



## Royal Commission into Aged Care Quality and Safety

### *What you need to know*

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On 16 September 2018, Prime Minister Scott Morrison announced a Royal Commission into the Aged Care sector. The Royal Commission, which is the highest form of inquiry in Australia, is set to focus on residential aged care and home care and will also cover the care provided to young people with disability who live in residential aged care facilities.

We understand that for many in the aged care sector a Royal Commission will be a rather foreign concept and that there is a general concern regarding how the Royal Commission will unfold and what it will mean for their organisation. To assist in relieving some of this uncertainty, we have prepared a general fact sheet below.

#### **What is a Royal Commission and what will it investigate?**

A Royal Commission is a special investigation into important matters of public concern. The Royal Commission into aged care will be focusing on residential aged care and home care but will also cover care for young people with disabilities who live in aged care homes. The Commission will hold public hearings as part of its inquiry.

The terms of reference define the scope of the Royal Commission and have not yet been finalised by the Commission, who we understand is currently consulting with all relevant stakeholders (i.e. residents, their families and aged care providers). However, more broadly, Scott Morrison indicated the expected scope of the Royal Commission will include:

- 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 from dementia and addressing their needs as they age;
- The future challenges and opportunities for delivering aged care services in the context of changing demographics, including remote, rural and regional Australia; and

- Any other matters that the Royal Commission considers necessary.

The Royal Commission will make recommendations on how to improve laws, policies and practices within the aged care industry to ensure older Australians receive care and services which are appropriate for their needs and which are safe. In doing so it will also consider how to appropriately fund aged care services to ensure the sector is sustainable now and into the future.

#### **What happens after the Royal Commission concludes its hearings?**

After the Royal Commission concludes the public hearings, it can make a range of recommendations, for example in relation to legislative and policy reforms. The Royal Commission may also, if circumstances warrant, refer a person or organisation to a regulatory or prosecuting body.

Subject to the outcome of the Royal Commission there is also a strong possibility that the hearings and subsequent findings/recommendations may adversely impact on the reputation of organisations in the sector. For this reason we recommend that organisations consider engaging business/PR consultants to manage any potential reputational damage.

#### **How will this impact on the aged care sector?**

As those in the sector would be aware, there have been numerous Federal inquiries since the *Aged Care Act 1997* (Cth) was first introduced. Recent inquiries include the Tune Review which focused on the impact and effectiveness of the changes made by the Aged Care (Living Longer Living Better) Act 2013 (which in itself was implemented as a result of a Federal inquiry) and made recommendations for future reform to the aged care system.

Due to the nature of a Royal Commission, being the highest form of inquiry in Australia, there should be an expectation amongst the sector that the scope and ultimate result of the Royal Commission will be far reaching – both in terms of the short term impact on providers and long term reform to the aged care system in Australia.



What this means is that, similar to the banks and insurance companies during the Banking Royal Commission, aged care providers will need to develop (relatively quickly) an understanding of their position in relation to each of the terms of reference once released and prepare an action plan to meet each of the relevant key milestones in relation to the Royal Commission.

### **Will the Royal Commission impact upon planned reforms?**

There has been no official statement issued regarding how the Royal Commission will, if at all, impact upon reforms which are currently in the works – for example the new Quality Standards. However, we would expect that this will become clearer once the terms of reference for the Royal Commission are released.

### **Important milestones for providers in preparing for the Royal Commission**

As we highlighted above, approved providers will need to ensure they understand their position in relation to the terms of reference of the Royal Commission and that they develop and implement an action plan to meet each of the relevant key milestones in relation to preparing for the Royal Commission.

#### **Stage 1: internal preparation**

Approved providers should immediately consider forming a Royal Commission working group and consider what key personnel from their organisation will represent each arm of the business in relation to responding to requests for documents, evidence or information. It will also assist provider's in streamlining the below stages.

#### **Stage 2: legal representation**

Approved providers should engage legal advisers to assist in the preparation for the Royal Commission and to represent their interests during the Royal Commission. Once Stage 1 is complete, the organisation's legal advisers should be introduced to and made familiar with the organisation's working group.

#### **Stage 3: assessment of the organisation's capacity to respond**

The organisation will need to conduct a review of its capacity to respond to requests for documents and evidence. Any identified gaps in the organisation's ability to respond quickly and effectively should be resolved where possible.

To that end we suggest providers consider the following preparatory steps:

- Review all Complaints Commissioner matters including all resolved and any unresolved matters. For unresolved matters, consider what responses can be provided.
- Review any historical or current issues with families, be they of an existing or previous resident, regardless if any complaints were made or not.
- Identify any significant complaints which may be unresolved or were not resolved to the satisfaction of the complainants.
- Review and consider your strengths and weaknesses in relation to any regulatory/compliance policies, procedures, systems and processes (i.e, conduct a gap analysis).
- Collate and store in a central and easily identifiable and accessible location the following:
  - information relating to complaints made by all stakeholders within at least the last 12 months.
  - information relating to significant clinical incidents.
  - information relating to reportable assaults.
  - information relating to any regulatory and compliance issues within the past 12-24 months.
  - documents subject to legal professional privilege.

#### **Stage 4: identification of the organisation's position in relation to the terms of reference**

Once the terms of reference for the Royal Commission are released, approved providers need to review each term of reference against their own assessment of the organisation's capacity to respond and to identify any weaknesses which will need to be remedied.

#### **Stage 5: identification of where the organisation sits in the regulatory landscape**

Approved Providers should review any interactions with regulatory bodies in recent times. Examining these interactions will assist in identifying any weaknesses and will assist in identifying issues which may be considered by the Royal Commission.



## Powers of the Royal Commission

The primary role of the Royal Commission is to collect information and evidence and to test that evidence in order to reach conclusions on a particular issue. In order to achieve this, the Commission is equipped with broad powers to compel witnesses to give evidence including the ability to:

- a. *summon people to give evidence or provide a document or other things;*
- b. *require a witness to give evidence under oath; and*
- c. *require a person to provide information or a statement in writing.*

There are no limits placed on the Commission in terms of how many times a person can be called before a Royal Commission to give evidence.

## What is a public hearing?

At a public hearing the Commission listens to evidence from individuals and organisations. The hearings allow the Commission to find out information to help with its inquiry and to test evidence that is presented before it.

## Information from the public and organisations

The Commission will encourage individuals and organisations who wish to contribute information to do so as it will assist the Royal Commission in its work to examine the aged care sector and care of older Australians.

Information which you provide to the Commission may be made public, uploaded to its website, or included in the Royal Commission's final report. If necessary the Royal Commission can also communicate information provided to it to law enforcement bodies.

If you wish, some or all of the information you provide can be provided in confidence and you can remain anonymous.

Once the Commission provides guidance on how to submit information for the Royal Commission we will provide an update.

## What to do if you receive a summons

In the event that you receive a summons from the Commission:

- a. *You are required to attend a hearing and tell the truth, and you are entitled to bring a lawyer to represent you;*
- b. *You may be provided with the assistance of an interpreter or support person when giving evidence.*

We recommend that if you receive a request you immediately seek legal advice.

## Giving evidence at a hearing

The Commission will identify a number of individuals and organisations as witnesses to give evidence at a public hearing. The Commission encourages all individuals and organisation who have information regarding the Royal Commission to contact it.

## Rights and responsibilities in providing information

People providing information to the Royal Commission are required to tell the truth and it is an offence to provide false or misleading information. However there are also a number of protections which apply in circumstances where you do provide the Commission with information.

Generally, a person will still be required to provide evidence even if it would incriminate them, unless they have been charged with an offence and the incriminating evidence relates to that offence.

## Privileged documents

If a document is requested by the Commission and is subject to legal professional privilege, it must be produced unless a court has previously found, or a claim is made to the Commission, that the document is subject to legal professional privilege.

## Offences

The Royal Commission is equipped with a number of measures/penalties to address instances where individuals fail to comply with an order made by the Royal Commission. Types of offences include:

- Refusing to give evidence;
- Interfering with evidence or witnesses;
- Providing false or misleading evidence; and
- Failing to produce a document determined not to be covered by legal professional privilege.

## Practice guidelines

The Royal Commission will release its practice guidelines which outline how the Royal Commission intends to proceed. Generally, the practice guidelines will cover a number of issues, including:

- a. *How to seek leave to appear and legal representation;*
- b. *a person's obligations to answer a summons or produce evidence; and*
- c. *Witnesses, evidence and cross examination.*





However, not all Royal Commissions follow the same practice guidelines. Practice guidelines are determined by each Royal Commission.

### Have any questions?

We hope that the above information provides some clarity to the recently announced Royal Commission into Aged Care Quality and Safety. Hynes Legal has represented and assisted clients with a broad range of inquiries into the aged care sector. We will be offering ongoing information and support to providers throughout the Commission process, including partnering and working collaboratively with peak industry bodies to assist providers.

If your organisation receives correspondence from the Commission requesting your participation in the Royal Commission or if you would like to know more about any of the above please contact us for assistance.

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### Disclaimer

*This content is not intended to be a substitute for legal advice. Providers should always seek legal advice as to how any new legislative requirements will apply to the individual circumstances of their business.*

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