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Inquiry into the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Submission from the Department of Health
to the Community Affairs Legislation Committee Inquiry into the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

5 November 2021

Australian Government
Department of Health

Contents

Australian Government
Department of Health

Australian Government
Department of Health

Introduction

The Department of Health (Department) welcomes the opportunity to make a submission to the Community Affairs Legislation Committee Inquiry into the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021.

Aged care reform

The Government is investing $17.7 billion into aged care reform. The measures included in the reform program will lead to once in a generation reform of aged care, providing respect, care and dignity to older Australians.

While many of the reforms currently underway are underpinned by legislation, there are also a range of measures that do not require legislative change. Some examples of measures that are being or have recently been implemented without legislative change include the basic daily fee supplement (including the requirement of reporting on food and nutrition), the development of new quality indicators, and workforce incentives and training programs.

The legislation currently before Parliament and introduced and passed earlier this year should be seen as one aspect of the broader reform program and one mechanism to implement responses to recommendations of the Royal Commission into Aged Care Quality and Safety's *Final Report: Care, Dignity and Respect* (Final Report).

A new aged care Act and the aged care legislative reform program

The first recommendation of the Final Report is that the *Aged Care Act 1997* (Aged Care Act) should be replaced with a new Act to come into force by no later than 1 July 2023. Recommendations 1, 2 and 3 of the Final Report set out a proposed definition of aged care, objects of the new Act, rights of older people receiving aged care and key principles to guide the administration of the new Act. The Australian Government accepted these recommendations in the *Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety* published on 11 May 2021.

In addition to recommendations 1, 2 and 3 relating to a new aged care Act, around 50 other Royal Commission into Aged Care Quality and Safety (Royal Commission) recommendations accepted by Government are likely to require some form of legislative change. Depending on implementation timeframes, recommendations may require:

- amendments to current primary or subordinate legislation
- enabling or specific provisions under the new Act and associated legislative instruments
- consequential amendments to other legislation
- specific transitional legislation.

Australian Government
Department of Health

Some of the urgent changes recommended by the Royal Commission will require both changes to current legislation and implementation under the new Act. The work to reform aged care legislation, including all the relevant subordinate legislation and transitional arrangements, started when the Royal Commission handed down its Final Report and will extend beyond commencement of the new Act on 1 July 2023.

The extent of structural reform recommended by the Royal Commission and agreed by Government necessitates a new legislative framework. The existing Aged Care Act is substantially a funding instrument for aged care providers, and it is no longer fit for purpose.

The new aged care Act will replace current aged care legislation, including the Aged Care Act, the *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act) and related delegated legislation with new legislation that places high quality, safe, compassionate and needs-based care and services for older people at the heart of the system.

The new Act will provide the foundation for fundamental and generational change to the aged care system. It will:

- provide older Australians access to needs-based aged care services
- establish new system oversight and accountability arrangements
- set standards to ensure high quality and safe aged care services
- strengthen regulatory and enforcement powers.

The first stage of aged care legislative reform commenced with the introduction of the Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 on 27 May 2021. The *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* (Royal Commission Response No. 1 Act) received Royal Assent on 28 June 2021.

The Royal Commission Response No. 1 Act contains three measures and was supported by the *Aged Care and Other Legislation (Royal Commission Response No. 1) Principles 2021* (Royal Commission Response No. 1 Principles). The measures in this first stage of legislative reform included:

- Schedule 1: Amendments relating to restrictive practices - a definition of “restrictive practice” and provision for the *Quality of Care Principles 2014* (Quality of Care Principles) to specify certain requirements in relation to the use of a restrictive practice.

- Schedule 2: Amendments relating to home care assurance reviews – an ability for the Secretary of the Department of Health to conduct home care assurance reviews to ensure better government oversight of the price of the services provided to home care recipients.
- Schedule 3: Amendments relating to the Aged Care Financing Authority – removing the requirement for the Minister for Aged Care to establish a committee known as the Aged Care Financing Authority to make way for a non-legislated committee.

The restrictive practices changes made by Royal Commission Response No. 1 Act commenced on 1 July 2021, with further changes under the Royal Commission Response No. 1 Principles relating to behaviour support plans, commencing on 1 September 2021. Amendments relating to home care assurance reviews commenced on 29 June 2021, with the first reviews under that program now underway. The Aged Care Financing Authority was abolished on 1 July 2021.

The Aged Care and Other Legislation (Royal Commission Response No. 2) Bill 2021 (Royal Commission Response Bill No. 2), introduced to the House of Representatives on 1 September 2021, and read a third time on 25 October 2021, is the second stage of legislative reform ahead of the new Act. Government amendments to Royal Commission Response Bill No. 2 were also moved on 25 October 2021.

This submission covers Royal Commission Response Bill No. 2 as amended in the House of Representatives on 25 October 2021.

Bill overview

Royal Commission Response Bill No. 2 contains nine schedules that implement several urgent reforms in response to the Final Report. Royal Commission Response Bill No. 2 includes measures to reform the funding of residential aged care services, increase provider governance and accountability as well as a range of requirements to improve quality and safety for senior Australians receiving aged care services. Royal Commission Response Bill No. 2 amends the Aged Care Act, *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act), the Quality and Safety Commission Act, *National Health Reform Act 2011* (National Health Reform Act), the *Military Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation (Defence Related Claims) Act 1988* and the *Veterans' Entitlements Act 1986.*

Consultation overview

The amendments in Royal Commission Response No. 2 Bill respond to recommendations of the Royal Commission, which ran for 28 months, included 23 public hearings involving 641 witnesses and received over 10,500 public submissions.

This extensive consultation process was not duplicated by the Department. Rather, the consultation for each schedule of the Royal Commission Response No. 2 Bill builds on the work of the Royal Commission. In some cases, consultation is continuing, particularly on details to be included in subordinate legislation.

For these reasons, and to ensure that reform timelines could be met with appropriate enabling legislation in place, Royal Commission Response No. 2 Bill was not the subject of an exposure draft process. Peak organisations, including COTA Australia, ACSA, the Older Persons Advocacy Network (OPAN), LASA and ESTIA Health were provided with an overview of the measures in Royal Commission Response Bill No. 2. on 1 September 2021. A detailed briefing on all aspects of the Royal Commission Response No. 2 Bill was provided to the same group on 10 September 2021. A LASA representative was unable to attend this meeting so a specific briefing for LASA was arranged for 29 September 2021.

In the course of these briefings COTA raised concern that not specifying the number of care recipients in relation to the requirement of clinical care experience on the governing body could provide an incentive for approved providers to reduce the size of their governing body to avoid the requirement. COTA met with representatives from the Department separately to discuss this requirement. This issue is addressed through government amendments to Schedule 5 of Royal Commission Response Bill No. 2.

Schedule 1 Residential aged care funding

Overview

Royal Commission Response Bill No. 2 will replace the outdated Aged Care Funding Instrument (ACFI) with the Australian National Aged Care Classification, or AN-ACC, residential aged care funding model from 1 October 2022. This responds to Royal Commission Recommendation 120 and represents significant funding reform for residential aged care.

From April 2021, residential aged care recipients have been progressively assessed and classified under the AN-ACC, and this classification will now be linked, through Royal Commission Response Bill No.2, to the subsidy calculation for residential aged care providers as the final step in implementing the AN-ACC model.

These amendments create a contemporary, efficient, effective and stable funding approach, to promote investment in residential aged care refurbishment and expansion, provide the foundation for reforms like mandatory minimum care requirements and quality rating systems, and support providers to better deliver individualised care for residents.

Australian Government
Department of Health

Government amendments

The Government amendments to Schedule 1 are technical and deal with the new concept of adjusted basic subsidy amount in the Aged Care Act and the Transitional Provisions Act.

The adjusted basic subsidy amount affects both the calculations of residential care subsidy and resident fees. After introduction of Royal Commission Response Bill No. 2, it was discovered that because the adjusted basic subsidy was applied in relation to the calculation of the maximum daily amount of resident fee, in certain circumstances the incorrect amount of residential care subsidy may be calculated to be paid to providers providing care to residents with high assets and/or high incomes.

The Government amendments insert the adjusted basic subsidy amount concept in relation to steps in the calculation of residential care subsidy. This avoids any unintended impacts on residential care subsidy amounts while preserving intended resident fee calculation outcomes.

Relevant Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety – Recommendation 120: Casemix-adjusted activity based funding in residential aged care

Royal Commission into Aged Care Quality and Safety – Recommendation 121: incentives for an enablement approach to residential care

The Government accepted recommendations 120 and 121 of the Royal Commission. Subject to passage of the Royal Commission Response Bill No. 2, the AN-ACC funding system will commence on 1 October 2022. The AN-ACC shadow assessment period commenced in April 2021 and permanent residential aged care residents will have an AN-ACC classification before 1 October 2022.

Consultation on AN-ACC

Following the announcement in 2016-17 that the Government would investigate options to strengthen residential aged care funding, the Department commenced consultation with a broad range of internal and external stakeholders to gauge appetite for residential aged care funding reform.

A series of 10 roadshows and a webinar (held from May to July 2017), emphasised stakeholder's openness to reform. The internally prepared evaluation report on these events recorded strong support for a new approach to care classification and funding, and demonstrated a groundswell of disenchantment with ACFI.

Through these events, stakeholders were introduced to the concept of a fixed/variable funding model based on the findings from the University of Wollongong's Alternative Aged Care Assessment, Classification System and Funding Models. The Department also flagged with stakeholders that a Resource Utilisation Classification Study (RUCS) would be commissioned to inform the adoption of a fixed/variable model.

On commissioning the University of Wollongong to undertake the RUCS, the Department appointed a Resource Utilisation Classification Study Sector Reference Group (RUCS SRG) in 2017-2019 to provide a sounding board on the aged care sector's impressions of the RUCS early findings, and to discuss the practicalities of implementing a fixed/variable funding model via external assessment. Members were appointed based on their technical expertise and experience – and included a mix of aged care managers, clinicians, finance officers and other administrators.

In tandem, several stakeholder forums were held with a broader audience to communicate the RUCS findings, with all material published online for transparency.

RUCS SRG members were optimistic that the AN-ACC proposals would transform and improve the payment of residential care subsidy (permanent and respite), with many members volunteering to act as change champions should the Government agree to the reform. This engagement signalled to the Department that the sector was ready to transition away from ACFI, and that the AN-ACC, recommended through RUCS, held broader appeal.

The Department also released a Consultation Paper in March 2019 (closing in May 2019) to explain the AN-ACC model in plain language and seek sector feedback. 91 submissions were received. Most of these submissions indicated general enthusiasm for the AN-ACC model and re-emphasised the sector's disenchantment with ACFI.

The idea of external assessment was also generally supported, although some submissions raised concerns over whether workforce could be found to efficiently undertake assessments in rural and remote areas. Other submissions questioned whether the external assessment process would significantly reduce the administrative burden on providers, given the external assessment process involves some level of interaction and assistance from staff within a facility.

Most submissions also emphasised the need for the total level of funding to the sector to also be considered.

Later in 2019, the RUCS SRG was superseded by a broader based committee, the Residential Aged Care Funding Reform Working Group, in recognition that the RUCS research was now finalised, and a greater number of stakeholders needed to be engaged.

The majority of members transitioned to this new group, which was inaugurated in November 2019 to advise the Department on residential aged care funding reform activities, including how to prepare the residential aged care sector.

The group is made up of around 25 members, including former RUCS SRG members, peak bodies, consumer representatives, academics, and rural and remote representatives. This group is integral to helping the Department finesse its approach to change and transition over time.

From July 2021, the Department also has been explaining the detailed operation of the AN-ACC funding model to providers through direct briefings and webinars.

The Department will consult further with the sector on amendments to subordinate legislation made under both Acts after the passage of the primary legislative changes. This will allow for refinement of the finer details of the model during 2022, prior to final implementation of the model on 1 October 2022.

There will be additional opportunities for regular consultation with stakeholders on the operation of the AN-ACC, through the evaluation strategy the Department will roll out.

Timeline for implementation and broader roll out of measure

- December 2020: amendments to primary legislation (through Aged Care Amendment (Aged Care Recipient Classification) Act 2020).
- March 2021: amendments to subordinate legislation (through Aged Care Legislation Amendment (Aged Care Recipient Classification) Principles 2021).
- April 2021: AN-ACC classification assessments commenced – existing permanent residential aged care recipients will have a useable AN-ACC classification for linkage of subsidy funding to that classification on and from 1 October 2022.
- July 2021 onward: departmental briefings on detailed operation of the AN-ACC funding model to providers via direct briefings and webinars.
- September-December 2021: amendments to primary legislation.
- First half 2022: sector consultation on amendments to subordinate legislation.
- September 2022: subordinate legislation finalised for 1 October 2022 commencement.
- October 2022: AN-ACC funding model commences.

The Government has also announced a 2-year $53.3 million fund will be established to assist providers who may need support during the transition to the AN-ACC.

Subordinate legislation

Amendments to primary legislation establish the framework for turning off the ACFI funding model, turning on the AN-ACC funding model, integrating respite funding into the AN-ACC funding model, and repealing redundant supplements.

Detailed implementation will require amendments to a number of Principles and Determinations made under the Aged Care Act and the Transitional Provisions Act.

At this stage, the scope of the changes to Principles and Determinations made under the Aged care Act will include amendments to:

- *Accountability Principles 2014*
- *Allocation Principles 2014*
- *Approval of Care Recipients Principles 2014*
- *Classification Principles 2014*
- *Fees and Payments Principles 2014*
- *Quality of Care Principles 2014*
- *Records Principles 2014*
- *Subsidy Principles 2014*
- *User Rights Principles 2014*
- *Aged Care (Subsidy, Fees and Payments) Determination 2014.*

The scope of the changes to Principles and Determinations made under the Transitional Provisions Act includes:

- *Aged Care (Transitional Provisions) Principles 2014*
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*
- *Aged Care (Transitional Provisions) (Residential Care Subsidy) Determination 2014.*

The Department will consult with sector representatives on subordinate legislation in the first half of 2022.

Schedule 2 Screening of aged care workers, and governing persons, of approved providers and Schedule 3 Code of conduct and banning orders

Overview

The National Care and Support Worker Regulation 2021-22 measure seeks to improve regulatory alignment across the care and support sector, incorporating the aged care, veterans' care and disability support sectors, to reduce red tape for employers, increase mobility of staff to work across the three sectors and strengthen safeguards for people who are provided with care, supports and services. Under the measure, the Government will develop a common code of conduct and a nationally consistent pre-employment worker screening process across the aged care, veterans' care and disability support sectors.

The measure responds to the Royal Commission Final Report, which recommended strengthening regulation of the personal care workforce and increasing protections for aged care consumers from workers who pose an unacceptable risk of harm. Royal Commission Response Bill No.2 supports the implementation of the measure by establishing the legislative authority for nationally consistent pre-employment screening for aged care

workers of approved providers, which will replace existing police check obligations. Royal Commission Response Bill No.2 also provides the basis to establish a national database of cleared and excluded individuals to support employment decisions in aged care, and through mutual recognition arrangements with the National Disability Insurance Scheme (NDIS), across the care and support sector more broadly.

The functions of the Aged Care Quality and Safety Commissioner (Commissioner) will be expanded to allow the Commissioner to enforce a Code of Conduct (Code) that applies to approved providers and their workers and governing persons. Consistent with arrangements that already exist under the NDIS Code of Conduct, the same set of basic behavioural standards will apply to both paid and unpaid aged care workers, regardless of their seniority or role within their respective organisations. Approved providers will need to take reasonable steps to ensure that their paid and voluntary employees comply with the Code.

The Government is seeking to align worker regulation arrangements across the aged care, disability and veterans' care and support sectors where it is reasonable and practical to do so. The Code will be based on the NDIS Code of Conduct, with modifications to ensure it is relevant to aged care.

In line with Royal Commission Recommendation 103, the Code will be backed up by a new banning order regime for aged care workers. A range of other remedial actions will be available to the Commissioner to respond to non-compliance with the Code, with civil penalties and banning orders being reserved for the most egregious matters.

These new regulatory arrangements will prevent unsuitable workers from entering or remaining in the aged care sector and ensure that poor conduct is held to account.

Relevant Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety – Recommendation 77: National registration scheme

The Government accepted in principle Recommendation 77 to regulate the personal care workforce but did not consider it is appropriate to do this through the National Registration and Accreditation Scheme (NRAS) for health practitioners. NRAS requirements would be disproportionately burdensome and costly for personal care workers.

The Australian Health Practitioner Regulation Agency (AHPRA) expressed significant reservations about whether the NRAS was the appropriate regulatory mechanism for personal care workers and noted the substantial issues and barriers that would need to be addressed to meet the threshold requirements for regulation as part of the National Scheme (see AHPRA response to Counsel Assisting's Final Submissions, 12 November 2020).

Australian Government
Department of Health

Consultation

In February 2020, the Department commissioned mpconsulting to conduct a scoping study to provide options for the development of aged care worker regulation arrangements, which included analysis of existing schemes in related sectors. An extensive public consultation process conducted as part of the study identified a stakeholder preference for staged improvements to aged care worker regulation arrangements, with the first stage comprising implementation of an enforceable code of conduct and a nationally consistent worker screening check for aged care workers. Most stakeholders supported alignment with the NDIS model. The Final Report of the scoping study was delivered on 25 August 2020 and informed the development of the National Care and Support Worker Regulation measure.

In August 2021, the Department held meetings with key aged care sectors stakeholders to introduce the measure and consult on extending the obligation to comply with the Code to approved providers as part of Royal Commission Response Bill No.2.

Timeframe for implementation

The Government has committed to implementing the National Care and Support Worker Regulation measure by 1 July 2022. As is the case with worker screening checks for the disability sector, it is proposed that aged care screening checks will also be conducted by state and territory governments. Commencement of revised aged care worker screening arrangements is therefore dependent on the successful negotiation of an Intergovernmental Agreement between the Commonwealth and state and territory jurisdictions, inclusive of agreed funding arrangements and timeframes for implementation.

Subordinate legislation

The Code will be based on the NDIS Code of Conduct, with modifications to ensure it is relevant to the aged care sector. Bringing the Code into effect through subordinate legislation is consistent with the approach taken in the NDIS, whereby the NDIS Code of Conduct is specified in the *National Disability Insurance Scheme (Code of Conduct) Rules 2018*.

Royal Commission Response Bill No.2 provides that the *Aged Care Quality and Safety Commission Rules 2018* (Quality and Safety Commission Rules) may establish a scheme for dealing with information given to the Commissioner relating to a failure by an approved provider, or an aged care worker or governing person of an approved provider, to comply with the Code. This approach is consistent with the approach taken in relation to equivalent functions and powers of the Commissioner under the Quality and Safety Commission Act, including with respect to the procedural aspects of the Commissioner's complaints functions (see, for example, Part 2 of the Rules).

The subordinate legislation will expand on the operational detail of processes and procedures to deal with a suspected failure to comply with the Code.

It is expected that aged care provider obligations for revised worker screening arrangements will be dealt with in Part 6 of the *Accountability Principles 2014*. This will include the eventual repeal of existing approved provider obligations relating to police checking requirements contained in the Accountability Principles and the Records Principles, once all of the state and territory aged care worker screening laws have commenced and been recognised in Commonwealth legislation. Transitional provisions will ensure existing police clearances are recognised for the remainder of their three-year validity period under current legislation.

Proposed consultation for subordinate legislation

Noting Government's commitment to base the Code on the existing NDIS Code of Conduct, stakeholder input will be sought into the content and operation of a draft Code.
A consultation paper will be released in the latter part of 2021, with targeted stakeholder forums to be hosted in November 2021. There will be opportunities for aged care providers, aged care workers and consumers, as well as stakeholders from the broader care and support sector, to contribute. It is therefore expected that the final Code will reflect a broad consensus view of the types of matters that should be included.

States and territories play an important role in the implementation of the existing NDIS worker screening check, including operating the worker screening units that conduct the checks consistent with the nationally agreed policy.

Expanding the functions of the worker screening units to include undertaking aged care screening checks on behalf of the Commonwealth will require the agreement and operational support of states and territories, including the passage of state and territory 'aged care screening laws', which will provide the basis for state and territory governments to conduct assessments about whether an aged care worker or governing person of an approved provider, or someone seeking to become an aged care worker or governing person, poses a risk to care recipients.

The Government will work closely with states and territories on the development and implementation of an Intergovernmental Agreement which reflects the agreed roles and responsibilities of the Commonwealth and state and territory jurisdictions, respectively, in giving effect to the National Care and Support Worker regulation Budget measure.

Australian Government
Department of Health

Schedule 4 Extension of incident management and reporting

Overview

Royal Commission Response Bill No.2 will extend the Serious Incident Response Scheme (SIRS) from residential care to home care, and flexible care delivered in a home and community setting from 1 July 2022, in line with Royal Commission Recommendation 100.

The SIRS also implements key recommendations in the Australian Law Reform Commission's report *Elder Abuse – A National Legal Response* and the *Review of National Aged Care Quality Regulatory Processes* by Ms Kate Carnell AO and Professor Ron Paterson ONZM. The SIRS is also consistent with the *National Plan to Respond to the Abuse of Older Australians*.

Under the SIRS, providers of in-home aged care services will gain additional responsibilities to identify, record, manage and resolve all incidents that occur. The SIRS will support providers to engage in risk management and continuous improvement activities to deliver safe quality care to aged care consumers. The SIRS places a greater focus on how providers investigate and respond to incidents by introducing more detailed responsibilities to manage and take reasonable steps to prevent incidents.

The definition of reportable incident will be extended to home and community care settings, so that home care and flexible care providers operating in these settings will be required to notify the Commissioner of these incidents. The Commissioner administers the SIRS in the context of a risk based, end-to-end quality and safety framework, with a focus on assessing the actions taken by the provider to ensure the safety, health and well-being of aged care consumers.

Protections against retribution or vilification for individuals reporting such incidents will also extend to incidents in home and community settings. Expanding the SIRS will reduce the risk of abuse and neglect, and introduce measures aimed at protecting vulnerable older Australians receiving aged care services in their home and the community.

Royal Commission Response Bill No.2 also makes amendments to expand the Commissioner's powers to deal with reportable incidents notified by Commonwealth funded aged care service providers. While compliance action is able to be undertaken through the terms of the relevant funding agreements, the Commissioner does not currently have powers to deal with reportable incidents notified by service providers of Commonwealth-funded aged care services.

Royal Commission Response Bill No.2 makes amendments that provide authority for the Quality and Safety Commission Rules to specify how the Commissioner may deal with notifications of reportable incidents by Commonwealth-funded aged care service providers.

Service providers under the National Aboriginal and Torres Strait Islander Flexible Aged Care Program (NATSIFACP) who deliver flexible care in a residential setting have had equivalent responsibilities under SIRS through the NATSIFACP program manual since 1 April 2021. When the SIRS is extended to in-home aged care services from 1 July 2022, service providers under the Commonwealth Home Support Programme (CHSP) and NATSIFACP who deliver care in home and community settings will also have SIRS obligations through the relevant program manuals (which form part of funding agreements).

Royal Commission Response Bill No.2 also authorises Commonwealth-funded aged care service providers to collect, use and disclose information relevant to their obligations in relation to the SIRS for the purposes of the *Privacy Act 1988.* As arrangements for CHSP and NATSIFACP service providers are regulated through funding agreements, these arrangements will ensure that service providers are acting in compliance with Commonwealth privacy law when adhering to their obligations under the SIRS.

Relevant Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety – Recommendation 100: Serious incident reporting

The Government accepted this recommendation. The SIRS in residential aged care and flexible care delivered in a residential aged care setting commenced on 1 April 2021 and, subject to passage of the Royal Commission Response Bill No. 2, the SIRS program will be expanded to in-home aged care services from 1 July 2022. The Commission's enhanced powers to administer the SIRS (introduced from 1 April 2021), including powers to require remedial action, internal investigations, and inquiries into incidents, as well as other actions will also be expanded to aged care delivered in home and community settings from 1 July 2022.

Consultation

The Department has conducted extensive consultation in relation to the SIRS. Prior to the commencement to the SIRS for residential aged care, including flexible care delivered in a residential setting, consultation was conducted on the scheme's design. The obligation to implement and maintain an incident management system that comply with the Quality of Care Principles and comply with any other requirements specified in the Quality of Care Principles that commenced on 1 April 2021 are extended to in-home services through the Bill.

During 2019, comprehensive public consultation was undertaken on the finer details of operation of a SIRS for residential aged care. A consultation paper was developed and used as a basis for face-to-face workshops, an online survey and targeted consultation with key stakeholders.

This consultation informed a model paper that was consulted on further with key stakeholders, before being used as a basis to prepare the *Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Act 2021*, and the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*.

The Department also undertook consultation on a draft of the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021* with a group of key stakeholders from December 2020 to January 2021. The stakeholders included representatives from consumer representative groups, advocacy organisations, industry peak bodies, professional and industrial organisations, and other government agencies.

In relation to the expansion of the SIRS to in-home aged care services, the Department engaged KPMG to undertake a prevalence and option study which was completed in June 2021. The option component of the study was informed through focus groups with aged care stakeholders (including consumers, consumer representative groups, aged care providers (across all care types, locations and specialities), industry peak bodies, other Government agencies and advocacy and interfacing organisations).

The final report on this study, *Improving aged care quality protections: Options for a Serious Incident Response Scheme (SIRS) in home and community aged care*, was used to develop a consultation paper which was used as a basis for public consultation through an online survey and virtual workshops with aged care stakeholders (including consumers and their representatives, consumer representative groups, aged care providers, other Government agencies and advocacy groups) from July to August 2021. In acknowledgement of the differences between residential and in-home aged care settings, the outcomes from this consultation are being used to inform the finer details when extending the SIRS to in-home aged care services, to be specified in subordinate legislation.

Timeline for implementation

The SIRS obligations under the Aged Care Act will be extended to providers of in-home aged care services from 1 July 2022. In parallel with Parliament's consideration of the Bill, the Department and the Aged Care Quality and Safety Commission are progressing IT system changes required to ensure that providers of in-home aged care services will be able to prepare notifications of reportable incidents through the My Aged Care Provider Portal in the same way residential aged care providers currently notify of reportable incidents. Communications and capability building activities are planned to be delivered to the sector in early 2022 to ensure providers, workers and consumers are prepared for the new obligations from 1 July 2022.

The privacy authorisation for Commonwealth-funded aged care service providers will commence from the day after Royal Commission Response Bill No.2 receives Royal Assent.

This will ensure that service providers of NATSIFACP who deliver care in a residential setting, are authorised to collect, use and disclose information, in accordance with the *Privacy Act 1988*, as soon as possible. While the SIRS obligations apply to these NATSIFACP service providers already, it is important that this authorisation apply as soon as possible because since 1 October 2021, providers of residential care, including flexible care in a residential setting, have been required to report Priority 2 reportable incidents to the Commissioner. Priority 2 reportable incidents are reportable incidents that have a low or no impact on an aged care consumer, which are less likely to be captured by existing authorisations provided for under privacy law.

Following Royal Assent, an amending instrument will also establish the details of how the Commissioner will be able to deal with reportable incidents notified by Commonwealth-funded aged care service providers. The arrangements will be largely consistent with those that currently exist under the Quality and Safety Commission Rules for approved providers. The legislative instrument including these arrangements is proposed to commence the day after it is registered on the Federal Register of Legislation.

Subordinate legislation

As discussed above, from 1 July 2022, the Quality of Care Principles and Quality and Safety Commission Rules will specify the operational arrangements for the SIRS for in-home aged care services. The arrangements will be largely consistent with existing arrangements for residential aged care, currently included in Part 4B of the Quality of Care Principles and Part 6A of the Quality and Safety Commission Rules. In general terms the subordinate legislation will extend the SIRS requirements to in-home services including requirements relating to the management of incidents, and the process and procedure requirements with a focus on preventing re-occurrence. The subordinate legislation will also extend the incident management system requirements and timeframes for reportable incidents, including the details regarding when and what information about reportable incidents should be included in a notification to the Commission and what actions the Commissioner can take in response.

However, it is recognised that there are significant contextual differences between residential care and in-home care, and that this will mean that the SIRS will need to differ in some minor ways for in-home care. Based on the outcomes of consultation so far, it is proposed that incident management requirements will be refined to ensure incidents only connected through the location of services delivered but that are outside a provider's control, are not considered a reportable incident (for example, if an incident were to occur between a family member and a neighbour while an aged care worker was delivering services to a consumer).

It is anticipated that the incident category on the use of restrictive practices will also require some refinements as the requirements for the use of restrictive practices under Part 4A of the Quality of Care Principles do not apply to providers of in-home care. However, these arrangements will be further tested and refined through targeted consultation on the instrument with a group of key stakeholders representing those who will be affected by the changes.

Following Royal Assent, the Quality and Safety Commission Rules will also be amended to prescribe how the Commissioner deals with reportable incidents notified by Commonwealth- funded aged care service providers, including under NATSIFACP. Mirroring existing arrangements for approved providers under Part 6A of the Quality and Safety Commission Rules, on receipt of a notification of a reportable incident by a service provider, it is proposed that the Commissioner will gain the power to require additional information, a final report to be provided or that an inquiry or remedial action be undertaken in relation to the incident. It is also proposed that the Commissioner will be able to refer the incident to police or another body with responsibility in relation to the incident, or take other action to deal with the incident the Commissioner considers reasonable. These amendments are proposed to be made soon after Royal Commission Response Bill No.2 receives Royal Assent.

Proposed Consultation for subordinate legislation

As noted above, as was done for the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*, the Department intends to undertake consultation with a group of key stakeholders on the amendments to the Quality of Care Principles and Quality and Safety Commission Rules that will specify the operational arrangements for the SIRS for in-home aged care services. It is proposed that the stakeholders will include representatives from consumer representative groups, advocacy organisations, industry peak bodies, and other government agencies.

A key focus through this consultation will be to understand where and how it may be appropriate for the SIRS arrangements to differ in acknowledgement of the contextual differences between the residential setting and the home and community setting. It is proposed, depending on drafting resources, stakeholder availability and approvals, that this consultation will be conducted in late 2021.

Australian Government
Department of Health

Schedule 5 Governance of approved providers

Overview

Royal Commission Response Bill No.2 strengthens legislative arrangements to improve the governance of approved providers. These amendments align with Royal Commission Recommendations 88 to 90, which note that good provider governance arrangements result in high quality care for consumers.

The amendments will introduce new governance responsibilities for approved providers in relation to the membership of their governing bodies, and the establishment of new advisory bodies, as well as measures to improve leadership and culture. They will also introduce new reporting responsibilities, which will help care recipients and their families to understand key details of providers, including information about financial circumstances, staffing levels and complaints.

The amendments will also require approved providers to notify the Commission of changes to key personnel and will replace the current disqualified individual arrangements with a suitability test for key personnel, which are consistent with the arrangements under the NDIS.

The strengthened governance arrangements are designed to improve the transparency and accountability of approved providers and change the culture from the top down.

Government amendments

Royal Commission Response Bill No.2 introduces two new responsibilities that relate to the membership of an approved provider's governing body. These responsibilities require:

- the governing body to have a majority of independent non-executive members
- at least one member to have experience in the provision of clinical care.

The Government acknowledges that some approved providers have a governing body that is formed by a sole director, or a small number of members. To address this, Royal Commission Response Bill No.2 provides that the above governing body membership requirements do not apply in certain circumstances.

The circumstances in Royal Commission Response Bill No.2 differed for the two new governance requirements. An approved provider that has a governing body of fewer than five members and provides care to fewer than 40 care recipients across their services, was not required to have a majority of governing body members who are independent non-executive members.

As introduced, the Royal Commission Response Bill No.2 provided that an approved provider with a governing body with fewer than five members was not required to ensure that at least one member of their governing body has experience in the provision of clinical care.

The government amendments (now included in Schedule 5 of Royal Commission Response Bill No.2) further strengthen the new provider governance arrangements by aligning these two 'carve out' arrangements. This means that the responsibility of approved providers to ensure that at least one member of their governing body has experience in the provision of clinical care will only cease to apply where the governing body has fewer than five members and the approved provider provides care to fewer than 40 care recipients across their services.

The amendments address feedback from COTA in relation to the obligation regarding having at least one member of the governing body with clinical care experience. This feedback was that not specifying an additional requirement about the number of care recipients who are provided services by the approved provider may provide an incentive for approved providers to simply reduce the size of their governing body to avoid the requirement, contrary to the intention of the Bill.

Relevant Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety – Recommendation 88: Legislative amendments to improve provider governance

Royal Commission into Aged Care Quality and Safety – Recommendation 89: Leadership responsibilities and accountabilities

Royal Commission into Aged Care Quality and Safety – Recommendation 90: New governance standard.

The Royal Commission highlighted provider governance as one of the key systemic problems responsible for shortfalls in the quality and safety of care, stating that if 'providers had good governance arrangements in place, it is highly likely that the level of substandard care would reduce significantly'.

The Government accepted these recommendations, including introducing strong legislative obligations for approved providers of aged care aimed at improving transparency and accountability and ensuring the needs, preferences and best interests of people receiving care are at the core. of service delivery.

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Subject to the passage of the Royal Commission Response Bill No. 2, strengthened provider governance responsibilities aimed at improving transparency and accountability, changing culture, and focusing on the best interests of people receiving care will commence on 1 March 2022. This date is to enable time, following passage of the Bill, for service provides to be informed of the changes and to prepare to meet their new responsibilities.

The Aged Care Quality and Safety Commission is also leading a provider governance capability building program, which will launch in December 2021. This program will seek to build governance capability across aged care leaders (such as board members) and be comprised of different modalities for varying needs. The program will focus on improving transparency and accountability to shift the focus of governing bodies to a consumer focused culture that comes from the top down and reinforces the need for all individuals working within the organisation to have sound caring practices that put consumer needs first. The program will also support aged care providers to be well educated on the strengthened legislative requirements from 1 March 2022.

The Government noted in its response to recommendation 88 that amendments relating to the *Freedom of Information Act 1982* will require consultation with the Attorney-General's Department. Consequential amendments to the *Freedom of Information Act 1982* will be required as a result of the new aged care Act, and relevant amendments will be considered at that time.

In accordance with Recommendation 89, the new Bill places a requirement on governing bodies of approved providers to ensure staff members:

- have appropriate qualifications, skills or experience to provide the care or other services that the provider offers
- are given opportunities to develop their capability to provide that care or those other services.

Consistent with Recommendation 89, these requirements reinforce providers' existing responsibilities under the Aged Care Quality Standards (Quality Standards) to ensure the organisation has a skilled and qualified workforce, sufficient to deliver and manage safe, respectful, and quality care and services. The Quality Standards also require the provider to ensure the workforce is recruited trained, equipped, and supported and to regularly assess, monitor and review the performance of each member of the workforce. The Aged Care Quality and Safety Commission assesses and monitors the performance of providers against these responsibilities.

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Consultation

Legislative arrangements in Schedule 5 closely align with Recommendations 88, 89 and 90 of the Final Report. The Royal Commission undertook extensive public consultation in reaching its recommendations, including receiving over 10,500 submissions, 6,800 telephones calls, and 641 witnesses at hearings. This included a hearing held on 15 November 2019 specifically on the governance of approved providers of aged care. The hearing examined the operations of two approved providers of aged care services and explored ways to improve the governance of aged care providers.

Further, the legislative amendments regarding key personnel requirements are also aligned with Recommendations 16 and 17 of the Inquiry into the Events at Earle Haven conducted by Kate Carnell in 2019. This Inquiry sought the views of those affected by the events including representatives from the provider, workers and residents and their families.

In response to feedback received during stakeholder briefing on the Bill, government amendments to schedule 5 of Royal Commission Response Bill No. 2 were made.

Further consultation on amendments to subordinate legislation will occur. This will include consultation in relation to each aspect of the subordinate legislation listed below, including approved provider's responsibilities relating to key personnel, governing bodies and reporting responsibilities.

Timeline for implementation

The amendments in Schedule 5 introducing new governance responsibilities for approved providers are intended to come into effect on 1 March 2022. This timing is to ensure providers have sufficient time to prepare to meet their new responsibilities.

Grace periods will apply to some new responsibilities for existing approved providers. The grace periods only apply to providers approved before 1 March 2022 and in relation to:

- the responsibilities of certain approved providers relating to their governing bodies etc. under proposed new section 63-1D
- the responsibility relating to constitution of approved providers that are wholly-owned subsidiary corporations under new section 63-1H.

This grace period, of one year, acknowledges that, depending on the constitution of the corporation, a full cycle of meetings may need to occur for new members of a governing body to be appointed, and for changes to be made to the constitution.

Further, approved providers will be required to commence collecting information for inclusion in the annual statement from 1 July 2022, and will need to compile their first statement for the 2022-23 financial year.

All other responsibilities and requirements apply from 1 March 2022.

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Department of Health

Subordinate legislation

Subordinate legislation is being prepared to provide additional detail on specific requirements in Royal Commission Response Bill No.2, including:

- responsibilities relating to the suitability of key personnel of an approved provider
- responsibilities of certain approved providers relating to their governing bodies, in particular, the requirements to establish and maintain a new quality care advisory body within approved provider organisations
- new reporting responsibilities for approved providers to submit an annual statement on their operations that will be made publicly available.

Schedule 6 Information sharing

Overview

The Government is aligning regulation across the care and support sector to improve quality and safety for consumers and participants while reducing the regulatory burden on cross-sector providers and workers. The care and support sector comprises aged care, disability support including the NDIS, and veterans' care.

An important first step in alignment is facilitating improved information sharing between the departments and agencies that oversee the care and support sector.

The information sharing amendments in Royal Commission Response Bill No. 2 will enable the Aged Care Quality and Safety Commission, Department of Health, Department of Veterans' Affairs, Military Rehabilitation and Compensation Commission and the Repatriation Commission to more efficiently share information across the bodies overseeing the care and support sector. This will enable them to be proactive in their management of risk across sectors, particularly in relation to provider or worker conduct that may put people receiving care, support or treatment at risk of harm. Reciprocal information sharing arrangements will also be put in place for the NDIS.

Royal Commission commentary

The information sharing amendments have been informed by the Royal Commission into Aged Care Quality and Safety (October 2018 – March 2021), the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (April 2019 –present), and the Independent Review of the Adequacy of the Regulation of the Supports and Services Provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020 (August 2020).

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The Royal Commission into Aged Care Quality and Safety noted the importance of improved information sharing and communication systems and endorsed a 'detective-oriented' approach by using available intelligence in a strategic way.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability interim report noted the importance of information sharing to quality care, though has not yet specifically addressed information sharing between regulators.

The Independent Review of the Adequacy of the Regulation of the Supports and Services Provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020 recommended improvements to the exchange of information between agencies regulating the NDIS and disability supports.

Privacy considerations

The information sharing arrangements are intended to facilitate sharing of information between care and support sector agencies to allow them to better ensure the quality and safety of care and supports, not to enable the general disclosure of participant information to government agencies.

The information sharing provisions are designed to be reasonable and proportionate in that they limit the sharing of information, including protected information, to specified Commonwealth departments and authorities and any additional such bodies prescribed in subordinate legislation that have regulatory, compliance or enforcement functions in relation to the provision of care, support, treatment or other related services or assistance. The information shared will be subject to the Australian Privacy Principles and the *Privacy Act 1988,* and protected information is subject to the restrictions on the use of protected information. The amendments will only allow information, including personal and protected information, to be shared for the purpose of the performance of functions or powers by the specified bodies.

These safeguards strike the right balance in ensuring the departments and agencies overseeing the care and support sector can share information with each other to proactively monitor cross-sector risks and protect consumers and participants from harm, with appropriate privacy protections in place.

Consultation

A comprehensive consultation process on care and support sector regulatory alignment is underway with stakeholders, including consumers and participants, families and carers, providers, workers, advocates and peak bodies.

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Informal bilateral meetings were first held with peak bodies and select stakeholders in the care and support sector to inform development of the consultation process. In particular, bespoke approaches to consumer engagement have been designed in consultation with consumer and participant peak bodies.

Briefing of stakeholders across the care and support sector on the information sharing amendments occurred on Tuesday 31 August 2021. Information sharing is also a key area of consideration throughout the broader consultation process.

The broader consultation consists of three stages:

- Stage 1: peak bodies (including consumers and participants, providers and workers) and providers – a background paper was released in October 2021 that informed workshops held over October 15 to 20 directed towards peak bodies and service providers across the care and support sector.
- Stage 2: public consultation – release of a consultation paper in early November, user-friendly online survey, written submissions and workshops for all stakeholders and the broader community. Focus groups for consumers and participants have been designed in consultation with consumer and participant representatives and will include disability accessible communication such as AUSLAN. The consultation paper will be accompanied by a consumer guide and easy read version.
- Stage 3: findings – release of consultation findings in early 2022.

Timeline for implementation and broader roll out of measure

The expanded information sharing provisions in Royal Commission Response Bill No. 2 will come into effect the day after the Act receives Royal Assent. They will not operate retrospectively to authorise disclosures prior to the provisions coming into effect; however, the information able to be disclosed may have been collected before or after commencement.

Similar information sharing arrangements about provider and worker conduct will also be in place under the NDIS. These arrangements will be facilitated by NDIS legislation and subordinate legislation, including new provisions recently passed in the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Act 2021.

Schedule 7 Use of refundable deposits and accommodation bonds

Overview

Royal Commission Response Bill No. 2. implements part of the second component of a three-phase reform process establishing a new financial and prudential monitoring, compliance and intervention framework (FPMCI framework) for the aged care sector.

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The remainder of phase two reforms will be implemented through subordinate legislation to take effect from 1 July 2022.

The FPMCI framework will build the sector's financial resilience and improve its accountability and support continuity of care. It will enable the Government to identify at risk providers earlier and help ensure providers meet their obligations to refund deposits to residents. The framework will also increase provider accountability and help ensure providers meet their obligations to refund deposits to residents. The purpose of these amendments is to further these aims.

Royal Commission Response Bill No. 2 enables the Secretary or Commissioner to request information or documents from an approved provider or borrower relating to the use of a loan made using a refundable accommodation deposit or bond and creates an offence of 30 penalty units ($6,660) for a borrower who does not comply with a request. The purpose of this amendment is to support continued oversight of the use of refundable accommodation deposits and bonds to make a loan, noting that such use may impact on an approved provider's financial viability and thus its ability to provide care to residents.

The Royal Commission Response Bill No. 2. also extends the period of liability between misuse of refundable deposits and insolvency for both providers and key personnel of providers from 2 years to 5 years. This will support compliance with and enforcement of legislative requirements in relation to permitted uses of refundable accommodation deposits and bonds.

The Royal Commission Response Bill No. 2 also clarifies a number of provisions to further assist interpretation of the legislation. This includes:

- clarifying that documents may be requested from providers in addition to information
- clarifying some of the kinds of information or documents that may be requested from a provider or borrower
- consolidating existing compliance requirements for a loan made with a refundable deposit or accommodation bond in a single piece of legislation.

The changes respond to Royal Commission Recommendation 134 relating to more stringent financial reporting requirements and strengthened monitoring powers.

The intended outcomes of these amendments are greater oversight of providers' financial viability and refundable accommodation deposits and bonds, streamlined legislative interpretation and greater disincentives for providers against misuse of refundable accommodation deposits and bonds.

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Department of Health

Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety – Recommendation 134: Strengthened monitoring powers for the Prudential Regulator

The Government accepted this recommendation. Additional monitoring powers are being introduced through the FPMCI framework. This included an expanded Aged Care Financial Report and new requirements for providers to supply financial information on request from 1 July 2021 that were introduced as part of Phase 1 reforms.

The amendments in the Royal Commission Response Bill No. 2 implement a component of Phase 2.

Consultation

Between 2017 and 2019, several reviews[1] examined the financial and prudential management of aged care providers. These reviews supported the need for increased financial transparency of providers, enhanced reporting requirements and greater protection of RADs. In response, in the 2018-19 Budget the Government announced it would strengthen prudential standards and guarantees in residential care through the 'Better Quality Care – managing prudential risk in residential care' measure.

The Department undertook public consultation in 2019 on how to strengthen prudential standards. Aged care sector technical experts and peak organisations were also consulted. The Department received 24 submissions from providers, provider peaks and financial services organisations which were largely supportive of increased provider financial transparency through improving disclosure and reporting. The amendments proposed in Royal Commission Response Bill No. 2 considered this feedback.

Broader prudential and financial reforms

The amendments in Royal Commission Response Bill No. 2. implement a component of Phase 2 of a three-phase reform package to introduce a new financial and prudential monitoring, compliance and intervention framework for the aged care sector. Additional amendments to aged care subordinate legislation will also commence from 1 July 2022, which includes requiring residential providers to submit Quarterly Financial Reports, to enable the Government to better monitor key financial information and expenditure on care.

[1] Stewart Brown, Review of Prudential Framework for Refundable Accommodation Deposits (October 2019); Inquiry into the Events at Earl Haven (2019); Deloitte, Implementation options review: Managing Prudential Risk in Residential Aged Care (May 2019); Legislated Review of Aged Care (Tune Review) (2017); EY, Review of Aged Care legislation which provides for the regulation and protection of Refundable Accommodation Payments in Residential Aged Care, (May 2017)

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Timeline for implementation and broader roll out of measure

- Phase 1 was introduced on 1 July 2021 and will help to increase the oversight of providers' financial viability.
- Phase 2 changes will take effect from 1 July 2022 and will:
    - Enable the Government to request information on loans made with refundable accommodation deposits or bond funds.
    - Extend the period of liability between misuse of refundable deposits and insolvency for both providers and individuals from 2 years to 5 years.
- Phase 3 changes will commence from July 2023 and will:
    - introduce minimum liquidity and capital adequacy requirements for aged care providers.
    - introduce stronger intervention and enforcement powers for government.
- Consultation with the sector on Phase 3 requirements will occur in late 2021.

Schedule 8 Independent Health and aged care pricing authority

Overview

The Royal Commission Response No. 2 expands the functions of the renamed Independent Health and Aged Care Pricing Authority (Pricing Authority). The amendments respond (fully or in part) to Royal Commission Recommendations 6, 11, 115 and 139.

In addition to its current role determining prices of public hospital services, the Pricing Authority will also provide advice to Government on broader health care, and aged care pricing and costing. The Minister for Aged Care will continue to determine actual amounts of aged care subsidies and supplements.

The amendments also enable the Pricing Authority to play a role in reforms being made to the Prostheses List, aimed at reducing the cost of private health insurance for the Australian public, as announced in the 2021-22 Federal Budget.

The office of the Aged Care Pricing Commissioner will be abolished, and the Commissioner's aged care accommodation pricing functions transferred to the Pricing Authority. These functions are to consider requests to establish or change extra service fees, and to consider requests to charge accommodation amounts above the default maximum amount established by the Aged Care Act.

New appointments and governance arrangements will reflect the Pricing Authority's expanded role. Composition of its Board will be amended to include one Chair, two Deputy Chair positions—one each for Aged Care Pricing and Hospital Pricing—and six members. At least two members of the Pricing Authority must have aged care pricing experience and two other members must have hospital pricing experience.

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Department of Health

Government amendments

The government amendments to Schedule 8 enable the Pricing Authority to delegate its new Aged Care Act functions to its Chief Executive Officer (CEO), an acting or permanent Senior Executive Service (SES) officer of the Pricing Authority, or an acting or permanent SES officer who is also an officer or employee of an APS agency or Commonwealth authority and who is assisting the Pricing Authority in relation to those functions. Provision for this inadvertently was not previously made in Schedule 8.

The government amendments respond to feedback from the Independent Hospital Pricing Authority requesting this matter be corrected.

Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety – Recommendation 6: Australian Aged Care Pricing Commissioner
Royal Commission into Aged Care Quality and Safety – Recommendation 11: Independent Hospital and Aged Care Pricing Authority

Royal Commission into Aged Care Quality and Safety – Recommendation 115: Functions and objects of the Pricing Authority

Royal Commission into Aged Care Quality and Safety – Recommendation 139: Parliamentary scrutiny of determinations by the Pricing Authority

In recommendation 6, Commissioner Pagone recommended that the Government should establish an Aged Care Pricing Authority and confer on it all necessary functions for determining prices (inclusive of subsidies and user contributions) for specified aged care services so as to meet the reasonable and efficient costs of delivering those services. Its functions should include the function of identifying and recommending to the Australian Aged Care Commission the aged care services for which price cap determinations or other forms of economic regulation may be appropriate.

The Government instead supported Commissioner Briggs' proposal for an expanded role for the Independent Hospital Pricing Authority under recommendations 11 and 115.

The Government accepted recommendation 11 and the aspects of recommendation 115 relevant to Commissioner Briggs' proposal and noted that the Government would introduce legislation providing for an expanded role for the Independent Hospital Pricing Authority in the 2021 Winter sittings to allow IHPA to commence preliminary work on aged care pricing from 1 July 2021. Subject to the passage of the Royal Commission Response Bill No. 2, the expanded functions of the renamed Independent Health and Aged Care Pricing Authority will commence 28 days after Royal Assent.

The government accepted recommendation 139 in principle but noted that the Minister for Health would be responsible for making decisions about the pricing of aged care services, taking into consideration the advice of the independent pricing authority, with annual reporting to Parliament.

Consultation

Discussion of Recommendation 115 in the Royal Commission's final report noted that a wide range of aged care providers and their peak representative organisations told the Commissioners that independently assessed funding levels will be important for ensuring they are adequately funded to deliver high quality care. [Final Report: Care, Dignity and Respect: Volume 1, Summary and Recommendations, p.150].

The Department briefed the CEO of the Pricing Authority about the arrangements in the measure on 20 August 2021. The Minster wrote to all states and territory Health Ministers on 2 September 2021, advising them that the Bill had been introduced and seeking any comments.

Responses have been received from Western Australia, Queensland, Victoria, Tasmania and New South Wales. Their main concern has been to seek reassurance that states and territories will continue to have a direct role concerning the selection of appointments to the Pricing Authority Board and the CEO and that public hospital pricing arrangements will not be changed. Some jurisdictions also raised concern that the expanded functions may impact on the Pricing Authority's ability to continue to undertake its functions regarding public hospital pricing.

The Bill would require that the Minister consult with all state and territory Health Ministers before making appointments of general board members, and have agreement of all Ministers to the appointment of the Deputy Chair (Hospital Pricing). There is no intent to change the existing processes for pricing of public hospital services and additional resources are being providing to the Pricing Authority to support it undertaking its new role without affecting existing activities. State Health Ministers have also sought assurance that the aged care pricing processes will be supported by broad consultation, noting that some states are also significant providers of aged care services. It is expected that the Pricing Authority will undertake suitably broad consultation with the aged care sector in relation to pricing of aged care and will take into consideration requests from the Commonwealth, the states and territories, and its new legislative responsibilities in developing its work plan.

Subordinate legislation

The Department is scoping potential amendments to subordinate legislation to support and inform the Pricing Authority's development of pricing advice. If amendments are required, the Department will consult with sector representatives in the first half of 2022.

Australian Government
Department of Health

Government amendment: Schedule 9 Restrictive practices

Overview

Schedule 9 revises the strengthened arrangements on the use of restrictive practices that commenced on 1 July 2021, to address unexpected outcomes in relation to the interaction with State and Territory guardianship and consent laws.

On 1 July 2021, the Royal Commission Response No. 1 Act and the Royal Commission Response No. 1 Principles established strengthened requirements on the use of restrictive practices in relation to care recipients in residential care, including flexible care in the form of short-term restorative care provided in a residential care setting. The strengthened requirements on the use of restrictive practices responded to the recommendations of the Royal Commission's Final Report (recommendation 17), the Final Report of the *Independent review of legislative provisions governing the use of restraint in residential aged care* (Restraint Review), and the Australian Law Reform Commission's report *Elder Abuse – A National Legal Response and the Review of National Aged Care Quality Regulatory Processes* (recommendations 4-10 and 4-11) by ensuring more robust protections for care recipients from abuse associated with the inappropriate use of restrictive practices.

From 1 July 2021, the Royal Commission Response No. 1 Principles amended the Quality of Care Principles to detail the responsibilities of approved providers relating to restrictive practices and the limited circumstances in which a restrictive practice can be used in relation to a care recipient. From 1 September 2021 the Royal Commission Response No. 1 Principles also amended the Quality of Care Principles to detail responsibilities of approved providers relating to behaviour support plans, which must be included in a care and services plan when a care recipient requires behaviour support.

In response to Recommendation 17(1)(b)(v) of the Royal Commission's final report, the strengthened arrangements clarified that prior to using restrictive practices the care recipient or a person who is authorised by law to consent on the care recipient's behalf, has consented to the use of restrictive practices in accordance with relevant State or Territory laws. The strengthened arrangements were not intended to affect the operation of any State or Territory laws, and instead are intended to provide clarification on how the laws, which protect individuals from interference with their personal rights and liberties, intersect with the arrangements for restrictive practices.

Since the commencement of the strengthened arrangements, the Government has received advice from States and Territories that in many jurisdictions, in practice, the relevant laws that authorise persons to consent on another's behalf may not allow, and in some cases prevent, persons being recognised as a restrictive practices substitute decision-maker under the Commonwealth aged care legislation.

The amendments introduce interim arrangements to address this issue until State and Territory laws can be amended.

The amendments would allow for the Quality of Care Principles to make further provision for informed consent to the use of restrictive practices to be given in circumstances where a care recipient does not have capacity to consent. This would include the authorisation of a person to consent to the use of a restrictive practice on a care recipient's behalf, where State and Territory laws do not clearly provide for a person to consent to the use of restrictive practices.

The amendments also include a provision to provide immunity from any civil or criminal liability for approved providers and individuals who used or assisted in the use of restrictive practices in relation to a care recipient, where consent was given to the use by a person authorised to provide consent under the Commonwealth laws, and the use complied with the requirements under the Quality of Care Principles. As the proposed consent arrangements may result in an approved provider relying on consent by a person authorised to give that consent under the Commonwealth's aged care laws, rather than under the laws of the relevant State or Territory, this will ensure that approved providers and relevant individuals working with them (such as staff members, volunteers and medical practitioners) are not open to any civil or criminal liability when restrictive practices are used in accordance with the Quality of Care Principles.

Introducing alternative consent arrangements will ensure that approved providers will be able to meet the strengthened requirements on the use of restrictive practices in jurisdictions where legal limitations with consent and guardianship laws exist.

Royal Commission recommendations

Royal Commission into Aged Care Quality and Safety - Recommendation 17: Regulation of restraints

The Royal Commission recommended that the Quality of Care Principles 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.

The Government accepted this recommendation and, as part of the Royal Commission Response Bill No. 1, the Government introduced strengthened restraint legislative provisions that commenced on 1 July 2021.

Consultation

The Department has undertaken extensive consultation in relation to the use of restrictive practices in aged care in addition to the consultation undertaken through the Royal Commission and the Restraint Review.

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Department of Health

The recommendations of the Royal Commission and Restraint Review instrumentally informed the strengthened arrangements on the use of restrictive practices in residential aged care, which commenced on 1 July 2021.

Prior to the commencement of the strengthened arrangements the Department undertook consultation with the Aged Care Clinical Advisory Committee (ACCAC) on the arrangements proposed. The ACCAC includes representatives with clinical experience in the use of restrictive practices including the National Disability Insurance Scheme Senior Practitioner, geriatricians, psychiatrists, general practitioners, pharmacists, nurse practitioners, and representatives for aged care providers and aged care consumers.

The Department also undertook consultation with the Restraint Advisory Group established to support the Restraint Review, both during the review and following to seek their feedback on the proposed strengthened arrangements. The Restraint Advisory Group includes representatives of aged care provider peak bodies, aged care consumer peak bodies, the Australian Guardianship and Administration Council, 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.

It was only after the introduction of the strengthened arrangements on 1 July 2021, that the Government began to fully understand the practical issues with the interactions with State and Territory consent laws. The clarification of consent arrangements brought the issue to the forefront and aged care providers and medical practitioners (e.g. general practitioners and geriatricians) contacted the Government as they were experiencing issues gaining consent prior to the use of restrictive practices in order to meet the clarified requirements. The Government also received correspondence from aged care peak bodies indicating the legal limitations in various jurisdictions.

Since becoming aware of the potential issue, the Department consulted each jurisdiction on their consent and guardianship laws, to clarify the limitations and inform the interim solution being implemented through the amendments.

The Department first met with representatives from the Office of the Public Advocate (or equivalent) in each jurisdiction on 10 August 2021. At this meeting, several jurisdictions advised limitations with legal authority under state and territory laws for a person to consent to the use of restrictive practices, although attendees did not provide detailed information on the limitations. From 13 September to 7 October 2021 the Department met with representatives from the relevant aged care policy departments in each jurisdiction individually to gain an understanding of potential legislative issues.

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Department of Health

On 12 October 2021 the Department met with a group of key stakeholders - including representatives from aged care consumer and provider peak bodies - to brief on the issue and to also seek input on the proposed alternative consent arrangements. The Department also briefed the ACCAC on the issues and the proposed legislative amendments at the meeting of 12 October 2021.

The Department has also established a working group with representatives from justice departments (or equivalent) in each jurisdiction, who first met on 6 October 2021, to discuss what amendments may be required to state and territory guardianship and consent laws in each jurisdiction to resolve the current issues. The Department continues to work with this group on the interim consent arrangements to be included in subordinate legislation.

To support ongoing work with jurisdictions on this issue, the Minister for Health and Aged Care, the Hon Greg Hunt MP, wrote to his State and Territory counterparts in late October 2021 advising of Commonwealth's proposed legislative amendments and requesting continued cooperation in supporting the aged care sector with consent requirements for restrictive practices.

The Department also intends to undertake targeted consultation on a draft of the subordinate legislation with key stakeholders including State and Territory government representatives and aged care consumer and provider peak bodies. This consultation will ensure that the revised arrangements will ensure protections for care recipients, and also ensure that the arrangements are practical and effectively interact with State and Territory laws. It is proposed, subject to drafting resources, stakeholder availability and approvals, that this consultation will be conducted in late 2021, to ensure that the interim arrangements are able to be in force as soon as possible.

Timeline for implementation

Following Royal Assent, subordinate legislation will establish the details of the interim consent arrangements. The legislative instrument including these arrangements is proposed to commence the day after it is registered on the Federal Register of Legislation. In parallel with consideration of Royal Commission Response Bill No.2 by Parliament, the Department is working closely with the Aged Care Quality and Safety Commission and State and Territory Governments to ensure once the interim arrangements are in place, there will be clear guidance for care recipients, aged care providers and their workers on how the arrangements apply (noting that this will differ across jurisdictions, and over time, depending on State and Territory arrangements).

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Subordinate legislation

Following Royal Assent, the Quality of Care Principles will be amended to establish arrangements that allow for certain persons or bodies to give consent if there is no one who can consent to the use of restrictive practices under State and Territory laws. Consequential amendments are also proposed to be made to ensure the effective operation of the alternative consent arrangements, and to also ensure that the immunity arrangements apply appropriately.

The subordinate legislation is proposed to introduce interim arrangements to address this issue until State and Territory laws can be amended. At this stage it is proposed that the Quality of Care Principles will authorise certain persons or bodies to consent to the use of restrictive practices where state and territory laws do not otherwise provide for consent to be provided. This is proposed to include authorising a person who is authorised to consent to medical treatment in relation to the care recipient under the applicable state and territory laws, and someone nominated by the care recipient in writing.

It is proposed that a hierarchy of arrangements will be introduced, with the new persons and bodies authorised under aged care law only becoming relevant where other avenues have been exhausted. However, before these arrangements are finalised, they will be tested and further refined through targeted consultation on the draft instrument with key stakeholders including aged care consumer and provider peak bodies, and State and Territory governments.

The new immunity arrangements will only apply where restrictive practices have been used in a way that is consistent with the requirements under the Quality of Care Principles. For example, the Quality of Care Principles require that restrictive practices must only be used as a last resort, only to the extent that is necessary, for the shortest time and in the least restrictive form, and to prevent harm to the care recipient. It is therefore proposed that amendments will also be made to the Quality of Care Principles to ensure that a restrictive practice may only be used in accordance with the consent that has been provided (such as the particular type of restrictive practice, for the time specified).

This will mean that if, for example, consent is given to the use of a restrictive practice for a particular period of time and it is used for longer than that specified period, it will not have been used in the circumstances set out in the Quality of Care Principles, and therefore those involved will not be able to rely on the immunity in this provision. A further example where the provision is not designed to provide immunity is where consent was provided to the use of a chemical restraint but a higher dose of the relevant medication than what is specified in the behaviour support plan is administered.

This will provide additional protections to care recipients and ensure that the scope of this immunity is limited to use that aligns with the consent that has been provided.

Summary

A number of significant aged care reforms, to be delivered throughout the remainder of 2021 and 2022 rely on timely passage of the Royal Commission Response No. 2 Bill. Each of the reforms underpinned by Royal Commission Response No. 2 Bill will be also be picked up in the new aged care Act. Throughout drafting and Parliamentary passage of the new Act there will be opportunity for stakeholders to engage further on the measures in Royal Commission Response No. 2 Bill, and for implementation issues to be considered and addressed.