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24 September 2019

Royal Commissioners The Honourable Richard Tracey AM RFD QC, The Honourable Tony Pagone QC and Ms Lynelle Briggs AO  
The Royal Commission into Aged Care Quality and Safety  
GPO Box 1151  
ADELAIDE SA 5001

Email: [ACRCenquiries@royalcommission.gov.au](mailto:ACRCenquiries@royalcommission.gov.au)

Dear Commissioners,

### ***Submission to the Royal Commission into Aged Care Quality and Safety***

#### **Liberty Victoria**

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
2. We welcome the opportunity to provide a submission to the Royal Commission into Aged Care Quality and Safety (**the Royal Commission**). The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

#### **Outline**

3. Our submissions are directed at the first item referred to in the Royal Commission's terms of reference, being:

*the quality of aged care services provided to Australians, the extent to which those services meet the needs of the people accessing them, the extent of substandard*

*care being provided, including mistreatment and all forms of abuse, the causes of any systemic failures, and any actions that should be taken in response*

4. Our principal concerns that we wish to raise include as follows:
  - a. Liberty Victoria is profoundly concerned that some aged care providers may conflate the notion of medical incapacity with legal capacity and this denies many vulnerable residents their right to participate in, and determine, his or her own legal affairs. In some circumstances this denial can also have significant consequences for the individual's wellbeing.
  - b. Liberty Victoria is also profoundly concerned that some aged care providers routinely deny residents from linguistically diverse backgrounds the use of appropriate translation and interpreting services. This greatly inhibits the ability of those individuals to accessing urgent and critical basic services, as well as enjoy day-to-day life with dignity.
5. Each of these matters is further developed below.

### **Legal capacity**

6. Liberty Victoria has profound concerns that some aged care providers are unlawfully denying residents access to legal assistance on the false understanding that he or she does not have sufficient *capacity* to participate in those processes.
7. Every adult person in Australia is generally presumed under law to have legal capacity to make their own decisions. In Victoria, this right is further protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In international law this foundational principle is also an international human right.<sup>1</sup>
8. Further, the High Court of Australia has held that capacity is not a medical concept but rather a legal concept and it is determined by the relevant law applicable in each situation.<sup>2</sup> In this regard, a person's capacity to manage one's affairs hinges on the complexity of the task or activity, but it is ultimately a "functional" issue – one to be judged in a real-life social context of the person's environment and supports. It is a "task-specific" and context-dependent question.<sup>3</sup> For these reasons, a person may be found to have legal capacity to participate in one process but not another as it is entirely dependent on that person's ability to understand the nature and consequences of the legal process.<sup>4</sup>
9. Liberty Victoria has profound concerns that the protocols and policies adopted by some aged care providers fail to recognise these principles. In particular, we are concerned that diagnoses of cognitive loss and other medical conditions common to residents of aged care facilities are construed by staff, including senior management, as confirmation that the individual lacks capacity to determine his or her legal affairs.
10. To illustrate this we would like to provide the following example provided by one of our members who practices as a lawyer in Victoria. This scenario has been depersonalised to preserve the client's confidentiality.

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<sup>1</sup> International Covenant on Civil and Political Rights opened for signature 16 December 1966, 999 UTS 171 [entered into force 23 March 1976], Article 16.

<sup>2</sup> *Gibbons v Wright* (1954) 91 CLR 423.

<sup>3</sup> Terry Carney, 'Aged capacity and substitute decision-making in Australia and Japan' (2003/2004) *LAWASIA Journal* 14.

<sup>4</sup> Nick O'Neil and Carmelle Peisah, 'Chapter 1 – Capacity' [2011] *SydUPLawBK* 3 in *Capacity and the Law* (2011) 3.

- a. An elderly individual (who we will call Sofia) travelled to Australia to visit immediate family who were residing here. While here, conflict erupted in her home country making it too unsafe for her to return. Following this, fearing for her safety Sophia accessed legal assistance from a lawyer/registered migration agent to apply to the Department of Home Affairs for a protection visa to remain in Australia.
  - b. Subsequent to the lodgement of the protection visa application Sophia's health deteriorated and she was placed in the care of an aged care provider. A medical professional diagnosed her as having suffered 'cognitive loss'.
  - c. Sophia's legal representative directed critical correspondence to the individual in the aged care facility for her consideration and urgent action. Relying on medical professional's diagnoses the aged care provider wrongly determined Sophia not to have capacity to engage in her own legal affairs and believing it is in Sophia's best interests, forwarded all correspondence from her lawyer to her niece, being the person listed on the facility's file as the next of kin.
  - d. The niece did not understand or respond to the letters from the legal representative. The representative contacted the aged care facility to confirm receipt of the correspondence and he was told by senior management that Sophia did not have 'capacity' to deal with her legal affairs, and the niece was dealing with them.
  - e. The Department of Home Affairs made a decision to refuse Sophia's application for a protection visa. In its correspondence the Department advised that Sophia's bridging visa would cease in 28 days, after which time she would be liable to being detained and placed in a locked immigration detention facility before being forcibly removed from Australia to her country of nationality.
  - f. The legal representative travelled to the aged care facility and took instructions from Sophia. Sophia demonstrated a high level of awareness of her protection visa process and became acutely distressed due to the fear she had of being detained and deported to the country she feared returning to. The legal representative immediately identified Sophia had capacity to provide instructions to him in relation to the protection visa process, and her migration processes more generally.
  - g. Sophia instructed her legal representative to lodge an urgent appeal and this temporarily prevented the Department from taking steps to detain and deport Sophia.
11. It is not correct or appropriate to presume that residents of aged care facilities lack capacity to engage with their legal affairs solely on the basis of medical evidence or opinion. It is absolutely critical that aged care service providers have formal safeguards in place to ensure:
- a. the assessment of a resident's capacity in a medical sense will not be conflated with the assessment of legal capacity, and
  - b. aged care providers alert legal representatives immediately in circumstances where evidence arises that might rebut the presumption of legal capacity (so that the legal representative can facilitate this assessment themselves).

### **Linguistically diverse residents**

12. Liberty Victoria is concerned that some aged care providers routinely deny residents from linguistically diverse backgrounds the use of appropriate translation and interpreting services. This may be due to most private aged care facilities generally being ineligible for access to Commonwealth funded translating and interpreting services through TIS National.<sup>5</sup>
13. It is our strong view that access to interpreting and translation services for residents of aged care facilities is not only critical to ensuring these individuals' wellbeing and sense of dignity, but also so that residents can access critical basic services such as medical care, social security services and access to legal advice and assistance.

### **Conclusion**

14. Liberty Victoria strongly recommends the Royal Commission extend its inquiry to include consideration of these important matters.

**Jessie Taylor**  
**President, Liberty Victoria**

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<sup>5</sup> Commonwealth Department of Social Services, Settlement Services, Free Interpreting Service, available at: <https://www.dss.gov.au/our-responsibilities/settlement-services/programs-policy/settle-in-australia/help-with-english/free-interpreting-service> [accessed 27 September 2019].