

## Imbalanced Commission Report Does Not Do Enough to Make Nursing Homes Responsible for Resident Safety and Quality of Life

SEPTEMBER 2020

### Summary

Justice in Aging Directing Attorney Eric Carlson served on the Coronavirus Commission on Safety and Quality in Nursing Homes. He did not endorse the Final Report, because of its imbalance. The Final Report recommends dozens of obligations for the federal government, but does little to set higher standards for nursing homes, or to ensure nursing home accountability.

### The Commission and its Final Report

On April 30, 2020, President Trump announced formation of a task force to advise the federal government on how to address COVID-19 infections and deaths in nursing homes. The project was carried out under a government contract with the Mitre Corporation, which accepted nominations for membership and, on June 19, announced the 25 members of the Coronavirus Commission on Safety and Quality in Nursing Homes. The Commission was tasked with making recommendations to the Centers for Medicare & Medicaid Services (CMS) on how to protect nursing home residents and staff members during the COVID-19 pandemic. Mitre performed logistics, convening, and report writing. Ultimately, 13 members endorsed the report without reservation, 11 members endorsed the report with reservations, and one member (Eric Carlson of Justice in Aging) did not endorse the report.

### Eric Carlson's Dissenting Statement

The Commission's Final Report makes 27 Principal Recommendations, with over 100 action steps. With limited exceptions, these recommendations and action steps do not address accountability of nursing homes and their operators. The result is an imbalanced report that gives a misleading impression of CMS's role.

In the longstanding and appropriate model, CMS funds nursing home care (through Medicare and Medicaid payment) and enforces the quality of care standards of the federal Nursing Home Reform Law. Nursing homes have responsibility for training their own staff, with occasional assistance from federally funded Quality Improvement Organizations.

For years, nursing home lobbyists have attempted to degrade this model. They characterize improved quality of care standards as “unfunded mandates,” even though Medicare and Medicaid payment rates are designed to be all-inclusive. Also, they criticize the supposed “punitive” nature of CMS’s system to penalize violations of the Nursing Home Reform Law, and argue that surveyors should consult with and “assist” facilities rather than enforce the federal requirements. These types of arguments, unfortunately, have found their way into some of the Final Report’s recommendations.

## Principal Weaknesses in Final Report

The Final Report’s major weakness is its failure to address enforcement of federal quality of care standards. Deficient facility practices bear significant responsibility for the volume of COVID-19 infections and deaths; accordingly, any comprehensive report must acknowledge and address CMS’s role in enforcing quality of care standards. The Final Report, however, has nothing to say about surveys, complaint investigations, and enforcement remedies.

Similarly, the Final Report falls short in proposing improvements to facility infection prevention and control standards. Under current regulations, facilities must contract with an infection preventionist on a part-time basis; in practice, most facilities simply add “infection preventionist” to the job duties of one of the facility’s nurses. The Final Report recognizes this problem but is unwilling to require nursing homes to employ an infection preventionist on a more consequential basis. Instead, the Final Report calls on CMS to “[i]dentify and deploy infection-preventionist resources to provide immediate assistance to nursing homes without full-time infection prevention support,” through collaboration with various government agencies and private entities (p. 44). As a practical matter, this recommendation and the proposed collaboration are fanciful – the federal government cannot and should not be responsible for pursuing ad hoc relationships to staff 15,000 nursing homes with full-time infection preventionists.

Likewise, the Final Report recognizes the value of full-time Registered Nurses but is unwilling to make nursing homes responsible. Instead, the Final Report calls on CMS to “provide 24/7 RN staff augmentation” by “[l]everag[ing] federal relief funds” and collaborating with state and local authorities (p. 44). This again is unrealistic, as are other recommendations that call on CMS to identify funding that may be nonexistent, insufficient, or designated for other purposes (*see* pp. 39, 42, 43, 49).

The same unwillingness to make nursing homes responsible pervades the Final Report. Instead of setting requirements, the Final Report recommends that CMS “urge” better staffing practices, and “reinforce” the role of medical directors (p. 43). In a similar vein, the Final Report makes multiple recommendations that CMS be responsible for providing nursing homes with training, technical assistance, or management tools, in conflict with CMS’s role as enforcer of nursing home standards (pp. 35, 45, 50, 54).

Finally, it should be noted that the Final Report fails to address alternatives to nursing facilities. Although the Final Report appropriately discusses potential long-term changes to the nursing home model and nursing home buildings (pp. 56-59), it does not address policy changes that would enable greater numbers of people to live at home with supportive services, rather than in a nursing home.

## Positive Aspects of Final Report

Many of the Commission's recommendations are both important and entirely consistent with CMS's proper role. This applies in particular to the recommendations for CMS responsibility related to COVID-19 testing and personal protective equipment (pp. 19-27). Likewise, the Commission's recommendations related to cohorting and visitation (pp. 28-37) are largely positive.

## Conclusion

The Commission was given an urgent task. During this pandemic, life continues to be difficult and unsafe for nursing home residents and staff members. Potential solutions should appropriately allocate responsibility to all parties – including nursing home operators – with a sense of urgency commensurate to the current crisis.