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Solicitors Assisting the Royal Commission
Royal Commission into Aged Care Quality and Safety
GPO Box 1151
Adelaide SA 5001

via email: ACRCfinalsubmissions@royalcommission.gov.au

Dear Solicitors Assisting the Royal Commission,

Response to Counsel Assisting's final submissions

Thank you for the opportunity to provide a response to Counsel Assisting's final submissions and other matters arising at the hearing, including remarks made by Commissioners at the Royal Commission into Aged Care Quality and Safety (**Royal Commission**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses and the government sector. That membership includes directors and leaders from the aged care sector.

The AICD has limited its comments to matters specific to the governance responsibilities of directors. We acknowledge that Counsel Assisting's final submissions cover a much wider range of sectoral issues and reforms.

Executive Summary

The AICD supports, in principle, the majority of Counsel Assisting's submissions on governance matters. The majority of our comments relate to relate to suggestions on drafting, whether matters should be contained in legislation or standards and suggestions on implementation, including the need for consultation. In particular, we have some concerns that some recommendations are too prescriptive and fail to take account of the variety and flexibility necessary for the system to function effectively.

We have specific concerns about the proposal to prevent aged care providers from utilising the provisions of the Corporations Act that allow subsidiary directors to act in the best interest of a holding company (Recommendation 52.1) and the requirement for individual attestation (Recommendation 53.1).

We do not believe the continuous disclosure recommendation (Recommendation 105) is appropriate. We recommend further consideration of proposed banning orders, as discussed below (Recommendation 111.1).

General support for submissions

The AICD welcomes the direction of the submissions. The Royal Commission has heard deeply disturbing evidence of failures in Australia's aged care sector, including with respect to the care and dignity of the

elderly and vulnerable. This evidence should concern all Australians. All involved in the sector, including directors, must reflect on how sub-standard care has been allowed to occur and the actions required across providers, government and stakeholders in response.

The Royal Commission's examination of the aged care sector has been timely and important, and the case for hard reforms, no matter how complex or difficult, cannot be ignored.

The AICD strongly supports the principles recommended by Counsel Assisting to underpin the aged care system including a universal right to high quality, safe and timely support and care to assist older people to live an active, self-determined and meaningful life.

We also recognise that funding reform is critical in addressing the systemic challenges across the sector.[1] We also strongly support the emphasis in the submissions on empowering older people, Indigenous communities, young people, people with disability and on promoting cultural awareness.

Process of preparing this Response

In order to prepare this Response, the AICD consulted with members who are directors of aged care providers in the for-profit and not-for-profit sectors, large and small, rural and metropolitan. This included one on one conversations with directors where the recommendations were discussed.

Response to Recommendations

Recommendation 22.1 – general duty

We support the inclusion of a new general duty in the proposed new Act (to replace the *Aged Care Act 1997* Cth), noting, as Counsel Assisting has said, that it will be an "aspirational duty". It is proper that the new Act contain a statement indicating the duty of a provider is to ensure that the personal care or nursing care they provide is of high quality and safe so far as is reasonable. It is important that in legislative drafting, as well as in the drafting of guidance, consideration is given to the intersection of any proposed general duty with duties already applicable, including statutory duties on directors in s181 of the Corporations Act.

Recommendation 22.2 – duty to provide qualified worker

We support this recommendation in principle, subject to the insertion of "so far as is practicable" in any future legislation. This aligns the wording of the clause with the occupational health and safety legislation referred to in the submissions.[2] Without that qualification the use of the word "ensure" makes it a slightly impractical duty. For example, no employer can "ensure" that a new hire has the skills to perform their role until they observe them once they commence employment. Suggested wording is set out below, with new words underlined:

[1] As far as not-for-profit providers are concerned, the AICD's 2020 Not-for-Profit Governance and Performance Study found that 60 per cent of Health and Residential Aged Care organisations were expecting to either break even or operate at a loss in the 2019/20 financial year. Only 36 per cent of Health and Residential Aged Care reported that their entity had made a profit in the previous financial year. The study over times shows that profitability in not-for-profit aged care has been steadily declining.

[2] See for example s. 21 *Occupational Health and Safety Act 2004* (Victoria); s.19 *Work Health and Safety Act 2011* (NSW).

have a duty to ensure, so far as is practicable, that any worker whom it makes available to perform personal care work has the experience, qualifications, skills and training to perform the particular personal care work the person is being asked to perform.

Recommendation 52.1 – independent members on the governing body of an approved provider

We have marked this as "support in principle" on the spreadsheet rather than "support" based on the suggestion that this be contained in legislation. We support the concept of boards of aged care providers containing a majority of independent, non-executive members with appropriate skills, experience and expertise. Our preference is that it should be contained in a governance standard, as this will allow more flexibility in its application (i.e. it should form part of Recommendation 53). If it is in legislation "independent" would need to be defined, either in the Act or via guidance issued by the regulator.

As noted by Counsel Assisting in their submissions, the AICD has long advocated that boards should have a majority of independent, non-executive directors. It is generally accepted that independent non-executive directors can bring an objective lens to decision-making allowing them to effectively challenge and monitor the management team.

We recognise that there might be circumstances where it is not possible or appropriate for a provider to have a majority independent board – for example in a community care model in an Indigenous community or in a small, remote area with a volunteer board where there may be personal ties between directors and managers. Faith-based charities that provide aged care may draw directors from that faith or congregation. Directors in these circumstances may be non-executive but not "independent" under some definitions. Any provision should not preclude, for example, a member of a not-for-profit being elected to the board.

This is acknowledged in the submissions where it is proposed as an "if not, why not" arrangement. We support that approach, which allows some flexibility for individual circumstances.

Recommendation 52.1 – Governing body acting in the best interests of the approved provider

It is unclear what mischief this proposal is trying to resolve as very little detail is provided in the submission to justify it. Retaining the ability to utilise s.187 of the Corporations Act would not, for example, allow a director to contract out of the new general duty proposed nor escape the power of the regulator to sanction the provider. We are concerned that it may have unintended consequences for directors of entities relying upon this provision for financial restructuring when this might ultimately be for the benefit of a subsidiary that is part of a Group. As far as we are aware, no other sector has seen the need to do this, including the disability and health care sectors which have been able to provide care and act in the best interests of the subsidiary. Limited information is provided in the submissions about what this recommendation is intended to achieve, and it might be worthy of further consultation and investigation by government before being implemented.

Recommendation 52.1 – notification of key personnel and changes to key personnel

We support the requirement of an express obligation to notify the regulator of key personnel and changes to key personnel. Some flexibility should be allowed to the regulator, for example they should have the discretion to extend the timeline beyond ten days where circumstances might warrant it.

We support the maintenance of the definition of "key personnel" on a functional rather than on a deemed position basis so that it captures those individuals who perform the function of planning, directing or controlling the activities of the entity.

Recommendation 52.1 – a "fit and proper person" test for key personnel of an approved provider

We support the inclusion of a "fit and proper person" test in legislation as an appropriate test for persons to serve as key personnel, including on boards of aged care providers. We support the suggestion in the submissions that the responsibility for assessing whether an individual is a "fit and proper person" and the undertaking of due diligence on "suitability matters" be done by the provider. In the case of potential directors this would be done by the board. Some guidance on what a "fit and proper" person is would be required.

Recommendation 52.1 – public annual reporting to government by every approved provider

We support the provision of an annual, public report to government as a statutory requirement including the key matters to be covered in the report. We think it would be preferrable for the detail of what is required in the annual report to be contained in a regulatory guide, while the requirement for the report itself could be legislated.

The contents of the annual report, as set out in paragraph 812 of Counsel Assisting's submissions, should be the subject of consultation with the sector to determine their proportionality and the burden that might be imposed on providers in their collection. For example, further consultation should occur on the level of specificity required for "information on staffing levels, qualifications, hours worked, employment status and turnover" or the definition of "complaints". Clear definitions and guidance would need to be provided so that providers were providing like for like information to the regulator.

Care would have to be taken to avoid the disclosure of personal details, not just of key personnel, but of staff. For example, depending on the level of specificity, in smaller providers, it could be clear how many hours specific employees worked by looking at the staffing data.

Care would also need to be taken that any report did not replicate other reporting that entities might need to provide to other regulators such as ASIC or the ACNC for example, or to shareholders and members. It should be possible for most entities to provide one report that satisfies all regulators rather than a multiplicity of overlapping reports, in order to reduce the resource burden of reporting. This should form a key part of the data governance framework proposed in Recommendation 56.

Recommendation 53 – Governance standard

We support the creation of a new governance standard for the aged care sector in the manner suggested by Counsel Assisting. We believe that the governance standards should be largely principles-based with boards able to determine the best application within their organisation while remaining accountable to government, regulators, clients, families and stakeholders.

Recommendation 53.1 – skills mix of members of an approved provider's governing body

We support the proposed requirement in governance standards that boards must have between them the mix of skills, experience and knowledge of governance to ensure the safety and high quality of care provided. We also support the suggestion in the submissions for boards to undertake an annual skills review and develop a training program.

The AICD provides a number of tools and resources that assist boards to undertake this process including a Checklist for assessing board composition, Guidance for preparing a board skills matrix and guidance on Board evaluation and director appraisal. These resources all enable boards to carry out this work and might form a useful resource for aged care boards in the future.

Some assistance may need to be provided to boards of smaller entities, as well as boards that rely on volunteers, to assist them to improve their skills mix. It is critical that any new mandatory requirements be accompanied by funding to assist individuals to improve their skills and discharge this important public function, as set out in Recommendation 54.

Recommendation 53.1 – care governance committee

We support the requirement for a mandatory Care Governance sub-committee of the Board, noting that there may need to be exceptions, for example where the board itself operates as a care governance committee in a small provider or an Indigenous provider. Alternatively, others might combine their clinical governance with a risk committee. This could be approved by the regulator on application. The governance standards themselves should be clear that having a care governance committee does not absolve the board for their overall responsibility for care governance. This is a core responsibility of the board that cannot be delegated to a sub-committee.

There may be cases where the regulator wishes to approve a Care Governance Committee operating where its Chair does not have experience in care provision, for example where that person resigns and is yet to be replaced or where a volunteer board does not yet have a person with those skills. The regulator should have the discretion to allow that.

The AICD has resources available to directors of aged care providers, such as the Board governance in the aged care sector tool, that provides some guidance for boards on how to establish and run a clinical governance committee.[3]

Recommendation 53.1 – establish systems for feedback and for receiving complaints

The AICD supports the recommendations requiring aged care providers to have a system in place for (a) supporting regular feedback from people receiving aged care, their representatives, and staff to obtain their views on the quality and safety of the services being delivered and ways of improving the delivery of those services; and (b) receiving and dealing with complaints. It is crucial that all providers put in place systems to ensure that its directors are provided with regular reports on complaints and feedback from clients and staff on the quality of services. Such steps form part of a well-developed risk management framework.

The role of director involves a complex spectrum of decisions and matters in the long-term interest of their organisation. The AICD encourages directors to take a long-term view of organisational interest when making decisions and that requires engagement with key stakeholders, including employees, clients and their families.

[3] We are also developing a specific tool for non-executive directors on clinical governance. Education and assistance for directors should also be provided by government to assist those that need to establish a committee, as set out in Recommendation 54.

Recommendation 53.1 – risk management practices

The AICD supports explicit recognition of the need for sound risk management practices in a governance standard. Establishing a risk management framework, including for non-financial risk, is one of the core duties of a board. The AICD has resources and training available to boards to help them manage risk and establish a risk framework. The Board governance in the aged care sector tool provides specific advice on risk frameworks appropriate to the aged care sector including red flags for directors such as chronic workforce vacancies and unresolved client complaints.

Recommendation 53.1 – individual attestation by a member of the governing body

We support this in principle, noting it is currently a requirement for health service providers, although we regard it as a fairly crude method of seeking compliance with the standards. However, it does run contrary to the generally accepted view that the board should collectively take responsibility for decisions of the organisation. It would be inappropriate, in our view, for the relevant attesting officer to face greater exposure to liability than other members of the board or any other individual, in the event that incidents of poor care or misconduct occurred.

We hold concerns that organisations that have strong systems in place will comply with this requirement without the need for individual attestation whereas providers who may be sub-standard, or who have poor governance arrangements in place, are unlikely to alter behaviour because of an individual attestation requirement and will treat it as a "tick and flick" exercise.

Recommendation 54 – program of assistance to improve governance arrangements

We support this proposal for ongoing funding for providers to improve their governance arrangements. We think this is necessary if the enhanced, mandatory governance requirements proposed in the submissions are adopted and given the concerns identified by the Royal Commission for the need for rapid improvement in governance. Assistance could be prioritised for, but not limited to, smaller providers with limited resources. Assistance could encompass the creation of specific tools and resources for aged care providers (some of which already exist as set out above) as well as the provision of specific educational offerings to directors of providers.

If a body is created to manage a program of assistance the AICD would be pleased to assist in the development of resources and educational programs alongside other stakeholders.

Recommendation 100.2 / 104.1 / 107.1 – enhanced financial reporting for prudential purposes

We support the requirement for financial reporting for prudential purposes by the regulator. We note the recommendation at paragraph 1399 of the submissions that the proposed Australian Aged Care Commission would consult with the sector before establishing any aged care specific financial reports. We would strongly urge that this step be taken. Upon examination, it may prove that existing financial reporting frameworks are sufficient for the Commission's requirements – especially as all non-government providers must already submit an audited General Purpose Financial Statement and providers must submit an Aged Care Financial Report

Recommendation 105 – Continuous disclosure

We do not support this proposal in the absence of further details regarding how it might apply. The terminology suggests a similar requirement to the continuous disclosure requirements that apply to listed companies, however it is not clear whether that is intended. It may be that what is contemplated is something more in the nature of incident reporting under model workplace health and safety legislation

or APRA's disclosure requirements for private health insurers (although this proposal goes much further). None of this is clear from the submission, nor is it clear whether this would be something that might be advised to a regulator as a matter of course or would require board sign-off.

We are concerned about the proposed requirement to disclose to the regulator when the provider becomes aware of material information that affects the provider's ability to pay its debts as and when they become due and payable. This is, presumably deliberately, drafted much more widely than the duty of a director to prevent insolvent trading in s.588G of the Corporations Act which refers to reasonable grounds for suspecting that the company is unable to pay its debts as and when they become due and payable. The requirement to disclose "material information that affects the provider's ability to pay its debts" could potentially encompass a very wide range of activities from entering into or negotiating a loan, embarking on a capital expenditure program or deciding to run a temporary budget deficit.

Given that failure to comply with this obligation is anticipated to amount to an offence, a cautious provider may decide to disclose large amounts of information to the regulator, to avoid the threat of sanction. Given the requirement for capital adequacy and liquidity disclosures it is unclear what else could be expected under this continuous disclosure regime.

In the event that this recommendation was adopted, extensive guidelines would need to be developed by the proposed Australian Aged Care Commission to assist providers with their continuous disclosure obligations. This should be done in consultation with the sector. This could include examples, case studies and scenarios to ensure that providers are not unwittingly committing an offence by failing to disclose information, or alternatively disclosing too much information to the regulator.

It would also be critical that any disclosure to the regulator be private and not public. This would be significant to their implementation, both for general reputational risk and relationship with suppliers and for any listed entity managing their ASX continuous disclosure requirements, particularly given its broad application.

Recommendation 109.1 – contravention of the Act

We support the creation of a new civil penalty offence for a contravention of the Act, including the new general duty set out under the Act. The composite nature of the drafting of the offence as set out in the submissions is important, for example it would be too likely that providers would breach the "aspirational" general duty if it was a stand-alone offence. Offences should be confined to the circumstances set out in the submissions, that is where the breach gives rise to harm or the risk of harm and there has been a failure to comply with one or more of the Aged Care Quality Standards. Consideration should be given to appropriate defences to accompany offences and penalties, including due diligence defences where applicable.

Recommendation 109.1 /110 – accessorial liability

We accept that, if an offence is to be created, there should be a provision for accessorial liability for key personnel, including directors. We also support the provisions as set out in the submissions which are similar in form, for example, to the accessorial liability provisions applying to directors under s.256 of the model Workplace Health and Safety Act as well as many other accessorial liability clauses under state and federal legislation. It is appropriate that the wording of any accessorial liability clause be expressed in similar terms to that which applies to breaches of similar duties other legislation.

The concept of an individual who "aids, abets, counsels or procures", "induces" or is "knowingly concerned" in a contravention are well understood by courts and set an appropriate level of potential liability for directors. As a matter of good governance and in order to promote accountability, individuals should only be held liable where there is some level of actual involvement. For example, this would not include imputed or constructive knowledge, where a person's knowledge is assumed because of their position or some duty to take reasonable care.

Where key personnel, including directors, have been knowingly concerned in a contravention then it is appropriate that they face sanction and that this act as a sufficient deterrent. This is consistent with principles of accountability and good governance.

As a civil penalty, the onus should be on the Australian Aged Care Commission to prove, on the balance of probabilities, that the person was involved in the contravention.

We accept that there might need to be some private remedy enforceable by the regulator where this has occurred as set out in Recommendation 110. This would need to be limited to accessorial liability in the case of an individual. As set out above, there should be appropriate defences for individuals who might be subject to a claim for individual remedy, including due diligence defences where applicable. High-level statutory guidance outlining what is required to satisfy the defence should also be available.

Recommendation 111.1 – Banning orders

Limited information is provided in the submissions about what "banning orders" powers would be given to a regulator and whether they would, for instance, apply to key personnel and directors. The circumstances in which a banning order would be applied are not discussed. It is not clear whether it is proposed that the regulator be granted an administrative power (for example, ASIC's power under s.920A of the Corporations Act for persons holding Australian financial services licences) or the power to apply to a court for a banning order (for example, ASIC's power under s.206 of the Corporations Act). It is also unclear whether a proactive power is contemplated.

Banning orders are significant remedies that will have a severe consequence on a recipient's professional reputation and livelihood. They should only be applied when they are necessary to protect consumers, proportionate to the misconduct, and subject to well-established administrative law, procedural fairness and natural justice principles. Generally, ASIC is generally the regulator which makes applications for banning orders although APRA, the ATO and the ACCC can do so in limited circumstances.

Recommendation 112 – new regulator

We support this in principle, noting that the evidence before the Royal Commission has justified the need for a new regulator with enhanced investigative and enforcement powers. There may need to be further consideration given to how that regulator will use its powers appropriately and proportionately with providers and individuals afforded natural justice including due process and proper rights of appeal. There should also be proper independent oversight of the exercise of these powers.

Response to remarks made by Commissioner Briggs – Provider leadership and culture

We support the remarks made by Commissioner Briggs around provider leadership and culture. What leaders do and say sets the tone for the rest of the organisation. As the board takes the highest leadership role in the organisation, how directors behave (for example, the quality and character of their discourse) and the decisions they make in the boardroom (for example, strategic directions, risk appetites

and remuneration frameworks) directly affect how the CEO and senior management perceive and embody their roles, and how they influence the organisation's overall culture. Effective governance identifies culture as an important lever to create value.

In this strategic context, the role of the board is to provide ongoing and effective cultural stewardship and oversight. As part of this role, it is important that directors take proactive steps to understand and assess the systems of culture (both formal and informal) in their organisation and work with management to leverage opportunities and implement changes where necessary. The AICD has released a tool Governing Organisational Culture to help directors with that task.

On a practical level it is difficult to see how enforceable requirements on culture could be drafted in a governance standard other than a general statement acknowledging the role of the board and senior management in setting and monitoring culture. In particular, it may only be apparent that a cultural problem exists after an instance of poor care or misconduct. Instead cultural oversight might form part of the educational offering and training for management and boards already discussed.

Next steps

We hope our Response will be of assistance to the Commissioners as they finalise their report. If you would like to discuss any aspects further, please contact David McElrea, Senior Policy Adviser at dmcelrea@aicd.com.au, or Christian Gergis, Head of Policy, at cgergis@aicd.com.au.

Yours sincerely,

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