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4 June 2021

Senate Standing Committees on Community Affairs
Department of the Senate

Re: Senate Community Affairs Legislation Committee inquiry into the Aged Care and Other
Legislation Amendment (Royal Commission Response No. 1) Bill 2021

To Whom It Make Concern,

The Older Person's Advocacy Network (OPAN) welcome the opportunity to make a submission to the above inquiry with a specific focus on the amendments to restrictive practices. OPAN has a strong interest in ensuring that the rights of older people are upheld and the minimisation, and eventually the removal, of the use of restrictive practices in aged care.

OPAN is a national network comprised of nine state and territory organisations that have been successfully delivering advocacy, information and education services to older people across Australia for over 25 years. Our members are also known as State Delivery Organisations (SDOs). The OPAN SDOs are ACT Disability, Aged and Carer Advocacy Services, Seniors Rights Service (NSW), Darwin Community Legal Service, Catholiccare NT (Central Australia), Aged and Disability Advocacy Australia (Queensland), Aged Rights Advocacy Service (SA), Advocacy Tasmania, Elder Rights Advocacy (Vic) and Sdvocare (WA).

OPAN's free services support older people and their representatives to address issues related to Commonwealth funded aged care services. OPAN is funded by the Australian Government to deliver the National Aged Care Advocacy Program (NACAP).

The starting point for the regulation of restrictive practices, as stated by the Royal Commission, must be that older people have the right to live free from chemical and physical restraint and other restrictive practices. Followed by the principle that such restraints can only be used as a last resort either after all other strategies have been implemented and reviewed for effectiveness and the older person or their family/representative provides informed consent.

In particular, OPAN endorses the following aspects of recommendation 17 on the use of restrictive practices:

- the use of restrictive practices in aged care must be based on an independent expert assessment and subject to ongoing reporting and monitoring.
- restrictive practice can only be used with the documented informed consent of the person receiving care or someone authorised by law to give consent on that person's behalf
- restrictive practice should only be used as a last resort to prevent serious harm after the approved service provider has explored, applied and documented alternative, evidence-based strategies to mitigate the risk of harm

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- any use of restrictive practices that is not in accordance with the statutory scheme should be reportable under the updated Serious Incident Response Scheme, and
- any breach of the statutory requirements should expose the approved provider to a civil penalty at the suit of the regulator.

OPAN is pleased to see that most of these requirements have been included in the proposed legislative amendments. Our detailed response follows.

Independent Assessment and Review: OPAN understands that independent assessment and review of the use of restrictive practices has not been supported and is not included within the proposed legislation. While we understand that this cannot be changed we would still like to note our support for an independent assessor and independent reviewer. For example, there is a risk that in residential care facilities they could have their own RNs approving restraint to make life easier for everyone at the facility. In particular we note Rec 17 - The Quality of Care Principles 2014 (Cth) should be amended by 1 January 2022 to provide that the use of restrictive practices in aged care must be based on an independent expert assessment and subject to ongoing reporting and monitoring. In light of this we suggest the following changes could be included:

- Large providers utilise an RN from another of their service outlets to assess and review a person
- Smaller providers use local external health practitioners, including via telehealth
- An option for the care recipient and/or their carer to request a review

Consent: OPAN recommends that consent is documented and demonstrates that it is informed consent. For example, a signed consent form (by the older person or their representative (if the older person cannot give consent) and the provider) stating that the reasons for the restrictive practice, what has been tried prior to the use of the practice etc. In addition specific reference should be made to the use of supported decision making in the legislation. There is no section addressing what happens if the older person or their representative refuse to give consent. Does the provider have the right to overturn the rights of the person?

Complaints and Concerns: There seems to be no process for the care recipient or their representative to challenge the use of, make a complaint about restrictive practices. In a rights-based model, older people should have it clearly included in the legislation that they can question/challenge the use of restrictive practices and seek an independent review. There also needs to be a greater role for the ACQSC to review the use of restrictive practices when conducting a site audit or where requested by the older person or their representative.

Supported Decision-Making: The legislation should clearly state that supported decision making must be used to obtain consent from the care recipient directly whenever possible. However, this will also require the Commonwealth to increase knowledge and practical application of supported decision amongst the aged care workforce by incorporating targeted training on human rights, legal capacity and supported decision-making principles and practices.

Substitute Decision Making: Concerns have been raised around those care recipients that do not have a substitute decision maker available. In particular, it has been noted that there is a wait to access a public guardian/advocate. The Commonwealth needs to work with the states and territories so that there is rapid access to, and well resourced, public substitute decision makers to make decisions on behalf of older people when needed. This is particularly important in relation to ensuring that restrictive practices are not inappropriately used.

The role of Advocates: OPAN advocates must be able to report on the use, or proposed use, of restrictive practices on an older person. Advocates can play a pivotal role in monitoring the use of

restrictive practices and can report any known unauthorised uses of a restrictive practice. They can question if the restrictive practice is not being applied in the least restrictive way or is being used inappropriately. The unauthorised use of a restrictive practice by a provider must constitute a reportable incident under the Serious Incident Response Scheme as recommended.

If you would like any further information please do not hesitate to contact me, Craig Gear, CEO,

Yours Sincerely

Craig Gear
CEO
OPAN