



Law Council  
OF AUSTRALIA

*Office of the President*

**25 September 2018**

Ms Glenys Beauchamp PSM  
Secretary  
Department of Health  
GPO Box 9848  
Canberra ACT 2601

By email: [agedcareconsultation@health.gov.au](mailto:agedcareconsultation@health.gov.au)

Dear Ms Beauchamp

### **Terms of Reference – Royal Commission into Aged Care Quality and Safety**

The Law Council of Australia welcomes the Australian Government's decision to establish a Royal Commission into Aged Care Quality and Safety (**the Royal Commission**). It also welcomes the decision to consult with the community, including residents, their families and aged care providers, prior to settling the Royal Commission's detailed Terms of Reference (**the ToR**).

The Law Council has been grateful for the input of the Queensland Law Society (**QLS**), Law Society of New South Wales (**LSNSW**), Law Society Northern Territory (**LSNT**), the Law Institute of Victoria (**LIV**) and the Law Society of South Australia (**LSSA**), its National Elder Law and Succession Law Committee, and its Family Law Section regarding the draft ToR.

The Law Council has briefly consulted with its constituent bodies and relevant committees since the Royal Commission was announced. It recommends that in addition to those matters which the Australian Government expects that the ToR will cover (which are described below), they should also address:

- incidences of elder abuse in residential aged care, including physical, emotional, financial and chemical abuse, as well as incidences of elder abuse in residential aged care occurring as a result of exploitation by family and friends;
- the experiences of Aboriginal and Torres Strait Islander Australians in residential aged care, including members of the Stolen Generations, as well as of individuals from cultural, religious or linguistically diverse backgrounds;
- the extent to which the rights of residents in residential aged care are respected;
- options for, and quality of, care provided to people with an intellectual disability or other cognitive impairment;
- current shortcomings in the availability and quality of residential care provided for Australians with disability who can no longer be cared for by their family and are too young for aged care;

- the adequacy of current requirements, qualifications and training for people who work in residential aged care;
- the role of health practitioners in delivering aged care, including the provision of medication to residents, and the adequacy of current health practitioner ratios and the Medicare framework to ensure quality health care for aged care residents;
- the adequacy and effectiveness of the current legislative framework governing residential aged care in Australia in ensuring that quality of care is provided. This should include the regulation and accreditation of aged care providers and facilities, the compliance of aged care providers with relevant laws, and the need to address any legislative gaps or inconsistencies. The following issues should for example be addressed:
  - the appropriateness of existing practices and regulation concerning admissions to aged care facilities;
  - challenges in aged care with regards to the law and substituted decision-making;
  - unconscionable industry practices of aged care operators, including contracting practices;
  - the effectiveness of the current complaints system within the aged care sector; and
  - the adequacy of protections available to ‘whistle-blower’ employees in the residential aged care sector to encourage the reporting of elder abuse without fear of retribution;
- the economic basis of the aged care system, including its overheads and profits, and its impact upon the care of individuals, their families and dependents affected by it. This should include:
  - an evaluation of the standard of care provided by not-for-profit aged care providers, compared to the for-profit sector; and
  - measures to increase access to quality residential aged care to more Australians lacking financial means;
- access to legal education and legal assistance services within residential aged care to build an increased understanding of residents’ rights and remedies under the law amongst residents, their families and their carers; and
- the need for the Royal Commission to have regard to the findings and recommendations of the Australian Law Reform Commission’s (**ALRC’s**) recent *Elder Abuse: A National Legal Response* report as an important starting point for its work.

## Background

The Australian Government has indicated that the Royal Commission’s ToR are likely to cover:

- the quality of care provided to older Australians, and the extent of substandard care;
- the challenge of providing care to Australians with disabilities living in residential aged care, particularly younger people with disabilities;
- the challenge of supporting the increasing number of Australians suffering dementia and addressing their care needs as they age;
- the future challenges and opportunities for delivering aged care services in the context of changing demographics, including in remote, rural and regional Australia; and
- any other matters that the Royal Commission considers necessary.<sup>1</sup>

## Discussion

Noting the brief time available for consultation on the ToR, the Law Council is not in a position to provide exhaustive comments on each of the additional points raised above, although it may make a detailed submission to the Royal Commission in due course. The following discussion provides brief context regarding several of the above recommendations.

### ***Incidences of elder abuse in residential aged care, including physical, emotional, financial and chemical abuse, as well as incidences of elder abuse in residential aged care occurring as a result of exploitation by family and friends***

Several Law Council's constituent bodies/committees emphasise the need for the Royal Commission to canvass the incidence of elder abuse, in its different forms, as it occurs in aged care.

In particular, the QLS raises its concerns that:

*Over-medicating, which can be viewed as a form of chemical restraint, is often raised as a major abuse problem in aged care, particularly the use of psychotropic drugs to control or manage resident behaviour. Most medication in aged care is, or must be, prescribed by a doctor. In this context, a source of any over-medication can be sheeted, potentially to the medical profession particularly if they add to the prescription that the staff can use the medication 'as required'. The Society is aware that there are cases where no consent is obtained by either the patient or substitute decision-maker and patients who query or complain are treated as having behavioural problems and subsequently may be issued with more medication.<sup>2</sup>*

These concerns regarding over-medication are also highlighted by the LIV in the context of the care provided to people with disability in care, as discussed further below.

The QLS also holds concerns about the use of physical and mechanical restraints that are sometimes used in residential aged care. It indicates that these forms of restrictive

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<sup>1</sup> Australian Government Department of Health, 'Consultation to develop the detailed Terms of Reference for the Royal Commission into Aged Care Quality and Safety', <<https://consultations.health.gov.au/aged-care-policy-and-regulation/terms-of-reference/>>.

<sup>2</sup> Queensland Law Society, Correspondence to the Law Council of Australia, 21 September 2018.

practices, along with chemical restraints, are unregulated and are often used without consent, and that there is often little external oversight of this issue.

Given these concerns, the QLS also recommends that the role of health care professionals should be an element of the Royal Commission's remit.

With respect to the need to address incidences of elder abuse in residential aged care which occur as a result of exploitation by family and friends, the Law Council's Family Law Section explains that exploitation in the family law context this might include a 'forced separation' by adult children who place a parent into care, and issue proceedings for a property settlement on behalf of the parent.

***The experiences of Aboriginal and Torres Strait Islander Australians in residential aged care, including members of the Stolen Generations, as well as of individuals from cultural, religious or linguistically diverse backgrounds***

In recommending that the ToR should address the experiences of aged care residents from diverse backgrounds, the LSNSW particularly emphasises that the ToR should *not* exclude consideration of the care of non-citizens.

***The extent to which the rights of residents in residential aged care are respected***

The LIV highlights concerns regarding the extent to which residents in residential aged care are treated as residents and not as hospital patients, and afforded rights that are applicable to residents, particularly the right to choose the care they wish to receive and the right to privacy. To this end, it suggests that the Royal Commission consider the work of Professor Joseph Ibrahim on the rights of residents in residential aged care and the extent of premature death.<sup>3</sup>

***Options for, and quality of, care provided to people with an intellectual disability or other cognitive impairment***

The LIV recommends that the Royal Commission should investigate the extent to which residents with intellectual disability or other cognitive impairment, such as acquired brain injury) are administered sedatives and psychotropic drugs to manage their challenging behaviours, rather than implementing better models of care that focus on a positive life experience, promote social and emotional wellbeing, and accord with basic human rights principles.

***Current shortcomings in the availability and quality of residential care provided for Australians with disability who can no longer be cared for by their family and are too young for aged care***

The LIV recommends that the Royal Commission should investigate the standard of care afforded to people currently living in Supported Residential Services (**SRS**) (including people with disability, and older persons), and should have regard to:

- staff to resident ratios;
- training and qualifications of staff;

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<sup>3</sup> Joseph Ibrahim, 'Premature deaths of nursing home residents: an epidemiological analysis (2017) *Medical Journal of Australia*, <<https://www.mja.com.au/journal/2017/206/10/premature-deaths-nursing-home-residents-epidemiological-analysis>>.

- the prevalence of resident-to-resident assaults in SRS;
- reporting standards of SRS providers; and
- premature deaths.

While acknowledging that SRS are a state issue, the LIV contends that these issues cannot be ignored if residential aged care is under consideration, as their services are the only alternative accommodation type to the family home or residential aged care.

The LSNT also strongly supports the need for the Royal Commission to cover all people with disability in residential accommodation and institutions, noting that there have been strong calls by people with disability nationally for a Royal Commission into violence, abuse and neglect. It draws attention to the lack of existing transparency, data, advocacy and oversight regarding this disadvantaged sector.

In this regard, the Law Council notes that the existing draft ToR, which include ‘the challenge of providing care to Australians with disabilities living in residential aged care, particularly younger people with disabilities’, currently appear to assume that it is appropriate for younger people with disabilities to live in residential aged care. It suggests that that such arrangements are unlikely to be suitable.

***The adequacy of current requirements, qualifications and training for people who work in residential aged care***

This issue was raised by several constituent bodies as of key concern. For example, the LIV states that with respect to the current qualifications of staff employed within the aged care sector, consideration should be given to introducing minimum requirements that employees within the sector be qualified health professionals (such as nurses and allied health professionals). This contrasts with the current reliance by residential aged care providers on ‘personal care attendants’ (**PCAs**). The LIV is concerned that PCAs lack formal nursing or allied health qualifications and are therefore not subject to regulation by the Australian Health Practitioner Regulation Agency. It suggests that an investigation could occur into the desirability of subsidising the cost of qualified health professionals in residential aged care facilities.

***The role of health practitioners in delivering aged care, including the provision of medication to residents, and the adequacy of current health practitioner ratios and the Medicare framework to ensure quality health care for aged care residents***

The QLS has identified the role of health practitioners in delivering aged care as critically important for consideration by the Royal Commission, having regard to the concerns raised above regarding over-medication of residents.

The LIV recommends that attention be given to the current ratios of suitably qualified health practitioners to Australians living in residential aged care, to ensure that residents receive care from an appropriate number of suitably qualified health practitioners. It further recommends that the Medicare framework for health practitioners who see patients in residential aged care should be considered, to encourage greater involvement by them in the care of residents.

***The adequacy and effectiveness of the current legislative framework governing residential aged care in Australia in ensuring that quality of care is provided. This should include the regulation and accreditation of aged care providers and facilities, the compliance of aged care providers with relevant laws, and the need to address any legislative gaps or inconsistencies.***

Several Law Council constituent bodies are strongly in favour of reviewing the legislative framework governing residential aged care in Australia as a core aspect of the Royal Commission's functions. Some key issues raised in this regard are discussed below.

#### Aged care facilities – entry and regulation

The QLS highlights in particular that review is needed of entry to, and regulation of, aged care facilities. It states that dementia and secure units are regularly regarded as aged care facilities rather than health facilities. However, there are important differences between facilities and how they should be serviced. The QLS further notes key concerns regarding admissions to aged care facilities. It states that:

- there have been regular occurrences of Aged Care Assessment Team assessments during hospital admission that routinely only provide approval for aged care placement, not a home with services;
- its members have shared experiences that admissions are made against an adult's will, coordinated by health discharge planners with plans to clear beds, minimise readmissions and relocate issues to federally funded institutions (aged care facilities). Often these steps are taken without the involvement of an adult or their support network. A QLS committee member indicates that as a typical case study illustrating the latter issue:
  - An older person lives in alone in their home and has a health incident resulting in hospital admission. Discharge planning determines that the adult should relocate to an aged care facility to minimise readmission, further injury risks and bed shortages in hospital. The adult does not agree, or is not well enough to process what is happening. The hospital commences a tribunal application to appoint a substitute decision-maker or enact an enduring power of attorney. The substitute decision-maker then accepts the hospital's opinion and places the adult in an aged care facility, which may include a secure unit if the adult discusses leaving. Where the adult protests, they may receive behaviour modification medications, and/or have their access limited to friends and family who may support their position by the aged care facility or substitute decision-maker. The substitute decision-maker proceeds to sell home and contents to pay for the RAD. Even if the adult regains decision-making power, little is done to reinstate the adult in the community, due to huge dislocation including loss of home and possessions, and being institutionalised and isolated.

#### Substituted decision-making challenges

The QLS also highlights the need to address existing challenges and misunderstanding in aged care with respect to the law and substitute decision-making which have been identified by its members practising in the area. This includes reports of aged care facilities refusing to place a person on a resident waitlist when the person has not appointed an Enduring Power of Attorney (**EPOA**). As further discussed below, the QLS stresses that complaints

from families would be reduced and more easily resolved through the provision of greater legal education for staff, families and residents on these issues.

The QLS further notes that aged care legislation has created a gap between state and federal law in this area. It states that each state and territory has, broadly speaking, provision for the appointments of EPOAs who are entitled to make decisions for residents in aged care in appropriate circumstances. However, the *Aged Care Act 1997* (Cth) has introduced a legal-representing position for a person where they would act in-between a decision-maker and an information receiver but who may not necessarily be the existing EPOA. The QLS indicates that this causes grief and anxiety for families and staff, and it sees potential in a rationalised uniform process by which terms are clearly defined and understood by all respective parties.

#### Unconscionable industry practices of aged care operators, including contracting practices

In this regard, the LIV has highlighted its concerns regarding, for example:

- retirement village contracts that are often entered in circumstances where there is a significant imbalance in negotiating power. It notes that it is not unusual for contracts to include terms which may be unreasonable or unconscionable under the Australian Consumer Law. The Law Council adds that ready access to legal assistance services for older persons who lack financial means is vitally important in this regard (as discussed further below); and
- unconscionable industry practices of aged care operators, including: attempting to recover reestablishment and/or reinstatement costs from a resident upon exiting a village; charging sales commission on their buyback of freehold title to retirement village units; and charging a RAD in excess of what a resident can afford to pay.

#### The effectiveness of the current complaints system within the aged care sector

The LIV recommends that any review of the complaints system should address the effectiveness of both internal and external complaints mechanisms within the aged care sector. This includes the range of powers given to external complaints mechanisms (investigative, conciliatory and determinative). Recommendations should be made on how complaints about residential aged care providers can be dealt with promptly and are backed up by appropriate sanctions to ensure providers meet their obligations to residents.

#### ***The economic basis of the aged care system, including its overheads and profits, and its impact upon care and upon the individuals, their families and dependents affected by it***

The LSSA notes that there is no express reference to the economics of aged care within the range of topics the Terms of Reference are likely to address. The LSSA considers that this an important aspect of aged care and it would be prudent to include reference to both the finances of the sector, and the financial position of the individuals who become dependent on it within the terms of reference of the Royal Commission.

The LSSA emphasises that the economics of aged care is not just limited to the providers of aged care services. The Royal Commission must also address the economic effect on patients, their families and dependents.

***An evaluation of the standard of care provided by not-for-profit aged care providers, compared to the for-profit sector***

The LIV recommends that this evaluation should include: the quality of care each sector provides, value for money, ability to cater for people irrespective of their personal means and a comparison of the number of complaints received by the ACCC in the not-for-profit and for-profit sectors.

***Measures to increase access to quality residential aged care to more Australians lacking financial means***

The LIV recommends that the Royal Commission should explore how the cost of entry to residential aged care can be reduced so that it is available to more Australians. In its view, this should include consideration of:

- regulating the amount that an aged care provider can charge as a Refundable Aged Care Deposit (**RAD**); and
- simplifying and making fairer the rule around selling the family home, including removal of the taxation and aged pension disincentives in selling the family home to enter residential aged care.

The LIV further recommends consideration of what Commonwealth Government assistance may be made available to not-for-profit aged care providers to allow greater access to residential aged care by people who could not otherwise afford the current cost of the RAD.

***Access to legal education and legal assistance services within residential aged care to build an increased understanding of residents' rights and remedies under the law amongst residents, their families and their carers***

The Law Council's *Justice Project Final Report* highlights that older people often lack legal awareness, including of their rights and how to address them, and often face other critical barriers including a lack of funds (including due to elder abuse), disability, psychological barriers, and digital exclusion. This means that they are dependent on legal assistance and other critical support services including disability advocates.

While there is much good work being done by legal assistance services to overcome these barriers in residential aged care, there is also a chronic lack of funding particularly for civil law issues. Additionally older people are often cash poor but relatively asset rich and therefore cannot meet legal aid means tests. In practice, this means that many older people and their families do not have the advice and help they need to stand up for their rights. The Law Council considers that access to legal services constitute a key tool to promote accountability and transparency in aged care. Further information is available in the Older Persons chapter of the *Justice Project Final Report*.<sup>4</sup>

With specific respect to aged care, as noted above, the advice of QLS members practising in this area is that there are challenges and misunderstandings in aged care with regards to the law and substituted decision-making. This includes reports of aged care facilities refusing to place a person on a resident waitlist when the person has not appointed an Enduring Power or Attorney. The QLS stresses that complaints from families would be

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<sup>4</sup> Law Council of Australia, *Justice Project: Final Report* (2018), Older Persons Chapter, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Older%20Persons%20%28Part%201%29.pdf>.

reduced and more easily resolved if both they and aged care facility staff were more familiar with basic legal principles, and that both more effective and efficient education for the community and training for staff are necessary.

***The need for the Royal Commission to have regard to the findings and recommendations of the ALRC's recent Elder Abuse: A National Legal Response Report as an important starting point for its work***

While the ALRC's report addressed a broader range of elder abuse, including that occurring beyond residential aged care, the Law Council considers that its findings and recommendations remain highly relevant to such settings. It will be important for the Royal Commission to have close regard to the ALRC report, and the extent to which the ALRC's recommendations have been, or are intended to be, implemented to avoid duplication of effort and inconsistent recommendations.

***Other relevant matters***

The Law Council's Family Law Section has highlighted that an ongoing deserving consideration involves the availability and willingness to act of litigation or case guardians in family law proceedings.

A case guardian in Family Court proceedings, referred to as a litigation guardian in the Federal Circuit Court, may be appointed to conduct a case on behalf of a party to a family law matter where a party is unable to act for themselves. The role of a case guardian is to provide a legal representative with the instructions necessary to conduct the family law litigation where the client is not capable of doing so themselves.

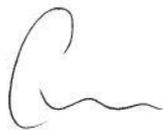
Where such a person cannot be found, the Commonwealth Attorney-General can nominate a person to act as litigation representative. However, as previously identified by the Law Council, in recent years and in the vast majority of cases where the Courts have made such a request, the Attorney-General has not been in a position to make such a nomination because of the unwillingness of authorities or lay people to act as litigation representatives. The Law Council has suggested that previous agreements between the Commonwealth, State and Territory Governments to facilitate the appointment of statutory authorities for this purpose may be necessary to significantly improve access to justice for people with disability in family law litigation. This issue remains and is clearly pertinent to older people in residential care with disability.<sup>5</sup>

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<sup>5</sup> Law Council of Australia, *Inquiry into Equality, Capacity and Disability in Commonwealth Laws: Australian Law Reform Commission submission*, 11 August 2014, <<https://www.alrc.gov.au/inquiries/disability/submissions>>.

Should you wish to discuss any of the above, please do not hesitate to contact Ms Leonie Campbell, Deputy Director, Policy Division, on 02 6246 3711.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Morry Bailes', written in a cursive style.

**Morry Bailes**  
**President**