

Guiding you through

The Royal Commission into Aged Care Quality and Safety



WHAT TO EXPECT

from the Royal Commission into
Aged Care Quality and Safety
(Aged Care Royal Commission)

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Establishing a Royal Commission

- Announcement by Government on 16 September 2018 to establish a Royal Commission into the aged care sector.
- Determine the **terms of reference** to form the basis of the terms recommended to the Governor-General. The terms of reference outline the scope and specific issues to be addressed.
- **Letters patent** are then issued by the Governor-General that formally appoint the Royal Commissioner and outline the terms of reference for the inquiry.

The investigation and reporting is expected to take 12 months, with the final report due February 2020

The terms of reference will be determined in consultation with the community, including residents and their families and aged care providers. It is expected 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.
- Any other matters that the Royal Commission considers necessary.

What you can do to prepare

- Identify who will lead the coordination of your response. This team will liaise with operational areas, IT, legal and media, and third parties such as legal representatives. Subject to the scale of your involvement in the Royal Commission, it is likely that this will need to be resourced on a full-time basis and likely by a number of people.
- Implement communication protocols regarding the Royal Commission. Internal and external emails regarding the Royal Commission should be limited, and it should be assumed they may be read by the Royal Commission and made public.
- Where relevant, consider the relationship between any of your entities in other states. In particular, will there be a coordinated response and representation? If so, how will those separate entities coordinate and agree?

How we can support you

- Provide initial advice, including meeting with the leadership team and other key executives.
- Provide guidance in relation to steps that can be taken so that you are well placed to deal with various issues arising from the Aged Care Royal Commission.



If you would like to discuss what to expect during the Royal Commission and how you could be potentially impacted, **contact us on (07) 3914 8243**. Alternatively directly contact a member of our team listed on the following page.



Preliminary Steps

- Commissioner to determine how the Commission will be conducted.
- **Investigation phase:** A team of investigators deployed by the Commissioner may interview witnesses. This could include you or a member of your team.
- An agenda or list of issues and priorities may be issued and the Commissioner may make orders for witnesses to attend the Commission or produce documents to the Commission.
- Any barrister appearing for an interested party would seek authorisation to represent that party (leave to appear).
- The Commissioner has powers to require entities to produce documents and to compel individuals to attend and give evidence. The Royal Commissions Act contains strict provisions including prohibiting the destruction of documents, and interference with witnesses.

A typical process:

- a. The Commissioner announcing that they will hold a preliminary hearing.
- b. Prior to the preliminary hearing, the Commissioner will issue a document setting out how the proceedings are to be conducted, typically setting out such matters as hearing times, how to obtain authorisation to represent a witness, directions in relation to the production of documents (as in how they should be produced), privilege and self incrimination, transcripts and witnesses and evidence (not who or what, but how evidence will be heard).
- c. At the preliminary hearing, the Commissioner would often begin hearing applications for "leave" (or permission) to appear in the Commission and make any other directions he considers necessary. However, whether applications for leave to appear will be dealt with at a preliminary hearing or later (for example, at the hearing of a substantive matter) depends on the Commission and what approach they want to take. Sometimes the preliminary hearing is just a public statement by the Commissioner and/or counsel assisting.

What you can do to prepare

- Identify your IT capabilities to search, collate, review and distribute significant volumes of documents across various business arms. Consider where documents are held e.g. document management systems, share drives, local drives and archives.
- Identify any significant safety and quality issues that may be the subject of a 'case study'. i.e. are there any notorious and time consuming complaints by persons likely wanting to ventilate those issues publicly?
- Consider approaching key former employees who may have retained a copy of relevant material.
- Prepare a legally privileged briefing paper for your Board and consider establishing a Board Sub-Committee to deal with Royal Commission issues.
- Review your insurances to see whether or not the costs of responding to the Royal Commission, or ancillary matters, may be insured. Broadly speaking, it is unlikely that costs directly associated with the Royal Commission will be insured, but likely that civil claims arising out of any identified misconduct will be.

How we can support you

- Assist with the production of documents in response to any notice to produce, including advising in relation to any Aged Care Royal Commission document management protocols, claims for confidentiality and privilege and the extent of your compliance obligations.
- Assist with the preparation of any written submissions to be provided by you to the Royal Commission.
- If required, we can recommend suitably experienced barristers to represent you during the Royal Commission.

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Evidence and witnesses

- Counsel, usually practising barristers, assist the Commission to conduct efficient proceedings. They can examine and cross-examine witnesses, without the Commissioner having to do it himself.
- All evidence is submitted through counsel.
- Counsel calls and examines witnesses. The opportunity is then made for persons with leave to appear to ask questions. The Commissioner is free to ask questions at any time.
- Closing address is made at the conclusion of evidence at public inquiries. All counsel appearing on behalf of an organisation or a witness usually have the opportunity to make a closing submission.

How we can support you

- Advising in relation to rubrics issues by the Royal Commission and preparing witness statements in response.
- Advising in relation to claims for confidentiality and legal professional privilege.
- Assisting in the preparation of your witnesses (if any) called to give evidence before the Royal Commission.

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Findings of the Royal Commission

- If the Commission is considering making an adverse finding, counsel assisting will usually indicate these findings to the individual or organisation and allow the opportunity to respond.
- The Royal Commission is not a judicial body and cannot issue binding directions. The report it produces is essentially the Royal Commission's recommendations and it is then dependent on the government to implement its recommendations through law reform or policy change.

How we can support you

- Assist with the management of any perceived reputational risks for you, including by potentially engaging with media consultants and key media outlets and reporters.

OUR RELEVANT EXPERIENCE

We are ideally placed to guide you through all aspects of the upcoming Aged Care Royal Commission.

Our team has a deep understanding of the aged care industry, and the factors which influence decision making within the highly regulated aged care environment. We have significant experience in the types of typical legal issues dealt with within the sector including: provision of client residential care: the legal requirements of accreditation and application for approved provided status, employment and industrial relations issues, workplace health and safety, and coronial inquests.

Coupled with our aged care sector knowledge is our extensive experience in inquiries, investigations and inquests, and acting for parties in Royal Commissions and Commissions of Inquiry.

Acting in relation to the **Royal Commission into Trade Union Governance and Corruption**.

Advising clients involved in the **Barrett Adolescent Centre Commission of Inquiry**.

Advising in relation to the **Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry** (Banking Royal Commission).

Acting for the **NSW Police Force** in a highly sensitive inquiry into the death of an on-duty police officer.

Acting for numerous **State and Commonwealth government departments** in relation to the production of documents and maintaining claims for privilege and public interest immunity.

Various **Independent Commission Against Corruption (ICAC)** hearings and inquiries involving State government officials.

Advising the SEQ Water Grid Manager in relation to the **Queensland Floods Commission of Inquiry**.

On behalf of the aged care industry, we **successfully opposed an application before the Industrial Relations Commission made by the Queensland Nurses' Union** to amend the State Nurses' Award to include mandated staff/resident ratios.

Acting for parties in relation to investigations and proceedings commenced by the **Australian Securities and Investments Commission (ASIC), including the Bank Bill Swap Rate (BBSW) proceedings brought by ASIC against Westpac**.

Acting on behalf of providers in **responding to industrial disputes before the Fair Work Commission**.

Acting in relation to the Queensland Government's **New Generation Rollingstock (NGR) inquiry**.

Assisting numerous for **profit and nonprofit providers to Assisted Aged Care Providers to comply with Consumer Directed Care provisions in the Home Care sector** including advice on regulatory compliance and drafting home care agreement documentation.

Assisting numerous large national nonprofit providers in the **conduct of appeals of department decisions internally and to the Administrative Appeals tribunals on diverse breach issues**.

Routinely advise providers on issues of **staff misconduct and AHPRA reporting including representing and managing allegations of resident abuse issues**.

Appearing in coronial inquests on behalf of **aged care providers** and successfully reversed adverse draft finding against a provider accused of inadequate supervision.

OUR TEAM



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