Corporate and Clinical Governance Update for Health and Aged Care Providers

by Alison Choy Flannigan, Partner

1. What is Corporate Governance?

Corporate governance is a broad-ranging term which, amongst other things, encompasses the rules, relationships, policies, systems and processes whereby authority within organisations is exercised and maintained.[1]

An effective governance framework should have appropriate regard to the:

- contribution of individual directors;
- effectiveness of the board and board performance;
- financial performance and governance;
- ways in which governance is applied throughout the organisation; and
- strength of the relationships the organisation fosters with its stakeholders.

2. What is Clinical Governance?

Clinical governance is the set of relationships and responsibilities established by a health/aged care service organisation between its governing body, executive, clinicians, patients, consumers and other stakeholders to ensure good clinical outcomes. It ensures that community and health/aged care service organisations can be confident that systems are in place to deliver safe and high-quality care, and continuously improve services.[2]

Clinical governance includes:

- evidenced based models of care;
- clinical/care case management;
- ensuring that the organisation meets its duty of care to patients/residents;
- governance, leadership and culture to improve safety and quality;
- patient safety and quality improvement systems;
- appropriate clinical policies and procedures, including in relation to medication management and infection control;
- clinical performance and effectiveness, ensuring that the workforce has the right qualifications, skills and supervision to provide safe, high quality care to patients/residents/clients, together with clear responsibilities and accountability;
- a safe environment for the delivery of care;
- partnering with consumers in their own care including health literacy;
- a multi-disciplinary approach to and input into clinical policies and practice (including medical, nursing, mental health/dementia, geriatrics, palliative, pharmacy, dietician, allied health, social workers, etc.); and
- reporting, audit and accountability, for example, adverse events and incidents.

3. What is an Integrated Corporate and Clinical Governance Framework?

In organisations such as health and aged care providers (including hospitals) the Board is ultimately responsible for both corporate and clinical governance and both are equally important.

Directors and officers owe obligations under common law, and depending upon whether the company is 'for-profit' or 'not for profit' under the *Corporations Act 2001 (Cth)* and/or under the Governance Standards of the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)*.

Foremost, the Board must lead by taking ultimate responsibility for clinical governance.[3] It is not appropriate for Boards to focus only on corporate management, whilst leaving clinical and care issues "up to the clinicians." There is a significant error in this thinking as demonstrated by the Oakden case described below. If the Board does not have the expertise, then the company should consider appointing independent director(s) with that expertise or obtain that expertise through a Board subcommittee or an advisory committee.

In many respects there is an overlap of corporate and clinical risks. A major clinical adverse event will have a negative impact upon the reputation and potentially the financial performance of the organisation.

An integrated corporate and clinical governance framework means that both corporate and clinical risks are reviewed in a holistic way including:

- a culture of compliance;
- setting the strategic direction for the organisation and its clinical/care services;
- ensuring the correct skill mix of the Board, including the appointment of independent directors with clinical skills as necessary;

[1] http://aicd.companydirectors.com.au/resources/all-sectors/what-is-corporate-governance
[2] *National Model Clinical Governance Framework* - Australian Commission on Safety and Quality in Health Care 2017, page 2.
[3] *The Board's Role in Clinical Governance*, Australian Institute of Company Directors 2011, page 16.

- appointment of appropriate Board sub-committees such as an audit and risk committee – independent of management – the role of audit and risk committees should include responsibility for both corporate/financial and clinical risks;
- board policies dealing with issues such as code of conduct, conflict of interest, delegation and confidential information;
- ensuring the responsibilities of managers for corporate and clinical responsibilities are clearly delineated so that there are no gaps and that they are clearly understood;
- involving stakeholders in decisions that affect them, including a consumer-driven model of care;[4]
- establishing sound audit and risk management practices and reporting (both corporate and clinical);
- monitor financial performance, reporting and compliance with standards;
- appropriate policies and procedures;
- legal and regulatory compliance as the sector is highly regulated, including in relation to accreditation, work health and safety and medications;
- appropriate skill mix and qualifications or managers and clinicians;
- orientation, training, continuing education and support, including education for the Board and managers; and
- ensuring that responsibilities are clearly understood and that managers are appropriately qualified and experienced; the implementation of a performance framework and accountabilities and ensuring that high standards of professional and ethical conduct are maintained.

[4] *Adding Value to Governance in Aged Care*, Governance Institute of Australia 2017

4. Why is Governance Relevant? – recent cases and lessons learnt

4.1 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

On 14 December 2017, the Governor-General of the Commonwealth of Australia, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd) appointed former High Court Judge, the Honourable Kenneth Madison Hayne AC QC, to inquire into and report on misconduct in the banking, superannuation and financial services industry.

Some of the behaviours presented in the testimony of witnesses include:

- misleading regulators;
- charging people for products and services that they did not receive; and
- failing to compensate people in a timely manner.

The Royal Commission has raised serious governance issues.

A fundamental principle supporting governance is that Boards are accountable for the culture of their organisation and there would appear to have been significant cultural issues in terms of expectations of compliance.

Whilst banking, superannuation and finance is a different industry to the health and aged care sector, there are lessons to be learnt for every Board in Australia. A fundamental principle supporting governance is that Boards are accountable for the culture of their organisations, including accountability and transparency. Similar to banks, the health and aged care sector can greatly affect the lives of vulnerable consumers.

4.2 The Oakden Reports

In South Australia, there have been two investigations into systemic errors at the Oakden Older Persons Mental Health Service Review facility, which was a mental health facility and a residential aged care facility.

Oakden has resulted in two reports:

- *The Oakden Report – The Report of the Oakden Review* – Dr Aaron Groves, Chief Psychiatrist (April 2017)
- *Oakden, A Shameful Chapter in South Australia's History* – A Report by the Hon Bruce Lander QC ICAC (February 2018)

The Oakden Report (2018) indicated systemic errors involving: [at page 23]

- elder abuse, including the inappropriate use of excessive force and seclusion of consumers;
- the failure to report suspected misconduct;
- poor governance in respect of the use of nursing agency staff;
- inappropriate physical condition of facilities;
- alleged assault by staff on a consumer;
- alleged attempt by two nurses to catheterise a consumer with incorrect equipment and without consent;
- alleged failure of a nurse to follow up an invasive procedure that was performed without consent; and
- alleged persistent inappropriate behaviour by a nurse towards consumers.

Lessons to be learnt included [at page 15 of 2018 report] that the regime existed, (that enabled the Oakden Facility and its operators to deteriorate to such an extraordinarily poor state) for such an extended period of time without any meaningful intervention.

Closing the facility without fully and properly understanding how and why the facility and its operations could deteriorate to such an extent, seemingly unchecked, leaves open the very real possibility that similar failures could be perpetuated in the future in other settings.

The extent to which senior persons in positions of authority outside the Oakden Facility did not know about what was occurring at the facility was breathtaking.

Nobody had overall control over the facility. Nobody had full time responsibility solely for Oakden. It was an extraordinary management structure.

Recommendations included: [at page 16 of the 2018 report]

(a) Consider adopting management structures for the administration of the *Mental Health Act 2009* (**MHA**) to match those of overall mental health clinical governance structures – eg an officer responsible for overseeing all clinical mental health care within a Local Health Network (**LHN**) as the responsibility for the administration of the MHA in that LHN

(b) Implement a structure to routinely remind all staff working at a treatment centre, assign responsibilities at the centre and the expectations and responsibilities imposed on that staff member;

(c) Chief Psychiatrist to have the power to conduct unannounced visits;

(d) Reporting on condition of all facilities in which health services are delivered and to ensure that they are fit for the purpose for which they are being used;

(e) New standards in relation to the use of restrictive practice and making the observance of those standards mandatory;

(f) Adequate allied health staff to provide the necessary support at the facilities.

There was a significant failure of corporate and clinical governance illustrated by the Oakden Report. Senior people who were responsible by virtue of their office for the delivery of care and services to the consumers in the Oakden Facility, should have known what was going on.

4.3 Bergin Inquiry

On 12 February 2018, the NSW Government released the report of former NSW Supreme Court Justice Patricia Bergin, SC into the fundraising activities of RSL NSW, RSL Welfare and Benevolent Institution and RSL LifeCare (the **Company**).

The Honourable Bergin SC found that:

- the Company had not properly considered its obligations under Charitable Fundraising legislation;
- the Board had an obligation to have in place mechanisms that would assist the directors to recognise and deal with any conflicts of interest that arose;
- there was no advice given to either RSL NSW or RSL LifeCare for the need for ratification of the consulting fees by the members in general meeting; and
- RSL LifeCare did not obtain Ministerial approval for the remuneration or disclose same in its accounts, and its accounts did not comply with the requirements of the *Charitable Fundraising Act 1991* (NSW) (**Charitable Fundraising Act**)

A copy of the report is available at: https://www.finance.nsw.gov.au/inquiry-under-charitable-fundraising-act-1991/

All not-for-profit health and aged care providers who are registered as a charity with the Australian Charities and Not-for-profits Commission must ensure that they comply with the ACNC Governance Standards available at: http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx

Not all charities realise that fundraising is more than 'rattling the tin'. Charitable fundraising can involve raising funds through your website, through raffles or special events organised by the organisation with volunteers and residents.

If a charity has a charitable fundraising authority, then it must also comply with the relevant State/Territory charitable fundraising authority conditions. For example, in New South Wales there are special requirements for constitutions, dispute resolution, the financial accounts and auditing. Refer to: http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising/Fundraising_controls.page

A Charitable Fundraising and Donations Policy and Charity Pack for staff and volunteers which complies with legal requirements is a recommended compliance tool.

The NSW Charitable Fundraising Act defines "fundraising appeal" broadly as follows:

(1) For the purposes of this Act, the soliciting or receiving by any person of any money, property or other benefit constitutes a fundraising appeal if, before or in the course of any such soliciting or receiving, the person represents:

(a) that the purpose of that soliciting or receiving, or

(b) that the purpose of an activity or enterprise of which that soliciting or receiving is a part,

is or includes a charitable purpose.

(2) It does not matter whether the money or benefit concerned is solicited or received:

(a) in person or by other means (such as by post, telephone or facsimile transmission), or

(b) as a donation or otherwise (such as by participation in a lottery, art union or competition; by sponsorship in connection with a walkathon, telethon or other similar event; in connection with the supply of food, entertainment or other goods or services; or in connection with any other commercial undertaking).

(3) The following do not, however, constitute a fundraising appeal for the purposes of this Act:

(a) a request for, or the receipt of, an amount required in good faith as the fee for renewal of membership of an organisation,

(b) an appeal by an organisation to (or the receipt of money or a benefit from) members of the organisation,

(c) a request that any property be devised or bequeathed, or the giving of any information as to the means by which any property may be devised or bequeathed,

(d) an appeal conducted exclusively or predominantly among persons sharing a common employer or place of work by one of those persons (being an appeal for a charitable purpose connected directly with another of those persons or any such other person's immediate family) and the receipt of money or a benefit from any such appeal,

(e) an appeal to (or the receipt of money or a benefit from) any Commonwealth, State or local government authority,

(f) anything prescribed by the regulations.

5. Commentary

The common thread to all three of these recent cases was that:

- respective Boards did not necessarily understand the legal and compliance obligations of the organisation or did not implement them;
- that they failed to have a clear picture of what was actually going on inside their organisations; and
- the organisation did not have a culture of compliance.

So what is a culture of compliance and how can you test if you have one?

A culture of compliance is when everyone in the organisation from the Board down to all staff and volunteers embed compliance into their everyday workflow and the foundation and expectations for individual behaviour to comply is set across an organisation.

Alison Choy Flannigan has undertaken corporate and clinical governance reviews for many "for-profit" and "not-for-profit" clients and have sat on Risk Committees of major private and public hospital operators and other health organisations. She undertook a corporate and clinical governance review for RSL LifeCare in response to the Bergin Inquiry and her recommendations have been included in the Bergin Inquiry Report.

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