

# Aged care reform heralds heightened risk for insurers

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## AT A GLANCE

- The work of the Royal Commission and the devastating impact of COVID-19 on the aged care sector make it clear that significant change is on the way.
- The Royal Commission is due to publish its final report on 26 February 2021.
- The anticipated recommendations, combined with impact of the pandemic, are likely to raise several issues for aged care insurers, ranging from class actions and investigations to EPL issues, D&O exposures and professional indemnity claims.

*The aged care sector in Australia is on the precipice of major reform. The combination of the Royal Commission into Aged Care Quality and Safety (Royal Commission) and the devastating impact of the COVID-19 pandemic has exposed flaws in the system that provides care to some of the most vulnerable members of our community.*

*This paper analyses the current landscape of aged care in Australia, looks at some of the reforms likely to be recommended by the Royal Commission, and explores the key issues for insurers in the sector.*

## A CHANGING LANDSCAPE

More than 1.3 million people are currently supported by the aged care sector in Australia.<sup>1</sup> This ranges from occasional support in the home all the way up to high-need residential care in an aged care facility. These services are currently supported by a \$21.2 billion

annual investment by the Commonwealth Government – a figure that has more than doubled in a decade.<sup>2</sup> Demand for aged care services is projected to significantly increase in the next generation. This goes

<sup>1</sup>[https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/ROACA/20366-Health-Report-on-the-Operation-of-the-Aged-Care-Act-2019%e2%80%932020-accessible.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/ROACA/20366-Health-Report-on-the-Operation-of-the-Aged-Care-Act-2019%e2%80%932020-accessible.pdf)

<sup>2</sup>[https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/ROACA/2009-10-ROACA.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/ROACA/2009-10-ROACA.pdf)

hand-in-hand with the expected rapid increase in the number of older Australians.<sup>3</sup>

Despite significant annual funding increases, the aged care sector has been criticised for not meeting the needs of older Australians. This led to the establishment of the Royal Commission in December 2018.

The Royal Commission laid bare the scope of its concerns in an interim report entitled 'Neglect':

*'As a nation, Australia has drifted into an ageist mindset that undervalues older people and limits their possibilities. Sadly, this failure to properly value and engage with older people as equal partners in our future has extended to our apparent indifference towards aged care services. Left out of sight and out of mind, these important services are floundering. They are fragmented, unsupported and underfunded. With some admirable exceptions, they are poorly managed. All too often, they are unsafe and seemingly uncaring. This must change'.<sup>4</sup>*

The Royal Commission expressed this view in October 2019 after hearing from hundreds of aged care residents and their families in 13 public hearings across Australia. The concerns of the Royal Commission were then compounded by the devastating impact of the COVID-19 pandemic on the aged care sector.



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## OPTIONS FOR REFORM

The Royal Commission's interim report flags an intention to "recommend a whole-of-system reform and redesign". The overall purpose is to empower aged care recipients and their families to make informed choices about their service providers, with a real option to change if necessary. Options for reform are likely to include new regulatory powers, avenues for civil remedies, mandatory staffing requirements and wholesale workforce changes. It seems clear that reforms of this nature will require legislative and

regulatory amendments, along with major funding increases.

Specific options for reform may include:

- a non-delegable duty of care on aged care providers to ensure that nursing and personal care is of high quality, safe and provided by adequately qualified staff – breaching this duty may attract a civil penalty and enliven a specific statutory right to seek compensation
- a significant increase to the regulator's ability to investigate suspected breaches, including the authority to search premises without a warrant or consent
- enforceable measures to restrict the use of anti-psychotic medication and to ensure that chemical and physical restraints are only used as a measure of last resort
- an immediate increase in the number of home care packages to clear the waiting list and a requirement that new packages be allocated within a month of assessment
- funding for dental care for all aged care recipients and for people who receive the age pension
- Medicare funding to allow people who receive aged care services at home to access telehealth consultations
- a plan to ensure no person under 65 lives in a residential aged care facility by 2025
- minimum staffing levels for nurses and personal care workers to provide 3.5 hours of care per day for each aged care recipient in residential facilities
- a requirement for residential aged care providers to formally engage with a series of allied health professionals, including podiatrists, physiotherapists, oral health practitioners, occupational therapists, speech pathologists, dietitians and music/art therapists, and
- increased award wages and remuneration for the aged care workforce.

The final reforms will require insureds to review and adjust their approach to many work practices, including significantly improving their compliance activities and records, and completely reassessing funding sources and resource allocations.

<sup>3</sup><https://agedcare.royalcommission.gov.au/sites/default/files/2020-09/research-paper-11-aged-care-reform-projecting-future-impacts.pdf>

<sup>4</sup><https://agedcare.royalcommission.gov.au/sites/default/files/2020-02/interim-report-volume-1.pdf>

Insureds should also anticipate increased regulatory and disciplinary investigations by the Aged Care Quality and Safety Commission (and its likely successor following publication of the Royal Commission's final report). These investigations will have the potential to lead to professional indemnity claims against aged care providers, as well as doctors and allied health professionals working in aged care facilities. There is also the potential for D&O claims following investigations.

### A WORKFORCE "UNDER PRESSURE" MAY LEAD TO CLAIMS

More than 366,000 people are employed in the aged care sector in Australia.<sup>5</sup> This includes a broad range of roles, such as nurses, personal care workers, allied health professionals and support staff.

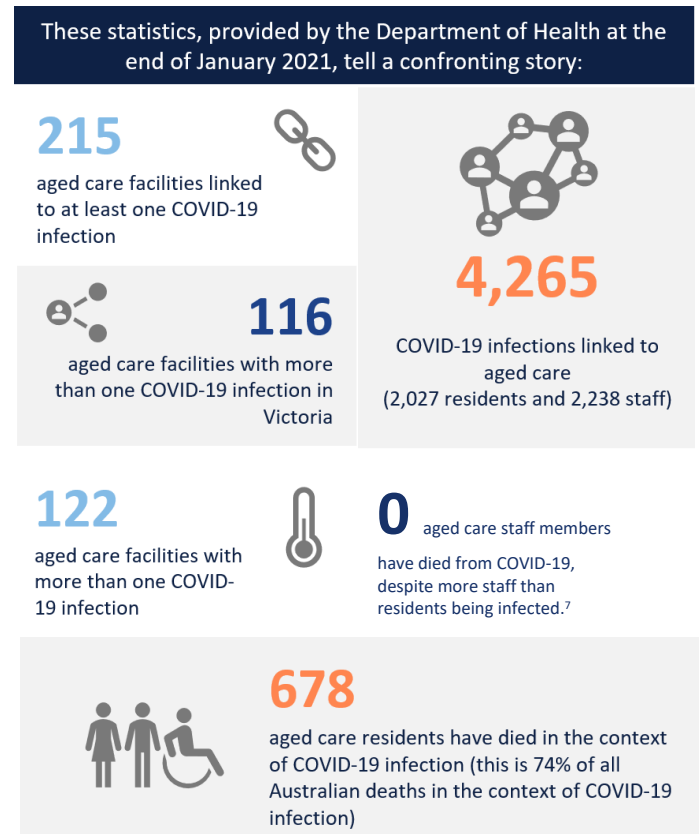
The Royal Commission has expressed a view that Australia's aged care workforce is "under pressure, underappreciated...(and) lacks key skills". This is because the aged care sector has generally low rates of pay, limited opportunities for advancement and further education, and drastic skill shortages in regional and remote areas.

This background, combined with the safety risks associated with COVID-19 and the potential for reform-related disciplinary investigations leading to a termination of employment, suggest that new EPL claims may arise in the sector.

### VULNERABILITY TO COVID-19 LEADS TO CLASS ACTIONS

Aged care residents have suffered a disproportionately high infection and mortality rate from COVID-19 when compared to the rest of the Australian population. The vulnerability of aged care residents to COVID-19 has led to prolonged bans on in-person visits by family, friends and healthcare professionals. This has resulted in months of isolation for aged care residents, as well as increased levels of depression, anxiety, confusion and loneliness.<sup>6</sup>

Figure 1.



The numbers, shown in Figure 1, paint a stark picture of what happens when a COVID-19 outbreak affects a vulnerable community. Only two thirds of aged care residents have recovered from a COVID-19 infection, compared to a recovery rate of 99% for the rest of the Australian population.

At this stage, two class actions have been filed in the Supreme Court of Victoria against the owners of aged care facilities. These class action proceedings allege a failure to adequately care for residents and protect them from COVID-19 infection, leading to death or serious injury for residents and nervous shock to family members and staff. Both proceedings allege a litany of breaches, such as failing to provide personal protective equipment, failing to follow government guidelines and directives about infection control, and failing to prevent people with a suspected COVID-19 infection from entering the facility.

<sup>5</sup>[https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/ROACA/20366-Health-Report-on-the-Operation-of-the-Aged-Care-Act-2019%e2%80%932020-accessible.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/ROACA/20366-Health-Report-on-the-Operation-of-the-Aged-Care-Act-2019%e2%80%932020-accessible.pdf)

<sup>6</sup><https://agedcre.royalcommission.gov.au/sites/default/files/2020-12/aged-care-and-covid-19-a-special-report.pdf>

<sup>7</sup> <https://www.health.gov.au/resources/publications/covid-19-outbreaks-in-australian-residential-aged-care-facilities-29-january-2021>

The prospect of two other class actions in Victoria and New South Wales has been announced, with the possibility of more to come.

### THE ISSUE OF VACCINES FOR AGED CARE STAFF

The disproportionate vulnerability of aged care recipients to COVID-19 means there is an increased focus on the obligation of providers to ensure the safety of all people involved in the sector. This includes the challenging issue of COVID-19 vaccines for aged care staff.

At this stage, there is no definitive answer about whether an employer can direct an employee to receive a vaccination. However, the 2020 decision of the Fair Work Commission in *Arnold v Goodstart Early Learning* provides some useful guidance.<sup>8</sup> Ms Arnold was a childcare worker who refused to accept a free mandatory flu vaccination. Ms Arnold did not meet one of the medical exemptions specified by Goodstart and her employment was terminated. Ms Arnold's application was dismissed because she filed out of time, but Deputy President Asbury made an important observation:

*"it is at least...arguable that the Respondent's policy requiring mandatory vaccination is lawful and reasonable in the context of its operations which principally involve the care of children".*

While there is a potential for EPL claims if an employee's vaccine refusal leads to a termination of employment, a comparison can be drawn between flu vaccinations in the context of childcare and COVID-19 vaccinations in the setting of aged care. Both employers provide care to vulnerable groups and a mandatory vaccination is a clear way to mitigate a specific risk. This means a requirement for an aged care worker to receive a COVID-19 vaccination may be considered a lawful workplace direction. This is particularly so in the context of the current National COVID-19 Safe Workplace Principle, which requires "a uniquely focused approach to work health and safety as it applies to businesses, workers and others in the workplace".

### WATCH THIS SPACE

The heightened focus on aged care in light of the Royal Commission's work and the COVID-19 pandemic raises several issues for insurers in the sector.

Class action proceedings related to infection control and COVID-19 deaths in aged care are already underway, with more likely to follow. Additionally, the need for workforce changes and increased scrutiny on service delivery may lead to EPL claims when disciplinary action is taken against staff members in the sector. Similarly, as reform is likely to lead to increased regulatory and disciplinary investigations, there's also the potential for a spike in D&O and professional indemnity claims involving aged care providers. Extensive publicity and reaction to the Royal Commission's final report may also lead to increased civil proceedings including class actions against aged care providers.

To help mitigate these risks, insureds should involve their insurers early when responding to sector reform and potential claims.

We will provide further analysis of the impact of reform on insurers and insureds after the Royal Commission publishes its recommendations on 26 February 2021.

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<sup>8</sup> *Arnold v Goodstart Early Learning* [2020] FWC 6083

## Need to know more?

For more information please contact us.



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