

Webinar – Aged Care Royal Commission Final Report: Legal Risk and Governance Issues Unpacked

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

Introducing Anita Courtney



Anita Courtney

Principal

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Anita is a Principal in Russell Kennedy's Aged Care Team who specialises in helping home care and residential care providers comply with their legal responsibilities

Anita helps providers respond to the Aged Care Quality and Safety Commission. She also helps providers with their duty of care and in responding to complaints

Anita drafts residential, respite and home care agreements and policies and provides training to home care workers on issues like consent and good record-keeping

Recently, Anita has been assisting home care providers with their Pricing Schedules

Introducing Solomon Miller



Solomon Miller

Principal

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Solomon acts for a range of aged care and not-for-profit clients specialising in advising them on strategic governance structures, reviews, risk assessments and mergers and amalgamations. Solomon has over 18 years' experience and has particular expertise in documenting commercial arrangements, including corporate structures, acquisitions, restructures, joint ventures and the licensing of technology and intellectual property

Solomon's specific aged care and health law experience extends to funding agreements, capital grants, regulation and compliance; service delivery models; and residents' rights and decision making processes (including consent and privacy obligations)

Introducing Libby Pallot



Libby Pallot
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Libby is the head of Russell Kennedy's Workplace Relations, Employment and Safety practice, a partner of the firm and she is the key contact for workplace relations matters in aged care

She and the employment team regularly provide advice to our aged care clients in relation to a variety of workplace issues

Introducing Donna Rayner



Donna Rayner

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Donna delivers expert legal advice to owners, operators and developers of retirement villages in Victoria, New South Wales and Tasmania

Donna also has experience in residential and commercial property transactions and drafting various types of commercial agreements. Donna was recognised by Best Lawyers 2013 - 2021 for expertise in Retirement Villages and Senior Living Law

Introducing Emma Turner



Emma Turner

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Emma advises clients across the disability, government, health and not-for-profit sectors in administrative law and regulatory compliance matters. She advises disability service providers on legal compliance with NDIS requirements, good governance and risk management. Her disability expertise also includes conducting legal audits on quality and safeguarding requirements and advising on human rights based approaches to compliance and corporate governance within the sector. For a number of years Emma has worked with the sector to improve prevention and response strategies to abuse of people with disability

Emma is leading our team of experienced lawyers representing clients in the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Webinar overview

1. Rights based assessed needs nature of the proposed new Act – Victor Harcourt
2. Proposed Changes to Governance of System and immediate Quality Improvements – Anita Courtney
3. Provider Governance, Funding & Contracting – Solomon Miller
4. Employment Law Focus – Libby Pallot
5. Retirement Living Focus – Donna Rayner
6. Disability Focus – Emma Turner
7. Live Q&A
8. Key takeaways and how we can help

Introduction



**Rights based assessed needs
nature of the proposed new Act –
Victor Harcourt**



Purpose

“... ensure that older people have an entitlement to high quality aged care and support and that they must receive it. Such care and support must be safe and timely and must assist older people to live an active, self-determined and meaningful life in a safe and caring environment that allows for dignified living in old age”

Objects – Rec 1

“ ...

provide a system of aged care based on a universal right to high quality, safe and timely support and care to:

- I. assist older people to live an active, self-determined and meaningful life, and
- II. ensure older people receive high quality care in a safe and caring environment for dignified living in old age”

Rights – Rec 2

For people:

- seeking aged care:
- receiving aged care:
- receiving end-of-life care
- providing informal care

These rights are supported by an enforceable duty

Principles – Rec 3

Paramount consideration: safety, health and wellbeing; older people first so that their preferences and needs drive the delivery of care

Principles:

- Provide certainty that older people will receive timely high quality support and care in accordance with assessed need
- Live in security, safety and comfort with their privacy respected
- Care should be provided in an environment which protects older people from risks to their health
- The Govt will fund the system at a level necessary to deliver high quality and safe aged care and ensure the aged care system's sustainability, resilience and endurance

High Quality – Rec 13

‘High quality’ means a standard of care designed to meet the particular needs and aspirations of the people receiving aged care

Characteristics of high quality aged care:

- diligent and skilful care
- safe and insightful care
- caring and compassionate relationships
- empowering care
- timely care

Statutory Duty of Care – Rec 14

AP must ensure that the personal care or nursing care is of high quality and safe so far as is reasonable, having regard to: the wishes of the care recipient; any reasonably foreseeable risks; and any other relevant circumstances

Any funded provider of service must ensure that any worker whom it makes available to perform personal care work has the experience, qualifications, skills and training to perform the particular personal care or nursing care work the person is being asked to perform

Areas of Focus: Food and nutrition; People living with dementia; Restrictive practices; and Palliative care

Enforcement – Rec 101 – 103

Breach of the statutory duty may attract a civil penalty (Rec 101) and a claim for Damages (rec 102)

A civil penalty may arise of the breach of duty is also a breach of the Quality Standards and causes harm or a reasonably foreseeable risk of harm

Key personnel may also be liable for a breach giving rise to a civil penalty if they:

- *aids, abets, counsels or procures the approved provider to commit the contravention, or

- *is in any other way, directly or indirectly, knowingly concerned in, or party to, the contravention by the approved provider

Damages may be sought by the Quality Regulator or the person harmed

Enforcement Powers – Rec 103

Enforceable undertakings, infringement notices and banning orders

Remove the executive decision-makers and appoint an external manager if there is an immediate and severe risk to the safety, health and wellbeing

**Proposed Changes to
Governance of System and
immediate Quality Improvements
– Anita Courtney**



Proposed Governance of System

System would be governed by the following institutions:

- System Governor
- New Quality Regulator with increased enforcement powers. Would include a Complaints Commissioner
 - “Tough cop on the beat” that should be “vigorous in sanctioning providers” including removing them from the sector
- An independent body to set and review the Quality Standards
 - ie the Australian Commission on Safety and Quality in Health Care
- An independent Pricing Authority to ensure that funding levels are appropriate
- An Inspector General to conduct systemic reviews; hold the regulators to account and conduct appeals of complaints

Focus on “high quality care”

- There are “pockets of excellence” but the “overwhelming majority” of facilities provided “average quality care”
- “High quality care”: must be measurable and refined over time
- A number of measures incl the amounts of time staff spend caring, changes in the reported quality of life and the incidence of particular health problems experienced by people receiving care
- Characteristics of high quality care: diligent and skilful, safe and insightful, caring and compassionate relationships, empowering care and timely care

Grounded in:

- Updated Quality Standards
- A positive, non-delegable duty to provide high quality and safe care
 - financial consequences for failure to meet this duty
 - similar to an employer's duty under OH&S law

Recommendations for the Quality Standards

- Criticism of the current Quality Standards
 - Lack of “objectively measurable standards... serves no one’s interests – not people receiving care, not approved providers and not the regulator itself”
 - BUT, conscious they are quite new and “are the result of an extensive process of consultation
 - Standards set by Commission on Safety and Quality in Health Care are “far more comprehensive, rigorous and detailed”
- **Urgent** review of the Quality Standards by the Australian Commission on Safety and Quality in Health Care:
 - Requiring best practice oral care, medication management, pressure injury prevention, wound management, continence care, falls prevention and mobility, and infection control
 - Imposing requirements to meet resident nutritional needs
 - Dementia care
 - Provider governance
 - High quality palliative care
- **Then**, more comprehensive review of the Standards

Quality measures

“Quality is not adequately measured in the Australian Aged Care System”

Proposes three linked mechanisms to measure high quality care:

1. Quality indicators

- Australian Commission and Safety and Quality in Health and Aged Care to develop quality indicators, including for home care
- Want indicators “related to quality of life” to be covered
- In the interim govt to expand the NQI program to use more comprehensive indicators for the existing domains of pressure injuries, unplanned weight loss, physical restraint

2. Benchmarks

- Appropriate benchmarks need to be set for each of the quality indicators
- Will enable providers can measure and improve their own performance

3. Star ratings

- Comprehensive performance rating system to allow people to differentiate between providers
- Informed by consumers, quality indicator outcomes, serious incident reports, complaints data and staffing levels

Priority areas for improvement

- Food and nutrition
 - Immediate \$10 per day increase to BDF conditional on funds being spent on daily living needs, especially nutrition
 - “People living in residential care should be able to smell their food being cooked, cook their own meals or at least participate in in the preparation”
- Dementia care
 - “All mainstream aged care services should be able to delivery safe and high quality aged care for most people living with dementia”
 - “Requires the right number and mix of staff who are trained in dementia care, having the right physical environment and having the right model of care”

Priority areas for improvement (cont)

- Use of restraints
 - Proposes move to a more NDIS style system, ie only be able to be used in an emergency or where behaviour support plan approved by the Quality Regulator
 - Penalties for non-compliance
 - Reporting requirements (part of the SIRS from 1 October)
 - More regulation of the need for consent
 - Current regime to be extended until end of the year
 - Providers encouraged to go further than current rules:
 - Seek independent review where restrictive practices used as part of routine management of the resident
 - Proactive reviews
- Palliative care
 - High quality palliative care to become “core business” for providers

Online platforms

- Prefer employment as a mode of engagement of the workforce.
- Concern about use of online Uber style platforms:
 - “Unless an older person willingly takes on the role of an employer and is fully informed about the implications, we consider it is undesirable for an older person to risk being deemed an employer because of their use of online platforms to select their workers”
- New duty on any entity which facilitates the provision of subsidised care (eg Mable, Hireup) to “ensure that any worker who they make available to perform care work has the experience, qualifications, skills and training to perform the particular care work they are being asked to perform”. Will require that they:
 - Investigate the work and the circumstances in which it is to be performed
 - Investigate the particular worker who is to perform the work
 - Ensure the worker has the experience, qualifications, skills and training that match the job
- NOT enough to make training available, have to ensure it is completed

Provider Governance, Funding & Contracting – Solomon Miller



Provider Governance

- Context
 - Cause of, or identification of, sub-standard care
- Independence
 - Majority independent non-executive directors (subject to exemption)
 - Best interest test (subsidiaries/holding companies)
- Skills mix
 - Right people, reviewing/receiving right reports
 - Clinical governance / financial governance / **human rights governance**
 - Policies and procedures / recruitment / succession

Provider Governance

- Committees
 - Mandated governance committee
 - Terms of reference (person centered)
 - Standing agenda items
- Director liability
 - Effective indemnification of officers
 - Insurance cover

Funding and Contracting

- Accommodation / service model
 - Phasing out of RADs
 - Manage viability
 - Lending covenants
- Funding
 - Transparency (use of funding / value)
 - Outcomes based measurement?
- Contractors
 - Continuity of care in contractor default scenario
 - Pass through of safety/quality attestation

Employment Law Focus – Libby Pallot



Employment law focus

- **Workforce – a review of the needs of the industry, including a recognised career and career path in aged care**
 - Body to oversee and focus of workforce planning
 - Increased use of specialist roles including in dementia, palliative care and mental health in aged care
 - Standard positions including job titles, designs, grades and definitions
 - Standard accreditation, training, skills and knowledge
 - Focus on attraction and retention and rural and remote workforce
- **Registration and minimum qualifications for personal care workers**
 - National registration system (AHPRA?)
 - Mandatory minimum qualification requirement, ongoing training, Code of Conduct, complaint process, minimum English requirement
- **Review of courses, qualifications, training and professional development**
 - Need for specialist aged care courses and micro-credentials
 - Review of all courses including Certificate III, university undergraduate degrees and other courses

Employment law focus - continued

- **Increase in wages**

- Vary wage rates in Aged Care Award 2010, Social, Community, Home Care and Disability Services Industry Award 2010, Nurses Award 2010
- Wages to reflect work value and to ensure equal remuneration in residential aged care and home care
- Discussion of Equal Remuneration Order made by Fair Work Australia in 2012 which significantly increased the wages in the social and community services industry

- **Minimum staff time in residential aged care and home care**

- Residential – minimum staff time standards for registered nurses, enrolled nurses and personal care workers and at least one registered nurse per site at all times (ratios)
- Home Care – time with clients, compensation for travel time, regulation around minimum visit time and supervision for home care workers

Retirement Living Focus – Donna Rayner



Retirement Living focus

Home Care Packages & Funding

- Big investment in home care
 - From 1 July 2024:
 - New funding model for care at home services (eg living supports, cleaning, laundry, meal preparation) (R118)
 - same funding for care at home as that in residential care (R119)
- Impact on village operations and financial models

Home Modifications (R34)

- Funding to stay at home longer (could this be in a Retirement Village or not)

Retirement Living Focus - continued

Aged Care Accommodation (R45)

- By 1 July 2023 – Development of design principles and guidelines for accommodation for older people
- Current retirement village accommodation – impact if 9c compliant

Interface between State Based Legislation and Federal Legislation

Disability Focus – Emma Turner



Disability

Greater equity, choice and control for people with Disability

- **Chapter 10 – Aged Care for Older People with Disability**
 - By 1 July 2024 every person receiving aged care who is living with disability regardless of when acquired should receive supports and outcome equivalent to those that would be available to persons who qualify for the NDIS
- **Chapter 11 – Younger people with Disability in Residential Aged Care**
 - No person under age 65 enters residential aged care from 1 January 2022
 - No person under the age of 45 lives in residential aged care from 1 January 2022
 - No person under the age of 65 lives in residential aged care from 1 January 2025

Disability - continued

Regulating for respect of people's rights, liberty and dignity

- Regulation of Restraints – use of restrictive practices based upon independent expert assessment and subject to reporting and monitoring – breach of statutory requirements subject to a civil penalty and person affected has potential to seek compensation
- A new Act based on universal human rights
- Shift to a rights based approach:
 - Put older people's needs and well being first – preferences and needs to drive delivery
 - Universal right to high quality, safe and timely support and care
 - Exercise choice and control
 - Ensure equity of access
- To be embedded in every part of the system – from policy development to service delivery

Q&A – Your Russell Kennedy Contacts



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