

19 February 2024

Department of Health and Aged Care (**the Department**)

AgedCareLegislativeReform@health.gov.au

copy: Mel.Metz@health.gov.au

Dear Department of Health and Aged Care

Exposure draft – Aged Care Bill 2023

Thank you for the opportunity to provide a submission on the exposure draft of the Aged Care Bill 2023 (**Exposure Draft**) and the accompanying consultation materials.

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 51,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

The AICD estimates that a significant number of our members are involved in the governance and management of aged care providers, including as directors of some of Australia's largest providers. The AICD participated in the consultation on the foundations of a New Aged Care Act and separately the Royal Commission into Aged Care Quality and Safety (**Royal Commission**).¹

The AICD has recognised the need for improvement in governance practices in the aged care sector and has sought to support to directors of aged care providers with contemporary guidance, most recently through the publication of [Governing for quality aged care – A director's guide](#) in December 2023 and an upcoming refreshed short course [Care Governance: Achieving Quality Outcomes](#).

The AICD in this submission has focused on the proposed responsible person duty recognising the significant implications of this measure for the governance of providers. As detailed in the Executive Summary and the submission we have very significant concerns with the proposed responsible person duty and its detrimental impact on the governance of aged care providers.

Engagement with aged care directors, in addition to aged care providers, legal experts and other industry bodies, has informed the AICD's submission.

¹ AICD submission, Foundations of a new Aged Care Act, October 2023, available [here](#); AICD submission, Response to Counsel Assisting's submission to the Royal Commission, November 2020, available [here](#).

1. Executive Summary

The AICD supports the objective of the broader reform process to create a simplified, rights-based legislative framework that will focus on the needs of older Australians and the quality of services provided to meet those needs.

We recognise the significant systemic organisational and operational failings in the provision of care to older people detailed by the Royal Commission and the comprehensive case it made for reform. The Exposure Draft is an important step forward in this reform process.

However, the AICD strongly opposes the proposed responsible person duty. Informed by extensive member feedback we consider this measure represents an unnecessary and punitive layering of criminal and civil liability that will ultimately undermine recent progress of the sector in enhancing accountability and governance practices. Our key points on the responsible person duty are:

- Australia's existing statutory and fiduciary directors' duties provides a comprehensive and clear legal framework that obliges directors to effectively oversee the effective management of aged care providers and the care provided to clients;
- a responsible person duty with civil and criminal liability was not recommended by the Royal Commission and there is no clear policy case for its introduction noting the existing duty frameworks and regulatory tools that are available to promote the provision of quality care. A sector specific directors' duty, carrying civil and criminal liability, would also be unprecedented in Australian human services industries;
- the proposed criminal and civil liability structure is excessive, unjustified and inconsistent with established principles for when new forms of director liability should be considered;
- the duty will result in very detrimental outcomes through deterring skilled and qualified directors and management from taking on board roles in aged care and as a result, weaken governance practices across the sector;
- the duty will exacerbate the ongoing viability challenges of aged care providers, particularly small and regional NFP providers, including the recruitment of skilled individuals and increasing insurance costs; and
- the framing of the due diligence and 'reasonable steps' elements under section 121 of the Exposure Draft do not appropriately reflect the oversight role of directors.

In addition to the responsible person duty, the AICD makes the following key points in the submission:

- support for the proposed provider duty;
- recommend the Department undertake further consultation with industry and legal experts on the regulator powers and reviewable decisions provisions of the Exposure Draft to ensure there is sufficient procedural fairness and checks on the extensive regulator powers; and
- recommend the proposed commencement date of 1 July 2024 be delayed and that commencement be set at 12 months from the date of Royal Assent of the legislation.

2. Statutory duty on responsible persons

This section responds to the proposed responsible person duty set out in section 121 of the Exposure Draft.

a) Punitive and unnecessary layering of new director liability

The AICD strongly opposes the proposed responsible person duty in section 121 of the Exposure Draft. A responsible person duty with criminal and civil liability elements was *not* recommended by the Royal Commission and the introduction of a new, sector-specific directors' duty for aged care directors would be an unnecessary and burdensome regulatory reform with significant unintended consequences.

As detailed below, our strong view is that a new duty would result in significant unintended consequences through significantly curtailing who will be prepared to be a responsible person of a provider. It will also disproportionately impact the viability of small and regionally based providers. These resulting detriments will materially outweigh any accountability benefits from the duty.

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**: This duty requires directors to demonstrate they have exercised reasonable care and diligence in safeguarding their organisation from key risks, including breaches of compliance obligations. In practice, this requires directors to stay informed and apply an enquiring mind about the organisation's activities, monitor the organisation's affairs and policies, test information put before them by management and proactively consider what other information they require.
- 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 in decision making, including customers or clients.²

Separately, directors also have workplace health and safety (**WHS**) duties under state based WHS legislation. The WHS duties provide an overarching obligation of due diligence on directors in respect of safe work environment for employees and anyone potentially affected by the business's operations (e.g. residents or at-home clients). Directors can be personally and criminally liable for breaches of WHS duties, and the penalties extend to possible imprisonment and very substantial fines.

In addition, we note that a responsible person has to meet the Aged Care Code of Conduct (**the Code**). The Code details standards of behaviour for aged care providers and governing persons (i.e. responsible persons) and covers areas such as preventing and responding to violence, discrimination, exploitation, neglect, and abuse. A responsible person that fails to meet the Code can be subject to civil penalties (250 penalty units) and separately a banning order by the Aged Care Quality and Safety Commissioner.

Further, the AICD considers the proposed duty is unnecessary in the context that recent governance focused reforms to the Act are designed to drive enhanced accountability at the governing body level. For instance, the establishment of quality care advisory bodies and annual provider operations report signed by the directors.

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

There is no comparable industry-specific civil or criminal personal liability regime in Australia directed at the directors or senior management of human services, healthcare, disability or education organisations. While statutory and fiduciary directors' duties and WHS laws apply across all sectors, the proposed duty would make aged care unique in the layering a new form of significant personal liability on directors. Not even directors and executives of financial services businesses, also the subject of an extensive Royal Commission and identified governance failings, are subject to individual civil or criminal liability. The *Financial Accountability Regime Act 2023 (FAR Act)*, which introduced new accountability obligations, only imposes limited accessorial liability on directors and executives.

The existing directors' duties framework, WHS law, recent governance focused reforms to the Act and the Code, in totality, represent an overwhelming regulatory architecture that focuses the mind of a director on overseeing the quality of care provided to residents and clients. Our view is that these frameworks 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.

In this context, the addition of a new sector-specific directors' duty is duplicative and unduly burdensome.

b) Severity of the criminal and civil regime

The AICD strongly opposes the proposed framing of the criminal and civil liability in the Exposure Draft, particularly the strict liability offences. We consider this is an unnecessarily punitive and excessive element of the proposed regime.

As under a strict liability offence the prosecution does not need to prove that the accused intended to commit the offence, was reckless, or even negligent, it has been recognised this form of liability should be implemented with significant caution, including in respect of the role of directors.³

We also draw the Department's attention to the Council of Australian Governments (**COAG**) six principles of director liability published in 2008.⁴ Under the Guidelines, the default position is that there should be no criminal liability for an organisation's conduct attached to directors. The principles state:

4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

- *there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);*
- *liability of the corporation is not likely on its own to sufficiently promote compliance; and*
- *it is reasonable in all the circumstances for the director to be liable having regard to factors including:*
 - *that the obligation on the corporation, and in turn the director, is clear;*
 - *that the director has the capacity to influence the conduct of the corporation in relation to the offending; and*
 - *that there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.*

³ Australian Law Reform Commission, *Traditional Rights And Freedoms—Encroachments By Commonwealth Laws* (ALRC Interim Report 127), 2015.

⁴ COAG Principles, 2008, available [here](#).

(e) Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:

- have encouraged or assisted in the commission of the offence; or
- have been negligent or reckless in relation to the corporation's offending.

The proposed approach to liability is inconsistent with these principles. Notably, it is not clear there are compelling public policy reasons for doing so in light of the recently implemented aged care governance reforms and those proposed under the Exposure Draft (e.g. the provider duty and strengthened regulator powers). The consistent message from our members is that under the recently implemented reforms, and proposed reforms, there is a rigorous regulatory framework that prompts both the provider and the board to deliver quality care to residents and clients consistent with the objectives of the Act and community expectations. In this context, a new form of criminal liability is completely unnecessary.

It is also unclear the policy basis for coupling both strict and fault-based elements to the proposed duty other than it has been adopted from WHS laws. This is an inappropriate policy approach to setting criminal liability in a particular industry with unique characteristics. As outlined above, many aged care providers are NFPs and can be a small organisation operating in a single community or location with most directors serving in a voluntary capacity.

Additionally, we note that the drafting of the proposed fault-based criminal offence in section 121(7) does not specify the requisite fault element. This offence carries a possible five-year imprisonment sentence and civil penalty. Where a fault threshold is not specified by the legislation, fault thresholds from section 5.6 of the Criminal Code apply by default.⁵ The proposed offence in section 121(7) includes a physical element of 'conduct'. As such, the default fault element for this offence is 'intention'.

Although the AICD strongly opposes the imposition of criminal offences under the Act, if the Government were minded to retain criminal liability provisions then the requisite fault element and procedural fairness elements attached to the liability must be made clear in the legislation and the Explanatory Memorandum.

Further, the framing of the provisions under subsections 121(1) - (2) are ambiguous, subjective and untested and will make it very challenging for responsible persons to be able to document and demonstrate they have taken reasonable steps as a defence. For instance, what constitutes a 'appropriate resources and processes' is unclear, including how it may differ by size and complexity of provider, and will create significant uncertainty about how to document and demonstrate compliance.

Drafting of subsection 121(3)

The AICD also has significant concerns with the expression of subsection 121(3) that provides that a responsible person can be found guilty of an offence on a strict liability basis regardless of whether the provider has been found guilty of an offence. The responsible person duty is expressly tied to the provider duty '*a responsible person of a registered provider must exercise due diligence to ensure that the provider complies with the provider's duty under section 120*'. As a matter of logic it would follow that in

⁵ See Commonwealth Criminal Code: Guide for practitioners, Attorney-General's Department, available [here](#).

almost all cases a responsible person could have only breached their duty in instances where the provider has breached its duty.

If the policy intent behind this drafting is for responsible persons to be accountable for a provider's compliance, then as detailed above we note the applicability of existing regulatory frameworks, include the Code and the director duties' framework already provides this recourse. For example, there is well-established legal principle that while a breach of an entity's compliance obligation does not necessarily mean that directors have breached their duty of care and diligence, there are situations in which directors' will be in breach of their duty by reason that their conduct caused or permitted the entity to breach, or they failed to take steps to prevent the breach, of its compliance obligation. For these reasons, we consider the drafting in section 121 (3) is unnecessary and recommend this provision be removed.

c) Impact on recruiting and retaining skilled responsible persons

The AICD urges the Department to closely assess the real risk that the proposed responsible person duty will have a profoundly detrimental impact on providers' ability to recruit and retain directors and senior management. This dynamic will likely disproportionately affect small, regional NFP providers.

In our consultation with members, we have heard consistent feedback that the proposed duty will deter well-qualified individuals from serving on the boards of aged care providers, including those with clinical experience. This feedback has revealed that directors and senior managers are already considering their positions due to the potential new exposure to excessive civil and criminal liability.

In assessing the potential impact on board recruitment and director skills it is crucial to consider the context by which a director sits on a provider board. It is common for a director to join a provider board out of a sense of community service, personal connection to the provider (e.g. faith, lived experience), awareness of the vital importance of the provider's services and the need to bring additional skills to the board. For instance, in regional settings a director will wear 'multiple hats' across the community and has often joined the board to support the crucial role the provider plays in the community. In many cases a director will undertake the role in an entirely voluntary capacity or receive limited fees, stipends or reimbursement of expenses. The AICD will shortly be publishing its annual NFP Study results for 2023.⁶ The Study reveals that of the respondents who are directors in aged care or health, only 37% receive some form of payment.

AICD member concern about attracting and retaining talented people with the proposed new duty extends to senior management, including nursing managers. The aged care sector is not analogous to highly remunerated industries, such as financial services, where an increase in personal liability risk may be outweighed by higher compensation for senior management and directors. In contrast, the aged care sector is generally resourced constrained and is limited in its ability to cover higher costs through increased prices/fees. Again, for small, regional and NFP providers, where they may only have one residential facility and/or limited at-home services, there is little room to pay additional compensation to attract talented people. The resourcing and viability challenges of the sector has been recognised by the Government in recent funding decisions, notably funding wage increases for aged care workers.⁷

Adding new forms of civil and criminal liability via the proposed duty, in addition to recent governance reforms to the Act, will result in many skilled and experienced individuals simply concluding that the risk they face is simply too great for them to serve on the board of a provider. Additionally, skilled

⁶ The AICD NFP Study for 2023 will be published in March 2024. The AICD NFP Study for 2022-23 can be found [here](#).

⁷ Department of Health and Aged Care, Aged Care Worker Wages, June 2023, page 2.

professionals, such as nursing managers, may simply move into adjacent health care settings where there is no such liability risk.

We are very concerned that losing talented people within the aged care sector will undermine the recent funding, operational and governance reforms. This outcome will ultimately lower governance and management practices in the sector, thereby increasing the risk of poor resident and in-home client outcomes.

d) Viability of providers and higher insurance costs

AICD members have raised concerns that the proposed responsible person duty will exacerbate the ongoing viability challenges of aged care providers, particularly small and regional NFP providers. As noted above, smaller providers may face considerable challenges in recruiting and retaining skilled directors and management, and will have limited financial capacity to offer higher compensation. This viability challenge will also be exacerbated by higher insurance costs.

The AICD's upcoming NFP Study will find that only 36% of health and aged care providers made a surplus during the period. This finding is broadly consistent with the August 2023 publication of the *Financial Report of the Australian Aged Care Sector 2021-22* that found considerable reductions in the profitability of both residential and home care providers, with residential providers operating on average at a loss per resident/recipient.⁸ Reporting indicates that these considerable financial challenges are acute with regional and remote providers.⁹

We have received feedback from directors and industry bodies that were the duty to be implemented in its proposed form it will result in a significant increase in directors and officers (D&O) insurance costs and coverage. Directors have noted that significant increase in D&O premiums will be very challenging for smaller providers to meet. There is also considerable concern that D&O insurance for providers may not provide coverage of the civil liability risk for responsible persons under the proposed duty. Were D&O insurance to become unaffordable, or not provide sufficient coverage, this would add to the considerable challenges providers already face in recruiting and retaining skilled directors and management.

The AICD strongly encourages the Department to undertake further analysis and consultation with the industry and insurance brokers on the potential impact of the proposed duty on the viability providers, including D&O insurance costs and coverage.

e) The use of 'ensure'

The AICD does not support the proposed drafting of the due diligence test and separately the 'reasonable steps' threshold as set out in subsections 121(1) - (2) of the Exposure Draft. We are particularly concerned with the use of the word 'ensure' on multiple occasions, particularly the implication that a responsible person should guarantee compliance by the provider with the provider duty under section 120. We recommend that 'ensure' be removed from the drafting.

Our view is that the drafting does not appropriately distinguish the governance and oversight role of non-executive directors and that were it retained, it would blur the line between senior management and the

⁸ Department of Health and Aged Care, *Financial Report of the Australian Aged Care Sector 2021-22*, August 2023.

⁹ The Guardian, *More regional aged care homes to close unless government funds pay rise, experts say*, May 2022.

board. Notably, 'ensure' has a plain English meaning of 'guarantee or make certain' and this is inconsistent with the oversight role of a director.¹⁰

There is a real risk that this drafting, requiring directors to guarantee compliance or ensure processes are in place, will result in directors actively involving themselves in management decision making, contrary to the governance role of a director. Further, it will promote a narrow compliance culture where directors are focused on documenting their 'due diligence', 'reasonable steps' and 'processes' in a manner that is disproportionate to the necessary focus on strategic priorities, such as continuous improvement and high-quality care.

Should the Government proceed with the proposed duty against our strong concerns, the drafting of these sections would need substantial amendment. In particular, we recommend removing the requirement in section 121(1) for responsible persons to 'ensure' a provider's compliance with its section 120 duty. An alternative legislative model is that adopted under the FAR Act that introduced accountability obligations on directors and executives of all banks, insurers and superannuation trustees.

The FAR Act also utilises the concept of 'reasonable steps' and had initially proposed using 'ensure' in its drafting. Following feedback from interested parties, including the AICD, the wording for accountable person obligations was amended under sections 21 and 22 of the FAR Act to remove 'ensure' and focus on the accountable person taking steps in conducting their responsibilities to prevent a material breach by the entity.¹¹ The relevant sections of the FAR Act are sections 21 and 22.

On balance, the AICD considered the FAR Act created sufficient space in the drafting and interpretation for the recognition of the distinct role of the director as opposed to management. Notably the coupling of reasonable steps with 'their responsibilities' assists in differentiating the role of director as compared to management within the broad definition of accountable/responsible person. This formulation is also consistent with directors' duty of care and diligence as it applies to an entity's compliance obligation.

We recommend the Department assess the FAR Act drafting as an appropriate alternative to the framing of the responsible person duty.

f) AICD recommendations

We strongly recommend the removal of the proposed responsible person duty from the Exposure Draft.

Were the Department minded to proceed with proposed the duty against our strong objections we recommend:

- criminal liability be removed with the duty limited to a civil fault-based only liability;
- the proposed due diligence and reasonable steps thresholds under sections 121 (1) and (2) be amended to remove the word 'ensure' and appropriately reflect the oversight and governance role of directors with the FAR Act representing a potentially appropriate drafting model; and
- section 121(3), which provides that a responsible person can be found guilty of an offence regardless of whether the provider has been found guilty of an offence, be removed

Notwithstanding the above, we remain of the view that even a responsible duty limited to civil liability would still have a very detrimental impact on the governance practices across the sector and impact

¹⁰ Oxford English Dictionary (<https://www.oed.com/>) accessed 6 February 2023.

¹¹ AICD submission, Financial Accountability Regime, August 2021, available [here](#).

the viability of small and regional NFP providers. These costs would far outweigh any accountability benefits from the introduction of the duty.

We urge the Department to undertake detailed consultation on this particular issue with providers, directors and legal experts. The AICD stands ready to assist in facilitating engagement with directors of providers.

3. Statutory duty on registered providers

This section responds to the proposed duty on providers under section 120 of the Exposure Draft.

The AICD's submission in 2020 to the Counsel Assisting's final submissions to the Royal Commission was supportive, in-principle, of a statutory duty associated with the provision of care being imposed on registered providers.¹² The AICD remains supportive of a new duty on providers that they must ensure, as far as 'reasonably practicable', that they do not adversely affect the health and safety of persons in their care. We recommend the Explanatory Memorandum provide additional detail on what constitutes 'reasonably practicable'. For instance, how a provider may balance any conflict or tension with meeting the duty and separately an individual(s) rights under the proposed Statement of Rights.

We also recommend the Department and regulator support this new duty with comprehensive guidance on the elements of what constitutes 'reasonably practicable' in an aged care setting. This guidance should provide additional detail on meeting this test, including the interaction with the Statement of Rights, and also reflect the relationship between the duty and other care obligations, notably the Aged Care Quality Standards and WHS laws.

4. Regulator powers

The AICD notes that the new proposed regulatory framework under the Exposure Draft will provide the Aged Care Quality and Safety Commission (**Commission**) with largely unchecked powers to intervene in the operations of providers.

These powers include the Commission being able to self-authorise (i.e. without a judicial officer review) entry to a residential care home for monitoring and investigation purposes without the occupier's consent. In addition, the Commission can issue directions to a provider and/or appoint an external manager to a registered provider. We note that these provisions are not subject to appeal or independent judicial review. Industry bodies and providers have raised significant concerns with the AICD on potential for these powers to be used by the Commission without appropriate justification. It has also been challenging for the industry to comment on the proposed regulatory structure absent key sections (e.g. Part 11) and the draft Aged Care Rules (**the Rules**).

We note the findings of the recent capability review of the Commission where providers raised concerns with the Commission's decision-making processes, including following procedural fairness, and the degree to which it adopts a risk-based approach to its regulatory activities.¹³ The capability review found that the Commission needs to be more open, transparent and accountable and adopt a more collaborative approach to its regulatory responsibilities.¹⁴

¹² AICD submission, November 2020, available [here](#).

¹³ David Tune AO PSM, *Report of the Independent capability Review of the Aged Care Quality and Safety Commission*, March 2023, Page 39.

¹⁴ *Ibid*, page 3.

In the context of the capability review findings, and absent key sections of the Exposure Draft, we recommend the Department closely assess including provisions to allow judicial review of these extensive Commission powers. In undertaking this assessment we recommend the Department undertake further targeted consultation with industry and legal experts on how appropriate safeguards can be implemented on Commission decision making.

a) Review of decisions

We note that Part 2 of the Exposure Draft covering reviewable decisions has yet to be drafted.

The AICD considers this is a key component of the proposed legislation in that it provides procedural fairness to providers and responsible persons on decision making by the Commission. As noted above, a significant expansion of the Commission's regulatory powers is proposed under the Exposure Draft. We expect that the scope of the reviewable decision provisions will be sufficiently broad and cover key Commission powers, including banning orders for instance.

The AICD recommends the Department undertake additional consultation on these provisions with key industry participants prior to any legislation being introduced into Parliament. This will ensure the industry has the opportunity to assess the draft legislation in totality.

5. Commencement

The AICD strongly supports a delay in the proposed commencement date of 1 July 2024. The complexity and scope of the proposed reforms under the Exposure Draft are considerable, and providers will face significant challenges in implementation.

As it stands the Exposure Draft is highly unlikely to be introduced to Parliament for consideration and debate until close to the proposed commencement date of 1 July 2024. In addition, significant parts/sections of the Exposure Draft and the Rules, a key element of the proposed reforms, are not ready for public comment. This makes it challenging for interested parties to sufficiently understand the scope of the proposed changes and the potential impact on their operations and the broader sector.

Even in the unlikely event the reforms were to pass Parliament in April or May, for example, it would be extremely difficult for providers, particularly small providers facing resource constraints, to prepare to implement the changes in such a short period. The result would be patchy and limited compliance with likely significant levels of inadvertent non-compliance. Providers and responsible persons should be afforded the opportunity to comprehensively prepare and restructure their operations and governance frameworks where appropriate.

We strongly recommend that commencement be set at 12 months from the date of Royal Assent. This approach to commencement will avoid implementation challenges due to a delay in Parliament considering the legislation. It is also consistent with the approach taken in the FAR Act where commencement was set at 6 months from Royal Assent for banks and 18 months for insurance and superannuation entities.

6. 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 or Christian Gergis, Head of Policy at 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