which includes personal information. The secrecy provisions establish a framework for the collection, use and disclosure of protected information, and includes criminal penalties for 2 years.

To the extent that home care assurance reviews authorise the collection, use or disclosure of personal information or may interfere with the right to privacy, it is lawful and non-arbitrary. The measure aims to achieve the legitimate objective of assuring the arrangements for the delivery and administration of home care are effective and efficient. It provides for increased oversight of home care for Government, which will ultimately assist care recipients, particularly those who may be vulnerable.

The measure also seeks the legitimate objective of improving transparency about approved providers of home care through the limited publication by the Secretary of reports in relation to assurance reviews and the non-compliance with notices to produce information or documents or answer questions. This will assist senior

Australians to make informed choices about their care. Overall the information collected, used and disclosed under this measure will increase program oversight and increase transparency for care recipients in relation to the operations and fees of approved home care providers.

The measure contains protections to ensure personal information is being collected in an appropriate and non-invasive manner to achieve the legitimate aims and objectives of conducting and reporting on the assurance reviews. This includes limiting the collection of information to the Secretary (or appropriate delegate) and those assisting the Secretary. The measure also does not require persons (including an approved provider who is not a corporation (as defined under the Aged Care Act)) to respond to a request for information or documents. The measure limits the use of information collected to persons assisting the Secretary for purpose of performing powers and functions in relation to the assurance reviews.

The measure reduces privacy risks and safeguards the individual's right to privacy in the following ways:

- by operating within the existing secrecy provision within the Aged Care Act. This means that the information collected and reports prepared as part of this measure will be protected information and can only be used or disclosed in to particular circumstances, such as in the performance of the functions and duties of those assisting the Secretary
- to the extent that it amends the existing secrecy provisions, ensuring reports published by the Secretary on assurance reviews must not include personal information. In addition, the amendments provide that reports containing personal information are limited in their distribution to approved providers to whom the information relates. To the extent that information is published about providers who do not comply with a notice to produce information or documents or notice to answer questions, the information published will not contain personal information
- by limiting the ability to issue notices requiring approved providers of home care to provide information and documents, and to answer questions to the Secretary or their appropriate delegate
- by limiting the addressee on a notice to provide information or documents or notice to answer questions to an approved provider
- by not requiring a person (including an individual care recipient) to respond to a request for information.

The limitations on the right to privacy under the measure are reasonable, necessary and proportionate as they appropriately balance the competing objectives of transparency and program oversight with an individual's right to privacy.

The amendments to Schedule 3 of the Bill do not engage any of the applicable human rights or freedoms.

Conclusion

The Bill is consistent with human rights as it advances protections for older Australians and strengthens the protection of care recipients by implementing measures to ensure greater protections from exploitation, violence, abuse and cruel, inhuman or degrading treatment. The Bill also ensures the inclusion of civil penalties is consistent with human rights criminal process guarantees.

The Bill also engages rights to privacy for the legitimate objective of providing advice that will assist in the provision of quality aged care services, and is reasonable, necessary and proportionate in the particular circumstances to achieving that objective.

The Hon Greg Hunt MP, Minister for Health and Aged Care

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NOTES ON CLAUSES

Clause 1 – Short Title

Clause 1 provides for the short title of the Act to be the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021*.

Clause 2 – Commencement

This clause sets out a table of the commencement dates of the new Act amendments. Sections 1 to 3 commence on the day the Act receives Royal Assent. Schedule 1 commences on 1 July 2021, Schedule 2 commences on the day after the Act receives Royal Assent and Schedules 3 and 4 commence on 1 July 2021.

Clause 3 – Schedule(s)

This clause provides that each Act that is specified in a Schedule of this Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item has effect according to its terms. This is a technical provision which gives operational effect to the amendments contained in the Schedules. Schedule 1 provides for amendments relating to restrictive practices, Schedule 2 provides for amendments relating to home care assurance reviews and Schedule 3 provides for amendments relating to the Aged Care Financing Authority.

SCHEDULE 1 — AMENDMENTS RELATING TO RESTRICTIVE PRACTICES

Overview

The purpose of Schedule 1 of the Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (Bill) is to amend the Aged Care Act and the Quality and Safety Commission Act to further strengthen legislation on the use of restrictive practices (previously referred to as restraint) in relation to recipients of aged care of a kind specified in the *Quality of Care Principles 2014* (Quality of Care Principles).

On 1 July 2019, the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* amended the Quality of Care Principles to limit the use of chemical and physical restraint by approved providers of residential aged care and short-term restorative care in a residential setting.

On 22 November 2019, the Quality of Care Principles were strengthened through the *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019* to:

- make it clear restraint must be a last resort
- require a review of the first 12 months of operation of the restraint regulations
- refer to state and territory legislation which regulates the responsibility of prescribers to gain informed consent for chemical restraint.

On 31 December 2020, the *Independent review of legislative provisions governing the use of restraint in residential aged care* (Restraint Review) was finalised and provided to the Department of Health. The purpose of the Restraint Review was to evaluate whether there had been a reduction in the inappropriate use of restraint since the introduction of the restraint provisions in the Quality of Care Principles and whether approved providers' awareness, attitudes, skills and behaviours in relation to restraint had changed. The Restraint Review made 10 recommendations to support the aged care sector to further minimise the use of restrictive practices.

On 1 March 2021, the Royal Commission released their final report which also made recommendations regarding how the relevant legislation should regulate the use of restrictive practices in the aged care sector (see Recommendation 17).

The amendments introduced by this Bill clarify the responsibilities of approved providers in relation to the use of restrictive practices.

State and territory legislation deals with who can give informed consent to the prescribing of medication for the purposes of chemical restraint on behalf of a care recipient who cannot themselves consent because they lack capacity. State and territory legislation also deals with who can give informed consent to the use of restrictive practices other than chemical restraint on behalf of a care recipient who lacks capacity to provide consent. This Bill is not intended to affect the operation of those state and territory laws, which protect individuals from undue interference with their personal rights and liberties in relation to the use of restrictive practices.

The amendments to the Aged Care Act by this Bill introduce the term 'restrictive practice', and define it as any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient. This aligns with the definition of restrictive practices applied under the National Disability Insurance Scheme (see the *National Disability Insurance Scheme Act 2013* and the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*). The amendments replace the concept of 'restraint' defined in the Quality of Care Principles, which will also be amended to reflect the new term 'restrictive practices'.

The Bill will introduce amendments to the Aged Care Act that will set out the requirements and preconditions that the Quality of Care Principles must provide for in relation to the use of restrictive practices. The Quality of Care Principles will outline the limited circumstances in which a restrictive practice can be used in relation to a care recipient.

The Quality of Care Principles will also clarify that from 1 September 2021, approved providers will be required to create behaviour support plans to inform the use of restrictive practices on a care recipient. Approved providers will be required to continue to include such information in a care recipient's care and support plan prior to the implementation of the new arrangements on 1 September 2021.

The purpose of the amendments are to clarify the current requirements in primary legislation, and enable delegated legislation to provide the detail of such requirements.

The Bill enables 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. As these amendments are intended to ensure that all forms of restrictive practices are accurately captured, it is appropriate that the legislation relating to restrictive practices can be adapted and modified in a timely manner. Allowing some flexibility to promptly respond to unforeseen risks, concerns and omissions aligns with community expectations and the key aim of regulating restrictive practices, which is to protect older Australians from use of such practices other than in accordance with the limited circumstances to be set out in the Aged Care Act and Quality of Care Principles.

Specifically, the amendments to the Aged Care Act will provide that the Quality of Care Principles must set out matters in relation to restrictive practices. It is intended that, through these requirements, approved providers will only be able to consider the use of restrictive practices:

- as a last resort to prevent harm after alternative best practice strategies have been explored, applied and documented, except in an emergency
- after considering the likely impact of the use of the practice on the care recipient
- to the extent necessary and proportionate to the risk of harm to the aged care recipient or other persons
- where the restrictive practice is the least restrictive form, and for the shortest time, necessary to prevent harm to the care recipient or other persons
- if informed consent to the use of the practice is given
- in accordance with the Charter of Rights and the Aged Care Quality Standards
- if care recipients are monitored whilst the restrictive practice is in use and the use and effectiveness documented.

There are limited situations where it may be appropriate to use restrictive practices to ensure the safety of residential aged care recipients and others, including in emergency situations. However, the Bill seeks to clarify that this is a safety measure of last resort where all other interventions have been employed and excluded. Restrictive practices must only be used in a way that supports good clinical practice and provides safe and improved care for consumers.

Any use of restrictive practices that is not in accordance with the strengthened legislation must be reported under the Serious Incident Reporting Scheme (SIRS).

The Bill also expands the Aged Care Quality and Safety Commissioner's (Commissioner's) ability to respond to breaches of approved providers' responsibilities in relation to restrictive practices. The Commissioner can issue a written notice if an approved provider does not comply with their responsibilities. The Commissioner may also apply for a civil penalty order if an approved provider does not comply with the written notice.

Consultation

Extensive consultation has been undertaken through the Royal Commission and the Restraint Review on the use of restrictive practices in residential aged care. The recommendations of the Royal Commission and the Restraint Review have instrumentally informed the amendments to the Aged Care Act.

Key stakeholders consulted in the drafting of the amendments included representatives of residential aged care providers and their peaks, consumer peaks, the Aged Care Quality and Safety Commission, the Australian Commission on Safety and Quality in Health Care and academics with expertise in aged care clinical practice.

Aged Care Act 1997

Item 1 – After paragraph 54-1(1)(e)

This item inserts new paragraph 54-1(1)(f) into the Aged Care Act. This amendment sets out a new responsibility of an approved provider in relation to the quality of the aged care that an approved provider provides. If an approved provider provides a kind of care specified in the Quality of Care Principles to care recipients, they have a responsibility to ensure a restrictive practice in relation to those recipients is only used in the circumstances set out in those Principles.

The Quality of Care Principles will be amended to provide the kinds of care delivered in a residential care setting that will be subject to new paragraph 54-1(1)(f).

Restrictive practice is defined in new section 54-9 (see Item 3 below).

Item 2 – At paragraph 54-3(2)(g)

This item amends the wording of paragraph 54-3(2)(g) of the Aged Care Act to omit the words 'physical restraint or chemical restraint' and substitutes the words 'a *restrictive practice'.

This is a consequential amendment to reflect the amendments made by Items 1 and 3. This amendment also reflects that the Quality of Care Principles will be amended to remove the definitions of 'physical restraint' and 'chemical restraint', although both types of restraint will be retained as a type of restrictive practice.

Item 3 – At the end of Division 54

This item inserts new sections 54-9 and 54-10 into the Aged Care Act.

Section 54-9

New section 54-9 sets out what a restrictive practice is in relation to a care recipient.

New subsection 54-9(1) defines a restrictive practice, in relation to a care recipient, to mean any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.

New subsection 54-9(2) provides that, despite subsection (1), the Quality of Care Principles may provide that a practice or intervention is a restrictive practice in relation to a care recipient.

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 purpose of these amendments is to include key matters that relate to the use of restrictive practices in primary legislation (as all of the current requirements are contained in the Quality of Care Principles), and enable delegated legislation to provide the detail of such requirements.

The Quality of Care Principles will provide additional detail on what constitutes a restrictive practice or intervention by defining each type of restrictive practice.

Providing clarity on restrictive practices and interventions has been requested by the aged care sector to ensure they can comply with their responsibilities regarding the use of restrictive practices in an aged care facility. To promote person centred care within the aged care sector it is essential that legislative responsibilities are understood and applied.

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. As these amendments are intended to ensure that all forms of restrictive practices are accurately captured, it is appropriate that the legislation relating to restrictive practices can be adapted and modified in a timely manner. Allowing some flexibility to promptly respond to unforeseen risks, concerns and omissions aligns with community expectations and the key aim of regulating restrictive practices, which is to protect older Australians from use of such practices other than in accordance with the limited circumstances to be set out in the Aged Care Act and Quality of Care Principles.

Section 54-10

New section 54-10 sets out that the matters that the Quality of Care Principles must require for the purposes of new paragraph 54-1(1)(f) (see Item 1 above).

New subsection 54-10(1) provides that the Quality of Care Principles made for the purposes of paragraph 54-1(1)(f) must require, or make provision for, certain matters relating to the regulation of restrictive practices. The Quality of Care Principles must:

- require that a restrictive practice in relation to a care recipient is used only:
 - as a last resort to prevent harm to the care recipient or other persons; and
 - after consideration of the likely impact of the use of the practice on the care recipient; and
- require that, to the extent possible, alternative strategies are used before a restrictive practice in relation to a care recipient is used; and
- require that alternative strategies that have been considered or used in relation to a care recipient are documented; and
- require that a restrictive practice in relation to a care recipient is used only to the extent that it is necessary and in proportion to the risk of harm to the care recipient or other persons; and
- require that, if a restrictive practice in relation to a care recipient is used, it is used in the least restrictive form, and for the shortest time, necessary to prevent harm to the care recipient or other persons; and
- require that informed consent is given to the use of a restrictive practice in relation to a care recipient; and
- require that the use of a restrictive practice in relation to a care recipient is not inconsistent with any rights and responsibilities of care recipients that are specified in the User Rights Principles; and
- make provision for, or in relation to, the monitoring and review of the use of a restrictive practice in relation to a care recipient.

New subsection 54-10(2) provides that the Quality of Care Principles made for the purposes of paragraph 54-1(1)(f) may provide that a requirement specified in those Principles does not apply if the use of a restrictive practice in relation to a care recipient is necessary in an emergency, noting that an emergency could be behaviourally based.

New subsection 54-10(3) clarifies that new subsections 54-10(1) and (2) do not limit the matters that may be specified in the Quality of Care Principles made for the purposes of paragraph 54-1(1)(f).

Item 4– Clause 1 of Schedule 1

This item inserts a new definition of ‘*restrictive practice*’ into Clause 1 of Schedule 1 to the Aged Care Act. Restrictive practice is defined, in relation to a care recipient, to have the meaning given by new section 54-9 (see Item 3 above).

Aged Care Quality and Safety Commission Act 2018

Item 5 – Section 7 (definition of compliance notice)

This item amends the definition of ‘compliance notice’ by omitting ‘section 74EE’ and substituting the words ‘subsection 74EE(1) or (1A)’ to refer to the new provision inserted into the Quality and Safety Commission Act by Item 9 below.

Item 6 – Section 74A (paragraph beginning “The Commissioner may give”)

This item amends the simplified outline of Part 8A in section 74A of the Quality and Safety Commission Act. This item inserts the words ‘or (f)’ after ‘paragraph 54-1(1)(e)’ in the paragraph beginning “The Commissioner may give...”. The effect of this amendment is that the simplified outline will describe that the Commissioner may give an approved provider a compliance notice requiring the provider to take, or refrain from taking, action in order to address non-compliance with the provider’s responsibilities relating to the use of restrictive practices. This amendment is consequential to other amendments introduced by Schedule 1 to the Bill, notably Item 1 and Item 9.

Item 7 – Before subsection 74EE(1)

This item inserts the clarifying subheading *Incident management provisions* before subsection 74EE of the Quality and Safety Commission Act. This is intended to differentiate subsection 74EE(1) from new subsection 74EE(1A), as inserted at Item 9.

Item 8 – Subsection 74EE(1)

This item omits the defining words “(a *compliance notice*)” from subsection 74EE(1) of the Quality and Safety Commission Act because the definition of compliance notice in section 7, amended by Item 5 above, defines a compliance notice with reference to both subsections 74EE(1) and (1A).

Item 9 – After subsection 74EE(1)

This item inserts a new subsection 74EE(1A) into the Quality and Safety Commission Act. This item provides for a new subheading, *Use of restrictive practices*, prior to setting out new subsection 74EE(1A), and a new subheading, *Compliance notice*, after new subsection 74EE(1A), to differentiate it from subsections 74EE(1) and (2).

New subsection 74EE(1A) provides that the Commissioner may give a written notice to an approved provider if the Commissioner is satisfied that an approved provider is not complying with the provider’s responsibility under paragraph 54-1(1)(f) of the Aged Care Act. The relevant responsibility is to ensure a restrictive practice in relation to certain care recipients is only used in the circumstances set out in the Quality of Care Principles (see Item 1 above).

Alternatively, the Commissioner may give a written notice to an approved provider if the Commissioner is aware of information that suggests that an approved provider may not be complying with that responsibility to ensure a restrictive practice in relation to certain care recipients is only used in the circumstances set out in the Quality of Care Principles.

The item mirrors existing provisions in subsection 74EE(1) relating to compliance notices for incident management provisions. The effect of new subsection 74EE(1A) is to establish a basis for the Commissioner to issue compliance notices regarding the use of restrictive practices.

Item 10 – Section 74J (table item 6, column 1)

This item amends item 6 of the table in section 74J of the Quality and Safety Commission Act by omitting the words ‘section 74EE’ and inserting the words ‘subsection 74EE(1) or (1A)’.

Section 74J identifies the decisions that are reviewable and the affected person who may request reconsideration of these decisions. The amendment of table item 6 has the effect of including a decision to issue a compliance notice under new subsection 74EE(1A) as a reviewable decision for a person whose interests are affected by that decision.

SCHEDULE 2—AMENDMENTS RELATING TO HOME CARE ASSURANCE REVIEWS

Overview

Schedule 2 of the Bill amends the Aged Care Act to allow the Secretary to conduct reviews (assurance reviews) to assure the arrangements for the delivery and administration of home care are effective and efficient. Assurance reviews will inform the continuous improvement of home care policy and the education of approved providers in relation to home care and home care services.

The Secretary, or appropriate delegate, will be able to issue ‘notices to give’ and ‘notices to attend’ to approved providers that are corporations to collect information in relation to an assurance review. Approved providers that are corporations will be required to provide all reasonable facilities and assistance to the Secretary, and persons assisting the Secretary, in their performance of the reviews. Failure to comply with these notices or provide reasonable assistance will incur civil penalties. The Secretary will also be able to request that a person (or approved provider that is not a corporation) to provide any information or documents that are relevant to an assurance review. The person is not required to comply with the request.

The Secretary or persons assisting the Secretary may prepare and publish reports on assurance reviews, dealing with findings, conclusions or recommendations made as a result of the reviews. The report may be published where no identifying personal information is included. The Secretary may publish information on providers who do not comply with notices to produce information or provide reasonable assistance. The assurance reviews will provide transparency for consumers and increased program oversight for the Government.

Aged Care Act 1997

Item 1 – At the end of section 84-1

This item adds home care assurance reviews to the list of matters dealt with by Chapter 6 of the Act.

Item 2 – After paragraph 86-9(1)(l)

This item amends section 86-9 to allow the Secretary to make publicly available information about approved providers who have failed to comply with notices given under sections 95BA-5 or 95BA-6 and/or their responsibilities under section 95BA-7. For example, the Secretary may note an approved provider’s non-compliance on the My Aged Care website.

Item 3 – At the end of Chapter 6

This item inserts Part 6.8, Division 95BA, sections 95BA-1 to 95BA-8 at the end of Chapter 6. Part 6.8 deals with home care assurance reviews.

New section 95BA-1 permits the Secretary (or delegate) to conduct reviews (assurance reviews) from time to time for the purpose of assuring that arrangements for the delivery and administration of home care are effective and efficient, and informing development of home care policy and education of approved providers in relation to home care and home care services.

The assurance reviews are distinct from the Aged Care Quality and Safety Commission's responsibilities in regulating approved providers on matters of care quality and safety. These reviews will focus on how approved providers use home care funds to deliver appropriate home care services effectively and efficiently.

New section 95BA-2 provides that the Secretary (or delegate) may specify the Terms of Reference for an assurance review, including which providers will be reviewed and the subject matter of the review. This will enable the Secretary (or delegate) to set the terms of reference for an assurance review on the basis of identified risks or issues related to the use of public funds under the Act. This provision also specifies the matters that may be the subject of an assurance review.

New subsection 95BA-3(1) enables the Secretary (or delegate) to prepare and publish reports on assurance reviews. Pursuant to new subsection 95BA-3(2), the reports published under new subsection 95BA-3(1) must not include personal information, but could provide findings, conclusions and/or recommendations arising from the review. Published reports will generally present findings in aggregate unless a specific example is warranted. For instance, if the reviews find an outlier to a general trend in provider behaviour, the report may highlight the outlier as long as the example does not include identifying information.

New subsection 95BA-3(3) also allows the Secretary to prepare a report on a particular assurance review. Pursuant to new subsection 95BA-3(4), this report will not be published, but may be provided to any approved provider to which the review relates.

New section 95BA-4 provides that the Secretary may be assisted by APS employees in the Department or persons engaged under contract by the Secretary and any of their employees in conducting assurance reviews and preparing any reports on assurance reviews. As part of their role, persons assisting the Secretary will be able to receive, use and disclose information relevant to an assurance review, including protected information as defined under the Act, where this is done in the performance of their functions and duties. Persons assisting the Secretary may not issue notices under Chapter 6-8 unless these powers are specifically delegated to the person under new subsection 96-2(1A). However, persons assisting the Secretary may ask questions requested under a notice issued under new section 95BA-6 if specified in the notice.

New section 95BA-5 permits the Secretary (or appropriate delegate) to issue a notice to provide information or documents to an approved provider where they reasonably believe the approved provider has information or documents relevant to the subject matter of an assurance review. A notice issued under new section 95BA-5 can only be issued to an approved provider that is a corporation as defined under the Act. An approved provider who receives a notice will be required to comply with the notice, including the timeframe specified in the notice. Failure to comply with the notice carries a civil penalty of 30 penalty units. An approved provider is entitled to be paid by the Commonwealth reasonable compensation for complying with this notice.

New section 95BA-6 permits the Secretary (or appropriate delegate) to issue a notice to answer questions to an approved provider who the Secretary reasonably believes has information relevant to an assurance review. A notice issued under new section 95BA-6 can only be issued to an approved provider that is a corporation as defined under the Act. The notice must specify the persons assisting the Secretary who will be asking the questions and the times and means by which the questions will be asked. The notice will permit the approved provider to nominate the appropriate officers, employees or agents to answer the questions. An approved provider who receives a notice will be required to comply with the notice. Failure to comply with the notice carries a civil penalty of 30 penalty units.

New section 95BA-7 requires that an approved provider that is a corporation as defined under the Act must provide the person conducting the assurance review all reasonable assistance and facilities necessary for the effective exercise of the person's duties in relation to the review. This could include provision of information (including where required under a notice) and access to relevant staff and facilities. Failure to comply with this duty carries a civil penalty of 30 penalty units.

New section 95BA-8 provides that the Secretary (or delegate) may request information or documents to be provided where they reasonably believe that a person (including an approved provider who is not a corporation as defined under the Act, or a care recipient) has information or documents relevant to a subject matter of an assurance review. The person is not required to comply with the request.

Item 4 - After subsection 96-2(1)

This item inserts new subsection 96-2(1A). New subsection 96-2(1A) provides that subsection 96-2(1) does not apply to the Secretary's power to give a notice under new section 95BA-5 or new section 95BA-6, and permits the Secretary to only delegate their powers under these new sections to an SES employee or acting SES employee in the Department.

Item 5 – Clause 1 of Schedule 1

This item amends Schedule 1 of the Act by inserting a new defined term of 'assurance review' in the Dictionary that links back to the definition in section 95BA-1.

SCHEDULE 3 – AMENDMENTS RELATING TO THE AGED CARE FINANCING AUTHORITY

Overview

Schedule 3 of the Bill removes the requirement for the Minister to establish a committee to be known as the Aged Care Financing Authority (ACFA). Once this requirement is removed, ACFA will be abolished and a new advisory body will be established to provide advice to Government on aged care financing issues. A separate instrument will repeal the *Committee Principles 2014*, which set out ACFA's functions and governance arrangements.

Aged Care Act 1997

Item 1 - Subsection 96-3(1)

This item repeals the existing subsection and substitutes a new subsection which provides that for the purposes of the Aged Care Act and the *Aged Care (Transitional Provisions) Act 1997*, the Minister may establish one or more committees.

Restrictive practices amendments – Certification of independent reviews equivalent to a Regulation Impact Statement



Australian Government
Department of Health

Mr Jason Lange
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and Cabinet
1 National Circuit
BARTON ACT 2600

Email: helpdesk-OBPR@pmc.gov.au

Dear Mr Lange

Certification of independent reviews: *Initial response to the Royal Commission (Quality and Safety) – Strengthening providers; New Aged Care Act.*

I am writing to certify that the attached independent reviews (**Attachment A**) have undertaken a process and analysis equivalent to a Regulation Impact Statement (RIS) for a number of aged care quality measures currently being considered by Government.

These documents are submitted to the Office of Best Practice Regulation for the purposes of satisfying the regulatory impact analysis requirements of the Government's initial response to the Royal Commission into Aged Care Quality and Safety (Royal Commission).

The scope of the certified reviews cover the scope of the policy proposal, with the exceptions of implementation and evaluation measures. Given the Government's existing commitment to implementation of relevant Royal Commission recommendations, the Department will remain alert to opportunities to embed evaluation into the policy proposal. Therefore I am satisfied that with this addition, the scope of the certified documents matches the policy proposal and answers all seven RIS questions.

Where fewer than three policy options have been examined, the Department's assessment is that this was feasible in light of the well-established policy problem and the extensive review processes that have informed this policy proposal.

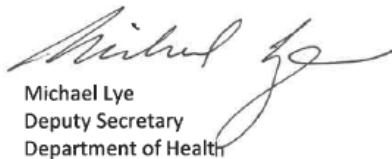
The regulatory burden to business, community organisations or individuals is quantified using the Australian Government's *Regulatory Burden Measurement* framework and is provided below.

I note that the implementation of this proposal will increase the regulatory burden. A search was undertaken across the Department, but no offset measures were identified. The Department will remain alert to opportunities to reduce the regulatory burden for affected stakeholders.

Regulatory burden estimate table				
Average annual regulatory costs (from business as usual)				
Change in costs	Business	Community organisations	Individuals	Total change in costs
Total, by sector	\$1, 446, 662	\$3, 708, 295	\$0	\$5, 154, 957

Accordingly, I am satisfied that the attached report is consistent with the *Australian Government Guide to Regulatory Impact Analysis*.

Yours sincerely



Michael Lye
Deputy Secretary
Department of Health
February 2021

Attachment A: Independent Reviews for certification of initial response to the Royal Commission into Aged Care (Quality and Safety).

Independent reviews for certification of initial response to the Royal Commission into Aged Care (Quality and Safety)

1. Royal Commission into Aged Care Quality and Safety, *Counsel Assisting's Proposed Recommendations at Final Hearing*, 22 October 2020
Available at: <https://agedcare.royalcommission.gov.au/media/29098>
2. Royal Commission Aged Care Quality and Safety Hearing, *Interim Report*, 31 October 2019
Available at: <https://agedcare.royalcommission.gov.au/publications/interim-report>
3. Royal Commission into Aged Care Quality and Safety Hearing, Transcript of proceedings, Hobart, 15 November 2019
Available at: <https://agedcare.royalcommission.gov.au/media/13646>
4. Human Rights Watch, *"Fading Away" How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia*, October 15, 2019
Available at: <https://www.hrw.org/report/2019/10/15/fading-away/how-aged-care-facilities-australia-chemically-restrain-older-people>
5. Senate Community Affairs References Committee, *Effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised - Final Report (April 2019)*
Available at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AgedCareQuality
6. *Review of National Aged Care Quality Regulatory Processes Report*, Carnell, K and Paterson, R, October 2017
Available at: <https://www.health.gov.au/resources/publications/review-of-national-aged-care-quality-regulatory-processes-report>
7. Australian Law Reform Commission, *Elder Abuse—A National Legal Response (ALRC Report 131)* June 2017
Available at: <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>