



**The Royal Commission into Aged
Care Quality & Safety, Duty of
Care, complaints, claims & open
disclosure**

April 2019

Preparing for the Royal Commission

The Commissioners

The Honorable Richard Tracey and Ms Lynelle Briggs AO have been appointed Commissioners.

- The Hon Richard Tracey was a judge of the Federal Court
- Ms Briggs is a former Australian Public Service Commissioner.

Timing

- Request for information issued November 2018
- Notices to produce issued February 2019.
- The Royal Commission's interim report is to be provided by 31 October 2019, and its final report no later than 30 April 2020.

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Terms of reference – Letters Patent dated 8 October 2019

Inquiry into the following matters:

- (a) the quality of aged care services provided to Australians, the extent to which those services meet the needs of the people accessing them, the extent of substandard care being provided, including mistreatment and all forms of abuse, the causes of any systemic failures, and any actions that should be taken in response;
- (b) how best to deliver aged care services to:
 - (i) people with disabilities residing in aged care facilities, including younger people; and
 - (ii) the increasing number of Australians living with dementia, having regard to the importance of dementia care for the future of aged care services;
- (c) the future challenges and opportunities for delivering accessible, affordable and high quality aged care services in Australia, including:
 - (i) in the context of changing demographics and preferences, in particular people's desire to remain living at home as they age; and
 - (ii) in remote, rural and regional Australia;

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Terms of reference

- (d) what the Australian Government, aged care industry, Australian families and the wider community can do to strengthen the system of aged care services to ensure that the services provided are of high quality and safe;
- (e) how to ensure that aged care services are person-centred, including through allowing people to exercise greater choice, control and independence in relation to their care, and improving engagement with families and carers on care-related matters;
- (f) how best to deliver aged care services in a sustainable way, including through innovative models of care, increased use of technology, and investment in the aged care workforce and capital infrastructure;
- (g) any matter reasonably incidental to a matter referred to in paragraphs (a) to (f) or that you believe is reasonably relevant to the inquiry.

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Terms of reference

For the purposes of the inquiry and recommendations, the Commission is to have regard to the following matters:

- (h) all forms of Commonwealth-funded aged care services, whatever the setting or environment in which those services are delivered;
- (i) all aspects of the quality and safety of aged care services, including but not limited to the following:
 - (i) dignity;
 - (ii) choice and control;
 - (iii) clinical care;
 - (iv) medication management;
 - (v) mental health;
 - (vi) personal care;
 - (vii) nutrition;
 - (viii) positive behaviour support to reduce or eliminate the use of restrictive practices;
 - (ix) end of life care;
 - (x) systems to ensure that high quality care is delivered, such as governance arrangements and management support systems;

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Terms of reference

- (j) the critical role of the aged care workforce in delivering high quality, safe, person-centred care, and the need for close partnerships with families, carers and others providing care and support;
- (k) the wide diversity of older Australians and the barriers they face in accessing and receiving high quality aged care services. This should take into account the increasing incidence of chronic and complex conditions;
- (l) the interface with other services accessed by people receiving aged care services, including primary health care services, acute care and disability services, and relevant regulatory systems. This should take into account how people transition from other care environments or between aged care settings; -
- (m) examples of good practice and innovative models in delivering aged care services;
- (n) the findings and recommendations of previous relevant reports and inquiries.

The Commission is not required to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

The Royal Commission

- Royal Commissions are appointed by executive government and are not 'judicial inquiries'
- Royal Commissions are powerful
 - Require production of documents and other things
 - Require attendance or appearance to answer questions
 - Require information in an approved form
 - Require evidence on oath or affirmation
 - May inspect, retain and copy documents or other things
 - Apply to a judge for a warrant to exercise entry
 - Communicate information relating to a contravention of a law
 - Take evidence
 - Apply to a judge for a warrant for the apprehension of a person who fails to appear to attend

Aged Care Act

- Approved Provider Responsibilities
 - Approved providers have a number of responsibilities under the *Aged Care Act 1997 (Cth)*
 - These responsibilities relate to:
 - Quality of Care Principles 2014 – the standards that an approved provider is expected to meet as a part of quality review;
 - User Rights Principles 2014 –which covers the rights and responsibilities of the consumer
 - Accountability Principles 2014 –which covers accountability for the care that is provided, including the suitability of their key personnel
- For those approved providers who do not meet their responsibilities, compliance action, including sanctions, under Part 4.4 of the Act may be taken.
- Sanctions can include revocation or suspension of approval and the restriction of payment of subsidies (Div. 66)
- This can include impact on residents/clients and resulting reputational and financial impact upon the organisation

Duty of Care

- Suffering loss as a result of negligence gives rise to a civil entitlement to damages
- Negligence means a failure to exercise reasonable care and skill
- In an action for negligence, the plaintiff must prove that:
 - the defendant owed him or her a **duty to take reasonable care**;
 - the defendant breached that duty by failing to take reasonable care;
 - the defendant's breach of duty caused the injury or damage suffered by the plaintiff; and
 - the injury or damage suffered was not too remote a consequence of the breach of duty.

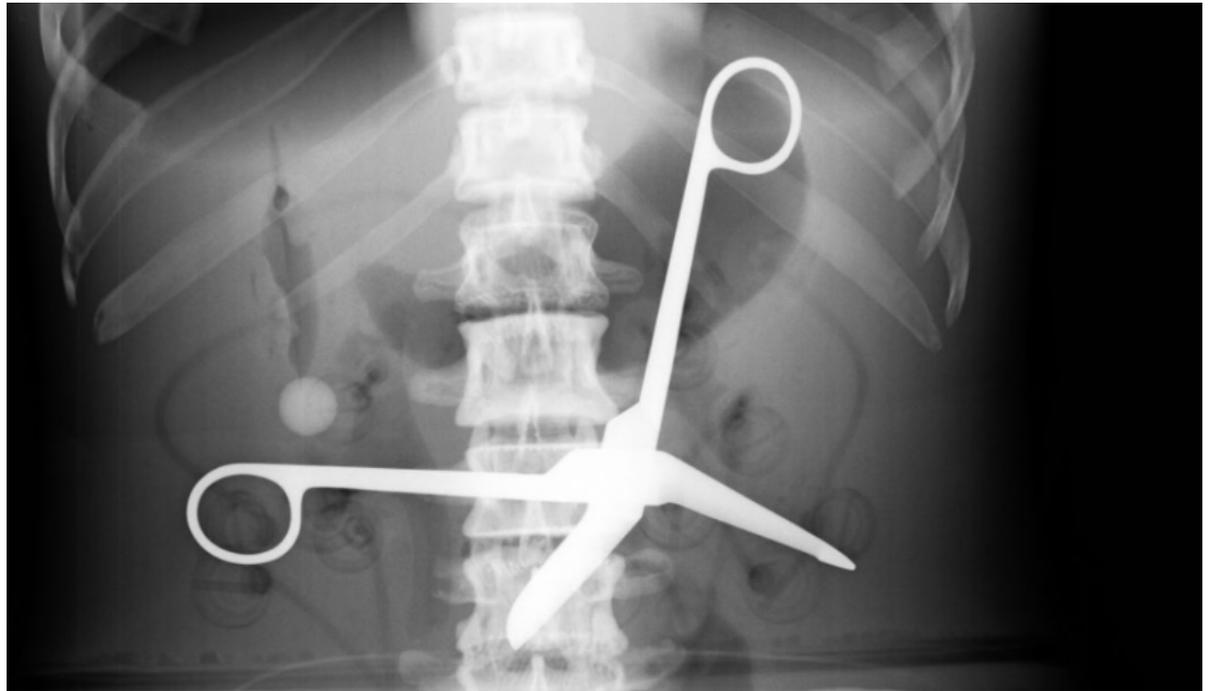
Duty of Care

- At common law, all health professionals are under a duty to exercise reasonable care and skill in providing treatment and advice to their patients
- This extends to:
 - taking a proper case history;
 - listening to and responding to patient complaints;
 - providing treatment; and
 - the provision of information and advice.

Civil Liability Act 2002 (NSW)

- **Section 50 -Professional negligence**

A person practising a profession does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.



Civil Liability Act 2002 (NSW)

Volunteers

61 Protection of volunteers

A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work:

- (a) organised by a community organisation, or
- (b) as an office holder of a community organisation.

volunteer means a person who does community work on a voluntary basis.

community work means work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose, and includes work declared by the regulations to be community work but does not include work declared by the regulations not to be community work

If the volunteer is not liable then it is unlikely that the organization will be vicariously liable for the volunteer's acts alone - but could be liable in its own right

Civil Liability Act 2002 (NSW)

Volunteers

62 Liability not excluded for criminal acts

This Part does not confer protection from personal liability on a volunteer in respect of an act or omission of the volunteer if it is established (on the balance of probabilities) that at the time of the act or omission the volunteer was engaged in conduct that constitutes an offence.

63 Liability of intoxicated volunteer not excluded

The protection from personal liability conferred on a volunteer by this Part in connection with any community work does not apply if:

- (a) the ability of the volunteer to exercise reasonable care and skill when doing the work was significantly impaired by reason of the volunteer being under the influence of alcohol or a drug voluntarily consumed (whether or not it was consumed for medication), and
- (b) the volunteer failed to exercise reasonable care and skill when doing the work.

Civil Liability Act 2002 (NSW)

Volunteers

64 Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions

This Part does not confer protection from personal liability on a volunteer in respect of an act or omission of a volunteer if the volunteer knew or ought reasonably to have known that he or she was acting:

- (a) outside the scope of the activities authorised by the community organisation concerned, or
- (b) contrary to instructions given by the community organisation.

65 Liability not excluded if insurance required

This Part does not confer protection from personal liability on a volunteer if the liability is a liability that is required by or under a written law of the State to be insured against.

66 Liability not excluded for motor accidents

The protection from personal liability conferred on a volunteer by this Part does not apply if the liability would, but for this Part, be covered by a third-party insurance policy under the Motor Accidents Compensation Act 1999 or be recoverable from the Nominal Defendant under that Act.

Part 1B Child abuse—liability of organisations, including for abuse carried out by volunteers

Duty to warn

- Section 50 of the *Civil Liability Act 2002* (NSW) does not apply to liability arising in connection with the giving of (or failure to give):
 - a warning;
 - advice; or
 - other information in respect of the risk of death of or injury (s 5P).
- Duty to warn of **material risks** of a proposed procedure or treatment



Vicarious liability for abuse

- An employer will be vicariously liable if the *employee's* actions constituting the abuse were carried out:
 - in the pursuit of the employer's interest;
 - in the performance of a contract of employment; or
 - in the apparent execution of ostensible authority.

Prince Alfred College Incorporated v ADC [2016] HCA 37

- The relevant approach is to consider any special role that the employer has assigned to the employee and whether that role gave rise to the “occasion” for the wrongful act
- Important factors include:
 - authority;
 - power;
 - trust;
 - control; and
 - the ability to achieve intimacy with the victim.

Reporting to the Police

- Concealing serious indictable offence (s 316 Crimes Act 1900) NSW
- (1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.
- (2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.
- (3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.
- (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.
- (5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

Reporting to the Police

- What is a serious indictable offence?
 - an indictable offence which is punishable by imprisonment for life or for a term of five years or more.
- Includes:
 - larceny by clerks or servants;
 - embezzlement by clerks or servants;
 - fraudulently appropriating property by a director, officer or member of any body corporate or public company;
 - fraudulent misappropriation of monies collected or received; and
 - obtaining money by deception;
 - Assault occasioning actual bodily harm: s 59
 - Sexual intercourse without consent
 - Murder

Mandatory reporting of health practitioners

- Who is required to report?
- 'health practitioners' registered under the Health Practitioner Regulation National Law (NSW) and their employers, including:
 - Registered nurses; and
 - Approved Providers who employ the above

Mandatory reporting of health practitioners

- What is the obligation to report?
 - The obligation is on any (registered health practitioner, including a RN) or employer (eg Approved Provider) who forms a reasonable belief (in the course of practising the profession) that another practitioner has engaged in notifiable conduct to make a report to AHPRA as soon as practicable



Mandatory reporting of health practitioners

- What is a reasonable belief?
 - A belief is a state of mind.
 - A reasonable belief is a belief based on reasonable grounds.
 - A belief is based on reasonable grounds when:
 - all known considerations relevant to the formation of a belief are taken into account including matters of opinion, and
 - those known considerations are objectively assessed.
 - A just and fair judgement that reasonable grounds exist in support of a belief can be made when all known considerations are taken into account and objectively assessed.

Mandatory reporting of health practitioners

- What is notifiable conduct? (Section 140)
 - practised the practitioner's profession while intoxicated by alcohol or drugs; or
 - engaged in sexual misconduct in connection with the practice of the practitioner's profession; or
 - placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or
 - placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

- Coroner's Act 2009 (NSW)
- Reporting to the Coroner
- A death is reportable under section 6 if:
 - it is violent or unnatural;
 - it is sudden and the cause is unknown;
 - it occurs in suspicious or unusual circumstances
 - The person has not been attended by a doctor in the 6 months preceding the death;
 - it was not the reasonably expected outcome of a health related procedure; or
 - the person was in or temporarily absent from a mental health facility where they were receiving involuntary treatment.
 - A health-related procedure means a medical, surgical, dental or other health-related procedure (including the administration of an anaesthetic, sedative or other drug), but does not include any procedure of a kind prescribed by the regulations as being an excluded procedure.

Open disclosure

- What is open disclosure
 - Open disclosure is the open discussion of incidents that result in harm to a patient while receiving health care with the patient, their family, carers and other support persons. The essential elements of open disclosure are outlined in the national Australian Open Disclosure Framework.
- Who is obliged to provide open disclosure?
 - Medical practitioners and registered nurses are required to practice open disclosure under the relevant Code of Conduct
 - Open disclosure is industry best practice
- Apologies compared to admissions of liability

Open disclosure

- Apologies – Civil Liability Act 2002
- **69 Effect of apology on liability**
- (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
 - (b) is not relevant to the determination of fault or liability in connection with that matter.
- (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter



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