

Attachment - Governance Institute of Australia Submission on Counsel Assisting's Recommendations to Royal Commission into Aged Care Quality and Safety

About Governance Institute of Australia

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. In addition, many of our members provide governance and risk management advice and services in the aged care sector, either in paid roles or as volunteers.

Governance Institute's activities in the aged care sector

In 2015, Governance Institute recognised the aged care sector as one where it could add value by developing governance guidance for those sitting on the boards of companies and facilities providing aged care. Our aim was to use our members' deep expertise in governance to provide those who sit on boards in the aged care sector with practical and concise guidance on how to deal with the issues challenging their boards. The first edition of this guidance, *Adding value to governance in aged care* (Governance in Aged Care) released in early 2017. This governance guidance was very well received and was downloaded over 800 times from our website. The publication was recently updated to take into account regulatory and other developments in the sector. The latest edition was released in July 2020 and is available on our [website](#). It has been downloaded 770 times since it was released.

Governance Institute made a [submission](#) in September 2018 on the Terms of Reference for the Royal Commission into Aged Care Quality and Safety encouraging the Minister to include a review of the current state and adequacy of the governance and risk management frameworks within organisations in the aged care sector. It is encouraging to see that the Commission has had a focus on the governance and risk management of organisations in the sector and to see Counsel assisting has made specific recommendations (Recommendations) directed at improving governance in the sector. Governance Institute's General Manager Policy and Advocacy also provided expert evidence on governance on 15 November 2019 at the Commission's Hobart hearings.

Governance Institute has also formed a strategic alliance with Leading Aged Services Australia (LASA) to deliver governance training which commenced in 2019. Governance Institute has jointly hosted governance workshops specifically developed for the aged care sector nationally with LASA. Overall we have trained approximately 1,000 people from both the Governance Institute and LASA membership groups. We hosted an in-house Training Certificate in Governance Practice with LASA in March 2020. Other Certificates scheduled for delivery in 2020 were cancelled due to the change of priorities for the aged care sector during COVID19.

Our detailed comments on Counsel Assisting's Proposed Recommendations are set out below. These comments are in addition to, and not in derogation from our previous submissions and our evidence to the Commission at the Hobart hearings.

Recommendation 52: Legislative amendments to improve provider governance

52.1 By 1 January 2022, the *Aged Care Act 1997* (Cth) should be amended to require that:

(a) the governing body of an approved provider providing personal care services must have a majority of independent non-executive members (unless the provider has applied to the Aged Care Quality and Safety Commissioner for an exemption and the exemption has been granted)

It is considered good practice for a board of directors to have a majority of independent non-executive directors. Independent non-executive directors are not employed by the organisation and do not have any material relationship with the organisation other than being a director. Examples of relationships which can impact a director's independence include material business relationships or close family ties with the organisation. This is the position taken in the leading Australian statement on good corporate governance practice in the Corporate Governance Principles and Recommendations (Corporate Governance Principles and Recommendations).¹ Governance Institute also recommends this as the most appropriate board structure in Governance in Aged Care.² It is also good governance for all aged care providers to consider the independence criteria set out in the Corporate Governance Principles and Recommendations as a guide to assist the board to ensure that directors bring independence of judgement to their decision-making.³

The rationale for independent directors is that the absence of relationships with an organisation mean that they are better able to act in the best interests of the organisation as a whole, and therefore the recipients of aged care services, as opposed to a particular group such as a particular group of shareholders or a material supplier or professional adviser to the organisation. This also means that it is harder for an individual or small group to dominate board decision-making and maximises the likelihood that decisions will not be biased in favour of a particular interest group.

While Governance Institute members agree that it is good governance for boards to have a majority of independent non-executive directors, they caution against including this requirement in legislation. They consider it would sit better in a governance standard that applies to the aged care sector rather than in legislation from which individual providers have to seek exemption because:

- The Principles and Recommendations apply to listed companies on an 'if not, why not' basis. The rationale is that the governance practices that organisations adopt are ultimately a matter for their boards who are responsible for managing their organisations. Under the Corporate Governance Principles and Recommendations, if the board of a listed organisation considers a particular governance recommendation is not suitable for its particular circumstances, it is entitled not to adopt the particular recommendation provided it explains publicly why it has chosen not to adopt it – the 'if not, why not' approach. This approach gives organisations the flexibility to adopt governance practices that suit their size, level of governance maturity and the needs of their investors and in the case of the aged care sector the recipients of their services, noting the substantial level of public funding of the aged care sector. The recommendations in the Corporate Governance Principles and Recommendations are not 'hard wired' into legislation, instead the Listing Rules require listed organisations to publicly disclose their governance practices. The 'if not, why not' approach is particularly important for smaller listed entities which are similar to many of the not-for-profit sector entities which provide aged care services, which may not have the resources to adopt many of the recommended governance practices. The flexibility offered by the

¹ See *Corporate Governance Principles and Recommendations*, ASX Corporate Governance Council, February 2019, Recommendation 2.4 at page 15.

² Op cit at page 8.

³ Op cit at page 38.

'if not, why not' approach has remained unchanged across four editions of the document and is one of the reasons for its continuing success as a statement of good governance practices. This flexibility is not possible if a requirement is 'hard wired' into legislation.

- As the Commission has heard, there is a broad range of organisations in the aged care sector including; listed organisations, large faith-based providers, charities and not-for-profits, community organisations and organisations dedicated to particular sections of the community. Approximately 55 per cent of aged care services are provided by not-for-profit organisations and approximately 60 per cent of residential providers are single-facility operators.⁴ Any governance requirements need to be scalable to suit the diverse types of organisations delivering aged care and related services. Requiring the boards of all aged care providers to consist of a majority of independent non-executive directors is likely to be impractical for smaller organisations which frequently have difficulty in securing suitably qualified non-executive directors. Governance Institute members consider that there is no 'one size fits all' approach to governance. Each organisation needs to adapt its requirement to suit its needs which will differ depending on its type, size, stakeholders and the services it is delivering. An appropriate governance structure for a listed aged care provider will differ from an appropriate structure for a single-facility community-based provider in a regional or remote area. The commitment to good governance practices should be the same, but the manner in which it is achieved will differ. For this reason, our members caution against hard wiring a requirement for a majority of independent directors into the Aged Care Act.

Counsel Assisting has also recommended the implementation of a new governance standard in Recommendation 24.1(d). We support this recommendation and consider that this proposal is best considered in the context of that new standard.

(b) the constitution of an approved provider must not authorise a member of the governing body to act other than in the best interests of the provider

Our members assume the intention of this proposal is to deal with the situation where a governing body is not subject to the Corporations Act or other legislation requiring members of the governing body to act in the best interests of the organisation. Our members consider a preferable approach may be to require an approved provider's constitution to provide that that a member of the governing body must not act other than in the best interests of the residents/client/customer. Our members note that a governing body may already be subject to provisions in the Corporations Act or under the ACNC Act so that any additional provision should not conflict with these existing requirements.

Recommendation 53: New governance standard

53.1 Any governance standard for aged care providers developed by the Australian Commission on Safety and Quality in Health and Aged Care should require every approved provider to:

- have members of the governing body who possess between them the mix of skills, experience and knowledge of governance responsibilities, including care governance, required to provide governance over the structures, systems and processes for ensuring the safety and high quality of the care delivered by the provider**
- have a care governance committee, chaired by a non-executive member with appropriate experience in care provision, to monitor and ensure accountability for the quality of care provided, including clinical care, personal care and services, and supports for daily living**

⁴ *Adding value to governance in aged care*, Governance Institute of Australia, July 2020 at page 10.

Principle 2 of the Corporate Governance Principles and Recommendations provides that the 'board of a listed entity should be of an appropriate size and collectively have the skills, commitment and knowledge of the entity and the industry in which it operates, to enable it to discharge its duties effectively and to add value'.⁵ While this is expressed to apply to listed organisations, it is unquestionably good governance for all organisation to have appropriately skilled and qualified boards.

It is also good governance for boards of directors to regularly assess the competence and effectiveness of the board as a whole and each member of the board, as well as any need for new directors. As part of this review boards should also assess their current skills mix, any gaps or any new skills that will be required.⁶ For this reason our members support the proposed requirement in Recommendation 53.1a, but as a practical matter, our members query whether this will be workable in smaller organisations, particularly those in regional and remote areas where it is difficult to secure the services of appropriately skilled and qualified directors. A further consideration is any constraints on board membership imposed by organisations' constitutions. One way of addressing this challenge in the aged care sector may be the use of advisory committees and external committee members.

Our members consider the proposal in Recommendation 53.1.b may need to be adapted for smaller organisations where these matters are probably best considered by the board as a whole, unless what is contemplated is a management committee which includes a non-executive director as a member. Many smaller listed organisations will deal with issues such as audit, remuneration and nomination as a whole board, rather than setting up separate committees which is more common in larger organisations. The key in this situation is ensuring whether at committee or board level care-related issues are receiving appropriate attention. This is best achieved by having a properly constituted board, well-constructed agendas and meaningful reporting, which will allow a board to govern care-related issues effectively. This is something which could be incorporated into a new more appropriate governance standard.

Counsel Assisting recommended the implementation of a new governance standard in Recommendation 24.1(d). We support this recommendation and consider that this proposal is best considered in the context of that new standard and should take into account our comments above.

Recommendation 54: Program of assistance to improve governance arrangements

54.1 The Australian Government should establish an ongoing program commencing in the 2021–22 financial year to provide assistance to approved providers to improve their governance arrangements, including their care governance arrangements.

Our members support the establishment of a program to assist approved providers improve their governance arrangements and appropriate governance training will be an important aspect of this program. They note that the existing guidelines around clinical governance are quite high-level and may not be sufficiently detailed to enable providers to operationalise their governance arrangements. They consider that it is the operationalisation of governance in organisations that will be critical if the program is to succeed.⁷

Recommendation 105: Continuous disclosure requirements in relation to prudential reporting

105.1 From 1 July 2023, approved providers should be required under statute to comply with continuous disclosure requirements, under which an approved provider that becomes aware of material information that:

⁵ See *Corporate Governance Principles and Recommendations*, ASX Corporate Governance Council, February 2019, Principle 2, page 12.

⁶ See *Adding value to governance in aged care*, Governance Institute of Australia, July 2020 at page 36.

⁷ One way of operationalising governance in an organisation is to adopt a 'whole-of-organisation' framework for governance. See *Adding value to governance in aged care*, Governance Institute of Australia, July 2020 at page 43.

- (a) affects the provider's ability to pay its debts as and when they become due and payable, or
- (b) affects the ability of the provider or any contractor providing services on its behalf to continue to provide aged care that is safe and of high quality to individuals to whom it is currently contracted or otherwise engaged to provide aged care

must immediately disclose the information to the Commission.

105.2 The Australian Aged Care Commission should have the power to designate events, facts or circumstances that should give rise to continuous disclosure obligations.

Our members have concerns about the use of the term 'continuous disclosure' in the proposed requirements for aged care providers. This term has a specific meaning in the context of listed entities. Not all aged care providers are listed and those that are, are already subject to the continuous disclosure requirements under section 674 of the Corporations Act and the ASX Listing Rules. ASX has also issued ASX Listing Rule *Guidance Note 8 Continuous Disclosure* to assist listed organisations meet their obligations under the Listing Rules. There is also a considerable body of case law around continuous disclosure.

Our members consider the proposal is unlikely to achieve the result the Recommendation seeks to address, namely that the Australian Aged Care Commission receives advance notification of issues affecting a provider's solvency or ability to provide an adequate standard of care. They consider the use of this term is confusing. Our members acknowledge the need to protect funds such as refundable accommodation deposits, but they consider that this proposal should be reconsidered and the objective may be better achieved in a different way. A preferable term may be 'material breach disclosure' or similar.

Recommendation: 115 Protection for whistle-blowers

- 115.1 The new Act should contain comprehensive whistle-blower protections for:**
- a. people receiving aged care, their family, carer, independent advocate or significant other
 - b. an employee, officer, contractor, or member of the governing body of an approved provider
- who makes complaints or reports suspected breaches of quality and safety standards or other requirements of the Act.**

Governance Institute considers that whistleblowing has a critical role to play in identifying, stopping and preventing misconduct. However, we note that it should be seen as just one, albeit vitally important, aspect of organisations' overall programs to ensure compliance with regulation and to detect and prevent misconduct. Our members' experience is that whistleblowing usually occurs when other avenues that should already exist within organisations to deal with misconduct have been exhausted, failed or do not exist.

We have long supported reform of whistleblower legislation and gave evidence at the Parliamentary Joint Committee Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors in 2017. We were a supporter organisation of the Whistle While They Work 2 (WWW2) national research project led by Griffith University. We were also actively engaged in advocacy around ASIC's guidance on whistleblowing.

The whistleblower protections in the Corporations Act were expanded from 1 July 2019 to require public companies, large proprietary companies, and corporate trustees of APRA-regulated superannuation entities to have a whistleblower policy from 1 January 2020. This means that almost all organisations incorporated under the Corporations Act are required to have a whistleblower policy. The Corporate Governance Principles and Recommendations also recommend that listed organisations have a whistleblower policy and that their boards (or a board committee) is

informed of any material incidents reported under the whistleblower policy.⁸ As noted above the Corporate Governance Principles and Recommendations operate on an 'if not, why not' basis.

Our members do not underestimate the important role whistleblowing has to play in bringing misconduct and poor behaviour to light. However, given the existence of the recently expanded whistleblower provisions in the Corporations Act and the existence of the Corporate Governance Principles and Recommendations, our members are concerned that Recommendation 115.1 duplicates and potentially expands these existing whistleblowing requirements. The duplication of whistleblower requirements may lead to uncertainty for aged care entities in their efforts to comply with multiple (and potentially conflicting) whistleblower requirements under different regimes, and this may lessen the benefits of having a clear whistleblowing regime in place.

The Governance Institute members consider that any changes to the existing robust whistleblowing regime (noted above) should be addressed through the existing whistleblower requirements, rather than creating new set of obligations under the Aged Care Act, which extend these obligations to new types of whistleblowers such as families, carers, independent advocates or significant others. They also consider that this potentially blurs the distinction between complaints and whistleblowing and that it may be preferable to separate these matters and, if necessary, give better protection to those falling under Recommendation 115.1 a in the context of complaints.

12 November 2020

⁸ See *Corporate Governance Principles and Recommendations*, ASX Corporate Governance Council, February 2019, Recommendation 3.3 at page 17.