



Provider responsibilities relating to governance

Guidance for approved providers

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Introduction

Overview

- The Aged Care Act has been amended to introduce specific responsibilities for approved providers in relation to their governance arrangements.
 - These changes aim to strengthen the leadership and culture of organisations delivering aged care and to support the best interests of consumers.
 - Provider responsibilities relating to governance complement other regulations including the integrated expectations of the Aged Care Quality Standards and requirements for incident prevention and management, complaints management, human resources and record keeping.
 - Governing bodies, as a core element of governance arrangements, play a critical role in aged care – they set the direction for, and culture of, the organisation, directly influencing the safety and quality of care provided to consumers.
 - This guidance provides an overview of key approved provider responsibilities in relation to governance.
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Context

Sound provider governance arrangements are critical to the provision of high-quality care for consumers of aged care services. Governance relates to how an organisation is managed, how it complies with its responsibilities and is held accountable for achieving outcomes for consumers. It includes:

- the way the organisation and governing body are structured
- what controls are put in place to prevent and manage risks, and to ensure compliance
- the way roles and responsibilities are distributed across those making executive decisions, and how they are held to account
- how information is circulated within the organisation
- the frameworks that are in place to support decision-making, risk management and compliance.

Governance arrangements and structure will vary between organisations and there is no 'one-size fits all'. Provider organisations include, for example, small privately owned companies, large corporate entities, Aboriginal Controlled Community Organisations and faith-based providers within church structures.

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Regardless of the organisation type, governance arrangements need to be in place to ensure visibility of risks and to inform robust decision-making about how the provider operates and ensures it meets its responsibilities. Decisions made at the executive level flow down into the delivery of care and services for consumers. Equally, things that occur at the consumer-facing level should flow up to the governing body to ensure risks and operational matters are managed appropriately across the organisation.

Amendments to the Aged Care Act have introduced specific responsibilities for approved providers in relation to their

governance arrangements. These responsibilities are aimed at ensuring providers have the right leadership and culture, and that the organisation is transparent and accountable, all the while focusing on consumer wellbeing, safety, choice, and quality of life.

These responsibilities relate to the membership of governing bodies, the establishment of advisory bodies, and other related responsibilities (as set out in this document) which are intended to improve oversight and transparency, and ensure that the focus of approved providers is on the best interests of consumers.

The role of the governing body

The governing body of an aged care approved provider plays a key role in ensuring that consumers get safe and quality care and services. Members of the governing body are tasked with:

- setting the direction and strategic priorities for the organisation
- overseeing the financial management of the organisation
- ensuring the efficient and effective operation of the organisation, as guided by the organisation's management team
- leading and setting the culture of the organisation.

Governing bodies include:

- the board or equivalent committee (including chair, independent and representative directors)
- group of persons responsible for the executive decisions within the organisation, including Chief Executive Officers and executive management team.

Just as organisation types are different, so too are the constitution of governing bodies. Some provider organisations may have small governing bodies with few members (executive and non-executive members), some may have informal arrangements to coordinate decision making between key personnel, and others may have a governing body as part of a parent company.

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The Royal Commission into Aged Care Quality and Safety (the Royal Commission) identified that the role of the governing body is critical to the provision of high-quality care for consumers. Noting that ‘those who hold managerial and leadership positions in providers of aged care are able to exert a profound influence over the culture of the care environment and the people who operate within it’.¹

The importance of this role is reflected across the aged care legislative framework, including the Aged Care Quality Standards (Quality Standards) and other provider responsibilities.

While provider organisations may be structured differently, at the highest level, the board (or equivalent) sets expectations and standards and holds its key personnel and management team accountable. Sound governance requires an appropriate separation between the board and those key personnel managing the organisation on a day-to-day basis, as the board is also responsible for overseeing the role of the other key personnel². For example, where a board sets the strategy and vision for the organisation, it is the Chief Executive Officer who implements and manages that strategy.

The board should satisfy itself that its governance framework is appropriate to ensure proper oversight of the organisation. As the most senior decision makers in an organisation, the board is ultimately accountable for the quality and safety of care provided to consumers.

Further information about governance and risk management tools for governing bodies can be found on the Commission’s website and in the following resources:

- [Australian Institute of Company Directors – Board governance in the aged care sector](#)
- [ASX Corporate Governance Council – Corporate Governance Principles and Recommendations](#).

How do these responsibilities intersect with the Quality Standards?

This guidance describes a set of provider governance responsibilities introduced through the Aged Care and other Legislation Amendment (Royal Commission Response) Act 2022. These responsibilities

are in addition to (and aligned with) the responsibility to comply with the organisational governance requirements in Standard 8 of the Quality Standards.

Standard 8 of the Quality Standards requires the governing body of a provider to be accountable for the delivery of safe and quality care and services.

¹ Royal Commission into Aged Care Quality and Safety, Volume 3B, p. 407.

² Direct lift from https://www.qmow.org/files/adding_value_governance_aged_care.pdf.

Standard 8 of the Quality Standards

Standard 8 requires your organisation to:

- have an organisation-wide approach to engaging consumers in developing, delivering, and evaluating their care and services as part of delivering consumer-centred services (including supporting consumers in that engagement)
- support and promote a culture of safe inclusive and quality care and services and be accountable for their delivery, including through leadership, decisions and directions set for the organisation
- have effective organisation wide governance systems around finances, continuous improvement, information management, workforce, regulatory compliance, and feedback and complaints
- have effective risk management systems and processes that help you identify, assess and manage high impact or high prevalence risks to the health, safety, and wellbeing of consumers
- have clinical governance and safety and quality systems that maintain and improve the reliability, safety, and quality of clinical care, and to improve outcomes for consumers.

Further information about your responsibilities under the Quality Standards is available on the [Commission's website](#).

Purpose of this guidance

This guidance describes expectations of you and your key personnel, both at the point of becoming an approved provider and your ongoing responsibilities including as governance arrangements change over time.

The guidance applies to approved providers under the Aged Care Act 1997 (the Aged Care Act), specifically residential care, home care and flexible care providers. These responsibilities do not extend to service providers that deliver care under grant agreements, such as Commonwealth Home Support Programme (CHSP) and National Aboriginal and Torres Strait Islander Flexible Aged Care Program (NATSIFACP) providers.

The guidance covers seven key areas:

- [Part 2](#) – The membership of governing bodies
- [Part 3](#) – The establishment and engagement of advisory bodies
- [Part 4](#) – The suitability of key personnel
- [Part 5](#) – Notifying the Commission of certain matters
- [Part 6](#) – Staff qualifications, skills and experience, and their further development
- [Part 7](#) – The content of the organisation's constitution
- [Part 8](#) – Information about providers' operations.

Each of these responsibilities are described in further detail in the respective Parts of this guidance.

The following table summarises these responsibilities and when they apply to approved providers.

Provider governance responsibilities

Summary of responsibility	Application	Commencement
Membership of governing body (see Part 2)		
<p>Unless this responsibility does not apply, an approved provider must ensure that:</p> <ul style="list-style-type: none"> • a majority of the members of the governing body are independent non-executive members, and • at least one member of the governing body has experience in the provision of clinical care. 	<p>Approved providers except those that are:</p> <ul style="list-style-type: none"> • a state or territory, a state or territory authority, or a local government authority • a kind of body that is known as an Aboriginal Community Controlled Organisation • if at a particular time, the governing body of the approved provider has fewer than five members, and the approved provider provides aged care to fewer than 40 care recipients across their services. <p>An approved provider may apply to the Commission for a determination that either or both of the governing body membership requirements do not apply for a period of time.</p>	<p>Existing approved providers (approved before 1 December 2022) – 1 December 2023.</p> <p>New approved providers (approved on or after 1 December 2022) – from the day they become an approved provider.</p>
Advisory bodies (see Part 3)		
<p>An approved provider must:</p> <ul style="list-style-type: none"> • establish, and continue in existence, a quality care advisory body (QCAB) that: <ul style="list-style-type: none"> — complies with the requirements about membership specified in the Accountability Principles — is required, at least once every 6 months, to give the governing body a written report about the quality of the aged care provided — is able, at any time, to give feedback to the governing body about the quality of the aged care provided • require the governing body to consider the QCAB's report or any feedback when making decisions in relation to the quality of the aged care 	<p>Approved providers except those that are a state or territory, a state or territory authority, or a local government authority.</p>	<p>Existing approved providers (approved before 1 December 2022) – from 1 December 2023.</p> <p>New approved providers (approved on or after 1 December 2022) – from the date of their approval.</p>

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Summary of responsibility	Application	Commencement
<ul style="list-style-type: none">• require the governing body to advise, in writing, the QCAB how the governing body considered such a report or feedback. <p>An approved provider must:</p> <ul style="list-style-type: none">• offer, at least once every 12 months, consumers and their representatives the opportunity to establish one or more consumer advisory bodies (CABs) to give the governing body feedback about the quality of the aged care provided• where established, require the governing body of the provider:<ul style="list-style-type: none">— to consider any such feedback given by the body or bodies when making decisions in relation to the quality of the aged care provided— to advise, in writing, the body or bodies how the governing body considered any such feedback.		
Consideration of suitability matters for key personnel (see Part 4)		
<p>An approved provider must:</p> <ul style="list-style-type: none">• consider all key personnel against the 'suitability matters' at least once every 12 months and be reasonably satisfied that the person is suitable to be involved in the provision of aged care• keep records of the matters considered and ensure the records comply with any requirement specified in the Accountability Principles.	All approved providers.	<p>All approved providers – from 1 December 2022.</p> <p>Given this responsibility commences on 1 December 2022, existing approved providers must have considered the 'suitability matters' in relation to all its key personnel and be reasonably satisfied that its key personnel are suitable to be involved in the provision of aged care by 1 December 2023.</p>
Obligation on key personnel to advise providers of suitability matters (see Part 4)		
Certain key personnel must notify the provider when their circumstances related to the 'suitability matters' change.	Key personnel of providers that are corporations.	All relevant key personnel of approved providers – from 1 December 2022.

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Summary of responsibility	Application	Commencement
Notification of certain changes to the Commission (see Part 5)		
An approved provider must notify the Commission: <ul style="list-style-type: none">• of a change of circumstances that materially affects suitability as an approved provider• if a person becomes or ceases to be key personnel• where they become aware of a change of circumstances that relates to a suitability matter in relation to a person who is one of your key personnel.	All approved providers.	<p>The changes to section 9-1 of the Aged Care Act take effect on and from 1 December 2022 in relation to a change of circumstance that occurs on or after that date.</p> <p>This means that the new 14-day period within which to notify the Commission does not apply if a change of circumstances occurs prior to 1 December 2022, such that the provider will have 28 days to notify the Commission on events occurring before 1 December 2022. Changes on or after 1 December 2022 are notifiable within 14 days.</p>
Staff member qualifications (see Part 6)		
An approved provider must require the governing body to ensure staff members: <ul style="list-style-type: none">• have the appropriate qualifications, skills or experience to provide the care or other services that the approved provider provides• are given opportunities to develop their capability to provide those services.	All approved providers except those that are a state or territory, a state or territory authority, or a local government authority.	<p>Existing approved providers (approved before 1 December 2022) – from 1 December 2023.</p> <p>New providers (approved on or after 1 December 2022) – from the date of their approval.</p>
Constitution of certain providers (see Part 7)		
An approved provider must ensure that their constitution does not authorise a director of the provider to act in good faith in the best interests of the holding company.	Approved providers that are: <ul style="list-style-type: none">• a body corporate incorporated or taken to be incorporated under the Corporations Act 2001, that have a constitution and are a wholly-owned subsidiary of another body corporate that is not an approved provider; or• an Aboriginal and Torres Strait Islander corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and that are a wholly-owned subsidiary of another body corporate that is not an approved provider.	<p>Existing approved providers (approved before 1 December 2022) – from 1 December 2023.</p> <p>New approved providers (approved on or after 1 December 2022) – from the date of their approval.</p>

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Summary of responsibility	Application	Commencement
Information on providers' operations and statement of compliance (see Part 8)		
An approved provider is to give the Secretary of the Department of Health and Aged Care (the Department) information relating to a reporting period as specified in the Accountability Principles. This includes a statement of compliance signed by the governing body, attesting to whether or not the provider complied with its responsibilities under the Aged Care Act and Commission Act.	All approved providers. Note that approved providers of short-term restorative care (STRC) and multi-purpose services (MPS) will not be required to submit this information.	All approved providers – from 1 December 2022. For a reporting period of 1 July 2022 to 30 June 2023, the information must be submitted by end October 2023.

This guidance also describes the role of the Aged Care Quality and Safety Commission (the Commission) in relation to provider responsibilities, including in relation to governance (see [Part 9](#)).

Getting familiar with the responsibilities

The Commission recommends that governing bodies and key personnel familiarise themselves with the legislation that supports the provider responsibilities in relation to governance. The legislation describes both provider and individual responsibilities, and the Commission's regulatory powers. You may also wish to review the [Explanatory Memorandum](#) that accompanied the Aged Care and other Legislation Amendment (Royal Commission Response) Bill 2022 when it was introduced to Parliament to further understand your responsibilities regarding governance.³

The new responsibilities will take time to implement. You are encouraged to turn your mind to these responsibilities in advance of their commencement, including to prepare your governing body, key personnel and workforce for how you will meet the responsibilities. For example, you may need to recruit people into your organisation, train your staff and governing body and, in some cases, establish new bodies and processes. Given how critical these changes are to strengthening aged care, providers are expected to identify and manage the risks of transitioning to strengthened governance arrangements, and to ensure smooth operation of the organisation as these changes are being implemented.

³ Refer to the information provided in relation to amendments made by Schedule 5 of the Bill.

Membership of governing bodies

Overview

- This part describes provider responsibilities relating to the membership of governing bodies.
 - Your governing body should have the right mix of skills, experience and expertise to fulfil its duties.
 - Unless the responsibilities do not apply, your governing body must have a majority of independent non-executive members and at least one member with experience in the provision of clinical care (the 'membership responsibilities').
 - The membership responsibilities for a governing body may not apply in one of four circumstances:
 - the organisation has fewer than five members in the governing body and care is provided, through one or more of its aged care services, to less than 40 consumers
 - the organisation is a state or territory approved provider, including a state or territory authority, or a local government authority
 - the provider is an Aboriginal Community Controlled Organisation
 - there is a determination that one or both membership responsibilities do not apply to the organisation.
 - You can apply to the Commission for a determination that either one or both the membership responsibilities should not apply in certain circumstances for the period determined by the Commission. You will need to provide evidence to support the Commission's consideration of your application.
 - Where the Commission makes a determination about membership responsibilities, it may, on its own initiative, vary or revoke the determination if satisfied that it is appropriate to do so.
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Context

The governing body has ultimate influence over the governance of the organisation and should have the right mix of skills, experience, and expertise to fulfil its duties, including the right mix of executive and non-executive members. Governing bodies should comprise people who are able to ensure that there is the right culture and effective organisation-wide governance systems relating to care and services, including clinical governance.

As identified by the Royal Commission, non-executive members bring independence and objectivity to a governing body, and can play a valuable role in challenging, monitoring and holding management to account. Responsibilities relating to the membership of governing bodies aim to ensure that the attributes of members reflect the needs of the organisation and that the organisation's leaders can contribute to the collective capability and effective functioning of the governing body. Clinical skills and expertise are also critical in the context of caring for older Australians.

Having a majority of independent non-executive members gives consumers, the public and the Commission confidence that organisations are informed by people who are objective, driven by purpose, and who can challenge each other to ensure decisions deliver positive and meaningful outcomes for consumers.

Requiring clinical care experience on the governing body reflects how important it is for the governing body to understand what good clinical care looks like in aged care delivery, and for this to inform care delivery. This person will bring a clinical perspective to governing body discussions and ensure the governing body is informed of the significance of clinical trends and outcomes. It is expected that this person would be applying their clinical knowledge through an organisation-wide lens.

A note to governing persons

Members appointed to the governing body must be suitable and committed to this role. The aged care sector is undergoing significant change and needs strong leaders and decision-makers. These responsibilities should be filled by people prepared to take an active role in the governing body's work.

What are your responsibilities in relation to the membership of governing bodies?

Under section 63-1D(2) of the Aged Care Act, unless these responsibilities do not apply, the governing body of an approved provider must have:

- a majority of independent non-executive members, and
- at least one member with experience in the provision of clinical care.

These are collectively known as your 'membership responsibilities' for the purposes of this guidance.⁴

What does this mean for your organisation?

For providers required to meet these responsibilities, if you currently have a governing body of 5 members who are all executive employees, you will need to re-adjust the make-up of your governing body to either, for example:

- remove 3 members and replace them with independent non-executive members; or
- add 6 members to your governing body.

This would result in a majority (3-2 or 6-5) members being independent and non-executive.

Similarly, if your governing body does not currently have any members with relevant experience in clinical care provision, you will need to ensure an appropriate member is recruited.

Who is an independent non-executive member?

Generally, **executive members** are employed by the organisation in an executive capacity. They may also be represented on the governing body. This may include, for example, the CEO.

In contrast, **non-executives** (appointed to governing bodies) are generally not otherwise employed by the organisation as a member of the executive team.

Each organisation needs to consider the independence of proposed members and whether the person's interests, positions and relationships enable them to bring independent judgement on issues considered by the governing body.

Factors that may be considered in assessing a person's independence include if the person:

- has provided professional services to the organisation or has a material business relationship with the organisation (e.g. being a supplier, consultant or contractor for the organisation) which may impact their capacity to act independently
- has relationships or preferences that may mean that they're influenced by other factors (e.g. having family receiving care by the organisation, or having shares in the company)
- is able to act objectively and independently in the best interests of care recipients rather than in the interests of another party.

For example, a substantial shareholder in the organisation or a person who has formerly been engaged in an executive role in the organisation is unlikely to have the sufficient independence from the provider to provide objective insights.

⁴ The Aged Care Act defines these as the 'governance responsibilities' but the more specific term of 'membership responsibilities' has been used for the purposes of this guidance.

Intersection with other responsibilities

Aged care providers are required to comply with many laws including work health and safety laws, corporations law, tax laws, and other state and Commonwealth laws relevant to their operations. The expectation now and into the future, is that providers concurrently meet these responsibilities.

You must ensure that new members to governing bodies are familiar with their broader duties (where applicable). For example, executive and non-executive directors of the governing body will be expected to apply their full experience and expertise to the role in order to discharge their duties, including under the corporations law.⁵ These may include, for example, acting with reasonable care and diligence, preventing insolvent trading and other statutory duties.⁶

Independent non-executive members can provide oversight and play a role in verifying and scrutinising decision-making and performance of the governing body. For example, in publicly listed organisations, non-executives are required to ‘challenge management and hold them to account.’⁷

This can help strengthen decision-making and assure stakeholders that robust decisions are being made; creating confidence in the governance arrangements of the organisation.

5 Griffin, et al, Across the board: Non-executive directors, <https://www.mondaq.com/australia/directors-and-officers/819404/across-the-board-non-executive-directors--part-1>.

6 AICD, General duties of directors, <https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/individual/director-tool-general-duties-of-directors.pdf>.

7 ASX Corporate Governance Council, Corporate Governance Principles and Recommendations, 4th ed, February 2019, <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>.

2. Membership of governing bodies

In identifying an appropriate person to be an independent non-executive member, you may wish to turn your mind to the following.

What skills and qualities you are looking for in an independent non-executive member

Consider engaging someone who is aware of your organisation and can contribute to the governance of the organisation, but who can also play a role in challenging and objectively analysing the organisation's position and holding management to account. Non-executive members should also have skills and knowledge to complement other members on the governing body. This may include financial, legal, clinical or community-based experience. They will also need values that align with the culture of the organisation.

Who may be excluded from this role based on their experience or connection to the organisation

Consider who would not be sufficiently 'independent' to serve in this role. For example, inviting a consultant who is currently providing consulting services to your organisation, or a staff member who recently worked for your organisation to join the governing body is unlikely to have the necessary independence.

How to find the right person for your organisation

Finding an appropriate independent person external to your organisation can be difficult. This is particularly so for some regional and remote organisations, and organisations that are small and family-owned.

In considering people to perform this role, reach out to people in the community, including local health professionals, business leaders, and those who have an interest in contributing to improving aged care services.

How you will be informed of conflicts, and how these will be assessed and managed

Assess the impact of any disclosed or known relevant interest, position or relationship the person has in respect of the organisation and determine whether it could interfere, or might reasonably be seen to interfere, with the person's capacity to be objective.

How you will ensure an independent non-executive member will have sufficient time to dedicate to the governing body

Consider the time a person would need to perform the role of an independent non-executive member, and if they will have sufficient time to commit to the organisation.

How the demographics of your governing body will be impacted by new members

Consider if there are diversity gaps on your governing body and if this is limiting the objectivity and representation of your governing body.

How do concepts of independence and conflicts of interest intersect?

Conflicts of interest occur where a person could influence decisions that they have a personal vested interest in, or which would directly benefit them or someone they know. For example, in the aged care context, this could include a person who:

- owns or has a significant investment in a subcontracting company that the provider is considering engaging
- has family members receiving care from the organisation
- is a shareholder in the organisation and therefore receives a financial benefit.

Conflicts are not static and do not always exclude a person from joining the governing body. It may however mean they are excluded from a decision where they have a conflict, or that their vote or view is given less weight in a decision that would favour them.

While conflicts should be avoided and minimised where declared, it's important to understand that it is the role of the governing body to have controls in place to ensure any conflicts are appropriately managed, so they do not inappropriately influence the decision-making of the governing body.

Who has experience in the provision of clinical care?

The aged care legislation does not specify the clinical care experience required for the purpose of this responsibility. This is because it will differ for different providers. You will need to consider the particular clinical care experience and qualifications that will best support the decision-making of your particular governing body.

Clinical care is health care that encompasses the prevention, treatment and management of illness or injury, as well as the maintenance of psychosocial, mental and physical wellbeing.⁸ The types of practitioners or persons involved in clinical care is broad and the skills and qualifications of the person you engage should be as relevant to the types of care and services that you provide.

For example, if you are a residential care provider that has a dedicated specialist dementia care unit, you may seek to recruit a member who is familiar with providing clinical care to consumers living with dementia. In the context of a home care provider that has a large proportion of consumers receiving regular physiotherapy care, a physiotherapist may be suitable.

While experience in the provision of clinical care might not require the person to be currently practising or delivering clinical care themselves, you may wish to consider the currency and relevance of their experience, including the context in which they provided clinical care.

⁸ https://www.agedcarequality.gov.au/sites/default/files/media/Fact_sheet_1_Introduction_to_clinical_governance.pdf

2. Membership of governing bodies

For example, you may engage a nurse practitioner, a person who has worked as a Director of Nursing, a registered nurse who has experience overseeing a health care service or aged care service, clinicians (including allied health professionals) engaged in a hospital, an Aboriginal Health Worker, occupational therapist or a local general practitioner with a specialisation in gerontology, noting that this will depend on the types of care and services provided by your organisation. As part of the governance body, the member engaged in this role must be able to contribute to discussions of the governing body, challenge decision-making, give insight into good clinical governance and provide clinical expertise on key decisions and reports that impact care delivery to consumers.

You should use your judgement as to the relevant skills and experience a person would bring to the organisation, including, for example, whether their experience provides them with sufficient understanding of:

- the types of clinical matters that your organisation faces
- the role and effective operation of clinical governance in an organisation
- how the quality of clinical care can be monitored and verified
- how improvement activities can be implemented to manage risks.

There may be circumstances where it is not possible to find a person with the relevant experience in your local area (particularly for rural and remote services). In this scenario, you should consider how members can be engaged remotely, including using technology to support their involvement on the governing body.

Best practice governance for providers where the membership responsibilities do not apply

Providers of all sizes should ensure that there is independence and objectivity in executive decision-making, and that the governing body has the relevant experience and expertise to interpret reports about the delivery of care and see signs of potential risks or issues with care delivery.

Providers that are not required to comply with the responsibility relating to independent members will be strongly encouraged to implement other measures to ensure objective executive decision-making as best corporate practice. Governing bodies may also seek external advice or seek feedback through the quality care advisory body or any established consumer advisory bodies (discussed below).

For example, providers that are not required to comply with the responsibility to ensure at least one member of the governing body has experience in the provision of clinical care could support their governing body's effective function through other means. This may include by seeking external advice or opinions on particular matters from a person with expertise in the provision of clinical care when executive decision-making impacts or interacts with the delivery of care. It may also include more extensive use of the quality care advisory body.

Applying for a determination

Under section 63-1E of the Aged Care Act, you may apply to the Commission for a determination that either one or both membership responsibilities do not apply in respect of your governing body.

This application is only relevant to those providers that are not already exempt under the Aged Care Act because they are a State, Territory or local government authority, an ACCO or by virtue of their size (i.e. approved providers that both have fewer than five members in their governing body and provide care to fewer than 40 consumers).

The Commission will consider various factors when assessing applications and make determinations on a case-by-case basis. Relevant considerations may include:

- the size and complexity of the organisation
- the number of services through which the provider provides aged care
- the number of consumers who are provided with aged care at those services
- the location of the services (including if location is impacting access to appropriate members and this cannot be overcome by virtual options)
- the demographics of the consumers and the governing body, including the need to ensure diversity and representation from the community is maintained
- the current membership of the governing body (i.e. the existing mix of skills and representation)
- if the provider is in a transition phase or undergoing a sale
- the annual turnover in key personnel
- where genuine attempts to recruit appropriate members is taking longer than expected.

2. Membership of governing bodies

Any approved provider who wishes to seek a determination must engage with the Commission and provide adequate information regarding how the quality of care will be maintained in the absence of those governance requirements.

The application must be made in writing in the form approved by the Commission and include any documents or information required as part of the form, along with any specified application fee (if any). Further information on how to apply will be made available on the Commission's website at www.agedcarequality.gov.au.

When considering applications for a determination and whether such a determination is reasonable in the circumstances, the Commission will seek evidence in support of the application. Evidence may include:

- documents detailing governance structure (including any committees, working groups supporting the governance arrangements)
- documentation detailing office holders, their responsibilities and powers
- board resolutions which detail previous decision-making processes
- company constitutions
- any other documentation which set out the composition of your board
- documents and information evidencing the reasons the determination is sought.

The Commission will seek to understand the reasons the determination is being sought and may consider any arrangements that have been made, or are proposed to be made, including arrangements:

- to assist the members of the governing body to act objectively and independently in the best interests of the provider and consumers, or
- to assist the governing body to seek, when it considers it necessary to do so, advice from a person with experience in the provision of clinical care (where relevant).

Example

The Commission may make a determination that the requirement for at least one member of the governing body to have experience in the provision of clinical care does not apply if a home care service is in a remote location and, despite significant effort, a person with such experience who is willing to serve on the governing body cannot be identified.

In making this determination, the Commission may seek information from the provider about attempts to recruit a suitable member, including any attempts to engage a suitable member who could perform the role virtually. The Commission would also consider the size of the service and the number of consumers who receive care through the service. Information to demonstrate that alternative arrangements have been made for the governing body to seek clinical advice on an ad hoc basis from a person with expertise in providing clinical care would also be relevant to the provider's application.

Deciding an application for a determination

If the Commission decides to make a determination regarding your membership responsibilities, the Commission will give you written notice of the determination, the specific membership responsibility/ies to which the determination relates, and the period for which the determination is in force.

If the Commission decides not to make a determination (i.e. does not approve your application), the Commission will give you written notice of the decision, including the reasons for the decision, and information about how you may apply for reconsideration of the decision. Part 8B of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) provides the mechanism for reconsideration of a decision not to make the determination.

Variation or revocation of a determination

A determination will be in force for the stated period or until it is revoked by the Commission under section 63-1F of the Aged Care Act. After that period, the requirements for membership of the governing body will re-apply. Should the circumstances giving rise to your application continue to be relevant before the period expires, you should make a fresh application to the Commission prior to the expiry of the determination.

If the Commission becomes aware that the criteria for the determination are no longer met, the Commission may vary or revoke the relevant determination. Examples include where the Commission becomes aware:

- of changes in your board membership which invalidate the basis of the determination
- that your consumer base exceeds 40 consumers.

In this case, the Commission will, as soon as reasonably practicable, give you a written notice of the decision, including the reasons for the decision, the day on which the variation or revocation takes effect, and information about how you may apply for reconsideration of the decision. Part 8B of the Commission Act provides the mechanism for reconsideration of a variation or revocation decision relating to a determination.

Record keeping

To demonstrate compliance, you must keep a record of the following in accordance with the Accountability Principles:

- the names of the members of the governing body who are independent non executive members
- the names of the members of the governing body who are not independent non executive members
- the names of the members of the governing body who have experience in the provision of clinical care and details of that experience for each of those members.

Advisory bodies

Overview

- This part describes the provider responsibilities in relation to advisory bodies.
- You are required to have a quality care advisory body that provides a written report to your governing body at least every 6 months about the quality of the aged care provided through an aged care service. If you operate more than one service, the written report must cover each service.
- The quality care advisory body must comply with the membership requirements specified in the Accountability Principles.
- The quality care advisory body must provide a written report to the governing body at least once every 6 months, be able, at any time, to give feedback to the governing body about the quality of the aged care provided through an aged care service(s).
- You must also offer to establish one or more consumer advisory bodies at least once every 12 months. Where a consumer advisory body is formed, you must require your governing body to consider any feedback provided by the body when making decisions relating to the quality of care provided and advise the consumer advisory body, in writing, how the feedback was considered.

- Processes should be established and maintained to record, monitor and report relevant information to the governing body in a systematic way, and to ensure that effective mechanisms are in place so that the governing body can take action where issues are identified.

Context

Noting the significant role governing bodies play in the quality of care being provided to older Australians, the Royal Commission recommended that every governing body has advisory bodies with appropriate experience in providing care as a core part of an organisation's governance arrangements.

Advisory bodies can help with problem-solving and identifying areas for improvement. They support organisations to engage with skilled and experienced individuals who have insights and knowledge that can assist the organisation to identify solutions and creative ways forward.

The advisory body responsibilities apply to all approved providers, except those that are a state or territory, a state or territory authority or a local government authority. Those exempt from the advisory body responsibilities should still ensure their governing body is fully informed about the quality of care being delivered by each aged care service and the importance of consumers being able to provide the governing body with feedback on the quality of care.

What are your responsibilities in relation to advisory bodies?

There are two key high-level provider responsibilities in relation to advisory bodies:

- to establish, and continue in existence, a quality care advisory body
- to offer to establish a consumer advisory body at least once every 12 months.

While it is mandatory to establish a quality care advisory body, the responsibility in relation to a consumer advisory body is to offer, at least once every 12 months, to establish such a body. This is because while a consumer advisory body is an important element of your governance arrangements, consumer participation is voluntary, and they may not wish to form an advisory body at a particular time.

The responsibility to establish a quality care advisory body embeds mechanisms in every provider organisation to ensure feedback loops and detailed consideration of quality issues. The quality care advisory body presents opportunities for governing bodies to draw on further expertise and to be given additional inputs into their decision making.

Similarly, consumer advisory bodies ensure feedback to the governing body about issues and areas for improvement informed by the experience of consumers.

Quality care advisory body

Under section 63-1D(6)(a) of the Aged Care Act, you must establish and continue in existence a quality care advisory body.

The quality care advisory body must:

- comply with the requirements about membership specified in section 53B of the Accountability Principles (described below)
- at least once every 6 months, give the governing body a written report about the quality of the aged care provided through each aged care service provided by the provider
- ensure written reports comply with the requirements in the Accountability Principles
- be able, at any time, to give feedback to your governing body about the quality of the aged care you provide through an aged care service.

Under section 63-1D(8) of the Aged Care Act, the quality care advisory body may request information from the approved provider about the quality of the aged care that you provide to enable them to prepare the written report. You must comply with such a request. For example, the quality care advisory body may request information about the kind of feedback and complaints made by consumers, their representatives, staff and others about the quality of aged care delivered at the service, or any regulatory action taken by the Commission.

Under section 63-1D(6)(b) of the Aged Care Act, your governing body must:

- consider reports or any feedback from the quality care advisory body when it is making decisions in relation to the quality of aged care provided through an aged care service
- advise the quality care advisory body in writing how it considered reports or feedback in their decision-making.

Who must be on the quality care advisory body?

Consistent with the requirements in the Accountability Principles, the approved provider must ensure that the quality care advisory body includes:

- a member who is one of the key personnel of the approved provider and who has appropriate experience in the provision of aged care
- a member who is directly involved in the delivery of aged care (for example, the person responsible for the delivery of care and services, quality manager, care coordinator or a personal care worker) or where clinical care is delivered, includes a member directly involved in providing clinical care (for example, the person responsible for the nursing services, a registered nurse or allied health practitioner, etc)
- a member who represents the interests of consumers, for example, a consumer or representative, a member of the consumer advisory body (if established), a member of an organised consumer advisory service, or a consumer advocate.

The size of your quality care advisory body should be appropriate to your organisation and informed by the membership requirements set out above. However, it is expected that each of the roles described above would be filled by a different person, such that a quality care advisory body would be made up of no less than three people.

The quality care advisory body may also include others with an interest in the quality of aged care delivered by the approved provider. Note that the legislation does not place any exclusions on who can be on a quality care advisory body, but careful judgement should be used in determining who can provide meaningful feedback, identify areas for improvement and provide insightful reports about the quality of care and services. While the Accountability Principles require at least one member of the advisory body to be key personnel, it is recommended that representatives of your governing body are not members of the quality care advisory body, noting that the role of the advisory body is to report to the governing body.

You can utilise existing bodies to meet this responsibility. There is no expectation that you replace any existing governance committees or bodies that serve a similar purpose to the quality care advisory body, but you need to ensure that any existing bodies meet the requirements of this responsibility if they are to perform as the quality care advisory body for the organisation. Note that this body can have a different title (i.e. it need not be called the quality care advisory body), as relevant to your organisation and the scope of its role.

How should the body operate?

It will be up to each provider to consider how quality care advisory body members will be appointed, how the quality care advisory body will operate and how it will intersect with management and other committees in the governance structure of the provider. The Royal Commission recommended that the quality care advisory body should have responsibility for ensuring that processes are established and maintained to record, monitor and report relevant information to the governing body in a systematic way, and should also ensure that effective mechanisms are in place so that the governing body can take action where issues are identified.

You may wish to consider the following:

Scope/terms of reference

Consider:

- clearly articulating the scope of the quality care advisory body (ie its terms of reference)
- the role and responsibilities of the body as distinct from the governing body and management team
- how you will ensure members of the body have a common understanding of expectations.

Governance

Consider:

- how the quality care advisory body will be incorporated into governance arrangements, including reporting pathways and any existing governance committees
- how the body will be engaged by the governing body.

Procedures

Develop protocols to establish, manage and review the body's operation, including:

- how members will be identified and appointed, including terms of appointment
- how you will ensure compliance with the requirements about membership specified in the Accountability Principles
- how often the members will convene and how they will communicate with each other (the advisory body may wish to determine their own procedures)
- how the body will be supported by the organisation to report on each of the provider's services
- how conflicts of interest will be identified, declared and managed
- how and when the body will be required to report to the governing body (e.g. whether more frequently than once every 6 months)
- how the governing body is to advise in writing how it considered any report or feedback received from the advisory body in the making of decisions relating to the quality of care, what actions it took and, if no action was taken, the reasons for this
- how the body can provide ad hoc feedback on request or on its own initiative to the governing body
- how the body will be informed as to the quality of care being provided by your organisation
- how the body can request information from you about the quality of the care that you provide through an aged care service
- the expectations for the format and content of written reports
- how the body's role and work will be evaluated and reviewed.

3. Advisory bodies

Confidentiality

Consider:

- how you will ensure the confidentiality of information that is shared with the quality care advisory body (where necessary)
- whether certain information provided to the advisory body will need to be de-identified in order to protect the privacy and personal information of consumers and others.

Support

Consider:

- how you will support the efficient functioning of the body, including through administrative support, and provision of information relevant to the body's role, including to help prepare and inform their written reports
- the information that the body will need in relation to each service. This may include information about:
 - the kind of feedback provided by consumers, representatives and staff members
 - the kind of complaints received about the quality of aged care
 - any regulatory action taken by the Commission in relation to the quality of aged care provided or following identified non-compliance with provider responsibilities
 - progress made in relation to the provider's plan for continuous improvement, particularly improvements made in the provision of aged care
 - any compliance notices or performance reports given to the provider by the Commission

- the staffing arrangements of the service
 - reportable incidents
 - metrics around food, nutrition and quality indicators if the provider provides residential care.
- how information from reports that are already being prepared can be utilised to support the body (for example, information reported through the Aged Care Financial Report and Quarterly Financial Report).

Costs

Consider whether members of the quality care advisory body will receive any payment or reimbursement of expenses. The quality care advisory body, while a key part of the governance systems within the organisation, does not hold the same level of formal responsibility, duty of care or powers as the governing body or provider. The body operates in an advisory capacity only and does not have the same role as the governing body or management team, nor the responsibilities of an approved provider. The provider and its governing body should be satisfied that there are structures, systems and processes in place to meet all provider responsibilities, and that quality outcomes are being achieved.

The quality care advisory body is responsible for working with the organisation's management team in directing feedback and advice to the governing body. While the body reports to the governing body, it is not under its direction. The quality care advisory body should be able to provide the governing body with objective and genuine advice about the quality of care and areas of improvement that the governing body can act on.

What must be included in the written reports provided by the quality care advisory body?

The written report given to the governing body by the quality care advisory body under section 63-1D(6)(a)(ii) of the Aged Care Act must comply with the requirements in section 53C of the Accountability Principles.

The written report must be provided at least once every six months, covering what has occurred during that preceding period (the report period). Reports from the quality care advisory body are intended to complement any existing arrangements for informing the governing body on the quality of services delivered.

The written report is to include any concerns the quality care advisory body has about the quality of care provided by you over the report period, taking into account:

- feedback provided by consumers and staff members about the quality of care that was provided to consumers through the service
- complaints received about the quality of aged care that was provided and any action taken to deal with the complaint
- any regulatory action taken by the Commission in relation to the quality of aged care provided
- progress made in relation to your plan for continuous improvement,⁹ particularly improvements made in the provision of aged care during the period
- any performance report given to the provider by the Commission

- information about the staffing arrangements of the service, including details of the following (as applicable):
 - the availability of allied health practitioners or other health support at the service
 - the availability of registered nurses at the service¹⁰
 - staff turnover at the service
- any reportable incidents that have occurred and any action taken by you in response
- if you provide residential care:
 - any feedback from consumers at the service about the quality of food provided
 - any changes to the quality of food provided by the service and the food preparation model used by the service
 - any menu assessments conducted by an accredited practicing dietitian in relation to food and nutrition provided by the service
 - any information about the quality of residential care you have measured or assessed for the purposes of the National Aged Care Mandatory Quality Indicator Program.

If your organisation has more than one service, the written report should either relate to all services or a written report should be produced for each service.

⁹ Within the meaning of the *Aged Care Quality and Safety Commission Rules 2018*.

¹⁰ As defined under the *Health Insurance Act 1973*.

What information is to be provided to the quality care advisory body?

You have a responsibility to provide the quality care advisory body with information about the quality of the aged care that they request to help them prepare the written report. You should be responsive to these requests and avoid barriers to the advisory body having access to the information it needs.

It is not expected that you generate additional reports and summaries, specifically for the quality care advisory body. You may wish to discuss with the advisory body what information is most useful and in what format to inform their report.

It is expected that the advisory body will be focusing on the macro issues and trends in your organisation, and not on individual complaints or feedback, etc. For example, while it is anticipated that the advisory body would consider kinds of feedback and complaints received, trends in relation to complaints and opportunities for improvement, the advisory body would not necessarily have a role in advising the governing body on individual matters.

These reports must include any concerns that the quality care advisory body has about the quality of care over the report period but may also provide updates around quality over time. For example, the quality care advisory body may examine how a previous issue has been dealt with, and whether the intervention was successful. It may also include comparative data from previous report periods.

A quality care advisory body can also provide the governing body with other reports (not related to the responsibility above). This may occur, for example, where the governing body has asked the body to report back on a particular topic.

What should the governing body do with the written reports?

Under section 63-1D(6)(b), the governing body must consider reports or feedback from the quality care advisory body when making decisions in relation to the quality of aged care provided through one or more services. The governing body must also advise the

quality care advisory body in writing how they have considered the report or feedback.

This information should inform decision-making around quality issues and areas of improvement. It is expected that the advice received by the governing body from quality care advisory bodies to be meaningfully considered and engaged with.

The role of the quality care advisory body does not displace the responsibilities of the governing body to analyse and assess the quality of care provided. The reports provided by the quality care advisory body are a supplementary source of information and advice and are one input into the broader considerations relevant to the decision-making of your governing body. Your governing body should consider the advice as part of broader continuous improvement activities and consider it in parallel with other information, including any feedback from the consumer advisory body (where established) and the routine reporting conducted by the provider for the governing body on quality of care.

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Reports from the quality care advisory body may inform the information you submit about operations and compliance in a reporting period, as described under [Part 8](#) of this guidance.

What will the Commission be looking for?

The Commission may ask you:

- about the role and responsibilities of the quality care advisory body in your organisation
- how you respond to information requests from the quality care advisory body
- how written reports inform the governing body and where this has occurred
- how responses from the governing body are communicated back to the quality care advisory body.

The Commission may also wish to review copies of the written reports. Given that the purpose of these reports is to identify areas of improvement and assess strengths and quality over the reporting period, the Commission may have regard to them to understand how effective the systems and process are within your organisation.

The Commission will be looking to understand that the provider and governing body are committed to quality within their organisation, including through genuine engagement with the quality care advisory body.

Consumer advisory bodies

Under section 63-1D(9) of the Aged Care Act, consumers and their representatives must be offered at least once every 12 months, the opportunity to establish one or more consumer advisory bodies to give the governing body feedback about the quality of aged care provided.

This responsibility is consistent with related requirements of the Quality Standards in relation to consumers. This includes:

- Standard 8(3)(a) which requires you to involve consumers in developing, delivering, and evaluating care and services, and supporting consumers in that engagement, as part of delivering consumer-centred services. You are expected to seek input from a wide range of consumers about their experience and the quality of the care and services they get. You are also expected to review and respond to the information you receive from consumers. This includes addressing, and working to fix, any issues consumers raise, and using the information to plan improvements and show that they have been made.
- Standard 6(3)(a) which requires you to encourage and support consumers to give feedback and make complaints about their care and services.
- Standard 6(3)(b) which requires you to demonstrate consumers are made aware of and have access to other methods for raising and resolving complaints.

Establishing consumer advisory bodies

A written offer to establish a consumer advisory body must be made to consumers and their representatives every 12 months, regardless of whether such a body (or multiple bodies) already exist. In making the offer you should actively engage and advise consumers and their representatives of the purpose and functions of the consumer advisory body and how they can be part of the body.

There is no specified size or constitution for a consumer advisory body. It can be as big or as small as the consumer interest within your organisation.

Ideally the body should comprise a majority of current consumers, with representation across the different types of aged care services your organisation provides. It should also be representative of the demographics and diversity of consumers in the organisation. For example, if your organisation has consumers from different CALD backgrounds or consumers living with dementia, you should ensure that consumers are invited to represent these perspectives.

If your organisation is delivering aged care services as well as other social and health services, you may wish to have one consumer advisory body that provides feedback on the quality of all services delivered. The consumer advisory body need not be aged care specific or constituted by aged care consumers only.

Providers may have more than one consumer advisory body. You may determine the appropriate number of consumer advisory bodies for your organisation. For example, a large residential aged care provider may wish to establish a consumer advisory body for each aged care service, or multiple bodies may be established, each of which is dedicated

to a certain aspect of quality feedback. However, for a small, community-based provider with a single service, it may be more practicable to establish one consumer advisory body for the whole organisation.

While there is no expectation that you replace existing consumer committees or bodies that serve a similar purpose to the consumer advisory body, the offer to establish a consumer advisory body must be made at least once every 12 months. You may consider offering the opportunity more frequently, including if a consumer expresses interest in such a body or when new consumers enter the service.

It is recognised that consumers and their representatives sometimes do not wish to be involved in such bodies, nor to contribute to the governance arrangements of the organisation. However, it is expected that at least every 12 months, you extend the opportunity to be a part of a consumer advisory body and that you support consumers and their representatives to establish a body that gives them a voice on quality of care issues.

You may wish to encourage consumers and representatives to establish a consumer advisory body by:

- sending written information (in a clear and understandable format) about the opportunity to form the body and the purpose of the body directly to consumers and their representatives, with information on how they can be involved
- for residential care services, putting up notices at the service about the body and how consumers and their representatives can become involved
- holding meetings on how to join the body and what being a part of the body would involve

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- identifying consumers who you know may be interested in being on the body and personally inviting them to join
- talking to your workers about the body and encouraging them to discuss it with consumers
- engaging with consumer representatives who may like to act as a proxy for the consumer (where the consumer has substitute decision-making and/or where the representative is actively involved in decisions about the consumer's care)
- informing possible members about the valuable impact their role can have on the running of the organisation and the care and services delivered.

Where a consumer advisory body is not established, it will be important for you to understand the underlying cause. You should identify reasons why consumers did not have interest in forming a body and use it to understand what supports you may need to put in place to help encourage consumers to have a voice to your governing body.

Example of engaging consumers as part of offer to establish consumer advisory body

After writing to consumers about the opportunity to convene a consumer advisory body, a provider identifies that only consumer representatives are asking to participate. While their input is important, the provider is keen to understand the lack of consumer interest. After approaching several consumers about the opportunity, the provider identifies that consumers don't feel they can represent the voices of all consumers at the service. The provider explains to consumers at the service that they are not expected to represent every consumer's views, that they will be supported with relevant information and that each consumer's views are valued and they can play an important role in helping to identify areas for improvement.

How should the consumer advisory body operate?

Different consumer advisory bodies will operate in different ways. Some may meet at regular intervals with an agenda, others may be more informal. Likewise, some consumer advisory bodies may want governing persons to attend meetings and others may not. These bodies should be a source of meaningful engagement with consumers, where real issues are discussed, consumer voices are heard and there is genuine engagement with the governing body.

You may wish to consider:

- working with consumers to determine the matters that are important to them and the issues on which they would like to focus
- co-developing how the body will work to make sure that this is meaningful to consumers
- the intersections between the consumer advisory body, the quality care advisory body and any other advisory bodies
- how consumers are supported to take an active role in the advisory body
- how the consumer advisory body will provide feedback to other consumers in the service
- how the advisory body (or members of the body) will have opportunities to engage with the governing body

- how the governing body will advise in writing how it considered any feedback received from the advisory body in the making of decisions relating to the quality of care
- how you will replace members, how you will address any barriers to participation and how new consumers will be advised of the body and given the opportunity to be involved.

You are expected to support the consumer advisory body in its operations. This might include coordinating meetings, circulating papers, drafting feedback and providing general administrative support. You should also ensure:

- consumer advisory bodies are informed of relevant information including the matters and decisions the governing body is considering and would value consumer input into
 - discussions within consumer advisory bodies are captured and recorded, in line with members preferences
 - the advisory bodies' contribution is raised with the governing body.
-

Example of engaging and supporting home care consumers

A home care provider writes to consumers inviting participation in a consumer advisory body. It provides a short description of the purpose of the body, the types of things members will be involved in and likely level of commitment needed from members. Consumers are invited to contact the Program Manager to sign up. Five consumers and one consumer representative nominate to join the body. The Program Manager speaks individually to each of the consumers in the days before the meeting to ensure all members are comfortable with the use of videoconferencing, to describe the themes the provider is keen for them to discuss at the upcoming meeting, and to record any issues the consumers would like to discuss. Members agree to a routine monthly meeting and the Program Manager requests agenda items from members in advance of meetings, drafts agendas, and sends agenda papers in advance of each meeting to support discussions. The governing body promotes the role of the consumer advisory body and values its advice. Detailed feedback is provided to the advisory body about how the feedback from that body has influenced the provider's operations including any changes that have been made and the positive impact for consumers.

How must the governing body use feedback from the consumer advisory body?

The governing body must consider any feedback provided by consumer advisory bodies when making decisions regarding the quality of care provided. The governing body must provide written advice to a consumer advisory body about how feedback was considered.

Consistent with your responsibilities under the Aged Care Act (including compliance with the Quality Standards), feedback from consumers is to be used to inform continuous improvements to care and services and resolve issues for consumers and others. This involves addressing the issues raised and making genuine attempts to find solutions and incorporate the views and wishes of consumers into decision-making.

This does not mean that you are required to implement all feedback, recommendations or suggested actions that a consumer advisory body provides. The feedback should however be used to provide the governing body insight into an issue, including to understand the consumer perspective and experience with your organisation, and should be drawn on in the governing body's decision-making.

Record keeping

To demonstrate compliance with your responsibilities in relation to the quality care advisory body, you must keep the following records in accordance with the Accountability Principles:

- membership of the quality care advisory body (including names of each member, date each member commenced and ceased/resigned)
- details about how the quality care advisory body satisfies the membership requirements in the Accountability Principles
- where the quality care advisory body meets, a copy of the minutes of any meetings and the dates on which the meetings were held
- a copy of each written report given to the governing body by the quality care advisory body
- details of any feedback given to the governing body by the quality care advisory body about the quality of the aged care
- a copy of written advice provided to the quality care advisory body by the governing body advising how the governing body has considered each report and any feedback.

In relation to consumer advisory bodies, you must keep a record of the following in accordance with the Accountability Principles:

- a copy of each written offer made to consumers and their representatives giving them the opportunity to establish a consumer advisory body
- the dates on which each offer was given
- if a consumer advisory body is established:
 - where the consumer advisory body meets, a copy of the minutes of each meeting
 - details of any feedback given to the governing body by the consumer advisory body
 - a copy of any written advice given to the consumer advisory body by the governing body advising how the governing body has considered any such feedback.

Suitability of key personnel

Overview

- This part describes the provider responsibilities in relation to the suitability of key personnel.
- Providers have a responsibility to be reasonably satisfied that people engaged as key personnel are suitable to be involved in the provision of aged care.
- Providers are required to consider the 'suitability matters' set out in the Commission Act for each of their key personnel at least once every 12 months and keep a record of this consideration. Failure to do so is an offence.
- The Commission may view these records as part of its monitoring and investigation functions to ensure compliance with this responsibility.
- Key personnel of providers that are corporations have a personal legal obligation to advise you of a change of circumstance relating to a suitability matter within 14 days after becoming aware of the change. Failure to do so is an offence.
- The Commission may, at any time, request that providers give information relevant to the organisation's continuing status as an approved provider or request information relevant to the suitability of key personnel.

- The Commission may also, at any time, determine that a person who is key personnel is not suitable to be involved in the provision of aged care.

Context

As the responsible officers of an organisation, key personnel play a critical role in supporting the organisation and the delivery of safe and quality care and services. Key personnel are people who:

- are responsible for the executive decisions of the provider, or
- have authority or responsibility for, or significant influence over, planning, directing, or controlling the activities of the provider, or
- are responsible for the nursing services provided by the aged care service and hold a recognised qualification in nursing, or
- are responsible for the day-to-day operations of the aged care service.¹¹

These people likely include, for example, the Director of Nursing, Chief Executive Officer, Service Manager, each of the governing body members, Operations Manager, Clinical Coordinator and any other staff in management or leadership roles.

Given the influences of these roles within the organisation, they need to be performed by fit and proper people, who are competent and have the experience, skills and qualities necessary to lead the organisation.

¹¹ Section 8B, Commission Act

What are your responsibilities in relation to key personnel?

There are four responsibilities in relation to key personnel. You must:

- engage key personnel who are suitable to be involved in the provision of aged care
- consider all key personnel against the suitability matters at least once every 12 months and be reasonably satisfied that the person is suitable to be involved in the provision of aged care
- keep records of the matters considered (section 63-1A of the Aged Care Act) and ensure the records comply with any requirement specified in the Accountability Principles (see Record Keeping below)
- such other responsibilities as are specified in the Accountability Principles.

These responsibilities create ongoing opportunities for you to reassess whether your key personnel are suitable to be leading your organisation. This includes ensuring they are trustworthy and demonstrate the personal integrity needed to make decisions to safeguard and engage with consumers and to manage government and consumer funds.

It is expected that you will seek to attract and retain key personnel who fulfil these criteria, and that you will exercise due diligence in gathering information about the suitability of each of your key personnel to ensure the strength and suitability of your leadership team.

Certain key personnel also have a personal obligation under section 10A-1 of the Aged Care Act to notify you (as the provider and their employer) of a change of circumstances that relates to a suitability matter in writing within 14 days after becoming aware of the change. In practice this might mean giving notice to the governing body of the organisation, or the relevant manager within the service who is nominated to receive such notices.

Who is suitable to be involved in the provision of aged care?

There are two components to suitability considerations for key personnel. They must:

- be fit and proper people; meaning they have the integrity, honesty and good reputation to make executive decisions or manage operational matters on behalf of the organisation
- have the experience, skills and qualities that make them appropriate leaders, as informed by the needs of the organisation and the skills required.

This experience may be broader than aged care or related care work. Skills and experience in other sectors, including in health delivery, hotel management, risk management, finance and law may also be relevant to your organisation. It is important in contemporary organisations that governing body members have complimentary skills, as relevant to their role and the objectives of the organisation.

Considering the suitability of key personnel

You are required to consider the suitability matters for each of the key personnel at least once every 12 months, and to be reasonably satisfied that the person is suitable to be involved in the provision of aged care. You are also required to keep a record of the considerations, including the matters that informed the assessment and the reasons why you are reasonably satisfied.

You should conduct this assessment by considering the matters known as ‘suitability matters’ (detailed below).

What are the ‘suitability matters’ and what is ‘reasonably satisfied’?

The term ‘suitability matters’ is defined in section 8C of the Commission Act and includes the following in relation to a person:

- the person’s experience in providing, at any time, aged care or other relevant forms of care
- whether a banning order against the person is, or has at any time been, in force
- whether a NDIS banning order against the person is, or has at any time been, in force
- whether the person has at any time been convicted of an indictable offence
- whether a civil penalty order against the person has been made at any time
- whether the person is, or has at any time been, an insolvent under administration
- whether the person is or has at any time been the subject of adverse findings or enforcement action by any of the following:
 - a Department of the Commonwealth or of a state or territory
 - the Australian Securities and Investments Commission
 - the Australian Charities and Not-for-Profits Commission
 - the Australian Competition and Consumer Commission
 - the Australian Prudential Regulation Authority
 - the Australian Crime Commission
 - AUSTRAC
 - a state or territory authority (including, but not limited to, a body that is equivalent to a body mentioned above)
 - another body established for a public purpose by or under a law of the Commonwealth
 - a local government authority
- whether the person:
 - is, or has at any time been, the subject of any findings or judgment in relation to fraud, misrepresentation, or dishonesty in any administrative, civil or criminal proceedings
 - is currently party to any proceedings that may result in the person being the subject of such findings or judgment
- whether the person is, or has at any time been, disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*
- any other matter specified in the *Aged Care Quality and Safety Commission Rules 2018* (the Commission Rules).

The responsibility to consider suitability matters does not displace the importance of ensuring key personnel are the right fit for the culture, needs and future directions of your organisation. For example, many providers use skills matrices to determine what skills they require of their key personnel and what skills they need to recruit for.

What information do you need to consider?

To satisfy themselves of the suitability matters above, providers are expected to seek certain information directly from key personnel and to undertake their own inquiries. For example, it is expected that providers would request a statutory declaration from key personnel affirming that they have not been found guilty of any of the relevant offences detailed above. In addition, providers would be expected to review:

- complaints relevant to the key personnel
- Serious Incident Response Scheme (SIRS) information that include reference to a key personnel's role in an incident
- staff performance in relation to their role in the organisation.

To be 'reasonably satisfied' you should consider all the facts available, including those presented by the key personnel and obtained through your own inquiries, and weigh the evidence in making a decision about whether the person is suitable to be involved in the provision of aged care. This involves considering the facts and information, including the reliability of the information and whether it affords proof of a fact. Independent legal advice should be sought if you are uncertain about whether you have reached the threshold of being 'reasonably satisfied'.

As part of considering the information before you, you should weigh:

- the nature of any convictions, or adverse decisions and how they reflect on the potential conduct or propriety of the person today

- any mitigating circumstances or time passed since suitability matters arose
- the likelihood the circumstances will be repeated or influence the key personnel in their current role
- the consequences that would flow from this person being engaged as key personnel, having the history they have
- the likely perception of others (including the Commission) regarding this person continuing to be engaged and holding a key personnel role
- whether there are protective factors in place, including the experience of the person since the suitability matter or controls the provider has implemented such that the suitability matter is low risk to the organisation and is in the best interests of consumers.

Consideration of the suitability matters does not mean that a person with past adverse findings is precluded from ever becoming key personnel. It is important to weigh all relevant information in the context of the person's position in the organisation. Providers would not be expected to remove all key personnel with any past adverse findings, but instead undertake reasonable consideration of how the finding affects or influences their role or capacity to make decisions on behalf of the organisation.

It may also help to consider what an objective person's views may be on the information, and to consider if you have knowledge on which to be reasonably satisfied that the key personnel is suitable to be involved in the provision of aged care.

4. Suitability of key personnel

Example

One of your key personnel lives in a flood affected region. They own their own home, but the insurance company no longer indemnifies them against flood damage. Recent flooding in the area has destroyed their home and the individual had no option but to file for bankruptcy. On close examination, you determine that the individual's circumstances do not impact their suitability to be key personnel, but you must still conduct an assessment and consider that information.

Your decision, the reasons for your decision and the date must be recorded. This enables you to demonstrate that you have taken the required steps to verify that this change does not affect the suitability of your key personnel.

This is conducted in addition to the assessment you need to undertake during each 12 month period to demonstrate you have considered each suitability matter and documented this assessment.

Obligation on certain key personnel to advise providers of suitability matters

Under section 10A-1 of the Aged Care Act, key personnel of providers that are corporations have an obligation to advise you of any changes in circumstances that relate to a suitability matter. This requirement assists providers to have the relevant information to ensure that all key personnel continue to be suitable to be involved in the provision of aged care and so that they can meet their responsibilities to notify the Commission.

You should:

- make it clear to the relevant individuals that they are key personnel and they therefore have a statutory responsibility
- ensure that all key personnel are aware of what the suitability matters are and the implications for failing to notify you of a change of circumstances (see [Part 5](#)).

On becoming aware of a change of circumstances relating to suitability from key personnel, the Commission must be notified within 14 days by the approved provider (refer to [Part 5](#) – Notifying the Commission of certain matters).

I am key personnel of a corporation – what are my obligations?

You must notify your employer (the approved provider) within 14 days after you become aware of a change in your circumstances that relates to one or more of the suitability matters set out above. The notification must be in writing and must include the details of the change of circumstances that relates to a suitability matter.

You are not required to disclose any spent convictions.

Failure to notify such a change is an offence under the Aged Care Act and you may be fined if you do not notify your employer of the change as required.

Determinations about suitability of key personnel

Determinations in relation to key personnel

As part of its monitoring responsibilities, the Commission may detect or be provided with information that raises concerns about the suitability of key personnel. This may lead to an investigation by the Commission.

Under section 10A-2(1) of the Aged Care Act, the Commission may, at any time, determine that an individual who is one of the provider's key personnel is not suitable to be involved in the provision of aged care.

In deciding whether to make the determination under section 10A-2(1), the Commission will consider the suitability matters in relation to the person, along with any other relevant information.

Procedural fairness for suitability determinations

If the Commission is considering making a determination that a person is not suitable to be involved in the provision of aged care, the Commission will notify the person and you (as the provider) in writing. This notice of intention to make a determination will set out the reasons why the Commission is considering making a determination and invite the person and you to make written submissions to the Commission in relation to the matter within 14 days after receiving the notice (or the shorter timeframe specified in the notice). The Commission may decide to make the determination after considering any submissions made by the person and/or you.

If the Commission decides to make the determination, the Commission must, within 14 days after making the decision, give the person and you a written notice of determination including the decision, the reasons for the decision, and the period within which you must take the action specified in the notice to ensure that the person ceases to be one of your key personnel. The notice will also describe the consequences of failing to comply with the notice (which is an offence under the Aged Care Act).

You or the person may request that the Commission reconsider the decision. Part 8B of the Commission Act provides the mechanism for reconsideration of a determination decision.

Record keeping

You must keep a record of suitability matters considered in relation to each individual key personnel in accordance with the Accountability Principles. This must include:

- the name of each person in relation to whom suitability matters were considered
- the date(s) on which the suitability matters were considered in relation to each person
- the outcome of your consideration of each suitability matter in relation to each person
- the reasons for reaching that outcome.

You should ensure that records are kept regarding how you considered information. For example, evidence of meeting records or memos, with the date(s) on which information was considered and what was discussed. As new key personnel join the organisation, ensure that they are included in the cycle of review.

In addition to any notifications made to the Commission, the Commission may also view these records as part of their monitoring and investigation functions to ensure compliance with this responsibility.

In addition to the above records, you may wish to also consider keeping records about:

- the organisation's procedures for consideration of suitability matters for key personnel
 - documents and information provided by key personnel or others
 - copies of determinations made by the Commission
 - copies of any notification of any changes to suitability matters made to the Commission (see [Part 5 – Notifying the Commission of certain matters](#)).
-

Notifying the Commission of certain matters

Overview

- This part describes the provider responsibilities in relation to notifying the Commission of certain matters regarding the suitability of providers and key personnel.
 - You have a responsibility to report any matters that materially affect your suitability as an approved provider.
 - You should ensure that the organisation has systems in place to support the notification of a change in circumstances to the Commission, what constitutes a material change and when a notification is required.
 - You also have a responsibility to notify the Commission of the occurrence of certain events relating to key personnel, including when a person becomes or ceases to be key personnel, or when you become aware of a change of circumstances that relates to a suitability matter in relation to key personnel.
 - Both notifications must be submitted through the Commission's website within 14 days after the event or change occurs and include sufficient evidence.
-

Context

Information about the organisation is required to be submitted to the Commission when certain changes or events occur. These notifications afford a level of transparency as to the organisation's capacity and provide the Commission with information about any potential risks in the governance of your organisation or the quality and safety of the care and services you provided. This helps to identify any potential risks to consumers.

It is important that the Commission has visibility of who you are choosing to lead your organisation and timely information about any disruptions or significant changes to your organisation that may need careful management. The Commission uses this information to monitor for risk signals that may indicate that:

- a certain person is not suitable to be leading your organisation
- your organisation is having difficulty retaining key leadership roles (which may indicate more systemic concerns)
- your organisation is undergoing significant changes that may create risks for consumers or impact the viability of the organisation
- the organisation does not have the capacity to comply with its responsibilities.

5. Notifying the Commission of certain matters

Your organisation should ensure it has systems in place to support your compliance with your notification responsibilities and that key personnel are familiar with what circumstances trigger a notification, and the timeframe in which a notification is required.

You will also need to form a view as to who in your organisation is a key personnel, consistent with the definition in the legislation. This includes considering the scope of any brokered or subcontracted contractors who work for your organisation, and whether they meet the definition of key personnel for the purposes of notifying the Commission of certain changes.

What are your responsibilities in relation to notifications about suitability and key personnel?

The Commission must be notified:

- of a change of circumstances that materially affects your suitability as an approved provider (known as material changes) (section 9-1 of the Aged Care Act)
- if a person becomes or ceases to be key personnel
- where you become aware of a change of circumstances that relates to a suitability matter in relation to a person who is one of your key personnel (section 9-2A of the Aged Care Act).

In each case, the notification must be made to the Commission within 14 days of:

- you becoming aware of a material change to your suitability as an approved provider
- a person becoming or ceasing to be one of your key personnel
- you becoming aware of a change of circumstances that relates to a suitability matter in relation to a person who is one of your key personnel.

Noting the overlap in circumstances relating to key personnel, for example, where the departure of a key personnel may materially affect your suitability to provide aged care, the same form is used to make both types of notifications. More information about making these notifications, including the form is available on the Commission's website.

The Commission may, at any time, request in writing that you provide information relevant to your suitability as an approved provider or request that you give information relevant to the suitability of your key personnel (sections 9-2(1) and (1A) of the Aged Care Act).

If the Commission makes a request for information about your continuing status as an approved provider or the suitability of your key personnel, you must comply with this request within 28 days after the request was made, or within such a shorter period as is specified in the notice (section 9-2(2) of the Aged Care Act). Failure to do so may result in a sanction being imposed under Part 7B of the Commission Act.

Notification of material changes

Notification of material changes is about identifying circumstances that might impact your suitability as an approved provider.

The term material change is used to describe a change that is substantial or considerable in nature.

Examples

A material change might be triggered when:

- the name of the legal entity, ABN, business or trading name is changed
- the provider's authorised contact officer or office information is changed i.e. address, phone number, email or website address
- changes are made that may impact the structure of the board or governance committees
- there are changes to your key personnel
- the incorporated status of the organisation changes
- the entity ownership changes or the organisation is acquired by another approved provider
- there is a transfer or sale of a majority controlling interest
- the organisation enters a sub-contract arrangement with a third party for delivery of clinical care
- a decision has been made to wind down the organisation or significantly reduce services
- the organisation nominates a management company to oversee day-to-day operations of the organisation
- organisation has decided to substantially change its investment profile for refundable accommodation deposits
- significant changes are made to the provider's existing, new or anticipated revenue source or the appointment of an external administrator, liquidator or receiver
- any other material changes occur which prevent you from meeting your provider responsibilities.

You should consider changes to the organisation on a case-by-case basis.

Content of material change notifications

Within 14 days after the change occurs, you must notify the Commission through the notification form on the Commission's website and provide evidence of the change. This evidence will vary based on the change, but may include, for example:

- an ASIC certificate of registration of change of name
- diagram of the organisational structure if the organisational structure has been amended
- change of ABN ID from the Australian Business Register
- copies of a management agreement or sub-contract agreement with another organisation to deliver aged care.

A person who is one of your key personnel who is legally authorised to give assurances and enter into contracts and commitments on behalf of the organisation will be required to complete the form and endorse the information provided.

Notification of certain events relating to key personnel

Under section 9-2A(1) of the Aged Care Act, you are required to notify the Commission in writing within 14 days if a person becomes or ceases to be one of your key personnel, or where you become aware of a change of circumstances that relate to a suitability matter in relation to a person who is one of your key personnel. Notifications must be in the form approved by the Commission.

If the notification relates to a person becoming one of your key personnel, you must state in the notification to the Commission whether you have considered the suitability matters in relation to the

person, and after considering those matters, whether you are reasonably satisfied that the person is suitable to be involved in the provision of aged care.

If the notification relates to a person ceasing to be one of your key personnel, you must set Notification of certain events relating to key personnel.

If the notification relates to an event that gives rise to a change of circumstances that relate to a suitability matter in relation to a person who is one of your key personnel, you must set out the following in the notification:

- the details of the change of circumstances that relates to a suitability matter
- whether you have considered the suitability matters in relation to the person
- whether, after considering those matters, you are reasonably satisfied that the person is suitable to be involved in the provision of aged care
- what, if any, action you have taken, or propose to take, in relation to the person.

Note that while a suitability matter includes a key personnel's experience in aged care, you do not need to notify the Commission when the experience of your key personnel changes (increases) because they acquire more aged care experience through performing their role.

Record keeping

Where a notification is made, you should keep records of the notification and any matters relating to the circumstances that gave rise to the notification, including your decision-making process and any supporting documentation.

Staff qualifications, skills and experience

Overview

- This part describes the provider responsibilities in relation to the qualification, skills and experience of staff members.
- You are responsible for complying with the Quality Standards in relation to staff expertise and competence.
- In addition, you must require your governing body to ensure that staff members:
 - have the appropriate qualifications, skills or experience to provide the care or other services you provide to consumers, and
 - are given opportunities to develop their capability to provide those care or other services.
- This responsibility extends to any person who is employed, hired, retained or contracted by you (whether directly or through an employment or recruiting agency) to provide care or other services.

Context

The responsibility to ensure staff members are given opportunities to develop their capability to provide care or other services builds on the requirements of the Quality Standards, and supports and drives renewed emphasis on leadership development, staff training, professional development and continuing learning, and staff engagement. The Royal Commission noted that investments in workforce development will be rewarded with higher staff performance, commitment and retention to the benefit of consumers.

While the Quality Standards require the workforce to be skilled and qualified to provide safe, respectful and quality care, these new responsibilities ensure there is direct oversight of staff qualifications, skills and capability by the governing body.

What are your responsibilities in relation to staff members?

Standard 7 of the Quality Standards requires providers to have a workforce that is sufficient, and that is skilled and qualified to provide safe, respectful and quality care and services.

Standard 7 of the Quality Standards

Your organisation has a responsibility to meet the Quality Standards, including the requirements in Standard 7, at all times. Standard 7 requires you to:

- ensure enough skilled and qualified staff to meet consumers' needs, including the right number and mix of skills needed to deliver and manage safe and quality care and services to consumers
- ensure workforce interactions with consumers are kind, caring and respectful of each consumer's identity, culture and diversity (including by engaging staff who have the ability to communicate and build positive relationships with consumers and provide consumer-centred care)
- ensure the workforce is competent and members of the workforce have the qualifications and knowledge to effectively perform their roles
- ensure the workforce is recruited, trained, equipped and supported to deliver the outcomes required by these standards
- conduct regular assessment, monitoring and review of the performance of each member of the workforce.

Further information about your responsibilities under the Quality Standards is available on the [Commission's website](#).

In addition, under section 63-1D(11) of the Aged Care Act, the governing body must ensure that staff members:

- have the appropriate qualifications, skills or experience to provide the care or other services that the approved provider provides to consumers through an aged care service
- are given opportunities to develop their capability to provide that care or those other services.¹²

These responsibilities extend to any person who is employed, hired, retained or contracted by your organisation (whether directly or through an employment or recruiting agency) to provide care or other services.¹³ They do not extend to visiting medical practitioners, pharmacists and other allied health professionals who have been requested by, or on behalf of, a consumer but are not contracted by the provider.

Staff members (including personal care workers, contractors, kitchen staff, etc) should be considered in light of their qualifications, skills and/or experience to provide the care or other services they are engaged to provide on your behalf. In addition, the managers and leaders within the organisation should have the professional experience and qualifications in management roles to enable them to manage complex aged care businesses. Governing persons should similarly have the relevant skills and experience to perform their role.

¹² Note that this responsibility does not apply to approved providers who are a state or territory, a state or territory authority, or a local government authority.

¹³ Being the definition of 'staff member' set out in Schedule 1, Aged Care Act.

Understanding and building staff capability

Your organisation should develop ways to understand and build the capability and skills of employed staff members including through professional development and training specific to their roles.

Building on the requirements of the Quality Standards, the governing body has a responsibility to ensure opportunities for staff development across the organisation are identified and provided to continuously improve the quality of care and outcomes for consumers.

For example, the governing body may seek to be assured of the workforce capability by:

- using a human resources system to identify trends in skills gaps
- undertaking ongoing review of the schedule of mandatory and discretionary staff training for currency and relevance to consumers and their needs
- creating a standing agenda item which provides the opportunity for management to discuss any concerns or areas for improvement in workforce capability with the governing body
- identifying opportunities (both internal and external) to develop skills of all cohorts of your workforce
- engaging with consumers and their representatives to understand where staff require development and capability building.

Record keeping

To demonstrate compliance with this responsibility, you must keep records that show how the governing body has ensured staff members:

- have appropriate qualifications, skills or experience to provide the care or other services to consumers
- are given opportunities to develop their capability to provide that care or those other services.¹⁴

This may include, for example:

- copies of qualification certificates, including registration certificates where required for the staff member
- minutes from meetings where the governing body identified and discussed opportunities for capability building, including the options discussed and ways these were identified
- organisation communications, staff newsletters, circulars etc. that demonstrate how capability need is identified and how staff are alerted to opportunities to build capability
- copies of performance management meetings
- copies of communications or meeting minutes informing the governing body about the progress of staff skills and benefits from capability building sessions
- copies of certificates and further training events your staff attended including attendee lists of the training your governing body identified as relevant to the skills needed to support service delivery and continuous improvement.

It is expected that you will retain all documentation to demonstrate the decision-making process and reasoning behind the consideration of staff member competencies and opportunities.

These records are in addition to the records to be kept about staff members, as required under the Records Principles.

¹⁴ See section 6D, Records Principles.

Provider's constitution

Overview

- This part describes the responsibilities of certain providers in relation to their constitution.
 - Certain approved providers have a responsibility to ensure that their constitution does not authorise their directors to act in good faith in the best interests of the holding company.
 - The effect of this responsibility is to ensure that directors of a wholly-owned subsidiary company operate in the best interests of consumers, and not the holding company.
-

Context

There are circumstances in which an approved provider may be a wholly-owned subsidiary of another body corporate (known as a holding company). In these circumstances, it is important to ensure that the directors are able to operate in the best interests of consumers, and not the holding company.

Existing provisions in the *Corporations Act 2001* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* permit a director, in certain circumstances (i.e. where this is expressly authorised in the wholly-owned subsidiary's constitution), to discharge the duty to act in the best interests of a wholly-owned subsidiary company by acting in the best interests of the holding company.

Given the intent is that approved providers act in the interests of consumers, approved providers that are wholly-owned subsidiaries of a holding company are expressly required to prioritise consumers in their organisation's constitution. This is aimed at ensuring the interests of the holding company are not elevated above those of the consumer.

What are your responsibilities in relation to the organisation's constitution?

This responsibility is specific to organisation's that are a wholly-owned subsidiary corporation of a holding company, where the holding company is not an approved provider. Where this is the case, you are responsible for ensuring that your constitution does not authorise a director of the organisation to act in good faith in the best interests of the holding company (section 63-1H(1) of the Aged Care Act).

If the constitution empowers the director to act in the best interest of the holding company, this is a direct conflict with prioritising the consumers in matters concerning them.

Intersections with other responsibilities

For those organisations that are subject to the Corporations Act, this new responsibility excludes you from relying on section 187 of the Corporations Act. This section permits directors of wholly-owned subsidiaries to be taken to be acting in good faith in the best interests of the subsidiary organisation if the constitution expressly authorises the director to act in the best interests of the holding company.

The new aged care law responsibility bars organisations from having such a provision in their constitution such that directors cannot rely on this to demonstrate they are acting in good faith for the provider organisation.

You may wish to seek legal advice about how to amend your constitution and what ramifications that may have for the way your governing body members make decisions and comply with their duties.

This same principle applies to those providers who are not subject to this responsibility, i.e. the organisation should not be putting another organisation's interests ahead of consumer interests.

Record keeping

You should ensure that a copy of your organisation's constitution (with the relevant clause to evidence compliance with this responsibility) is readily available.

Information about providers' operations

Overview

- This part describes the responsibilities of approved providers to provide a report on their operations and a statement of compliance to the Department of Health and Aged Care (the Department).
- Information submitted on providers' operations, along with other information already submitted to the Department by approved providers, will be published on My Aged Care to help consumers and their representatives understand key details about you and your organisation.
- The statement of compliance will be provided to the Department and shared with the Commission as a declaration of compliance. This statement is to be published by the Department.

Context

Reporting responsibilities under sections 63-1(1)(m) and 63-1G of the Aged Care Act require all approved providers to give the Department information as set out in the Accountability Principles.

Certain information about your organisation's operations and compliance is to be given to the Department within four months after the end of the relevant reporting period for the provider and will be published for each service. The information about your operations will include a statement of compliance, signed by a governing body member, that attests that you are meeting the provider responsibility at each service. This information and statement will be published on My Aged Care and updated as part of the annual submission of information to the Department.

The responsibility to submit information on operations encourages accountability and transparency and is designed to provide consumers and representatives with clear, timely and meaningful information about the quality of services to help them make informed decisions about the best arrangements for them.

The responsibility for the governing body to attest to the provider's compliance ensures governing persons are informed of and reflect on the provider's performance. This is consistent with the role and expectations of the governing body to understand and respond to any risks to consumers, workers and/or the organisation and to drive continuous improvement across the organisation.

What are your responsibilities in relation to reporting on provider operations?

Section 63-1G of the Aged Care Act requires approved providers to submit information on their operations in relation to a reporting period.

Residential care providers and home care providers are required to submit the following information as relevant to the reporting period:

- information about the kind of feedback and complaints received in respect of each service
- information about improvements made by the provider in relation to the quality of each service
- information about the diversity of the governing body of the provider (for example, whether the provider's governing body includes Aboriginal and/or Torres Strait Islander, disability, gender diversity and cultural and linguistic diversity) and initiatives implemented to support a diverse and inclusive environment for consumers and staff members in relation to each service
- whether the provider was, in the reporting period, a state or territory, a state or territory authority, or a local government authority
- whether the provider complied with the responsibilities regarding membership of the governing body of the provider (where applicable during the reporting period)
- whether the provider was not required to comply with these membership responsibilities during the reporting period.

Approved providers of flexible care as transition care will be required to report:

- information about the kind of feedback and complaints received in the reporting period in respect of each flexible care service through which transition care is provided
- information about improvements made by the provider in the reporting period in relation to the quality of each flexible care service through which transition care is provided.

Increased transparency around complaints, feedback and improvements gives consumers insight into the types of risks and issues experienced by organisations, and how responsive and proactive organisations are in resolving these. This helps consumers compare providers and make decisions about what is best for them.

Information collected for the purposes of these reports could be used by providers in other aspects of their operations, including:

- in communicating improvements to consumers
- in identifying the activities of the organisation for prospective consumers
- using the information as part of what is provided to the quality care advisory body to review and assess for their purposes
- in summarising trends and outcomes in reports to the governing body
- as part of annual reports and communications to the public in brochures, etc
- in job advertisements and recruitment packages
- on websites and in benchmarking activities with other providers.

Efficient collection of information

The Department and the Commission are committed to minimising administrative burden on providers. It is acknowledged that providers should only have to submit information once. Work is underway to ensure an integrated and efficient way of gathering provider information and avoiding duplicative reporting for providers.

What are your responsibilities in relation to the statement of compliance?

If you are an approved provider that provides residential care or home care, you must:

- prepare a statement for a reporting period that complies with the requirements specified in the Accountability Principles (see below)
- give a copy of the statement to the Department within 4 months after the end of the reporting period.

The statement requires the governing body to attest that the governing persons have satisfied themselves that the provider has in place the structures, systems and processes to deliver safe and high quality care, evidenced by its compliance with its provider responsibilities. This provides an opportunity for governing persons to reflect on the provider's performance at each of its services, and to prompt action where emerging and actual risks to consumers are identified through non-compliances.

The statement must:

- be in the form approved by the Department
- state whether or not the governing body believes that the provider has complied with all of the provider responsibilities under the Aged Care Act and the Commission Act
- be signed by a member of the governing body on behalf of all members of the governing body
- where the governing body believes the provider has failed to comply with one or more provider responsibilities, set out in the statement the details of:
 - each responsibility or requirement that the governing body believes that the provider has failed to comply with
 - the reasons why the provider has failed to comply with the responsibility or requirement
 - what actions the provider has taken, has started to take or will take, to rectify the non-compliance.

What is the reporting period?

The reporting period is a period of 12 months starting on July of each year (i.e. July to June each year).¹⁵ You are required to submit the information within four months after the end of the 12 month period (i.e. by end October).

If you were only responsible for the operations of the service during part of a reporting period (not the full 12 month period), you do not need to report in respect of the full period.

Record keeping

You may wish to keep copies of the information submitted and evidence of the date you submitted the information for your records.

¹⁵ See section 63-1G(3), Aged Care Act

Role of the Commission

Overview

- This part describes the role of the Commission in monitoring and enforcing provider responsibilities in relation to governance.
- The Commission is responsible for monitoring and enforcing compliance with the provider responsibilities, including matters relating to the governance of the provider.
- The Commission has the power to take regulatory action(s) where appropriate to address provider non-compliance with their responsibilities.
- Following a finding of non-compliance in relation to a provider, the Commission may respond by taking a number of actions, including (and not limited to):
 - asking a court to impose a civil penalty order
 - seeking an injunction from a court
 - issuing a compliance notice
 - imposing sanctions under Part 7B of the Commission Act against providers
 - accepting a written undertaking given by a provider that it will take specified actions to comply with its responsibilities and/or will take specified actions to ensure that these responsibilities are not contravened in the future
 - issuing a Non-Compliance Notice

- seeking the provider's agreement to certain matters
- seeking to enforce an offence provision against the provider or a key personnel.
- Information obtained by the Commission about your responsibilities in relation to governance may be used by the Commission in relation to its other functions.

The role of the Commission

The Commission is responsible for accrediting, assessing and monitoring providers of aged care services that are subsidised by the Australian Government. The Commission also resolves complaints about these services. Through its engagement and education work, the Commission builds confidence and trust in the aged care system, empowers consumers to make informed choices, provides education and information about matters relating to its functions, and promotes best practice service provision.

A key part of the Commission's role is monitoring and enforcing provider responsibilities, including those related to governance.

The Commission's functions in this regard include:

- providing guidance and education to assist providers to meet responsibilities
- monitoring provider compliance with these responsibilities
- enforcing provider compliance with these responsibilities.

Provider governance

Guidance for approved providers

Commission's regulatory response and actions

The Commission has a responsive, risk-based and proportionate approach to regulation, using the full range of educational and regulatory tools to address provider level and sector wide risks. This includes:

- engaging with providers and offering guidance and education to assist them to build their capability
- providing feedback to the sector and individual providers to promote understanding of provider responsibilities and to support continuous improvement by providers in the quality and safety of care and services
- using monitoring and performance assessment activities, campaigns and targeted regulatory approaches
- applying regulatory actions and regulatory powers, as appropriate.

As part of the regulatory activities undertaken by the Commission, the Commission monitors:

- the quality of care and services provided by a provider through its aged care service(s)
- whether a provider has complied with its responsibilities
- a provider's response to non-compliance.

The Commission's monitoring powers can be exercised regardless of whether there has been non-compliance, and may support, precede or follow other compliance or enforcement actions.

Compliance and enforcement action

The Commission has a range of regulatory powers. The Commission may take the following compliance and enforcement action in certain circumstances:

- ask a court to impose a civil penalty order
- seek an injunction from a court
- issue an infringement notice in certain circumstances
- issue a compliance notice, including in relation to failures to submit information relating to a reporting period (discussed below)
- impose sanctions under Part 7B of the Commission Act
- accept a written undertaking given by a provider that it will take specified actions to comply with its responsibilities and/or will take specified actions to ensure that these responsibilities are not contravened in the future
- issue a Non-Compliance Notice
- require a provider to agree to certain matters
- seek to enforce an offence provision against the provider or a key personnel.

The Commission may take one or more of these actions where it is appropriate and proportionate in order to address the non-compliance. A number of these powers may be applied, as appropriate, where a provider is not complying with its other responsibilities.

9. Role of the Commission

The actions taken by the Commission will depend upon the circumstances and will be informed by the Commission's regulatory approach and *Compliance and Enforcement Policy*.

For more information about the Commission's regulatory approach and to explain what is meant by responsive, risk-based regulation, see the Commission's *Regulatory Strategy*.

Offence provisions

Approved providers

Failure to comply with certain provider responsibilities may be an offence.

For example, it is an offence for you to fail to:

- notify the Commission of a material change within 14 days of the change¹⁶
 - This is a strict liability offence which carries a maximum penalty of 30 penalty units¹⁷ which currently equates to \$33,300 for a corporation.
- comply with a request from the Commission about the suitability of your key personnel
 - This is a strict liability offence¹⁸ which carries a maximum penalty of 30 penalty units.

- comply with your responsibilities to consider the suitability matters relating to your key personnel at least once every 12 months in accordance with any requirements specified in the Accountability Principles¹⁹
 - Contraventions carry a maximum penalty of 300 penalty units which currently equates to \$333,000 for a corporation.
- notify the Commission about certain events relating to key personnel.
 - Contraventions carry a maximum penalty of 30 penalty units.²⁰
- take action as required by a determination relating to your key personnel.²¹
 - Contraventions carry a maximum penalty of 300 penalty units.
 - Note that the obligation to comply with a determination continues notwithstanding that the period within which to comply has expired. As such, your organisation may be guilty of an offence in respect of each day during which you fail to comply.

Where you fail to take action as required in a determination in relation to suitability of a key personnel, you may be issued with a remedial order under section 10A-3 of the Aged Care Act.

¹⁶ Section 9-1(4) Aged Care Act.

¹⁷ The value of a penalty unit is prescribed by the Crimes Act 1914 and is currently \$222 for offences committed on or after 1 July 2020. Where the breach is by a body corporate, such as a provider organisation, the maximum penalty payable is 5 times the prescribed penalty units. The penalty unit amount is due to be indexed again on 1 July 2023.

¹⁸ Section 9-2(3) Aged Care Act.

¹⁹ Sections 63-1A and 10A-2B Aged Care Act.

²⁰ Section 9-2A(3) Aged Care Act.

²¹ Section 10A-2A Aged Care Act.

Provider governance

Guidance for approved providers

What is a remedial order?

Where the Commission makes a determination that one of the key personnel is not suitable and you fail to take the action specified in a notice of determination, an 'unacceptable key personnel situation' will arise.

If such a situation exists, the Federal Court may, on application by the Department, make such orders as the court considers appropriate for the purpose of ensuring that the situation is resolved (i.e. the unacceptable key personnel situation ceases to exist).

The intention of remedial orders is to enable quick and effective action to be taken where an unacceptable key personnel situation exists, particularly so that the risk of such a situation to vulnerable older Australians is mitigated.

Key personnel

It is an offence for key personnel of an approved provider to fail to notify the provider of a change of circumstances relating to a suitability matters within 14 days of the change occurring.²² The offence carries a maximum penalty of 30 penalty units which currently equates to \$6,660 for a person.

Failure to notify a change of circumstances that impacts your suitability to be involved in the provision of aged care is an offence because the information you make available to the provider affects their ability to comply with their responsibility to consider your suitability, and as necessary, notify the Commission.

Compliance notice for failure to submit information relating to a reporting period

While the Commission has a range of regulatory powers to respond to provider non-compliance, there are also some bespoke powers to address specific types of non-compliance. For example, the responsibility to submit information relating to a reporting period on your organisation's operations (see Part 8) can be enforced by way of a compliance notice (section 74EE(1AA) of the Commission Act).

This means that should you fail to submit the information, the Commission may issue a compliance notice if satisfied that you are not complying with your responsibility under section 63-1G of the Aged Care Act, or if the Commission is aware of information that suggests you may not be complying. The compliance notice will require you to address the actual or possible non-compliance within a reasonable timeframe.

A decision to issue a compliance notice is a reviewable decision for a person whose interests are affected by those decisions.

²² Section 10A-1(3) Aged Care Act.

Glossary

Aboriginal Community Controlled Organisation

A body that is:

- incorporated under relevant legislation and not-for-profit
- controlled and operated by Aboriginal and/or Torres Strait Islander people
- connected to the community, or communities, in which they deliver the services
- governed by a majority Aboriginal and/or Torres Strait Islander governing body.²³

Accountability Principles 2014 (Accountability Principles)

These principles set out the responsibilities of approved providers regarding the information that is required to be given to the Department, aged care financial reports, requirements in relation to certain staff members and volunteers and the reasonable steps providers are required to ensure the suitability of key personnel.

Aged Care Act 1997 (the Aged Care Act)

The overarching aged care legislation which outlines the obligations and responsibilities that aged care approved providers must follow to receive subsidies from the Australian Government.

Aged Care Quality and Safety Commission (the Commission)

The national end-to-end regulator of aged care services, and the primary point of contact for consumers, providers and members of the community in relation to quality and safety in aged care in Australia. The Commission's primary purpose is to protect and enhance the safety, health, wellbeing and quality of life of aged care consumers; to promote aged care consumers' confidence and trust in the provision of aged care services; and to promote engagement with aged care consumers about the quality of their care and services.

Aged Care Quality and Safety Commission Act 2018 (the Commission Act)

The Commission Act sets out the functions related to the Commission and establishes a regulatory framework.

Aged Care Quality and Safety Commission Rules 2018 (the Commission Rules)

The Commission Rules set out the process for how the Commission performs its functions as defined in the Commission Act.

²³ See National Agreement on Closing the Gap, 2020, p.8.

Aged Care Quality Standards (the Quality Standards)

The Quality Standards with which approved providers must comply under section 54-1(1)(d) of the Aged Care Act. The Quality Standards are set out in Schedule 2 of the Quality of Care Principles 2014.

Consumer

As defined in the Commission Act (see definition of ‘care recipient’), means a care recipient or a person who is a recipient of a Commonwealth funded aged care service as approved under Part 2.3 of the Aged Care Act.

Department of Health and Aged Care (the Department)

Means the Commonwealth Department of Health and Aged Care.

Membership responsibilities

The responsibilities set out in section 63-1D(2) of the Aged Care Act being, the responsibilities on certain approved providers to ensure that:

- a majority of the members of the governing body of the provider are independent non-executive members and
- at least one member of the governing body of the provider has experience in the provision of clinical care.

The Aged Care Act defines these as the ‘governance responsibilities’ but the more specific term of ‘membership responsibilities’ has been used for the purposes of this guidance.

Governing body

Governing body of an approved provider is defined in Schedule 1 of the Aged Care Act to mean:

- if the provider is a body corporate incorporated, or taken to be incorporated, under the Corporations Act 2001—the board of directors of the provider, or
- otherwise—the group of persons responsible for the executive decisions of the provider.

Governing person

A governing person is defined in section 7 of the Commission Act to mean an individual who is one of the key personnel of the provider under section 8B(1)(a) or (b) of the Commission Act, being:

- where the entity is not a state or territory — a member of the group of persons who is responsible for the executive decisions of the entity at that time
- where the provider is not a state or territory—any other person who has authority or responsibility for, or significant influence over, planning, directing or controlling the activities of the entity.

Local government authority

A body established for the purposes of local government by or under a law of a state or territory.

Material change

A change that is substantial or considerable in nature and materially affects the suitability of an approved provider to provide aged care.

Approved provider

An approved provider is defined in section 7 of the Commission Act to mean a person or body that has been approved as a provider of aged care under section 63D of the Aged Care Act, or is taken under section 63F(2)(a), to be an approved provider, and the approval of the person or body is in effect.

Provider responsibilities

The set of responsibilities that an approved provider has in relation to the aged care they provide through its services to aged care consumers/care recipients. These responsibilities, as specified under the aged care legislative framework, relate to:

- the quality of care they provide
- user rights for the people to whom the care is provided
- accountability for the care that is provided, and the basic suitability of key personnel.

Records Principles 2014 (Records Principles)

These principles specify the kinds of records that must be kept and retained by an approved provider.

Reportable incident

A reportable incident is defined in section 54-3(2) of the Aged Care Act (and section 15NA of the Quality of Care Principles 2014 defines or clarifies the meaning of expressions used in section 54-3(2) of the Aged Care Act).

Staff member

A staff member is defined in Schedule 1 of the Aged Care Act to be an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services.

State or territory authority

Means a body established for a public purpose by or under a law of a state or territory.

Suitability matter

Defined in section 8C of the Commission Act and includes the following in relation to an individual:

- the individual's experience in providing, at any time, aged care or other relevant forms of care
- whether a banning order against the individual is, or has at any time been, in force
- whether a NDIS banning order against the individual is, or has at any time been, in force
- whether the individual has at any time been convicted of an indictable offence
- whether a civil penalty order against the individual has been made at any time
- whether the individual is, or has at any time been, an insolvent under administration
- whether the individual is or has at any time been the subject of adverse findings or enforcement action by any of the following:
 - a Department of the Commonwealth or of a state or territory
 - the Australian Securities and Investments Commission
 - the Australian Charities and Not for Profits Commission
 - the Australian Competition and Consumer Commission
 - the Australian Prudential Regulation Authority
 - the Australian Crime Commission
 - AUSTRAC
 - a state or territory authority (including, but not limited to, a body that is equivalent to a body mentioned above)
 - another body established for a public purpose by or under a law of the Commonwealth
 - a local government authority
- whether the individual:
 - is, or has at any time been, the subject of any findings or judgment in relation to fraud, misrepresentation or dishonesty in any administrative, civil or criminal proceedings
 - is currently party to any proceedings that may result in the individual being the subject of such findings or judgment
- whether the individual is, or has at any time been, disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*
- any other matter specified in the rules.



The Aged Care Quality and Safety Commission acknowledges the Traditional Owners of country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to Elders both past and present.

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