

12 August 2019
The Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600
By email: human.rights@aph.gov.au

Dear Secretary

QUALITY OF CARE AMENDMENT (MINIMISING THE USE OF RESTRAINTS) PRINCIPLES 2019

This submission is made on behalf of the National Older Persons Legal Services Network (the Network), which is a Network of the National Association of Community Legal Centres (NACLC).

NACLC is the peak body for all community legal centres in Australia. Community legal centres are independent, non-profit, community-based organisations that provide free and accessible legal and related services to everyday people, including people experiencing discrimination and disadvantage. Our members are the eight State and Territory Community Legal Centre Associations that represent 181 centres across Australia.

The National Older Persons Legal Services Network is a Network of NACLC. Its members include representatives from centres across Australia. The Network shares information and good practice and undertakes law reform, policy and advocacy work relating to the rights of older people in Australia and internationally. The Network members that contributed to this submission have specialist expertise in older person's rights issues.

We make this submission to assist the Committee's consideration of the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (the Principles) in light of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

We note and support the submissions made by Human Rights Watch, ADA Australia, the Public Advocate of Queensland and the Combined Guardians/Advocates.

Key Concerns

The use of restraints in aged care settings is a human rights issue of national importance that is inadequately addressed by the Principles. In our view, the Principles are not compatible with human rights. We submit the Committee's statement of compatibility should include an assessment that legislative instrument F2019L00511 is not compatible with human rights.

Restraints are Serious Human Rights Issues

There is substantial evidence that the use of restraints is an unnecessary, disproportionate and unlawful breach of an older person's human rights, including rights arising under state/territory, national and international laws.

The Principles do not provide sufficient protection against such breaches, nor do they provide sufficient accountability for Australia's obligations under international law.¹

The Inadequacy of Consumer Rights

The *Aged Care Act 1997* (Cth) (the Aged Care Act) and related Acts and the Principles are founded on the consumer (rights) protection model – called User Rights. Our view is the consumer protection model is a fundamentally flawed method of protecting older Australians from serious human rights breaches. Additionally, we note the consumer protection model of aged care is not aligned with, nor do aged care consumers have recourse to Australia's national consumer protection laws.

Therefore, we suggest the Principles are not founded within an appropriate rights framework, and in any event, the Act and the Principles do not provide real consumer rights. Even if the model was more closely aligned with Australian consumer laws, those laws would not provide effective or appropriate rights, remedies or redress for older Australian subject of the use of restraints. The treatment of a consumer deceived into a contract for goods by false advertising is different to the treatment of an older person given chemical restraints.

Limited Rights, Remedy and Redress

Older persons who are restrained lack adequate protection from human rights breaches and consequent harm caused by that restraint. Australia's current system of aged care quality and safety does not provide individuals with enforceable guarantees of their human rights.

The articulation of rights within the Charter of Aged Care Rights (the Charter) is a loose hybrid of consumer rights and human rights concepts, yet the Charter lacks clarity and specificity about the normative content of those rights.² Instead, the suite of laws provides guarantees between service provider and the Commonwealth through the intermediary of the Aged Care Quality and Safety Commission and aged care accreditation processes. These processes are described in the recent Royal Commission into Aged Care Quality and Safety Background Paper 7 August 2019 – Legislative Framework for Aged Care Quality and Safety Regulation.

While such regulatory oversight is essential, it is only one aspect of systemic accountability. Individual complaints mechanisms within aged care are driven by a dispute resolution culture, and are essentially geared to engage a process of investigation of systemic service quality and satisfaction of accreditation standards, rather than provide individual rights with associated remedies and redress. Beyond a process of reaching agreement, the Principles have limited ability to be enforced in individual cases of human rights abuses. Our concerns are borne out by application of the Aged Care Quality Standards (the Quality Standards) contained in the Quality of Care Amendment (Single Quality Framework) Principles 2018. The Quality Standards pose standards as 'consumer outcomes' and 'organisational requirements' rather than individual rights.

¹ This includes the Convention on the Rights of Persons with Disabilities (arts 5, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 30), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art 16), the International Covenant on Civil and Political Rights (arts 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 22, 26), the International Covenant on Economic, Social and Cultural Rights (arts 1, 12, 15).

² Normative content includes scope, legal guarantees, availability and accessibility, remedies and redress.

We note that the Commissioner can give directions, which can be acted on by the Secretary including the imposition of sanctions.³ The Aged Care Act sets out that a failure to meet responsibilities under the Act does not have consequences apart from under the Act unless it is a breach of another law.⁴

Given this, it seems the Charter rights are essentially ‘soft law’ or ‘grey-letter law’.⁵ Our view is the gravity of matters like harm arising from the use of restraints is ill-suited to dispute resolution. Accordingly, any breach of the Principles will have limited prospect for individual enforcement, remedy and redress. This is a design fault, and despite their description, the Charter and the Quality Standards simply do not translate into individual rights.

The Principles therefore are not compliant with Australia’s obligations under international law. In essence, the outcomes of the aged care complaints system are not the effective remedy required under international law.

Clause 15E: The Operation of State and Territory Laws

We note the principles do not seek to affect the operation of state and territory laws.⁶ We make a number of points about the ambiguity of this clause:

- The meaning of “any law of a State or Territory in relation to restraint” is unclear. The phrase used by the Principles might refer to laws that have a sole or dominant purpose to operate “in relation to restraint” like disability services laws, or might be construed more broadly, for example state and territory human rights laws and anti-discrimination laws;
- There is a lack of clarity about the application of state and territory laws to residential aged care settings and the Principles do not address this issue;⁷ and
- Statutory human rights considerations are relevant in three jurisdictions (ACT, Vic and Qld) and the impact of human rights laws on public entities providing aged care services remains uncertain and untested. Increasingly, state human rights laws have clearer application to the provision of federal/state services like the Queensland Act’s inclusion of National Disability Insurance Scheme providers.⁸ It seems likely that the use of restraints in aged care will be subject to consideration under the Human Rights Act in Queensland.

In our view clause 15E is ambiguous and could lead to inconsistent application of the Principles.

³ Aged Care Quality and Safety Commission Rules 2018, sections 21(3), 23, *Aged Care Act 1997*, Part 4.4.

⁴ *Aged Care Act 1997*, sections 53-2.

⁵ <http://www5.austlii.edu.au/au/journals/AJAdminLawF/2010/4.pdf>

⁶ Clause 15E.

⁷ The Act’s application to residential aged care providers was raised In the Queensland Parliamentary Committee’s review of the Human Rights Bill 2018.

⁸ See section 9(5) of the *Human Rights Act 2019* (Qld).

Clauses 15F and 15G: The Substantive Provisions

We note differential tests are to be applied in respect of physical and chemical restraints. There appears to be no genuine normative basis for this distinction. The Principles are also at odds with the Charter in a number of instances – for example, the lack of informed consent in chemical restraints is inconsistent with Charter right 7, to have control over and make choices about my care, and personal and social life, including where the choices involve personal risk.⁹

Physical Restraints

We note the test for physical restraints includes five stages.¹⁰ Our concerns with those tests include:

- The process includes a risk assessment without further detail about the required nature, scope and extent of that assessment;¹¹
- It may be that providers do not engage with the requirements at all but simply rely on the emergency discretion on the occasion of each use of restraints. There doesn't appear to be any process where the institutional use of the discretion would be monitored over time, including for misuse;
- The process of testing alternatives requires no assessment of the efficacy of the alternatives used (to the extent possible) or considered.¹² While the Explanatory Statement uses the language of 'last resort', this is not embedded within the Principles themselves. It isn't clear why such an important overriding value would not be clearly marked out within the Principles;
- The notion of least restrictive form is described by the Explanatory Statement as importing a requirement for the shortest possible duration.¹³ This requirement and conditions as to frequency of use or repetition are not embedded within the Principles themselves but for clause 15F(2)(d) which does not adequately clarify the duration/frequency issue. One might presume from the Principles that a single assessment might lead to open-ended use of restraints into the future;
- The requirement for informed consent is critical, but complex and potentially problematic given the use of restraints does not fit neatly into the paradigm of medical treatment.¹⁴ Put simply, the range of restraints used reflect behavioural controls as much as they reflect medical treatment. Therefore, presuming all restraints have a medical basis and can be resolved by informed consent belies the extent and range of restraints used within institutional settings. Many commentators contend the use of restraints more often reflects behavioural controls than individual clinical needs. The Explanatory Statement notes the Aged Care Quality Standards require the Care and Service Plan to identify "the care to be provided to the consumer in relation to the consumer's behaviour". We note that just because restraints are described as 'care' does not necessarily make that so; and

⁹ The Principles are inconsistent with Charter of Aged Care rights at 1, 2, 4, 5, 7, 9, 10 and 11.

¹⁰ Clause 15F.

¹¹ Clause 15(1)(a).

¹² Clause 15 (1)(b)-(c).

¹³ Clause 15F (1)(d).

¹⁴ Clause 15F (e).

- It concerns us that a third-party representative can give informed consent to the use of restraints for an older person. It is questionable whether families and others should be given the power to approve the use of restraints in the absence of any controls. It also supplants other forms of appointed decision making in a way that does not guarantee the safeguards required by international norms like CRPD.

Chemical Restraints

We note the test for chemical restraints (clause 15G) includes a three-stage test. Our concerns include:

- The differential nature of the test when compared with clause 15F;
- Notwithstanding our concerns about the application of informed consent to what amount to behavioural controls; the complete absence of any requirement for informed consent; and
- The requirement that a practitioner has “assessed the consumer as requiring the restraint” provides few controls over the exercise of a significant discretion. The Principles provide no detail about how this decision ought to be reached. In clause 15G, different language is used including that “the reasons the restraint is necessary...” The overall paucity of safeguards emphasises institutional convenience over individual rights.

Lack of Specificity

The Principles lack specificity about a range of issues and terms, including:

- The extent to which processes, decisions and actions are documented and recorded, and how they are used to make assessments, give information and engage with processes of monitoring and review;
- What is meant by key terms and concepts such as ‘necessity’, ‘least restrictive form’, ‘informed consent’, ‘as soon as practicable’, ‘minimum time necessary’, ‘informed’, ‘assessed’, ‘behaviours’, ‘alternatives’, ‘reasons’, ‘emergency’, ‘regularly monitor’ and ‘signs of distress or harm’. While it may not be possible or even prudent to define all these terms, they import significant discretion into the process and invite subjective and potentially unreasonable or improper decision-making;
- It is unclear how restraints that fall outside the ambit of section 4 and clauses 15F and 15G would be regulated. This might include restraints that interfere with an older person’s rights to autonomy, independence, participation, family, privacy etc. The Royal Commission into Aged Care Quality and Safety Background Paper 4 canvasses this issue in detail and provides a number of examples that may not be regulated by the Principles.¹⁵ So while the definitions seek to be broadly encompassing of restrictive practices, they are not.

¹⁵ <https://agedcare.royalcommission.gov.au/publications/Documents/background-paper-4.pdf>

Conclusion

As outlined above, in our view the Principles are not compliant with Australia's existing obligations under a range of international laws. We submit that the Principles are also inconsistent with the evolving set of proposed older person's human rights as articulated in debates before the United Nations Open-ended Working Group on Ageing over the last decade.

These include rights to non-discrimination and equality, autonomy and independence, life and dignified death, self-fulfilment and leisure, participation, aging in a place of choice, support for independent living, mobility and accessibility, privacy and family life, freedom from violence, abuse and neglect and from torture, cruel, degrading or inhumane treatment.

Contact and Next Steps

We confirm that Mr Bill Mitchell, who is a member of the Network is scheduled to give evidence to the Committee at its Sydney hearing.

Mr Mitchell is the most appropriate contact for any questions or further information in relation to this submission. His contact details are:

Bill Mitchell
Principal Solicitor
Townsville Community Legal Service Inc.

Yours sincerely,

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