

## Article Information

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## Preparing for the Royal Commission into Aged Care Quality and Safety

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The purpose of this article is to:

1. Assist you with understanding the process of a Royal Commission;
2. Outline the steps you and your organisation can start taking now in order to prepare for the Royal Commission; and
3. Consider how you can best position yourself to deal with the potential fallout from the Royal Commission.

We explore these questions further below.

### Terms of Reference

Public submissions as to the terms of reference for the Royal Commission have recently closed, with over 3,000 submissions having been received. The Government has also concluded its consultations with relevant stakeholders and groups within the aged care sector. The Government is now proceeding to analyse those responses and consultations with a view to finalising and issuing the terms of reference.

The key themes which the Royal Commission will be required to address will likely include:

- The quality of care provided by residential and home aged care providers, with a particular focus on the nature, extent and cause of substandard care;
- The unique challenges faced in providing care to younger Australians with disabilities living in residential aged care;
- The availability and sustainability of care given Australia's increasing ageing population, including in remote, rural and regional Australia;
- Staffing and workload issues within the aged care sector, including as to the challenges of providing sufficient numbers of appropriately qualified and trained staff within aged care facilities, particularly in light of the increasing number of dementia sufferers;
- An assessment of the extent to which existing, planned reform will address the above issues and the extent to which further legislative, regulatory and standards reform is required and the nature of the same;
- The challenges associated with establishing an appropriate and sustainable funding regime in the context of the above issues.

### How is a Royal Commission different from other inquiries?

Royal Commissions tend to investigate and deal with matters of significant national or community concern. Royal Commissions have wider and stronger powers, such as the power to compel production of documents and attendance of witnesses, as compared to other inquiries or commissions of inquiry. Further, Royal Commissions are conducted in public, although the power to hold private sessions was granted to Commissioners in the Royal Commission into Institutional Responses to Child Sexual Abuse. They are often used by plaintiff lawyers and firms to assess whether actions can be launched against entities who may have breached the law.

## Stages of a Royal Commission

1. *Terms of Reference*: The first stage, which as referred to above is still underway, is for the terms of reference of the Royal Commission to be finalised. Letters Patent will then be issued setting out the terms of reference.
2. *Appointment of Commissioner(s)*: The Governor-General is responsible for appointing the Commissioner or Commissioners (depending on the scope of the Royal Commission) responsible for conducting the inquiry. Commissioners are usually former Justices of the Supreme, Federal or High Courts. Senior Counsel Assisting are thereafter appointed to assist the Commissioner with the inquiry, taking a role similar to that of counsel in private litigation, including as to the examination of witnesses.
3. *Submissions*: In order to identify relevant case studies, as well as organisations and issues which require further investigation, early submissions will be sought from relevant stakeholders in the industry. In this particular case we would expect this to include residents and their families, aged care providers, advocacy and industry groups and health care professionals. Whilst public submissions will likely be opened up to the wider community, aged care providers may well be individually approached by the Commission and requested to provide early written submissions to the Royal Commission addressing the matters identified in the terms of reference. This is a critical stage which must be managed carefully as these responses are often determinative of the extent of an organisation's or individual's ongoing involvement in the Royal Commission.
4. *Public Hearings*: Following a review of the submissions, it is likely that various 'case studies' which warrant further inquiry by way of public hearings will be selected. It may be that hearings will be broken down into a series of 'rounds' to address the various topics of inquiry required by the terms of reference. In order to prepare for these public hearings it is usual for the Commission to:

4.1 Issues notices to produce documents to those organisations and parties who they are considering examining;

4.2 Require certain organisations and parties to provide written witness statements addressing specified topics. Witnesses may be specifically identified and subpoenaed by the Royal Commission or targeted organisations may be requested to nominate witnesses who are best placed to address the questions posed by the Commission;

4.3 Subpoena those organisations and individual witnesses who will be required to attend public hearings to give evidence;

4.4 Invite those organisations and individuals against whom potential adverse evidence may be given to apply for leave to appear at the public hearings.

5. *Counsel Assisting's Submissions*: At the conclusion of public hearings, or of a particular round of public hearings, written submissions as to potential findings open on the evidence, will be issued. Parties who are the subject of those potential adverse findings will be given an opportunity to make submissions in response.

6. *Report*: The Commission will likely issue interim report(s) as to its findings and recommendations arising out of the inquiry or there may be a provisional report issued prior to delivery of the final report. Ordinarily, interested parties will be given an opportunity to comment on any interim or preliminary report.

## How best to prepare yourself for the Royal Commission

The key steps which aged care providers should consider undertaking now to best prepare themselves for the Royal Commission into Aged Care Quality and Safety include:

- Identify your role and the extent of your participation in recent previous inquiries including the *Legislated Review of Aged Care 2017* (14 September 2017, David Tune AO PSM) and the *Review of National Aged Care Quality Regulatory Processes* (25 October 2017, Kate Carnell AO);
- Review relevant submissions and recommendations from such inquiries with a view to identifying particular areas of concern in respect of your business;
- Determine the extent to which case studies within your organisation may be able to be highlighted as emblematic of wider industry or systemic problems by considering whether there have been substantial or numerous instances of compromised care identified at your facilities or whether there are structural features of the operation of your facilities which may be described as contributing to 'systemic failures' within the aged care sector;
- Assemble your legal team including counsel with Royal Commission experience and knowledge and experience of the aged care sector, including so as to maximise confidentiality and legal professional privilege moving forward;
- Review the status of document management and record keeping within your organisation so that you are able to rapidly identify, locate, collate and provide information and documents in an appropriate form the event you are required to produce documents in respect of the Royal Commission;
- Identify potential witnesses within your organisation who may be best placed to provide evidence in the Royal

Commission in the event your organisation is subpoenaed to attend;

- Review your insurance policies to determine the extent to which coverage may be extended in respect of Royal Commission participation and involvement.

## **Our Experience**

Piper Alderman has extensive experience in dealing with Royal Commissions and commissions of inquiry. Our lawyers have had significant roles advising and acting for organisations and boards, directors and officers, insurers and insurance brokers, auditors and various advisors to boards in Royal Commissions including:

1. Misconduct into the Banking, Superannuation and Financial Services Industries;
2. Institutional Responses to Child Sexual Abuse;
3. Trade union governance and corruption;
4. The collapse of HIH Insurance;
5. AWB/UN Oil for Food Programme; and
6. State Bank of South Australia.

In order to progress your preparation for the Royal Commission, we would be pleased to attend and present to your board on an obligation free basis about the background to the Royal Commission and steps you can take now in order to be ready. If you would like to arrange a presentation please see our listed contacts.