

# Quotations from the Law Council of Australia’s report to the Department of Health on October the 27<sup>th</sup> 2021

The report is entitled “Aged Care Quality Principles”

Quotations from throughout the document in the same sequence thereto:

## “Relevant Royal Commission recommendations and Australian Government response

### Royal Commission recommendations

16. The Final Report recommended reform to the Standards. It found that the Standards do not:
  - define quality, or high quality, aged care – they set out the minimum acceptable standards for accreditation;<sup>11</sup>
  - set sufficiently high standards of quality and safety<sup>12</sup> and lack of objectively measurable standards.<sup>13</sup>
17. The Final Report also noted that there is no guidance in the Aged Care Act as to the process to be followed to make the Principles, and while the experts are consulted  
by the Department in the development of the Standards, the views of those experts are not always followed.<sup>14</sup>

## Observations about the existing Standards

### Comments about the existing standards

48. The following comments are made in context of the KPMG evaluation of the current Standards, noting the parameters cited above.
49. In summary, the Law Council considers that the existing Standards:
  - can be confusing and impractical in that they impose multiple, potentially conflicting obligations on organisations;
  - confer potentially conflicting rights for consumers and obligations on organisations, without providing guidance as to how such conflict might be resolved; and
  - require clarity as to how decisions are made by or on behalf of consumers in the aged care system, in the context of relevant State and Territory legislation.

51. The Quality of Care Principles do not expressly specify how to read the consumer outcome and organisational statement against the requirements. They are all articulated to form part of the 'standard'.<sup>44</sup> The terms used in the Standards do not link to any particular language in section 54-1 of the Aged Care Act, which relevantly provides that an approved provider must 'comply with the Standards'.<sup>45</sup>
52. The Explanatory Statement for the *Quality of Care Amendment (Single Quality Framework) Principles 2018* (Cth), which inserted the present Schedule 2 into the Aged Care Act, does not provide any explanation as to how to read the three expressions of each standard together.
53. The *Guidance and Resources for Providers to support the Aged Care Quality Standards (Standards Guidance document)*,<sup>46</sup> a non-legal guidance document published by the Aged Care Commission, suggests that the consumer outcome, organisational statement and requirements are three different ways of expressing each standard and that the 'requirements' are to 'demonstrate that the Standard has been met'.<sup>47</sup>
54. From a statutory interpretation perspective, it would appear that the best way to read the Standards is to consider the consumer outcome and organisational statement as essentially providing context and anticipated outcomes of compliance with the 'requirements'.
55. However, the Law Council considers that from a drafting perspective, the obligations of approved providers for compliance should be expressed in terms that make it clear what needs to be 'complied' with by an aged care provider and should be objectively measurable, as recommended by the Final Report.
56. To demonstrate, it is useful to pick-up the example provided in the Final Report:<sup>48</sup> *The lack of objectively measurable Standards in aged care is concerning. Standard 7, which requires that a provider has a workforce 'that is sufficient, and is skilled and qualified to provide safe, respectful and quality care and services', provides a good example. The lack of any clarity about the meanings of 'sufficient', 'skilled' and 'qualified' serves no one's interests—not people receiving care, not approved providers and not the regulator itself.*
62. In the experience of some legal practitioners, the differences add unnecessary complexity and potential confusion to the organisation's task of compliance and to the consumer's opportunity to enforce their rights.

66. The Law Council would welcome the opportunity to be consulted on any proposed revised drafting.

**Recommendation**

- **The Standards be amended to:**
  - make clear which aspects amount to the requirements against which an aged care provider or service would be assessed;
  - ensure that the obligations are expressed in consistent terms and set clear and objectively measurable standards.

68. The Law Council considers that there is the potential for conflict as between the rights of 'consumers' (i.e. aged care recipients) expressed in the Standards and the legal obligations of organisations arising from the common law, contract and statute.

78. The Law Council submits that 'expectation' should be enshrined in the Standards themselves, rather than the Guidance document, and it should be clear what the minimum standard expected is of aged care providers.

84. The Law Council noted that the definition replicated the definition of 'restrictive practice' in section 9 of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**). It also pointed out that while the NDIS Act articulates several human rights of persons with disabilities as general principles guiding actions under that Act, thus linking into the reference of 'rights' in that definition, there is not, presently, any scheme in the Aged Care Act for recognising human rights.

122. The Law Council considers that it would be beneficial if the aged care legislation – specifically, the Aged Care Act, Quality of Care Principles, and the Standards themselves, to be clearer with respect to the role of representatives of aged care recipients, and the interaction between representatives and the obligations of aged care providers.

141. The experience of practitioners is that this inconsistency can cause confusion to consumers and organisations. In circumstances of conflict where a representative decision-maker is not actually making decisions in the interests of the consumer, an organisation may be left with the options of ignoring their wishes or seeking clarification from a Tribunal."

Source:

<https://www.lawcouncil.asn.au/publicassets/a263f065-a945-ec11-9444-005056be13b5/4115 - Aged Care Quality Standards.pdf>