

20 April 2021

Our ref: [VK: EL]

Mr Michael Tidball
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By email: kate@qls.com.au

Dear Mr Tidball

Royal Commission into Aged Care Quality and Safety – Final Report

Thank you for the opportunity to provide feedback on the recommendations of the Royal Commission into Aged Care Quality and Safety's Final Report. The Queensland Law Society (QLS) appreciates being consulted on this issue.

This response has been compiled with the assistance of the QLS Elder Law Committee, whose members have substantial expertise in this area.

QLS supports legislative and structural reforms within the aged care sector. QLS intends to provide detailed comments once draft legislation has been released. By way of preliminary comment, QLS highlights the need for legislation in this sector to adopt a human rights framework.

Human Rights framework

It is QLS' position that any legislation drafted to replace the *Aged Care Act 1997* (Cth) must have a human rights focus that expressly protects and enhances the human rights of older people in line with international recommendations and protections.

A consumer rights style protection framework has proven to be inadequate and has produced unacceptable outcomes for people in aged care. The issues affecting persons within the aged care sector fundamentally involve violations of human rights, including rights protecting against inequality and discrimination, protection from torture and cruel and inhuman treatment, free exercise of thought and movement, privacy, cultural rights, the opportunity to participate in public life, personal security and choice with respect to health care. A rights-based approach places greater emphasis on the realisation of human rights and is a necessary tool to appropriately define and address concerns within the aged care sector.

The Royal Commission's recommendations were informed by existing instruments including the 1991 United Nations Principles for Older Persons and the five key themes of independence, participation, care, self-fulfilment and dignity.¹ The UN Principles are non-binding soft law, and

¹ United Nations Principles for Older Persons, adopted by the General Assembly, resolution 46/91 of 16 December 1991 <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>>

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have not had a significant impact on the quality of aged care in Australia in the last 30 years of their operation. While they are valuable aspirational standards, they lack detail and are no longer reflective of contemporary human rights issues in aged care.

The set of rights recommended by the Commission present a good starting point, however, it is QLS' position that other rights should be considered for inclusion to ensure that the rights granted by legislation are contemporary and comprehensive. The rights recommended by the Commission are very limited in scope, narrowly defined and prescribed only in certain situations. Problematically, the set of rights recommended by the Commission appear to have been constructed without reference to the existing work of the United Nations' "Open-Ended Working Group on Ageing for the Purpose of Strengthening the protection of the Human Rights of Older Persons,"⁴ or the work of the Office of the High Commissioner for Human Rights.⁵ Consequently, the Commission's recommendations fall short of reflecting even the rights for older persons that Australia has recognised and ratified to date.

It is particularly concerning that the rights in care proposed by the Commission do not provide for rights to privacy and family, which has been a pertinent issue for those in aged care during the COVID-19 pandemic. Further, while the Commission has provided for rights to autonomy, presumption of legal capacity and right for older persons to make decisions about their care and quality of their lives, this is a trimmed down version of the broader right to equality before the law. Given this, the prescriptive nature of the Commission's recommendations is potentially problematic; human rights should be universally applied to those seeking or receiving aged care or related services.

It is unclear from the Commission's recommendations whether the rights suggested will have strong enforcement mechanisms. QLS submits that the rights proposed to be protected under the new legislation must be enforceable by individuals, including on behalf of those who lack legal capacity such as persons with dementia who are subject to restrictive practices. Enforcement mechanisms should ensure that older persons have access to prompt remedies and redress and which are appropriate, effective and holistic, including rights of appeal, restitution, indemnity, compensation and reparation.

The aged care system should be flexible, responsive and free from ageist constructions of older people's needs. A rights-based system would promote flexibility by balancing the older person's rights to autonomy and self-determination against the person's social, emotional and clinical needs and goals.⁶ To give effect to a flexible, rights-based model, QLS supports a move from the substituted decision-making model to supported decision-making. Traditional substituted decision-making models are anchored in the 'best interests' of the older person, while supported decision-making centralises the preferences, wishes, opportunities and values of the older person themselves, thereby giving greater effect to individual autonomy and independence. A strong human rights framework, complemented by a supported decision-making model, would

⁴ See United Nations, Open-Ended Working Group on Ageing, established by General Assembly, resolution 65/182 (21 December 2010) <<https://social.un.org/ageing-working-group/>>.

⁵ Office of the High Commissioner for Human Rights, *Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons* (Working Paper, March 2021) <<https://social.un.org/ageing-working-group/documents/eleveth/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>>

⁶ See Royal Commission into Aged Care Quality and Safety, (Final Report Volume 1, 2021) 206 <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>> Ibid.

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ensure that entry into, and care in, a residential aged care facility accounts for the older person's needs while taking into account their wishes, preferences, values and beliefs.

The experiences documented by the Royal Commission should prompt a cooperative discussion between the Commonwealth and States to review both Commonwealth and State legislation, which is applied when making decisions about the care of an older person. Such a review must ensure that legislative reform is achieved across all jurisdictions with a consistent human rights focus.

Independent Commission

QLS supports an independent commission that is sufficiently separate from Government, in line with Recommendation 5. Government has already had adequate control which was not sufficiently exercised to avoid the concerning circumstances many older people and their families have found themselves in, as documented by the Royal Commission.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President