



## **Australian Government**

Australian Government response to the Parliamentary Joint Committee on Human Rights report on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*

March 2020

## Introduction

The Australian Government welcomes the report of the Parliamentary Joint Committee on Human Rights on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*.

The Government thanks the Committee for its work, and notes the concerns raised by the Committee, as well as submissions and evidence presented to the Committee from individuals and organisations with an interest in the use of restraints in residential aged care.

### The Royal Commission on Aged Care Quality and Safety

The Royal Commission into Aged Care Quality and Safety (Royal Commission) was announced by the Prime Minister, the Hon Scott Morrison MP, on 16 September 2018 and established on 8 October 2018.

The Royal Commission is a vital step for Australia to understand how we can meet the challenges and the opportunities of delivering aged care services now and into the future.

On 31 October 2019, the Royal Commission released its Interim Report.

The Royal Commission highlighted the overuse of restraints in aged care, noting “while some providers strive to deliver restraint-free environments, there is both empirical and anecdotal evidence to show that the use of restraints is common in aged care”<sup>1</sup>; and “the ‘drivers’ behind the use of restrictive practices are complex and involve multiple factors across the aged care and health systems.”<sup>2</sup>

The Interim Report made preliminary observations and identified areas for reform in relation to the use of restraints, including staff training, regular reviews of residents taking psychotropic medications, and publication of data on restraint use. The Royal Commission is likely to make recommendations on the use of restraints in its Final Report, due by 12 November 2020.

In response to the Interim Report, the Government elevated the Quality Use of Medicine and Medicine Safety to be a National Health Priority and allocated \$35 million to fund initiatives aimed at minimising the use of restraints in residential aged care.

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<sup>1</sup> Royal Commission into Aged Care Quality and Safety, Interim Report, Volume 1, p.198

<sup>2</sup> Royal Commission into Aged Care Quality and Safety, Interim Report, Volume 1, p.203

As the Royal Commission progresses its work, the Government continues to implement its rigorous reform program, including measures to minimise the use of restraints in residential aged care services.

### Regulating restraint use in residential aged care

On 1 July 2019, the Government introduced regulatory requirements in relation to the use of restraints, set out in the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*. These arrangements are set out in Part 4A of the *Quality of Care Principles 2014* and, for the first time, put explicit obligations on residential aged care providers in respect of the use of restraints. The regulations impose restrictions on the use of restraints in residential aged care services. This is in addition to the restrictions imposed by other laws residential aged care providers are required to meet, including state and territory legislation and common law.

The regulatory changes require providers to satisfy a number of conditions before restraint can be used, including an assessment by an approved health practitioner (for physical restraint) or assessment by a medical practitioner or nurse practitioner who has prescribed the medication (for chemical restraint).

The residential aged care provider must also have the informed consent of the consumer or their representative before using physical restraint, unless restraint is necessary in an emergency. Providers are expected to note consent in the consumer's care plan.

Informed consent for the use of chemical restraint must be obtained by the prescribing medical practitioner or nurse practitioner before prescribing medicines, including psychotropics and benzodiazepines. This obligation is set out in the codes of conduct which apply to medical practitioners and nurse practitioners, and is regulated by the respective professional boards. Medical practitioners and nurse practitioners are also required to comply with relevant state and territory laws, including medicines and poisons legislation which governs the prescribing, dispensing and administration of scheduled medicines.

A decision to use restraint should be a strategy of last resort and any use of restraint must also be regularly monitored. Where restraint is used, it must be used for the minimum time necessary, and the need for the restraint must be reviewed.

Other regulatory requirements in relation to the use of restraints also took effect on 1 July 2019. These are addressed in the *Quality of Care Principles 2014* through the Aged Care Quality Standards (Quality Standards), and the *User Rights Principles 2014* through the Charter of Aged Care Rights, made under the *Aged Care Act 1997*:

- Under the Quality Standards, aged care providers must demonstrate that clinical care is best practice, tailored to the needs of each care recipient, and is supported by a clinical governance framework that minimises the use of restraint (including physical and chemical).

The Aged Care Quality and Safety Commission (Commission) assesses and monitors providers' performance against the Quality Standards. Sanctions may be imposed on residential care providers that do not meet their requirements under the Quality Standards.

- The Charter of Aged Care Rights provides that care recipients have the right to live without abuse and neglect, to be treated with dignity and respect, and to have control over and make choices about their care.

In addition, the National Aged Care Mandatory Quality Indicator Program includes an indicator on the use of physical restraint, which was mandated for all Commonwealth subsidised residential aged care providers from 1 July 2019. All residential aged care services must collect and provide data to the Department of Health (Department) against the physical restraint quality indicator.

### Strengthening regulation of restraint

The *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* has been the subject of significant interest, including issues in relation to human rights, informed consent for the use of chemical restraint, and whether it is appropriate to regulate these matters within delegated legislation.

The Government carefully considered concerns raised by the Parliamentary Joint Committee on Human Rights, and others, including suggestions for amendments to the regulations, and has taken action to further strengthen the regulation of restraint in residential aged care.

The intent of the legislation has always been that the use of restraint must be a measure of last resort, and in November 2019 the Government made amendments to the legislation to reflect this intent. The *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019* commenced on 29 November 2019. Part 4A of the *Quality of Care Principles 2014* now:

- makes it clear any form of restraint must only be used as a last resort;
- refers to state and territory legislation which regulates the responsibility of prescribers to gain informed consent for chemical restraint; and

- requires a review of the first 12 months of the operation of the restraint regulations to consider the effectiveness of the Quality of Care Principles in minimising the use of inappropriate restraint by providers of residential aged care.

In addition, the Commission continues to give high priority to the issue of inappropriate use of physical and chemical restraint in its education and its regulatory activities. The Commission uses the full range of complementary functions under the *Aged Care Quality and Safety Commission Act 2018* that enable the Commission to better manage risks and respond appropriately to instances of failure.

The Commission's regulatory activities include the use of risk screening questions about the use of physical and chemical restraint, which are asked at unannounced site visits, and re-accreditation audits. The implementation of the assessment methodology to support the consumer focus of the Quality Standards assists the Commission to assess provider's understanding of how the Quality Standards are being applied in practice, and if consumer outcomes are being managed and supported. For restraints, this specifically includes assessment of Standard 3, Personal and clinical care, Standard 7, Human Resources and Standard 8, Organisational Governance. Information received through complaints to the Commission further assists with planning provider quality assessments.

#### Non-regulatory activities to minimise the use of restraint

Minimising the use of restraint in residential aged care requires a multi-pronged approach. Regulatory and compliance measures are only part of the solution, with cultural change and effective clinical governance needed to drive reform.

The Australian Government Chief Medical Officer is chairing a Clinical Advisory Committee (Committee) which has considered non-regulatory activities to reduce the inappropriate use of chemical restraint in residential aged care. The Commission's Chief Clinical Advisor is a member of the Committee.

The Government has supported all of the Committee's recommendations for implementation and a program of work is now underway to address these, including:

- Establishment of an additional Pharmaceutical Benefits Scheme (PBS) authority code for repeat prescription of the antipsychotic risperidone after an initial 12-week period. From 1 January 2020, the PBS listings for risperidone for the treatment of Behavioural and Psychological Symptoms of Dementia (BPSD) of the Alzheimer type changed. This change involves the addition of a new 'continuing' listing that requires prescribers to seek a telephone authority from Services Australia prior to prescribing risperidone beyond 12 weeks of 'initial' therapy, when appropriate. This was a recommendation of the Pharmaceutical Benefits Advisory Committee.

- Awareness raising activities for prescribers of antipsychotics and benzodiazepines in residential aged care and targeted letters to high prescribers. In December 2019, the Chief Medical Officer wrote to all prescribers who were identified as prescribing PBS medications to residents of a residential aged care service between 1 April 2018 and 31 March 2019. The letter and accompanying factsheet, *Six steps for safe prescribing*, provide information and resources that support the appropriate management of dementia in a residential aged care setting.
- Development of education messaging about the appropriate use of antipsychotic medications and benzodiazepines in residential aged care for doctors and other prescribers, pharmacists, nurses and personal care workers, and families and decision makers.
- Workforce training initiatives addressing continuing professional development for doctors, nurses and other prescribers; piloting train-the-trainer programs for nurses and personal care workers; and nurse champions in residential aged care.
- Expanding a trial of embedded pharmacists to all residential aged care services in the Australian Capital Territory (ACT). Funding has been provided to the ACT Primary Health Network who will partner with the University of Canberra to conduct the trial. It is anticipated that the first cohort of pharmacists will be placed in aged care services by February 2020.

This program of work promotes cultural change within the health and aged care sectors, which can best be achieved by a person-centred care approach. It complements the new regulations, which impose restrictions, safeguards and conditions on the use of restraint by residential aged care providers. Together, these measures work to protect the rights of vulnerable senior Australians receiving aged care service.

Other actions taken by the Government to minimise the use of physical and chemical restraint in residential aged care were announced as part of the 2019-20 Mid-Year Economic and Fiscal Outlook, in response to the Royal Commission's Interim Report. The response package included:

- \$5.7 million for a Dementia Behaviour Management Advisory Service and Severe Behaviour Response Team services;
- \$4.3 million for the Dementia Training Program to increase the availability of vocational training for personal care workers;
- \$25.5 million to improve medication management programs to reduce the use of medication as a chemical restraint on aged care residents and at home, and new restrictions and education for prescribers on the use of medication as a chemical restraint.

In addition, \$7.7 million was allocated in the 2019-20 Budget to reduce the misuse of medicines in residential aged care by:

- establishing a pharmacy unit within the Commission to work directly with residential aged care providers around best practice use of medicines; and
- expanding the National Aged Care Mandatory Quality Indicator Program to include two new quality indicators – falls and fractures, and medication management.

The Government is also looking at other mechanisms of aged care reform, including under the Serious Incident Response Scheme where a serious incident will be an alleged, suspected or actual occurrence of a range of categories of incident, one of which is proposed to be inappropriate physical or chemical restraint.

### [Recommendation 1](#)

**In light of the above concerns, the committee recommends, at a minimum, that:**

- **the instrument be amended to include a note to clarify that other laws prohibit the use of both physical and chemical restraint without prior informed consent; and**
- **detailed amendments are made to the explanatory materials accompanying the instrument to clarify how the instrument interacts with state and territory laws, in particular regarding the authorisation of substitute decision-making and the continued obligations for prescribers to exhaust alternative options and obtain informed consent prior to the use of chemical restraint.**

The Australian Government **supports in-principle** this recommendation, which has been addressed through amendments to Part 4A of the *Quality of Care Principles 2014*.

Part 4A now includes two notes that indicate the legal framework governing the responsibility for prescribers to gain informed consent prior to prescribing medicines, including psychotropics and benzodiazepines. The legal framework requires specified medical professionals to obtain informed consent before undertaking any examination, investigation or providing treatment. However, exemptions to this requirement apply for emergencies, for example if a person is experiencing an acute psychosis and there is an immediate risk of harm to the individual, or others. In such a situation, it may not be possible to obtain informed consent beforehand.

- Note 1 of Part 4A references the professional codes of conduct which apply to medical practitioners and nurse practitioners for obtaining informed consent before prescribing medicines, including those used for chemical restraint. The codes of conduct are approved under section 39 of the Health Practitioner Regulation National Law and regulated by their respective boards: The Medical Board of Australia (MBA) and the Nursing and Midwifery Board of Australia (NMBA). All

registration standards, codes and guidelines developed by a National Board are admissible in proceedings under the National Law.

In line with the provisions of the National Law, the MBA and NMBA have each published a code of conduct to set the professional expectations for their respective professions. The MBA's *Good medicine practice: a code of conduct for doctors in Australia* and the NMBA's *Code of conduct for nurses* set the expectations of the MBA and NMBA for a range of topics including communication with patients and/or their carers; gaining informed consent; and the use of scheduled medicines.

The codes of conduct set out that informed consent must be obtained before carrying out a medical or health care examination or investigation, or providing treatment, noting this may not be possible in an emergency.

The codes of conduct require practitioners to comply with relevant legislation administered by states and territories, including medicines and poisons legislation which governs the prescribing, dispensing and administration of scheduled medicines.

- Note 2 of Part 4A sets out that state and territory legislation deals with who can give consent to medical or health care on behalf of a consumer who cannot give consent themselves, because of any physical or mental incapacity. This includes substitute decision-makers, who may give consent to prescribed medicines, including benzodiazepines and psychotropics.

Information about these laws is provided in the Explanatory Statement to the Principles, along with the relevant state and territory contacts where further information can be sought in each jurisdiction. States and territories have different legislative frameworks, which may be amended from time to time. Accordingly, the note included in the *Quality of Care Principles 2014* cannot provide detailed information on the requirements in each jurisdiction. Therefore, prescribers and other health professionals should familiarise themselves with the requirements in the applicable state or territory and seek advice if necessary.

The decision to use chemical restraint in a residential aged care service is a clinical decision that must be made by a medical practitioner or nurse practitioner. A medical practitioner, nurse practitioner or registered nurse who has day-to-day understanding of the care recipient may make a decision in relation to the use of physical restraint. Except in an emergency to avoid harm to care recipients, all decisions to use restraint must be made in consultation with the care recipient or their legal representative where the care recipient is unable to give informed consent; and the use of restraint must only be considered after exhausting all reasonable alternative options.



Before a medical practitioner or nurse practitioner prescribes medication for the purposes of managing behaviours that cause concern, he or she must assess the care recipient as requiring the medication. During the assessment, the medical practitioner or nurse practitioner must satisfy themselves that other non-pharmacological methods have been tried to the fullest extent possible, and those methods have not been successful. The consumer must be experiencing symptoms which are likely to be alleviated by the proposed medication.

The medical practitioner or nurse practitioner would then make a clinical judgement. For example, some behaviours of concern do not respond to medications; therefore, it would not be appropriate to prescribe for these behaviours. However, for some behaviours, e.g. aggressive or psychotic behaviours associated with dementia, including people who have distressing hallucinations or delusions, medication can be of benefit.

All providers of residential aged care are required, under the Quality Standards (Quality Standards), to comply with relevant state or territory laws, including in relation to obtaining informed consent for the use of physical restraint when a care recipient is unable to consent because of any physical or mental incapacity.

In addition, a range of resources have been developed to support residential aged care providers understand appropriate use of chemical and physical restraint in residential aged care and support a restraint free environment:

- The Department has developed the *Decision-Making Tool Kit – Supporting a restraint free environment in Residential Aged Care*. The Commission will be reviewing and updating this guidance document in 2020.
- The Commission has developed a *Self-Assessment Tool for Recording Consumers Receiving Psychotropic Medications* that provides details of the type of information that the Commission will seek to review when undertaking assessments of aged care services against the Quality Standards, and as part of that, monitor how services are effectively overseeing the use of restraints. The tool will also support aged care services' continuous improvement of care and services in relation to use of restraints. The Commission wrote to all residential aged care providers in June 2019 with the Self-Assessment Tool.
- The Commission has also developed the *Guidance and Resources for Providers to support the Aged Care Quality Standards* (2019) booklet which contains information about minimising the use of restraint within both Standard 3 (Personal and Clinical Care) and Standard 8 (Organisational Governance). This tool contains reflective questions and examples of actions and evidence that providers can consider in demonstrating that restraint is only used as a last resort, is monitored and consent is provided. The tool also includes references to relevant resources and tools from the Department and Dementia Australia.

- The Commission has also released scenarios involving physical and/or chemical Restraint and a Regulatory Bulletin to help providers understand issues and their responsibilities around minimising the use of physical and chemical restraint.

Copies of these tools and further information is available on the Commission's website at: [www.agedcarequality.gov.au/providers/assessment-processes/minimising-restraints-use](http://www.agedcarequality.gov.au/providers/assessment-processes/minimising-restraints-use)

## Recommendation 2

**The committee also recommends that the minister undertakes extensive consultation with relevant stakeholders to work towards better regulating the use of restraints in residential aged care facilities, in particular including:**

- **an explicit requirement to exhaust alternatives to the use of restraint, including preventative measures and that restraint be used as a last resort (noting the approach taken by the National Disability Insurance Scheme rules);**
- **obligations to obtain or confirm informed consent prior to the administration of chemical restraint;**
- **improved oversight of the use of restraints in aged care facilities; and**
- **mandatory reporting requirements for the use of all types of restraint.**

The Australian Government **supports-in-principle** this recommendation.

Amendments to Part 4A of the *Quality of Care Principles 2014* now make it clear that the use of physical or chemical restraint must always be the last resort.

Part 4A also provides for a review of the operation of the regulatory arrangements to be conducted 12 months after their commencement. The review must consider the effectiveness of Part 4A in minimising the use of physical restraints and chemical restraints by approved providers of residential aged care in relation to consumers in the period 1 July 2019 to 30 June 2020.

The review must make provision for consultation. It is intended consultation will include engagement with a range of key stakeholders such as state and territory public guardians and public advocates, and state and territory tribunals which can appoint decision makers for consumers and/or give consent themselves.

It is also expected the review will consider concerns raised by the Parliamentary Joint Committee on Human Rights in its report, in addition to concerns raised by other individuals and groups, including consideration of the approach taken by the National Disability Insurance Scheme.

The review must be completed by 31 December 2020. A written report of the review must be prepared and include recommendations in regard to appropriate regulatory arrangements post 30 June 2021. A copy of the report must be published on the internet, and must also be tabled in each House of Parliament within 15 sitting days of that House after the report is given to the Minister.

With regard to reporting the use of restraints, to further improve clinical care in residential aged care, all Australian Government-subsidised residential aged care providers must comply with the National Aged Care Mandatory Quality Indicator Program from 1 July 2019, requiring residential aged care providers to collect and report data against three quality indicators: physical restraint, unplanned weight loss and pressure injuries. This is expected to contribute to reducing the use of physical restraint in residential aged care over time.

In parallel, under the 2019-20 Budget Measures *More Choices for a Longer Life – Mandatory National Quality Indicators and Reducing the Misuse of Medicines in Residential Aged Care*, Government announced the development of new quality indicators including medication management.

The Department of Health (the Department) has engaged a PricewaterhouseCoopers (PwC)-led consortium with the University of Queensland and the Royal Australian College of General Practitioners to develop quality indicators relating to medication management. This process involves an evidence review, consultation with stakeholders, and piloting of the new quality indicators in early 2020. This includes piloting an indicator related to chemical restraint.

On conclusion of the work being undertaken by PwC, the Department will provide advice to Government that will inform the decision on which medication management quality indicators are to be included in the National Aged Care Mandatory Quality Indicator Program from 1 July 2021.

### **Dissenting Report**

The Dissenting Members of the Parliamentary Joint Committee on Human Rights consider that, as currently drafted, the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* engages and limits a number of human rights, and submitted a Dissenting Report.

In their report, the Dissenting Members made three recommendations.

### Recommendation 1

**The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 should be disallowed.**

The Australian Government **notes** this recommendation. Notices of motion to disallow the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* were withdrawn.

Disallowance of the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* would have meant the new requirements, which put explicit obligations on residential aged care providers in respect of the use of restraints, would no longer be in force.

Rather than supporting disallowance of the Principles, the Australian Government amended the Principles to incorporate amendments that could be implemented with immediate effect.

### Recommendation 2

**In the short term, urgently reintroduce a new instrument to ensure the provision of informed consent for the use of chemical restraints, reducing the use of restraints, oversight and effective reporting of the use of restraints.**

The Australian Government **supports-in-principle** this recommendation. The *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* commenced on 29 November 2019, and amended Part 4A of the *Quality of Care Principles 2019*. This instrument:

- makes it clear restraint must only be used as a last resort;
- refers to state and territory legislation which regulates the responsibility of prescribers to gain informed consent for chemical restraint; and
- requires a review of the first 12 months of the operation of the restraint regulations to ensure aged care facilities are minimising the use of inappropriate restraint.

It is expected the review will consider concerns raised by the Dissenting Members in the Parliamentary Joint Committee on Human Rights Report.

### Recommendation 3

**A widespread consultation process should be implemented urgently to determine the best regulatory framework to protect residents of aged care facilities in the use of restraints.**

The Australian Government **supports-in-principle** this recommendation and notes the amendments to Part 4A of the *Quality of Care Principles 2014* include a review clause.

The review of the operation of Part 4A must consider the effectiveness of Part 4A in minimising the use of physical restraints and chemical restraints by approved providers of residential aged care in relation to consumers in the period 1 July 2019 to 30 June 2020.

The review must make provision for consultation. It is intended consultation will include engagement with a range of key stakeholders such as state and territory public guardians and public advocates.

The review and be completed by 31 December 2020. It is expected the review will make recommendations in regard to appropriate regulatory arrangements post 30 June 2021.