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Australian Government  
Department of Health and Aged Care  
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Canberra ACT 2601  
Australia

## **Submission by Human Rights Watch on Exposure Draft - Aged Care Bill 2023: Restrictive Practices**

Human Rights Watch welcomes the opportunity to make a submission on the [Exposure Draft - Aged Care Bill 2023](#). It follows our submission of September 8, 2023, to the Public Consultation: Foundations of a new Aged Care Act.

### **1. Free and informed consent**

In our submission of September 8, 2023, we called for the new Aged Care Act to guarantee the right to free and informed consent for all examinations, diagnoses, treatment and interventions. In Human Rights Watch's research, many relatives of older people in aged care facilities said they only learned that their relatives had been given medications after they received pharmacy bills listing the medications.<sup>1</sup>

The United Nations Convention on the Rights of Persons With Disabilities (CRPD), which Australia ratified in 2008, requires informed consent for examination, diagnosis, medical

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<sup>1</sup> Human Rights Watch, "Fading Away" *How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia*, (New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/10/15/fading-away/how-aged-care-facilities-australia-chemically-restrain-older-people#:~:text=Human%20Rights%20Watch%20documented%20several,staying%20awake%20during%20the%20day>.

treatment and interventions.<sup>2</sup> The CRPD Committee has determined that treating an adult with medications without consent is a violation of the right to equal recognition before the law,<sup>3</sup> the right to personal integrity, and the right to freedom from violent exploitation and abuse, as well as the right to freedom from torture and inhuman and degrading treatment.<sup>4</sup>

While the Statement of Rights includes the right to “Independence, autonomy, empowerment and freedom of choice” in Chapter 1, Part 3, Division 1, Section 20, it fails to include the right to free and informed consent for all examinations, diagnoses, treatment and interventions.

### **Recommendation**

The new Aged Care Act should guarantee the right to free and informed consent for all examinations, diagnoses, treatment and interventions.

## **2. Freedom from all forms of violence, degrading or inhuman treatment, including chemical restraint**

In our submission of September 8, 2023, we called for the new Aged Care Act to prohibit all use of chemical restraints, a restrictive practice involving the use of medications to control the behavior of aged care residents without a therapeutic purpose. In addition to the physical, social, and emotional harm for older people restrained with these drugs, the use of these drugs in older people with dementia is also associated with an increased risk of death.<sup>5</sup>

The Statement of Rights in the Stage 1 Public Consultation included the right to “freedom from inappropriate use of restrictive practices.” We welcome the guarantee of freedom

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<sup>2</sup> Convention on the Rights of Persons with Disabilities (CRPD): resolution adopted by the UN General Assembly, January 24, 2007, A/RES/61/106, available at: <https://www.refworld.org/docid/45f973632.html>, art. 25 (“States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.” Article 25(d) further specifies that states shall “[r]equire health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent” [emphasis added].).

<sup>3</sup> CRPD Committee, General Comment No. 1, para. 41, citing CRPD arts. 14 and 25.

<sup>4</sup> Ibid., para. 42, citing CRPD arts. 15-17.

<sup>5</sup> US Drug and Food Administration, “Information for Healthcare Professionals: Conventional Antipsychotics,” June 16, 2008, <https://wayback.archive-it.org/7993/20171102213617/https://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm124830.htm>

from all forms of violence, degrading or inhuman treatment in Chapter 1, Part 3, Division 1, Section 20(4) of the Exposure Draft. The use of drugs as a chemical restraint is an inappropriate use of restrictive practices and could constitute cruel, inhuman and degrading treatment under international law.

Australia is party to several international conventions that prohibit torture and other cruel, inhuman or degrading treatment or punishment, including the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of People with Disabilities.<sup>6</sup>

Human Rights Watch has documented the widespread use of chemical restraint in aged care facilities in Australia.<sup>7</sup> We are disappointed that, despite the guarantee of the right to freedom from all forms of abuse, degrading or inhuman treatment in the Exposure Draft, the use of chemical restraint is not prohibited. In fact, the Exposure Draft, like legislation before it, explicitly allows the use of restrictive practices, which could include chemical restraint, in Chapter 1, Part 2, Division 2, Section 17(1), as a “last resort” and after other criteria have been met.

Regulations introduced in 2019 to minimize the use of restrictive practices<sup>8</sup> have failed to protect aged care users from the use of chemical restraint. Human Rights Watch’s review of non-compliance reports for aged care facilities across Australia from July 1, 2020 to June 30, 2021 found use of chemical restraints in more than 150 aged care facilities.<sup>9</sup> Some aged care facilities that did not meet compliance standards failed to regularly monitor the

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<sup>6</sup> International Covenant on Civil and Political Rights, adopted December 16, 1996, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. Res. 39/46, Annex 39, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/810 at 71 (1948), art. 37; Convention on the Rights of Persons with Disabilities (CRPD), adopted December 13, 2006, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. (No. 49) at 65, U.N. Doc. A/61/49 (2006), art. 15.

<sup>7</sup> Human Rights Watch, “*Fading Away*” *How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia*, (New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/10/15/fading-away/how-aged-care-facilities-australia-chemically-restrain-older-people#:~:text=Human%20Rights%20Watch%20documented%20several,staying%20awake%20during%20the%20day>.

<sup>8</sup> Australian Government, Aged Care Quality and Safety Commission, “Minimising the Use of Restrictive Practices,” undated, <https://www.agedcarequality.gov.au/older-australians/safety-care/minimising-restrictive-practices> (accessed January 23, 2024).

<sup>9</sup> “Australia: Chemical Restraint Persists in Aged Care: One Year After Royal Commission Report, Older People Still Not Protected,” Human Rights Watch news release, March 20, 2022, <https://www.hrw.org/news/2022/03/30/australia-chemical-restraint-persists-aged-care>.

use of drugs that are administered for chemical restraint, failed to provide individual care plans with ways to manage behavior without the use of chemical restraints, and did not provide alternative strategies to ensure that chemical restraint is a last resort.

Despite this, amendments in 2021 to the Aged Care Act 1997 allowed for the use of chemical restraint as a restrictive practice as a “last resort.”<sup>10</sup> Like the 2021 amendments, the Exposure Draft of the new Aged Care Act also fails to ban chemical restraint and only seeks to minimize its use. As such it fails to ensure aged care users’ right to freedom from inappropriate use of restrictive practices, and freedom from all forms of violence, degrading or inhuman treatment.

### **Recommendations**

1. The new Aged Care Act and proposed Rules on its application should prohibit all use of chemical restraints.
2. The new Aged Care Act and proposed Rules on its application should include adequate minimum staffing levels to provide support to older people.
3. The new Aged Care Act and proposed Rules on its application should include mandatory training for all aged care facility staff in dementia and alternative methods and skills to de-escalate unwanted behavior and support the needs of people with dementia.

### **3. Supported decision making: Overriding the individual’s will and preferences**

In our submission of September 8, 2023, we called for the new Aged Care Act to ensure that protection from harm should never substitute an older person’s will and preferences or the best interpretation of them, unless the same action would be taken for any person, regardless of age, cognitive ability or other characteristic.

Even where it is not practicable to determine someone’s views, wishes and preferences, the CRPD Committee has stated that, “the ‘best interpretation of will and preferences’

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<sup>10</sup> Australian Government, “Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021,” [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bid=r6723](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bid=r6723) (accessed January 22, 2023).

must replace the ‘best interests’ determinations. ...The ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”<sup>11</sup> Protection from harm should never substitute an older person’s will and preferences or the best interpretation of them, unless the same action would be taken for any person, regardless of age, cognitive ability or other status.

We are therefore disappointed to see that in Chapter 1, Part 4, Division 1, Section 30, 3(e)(ii), the Exposure Draft explicitly allows representatives to substitute an older person’s will and preferences or the best interpretation of them in order to protect them from harm without the condition that this is only permissible when the same action would be taken for any person, regardless of age, cognitive ability or other status.

### **Recommendation**

The new Aged Care Act should ensure that protection from harm should never substitute an older person’s will and preferences or the best interpretation of them, unless the same action would be taken for any person, regardless of age, cognitive ability or other status.

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<sup>11</sup> CRPD Committee, “General Comment No.1 (2014) on Article 12: Equal recognition before the law,” <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1>, para. 21.