

The Royal Commission into Aged Care Quality and Safety

How will you prepare?



aitken
partners

» lawyers&advisors



**"PRIME MINISTER
SCOTT MORRISON
SAYS AUSTRALIANS
SHOULD BRACE FOR
SOME "BRUISING"
INFORMATION TO
COME OUT OF THE
ROYAL COMMISSION
INTO AGED CARE."**

*The Australian,
16 September 2018*





“IF YOU WANT TO DEAL WITH A PROBLEM, YOU HAVE TO BE FAIR DINKUM ABOUT UNDERSTANDING THE FULL EXTENT OF IT. WHETHER THERE IS A CRISIS IN AGED CARE OR NOT IS TO BE DETERMINED.”

Prime Minister Scott Morrison

The Royal Commission into Aged Care Quality and Safety will touch all areas of the aged care sector – large and small providers, not-for-profit and for-profit providers and providers in all parts of Australia including city and rural providers. It will focus on all forms of Commonwealth-funded aged care services, whatever the setting or environment in which those services are delivered. This will include home care and respite care, in addition to care provided in a residential care facility.

Indications from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) and other recent regulatory inquiries suggest that providers may receive requests from the Commission to provide substantial information in short time frames. It is therefore imperative that providers are prepared and have the ability to respond to requests quickly and in an accurate, complete and concise manner. Any providers whose responses fall below public expectations risk criticism or action by the Commission and adverse media attention.

While the scope of the Terms of Reference is wide ranging, it is evident that a significant focus will be on the exposure of individual incidents of abuse and neglect within the sector, as well as failings in providing adequate quality of care to, and protecting the safety of, care recipients. However, references in the Terms to “examples of good practice and innovative models”, “future challenges and opportunities for delivering accessible, affordable and high quality aged care services” and “increased use of technology” will give providers an opportunity to demonstrate their organisation’s good practices to the Commission.

What is clear is that the effect of the Commission will be far reaching. Its impact on aged care providers and reform of the aged care sector will be significant and will touch all sector stakeholders.

It is important that all providers get their houses in order now!





**AN ASSESSMENT
OF COMPLIANCE
WITH STATUTORY
OBLIGATIONS
FORM PART
OF THE
BACKGROUND
WORK IN
PREPARING
FOR THE ROYAL
COMMISSION.**

Aitken Partners is a Premium Level Melbourne-based law firm offering a range of legal services to business, private clients and not-for-profits. Combined with our affiliate law firms in the MSI Global Alliance we have significant and current experience in the relevant areas of:

1. the Health & Aged Care Industry
2. Elder Law
3. Royal Commissions and
4. other investigative regimes and multi-party investigations.

Specifically, in respect of Aged Care, Aitken Partners practitioners are recommended by DoYLES Guide, and their experience covers all aspects of legal services for clients in the aged care sector, including:

- » resident complaints and legislative complaints resolution schemes
- » regulatory actions, including responses to notices of non-compliance and reviews of sanctions
- » resolving disputes with residents
- » compliance with the aged care legislation
- » selling and purchasing aged care facilities
- » land acquisition, subdivisions and planning approvals
- » leases of aged care facilities
- » development and management agreements
- » resident agreements
- » training aged care facility and home care staff
- » preparing policies and procedures for handling data and complaints.



Our clients in aged care and disability services are both not-for-profit and for-profit enterprises. We are a Melbourne firm who can bring a national network to bear if, and when, required.

To help you with advice on dealing with the Commission, you need both our industry expertise and our knowledge and experience in investigations and litigation.

What we do

We see our role as guiding our clients through the legal aspects of the Commission process, assisting them to balance their legal risks and obligations with due regard for commercial outcomes and preservation of reputation.

The usual process of a Commission is to initially request submissions from all concerned parties. We expect a large volume of submissions from the families of many elderly and disabled Australians receiving care. Some of these will be general in nature but others will be specific and detail issues including the likely naming of providers.

If a submission affects you, it is important that you manage your response and possible attendance at the Commission with care and haste. While there are many possible outcomes from this Commission, we cannot rule out the possibility of sanctions or criminal action against providers, senior management and Boards.

We believe it is critical that any investigation into a specific allegation or complaint is handled with the protection of legal professional privilege. It is also important to discover the facts and deal with allegations in an appropriate manner.

What you should do

As we have previously highlighted, providers will need to act quickly to ensure they have the capacity, or can access external capacity, to respond in a timely manner to the requirements of the Commission. We suggest that providers develop an action plan to assess, gather and prepare their organisational resources to meet any request and deadlines set by the Commission.

You should also ensure your facilities and services are meeting their compliance obligations as government has announced a three-fold increase in the spot auditing of facilities and services in next 12 months.

The Terms of Reference

On Tuesday 9 October Prime Minister Scott Morrison announced the Terms of Reference for the Royal Commission into Aged Care Quality and Safety. This announcement followed more than 5,000 submissions received from consumers and aged care stakeholders.

In his announcement the Prime Minister confirmed that the Commission will be based out of Adelaide. The Governor-General appointed the Honourable Justice Joseph McGrath and Ms Lynelle Briggs AO as Royal Commissioners. They are instructed to commence the inquiry as soon as practicable, with an interim report due by 31 October 2019, and the Commission's final report due no later than 30 April 2020. Based on these timelines, and what we have learnt from prior Royal Commissions, it is likely that the Commission will commence before the end of 2018.

The Terms of Reference for the Royal Commission are included in the Letters Patent, which the Governor-General signed on 8 October 2018.

In summary, the Terms of Reference require, and authorise, the Commissioners to inquire into the following matters:

- (a) the quality of aged care services provided to Australians (including the extent of substandard care being provided, mistreatment and all forms of abuse);
- (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;
- (c) the future challenges and opportunities for delivering accessible, affordable and high quality aged care services in Australia (including a desire to live at home);
- (d) what can be done 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;
- (f) how best to deliver aged care services in a sustainable way, including through innovative models of care, technology, and investment in the aged care workforce and capital infrastructure;
- (g) any other matter reasonably incidental to the matters referred to in paragraphs (a) to (f) or that the Commissioners believe is reasonably relevant to the inquiry.

A copy of the Letters Patent (including the full Terms of Reference) can be found here:

<https://agedcare.royalcommission.gov.au/Documents/Aged-Care-Royal-Commission-Signed-Letters-Patent-8-Oct-2018.pdf>

A website for the Aged Care Royal Commission has been set up to keep stakeholders informed of developments as they occur and can be accessed here:

<https://agedcare.royalcommission.gov.au/Pages/default.aspx>



How the Royal Commission will operate

It is the job of the Commissioners to conduct the inquiry in accordance with the Terms of Reference. However, the details of precisely how the Commission will conduct its enquiries will be the subject of future guidelines and releases from the Commission.

The Commission can request any person operating within the aged care sector to provide any details the Commission may require. If a request is not responded to, the Commission may use its coercive powers to compel the production of the information. In our view, it is highly likely that providers will be 'invited' to self-report and disclose to the Commission details of regulatory breaches and other wrong doings in advance of the commencement of hearings (as was the case in the Banking Royal Commission).

The Commission's coercive powers are also broad and wide ranging, and the Commission has the ability to compel an individual or other body to participate in the inquiry, if they do not do so voluntarily. This will be relevant for a providers' directors, management, staff and contracted personnel who may be required to appear as representatives of the provider at the Commission.

A Commission can take evidence in a number of ways, and for different purposes, but predominantly evidence is taken by the conduct of formal hearings. Hearings may either be open to the public, closed or restricted (allowing only specific categories of attendees). Evidence given in a closed hearing will not be made publicly available and will be used in a way that protects individual identities.

It is likely that the Commission guidelines will generally cover matters such as leave to appear and legal representation, witnesses, evidence and other regulatory matters. They are to be read in conjunction with the Royal Commissions Act 1902 (Cth).

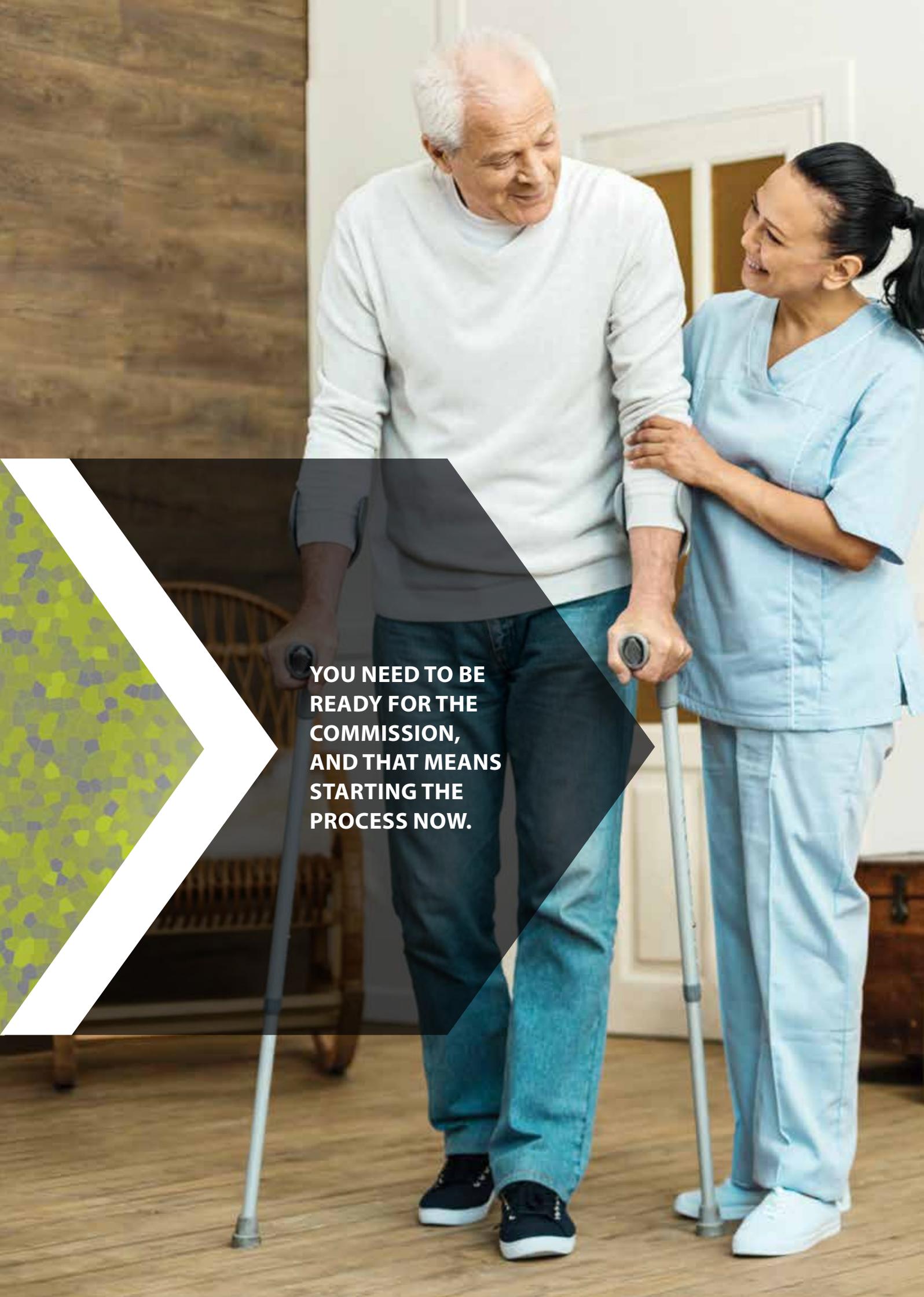
If summoned, there are few grounds on which an individual or body corporate can refuse to co-operate, or otherwise give evidence to a Commission, and a failure to comply may result in fines and, in some circumstances, imprisonment. It is also an offence to intentionally provide false or misleading evidence to a Commission or to intentionally insult or disturb it.

A Commission can, and frequently does, refer information about suspected or alleged crimes or regulatory breaches to relevant law enforcement and compliance authorities and may share relevant information with other ongoing inquiries.

It is important to understand that these consequences not only apply to the organisation, but may apply to individuals such as senior management and directors. In this regard, your organisation should give early consideration to whether separate legal representation should be appointed to represent your organisation on the one hand, and your directors and/or senior management on the other.



**"...THESE
CONSEQUENCES
NOT ONLY
APPLY TO THE
ORGANISATION,
BUT MAY APPLY
TO INDIVIDUALS
SUCH AS SENIOR
MANAGEMENT
AND DIRECTORS."**



**YOU NEED TO BE
READY FOR THE
COMMISSION,
AND THAT MEANS
STARTING THE
PROCESS NOW.**

Stage 1 – Gather and Prepare

- 1. DOCUMENTATION** – locate and secure any relevant documentation and ensure it is up to date (even if time limits for its retention may have passed). We recommend against destroying any documents that may be relevant to the Commission.
- 2. REVIEW** – conduct an historical review of the complaints and incident reports of your services to ensure they have been properly recorded and, importantly, investigated and responded to. Identify those that may be of significance in the context of the Commission, in particular notices of non-compliance, sanctions, past coronial inquests and particular family concerns. Where you have issues that have been the subject of significant disputes/complaints by family members, there is a likelihood that those family members will see the Commission as an opportunity to tell their stories. You should also reflect on any former employees who are likely to take the opportunity to raise issues with the Commission (legitimately or as a way of damaging your organisation due to past grievances). A more general review of your compliance with statutory and regulatory requirements will also help you prepare and minimise risk.
- 3. POLICIES** – assess your policies and procedures including in relation to quality of care but also incident reporting and complaint handling. Ensure that you have also retained prior copies of such policies and procedures even if these have been updated.
- 4. CONTRIBUTE** – if you wish to be a voluntary contributor to the Commission, start compiling your draft comments and case studies now. The Terms of Reference specifically refer to opportunities for delivering accessible, high quality, cost effective care, providing care recipients with greater choice and control, innovative models of care and the increased use of technology.
- 5. PERSONNEL** – identify key personnel in your organisation who will manage any requirements arising from the Commission and who will represent your organisation should it be required to give evidence. Meet with these people early and define their responsibilities to assist in streamlining the process. Identify key personnel that have now left your organisation that may have intimate knowledge of any past incidents or issues, and whether these people will be available to assist you.
- 6. REPUTATION** – ensure you have a centralised media and public relations system in place to handle media and other enquiries and protocols to handle how communication is managed. It is important that you ensure accurate, timely, careful and clear public comment and that there are specific spokespersons appointed to manage all inquiries. All other staff should be clearly instructed to refer inquiries to those persons (and that they are not authorised to speak for the organisation). Media and public statements should be vetted by lawyers. Reputational damage from the Commission is a significant risk to all providers.

Stage 2 – Identify, Action and Plan

- 1. EXTERNAL ASSISTANCE** – identify and retain appropriate external service providers to review your practices and records, evaluate any material gathered and to assist in preparing submissions or responses and, if required, representing you at the Commission.
- 2. LEGAL REVIEW** – engage us to undertake a legal review of the information and procedures referred to above to identify potential risks and to advise on preparation and mitigation strategies. Retain us at an early stage and allow us to engage a suitable barrister in anticipation of your possible involvement. If any complaints or other matters are unresolved, consider what can be done to try to reduce the number of unresolved matters.
- 3. GAPS** – identify and resolve gaps in personnel or documentation, and action these matters as a priority.
- 4. ENGAGE** – engage with stakeholders, care recipients and their families and the wider aged care sector.
- 5. ORGANISATION REVIEW** – evaluate your organisation's risks and consider, and action, your insurance position.

Aitken Partners will keep you informed of further developments as they progress. We will ideally do this by email and by request only. If you want to be added to our electronic mailing list please email aclarke@aitken.com.au to be added to the mailing list.

We will shortly be in touch to advise of the date for an upcoming seminar we will be hosting to assist providers with navigating the Commission and conducting risk assessments on the impact of it on their organisation.



Aitken Partners has put together an in-house team to advise clients through the duration of the Commission. Our team includes principal lawyers who are either independently rated for their expertise or are accredited specialists in Aged Care & Health, Estates & Succession Law, Elder Care and Dispute Resolution. In addition, we have the numerous experts from within the MSI Global Alliance and through other partnerships on whom we can call as needed.

Contact

RIC BIRKETT

Principal Lawyer

t » +61 3 8600 6071

e » AgedCareRC@aitken.com.au





**ANDREW
BLOGG**
*Principal
Lawyer*



**ED
CLARK**
*Principal
Lawyer*



**KATHY
WILSON**
*Principal
Lawyer*



**JONATHON
LEAN**
*Senior
Associate*



**JULIE
MAXFIELD**
*Senior
Associate*



**GEORGIA
AGAR**
Lawyer



**ANDREW
CLARKE**
*Media &
Communications*



**REUBEN
GILL**
Lawyer



lawyers&advisors

Level 28, 140 William Street
Melbourne Vic 3000

t » +61 3 8600 6000

e » info@aitken.com.au



aitken.com.au



@AgedCareRC

