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Department of Health and Aged Care

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Dear Department of Health and Aged Care

### **A New Aged Care Act: The Foundations - Consultation Paper No. 1**

Thank you for the opportunity to provide a late submission on the proposed foundations to update and modernise the *Aged Care Act 1997* (**Aged Care Act**).

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 of more than 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises and the government sector.

The AICD has a number of members who are involved in the governance and management of aged care providers, including as directors of some of Australia's largest providers. Engagement with these members has informed our policy position in this submission.

### **Executive Summary**

This submission is limited to the new proposed duties of care at an organisational, responsible person and individual worker levels.

As detailed below, the AICD has significant concerns about the proposed imposition of new personal duties on the responsible persons and individual aged care workers. There is a genuine risk that the weight of new personal liability will deter well-qualified individuals from serving on the boards of aged care providers, including those with clinical experience. Such an outcome will undermine the recent governance reforms to the Aged Care Act and ultimately lower governance practices in the sector, thereby increasing the risk of poor resident outcomes.

The AICD also does not support a new duty on aged care workers. We consider that the imposition of such a duty is unnecessary and punitive impost on relatively low paid frontline workers and will have a very detrimental impact on the recruitment and retention of staff at a time when staffing challenges are acute.

We are concerned that the impact of these reforms, in combination with the recent changes to the Aged Care Act that providers are currently struggling to implement, will result in significant detrimental impacts on the viability of small, NFP and faith-based providers.

The AICD looks forward to participating in the consultation on the exposure draft legislation when it is released. We can also assist in facilitating consultation between the Department of Health and Aged Care (the **Department**) and directors of aged care providers.

## A new duty of care and compensation pathways

This section responds to questions 15 – 18 of the consultation paper.

### Statutory duty on registered providers

The AICD submission in 2020 to the Counsel Assisting's final submissions to the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) was supportive in-principle of a statutory duty associated with the provision of care being imposed on registered providers.<sup>1</sup>

Consistent with the Royal Commission recommendations, the AICD remains supportive of a new duty on providers that will be focussed on ensuring they take reasonable steps to avoid their actions adversely affecting the health and safety of persons in their care. However, as discussed further below in respect of a duty on responsible persons, we do consider that the workplace health and safety legislation may already cover the provision of care in aged care settings. We encourage the Department to assess the degree to which existing legislation already imposes obligations on providers and responsible persons to provide safe and healthy workplace settings, for both employees and residents.

The AICD supports the policy detail in the consultation paper that the penalties for a breach of the duty will only apply where a failure to take reasonable steps results in a risk to, or actual serious illness, injury or death of an individual to whom the duty is owed. We recommend that this threshold and what constitutes 'reasonable steps' is detailed in both the primary legislation and the explanatory memorandum. Absent legislative detail on the threshold and 'reasonable steps' for a breach of the duty, providers will face a high degree of uncertainty about the standards of care they are required to meet. This would also limit the ability of the governing body of the provider to have effective oversight of this duty.

We also recommend that the introduction of a provider duty be supported with extensive guidance. This guidance would provide additional detail on best practice for taking reasonable steps and reflect the interaction between the duty and other care obligations, notably the Aged Care Quality Standards and workplace health and safety law.

### Responsible persons of registered providers

The AICD does not support a new duty on responsible persons of registered providers, as currently proposed in the consultation paper.

We note that a duty on responsible persons was not recommended by the Royal Commission. Further, the AICD considers recent governance focused reforms to the Aged Care Act are already designed to drive enhanced accountability at the governing body level and a new duty would be an unnecessary new layer of personal liability that would add to regulatory complexity with very limited benefit.

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<sup>1</sup> AICD submission, November 2020, available [here](#).

Depending on the corporate structure of the provider, responsible persons already must meet the director duties framework either under the *Corporations Act 2001* (**Corporations Act**) or Australian Charities and Not-for-profits Commission (**ACNC**) Governance Standards. These duties frameworks impose broader overarching obligations on responsible persons, notably a duty to act with care and diligence and a duty to act in good faith and in the best interests of the company. A recent legal opinion by Bret Walker AO SC, commissioned by the AICD, found that while shareholders/members' interests are central, directors can, and should, also consider a range of stakeholder interests, including customers or clients.<sup>2</sup> Our view is that these duties frameworks already provide a structure to ensure that responsible persons are appropriately governing providers and have effective oversight of the level of care that is provided to residents.

It is unclear how an additional responsible person duty will drive behavioural change beyond what is contemplated by the governance reforms the industry is currently seeking to implement. Feedback from members who sit on the governing bodies of aged care providers has noted the significant challenges they currently face in implementing recent reforms to the Aged Care Act, including governance changes. These changes include requirements on composition of governing bodies, the drafting of the provider's constitution, the establishment of advisory bodies and new accountability requirements, notably an annual attestation in respect of provider compliance.

These changes are placing a significant compliance burden on organisations, in what is typically a low profit margin sector, and have raised industry concerns about the viability of small and regional based providers. Directors have reflected to the AICD that they are increasingly involved in functions that were once the responsibility of management as a necessary step of ensuring that the organisation is complying with its obligations. For example, directors receiving daily reporting on staffing ratios and whether this is compliant with regulatory requirements.

The AICD considers that the annual attestation process, changes to the constitution and composition of governing bodies will drive a significant uplift in accountability of responsible persons. A new, additional, form of personal liability would be a disproportionate layering of regulatory burden on an industry that is struggling to implement wide ranging reform.

The consultation paper notes the intent to model the duty on existing duties on officers under section 27 *Work Health and Safety Act 2011* (**WHS Act**). The AICD considers that it is likely that WHS duties on officers are already applicable to the care provided to residents in an aged care setting. We note that in Victoria the workplace regulator has charged aged care providers for breaches under Victorian legislation (equivalent to WHS Act) for failing to ensure that its workplaces were without risk to health to both employees and residents during the COVID-19 pandemic.<sup>3</sup>

We encourage the Department of Health and Aged Care to consult closely on the potential for the WHS Act to already cover the provision of care in aged care settings and be applicable to how responsible persons oversee that care. Prima facie to add a new overlapping duty on responsible persons in addition to WHS Act obligations would result in significant regulatory complexity and uncertainty, including which

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<sup>2</sup> AICD publication, Directors' "best interests" duty in practice, July 2022, available [here](#).

<sup>3</sup> WorkSafe Victoria enforcement actions against St Basil's Homes For The Aged (July 2022) details [here](#) and Heritage Care Pty Ltd (July 2022) available [here](#).

regulator would have responsibility for monitoring and enforcement. In our view, it would be far preferable to clarify the application of existing WHS laws to the aged care sector.

Lastly, we have significant concerns that a new personal duty will severely impede the ability of providers to recruit and retain skilled responsible persons, particular small, NFP and faith-based providers where directors are often volunteers. This outcome would defeat the very governance changes that providers are now implementing, notably recruiting independent directors and those with clinical experience. AICD members have provided feedback that recruiting directors with these backgrounds is already challenging, particularly for smaller providers. A new form of personal liability may severely curtail the available pool of people who are willing to add their necessary skills and expertise to sitting on the governing body of a provider. Such an outcome will ultimately lower governance practices in the sector, thereby increasing the risk of poor resident outcomes.

### **Aged care workers**

The AICD does not support the proposed duty on aged care workers as outlined in the consultation paper. We note that such a duty was not recommended by the Royal Commission. Our view is that the imposition of such a duty is unnecessary and punitive impost on frontline workers and will have a very detrimental impact on the recruitment and retention of staff.

As noted above, we consider it likely that the WHS Act is likely already applicable to how aged care workers undertake their duties in the workplace. We are also not aware of any other comparable industry or sector in Australia where frontline workers face additional personal duties or obligations beyond that in the WHS Act. Aged care workers are some of the lowest paid workers in Australia and there are significant challenges in recruiting workers to staff aged care homes. This context informed the Government's decision to fund the 15% minimum wage increase determined by the Fair Work Commission from the middle of 2023. The Government in making this announcement noted that:

*A valued workforce with the right skills and knowledge is critical to reform the aged care system so older Australians are front and centre. This starts with fair wages for workers, a supportive workplace and recognition of the complex, often undervalued work involved.<sup>4</sup>*

The AICD considers that imposing a personal duty on relatively low paid frontline workers is entirely inappropriate and will be detrimental to the recent policy decisions to appropriately compensate these workers and recruit and retain a skilled workforce.

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<sup>4</sup> Department of Health and Aged Care, *Aged Care Worker Wages*, June 2023, page 2.

### Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Simon Mitchell, Senior Policy Adviser at [smitchell@aicd.com.au](mailto:smitchell@aicd.com.au) or Christian Gergis, Head of Policy at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

**Louise Petschler GAICD**

General Manager, Education & Policy Leadership