



## **Fine words aplenty but hard yards ahead**

*“The Royal Commission is a once-in-a-lifetime opportunity to come together as a nation to consider how to create a better system of care for elderly Australians that better aligns with the expectations of the Australian people”*

The late Commissioner Tracey, Preliminary Hearing, Transcript, 19 January 2019.



**At the beginning - Commissioners Tracey and Briggs**



**Peter Gray, QC**

*“We submit that the final report should set a new bar for aged care in Australia. Looking after older people should be part of who we are. We should have an innate respect for them and elevate their place in our community. All of Australia should value and develop our connection with them”.*

Counsel Assisting’s Final Submissions, 20 October, 2020, paras. 145 & 146.

### **Out of left field**

*How would a new title namely, Elder Care Act, sound as symbolic of the “new bar” and using the word ‘elders’ instead of ‘the aged’ or ‘older persons’? In other words, take a leaf from the book of Australian aboriginal culture and use the word ‘elder’ to denote respect.*

**Royal Commission ending its journey  
final submissions from Counsel Assisting  
a handful of the significant recommendations**

*see pages 3 - 7*

## **The accumulated evidence** *raw material for crafting the final report*

### **Hearings**

There were 97 days of hearings. They were held in all capital cities and four regional centres: Broome, Cairns, Mudgee and Mildura. The transcript was 9,671 pages.

### **Submissions**

Between 24 December 2018 and 9 October 2020, 10,203 submissions were received.

### **The first witnesses**



**Clive and Barbara Spriggs**  
*Evidence about Oakden*  
11 February 2019

### **Witnesses**

641 witnesses gave evidence and 113 of them were direct experience witnesses: people living in residential aged care, people receiving home care and their families.

### **Visits to nursing homes**

The Commissioners visited 34 aged care services in locations as varied as Bidyadanga and Balaklava.

### **Overseas**

In early 2020, the Commissioners travelled overseas to meet with international officials and experts on aged care and viewed innovative aged care models in several countries.

### **Research**

The research team has overseen a comprehensive research program. Twelve research papers are published on the website along with eight background papers on subjects ranging from carers of older Australians to restrictive practices in nursing homes and two consultation papers on program redesign and financing aged care.

Counsel Assisting, Final Submissions, 20 October 2020, paras. 4-9.

## **A handful of significant recommendations *as advocated by Counsel Assisting***

On 20 October 2020, Counsel Assisting (*Peter Gray QC, Peter Rozen QC, Richard Knowles SC, Paul Bolster, Erin Hill, Brooke Hutchins and Eliza Bergin*) made final submissions comprising 480 pages and 124 recommendations. A handful of these are detailed here.

All the recommendations will not necessarily be in the Final Report. Nonetheless it is likely that most, if not all, will appear, perhaps with fine tuning. The Commissioners make the final decision and it is likely that at the time of writing their decisions have already been made. The Royal Commission is due to present its Final Report to the Government by 26 February 2021.

## **A new Act based on human rights principles for older people**

### ***Recommendation 1***

*The lawyers point out that the current Act is “substantially a funding instrument where the rights of older people are picked up” in subordinate law known as the User Rights Principles (para. 152) which contains the Charter of Aged Care Rights. The Charter does not establish any rights that are capable of enforcement, either by the individual or the regulator (para. 153).*

*The rights should include the right to high quality care that is safe, empowering and timely; the right to dignity which relates to the way care is delivered; the right to control and choice; and the care must be capable of being delivered (paras. 125, 132, 133 and 138).*

## **A new enforceable general duty of care on providers**

### ***Recommendation 22***

*The lawyers argue there is a major gap in the current law namely, that nowhere in the Aged Care Act is there a clear statement of the approved provider’s basic responsibility to ensure that the care provided to residents is safe and of high quality (para. 391).*

*They propose a new general duty on providers to ensure, as far as*

*continued next page*

## A new enforceable general duty of care on providers

### *Recommendation 22*

*continued from page 3*

*as is reasonable, the quality and safety of its services. The intent is to send a clear message to providers that their primary purpose is to protect the health, wellbeing and safety of their residents. The duty draws in part on the employer duty under established OH&S law (paras. 392 & 393). They also recommend that the “facilitators of labour”, that is labour hire companies such as Mable and Hire-Up, should have a duty, albeit more limited, to ensure any worker they make available to perform care work has the “experience, qualifications, skills and training” to perform the particular care work they are asked to perform (paras. 399 - 402).*

## Minimum staff time standard for residential care

### *Recommendation 47*

*The lawyers argue it is clear that higher nurse staffing levels contribute to lower rates of pressure injuries, pain, infections, weight loss, dehydration, emergency admissions and lower use of antipsychotic medication. Counsel Assisting was very precise on this recommendation but the proposal is fairly complex. There is provision for exemptions but only for the skills mix not for the total care hours per resident. A minimum standard should be mandatory and expressed in terms of particular skill levels and volume of care per resident per day (paras. 695-704).*

#### **By 1 July 2022**

#### **A mandatory minimum staff time, quality and safety standard**

Providers to ensure total care (from RNs or ENs or PCWs) of **215** minutes per resident per day for the average resident including at least **36** minutes of RN time.

At least one RN on site for morning and afternoon shifts, that is, for 16 hours per day.

#### **By 1 July 2024**

#### **A mandatory minimum staff time, quality and safety standard**

Providers to ensure total care (from RNs or ENs or PCWs) of at least **215** minutes per resident per day for the average resident including at least **44** minutes of RN time **OR** at least **264** minutes per resident per day for the average resident with at least **36** minutes of that staff time provided by an RN .

At least one RN on site per facility at all times.

## **National personal care worker registration scheme**

### ***Recommendation 48***

*This proposal has widespread support. The lawyers recommend that the Australian Health Professions Regulation Agency (AHPRA) administer a registration scheme for the occupation of ‘aged care personal care worker’ just as they do for nurses, doctors, physiotherapists and others. The AHPRA system is designed to promote public safety and would professionalise this occupation which would have its own National Board* (paras. 727-741).

Counsel Assisting believe the occupation meets the six criteria to become part of the National Scheme. These criteria include:

- \*that the occupation is most appropriately regulated by the Health Ministry;*
- \*that the activities of the occupation pose a significant risk of harm to the health and safety of the public;*
- \*that existing regulation fails to address health and safety issues.*

### **The ‘significant risk of harm’ criterion**

In assessing an occupation against the ‘significant risk of harm’ criterion, the lawyers argue the evidence suggests the daily work of personal carers may entail at least the following risk sub-categories:

- \*treatment commonly occurs without others present*
- \*patients commonly required to disrobe*
- \*supplying substances for ingestion*
- \*putting an instrument, hand or finger into a body cavity* (para.733).

### ***Recommendation 48.1***

By 1 July 2022, AHPRA establish a National Board and registration scheme for personal carer workers with the following features:

- a. a mandatory minimum qualification
- b. ongoing training and continuing professional development requirements
- c. minimum levels of English language proficiency
- d. criminal history screening requirements
- e. a code of conduct and power for the registering body to investigate complaints into breaches of the Code of Conduct (para. 741).

## **Civil penalty and private right of compensation for certain contraventions of provider's general duty of care**

### *Recommendations 109 and 110*

#### **Follow the OH&S and environmental law examples**

*The inclusion of a statutory duty of care (Recommendation 22 above) would provide a focus for the regulator's compliance and enforcement work. The lawyers note that the introduction of a general OH&S duty on employers in recent decades dramatically shifted the approach of regulators away from enforcing prescriptive standards to targeting compliance with the general duty. The goal is for a similar shift in the regulating of aged care (para.396).*

#### **Lip-service so far, strong sanctions now needed for genuine accountability**

*Counsel Assisting conclude that aged care regulation has paid lip-service to the welfare of those receiving care and, for regulation to act as a strong deterrent to poor quality or unsafe care, strong sanctions must be likely where standards are not met (para. 1454).*

#### **Provider, directors and senior managers could face court action**

*Counsel Assisting propose that both the regulator and the people harmed by the alleged unlawful conduct should be able to hold both the provider and the organisation's key personnel accountable via an application to a court of competent jurisdiction. A court would have the power to impose financial penalties in the form of an award of damages in the event of a contravention finding (paras. 1455-1467).*

#### **Counsel Assisting**



**Peter Rozen QC**



**Paul Bolster**



**Erin Hill**



## **Protection for whistle-blowers**

### ***Recommendation 115***

*Current legal protection (Aged Care Act 1997) is narrow, limited to employees who disclose information about a suspected reportable assault. There is no protection in relation to complaints or information about substandard care more broadly. The lawyers cite, with approval, recently strengthened provisions in the Corporations Act 2001 (Cth). These apply protections to an expanded scope of disclosures and to a broader range of people, including past employees. They advocate comprehensive whistle-blower protection provisions (paras. 1521 & 1523-4).*

### ***Recommendation 115***

The new Act should contain comprehensive whistle-blower protections for:

- a. people receiving aged care, their family, carer, independent advocate or significant other
- b. an employee, officer, contractor, or member of the governing body of an approved provider

who makes complaints or reports suspected breaches of quality and safety standards or other requirements of the Act.

## **Enforcement: power to regulator to remove a provider's executive management team and appoint external managers**

### ***Recommendation 111.1 b***

*Counsel Assisting agreed that aged care enforcement was “enfeebled” and below community expectations. A wider range of enforcement powers was needed including the power for the quality regulator to remove the group of people responsible for the executive decisions of the provider and to appoint an external manager. This could be invoked where residents are at risk of serious harm and it is not possible or desirable to move them to another service (paras. 1475-1479). The July 2019 Earle Haven (Queensland) emergency is cited where 70 high care residents had to be evacuated by ambulances after the home abruptly shut down. This followed a decision by the provider PeopleCare to terminate the contract of a subcontractor HelpStreet, which managed the home, alleging poor care. The latter demanded \$3.8 million for an ‘orderly exit’ and two days later abandoned the facility (S. Elks, ‘Nursing home’s decade of failure’, [The Australian](#), 21 September, 2019).*

## Believe it or not

### No worker voice

#### *“self-defeating and perplexing”*

The 10 member Aged Care Workforce Industry Council has only one member representing aged care workers and there is no representation of the thousands of nurses who work in aged care nor any of the allied health professions. None of the 13 member Aged Care Workforce Strategy Taskforce represented aged care workers. The lawyers have recommended changes and described the undervaluation of worker contribution, including during the development of the COVID-19 visitors code, as a “sector and government blind spot” (paras. 629-630).

### Skills gaps

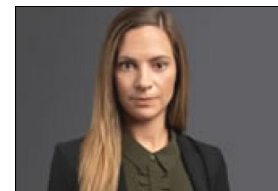
#### *bureaucratic log jam*

An Aged Services Industry Reference Committee was established in March 2018 to “revisit national competency standards”. The lawyers note that it has made minor changes to the elective requirements for *Certificate III in Individual Support (Ageing)* and only now, an infection prevention and control module in the elective group (para 664). Surely it should be mandatory! Elder Care Watch views this glacial change as due in part to the log jam of overloaded committees and multiple jurisdictions dealing with training.

## Counsel Assisting



**Richard Knowles SC**



**Brooke Hutchins**



**Eliza Bergin**

## This is reassuring

*“It is ...important to ensure that work that requires the skills of a nurse is performed by a nurse. The case studies revealed evidence of personal carers dressing wounds (Avondrust, Interim Report: Neglect, vol. 2, pp. 320-322) - work that should clearly be performed by a nurse. The answer to this is not to train personal carers to be better at wound dressing, the answer is to ensure there are more nurses working in aged care”* (Counsel Assisting, 20 October, 2020, para. 661).



The Interim Report was titled **Neglect**. What will the Final report, due by 26 February 2021, be called?

### Independence

Elder Care Watch is independent and does not seek or accept funds from governments or private organisations.

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