

The Hon. Tony Pagone QC  
Ms Lynelle Briggs AO  
Royal Commission into Aged Care Quality and Safety

Dear Commissioners

### **Submission on the Necessity for the Reform of the Aged Care Act 1997**

The prevalence and spread of COVID-19 in the Australian population and disastrous consequences it has had in residential aged care facilities has prompted us to make this submission to provide recommendations to enable vulnerable aged care residents to be protected in the future from neglect and to ensure quality of care.

With the launch of the class action lawsuit against [REDACTED] after the outbreak of the novel Coronavirus infected almost every aged care resident at their [REDACTED] facility, it is now more important than ever to ensure that the consumer rights of aged care residents are guaranteed. It should not take a global pandemic and a class action of over 30 families of relatives who died as a consequence of an outbreak to seek amends from providers. This submission outlines steps that can be taken strengthen the current system of aged care services to hold negligent providers accountable and to promote the empowerment and dignity of care recipients.

Despite being referred to as “consumers” in the User Rights Principles, individuals entering aged care facilities are not guaranteed the same provisions to enforce their rights as consumers in their residential care contracts consistent with other Australian laws. In fact, there is currently little that can be done on behalf of the resident, or “consumer”, when there has been a failure in the quality of care received aside from invoking their right to complain. No legal action for a breach of the quality and standards of care in the *Aged Care Act 1997* (the *Act*) can be made because the Act itself effectively renders those claims unenforceable.

Essentially, the protection of a resident’s quality of care is supported by two pillars—the statement of Rights and Responsibilities and the complaint system—each with their own unsatisfactory shortcomings which are outlined in the submission. Below is a summary of the key changes proposed that are crucial to upholding the rights of aged care recipients, including in instances of infectious disease outbreaks.

## Recommendations

1. Include previously stated rights which have been omitted from the Charter of Rights, into the new “simplified’ Charter of Aged Care Rights.
2. Remove the allowance in the User Rights Principles for aged care providers to assist in ensuring care recipients’ understanding of the resident agreement.
3. Require the Charter of Rights to be incorporated into residential care contracts through a contract clause.
4. Have a clause in every residential contract that specifically states that the resident will have access to the same measures set out in Australian consumer law as do all Australians, and that the rights in the Charter are enforceable by the consumer; and amend the User Rights Principles to require every aged care contract to have a standard annexure with information about Australian Consumer Law.
5. Require aged care providers to participate in a compulsory arbitration process as an alternative for residents when serious disputes are not satisfactorily dealt with.

## Rationale

- 1. Include previously stated rights from the Charter of Rights into the new “simplified’ Charter of Aged Care Rights.**

The new “simplified” Charter of Aged Care Rights proposed by the Department of Health has significantly watered-down the user rights outlined in the previous Charter of Rights. In an attempt at simplicity and clarity, the new Charter has neglected to include a previously stated right to “full and effective use of his or her personal, civil, legal, and consumer rights”, as well as important others. Rather than establishing specific rights of individuals, the new Charter ensures the vague generality of “safe and [of] high quality services”, which is no doubt the primary objective of anyone seeking care for vulnerable elders.

- 2. Remove the allowance in the User Rights Principles for aged care providers to assist in ensuring care recipients’ understanding of the resident agreement.**

In order to remedy what could either be an unfortunate oversight or a blatant conflict of interest, this submission calls on the Minister and the Department of Health to remove any such provision requiring staff to explain the contract.

**3. Require the Charter of Rights to be incorporated into residential care contracts through a contract clause.**

The newly required process of relying on provider staff to assist with incoming residents to understand their rights and with explaining the residential care contract gives the impression that the rights associated with the Charter are prioritized. In reality, the Charter is not, in fact, even connected to the residential care contract thus rendering the rights associated with the Charter unenforceable due to the fact that they only have a status which is given under the Act. The Minister and the Department of Health should require the Charter to be attached to the residential care contract by reference to a contract clause which would incorporate the Charter into the contract.

**4. Have a clause in every residential contract that specifically states that the resident will have access to the same measures set out in Australian consumer law, and that the rights in the Charter are enforceable by the consumer; and amend the User Rights Principles to require every aged care contract to have a standard annexure with information about Australian Consumer Law.**

The existence of apparent rights under the proposed Charter, while presumably providing comfort to residents and their loved ones, gives the false impression that residents or their families could initiate action themselves in a case of a breach in quality care standards. In fact, the Act merely grants individuals the right to complain and wait for a bureaucratic response that references a care standard based on the minimum requirements necessary for a provider to retain their license and Commonwealth funding. This response through the complaints system does not protect individuals from harm or injury, nor does it enforce a just outcome for residents or their loved ones. In order for a care recipient to enforce their rights, this submission proposes that there be a clause in every residential contract that specifically states that the resident will have access to the same measures set out in Australian consumer law as does every Australian, and that the rights in the Charter are enforceable by the resident.

In extension, this submission holds that by not acknowledging and explaining consumer rights in residential care contracts, vulnerable aged care consumers are being treated less favorably in the contract than they are under Australian Consumer Law, and therefore a standard annexure outlining Australian consumer law should be required in every aged care contract.

**5. Require aged care providers to participate in a compulsory arbitration process when serious disputes are not satisfactorily dealt with.**

In instances of injury, stress, or trauma, there are limited pathways for civil legal claims which attempt to amend the situation, and the available options are rarely pursued. In addition, there are no known provisions for private dispute resolution through arbitration included in any residential care contract, likely due to the fact that the alternative option for settling disputes through the aged care complaint system is utterly devoid of any remedies available to the resident as an individual or accessible through their loved ones. We're calling for the mandatory submission of the Provider to a binding arbitration process to resolve serious disputes that are not satisfactorily dealt with.

**Conclusion**

Including consumer law protections and the right to take legal action is fundamental to securing the dignity and empowerment of individuals, and an important step in strengthening the system of aged care services, especially in light of the trauma and neglect which residents in aged care facilities have endured.

Yours sincerely,



Dementia Reframed



**Seniors Rights  
Service**



**QACAG**  
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