

The Royal Commission into Aged Care Quality and Safety has potential to be the catalyst for significant reform of the aged care system. The aged care industry is familiar with reviews and inquiries, but the public policy changes that may flow from the Commission's report may have the greatest impact upon approved providers.

For the Royal Commission to effectively investigate the Terms of Reference there will be a major inquiry into the conduct of approved providers aided by the extensive powers given to the Commission. For those approved providers whose conduct is scrutinised by the Commission, there is not only a concern about reputation, but also any litigation or disciplinary action that may follow.

Preparation for possible involvement in the Royal Commission requires approved providers to understand the strengths and weaknesses of their position by reference to the Terms of Reference. That understanding will be the basis for your strategy in meeting the challenges of the Royal Commission if called upon to provide documents, statements or evidence. We recommend you seek legal advice now to understand the best preparation strategy for your organisation as you may not have much time if called upon.

What is the purpose of a Royal Commission and how do they function?

The purpose of a Royal Commission is to inquire and investigate a subject matter, gather evidence and then deliver a report on its findings and recommendations to the government. The Royal Commission into Aged Care Quality and Safety will be governed by the *Royal Commissions Act 1902* (Cth) (**Act**) and the Letters Patent which will establish the Commission, appoint the Commissioner(s) and set out the Terms of Reference.

The Terms of Reference determine the matters the Commission is authorised to inquire into. They will be published on the Commission's website once established. The Terms of Reference establish the boundaries of the inquiry and are the touchstone for relevance in the exercise of powers. The Terms of Reference are usually interpreted broadly given the nature and function of Royal Commissions. They also give an indication about whether the inquiry will be more in the nature of an investigation to establish responsibility for certain outcomes, or an examination of issues to develop public policy, or a combination of the two.

While the Government is still settling the precise Terms of Reference, the areas considered by the Government to be appropriate for the inquiry indicate that this Royal Commission will be a combination of both as described below. It will investigate, for example, the extent of sub-standard care to determine the magnitude of the problem, and it will consider what improvements can be made in the delivery of aged care to inform policy reform.

Investigatory

- The quality of care and the extent of substandard care
- Challenge of providing care to young Australians with disabilities living in residential aged care

Investigatory/policy

- The challenge of supporting the increasing number of Australians suffering dementia and addressing their care needs as they age

Policy

- The future challenges and opportunities for delivering aged care services in the context of changing demographics, including in remote, rural and regional Australia

How long will the Royal Commission take to complete?

Royal Commissions are usually given a timeframe for the delivery of the report containing the findings and recommendations. The Terms of Reference will heavily influence whether the timeframe is months or years. The public interest in the Commission, the number of submissions received from the public, the complexity of the issues that are raised for investigation and the public hearings may call for the Government to set a generous timeframe. That timeframe may be revised during the life of the Commission if it becomes apparent that the report cannot be delivered within the original deadline. We would expect that the life of the Royal Commission will be an extended one if it is to meet the public's expectation of a thorough and considered investigation into the aged care system that will improve outcomes for current and future residents / clients.

What powers does the Royal Commission have?

The quality of the Royal Commission's report depends very much upon the quality of the investigation it undertakes, and its analysis of the subject-matter. The Commission is given extensive powers to obtain the information, documents, statements and evidence it requires to inform itself. As Royal Commissions are inquisitorial in nature rather than adversarial, it is the Commission which defines how it informs itself having regard to the Terms of Reference.

A failure to respond to the coercive powers of the Royal Commission may not only attract adverse public comment, it may attract serious consequences. For example, the Commission will have:

- the power to demand the production of documents
- the power to penalise for non-attendance or refusal to give evidence
- the power to examine a person under oath and require answers to the questions posed
- the power to exclude the public from hearings in certain circumstances and
- the power to issue search warrants and arrest warrants

It is therefore imperative that anyone the subject of a summons to produce documents, make a statement or give evidence should seek advice about how they engage with the Royal Commission so that they do not fall foul of the offences that attach to disobeying or disrespecting the powers the Royal Commission has. Integral to that is considering whether the exercise of powers is within the powers conferred upon the Commission, or if there are any relevant limitations or exemptions.

What do I need to know about the Royal Commission process?

- Royal Commissions are run on tight deadlines and material will often be required in short timeframes
- Royal Commissions establish the procedure or timetables that must be complied with
- The Commission will request interviews/hearing appearances with key personnel and employees
- Approved providers may be asked to nominate one person to give evidence on its behalf, and that person may be recalled to give evidence
- The Royal Commission may examine issues by reference to case studies hearing from a representative sample of approved providers that illustrate the concerns raised in the inquiries made by the Commission
- The ability to rely upon the privilege against self-incrimination or legal professional privilege to be exempt from providing documents or evidence is significantly curtailed
- It is far better to build a good working relationship with the Royal Commission's office to resolve issues than it is to have public arguments
- Commissions are well publicised - the public pay attention to what is happening and read the headlines
- Witnesses need to be well prepared, have a thorough understanding of the subject-matter, be willing to make concessions where appropriate and explain the effectiveness of any improvements that have been made
- Hearing topics will change and are likely to be published on a rolling basis
- The focus of the Commission may change as may the hearing topics, which may impact upon the preparation undertaken by approved providers

- While it is possible to recover the costs of attending the Commission to give evidence, the amount recovered will not cover the bulk of the costs of preparing to give evidence
- You may have insurance that covers the costs of responding to the Commission so check carefully your insurance policies and speak to your brokers or insurers to ensure any costs covered by the policy are reimbursed to you

What will the Royal Commission into Aged Care focus on?

When the Terms of Reference are established, the Royal Commission will decide the precise matters that it will inquire into under the general headings of the Terms. The actual areas for investigation will likely change as evidence is obtained and heard; and as hearing topics are decided upon. Given the broad coverage of the Royal Commission, it is recommended that approved providers treat this as an opportunity to audit likely areas of exposure. We anticipate that the following areas will be the key focus of the Royal Commission:

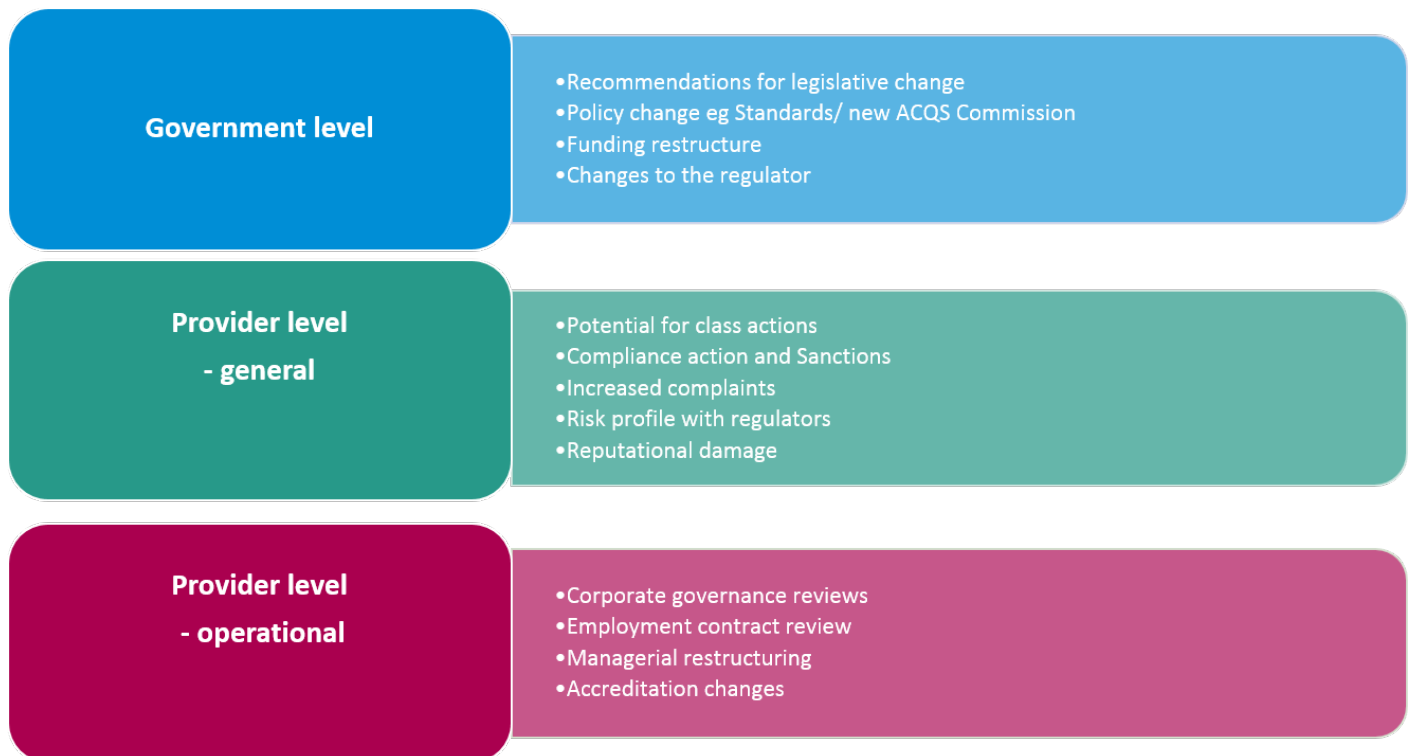
What will happen at the end of the Royal Commission?

Once all the evidence has been heard and collected, it will be the role of the Commission's members to make recommendations to the government. The members can also make a referral of findings to other bodies to investigate for regulatory action, civil penalties or criminal offences. For example, if an adverse finding is made against you or your organisation, a referral can be made to the Director of Public Prosecutions, the Australian Federal Police, the Australian Competition and Consumer Commission, the Fair Work Commission, the Australian Taxation Office and other Commissions. This may include a referral to the new Aged Care Quality and Safety Commission which combines the majority of the regulatory functions of the current regulators and begins on 1 January 2019.



Depending on the findings, there is also the risk that your organisation will be subject to further litigation post the Royal Commission. The media coverage may see a push for class actions or more claims against your organisation, for example, compensation claims from representatives of care recipients or your workforce.

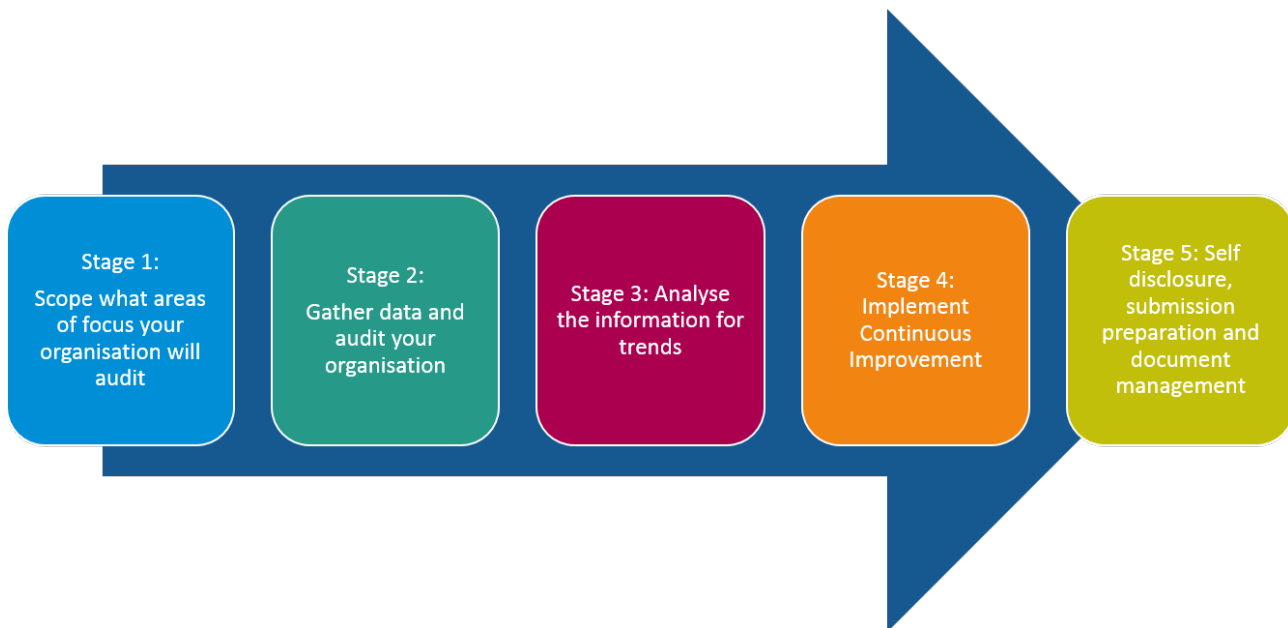
Changes will be wide-ranging and even if the recommendations of the Royal Commission are not swiftly implemented, we will see the beginning of a shift in the industry at all levels of stakeholder engagement. For example, at the government and provider level, the following may occur:



How do I begin preparing for the Royal Commission?

A staged approach to preparation for the Royal Commission should be undertaken. You should consider seeking legal advice about how to structure your understanding of what your organisation will need so that you can customise the preparation approach to the type and size of your organisation. In all organisations, the areas of focus listed above should be considered and audited followed by an in-depth review of the supporting documentation. You will then need to conduct a risk assessment and continuous improvement plan before collating all this information ready for any requests you might receive from the Commission. Each stage of the process is impacted by the thoroughness of your preparation and developing responses to anticipated issues or areas of risk.

Having developed a thorough understanding of the strengths and weaknesses of your position, your strategy or case concept for managing your involvement with the Royal Commission can be developed. Needless to say, developing strategy on the run having received the summons to provide evidence does not place your organisation or its people in the best position to protect reputations and avoid any consequent actions.



What tips do you have for preparing?

- ✓ Formulate a thorough system for managing your documents in a manner that is consistent with the Commissions document management protocol.
- ✓ Compile any submissions or papers your organisation has contributed to in the past, for example, to the Tune Review or Senate inquiries, to gauge an idea about your organisation's role in the reform landscape.
- ✓ Assess the focus areas where your organisation may be exposed.
- ✓ Identify those facilities within your group that have weak spots and turn your attention to those facilities immediately.
- ✓ Collate data on those areas in your organisation which present a risk and brief the Board about those risks.
- ✓ Document improvements that have been made in response to failings and ensure that the effectiveness of those improvements have been measured.
- ✓ Identify who in your organisation is likely to represent your organisation should you be involved in giving evidence and who in your team will be involved in preparing for the Royal Commission.
- ✓ Ensure you have a media and public relations system in place to handle the calls you may receive and how the issues will be communicated to your stakeholders.
- ✓ Don't wait until you're called upon before preparing.
- ✓ Check your insurance policy and review whether the legal expenses incurred will be covered by insurance.

What assistance can I get from Russell Kennedy Lawyers?

Russell Kennedy Lawyers can assist by explaining the Terms of Reference of the Royal Commission, how they may affect you and how you can start preparing should you be called upon to provide evidence. We can assist with the audit of your legal risk, and the development of your strategy to manage your risk. We can assist with document management and witness preparation. Russell Kennedy can advise upon the exercise of the coercive powers and any limitations or exemptions to them, as well as liaise with the Royal Commission on your behalf.

We are providing information to approved providers in the form of updates and keeping them informed via our email alerts. Our deep understanding of the aged care sector, and our involvement in previous Royal Commissions places us in a unique position to assist you to navigate the challenges of the Royal Commission into Aged Care Quality and Safety.

Disclaimer

The information contained in this guidance is intended as general commentary only and should not be regarded as legal advice. Should you require specific advice on the topics discussed, please contact the firm directly.

Your Russell Kennedy Team



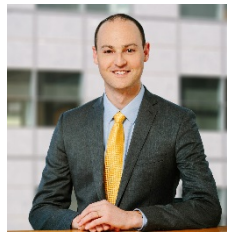
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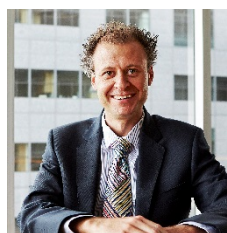
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Royal Commission into the Home Insulation Program

Retained by a Commonwealth Department to represent one of its employees in the Royal Commission.



2009 Victorian Bushfires Royal Commission

Represented former Chief Commissioner of Police, Christine Nixon to respond to anticipated adverse comments.

Represented the Victorian Building Authority which had been afforded 'whole of Government' representation, to protect its interests in responding to the Bushfires Royal Commission.



COMMISSION FOR CHILDREN AND YOUNG PEOPLE

Acted for a homecare organisation in a Commission for Children and Young People's inquiry into the death of a child under child protection.



Royal Commission into Trade Union Governance and Corruption

Represented the CEO of the Peter McCallum Cancer Institute in the Royal Commission into Trade Union Governance and Corruption.



PARLIAMENT OF VICTORIA
Environment, Natural Resources and Regional Development Committee

Advised clients in relation to the Inquiry into the CFA Training College at Fiskville.



Royal Commission into Institutional Responses to Child Sexual Abuse

Acted for a provider of Residential Aged Care, Retirement Living, In Home Care, Family, Children and Disability services with respect to responding to requests for information and documents; as well as preparing witness statements; and strategic input into responding to the issues of concern arising from the Royal Commission.



Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

We acted for a not-for-profit organisation and assisted them with their strategic positioning and providing advice on their risk strategy and policies.



Represented the former Metropolitan Ambulance Service in the Royal Commission.



PARLIAMENT OF VICTORIA
Legislative Council
Environment and Planning Committee

Advised clients in relation to Inquiry into fire season preparedness.



PARLIAMENT OF VICTORIA
Independent Broad-based Anti-corruption Commission Committee

Advised clients in relation to an Inquiry into external oversight of police corruption and misconduct in Victoria