Submission to Productivity Commission Inquiry

Caring for Older Australians July 2010

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(1) Aged care facilities: regulation of corporate governance

The government has stated that "Aged care is an important component of Australia's health system" *(Productivity Commission Issues paper May 2010 page 30)* yet, in terms of corporate governance, I believe that we regulate corporate governance in the aged care sector very differently from the way we regulate corporate governance in the public hospital sector. Both sectors rely on massive funds from government to provide services.

The regulation of aged care facilities receiving government subsidies is deficient when it comes to the matter of corporate governance that is, the appointment and the operation of boards of management however styled and, where applicable, of directors. Many boards of management in the aged care sector of the health system are subject to lighter regulation than boards of management in the public hospital sector of the health system.

Public hospital regulation

Public hospitals, which are regulated as to their governance under State Acts of parliament. The regulation is typically detailed concerning the method and selection of their boards of management. Vacancies are advertised in newspapers and criteria for selection are available to anyone interested. The term of office and method of removal from office is also, I believe, public knowledge.

Aged Care Act regulation

The Commonwealth *Aged Care Act* is concerned with only one limited aspect of boards of management. At the time when an association or company is seeking to become an 'approved provider' and thus eligible for public funds, the Act requires that the Secretary of the Department of Health and Ageing consider, *inter alia*

> *1(a) The suitability and experience of the applicant's "key personnel"*
>
> For the purpose of the Act, "key personnel " includes:
>
> *(3) (a) a member of a group of people who are responsible for the executive decisions of the applicant*
>
> *3 (b) any other person who is concerned in, or takes part in, the management of the applicant*
>
> Aged Care Act 1997 (Cth) section 8-3

The nature of the checking at the time of application to become an approved provider is set out in more detail in Part 2 of the *Approved Provider Principles 2007.*

No periodic monitoring

There is nothing to indicate there is any other subsequent checking or subsequent requirement to provide any information concerning method of appointment or term of office or criteria for selection. It thus appears that there is only a 'one-off' check on the personnel who oversee the incorporated associations and companies that are responsible for strategic management decisions affecting the lives of frail, elderly people with complex medical conditions.

Greater discretion than public hospitals

Nursing home boards of management and directors have far greater discretion with respect to staffing in this sector of Australia's health system than do boards of management in the public hospital sector. In public hospitals, and incidentally in the small number of nursing homes that are owned by governments *(see below)*, there are industrial agreements specifying staff:patient ratios in detail across various wards and departments. This type of regulation does not exist in the aged care sector. This gives these boards and directors wide discretion when it comes to staffing decisions.

Degree of corporate governance regulation depends on nature of legal entity of provider

The sector is covered by a mixture of federal and state regulation depending on the nature of the legal entity of the particular approved provider of aged care services. Further, the regulation is not health sector specific in the way that it is with the public hospital sector. It is pertinent to take a closer look at the types of organisations which receive public funding for aged care services. The *Issues Paper* at page 11 distinguishes the not-for-profit group *(see text box)*.

Types of organisations providing aged care services

> *"There were 2783 homes across Australia providing residential care at June 2009. The not-for-profit group (comprising religious, charitable and community-based providers) accounted for almost 60 per cent of residential places and the commercial providers around 34 per cent. The balance (around 6 per cent) were government operated facilities".*

Commercial providers

The nursing homes and hostels which are private companies (commercial providers) will be regulated under the *Companies Act* (Cth). It seems unlikely however that ASIC would have the resources to keep a close eye on all of them.

Not for profit providers operate as businesses

Most approved providers in this category are incorporated. They are operated as businesses. Some are subject to the Commonwealth *Corporations Act,* others are subject to State legislation and there are others whose legal status is unclear. The following examples are illustrative:

Regulation of approved providers in the not-for-profit group

Anglicare (SA) Incorporated

Registered as an 'incorporated association' under the *Associations Incorporation Act 1985 (SA).* The administrative government agency is the *Office of Consumer & Business Affairs, South Australia.*

Anglican Aged Care Services Group [Victoria]

Registered as a company/business with ASIC and presumably subject to the governance provisions of the Commonwealth *Corporations Act 2001.*

Mercy Health & Aged Care Inc

Registered under the jurisdiction of ASIC but with an ARBN number rather than an ACN or ABN. Referred to as a "Registered Australian Body".

Public has access to very limited information

In the case of Anglicare (SA) Incorporated, the public can access the constitution (rules of association) and the name of the Public Officer, on payment of a fee, from the SA Office of Business & Consumer Affairs. The title of this Office would suggest that the approved provider Anglicare (SA) Inc is operated as a business.

There is no public access to the names of the members of the association's committee (board of management) unless by chance the association happens to include the names of the members in its constitution document. The public can access a 'periodic return' which may contain financial information. Again, a fee is required for these documents. All records are archived off-site and the fee structure for documents therefore includes a retrieval fee.

Private providers exempt from provisions of Freedom of Information Acts

The lack of transparency which flows from many not-for-profit approved providers being registered as incorporated associations is compounded by the fact that these associations are in private ownership and therefore exempt from the provisions of Freedom of Information Acts, either State or Federal. The same exemption applies of course to the private for-profit approved providers.

No monitoring by State authorities

In the case of South Australia at least, it is not part of the responsibilities of the Office of Business & Consumer Affairs to monitor the adherence of registered associations to their rules. This means there is no external check on how these organisations are being governed and whether their rules of association are being adhered to.

Annual general meetings

It may be argued that information is available via annual general meetings but these are frequently internal and do not, I believe, involve any accountability to a regulator, be it the federal Department of Health and Ageing or the Office of Business & Consumer Affairs (SA) or ASIC .

For profit vs not-for-profit: more similarities than differences?

It is reasonable to assume that the providers in the not-for-profit group will be pursuing an operating surplus. Just how assiduously the operating surplus is pursued may depend very much on the executive decisions of their boards of management. Where cost minimisation is vigorously pursued, the effect on the resources allocated to direct care of residents may well be little different from the effect of a similar mindset among the directors of a for-profit facility. Alternatively, some not-for-profit providers may direct their operating surplus back into direct care. Yet the regulation of the so-called not-for-profit boards of management, managing huge amounts of government money, could be limited to the spindly requirements of State based legislation for incorporated associations.

Summary

Nursing home boards of management are subject to sometimes obscure but apparently lighter regulation than public hospital boards of management. Yet both types of service providers are important components of Australia's health system and both receive massive government subsidies. Not-for-profit providers registered under State legislation are, I believe, virtually 'regulation free'.

I believe that corporate governance in aged care is less transparent than in public hospitals and none of it is covered by health-sector specific regulation. One reason is that overwhelmingly, aged care services are in private ownership and beyond the reach of Freedom of Information Acts.

So called 'not-for-profit' providers in aged care are operated as businesses pursuing an operating surplus, and to that extent, the for-profit/not-for-profit distinction can be misleading.

(2) Provision of extra services

The provision of extra services in residential aged care can be viewed as a provision of services issue and as a funding issue.

Change the language from 'extra services' to 'extra hotel services'

To the uninformed, the term 'extra services' might reasonably be interpreted to include 'extra nursing services' or 'extra personal care services'. Of course it means neither. Extra services means 'extra hotel services' which is taken to include matters such as the quality of the décor, fixtures and fittings, menu choice, the provision of wine or beer and the daily newspaper. This fact needs to be made clearer to the consumer through a change in the language of regulation. Where the term 'extra services' appears in the *Aged Care Act* and the *Aged Care Principles* it should be amended to read "extra hotel services".

Paying for services unable to be consumed

There are likely to be many residents today who are paying the extra service rate but who, due to a progressive decline in their physical or mental health, are unable to consume or otherwise benefit in any meaningful way, from the so-called 'extra services' for which they are paying dearly. There should be provision for residents whose dependency level has undergone dramatic change while in an aged care facility to unilaterally change their status. In other words, they should be given the option of no longer having to pay for services they are simply unable to consume.

Extra service places as a proportion of total residential places

Given that there is no upper limit on the extra services fee (only on the fee increase), extra service beds are potentially a major source of revenue for providers. The Commission should investigate the accuracy and the currency of the statistics regarding the percentage of total beds which are extra service beds. Anecdotal evidence suggests extra service beds are increasing as a percentage of total beds. This warrants investigation.

(3) Regulation: the Aged Care Complaints Investigation Scheme

The present Aged Care Complaints Investigation Scheme is very much part of government. It operates within the Department of Health and Ageing. Thus the Scheme is located within the very Department which funds and regulates the services which are the subject of complaints. This is unacceptable.

Establishing an independent Complaints Commission a priority issue

The Walton Report, commissioned by the Government, was released in April 2010. An important recommendation was for the establishment of an independent Complaints

Commission. At present this recommendation is languishing in the recesses of a government advisory committee. The establishment of an independent body to hear complaints about aged care services should be regarded as a matter of urgency.

Training for investigators

Legislative change in 2007 brought a much needed shift in emphasis in the Scheme to investigation and away from mediation and 'talk-fests'. This followed allegations of rape of residents in a Victorian nursing home and extensive media coverage of aged care. In relation to investigations of complaints, the Walton Report called for the development of a training program for staff conducting investigations. There was considerable evidence presented to the Review of poorly reasoned decisions and failure to appreciate the importance of natural justice in the investigation process. Government media releases announcing the belated provision of funding for training did not include a timetable for action. Correcting these glaring operational deficiencies should also be treated as a priority, as proposed in the Walton Report (M. Walton, Review of the Aged Care Complaints Investigation Scheme, October, 2009).

Public Hearing

Finally, I would like the opportunity to speak to my submission at a public hearing.