Productivity Commission

Caring for Older Australians

Post Draft Submission

Mary T. Archibald PSM

My comments are those of a registered nurse with over 40 years work experience in the public and private sector including working as a CEO and Director of Nursing of a public hospital and as a clinical educator in aged care from 2002 to 2008. I have held directorships in the public and private sectors. I also write from experience as a guardian of a nursing home resident and latterly as a member of an incorporated association, which is an approved provider under the *Aged Care Act 1997.*

1. Boards of management in nursing homes

My submission concerns the management of aged care services at service provider level and in particular the regulation and operation of Boards of Management. The focus is private, not-for-profit providers, which currently comprise the majority of providers in Australia.

2. Original submission (July 2010): variability in the regulation of management

In my original submission, I discussed the regulation of corporate governance of nursing homes noting that some were covered by federal law *(Corporations Act)* and some by various state laws. So while approved providers are subject to the same regulation about standards of care, they are subject to very different forms of regulation in terms of their corporate governance. It all depends on the legal status of the approved provider and the State in which they are situated.

In my July submission, I provided some examples of the different types of regulation applying to providers in the not-for-profit group. Where they are regulated under state law, the regulation appears to be wafer thin.

3. Approved providers: types of organisation

The Australian Institute of Health and Welfare classifies providers of aged care services. It distinguishes **private; not-for-profit;** and **government (state and local)** providers (AIHW, Residential aged care in Australia 2008-2009: a statistical overview). The largest group, representing 60 per cent of all providers, is the **not-for-profit** group. This classification is misleading however because the **'private'** category is also **'for profit'** and the **'not-for-profit'** category is also **'private'.** It would be clearer if the categories were **"private for-profit'** and **'private not-for-profit'**.

Incidentally, none of the privately owned service providers, meaning almost all providers in Australia, is subject to Freedom of Information law. This is relevant to the issue of transparency discussed below.

An interesting but complex question is who are the owners of the myriad of nursing home providers, which are incorporated associations? Clearly, this would be a matter for the specialist lawyers.

4. Stronger recommendations needed in Final Report

I have observed first hand poor management, both at Board level and, prior to 2009, at CEO level. I believe that, in its Final Report, the Commission should make stronger recommendations concerning the management of nursing homes. Before outlining some proposed recommendations, I will refer to the coverage of management in the Draft Report.

5. Caring for Older Australians - The Draft Report – Management

The Draft Report is silent on boards of management. The only reference to management at service provider level is in the context of recruiting and retaining an appropriately skilled permanent workforce:

"The variability of management within the aged care sector is an important determinant of the attractiveness of individual service providers as places of employment. While there have been significant investments aimed at improving the clinical care skills of aged care workers, there has been much less focus on developing management capacity and anecdotal evidence suggests that the majority of managers were formerly clinical staff with limited experience in management roles" (Draft Report, page 362).

The Draft Report has only one relevant recommendation. It relates to education for managers but does not mention boards of management:

"The Australian Government should promote skill development through an expansion of courses to provide aged care workers at all levels with the skills they need, including

- *Advanced clinical courses for nurses to become nurse practitioners*
- ***Management courses for health and care workers entering management roles"***

(Draft Report, Recommendation 11.3, pp. 371-372, emphasis added)

6. Recommendations

The following are some suggested recommendations drawn from the issues raised in the discussion below. They are directed to boards governed by state laws as distinct from those governed by the federal *Corporations Act.* It is assumed that the **private for-profit** providers will be governed by the *Corporations Act.*

(i) That there be increased scrutiny of the recruitment, selection and terms of appointment of boards of management of private not-for-profit approved providers.

At present the *Aged Care Act (section 8-3(3)(a))* requires that the suitability of members of a board of management, (who meet the definition of 'key personnel' under the legislation) be considered when an application is made to become an approved provider. There does not however appear to be any check on suitability of members over time, to take account of changes in board membership. Nor does there appear to be any check on the process of recruitment and selection of board members.

(ii) That boards of management of private not-for-profit providers should be required to attend accredited directorship courses.

The purpose is to ensure that board members have the same skills and abilities as would be expected of directors in the corporate sector.

(iii) That boards of management, include at least one member with formal qualifications and experience in human resource management

In its discussion of workforce issues, the Commission has recognised the importance of human resource management and the eventual impact of such management on the quality of care able to be provided. It would be desirable for the skill profile of boards to include this important area of expertise.

(iv) That a residents' representative be granted observer status at board of management meetings with an obligation to report back to 'residents and relatives' meetings.

This recommendation relates to the general issue of the transparency of governance in private organisations receiving large government subsidies and is in the spirit of the Charter of residents' rights and responsibilities.

7. Regulation of public hospital boards of management

As discussed in my July 2010 submission, the governance of public hospitals is regulated under state law. In Victoria, the regulation is detailed concerning the method and selection of their boards of management. There is transparency. Vacancies are advertised in newspapers and criteria for selection are available to anyone interested (See Appendix 1, *Advertisement for "Appointments to Boards of Directors of Public Health Services, Ambulance Victoria, and Rural Public Hospitals," Herald Sun, 29 January 2011).* The term of office and method of removal from office is also public knowledge. I believe this is not true for most nursing homes.

But public hospitals and private not-for- profit nursing homes, have something significant in common. They all receive large subsidies from the public purse.

8. Private not-for-profit providers covered by Victorian law

The situation for nursing homes whose corporate governance is under the jurisdiction of Victorian law is now discussed.

(a) Number of approved providers registered under Victorian law unknown

An enquiry to Consumer Affairs Victoria, on 17 March 2011, established that there is no exhaustive list of registered associations nor classification of associations by industry sector. Hence the number of nursing home providers operating under this law is unknown. Anecdotal evidence suggests there are hundreds perhaps thousands of associations of diverse kinds. If there are no lists of registered associations this suggests that routine auditing of adherence to rules by the relevant government agency is unlikely. It is unknown whether, in terms of monitoring, distinctions are made between associations as diverse as suburban sports clubs, perhaps reliant on their own resources, and nursing homes receiving millions of dollars of public money.

(b) Associations excluded from the *Corporations Act*

The relevant legislation in Victoria is the *Associations Incorporation Act 1981.* Section 53 of this Act provides that, unless an association is also registered as a company under the (federal) *Corporations Act,* the provisions of the latter legislation do not apply.

(c) Victorian regulation very limited

The *Associations Incorporation Act* stipulates minimal requirements concerning boards of management. Under the Act a board of management is referred to as *"the committee"* and the association rules must provide for:

> *(a) the election or appointment of members of the committee*
>
> *(b) the terms of office of members of the committee;*
>
> *(c) the grounds on which, or reasons for which, the office of a member of the committee shall become vacant;*
>
> *(d) the filling of casual vacancies occurring on the committee*
>
> *(e) the quorum and procedure at meetings of the committee*

Associations Incorporation Act 1981 Vic, Schedule, Item 4.

It is clear that this regulation leaves a great deal of discretion to boards of management, for example, there is no upper limit on the term of office.

The limited provisions in the federal *Aged Care Act* and the Victorian *Associations Incorporation Act* suggests that there is little scrutiny of the corporate governance of nursing homes registered under state law in Victoria.

9. Responsibilities of Boards of Management: a case in point

Approved providers operating under state law will be governed by rules of association registered under that law. The following Victorian example is a case in point. Two typical responsibilities of boards are to develop policy and to appoint and select staff. This is evident in the rules of Association X which read, *inter alia:*

> *The* [board] *shall manage the business and affairs of* [the association] *and …….*
>
> *ii) shall have the power to perform all such acts as seem to appear to the* [board] *to be essential for the proper management of the business and affairs of the Association, including responsibility for:*
>
> *…….*
>
> *C. the policies of* [the association]
>
> *……*
>
> *F. the appointment and termination of staff*
>
> (Rule…., [board], Rules of Association, …….. Association Incorporated 2009)

A board may delegate responsibilities to the CEO and this occurs in the above example, where the CEO responsibilities are expressly stated in the Rules. The Board is ultimately responsible but obviously a crucial decision a board makes is the appointment of the CEO. The CEO then selects the staff. The skills and personal qualities of those selected are central to the quality of the service provided. So the board will drive the culture of an organisation and we should not forget that the organisations involved here are responsible for the care of frail, dependant elders typically with multiple medical conditions.

10. An illustration of board of management practice

(a) Unusual events during 2009

The approved provider in this example, is based in Victoria, and is among the 60 per cent of providers classified as **'not-for-profit'** by the AIHW. In earlier years, the AIHW annual statistical overviews of residential aged care provided more detail on types of organisation. In the earlier classification, this provider would be classified under their category **'community-based organisations'.** The other categories were **'religious organisations'** and **'charitable organisations'.**

In this example, the approved provider, is regulated by Victorian law, the *Associations Incorporation Act 1981* with respect to its governance. I believe, the events relating to governance during 2009 suggest a lack of transparency in the processes for board appointments. It is pertinent to note that this association has been registered for about two decades (Communication with Consumer Affairs Victoria, 17 March 2011).

(i) Board processes

During 2009, the [board] launched a membership drive, publicised through the Association's newsletter.

At the 2009 Annual General Meeting (AGM) members of the Association were told that this was the first formal meeting of the Association. They were advised that, on previous occasions, the AGM had been an informal meeting of all interested parties without regard to financial membership of the Association ([association], AGM Minutes, 2009).

This seems extraordinary and it is hard to imagine an approved provider operating under the federal *Corporations Act* being able to do this.

The Minutes also record that the existing Board members had all nominated for positions on the [board]. A motion that the nominations be accepted was carried unanimously. An agenda had been sent to members but significantly, there was no formal call for nominations and there was no nomination form accompanying the agenda. There was no proxy vote form accompanying the agenda.

(ii) Operating with outdated rules

At this same AGM there was also discussion about the Association's rules and the fact that they had not been authorised for many years and were no longer relevant.

So the sequence of events was such that the Board was elected unopposed before the meeting was advised of the problem with the rules. I believe it is arguable that natural justice principles were not followed in relation to nomination for Board positions and it was unclear what rules were operating when the Board was re-elected for a further three years.

(b) Annual General Meeting 2010: behaviour by Board members

At the Annual General Meeting of the Association in 2010 questions were asked about risk management strategies and about due process in relation to Board appointments. On raising risk management strategies, the questioner was subjected to hostility and aggression from a Board member. The risk management questions were prompted by the fact that a resident had recently experienced an acute psychotic episode in which in excess of 20 panes of glass were smashed and some residents and staff, were traumatised.

A letter was sent to the Board Chairperson in late December 2010 expressing concern about what had occurred at the AGM. Following no response, another letter was written in late January. A scrappy reply was received which did not deal with the substance of the letter but adopted a personalised approach citing the Chairperson's health problems.

I believe this is unprofessional. If a Board Chairperson is unable to function, the responsibilities should be temporarily passed to a Deputy. The Board in question would certainly benefit from some management education as a matter of urgency. It may well be that this lack of professionalism extends to other boards of incorporated associations.

(c) Management culture: outdated custodial frame of reference

Over a period of three years (2005 to 2008) the board of management and the CEO of this Association did not deal with complaints on their merits. They were hostile to complainants, seeking to make the complainant the "guilty" party and on occasion, sending lawyers' letters designed to intimidate. The management culture did not accept the legitimacy of making a complaint. The Association was subsequently found to be in breach of the *Aged Care Act* on four separate occasions including one instance where the then Board Chairperson was found to be in breach of his legal responsibilities. The four findings of breaches of the *Aged Care Act* is significant because under the Aged Care Complaints Investigation Scheme, the percentage of complaints that are upheld is in the range of ten to fourteen per cent (See Report on the Operation of the Aged Care Act, from 2006-2007 to 2009-2010).

In conclusion, I believe that the quality of management is critical to the nature of the services provided in nursing homes and it deserves more attention than it has received to date. I urge the Commission to give favourable consideration to the proposed recommendations above.

Mary T. Archibald PSM

21 March 2011

APPENDIX 1.

Victoria Department of Health

Appointments to Boards of Directors of Public Health Services, Ambulance Victoria, and Rural Public Hospitals

The Minister for Health, the Hon David Davis MP, is pleased to invite applications for part time board chair and director positions of public health services, Ambulance Victoria, and rural public hospitals (including multi purpose services) with terms of office commencing from 1 July 2011.

There are 19 public health services, consisting of 13 public health services (including Dental Health Services Victoria) in the Melbourne metropolitan area and six public health services in regional Victoria. There are 56 rural public hospitals and seven multi purpose services in regional Victoria.

These positions provide an exciting opportunity for suitably qualified and experienced persons to contribute and provide high level advice on the delivery of public health care to the Victorian community.

Guidelines for applicants, application forms and terms and conditions of appointment are available for downloading from **www.health.vic.gov.au/governance**

The Victorian Government is committed to ensuring that government boards and committees reflect the composition of the Victorian community. This includes appropriate representation of women, indigenous Victorians, young Victorians, Victoria's culturally diverse community and Victorians living with a disability.

Applications close at 5.00 pm **Wednesday 9 February 2011.**

Public health services and Ambulance Victoria

Applicants for public health service boards and the Ambulance Victoria Board are required to submit their completed application letter and CV to:

Applications Officer
Service Performance and Governance
Hospital and Health Service Performance
Department of Health
GPO Box 4541
MELBOURNE 3001

For further information contact the applications officer on 03 9096 8209.

Rural public hospitals (including multi purpose services)

Applicants for rural public hospitals and multi purpose services are required to submit their completed applications to the Chair, Selection Panel, (Rural public hospital name and address).

For further information contact the hospital or relevant Department of Health regional office.

DH Region	Contact	Phone no.
Barwon South-Western	Jenny Daffy	(03) 5226 4544
Gippsland	Jacqui Hickey	(03) 5177 2509
Grampians	Warren Anderson	(03) 5333 6083
Hume	Michael Hedderman	(03) 5722 0960
Loddon Mallee	Colin Wellard	(03) 5434 5527

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