



Regulatory Bulletin

Strengthening provider governance responsibilities – governing body requirements

RB 2023-23

This regulatory bulletin discusses strengthened provider governance responsibilities for approved providers concerning their governing body. This includes the governing body requirements that were introduced on 1 December 2022.

Changes involving the composition of governing bodies are already in effect for providers who applied for approval after 1 December 2022.

For existing providers (who had approved provider status before 1 December 2022), these requirements will apply from 1 December 2023. This bulletin also explains how we will regulate these responsibilities.

Key Points

- Approved providers have responsibilities under the *Aged Care Act 1997* (Aged Care Act) to strengthen governance practices. This builds transparent and accountable leadership, and culture that drives the delivery of a quality aged care experience for people receiving aged care.
- The new governing body responsibilities require approved providers to:
 - have a governing body made up of a majority of independent non-executive members and at least one member with experience in the provision of clinical care. This information must be reported to the Department of Health and Aged Care (the Department) as part of an annual Provider Operations report
 - establish and maintain a Quality Care Advisory Body
 - offer to form a Consumer Advisory Body at least once every 12 months
 - prioritise people receiving aged care (rather than the interests of the holding company) if the organisation is a wholly owned subsidiary
 - ensure that staff have the appropriate qualifications, skills and experience.
- These new responsibilities enhance providers' existing responsibilities under the Aged Care Act and Aged Care Quality Standards (Quality Standards).
- A high performing, effective governing body is essential for the proper governance of an organisation. The governing body's



policies and operating procedures must address, among other things, the need for independent non-executive directors to challenge management and hold them to account, and robust processes for satisfactorily managing conflicts, including conflicts of interest.

- The Commission will hold providers to account for the quality and safety of the care they give and for meeting their responsibilities under the Act, including their provider governance responsibilities. This will happen by monitoring provider performance and identifying and responding to areas of risk to people receiving aged care. We will also take action on non-compliance by providers.
- The Commission's regulatory response to a provider who demonstrates a willingness to take all reasonable steps to comply with their provider governance responsibilities will be different from our response to a provider who cannot demonstrate their effort to comply or who deliberately does not comply. This is particularly the case where a provider's unwillingness may be placing people in its care at risk of harm or a poor-quality aged care experience.
- Providers who are a government authority, an Aboriginal Community Controlled Organisation, or have fewer than 5 governing members on their governing body and provide care to fewer than 40 people, are automatically exempt from the governing body requirements.
- In certain circumstances, an approved provider can apply for a determination from the Commissioner (**determination**) that, for a limited period, they do not need to meet one or both of the requirements to have a governing body made up of a majority of independent non-executive members and at least one member with experience in the provision of clinical care.
- Exempt providers and providers subject to a determination (meaning they do not need to meet one or both of the above requirements) must include this information in their annual Provider Operations report to the Department.



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Bulletin number: RB 2023-23

Version number: 1.0

Document number: FRM-ACC-0895

Publication date: 28 November 2023

Replaces: N/A – new release

Information in this bulletin applies to: All residential aged care services, home care services and flexible care services through which short-term restorative care is provided in a residential care setting.

Attachment:

- Provider responsibilities relating to governance – Guidance for approved providers
 - Aged care approved provider – Request for a determination that certain governing body responsibilities do not apply form
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Notes: This Regulatory Bulletin summarises legislative provisions relating to governing body responsibilities. These include an outline of the process for requesting a determination that certain governing body responsibilities do not apply.

To be reviewed: November 2024



Strengthening provider governance responsibilities – governing body requirements

Importance of governance in delivering quality care

Governance refers to the arrangements and practices that allow an organisation to set its direction and manage its operations to achieve expected outcomes in an accountable way. The governing body provides leadership and direction to enhance confidence in an organisation, its decisions and actions. It also sets the tone and values of the organisation.

The Royal Commission into Aged Care Quality and Safety (the Royal Commission) identified that the role of the governing body was critical to the provision of high-quality aged care, including:

- that it is accountable for the quality of care delivered and should have the right mix of skills, experience and knowledge of governance responsibilities to ensure the safety and high quality of care
- that current good governance practice in Australia is represented (where possible) by most members of an organisation's governing body being independent of the organisation.

The amendments to the Aged Care Act reinforce the Royal Commission final report that the governing body has a role in making sure that the provider is effectively governed and there are systems to facilitate the provision of safe and quality care.

The governing body has the **unique role of oversight that is generally distinct from the day-to-day management of operations** (which is generally overseen by the executive team).

New governing body responsibilities

A range of governing body responsibilities will apply to all approved providers from 1 December 2023. These responsibilities require approved providers to:

- have a governing body composed of a majority of independent non-executive members and at least one member with experience in the provision of clinical care (see [Governing body composition section 63-1D\(2\) of the Aged Care Act](#))
- establish and maintain a Quality Care Advisory Body (see [Quality care advisory body section 63-1D\(6\) of the Aged Care Act](#))
- offer to establish a Consumer Advisory Body at least once every 12 months (see [Consumer advisory body section 63-1D\(9\) of the Aged Care Act](#))
- prioritise people receiving aged care (rather than the interests of the holding company) if the organisation is a wholly owned subsidiary
- ensure that staff have the appropriate qualifications, skills and experience.



The new responsibilities do not apply to providers delivering services under a grant agreement, such as the Commonwealth Home Support Programme (CHSP) and National Aboriginal and Torres Strait Islander Flexible Aged Care Program (NATSIFACP).

Connection with other provider responsibilities

The new governing body responsibilities enhance existing responsibilities of approved providers under the **Quality Standards**. Quality Assessors will be specifically monitoring these responsibilities against the following:

Under **Standard 7 Human resources**, providers must meet requirement 3(c) which states that:

- (c) the workforce is competent and members of the workforce have the qualifications and knowledge to effectively perform their roles.

Under **Standard 8 Organisational governance**, providers must meet requirements (3)(a), (b) and (c) which require the organisation to demonstrate:

- (a) people receiving aged care are engaged in the development, delivery and evaluation of care and services and are supported in that engagement
- (b) the organisation's governing body promotes a culture of safe, inclusive and quality care and services, and is accountable for their delivery
- (c) effective organisation-wide governance systems.

Governing body composition

From 1 December 2023, residential, home and flexible care providers need to ensure that their governing body has:

- a majority of **independent non-executive** members
- at least one member with experience in providing clinical care.

Providers also need to report about this in the annual Provider Operations report (see [Reporting on Governing Body Requirements](#) and [section 63-1G of the Aged Care Act](#)).

Providers do not need to meet these governing responsibilities if their organisation:

- is a state or territory, or a state, territory or local government authority
- has fewer than 5 board members and provides aged care to fewer than 40 people
- is an Aboriginal Community Controlled Organisation
- has been granted a determination by the Commission that one or both membership responsibilities do not apply to the organisation.



The importance of independent governing body members

The Royal Commission described an **independent member** of an organisation's governing body as a person free of any interest or relationship that might influence, or reasonably be perceived to influence, their capacity to:

- bring independent judgment to bear on issues considered by the governing body
- act in the best interests of the organisation as a whole.

An independent member of an organisation's governing body is a person whose only interest in, or relationship with, the organisation stems from their role as a member of that governing body.

Independent members bring objectivity and independence to act in the best interests of the organisation. In the context of the aged care system, this extends to acting in the best interests of people receiving aged care.

** 'Immediate family' of the person above includes the person's spouse, de-facto partner, parents, children, siblings, mothers-in-law, fathers-in-law, sons-in-law, daughters-in-law, brothers-in-law, sisters-in-law, first cousins, grandchildren or other persons living in the individual's principal place of residence. It also includes the immediate family of the person's spouse or de facto partner. A conflict of interest exists in these circumstances regardless of whether an advantage, unethical or improper act results from that conflict.*

Independence checklist for approved providers

When assessing the independent status of a person who is or could become a member of a governing body, approved providers should consider this checklist as a guide.

A person may be considered independent if that person and any member of their immediate family*:

Has not had an employment relationship with the provider in the last 3 years.

Is not currently and has not been a principal, employee, professional adviser or material consultant to the organisation and has not been an employee materially associated with a service provided to the organisation.

Is not a material business partner (e.g. as a supplier, professional advisory, consultant, service delivery partner) or customer of the organisation, or otherwise associated directly or indirectly with, a material business partner or customer.

Does not have a material contractual relationship with the organisation.

Is not employed by an organisation that may obtain a competitive or commercial advantage through knowledge of matters that may be discussed by the governing body (regardless of whether the employer is a current business partner to the organisation).

Does not hold a governance role in an organisation that is a current business partner or could obtain a competitive advantage through knowledge of the organisation's activities.



Independence and conflicts of interest

Approved providers must consider and manage any real or perceived conflicts of interest where a governing member could influence decisions or where they or someone they know could directly benefit. For example, 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 receives a financial benefit.

Conflicts are not static. The nature of conflict may change depending on the broader social context, such as memberships or affiliations with different interest groups, cooperatives, religions or local organisations. Therefore, a conflict may not always exclude a person from joining a governing body.

Conflicts should be avoided wherever possible, and minimised where declared. They should be managed by following the governing body's policy and procedures on conflicts of interest. This may mean that the person may be excluded from a decision where they have a conflict. Another option is that their vote or view may be given less weight in a decision that would favour them.

It's important to understand that the governing body has a responsibility to make sure that controls are in place to identify and appropriately manage any conflicts.

Key principles of managing conflicts of interest

The following principles guide approved providers in managing conflicts of interest:

- **Adopt a conflict of interest policy.** A policy outlining how the organisation will manage conflicts of interest makes clear the procedure the governing body will use to address and respond to issues.
- **Create and maintain a register of interests.** This will help an organisation to understand potential conflicts before they arise and give the governing body more time to consider how best to manage them.
- **Create and promote a culture of disclosure.** Governing members should view disclosing their interests as part of their role and should encourage colleagues to do the same.
- **Promptly manage conflicts of interest.** Depending on the circumstances, it may be appropriate to have a governing member:
 - excuse themselves from participating in any discussion on the conflict
 - remove themselves from the room during the time of any discussion
 - abstain from voting on the matter.

An organisation needs to decide what form of remedial action is appropriate. It needs to do this based on its responsibilities under law, its policy and the particular circumstances. Several steps may be needed to address the conflict.

In some situations, conflicts can arise that are serious or which regularly impact on the ability of the governing body member to make decisions in the best interests of both the organisation and people receiving aged care.

In these cases, the governing body member may need to consider if it is appropriate for them to continue on the governing body, or if they should resign.



The process of managing conflicts of interest may look something like:

1. A governing body member identifies that they have a conflict of interest.
2. That conflicted member notifies the governing body of their conflict in line with the organisation's policy.
3. The Chair and/or other members of the governing body decide on the appropriate action to address the conflict, and document this decision.
4. The governing body informs the conflicted governing member of the outcome.

The steps an organisation takes may vary depending on its conflict of interest policy, as well as its processes and systems.

It is also important to remember that sometimes a conflict of interest may be identified by someone other than the person who has the conflict.

Quality care advisory body

From 1 December 2023, residential, home and flexible care providers need to have a quality care advisory body.

Under Part 4.3 Accountability, section 63-1D(6) (a) of the Aged Care Act, **approved providers must establish and continue a quality care advisory body to support and inform the governing body, help with problem-solving and suggest improvements.**

The quality care advisory body must include:

- a member of key personnel who has appropriate experience providing aged care
- a staff member directly involved in the delivery of aged care, or a staff member directly involved in the delivery of clinical care (if applicable)
- a member who represents the interests of care recipients (or their representative).

The quality care advisory body is expected to:

- provide the governing body with a written report at least every 6 months about the quality of each of the approved provider's aged care service(s).
- make sure that written reports fulfil the requirements under **section 53(C) of the Accountability Principles** regarding any concerns that the quality care advisory body has about the quality of care provided by the provider over the reporting period.
- give feedback about the quality of aged care as requested.

Under **Standard 1 Consumer dignity and choice**, approved providers must meet requirement 3(e), which specifies that:

- (e) information provided to each consumer is current, accurate, timely, clear, easy to understand and allows them to choose.

Providers do not need to establish a quality care advisory body if their organisation:

- is a state or territory, or a state, territory or local government authority
- is an Aboriginal Community Controlled Organisation.



Consumer advisory body

From 1 December 2023, residential, home and flexible care providers need to offer people receiving aged care and their representatives, at least every 12 months, the option of forming one or more consumer advisory bodies.

Providers who already have a consumer advisory body (however titled) must still formally approach **their care recipients at least every 12 months to offer to revise or improve the current advisory body arrangements.**

Under Part 4.3 Accountability, section 63-1D(9)(a) of the Aged Care Act, **approved providers must provide people receiving aged care and their representatives an opportunity to establish one or more consumer advisory bodies to ensure feedback is received from care recipients about the quality of care and services they receive. The governing body must write to the consumer advisory body explaining how their feedback was used or considered.**

The invitation must:

- be in writing
- be made to care recipients and their representatives
- give information about the consumer advisory body and how to join.

The consumer advisory body:

- can be any size or structure to suit the organisation's needs
- can include current and past care recipients and their representatives
- should include mostly current care recipients and representatives
- must reflect the diverse backgrounds of care recipients and support care recipients who have barriers to participation

- must have opportunities to give feedback to the governing body on the quality of aged care provided
- should have representatives from different services and care offered.

Under **Standard 6 Feedback and complaints**, approved providers must meet requirements 3(a) and (d) which state that:

- (a) care recipients, their family, friends, carers and others are encouraged and supported to provide feedback and make complaints
- (d) feedback and complaints are reviewed and used to improve the quality of care and services.

Reporting on governing body requirements

The Royal Commission recommended that older people have better access to information about providers' operations. In response, providers now need to report additional information on their operations annually to the Department. **The reporting period begins on 1 July and ends on 30 June the following year, and reports are due by 31 October.**

Included in the Provider Operations Report, approved providers must give a statement signed by the governing body based on their self-assessment with information:

- on whether the providers' governing body includes representatives from First Nations, disability, gender diverse and cultural and linguistically diverse communities (or any other diversity demographic)
- about whether the provider:
 - has a majority of independent non-executive members and a person with experience in providing clinical care on their governing body



- has been granted a determination that they do not need to meet one or both of the above requirements for a period of time.

For more information on broader reporting requirements, refer to: www.health.gov.au/topics/aged-care/aged-care-reforms-and-reviews/strengthening-provider-governance-in-aged-care#reporting-requirements.

Providers who do not submit the Provider Operations Report to the Department of Health by 31 October, will be in breach of approved provider responsibilities under the *Aged Care Act 1997* (the Act).

Where a provider fails to meet its reporting obligations, the Commission will consider a range of escalating regulatory actions. Depending on the nature and extent of the non-compliance, this may involve calling or emailing a provider, issuing a notice requiring information or taking compliance action.

The approach taken will be proportionate and risk-based. We will consider factors such as:

- the nature, frequency and timeframe of the non-reporting
- the consequences of the non-reporting in relation to the risk of harm to people receiving aged care
- whether the provider has advised the Department or the Commission (where relevant) of the reporting delay, provided a reasonable explanation for the delay and has a reasonable plan to comply with the requirement and ensure ongoing compliance.

Regulating approved provider responsibilities

The Commission's role is to monitor, identify and respond to areas of risk to people receiving aged care. As part of this, we monitor providers' compliance with their responsibilities under aged care legislation, and identify and respond to non-compliance. We regulate in line with statutory functions and community expectations.

The Commission finds risks to people receiving aged care by using multiple sources of intelligence that enable real-time monitoring of approved providers. For example:

- through complaints about services, Residents Experience Surveys and other consumer feedback that provides important information about consumer concerns and experiences
- through the Commission's monitoring, investigation and compliance functions
- through provider reporting and information from the Department of Health and Aged Care (the Department) and other regulators. Information from the Department includes annual reports from providers on their operations (where applicable).

In regulating provider governance responsibilities, the Commission will consider ongoing efforts by providers to meet the requirements. We will also consider any pending decision on a provider's application for a determination that they do not need to meet one or both responsibilities on the composition of their governing body for a period of time (see [Determinations section](#)).

The Commission will consider each case in context. A provider's non-compliance with a particular responsibility will not be considered in isolation from other relevant factors. In all cases, the Commission will act without delay to protect care recipients where we assess that they are exposed to an immediate and severe risk of harm.



Performance assessment and monitoring

The Commission carries out audits against the Quality Standards as part of the reaccreditation requirements for residential aged care services and quality review requirements for home care services. We also do assessment and monitoring activities as part of our risk-based targeted monitoring program, which may include a performance assessment against the Quality Standards.

Compliance and enforcement

The Commission expects approved providers to co-operate and show a willingness to comply with their governance responsibilities.

Our response to any non-compliance will be informed by a range of factors, including if the provider demonstrates they are actively working to comply with their obligations. Where a provider demonstrates it is actively working to comply with its responsibilities, the Commission's response will be different from where the provider is unable to demonstrate a suitable response, or deliberately avoids compliance obligations and may be placing care recipients at risk of harm.

We will escalate our regulatory response where there is significant or repeated non-compliance.

Determinations

The Commission is aware that some providers may face challenges in meeting one or both responsibilities about governing body composition (see section [Governing body composition](#)).

We recognise that it can be more difficult for providers operating aged care services in a rural or remote area to attract and retain skilled governing body members, and especially people with clinical care experience.

In these situations, providers should consider:

- how technology could be used to engage members from neighbouring towns or medical practices remotely
- working with other approved providers who are facing the same circumstances. Providers may be able to work together to find a solution that is mutually beneficial
- seeking expressions of interest including through local organisations and professional bodies.

Where a provider has explored and tested all available options without success, it can apply for a determination from the Commission that it does not need to meet one or both of the requirements to have a governing body made up of a majority of independent non-executive members and at least one member with experience in the provision of clinical care.

To apply, providers must complete the [Request for a determination that certain governing body responsibilities do not apply form](#).

We assess applications for a determination on a case-by-case basis, recognising that not all approved providers are the same. Our determination decision will consider the individual circumstances of the approved provider and its reasons for seeking a determination. As a guide, the Commission may decide that a provider does not need to meet certain governing body composition responsibilities for a maximum period of 12 months.

Approved providers should be aware that we may (on our own initiative) vary or revoke a determination decision if satisfied that it is appropriate to do so. We will not vary or revoke a determination decision without speaking with the provider.



A determination that a provider does not need to meet certain governing body composition responsibilities **does not** release that provider from any of its other obligations under the Aged Care Act and relevant subordinate legislation, including the Accountability Principles.

Additional resources

The Commission has a range of resources available to support approved providers. These are published on our website and include guidance documents, fact sheets, videos, educational workshops and regular communication through the Quality Bulletin.

We also offer education modules through the Aged Care Learning Information Solution (ALIS).

The following resources can be found on our website:

- [Governing body determinations – your questions answered](#)
- [Provider responsibilities relating to governance – Guidance for approved providers](#)
- [Governing body fact sheet](#)
- [Provider governance – provider responsibilities 1 December 2023](#)
- [Strengthening provider governance – eLearning module](#)
- [Strengthening provider governance – webinar, presentation slides and QandAs](#)
- [Staff qualifications fact sheet](#)
- [The Code of Conduct for Aged Care – Guidance for aged care workers and governing persons](#), specifically Chapter 4

- [Resources for providers to support the Aged Care Quality Standards](#), specifically Standard 1 Consumer dignity and choice, Standard 6 Feedback and complaints, Standard 7 Human Resources and Standard 8 Organisational Governance.

Frequently asked questions

1. Do I need to meet the governing body membership requirements if my organisation is providing aged care to 41 people?

Yes. We know that organisations change over time, including providing care to a larger or smaller number of people and having individuals join or leave their governing body. Providers should be prepared to respond to these sorts of changes. For example:

- If an organisation has fewer than 5 members on its governing body and 38 people are currently receiving aged care services, then it does not need to meet either of the governing body membership requirements. However, since consumer numbers can change over time, if the number of care recipients increases to 40 or more at any point, the provider will then need to meet both requirements or apply for a determination.
- If an organisation has fewer than 5 members on the governing body, and more than 40 people receiving aged care services, the provider will need to meet the two governing body membership requirements. If the provider is unable to meet these requirements, the provider will need to submit an application for determination.



2. Does the determination decision apply to the provider or the service?

The Commission will issue a determination decision to the provider and not the service.

3. Can I get a determination decision for the advisory body requirements?

No. The Commission is not able to make a determination decision in relation to a quality care advisory body or a consumer advisory body. A determination decision under section 63-1D of the Aged Care Act only relates to membership of the governing body.

Approved providers will need to meet those other requirements.

4. What if I only need a determination decision for 3 months?

The Commission can make a determination that lasts for 3 months. We have set a maximum timeframe of 12 months for a determination to be in place to give the provider sufficient time to meet the requirements. A provider can use the application form to advise if a shorter period of time is preferred. The reason for the request should be explained in the application form so that the Commission can make an informed decision.

5. What if I need more time than the Commission gives me to meet the requirements?

The Commission will contact a provider approximately half-way through the period for which its determination is in place (so, at around 6 months for a 12 month determination). This will allow the provider

to discuss any unexpected issues or barriers being experienced that are continuing to affect its ability to meet the governing body membership requirements.

At or shortly before the expiry of its first determination period, a provider has the option of applying for another (time-limited) determination.

Definitions

Governing body:

A governing body is a term used to identify the group of people assigned the responsibility to govern an organisation, company or other similar entity. A governing body is a legal requirement of several different forms of for-profit and non-profit organisations.

An organisation's governing body might be called a board of directors, board of trustees, committee, management committee, council, governing board or responsible entity, depending on your organisation's legal form or constitution(s). The individuals who serve on the governing body might be called board members, directors, committee members, non-executive directors or trustees.

Independent non-executive member:

An independent person is objective and their role is to make sure decisions that your governing body makes, deliver positive and meaningful outcomes for your care recipients.

This is consistent with the principles set out in the Australian Securities Exchange (ASX) Corporate Governance Principles and Recommendations. Drawing on these principles, this bulletin includes a [checklist](#) for assessing the independent status of a person who is or could become a member of a governing body.



Clinical care:

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. It includes care provided by doctors, nurses, pharmacists, allied health professionals and other regulated health practitioners. Organisations providing clinical care are expected to make sure the care provided is best practice, meets the consumer's needs, and optimises the consumer's health and wellbeing.

Need to know more?

If you have any questions or feedback on this Bulletin, email: info@agedcarequality.gov.au.

Stay up to date with Regulatory Bulletin releases by [subscribing to the Commission's newsletter](#).

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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