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COFFEE TALK - DIRECTORS SERIES

A HEALTH INDUSTRY SEMINAR SERIES

What Directors Need to Know: Quality of Care, Privacy and Accountability



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Agenda

1. Governance First Principles
2. Accountability and Transparency
3. Board Responsibility for Quality of Care
4. Enterprise Risk Management: Privacy and Cyber

Governance First Principles: Board Responsibilities

Duties and responsibilities informed by:

- Common law governing corporations
- Ontario *Corporations Act*
- Articles, letters patent, by-laws of the institution
- Legislation specific to organization (i.e. PHA, LTCHA, HCCSA)
- General legislation that applies to all directors (e.g. Employment Standards, OHSA, etc.)

Governance First Principles: Duties of Directors

1. Fiduciary Duties

- Exercise power in good faith and honesty
- Duty of loyalty to the Corporation
- Avoidance of conflict of interest
- All directors owe same duty – whether elected or appointed (*ex officio*)

2. Duty of Reasonable Care and Skill

Directors' Liability – Standard of Care

- No standard of care set out in *Corporations Act* (there is in *Not For-Profit Corporations Act, 2010* but it is not yet in force)
- In the interim, amendments proposed to the *Corporations Act* September 2017

127.1 (1) Every director and officer, in exercising his or her powers and discharging his or her duties to the corporation, shall,

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

- May be set out in specific statute (i.e. s. 69 LTCHA)
- May be statutory protections from liability (i.e. s. 13 PHA)

Board Responsibilities and Duties

- General Duties:
 - Corporate responsibility for reasonable policies/safe environment
 - Quality of care
 - Legislative compliance
 - Performance of senior management
- Specific responsibilities as prescribed by legislation (i.e. PHA, LTCHA, HSSCA)

The Changing Face of Health Care

- Increased focus on “accountability” and “transparency”
- Supported/implemented by “umbrella” legislation
 - *Commitment to the Future of Medicare Act, 2004*
 - *Local Health System Integration Act, 2006*
 - *Broader Public Sector Accountability Act, 2010*
 - *Excellent Care for All Act, 2010*
 - Amended by Bill 41, *Patients First Act, 2016*
- Operational mechanisms, e.g. Broader Public Sector Directives, Service Accountability Agreements, attestations

Accountability & Transparency

Local Health System Integration Act, 2006

- Preserves voluntary board governance for HSPs
- LHIN planning, funding and integration mandate (now delivery of health care services as well)
- Health service providers → Service Accountability Agreement with LHIN
 - Funding terms and conditions, performance goals and objectives, targets and measures, policies and directives etc.
 - Must achieve balanced budget
 - Compliance attestation

Accountability & Transparency

Broader Public Sector Accountability Act, 2010

- Public reporting
- Compensation and wage restraint
- Perquisites, Procurement, Expenses, Business Plans and Directives
- Business Plans
- Compliance and attestations
- Enforcement provisions
- Obligations applicable to HSP under BPSAA are deemed to be incorporated into SAA or other funding agreement

Accountability & Transparency

Patients First Act, 2016

Ministry directives

- Operational or policy directives to LHINs or public hospitals – public interest
- Provincial standards for provision of health services by LHIN or HSPs – public interest
- May be general or particular in application
- LHIN/HSPs must comply
- Protection for denominational HSPs

Accountability & Transparency

Patients First Act, 2016

- LHIN Directives:
 - May issue operational or policy directives to HSPs where in public interest (except LTC homes and hospitals)
 - May direct that HSPs undergo audit, operational or peer review
- LHIN may appoint investigators to report on quality of management, quality of care/treatment provided, other matters
- LHIN may appoint supervisor (excludes hospitals and long-term care homes)

Accountability & Transparency

Implications?

- Generally, LHIN/MOHLTC immune from liability by statute
- No recourse to MOHLTC
- Conflict with board responsibilities
- Tort liability lies with the health service provider
 - Held to standards for practice, staffing levels and qualifications, equipment, etc.

Board Responsibility for Quality

- Common law obligations
 - Duty of care owed to patients/residents/clients
 - Corporate responsibility – responsible for staff, equipment, facility, as well as “systems” responsibilities
- Obligations set out in governing legislation – may require by-laws, systems, processes, policies, reporting
- *Excellent Care for All Act, 2010*
- Accreditation and industry standards



Statutory requirements - Examples

- *Public Hospitals Act* and Regulation 965
 - By-laws and quality processes
 - MAC to advise Board on matters relating to quality
 - ECFAA Quality Committee
- *Home and Community Care Services Act, 1994*
 - quality management system for monitoring, evaluating and improving the quality of community services provided or arranged
- *Long Term Care Homes Act, 2007*
 - quality improvement and utilization review system that monitors, analyzes, evaluates and improves the quality of the accommodation, care, services, programs and goods provided to residents of the long-term care home

Excellent Care for All Act, 2010

- Public hospitals must establish Quality Committee
 - Composition set by Regulation
 - Monitors and reports to Board on quality issues and overall quality of services provided
 - Considers and makes recommendations to the Board regarding quality improvement initiatives and policies
 - Oversees preparation of annual Quality Improvement Plan which identifies performance improvement targets and justification for those targets

Other Legislation

- *Quality of Care Information Protection Act, 2016*
- *Public Hospitals Act – Regulation 965 - Disclosure of Critical Incidents*
 - Mandatory disclosure of critical incidents, analysis of critical incidents and identifying systemic steps to avoid or reduce the risk of further similar critical incidents
 - Aggregate critical incident data provided to Quality Committee twice annually
- *Apology Act*
- *Freedom of Information and Protection of Privacy Act*

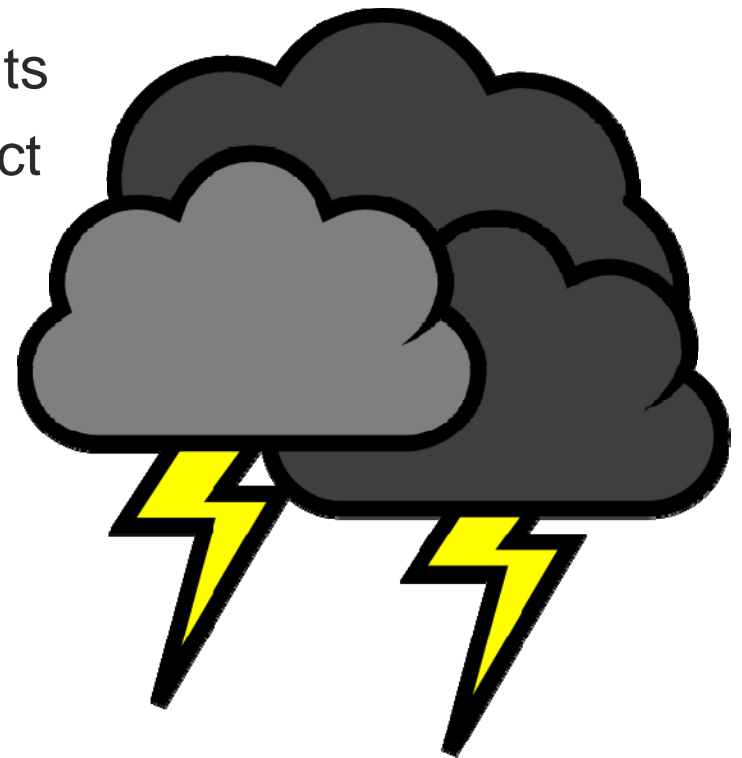
Board's Role in Ensuring Quality

- Quality is a strategic priority for Board, is incorporated into mission, vision and values and all aspects of decision-making
- Board members are knowledgeable about quality principles and receive adequate training / assistance
- Board members know what questions to ask and receive the information they need to assess and monitor quality
- Senior leaders (administrative and clinical) are accountable to the Board for quality performance

Be mindful of governance vs. management responsibilities!

Healthcare: The Perfect ERM Storm

- Complex, highly regulated environment
- Board responsibility for key areas of operational performance (i.e. quality and patient safety, privacy)
- Dependency on funding/funding constraints
- Product quality has direct consumer impact
- Open and transparent process
- Obligations extend beyond organization



Example – Privacy / Cyber

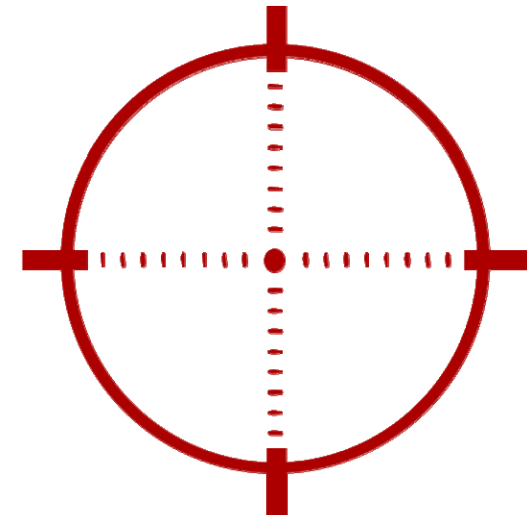
- Board responsibility for privacy and security of personal information and personal health information → PHIPA, FIPPA
 - PHIPA HIC = “person who operates” = corporation
 - FIPPA “Head” = Chair of Board
- Exponential growth in use of technology, electronic health records, data sharing, electronic communications, medical devices and monitoring technologies, personal devices, video surveillance, social media, etc.
- Complex regulatory environment, evolving standards and resource constraints

Privacy Risk

- Increasing concern regarding risk of identity theft
- Mandatory reporting of privacy breaches where PHI is stolen or lost or if it is used or disclosed without authority
- Emerging privacy torts for breach of privacy (i.e. “intrusion upon seclusion”; “public disclosure of private facts”)
- Significant increase in privacy class actions across Canada (still early stages) for loss/theft of PHI and unauthorized access (snooping)
- Reputational risk

Cybersecurity Risk

- May result in privacy breach
 - PHI is valuable
 - Slow to adapt
 - Wealth of information
 - Vulnerable to human error
 - Wide range of communications technologies
-
- **Health sector experiencing significant increase in the growth of intentional attacks**



Enterprise Risk Management

- Align management's responsibility to manage operational risk and the Board's responsibility to ensure risk oversight
- Management of risk within organization's risk tolerance
- Effective decision-making and good governance
- Creation of an ERM culture

Applying an ERM Framework

Example: Privacy and Cyber Risk

- ERM approach to privacy goes beyond asking whether the hospital's privacy policies and procedures are adequate to consider the needs and capabilities of the enterprise

Applying ERM Framework

- Proactive process for assessing and addressing risks across an organization that threaten the achievement of its strategic goals and objectives
- Framework for understanding and prioritizing organizational risks
- Measures the degree to which an organization is successful in controlling key risks

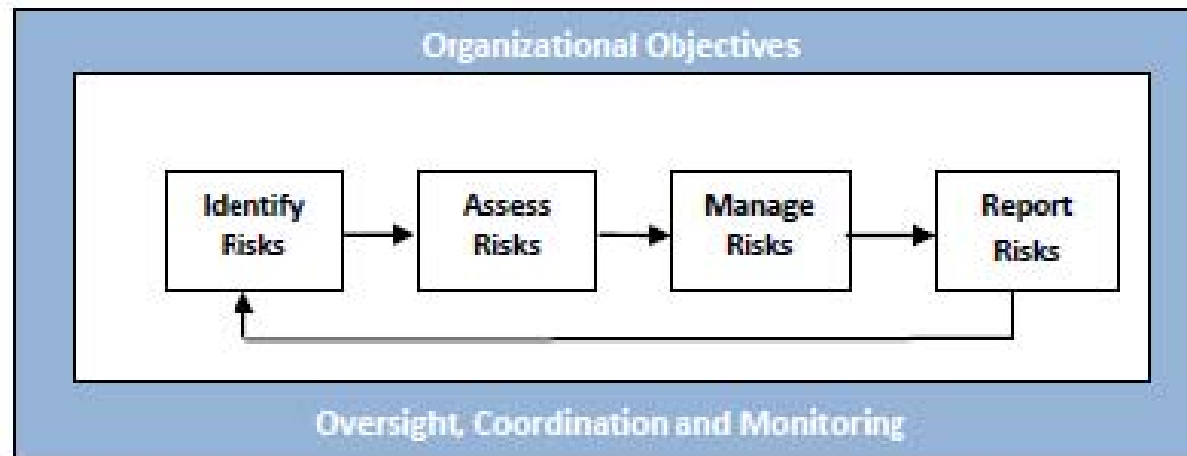


Figure 1: Simplified IRM Framework

1. Identify Risks

- Events that may have a negative impact represent risks
- Events that may have a positive impact represent opportunities (management can channel back as part of strategy)
- Identify internal (i.e. staff snooping) and external (i.e. hackers) factors that could impact strategy and achievement of objectives

2. Assess Risks

- Understand the extent to which potential events might impact objectives
- Assess risk from two perspectives:
 - Likelihood of risk (rare → almost certain)
 - Impact (insignificant → extreme)
- Risk Matrix / Grading tool – rank risk, establish baseline and measure progress and trends over time

3. Manage Risks

- Identify and evaluate possible responses
- Evaluate in relation to risk appetite, cost / benefit analysis and degree to which a response will reduce impact or likelihood
- Select and execute response based on evaluation

Manage Risks - ERM Strategies

Risk Management Strategy	Examples
Avoid	Do not start or terminate program or activity (i.e. technology or software that does not meet organizational privacy and security standards)
Remove	Discontinue obsolete or faulty software or system
Change Likelihood (prevent or reduce)	Enhanced training, policy development or system improvement
Change Consequences	Privacy breach protocol / notification process
Risk sharing or risk transfer	Privacy / Cyber Insurance Outsource or contract out
Retain Risk (informed decision)	Legacy systems and technologies

4. Report

- Evaluate and report on risks
- Re-evaluate

Questions?

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