PARLIAMENT OF AUSTRALIA

Parliamentary Joint Committee on Human Rights
Parliament House, Canberra ACT 2600
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www.aph.gov.au/joint_humanrights

28 August 2019

Ms Glenys Beauchamp PSM
Secretary of Department of Health

Dear Secretary

Inquiry into Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019

I write to you in relation to the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 ('the instrument') on behalf of the Parliamentary Joint Committee on Human Rights (the committee).

The committee would like to thank officers of your department for attending the hearing in relation to the instrument in Sydney on 20 August 2019. I note that the following questions were taken on notice at the hearing (with a date for return of answers by 9 September 2019):

A. You mentioned that it's not just these principles that we have in front of us today that govern, regulate and stipulate how [the process of prescribing the use of certain drugs] works, that there is actually quite a complex interaction between federal legislation, various state based legislation, the industry guidance and principles which governs how doctors, nurses and aged-care facility workers go about their work. That's also the case for what we might consider the pattern of behaviour that could lead to physical restraint as well. Is that correct? It's not just the use of chemical restraints that we're concerned about here; holistically, the whole sphere of aged care is this quite complex interaction of where state legislation ends and federal legislation or regulation principles kick in? … Is there any way that you can provide to the committee simple guidance on what those instruments might be and how they interact? … [Please include the] things that a medical practitioner must do before they prescribe interventions around chemical restraints …. [and] registration requirements and those sorts of things.[1]

B. Please provide a list of organisations that were consulted [and] a synopsis of the consultation process.[2]

C. In the department's view, does [the instrument] engage Australia's obligations under the convention against torture? That's a shorthand version of a longer protocol which includes prohibitions against inhuman treatment. The evidence that we've received today is that, in the view of some submitters, it does engage them. If the department thinks it doesn't, could you explain why you think it doesn't? And if the department thinks it does, could you explain why it doesn't say it in the explanatory memorandum? [3]

[1] Proof *Hansard*, p. 71.

[2] Proof *Hansard*, p. 74.

[3] Proof *Hansard*, p. 75.

The committee has had the opportunity to review the evidence submitted to the inquiry, in addition to the instrument and explanatory materials, and has a number of further questions that would assist with its examination of the instrument in relation to its compatibility with international human rights.

1. How do the consent arrangements for the use of physical restraints operate? In particular:
    a) when can consent be sought from the representative of an aged care consumer rather than the consumer themselves? If more than one person qualifies as a consumer's representative under the instrument, who decides which person will ultimately be deemed to be the consumer's representative (and on what basis)?
    b) if consent is obtained from a representative in accordance with the terms of the instrument, but that person does not have authority under relevant state and territory laws to provide such consent, what are the legal consequences for approved providers (and their employees) in using such restraints? (i.e. would the terms of the instrument be relevant in determining whether consent had properly been obtained for the purposes of criminal, civil and other relevant laws?).
    c) how long is consent valid for? (i.e. is it necessary to obtain consent each time a physical restraint is used?).
    d) are supported decision-making arrangements provided for under the instrument?
    e) does the definition of 'restraint' in the instrument mean that, even where an aged care consumer requests to certain restrictive practices (such as a bed rail or concave mattress), all other requirements in section 15F would also first need to be met before that request could be implemented?
    f) why is 'emergency' not defined in the instrument?
2. How do the consent arrangements for the use of chemical restraints operate? In particular:
    a) what are the *legal* obligations of prescribers, particularly in relation to obtaining informed consent (including the consequences for prescribers in not obtaining informed consent)?
    b) why are approved providers not also required by the instrument to obtain informed consent from consumers *prior* to the application of chemical restraint, or, at a minimum, to confirm and document that consent has been provided to the prescriber before chemical restraints are applied?
3. How does the instrument achieve the objective of promoting a restraint-free environment and ensuring that restraint is not used until all alternatives have been explored? In particular:
    a) what evidence was relied on in designing the instrument to achieve the above objective?
    b) noting that the use of chemical restraint is not used for therapeutic purposes,[4] why is there no requirement that approved providers (as opposed to the practitioners) only use chemical restraint where:
        - it is the least restrictive form of restraint possible;
        - it is for the minimum time necessary;
        - the necessity for chemical restraint is regularly monitored and reviewed;

[4] According to section 4: 'chemical restraint means a restraint that is, or that involves, the use of medication or a chemical substance for the purpose of influencing a person's behaviour, other than medication prescribed for the treatment of, or to enable the treatment of, a diagnosed mental disorder, a physical illness or a physical condition.'

- the aged care consumer has been assessed as posing a risk of harm to themselves or others; and
- other alternatives have first been used where possible?[5]

c) why is there no requirement in the instrument that approved providers take all reasonable steps to reduce and eliminate the need for the use of restrictive practices?

d) why is there no express requirement in the instrument that restraints only be used as a last resort and be in proportionate to the potential negative consequence or risk of harm?

In order for the committee to complete its inquiry during the disallowance period for the instrument, the committee requests that the response be provided by close of business on 12 September 2019.

Please email a copy of the signed response to the secretariat at human.rights@aph.gov.au.

Should you have any questions regarding the committee's consideration of this legislation, please contact the committee secretariat on 02 6277 3823.

Mr Ian Goodenough MP
Chair

[5] Noting that the instrument provides only that *after* chemical restraints are used, the provider must document any alternatives that may have been used, but that Ms Laffan's evidence states that 'on the legislative front' the approved provider 'needs to consider and use alternatives to restraint', *Proof Hansard*, p. 70.