

15 September 2019

ROYAL COMMISSION
GPO Box 1151
Adelaide SA 5001

Dear Committee Secretary

UNSW LAW SOCIETY SUBMISSION REGARDING THE ROYAL COMMISSION INTO
AGED CARE QUALITY AND SAFETY

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Royal Commission into Aged Care Quality and Safety.

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to advance the education of our student-members.

Our enclosed submission reflects the opinions of member-contributors of the UNSW Law Society.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely



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THE QUALITY AND SAFETY OF AGED CARE FACILITIES

I OVERVIEW

The Oakden Elder Abuse Report¹ documented the extent of abuse and neglect suffered by residents in the Oakden nursing home. The report detailed issues with management deficiencies, under-resourcing and maladministration which resulted from years of systemic failings, oversight and a lack of transparency in the industry.² Unfortunately, instead of isolated incidents, there is a concerning trend of gross negligence towards care of the elderly.

Currently, around 5% of the Australian elderly population reside in aged care facilities.³ However, demographics analyses indicate as the ‘baby boomer’ generation ages, there will be a large increase in the elderly population in Australia. In 2017, 15% of the Australian population was aged 65 and over⁴ but the Australian Bureau of Statistics projects that by 2057, individuals aged 65 years and over will make up approximately 22% of the population.⁵ In the context of a steadily ageing population, there is an imperative to deliver accessible, affordable, and high-quality aged care services.

II CHANGING DEMOGRAPHICS

A *Remote, Rural, and Regional Communities*

There are significantly higher rates of older Australians living in non-metropolitan areas, with 40% of 70 to 74 year olds living outside capital cities.⁶ The ability of aged care providers to deliver accessible, affordable and high quality services varies from region to region because policies are inconsistently and ineffectively applied. The rural dimension to aged care is also complicated by the fact that, on average, regional-based elderly people subsist on lower incomes and reduced mobility when compared to their metropolitan counterparts.⁷ Consequently, residential aged care facilities in non-metropolitan areas tend to be small and are thus unable to benefit from advantages such as economies of scale and scope due to a relatively smaller and less concentrated market.⁸ Additionally, the vast majority of existing services

¹ Adam Graycar, ‘Oakden Not the Only Care of ‘Elder Abuse’ In Our Community’ (Media Release, 15 March 2018) <<https://indaily.com.au/opinion/2018/03/15/oakden-not-case-elder-abuse-community/>>.

² Ibid.

³ Australian Bureau of Statistics, *Disability Ageing and Carers, Australia: Summary of Findings, 2015* (Catalogue No 4430.0, 18 October 2016).

⁴ AIHW, ‘Older Australia at a Glance’, *Australian Institute of Health and Welfare* (Web Report, 10 September 2018) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile/>>.

⁵ Australian Institute of Health and Welfare, *Older Australia at a Glance*, Report No 87 (2018).

⁶ Kathy Bell, *Towards an Action Plan for Aged Care for Rural and Remote Australia* (Report from Australian Association of Gerontology Regional, Rural and Remote Special Interest Group workshop, 7 November 2017) p 6.

⁷ Aged Community Services & Australia and the National Rural Health Alliance, *Older People in Aged Care in Rural, Regional and Remote Australia*, June Discussion Paper (2004).

⁸ Baldwin, R et al, *Issues facing aged care services in rural and remote Australia* (Report)

<<https://www.nintione.com.au/resources/rao/issues-facing-aged-care-services-in-rural-and-remote-australia/>>.

in rural areas tend to be not-for-profit or public sector services which indicate that commercial organisations have limited financial incentives in engaging with rural, remote, and regional markets.⁹ The reduced availability of social services in regional areas thus present greater pressure to achieve equitable outcomes for the elderly population in these areas.

B *Ageing Population and In-Home Care*

As previously stated, Australia's ageing population is already recognised by the Australian government. In June 2018, the number of places for residential aged care reached 207,100,¹⁰ and 97% of people using residential care were 65 or over.¹¹

A direct result of Australia's ageing population is the increased demand for aged care services. As only around 5% of the elderly population reside in aged care facilities, there is a revealed preference for older people seeking to remain at home as they age to 'age in place'.¹² 'Ageing in place' requires government assurance of appropriate health and social services in home which invariably poses a challenge, as houses and infrastructure must be more accessible to support the health and mobility of older Australians.¹³ The Commonwealth Home Support Programme and Home Care Packages are current policies that support those living at home. However, such subsidised programs are in high demand and will need further development if they are expected to cope with a steadily increasing elderly population. The priority list for home care packages in particular is struggling to meet demands, with over 127,000 people waitlisted for the service.¹⁴ There is thus a need to improve the accessibility and affordability of in-home care.

III EXISTING FRAMEWORKS AND PROBLEMS

A *Quality Indicator Programme*

The National Aged Care Quality Indicator Program is a pilot version of a self-audit program that sought to implement a national quality audit scheme among all aged care facilities.¹⁵ Compliance with the pilot program was generally high and feedback indicated that such audits were required to keep the industry accountable and could improve the standard of care.¹⁶ However, participants also indicated that data

⁹ Kathy Bell, *Towards an Action Plan for Aged Care for Rural and Remote Australia* (Report from Australian Association of Gerontology Regional, Rural and Remote Special Interest Group workshop, 7 November 2017) 7.

¹⁰ GEN Aged Care Data, *Services and places in aged care* (30 June 2018) Australian Institute of Health and Welfare <<https://www.gen-agedcaredata.gov.au/Topics/Services-and-places-in-aged-care>>.

¹¹ Australian Institute of Health and Welfare (n 10).

¹² PC, 'Housing decisions of older Australians', *Productivity Commission* (News Article, March 2016) <<https://www.pc.gov.au/news-media/pc-news/previous-editions/pc-news-march-2016/housing-decisions-older-australians>>.

¹³ AIHW, 'Ageing and the health system: challenges, opportunities and adaptations', *Australian Institute of Health and Welfare* (online, n.d.) 11 <https://www.aihw.gov.au/getmedia/19dbc591-b1ef-4485-80ce-029ff66d6930/6_9-health-ageing.pdf.aspx>.

¹⁴ Michael Woods and Sarah Wise, "Would You Like To Grow Old At Home? Why We're Struggling To Meet Demand For Subsidised Home Care", *The Conversation* (Webpage, 2019) <<https://theconversation.com/would-you-like-to-grow-old-at-home-why-were-struggling-to-meet-demand-for-subsidised-home-care-112963>>.

¹⁵ KPMG, *National Aged Care Quality Indicator Programme – Residential Care Pilot Outcomes* (Report, March 2016).

¹⁶ *Ibid* 4.

collection was generally too resource intensive when taking into account the current staffing resources available. This was especially in regards to quality factors that were associated with a significant time burden.¹⁷ It was also found that during the pilot, the lack of time or resources could potentially deter facilities from participating at all.¹⁸

The lack of appropriate staff resources and in particular, a lack of mandated staff-to-resident ratios is linked consistently to adverse resident outcomes.¹⁹ The NSW Nurses and Midwives' Association member surveys demonstrated that increased staffing, especially during night shifts would lead to a reduced chance of falls and hip fractures in residents.²⁰ The survey further found that 43% of participants were employed on a ratio of 1 registered nurse to 50 - 100 residents, with 8% employed on a ratio of 1 nurse to 100-150 residents.²¹ With a turnover rate of up to 20%, the issue of understaffing amongst healthcare professionals (including nurses), is particularly concerning.²²

Moreover, staff burnout is a major factor in elder abuse and neglect. Without adequate training and education, the feelings of helplessness and inadequacy that aged care staff experience when dealing with difficult older persons is exacerbated.²³ As observed by Jan Howard, a Registered Nurse working in a Tamworth aged care home, nurses tend to be 'feeling the pressure of lack of time, constantly clock-watching because time is getting away...and they still have umpteen other jobs to do before the end of their shift'.²⁴ The high volume of tasks in the aged care context have resulted in situations such as having low number of staff available to assist with immobile residents needing to go to the toilet or changing incontinence pads.²⁵ Undercover reporters from the Sunday Telegraph who worked inside two metropolitan nursing homes in Sydney have also reported situations where frail residents incapable of feeding themselves are left to cold, unappetising meals,²⁶ and severe lapses in hygiene seen where staff rush between patients without cleaning hands or changing gloves.²⁷ The lack of adequate resources and funding into the aged care system represents a systemic failure that has facilitated the neglect of elderly people.

Additionally, for-profit providers of aged care services have complex corporate structures which, when considering areas such as Norfolk Island offer companies a domestic tax haven, show a complete lack

¹⁷ Ibid 5.

¹⁸ Ibid 8.

¹⁹ Lisa Martin, 'Ramping up nursing home inspections not enough to improve care, experts warn', *The Guardian* (online at 4 January 2019) <<https://www.theguardian.com/australia-news/2019/jan/04/ramping-up-nursing-home-inspections-not-enough-to-improve-care-experts-warn>>.

²⁰ NSW Nurses and Midwives' Association, *Why Ratios Matter – Hip Fractures in Residential Aged Care* (Report, March 2019) 4.

²¹ Ibid 4.

²² David Marn-Guzman, 'Aged care royal commission comes amid major workforce challenges', *Financial Review* (online at 16 May 2019) <<https://www.afr.com/news/policy/industrial-relations/aged-care-royal-commission-comes-amid-major-workforce-challenges-20180916-h15fxi>>.

²³ Frank Glendenning, Elder Abuse and Neglect in Residential Settings: The Need for Inclusiveness in Elder Abuse Research (1999) 10 *Journal of Elder Abuse and Neglect* 1, 7.

²⁴ The LAMP, 'Regional Australia Needs Quality Aged Care', *Aged Care* (April 2012).

²⁵ Ibid.

²⁶ Rosie Squires, 'Aged-care Residents in Living Hell', *Sunday Telegraph* (News Article, 30 May 2010)

<<https://www.dailytelegraph.com.au/aged-care-residents-in-living-hell/news-story/8e3d9604f81108bf0ed6ae3d7c51687b>>.

²⁷ Ibid.

of transparency and accountability in the industry.²⁸ This lack of financial transparency is especially important due to the existing funding arrangements between residential care providers and the Federal Government, with the six largest family-owned providers being paid \$711 million in 2017-18.²⁹ There are thus insufficient safeguards for the use of federal funding among for-profit providers.

B *My Aged Care*

A key recommendation by the Productivity Commission in its 2011 report, *Caring for Older Australians*, was to create a single gateway where older Australians or those acting on their behalf can obtain information about, and access to, aged care services.³⁰ The gateway, called My Aged Care, was initially established in 2013 and became fully functional in its present form in early 2016. The main features included a contact centre, website, central client record, national standardised needs assessment form, online referral management, web-based portals for clients, assessors, and service providers. There are also two assessment pathways; the Regional Assessment Services (RAS) which conducts assessments for those who seek entry-level support, and the Aged Care Assessments teams, which conducts assessments for all levels of aged care services and matches assessors with eligible clients in their local area.³¹

However, in their submission to the 2017 Legislated Review of Aged Care, National Seniors Australia indicated that under one-fifth of members had used My Aged Care, which implies a lack of public knowledge about the system.³² Additionally, there has been a decline in the percentage of aged care services providers who were satisfied with their experience, with no more than 40% of health professionals indicating that it was easy for consumers of aged care services to 'get the services they need'.³³ This lack of public awareness discloses the ignorance towards existing services which impedes upon widespread accessibility of aged care services.

C *Regulatory Groups*

There are currently three main regulatory bodies that the Australian government employs to ensure that aged care services are safe and of high quality. They are the Department of Health, the Aged Care Complaints Commissioner, and the Australian Aged Care Quality Agency. These bodies achieve this by collaboratively reviewing, funding, accrediting, and resolving complaints about aged care services.³⁴ It is suggested that the Australian government should have the largest responsibility in ensuring services provided by aged care facilities are high quality and safe. This responsibility stretches from creating and renewing policies and law that promote these principles across nationwide, to allowing families and

²⁸ Centre for International Corporate Tax Accountability & Research, *All in the Family: Tax and financial practices of Australia's largest family owned aged care companies* (Report, May 2019) 7.

²⁹ *Ibid.*

³⁰ Productivity Commission, *Caring for older Australians* (Report, Vol 1, 2011).

³¹ *Ibid.*

³² David Tune, *Legislated Review of Aged Care* (Final Report, 2017) 128.

³³ AMR, *My Aged Care Stage Two Wave 1 Research*, (2016).

³⁴ *Current System for the Delivery of Aged Care: Overview* (Web Page)

<https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/AgedCareFacilities/Report/section?id=committees%2Freportrep%2F024167%2F25943>.

the general public to make complaints and feel heard when there is an issue about safety and quality, as well as to ensuring the sustainability of safety and quality practices in the aged care industry.³⁵

The Aged Care Home's Accreditation Standards provide a general overview of what safe and high quality aged care services should look like. It includes four standards covering management and staffing, health and personal care of the individual, care recipient's lifestyle, and the physical environment and safe systems. In totality, the standards have been deployed to ensure a consumer-centric experience at aged care service facilities.³⁶

The Aged Care industry is governed by many safety and quality standards and procedures set out by the Australian government to ensure consistency and compliance across the industry.³⁷ For example, the Quality Agency oversees the accreditation standards in which aged care service providers must understand and ensure compliance under the Charter. From July 2019, the Australian government will make it mandatory for government-funded aged care service providers to provide data every three months on pressure injuries, use of physical restraint, and unplanned weight loss as three clinical quality indicators. The government will then provide a report of their results and this information can then be shared to consumers to make better informed choices to which aged care service is more suited to their needs.³⁸

The Australian government also has a role in fostering community support in promoting safe and high quality aged care service. This paper recommends that communities and local councils become more aware of the situation of their local aged care facilities, help facilitate community awareness programs, and create opportunities for its community to volunteer or engage with aged care facilities and its residents. Greater awareness could also be raised about the Complaints Commissioner so that the wider community can also be involved in holding any substandard to safe and high quality aged care service provider accountable.

D *Familial and Communal Support*

Australian families can also ensure aged care services are high quality and safe by first being informed of their consumer rights. The new single Charter of Aged Care Rights being released in July 2019 covers fourteen main protections that are fundamental and complementary to the right to safe and high quality aged care service. Some examples include the right to be informed about the care and services in a consumer-centric manner, to have access to information about rights, care, and services, and the right to be listened and understood. Families can have dialogue and sign the Charter in presence of the aged care provider to ensure both have this understood, despite it being only optional for the consumer to

³⁵ Ibid.

³⁶ *Accreditation Standards* (Web Page) <<https://www.myagedcare.gov.au/quality-and-complaints/accreditation-standards>>.

³⁷ *Current System for the Delivery of Aged Care: Overview* (n 34).

³⁸ *Quality Indicators in Aged Care* (Web Page) <<https://www.myagedcare.gov.au/quality-and-complaints/quality-indicators-in-aged-care>>.

sign.³⁹ Australian families can also view the most current accreditation report on aged care homes and assess its suitability in their own terms on the Commission's website.⁴⁰

As for the wider community, there are programs to participate in to promote safe and quality aged care services and to hold the aged care industry accountable to national standards. For example, it may be opening dialogue with the wider community on ways to support individuals in aged care, implementing adjustments in the local area so that aged care individuals can also be engaged with local civility activities, or participating in volunteering programs in a local aged care facility.⁴¹

IV AREAS OF CONCERN

The quality of aged care services does not satisfy the needs or expectations of those accessing them or wider community standards. The 2019 AMNF survey identified 'a profound lack of respect for Australia's elderly',⁴² and included documented cases of bullying, rushed treatments, and neglect.⁴³ Such a negative perception has resulted in inadequate and substandard care. Areas of concern include the lack of proper training for care of dementia patients, poor cleaning services, lack of duty of care, service staff theft, inadequate food provision, inadequate end of life care, and poor medication management.⁴⁴

A *Medical Misuse and Restraints*

Chemical restraint refers to the practice of using prescribed medication to restrict an older person's behaviour for the purposes of control.⁴⁵ The medication or dosage used is not necessary for treating a condition.⁴⁶ Chemical restraints are often used for convenience to help staff manage workload even where it is contrary to the elderly's best interests.⁴⁷ As noted by the Law Council of Australia, chemical restraints are unregulated and often used without consent or external oversight.⁴⁸ The problem arises in the vagueness of prescription instructions and dosage which allows for abusive use by individual carers and staff.⁴⁹

³⁹ Charter of Aged Care Rights Template for Signing (Web Page) <<https://www.agedcarequality.gov.au/resources/charter-aged-care-rights-templates>>.

⁴⁰ Accreditation Standards (Web Page) <<https://www.myagedcare.gov.au/quality-and-complaints/accreditation-standards>>.

⁴¹ Australian Government Department of Social Services, 'A Guide to Improve Aged Care Services for Your Community' (2015).

⁴² Australian Nursery and Midwifery Federation, ANMF National Aged Care Survey: Final Report 2019 (May 2019) <http://anmf.org.au/documents/reports/ANMF_Aged_Care_Survey_Report_2019.pdf>.

⁴³ Australian Nursery and Midwifery Federation (n 38).

⁴⁴ National Seniors Australia, 'Witness Statement: Royal Commission into Aged Care Quality and Safety' (Published Statement, 31 January 2019) [2.1]-[2.2] <<https://nationalseniors.com.au/uploads/Royal-Commission-Aged-Care-Witness-Statement-Transcript-110219.pdf>>.

⁴⁵ Ridhian Hughes, 'Chemical Restraint in Nursing Older People' (2008) 20(3) *Nursing Older People* 33, 33.

⁴⁶ Department of Health and Ageing (Cth), 'Decision-Making Tool: Supporting a Restraint Free Environment in Residential Aged Care' (12 August 2012) 26.

<https://agedcare.health.gov.au/sites/default/files/documents/09_2014/residential_aged_care_internals_fa3-web.pdf>.

⁴⁷ Hughes (n 27) 34-35.

⁴⁸ Law Council of Australia, Submission to the Royal Commission into Aged Care Quality and Safety: Terms of Reference (25 September 2018) 3-4.

⁴⁹ Hughes (n 27) 34-35.

Additionally, the overuse of narcoleptic or antipsychotic medication can have serious health implications on a person's physical and psychological wellbeing. Antipsychotic drugs used to treat behavioural and psychological symptoms of dementia can increase cognitive decline, and the risk of falls, stroke and death.⁵⁰ Similarly, benzodiazepines prescribed to treat agitation and anxiety can also increase the risk of fall, death and pneumonia.⁵¹ Therefore, this paper recommends the regulated use of narcoleptic or antipsychotic drugs as a necessity.

B *Lack of Self-Determination*

Self-determination for older people requiring care is 'defined as a process in which the person has control, legal and ethical rights, knowledge, and the ability to make a decision based on free choice'.⁵² Self-determination is generally considered essential to more client-centred approaches in health care.⁵³ The approach to elder issues in Australia is 'informed by human rights conceptualisations that emphasise self-determination, autonomy, and respect'.⁵⁴ As noted in the Department of Health's 2017 Legislated Review of Aged Care, policy changes have increasingly focused on consumer choice and control, and ways to respect the dignity and independence of older people using aged care services.⁵⁵ However, the National Seniors Report on Home Care for the Aged Care Services Workforce Strategy found that of over 4500 consumers surveyed, only a little over 50% felt the person receiving care was encouraged and supported to function independently.⁵⁶

An older person may need decision-making support or an appointed decision-maker when determining their aged care arrangements. Section 96-5 of the *Aged Care Act 1997* (Cth) (the 'Act') allows a representative of a care recipient lacking physical or mental capacity, to enter into an aged care service agreement on their behalf.⁵⁷ Whilst one of the objectives of the Act is to 'encourage diverse, flexible, and responsive aged care services that facilitate the independence of, and choice available to, those recipients and carers',⁵⁸ there needs to be stronger legislative recognition of the need for services and facilities to prioritise the independence, self-determination and preference of aged care users.

C *Special Interest Groups*

1 *Indigenous Australians*

⁵⁰ Juanita L Westbury et al, 'RedUSe: Reducing Antipsychotic and Benzodiazepine Prescribing in Residential Aged Care Facilities' (2018) *Medical Journal of Australia* 208(9) 398, 398.

⁵¹ *Ibid.*

⁵² Christina Ekelund, Synneve Dahlin-Ivanoff and Kajsa Eklund, 'Self-determination and Older People – A Concept Analysis' (2013) 21(2) *Scandinavian Journal of Occupational Therapy* 1, 1.

⁵³ *Ibid.*

⁵⁴ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse* (Family Matters No. 98, November 2016) <<https://aifs.gov.au/publications/family-matters/issue-98/elder-abuse>>.

⁵⁵ Department of Health (Cth), 'Legislative Review of Aged Care' (2017) 6.

⁵⁶ National Seniors Australia (n 27) [1].

⁵⁷ *Aged Care Act 1997* (Cth) s 96-5.

⁵⁸ *Ibid* s 2-1(1)(g)(ii).

There are specific issues pertaining to Indigenous Australians that make them particularly vulnerable to poor aged care services. This includes: Indigenous Australians and Torres Strait Islanders are affected by age-related conditions earlier than non-Indigenous populations and have lower life expectancy;⁵⁹ members of the stolen generation aged 50 and over are more likely than the general Indigenous population have lower life outcomes in areas of health and socioeconomic status;⁶⁰ cultural and linguistic barriers that impede the capacity of the elderly, their families and carers to be health literate;⁶¹ and the lack of cultural and spiritual engagement when interacting with aged care services.⁶²

2 *Young People With Disabilities*

With over 6000 young people with disabilities (those under 65) living in nursing homes across Australia,⁶³ they are often a group neglected by the wider community. With the average age of nursing home residents being 84,⁶⁴ aged care facilities are both an inappropriate and severely limiting environment for young individuals, especially when there are viable alternatives.

Living in a nursing home as a young person facilitates social detachment through the isolation from the broader community.⁶⁵ Due to the significant age gap between the elderly and younger residents in aged care facilities, many of the 6000 young people report that they are struggling to form meaningful friendships within these spaces.⁶⁶ This inability to form friendships subsequently leads to feelings of social isolation and a plethora of mental health issues. This feeling of isolation is further exacerbated considering 82% of young people with disabilities living in nursing homes have not received frequently visits from friends.⁶⁷ Furthermore up to 13% of young people having stopped going outside.⁶⁸ As such, the ability for young people with disabilities to experience successful personal and rehabilitative development is currently limited.

Furthermore, these facilities are often vastly ill-equipped to provide the specialised and vast rehabilitative services that these young people need to improve their health and ability to live

⁵⁹ Australian Institute of Health and Welfare, *Older Australians at a Glance* (Web Report, 10 September 2018), 'Culturally & Linguistically diverse Australians' <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/culturally-linguistically-diverse-people>>.

⁶⁰ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations aged 50 and over* (November 2018) 2 <<https://www.aihw.gov.au/getmedia/32bdde34-2f4a-49d9-8f15-4e32bf2edcc1/aihw-ihw-199.pdf.aspx?inline=true>>.

⁶¹ Rural Doctors Association of Australia, *Aged Care in Rural & Remote Australia* (Position Paper, May 2017).

⁶² Meaningful Ageing Australia, *National Guidelines for Spiritual Care in Aged Care* (2016) 8 <<https://meaningfulageing.org.au/wp-content/uploads/2016/08/National-Guidelines-for-Spiritual-Care-in-Aged-Care-DIGITAL.pdf>>

⁶³ The Feed, 'Forced to live like an old person: young people with disabilities trapped in aged care', *SBS 2* (online, 27 May 2015) <<https://www.sbs.com.au/news/thefeed/story/forced-live-old-person-young-people-disabilities-trapped-aged-care>>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ 'The issue facing younger people with disability in aged care', *Aged Care Guide*, June 2019. <<https://www.agedcareguide.com.au/talking-aged-care/younger-people-with-disability-in-aged-care>>.

⁶⁸ *Ibid.*

independently.⁶⁹ Young disabled individuals living in aged care facilities often have very specific and complex injuries and their required rehabilitation services are just as individualised. The ill-equipped nature of these services is at a significant disparity to what aged care facilities, which are designed to cater for health issues relating to the elderly, are able to provide.⁷⁰ This inability to adequately rehabilitate young and disabled individuals to their full potential hinders the prospects of that person to regain enough independence to move from the aged care facility. Furthermore, this decreases their quality of life by unnecessarily subjecting them to avoidable impaired health.

3 *Rural Oral Care Facilities*

Limited assistance from aged care staff in rural aged care facilities is being reported. This has been particularly controversial in regard to simple oral health tasks. These tasks include brushing one's teeth and being unable to undergo dental x-rays due to wheelchairs preventing individuals from fitting in the machine. The inability to perform these tasks build upon existing oral services facilities being unable to cover the large geographic areas of rural areas, combined with inadequate transport services for individuals to use. Interestingly, due to oral healthcare's de-prioritisation and its high costs, that there is low incentive for dental professionals and aged care providers to provide these services instead of often more urgent medical care needs.⁷¹ Due to its costs and non-fatal nature of its concerns, lower socio-economic and rural elderly individuals who receive pensions often de-prioritise oral healthcare. For these reasons, the current quality and availability of oral health care to elderly individuals in these regions remains inadequate.⁷²

D *Funding*

A significant challenge in meeting growing aged care demands lies in insufficient funding. The Australian Nursing and Midwifery Federation's 2016 survey identified the most significant issue to be 'Commonwealth funding cuts and staffing levels.'⁷³ Consequently, both community participants and aged care workers found major issues 'with respect to qualifications of staff, food quality and domestic services'.⁷⁴ The majority of participants highlighted the need for increased government funding.

Financially, aged care providers may face difficult conditions throughout 2019. Stewart Brown's financial review of the sector found that 'the financial viability of a considerable number of residential care facilities will come under scrutiny'.⁷⁵ Earnings before tax were at a negative value for 49.2% of the 974 residential care facilities surveyed, a marked increase in losses from 2016-17. In terms of home care, the HCP (home care packages) sector has also experienced a drop-in profitability, with a 6.1%

⁶⁹ George Taleporos, 'Five years on, NDIS is getting young people out of aged care, but all too slowly', *The Conversation*, June 12, 2018. <<https://theconversation.com/five-years-on-ndis-is-getting-young-people-out-of-aged-care-but-all-too-slowly-97851>>.

⁷⁰ *Ibid.*

⁷¹ Lydia Hearn & Linda Slack-Smith, 'Oral Healthcare in Residential Aged Care Services: Barriers to Engaging Health-Care Providers' (2015) 21(2), *Australian Journal of Primary Health*, 148, 151.

⁷² *Ibid.*

⁷³ Australian Nursing and Midwifery Federation (n 38).

⁷⁴ *Ibid.*

⁷⁵ Aged Care and Community Services Division, *Aged Care Financial Performance Survey*, (June 2018) Stewart Brown <<http://www.stewartbrown.com.au/images/documents/StewartBrown---ACFPS-Sector-Report-June-2018.pdf>>

decrease in revenue over 2018.⁷⁶ Thus, the quality and accessibility of these services will most likely suffer as facilities and services are increasingly downsized or under-utilised.

E *Staffing*

Inadequate staffing at aged care facilities is hardly a recent phenomenon,⁷⁷ therefore this paper recommends safe patient-staff ratio should be a compulsory requirement.

Patients from an aged care facility often report a lack of timely response when nursing assistance is called for, mainly due to inadequate staffing. Owing to long wait times, these patients often resort to desperate measures. This creates significant distress and, more importantly, increased risks of infection that can create further health complications.

Nurses and carers from various facilities are also mentally and physically exhausted due to inadequate staffing, and they are in desperate need of having this issue addressed.⁷⁸ It is ultimately residents who suffer from this detrimental inadequacy, with a lack of staff being potentially responsible for drug induced over-sedation of residents,⁷⁹ inappropriate restraint use,⁸⁰ inadequate nursing care,⁸¹ and the mismanagement of palliative care.⁸² To rectify the problem it is essential to begin with legalising compulsory aged care ratios across all aged care facilities, and subsequently work towards giving the highest standard of care our aged care population deserves by ensuring quality control mechanisms are in place.⁸³

F *Commercial Providers*

The commercial nature of aged care facilities is also a major concern and it is potentially catastrophic for both residents and staff.⁸⁴ Service providers need to be made accountable and have strictly monitored regulations to prevent abuse of the current for-profit system.

⁷⁶ Ibid.

⁷⁷ NSW Nurses and Midwives' Association, *Are there ratios in Aged Care?* (3 August 2015) <<https://www.nswnma.asn.au/are-there-ratios-in-aged-care/>>.

⁷⁸ Susan Walton, 'Aged care's cry for help' (2019) 76(4) *The Magazine of The NSW Nurses and Midwives' Association* 1, 8–9.

⁷⁹ Kathleen Calderwood, 'Lack of staff behind chemical sedation of patients in aged care facilities', *ABC News* (online), 15 May 2019 <<https://www.abc.net.au/news/2019-05-15/aged-care-royal-commission-chemical-sedation/11116362>>.

⁸⁰ Barbara Miller, 'Nurse tells Aged Care Royal Commission dementia patients restrained due to a lack of staff', *ABC News* (online), 15 May 2019 <<https://www.abc.net.au/radio/programs/worldtoday/dementia-patients-restrained-due-to-lack-of-staff-nurse/11115372>>.

⁸¹ Harriet Alexander, 'Fighting to breathe, no staff member in sight: Aged Care Royal Commission hears Vera's story', *The Sydney Morning Herald* (online), 13 May 2019 <<https://www.smh.com.au/national/fighting-to-breathe-no-staff-member-in-sight-aged-care-royal-commission-hears-vera-s-story-20190513-p51mw1.html>>.

⁸² Liz Alderslade, "'Inadequate Care' and mismanagement of palliative care' on The Aged Care Guide, *Talking Aged Care* (14 May 2019) <<https://www.agedcareguide.com.au/talking-aged-care/royal-commission-inadequate-care-and-mismanagement-of-palliative-care>>.

⁸³ Australian Nursing and Midwifery Federation, Submission to Royal Commission into Aged Care Quality and Safety, *National Aged Care Survey- Final Report*, May 2019.

⁸⁴ NSW Nurses and Midwives' Association, *Make aged care ratios law now* (29 May 2018) <<https://www.nswnma.asn.au/make-aged-care-ratios-law-now>>.

According to the final report of National Aged Care Survey, 89.5% of staff working at an aged care facility indicated that aged care funding was inadequate.⁸⁵ Yet, commercial service providers receive approximately \$2.17 billion annually in government subsidies and residents are also required to contribute towards their own care either from their Aged Pension, or have a means-tested assessment.⁸⁶ Despite inadequate funding claims, the industry made over \$1 billion in 2017.⁸⁷ The funding provided simply does not reflect the standard of care that residents are currently receiving, and it seems that profit maximising is the detrimental barrier to providing safe and effective aged care services.⁸⁸

There are two pathways to rectify this problem: either hold aged care providers accountable for the funding they receive,⁸⁹ or remove the profit motive from aged care entirely and bring all aged care facilities into the public health system.⁹⁰ Funding needs to be channelled into aged care facilities to improve the quality of care that residents receive, and this must be supervised by a regulatory framework to bring about positive changes.

V FUTURE CHALLENGES

A key challenge that Australia will face in the future is being able to provide affordable and accessible aged care to a rapidly increasing number of elderly individuals without having to sacrifice their quality of life and care. Present resource limitations and future economic outlooks,⁹¹ both on personal individuals and governmental policy, may become the principal limiters on the quality and affordability of aged care services. The formalisation and standardisation of aged care presents an alluring solution in the face of rising costs and growing aged populations.⁹²

VI INTERNATIONAL CASE STUDIES

A *Scandinavia*

The elderly population and aged care policies of Scandinavian countries during the 1980s-90s bears a remarkable similarity to contemporary Australia. A growing proportion of the elderly population prefer to live independently from their children and rising costs of aged care drove policy to reduce levels on

⁸⁵ Australian Nursing and Midwifery Federation, Submission to Royal Commission into Aged Care Quality and Safety, National Aged Care Survey- Final Report, May 2019.

⁸⁶ Parliament of Australia, Aged Care: a quick guide (24 October 2016) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Aged_Care_a_quick_guide>.

⁸⁷ NSW Nurses and Midwives' Association, (n 84)

⁸⁸ Kai Perry, 'Profits are the source of problems in aged care', *The Socialist* (20 April 2018)

<<https://thesocialist.org.au/profits-problem-aged-care/>>.

⁸⁹ NSW Nurses and Midwives' Association (n 84).

⁹⁰ Michael Naismith, 'Remove the profit motive from aged care', *The Socialist* (3 December 2018)

<<https://thesocialist.org.au/remove-profits-aged-care/>>.

⁹¹ International Monetary Fund, *World Economic Outlook: Growth Slowdown, Precarious Recovery* (Report, April 2019) 157.

⁹² Liz Forsyth, *Rising Cost of Residential Aged Care: Implications and Actions* (Web Page, 10 March 2017)

<<https://home.kpmg/au/en/home/insights/2017/03/residential-aged-care-rising-cost.html>>.

institutionalism.⁹³ This resulted in a bifurcated approach amongst Scandinavian countries. First, the highly standardised ‘home-help’ systems in Finland, Iceland, and Norway, where elderly people received a standard amount of assistance regardless of actual ability to perform daily activities which, was correlative with greater proportions of institutionalism once individuals became dependent on others.⁹⁴ Second, the ‘needs adjusted home-help’ systems in Denmark and Sweden which, are conducive to greater independence and home living but comes at the expense of greater costs to government services and reduced general proportional access to this type of care.⁹⁵

The balancing of economic resources against the availability and affordability of aged care services has and will continue to be a competitive force that challenges the Australian economy. It is necessary to ensure that whilst all Australians should receive equal access to a basic level of aged care, those with greater needs have to be adequately provided for in order to maintain a degree of independence and desire to remain living at home as they age. Basic forms of funding levels may simply arise in the form of social security and expanded funding for independent living solutions such as serviced apartment services or needs-adjusted home-help.⁹⁶

B Japan

Similar to Australia’s ageing rural population, in 1970s Japan, fragmented aged care solutions failed to provide adequate care for a rural population ageing faster than the national average.⁹⁷ The creation of a ‘Community Based Integrated Care System’ modelled after contemporary Swedish aged care models, integrates all healthcare resources including hospital, welfare, home-visit and community activities into an all-encompassing system.⁹⁸ The outcomes of this model was successful at improving elderly individual’s quality of life and slowing down rising medical costs which, led to the adoption of this integrated care system across every district in Japan by 2005.⁹⁹ The success of this model in rural communities internationally may provide some guidance for Australia’s rural populations.

Furthermore, Japan’s research into artificial intelligence able to perform chores such as folding clothes and dispensing medicine, have assisted in an increased quality of aged care by reducing labour and time costs. These robots have also been developed to recognise human expressions and idiosyncrasies to deliver a more natural user experience and to decrease the social isolation felt by the elderly.¹⁰⁰ Although robots are not intended to completely replace human caretakers, overall productivity can increase by

⁹³ Gunborg Jakobsson, ‘The Politics of Care for Elderly People in Scandinavia’ (1998) 1(1) *European Journal of Social Work* 87, 88.

⁹⁴ Ibid 91.

⁹⁵ Ibid 92.

⁹⁶ Property Council of Australia, *National Overview of the Retirement Village Sector* (Report, October 2014) 7.

⁹⁷ Yu Hatano et al, ‘The Vanguard of Community-based Integrated Care in Japan: The Effect of a Rural Town on National Policy’, (2017) 17(2) *International Journal of Integrated Care* 1, 1.

⁹⁸ Ibid 2.

⁹⁹ Ibid 6.

¹⁰⁰ Angela Castles, ‘Brisbane startup Conpage partners with SoftBank to introduce robots named Pepper into aged care facilities’, *SmartCompany* (online at 19 May 2019) <<https://www.smartcompany.com.au/startupsmart/news/conpage-partners-softbank-robots-aged-care/>>.

incorporating both robotic and human workers.¹⁰¹ Given the instability of staffing in remote regions, robots can be utilised in periods of staff shortages by providing a consistent standard of care. The use of robots is a relatively uncommon practice, with most robots used in Australia being imported from Japan. There is thus potential for research and development into robotic technology to assist with the improvement of aged care services.

VI RECOMMENDATIONS

A *Improvements to Consistency*

- I. A more consistent understanding of what constitutes ‘elder abuse’ is necessary. The World Health Organisation defines elder abuse as ‘a single, or repeated act, or lack of appropriate action, occurring within any relationships where there is an expectation of trust which causes harm or distress to an older person’. However, studies have shown there is no consensus among government agencies, health care professionals and family carers.¹⁰² Discrepancies are evident in the lack of recognition about what forms of restraint constitute as abuse.¹⁰³ Almost a quarter of health professions do not consider locking a person inside a house as abuse, while a quarter believe the use of chair restraints are not abusive, contrary to government guidelines.¹⁰⁴ This necessitates a uniform understanding of elder abuse amongst the community, and in particular, those in aged care services.
- II. Aged care laws and legal framework should adopt a new set of objectives and supported decision-making principles informed by Recommendation 3-2 to 3-4 of the ALRC’s Inquiry on Equality, Capacity and Disability in Commonwealth Laws,¹⁰⁵ and Recommendation 5.2 of the NSWLRC’s recent review of the Guardianship Act 1987.¹⁰⁶ Legal and policy reforms should prioritise the older person’s will and preference, independence and self-determination where possible. A person’s will and preference should not be followed if it creates an unacceptable risk to the person. In this case, decisions should be made to instead promote the person’s wellbeing.¹⁰⁷

B *Improvements for the Quality of Aged Care Services*

- I. More stringent financial disclosure requirements for funding. To make it mandatory for providers receiving more than \$10 million in annual federal funding to file full financial

¹⁰¹ Create Digital, ‘This human-like robot is lending a helping hand in aged care homes’, *Create Digital* (online at 19 May 2019) <<https://www.createdigital.org.au/human-like-robot-aged-care-homes/>>.

¹⁰² C Hempton et al, ‘Contrasting Perceptions of Health Professionals and Older People in Australia: What Constitutes Elder Abuse?’ (2011) 26(5) *International Journal of Geriatric Psychiatry* 466; Maureen J Fitzpatrick and Sharon Boland Hamill, ‘Elder Abuse: Factors Related to Perceptions of Severity and Likelihood of Reporting’ (2011) 23(1) *Journal of Elder Abuse and Neglect* 1, 2-3.

¹⁰³ *Ibid* 472.

¹⁰⁴ *Ibid*.

¹⁰⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 24 November 2014) 11-13.

¹⁰⁶ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 42.

¹⁰⁷ *Ibid* 48.

statements with ASIC in order to be eligible for funding in the future.¹⁰⁸ Any additional federal funding for residential care providers must be tied to maintaining increased staff resources, as well as achieving certain quality indicators. Additionally, there should be more unannounced accreditation audits, not limited to the resident care services who apply for re-accreditation, but also those who have demonstrated satisfactory performance from previous audits. This would provide a basic level of financial transparency within the industry.

- II. Mandated staff ratios should be implemented across the residential aged care sector and also a more realistic allocation of tasks per shift, leaving capacity for carers to accommodate the need of each resident to the best of their abilities. This is to be accompanied by training and appraisal programs to promote a proactive culture in attending to the needs of elders. There should also be an incentive program for multicultural recruitment with English language skills being an important criterion.
- III. A public feedback system should be implemented to allow families and the general public to make complaints when there is an issue about safety and quality. There should also be a mandatory national standard which, aged care services must meet. This includes clinical quality indicators that are aligned with the principles of the Charter and are backed up by qualitative and quantitative research to ensure services are safe and of a high quality. This in turn will lead to a more comprehensive report being produced for aged care providers to receive as feedback to address any possible areas of concerns. This will also offer Australian families a greater in-depth look into the service to better inform their choices. The effects can also be found in providing high quality training programs for aged care services staff and ensuring facilities are to Charter standards. Additionally, the compulsory reporting should be extended so that all registered providers, and not only government subsidised ones, must provide data to the government on a frequent basis.
- IV. Investment in group housing facilities with on-call staff. This recommendation would see the expansion of the existing small-scale alternative housing model to allow access to a much larger number of young people. It currently involves individual houses and apartments for young disabled individuals with the ability to request assistance from a nurse that is on-call for 24 hours a day. This provides these individuals with the freedom and integration into a community that nursing homes are unable to offer.
- V. Revision and allocation of individual funding budgets to independent housing remedies (i.e. home adjustments). Through NDIS representatives assisting young individuals in nursing homes to effectively utilise their allowance, money can be appropriately targeted at increasing prospective for independent living or nursing home alternatives. This could involve the adaptation of home facilities to suit the young person (e.g. building ramps) or may involve informing them as to their eligibility for grants regarding home ownership, especially in the wake of proposed amendments to first home owner grants following the 2019 Federal election.
- VI. Creation of mandatory reporting by personal doctors of the rehabilitation services accessed by young people in nursing homes. By forming a forum for the mandatory reporting of the rehabilitation accessed by each young person in a nursing home, with the aid of a doctor, it would be considerably easier to monitor whether that person is accessing the services that they need.

¹⁰⁸ Centre for International Corporate Tax Accountability & Research, *All in the Family: Tax and financial practices of Australia's largest family owned aged care companies* (Report, May 2019) 8.

C *Improvements to Quality of Life*

- I. The expansion of the Multi-Purpose Services (MPS) aged care programs would be beneficial in regional areas which cannot support residential facilities. Having already demonstrated its effectiveness assisting elderly people to remain in their homes, the flexible initiatives which are implemented under the auspices of the MPS would be strengthened in funding were allocated to create new places.¹⁰⁹ Ultimately, this would go some way to ensuring that older residents of remote communities could access high-quality welfare services despite not being physically proximate to existing standalone healthcare providers.
- II. The prioritisation of short-term reablement programs rather than focusing on future needs of each individual which, would increase the independence of elderly people. This could look like minor changes to city and community infrastructure that consider the needs and abilities of elderly people.
- III. Establishment of a network for disabled young people in aged care facilities that are able to interact and meet with each other. For those young people that are unable to be moved from aged care facilities in the near future, the creation of a network that allows young disabled individuals to communicate with other young people in nursing homes, this would provide some counter to the social isolation so common amongst this demographic. Furthermore, the facilitation of visits between these people would also ensure that they were having physical interactions with other beyond the confines of the aged care facility.
- IV. The integration of cultural and spiritual care in aged care services with a high proportion of Indigenous residents. This could resemble the Walumba Elders Centre in Warrmarn where the centre takes into account a number of cultural preferences and practices of the Gija people.¹¹⁰ This includes designing multiple pathways through the centre to facilitate avoidance relationships, design according to gender separation and the inclusion of outdoor spaces for ceremonial activities. The location of the centre close to the school and town centre allows participation in the community and the continued transmission of knowledge to younger generations. Such designs can reduce the disruption to cultural and spiritual life.

D *Improvements to Medical Services*

- I. The expansion of the Reducing Use of Sedatives (RedUSE) intervention across all residential aged care facilities across the country. The program aimed to promote the appropriate use of antipsychotic and benzodiazepine medicine. RedUSE significantly reduced the inappropriate prescription of antipsychotic and benzodiazepines in residential aged care facilities by 13% and 21% respectively.¹¹¹ In order to mitigate the financial constraints in receiving oral health care, it is recommended that Medicare cover the costs for pensioners. This effectively mitigates the de-prioritisation that individuals impose on dental health due to its high cost; incentives for more

¹⁰⁹ Wyatt, Ken "Flexible care places boosted in regional and remote areas", *Community Care Review* (Webpage, 2019) <<https://www.australianageingagenda.com.au/2019/01/07/flexible-care-places-boosted-in-regional-and-remote-areas/>>.

¹¹⁰ Iredale Pederson Hook, *Walumba Elders Centre* <<http://iredalepedersenhook.com/?portfolio=wulumbu-aged-care-centre>>.

¹¹¹ Juanita L Westbury et al, 'RedUSE: Reducing Antipsychotic and Benzodiazepine Prescribing in Residential Aged Care Facilities' (2018) 208(9) *Medical Journal of Australia* 398, 398.

dentals professionals to work in rural areas in the form of perhaps higher pay, subsidised residence or other benefits would help to encourage a higher quantity of these services in regional areas;¹¹² access would expand with the implementation of more efficient transport services to allow individuals to travel and receive dental health; development of dental x-ray machines to accommodate elderly individuals with wheelchairs or other accessibility issues is especially important to preventing these services to lock out people with existing medical issues.¹¹³

¹¹² Chris Taylor R Jed Donoghue, 'Innovation and Translation: New Ways to Provides Community Aged Care Services' (2015) 34(3) *Australasian Journal on Ageing* 199.

¹¹³ Rachel Tham & Susan Hardy, 'Oral Healthcare Issues in Rural Residential Aged Care Services in Victoria, Australia' (2011) 30(2) *Gerodontology* 127.