

30 September 2024

Senate Community Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Aged Care Bill 2024

Thank you for the opportunity to provide a submission to the inquiry on the Aged Care Bill 2024 (**the Bill**) and the accompanying explanatory memorandum.

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 53,000 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 has many members 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 exposure draft of the Aged Care Bill 2023 (**Exposure Draft**), foundations of a New Aged Care Act and separately the Royal Commission into Aged Care Quality and Safety (**Royal Commission**).¹

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

We acknowledge the particular vulnerability of aged care clients and the need to have strong governance and accountability mechanisms in place to support high quality service provision.

Engagement with aged care directors, in addition to aged care providers, legal experts and other industry bodies, has informed the AICD's engagement on these important reforms.

1. Executive Summary

The AICD recognises 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.

¹ AICD submission, Exposure Draft of Aged Care Bill 2023, February 2024, available [here](#); 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](#).

The Bill is an important milestone in this reform process and should provide much needed certainty for aged care providers and older Australians.

While the AICD does retain some concerns with certain elements of the Bill, we consider that on balance the Bill will result in management and governance improvements at providers with resulting care benefits for older Australians.

Given the limited time to provide a submission we have focused on the Responsible Person Duty (the **Duty**) and additionally how the Duty aligns with the Code of Conduct for Aged Care (the **Code**). Our key points are:

- We strongly support the amendments to the Duty under section 180 of the Bill since the Exposure Draft. In particular, the removal of criminal liability and certain strict liability offenses that had previously been contained in the Exposure Draft are critical adjustments that represent a measured reframing of the Duty to reduce the very real concerns of providers and directors. While we remain of the view that the Duty is an unnecessary layering of additional liability on directors, we consider these changes have mitigated the real risk that the Duty would have resulted in an exodus of skilled directors and senior managers from the aged care sector.
- We strongly recommend the Committee consider whether volunteer directors of providers should be excluded from the penalty provisions of a breach of the Duty consistent with workplace health and safety law under the *Work Health and Safety Act 2011 (Cth)* and state equivalents. Excluding volunteer directors would be an important recognition of the key role of volunteers in the sector, particular at small and regional NFP providers. These directors would still be required to meet the Duty and would be subject to other accountability obligations under the Bill, notably the Code. A similar case can be made for directors of charities registered with the Australian Charities and Not for Profit Commission (**ACNC**), recognising that these directors are currently excluded from the civil penalty regime applicable to breaches of the core directors' duties contained in the *Corporations Act 2001 (Cth)*.
- We recommend the drafting of the due diligence obligation under subsection 180(2) clarify: the distinction between the role of a non-executive director and management; and knowledge of regulatory requirements expected of responsible persons.
- We recommend that the Code be harmonised with the Duty and reflects the distinct role of non-executive directors. In particular, we consider the Code should be simplified for responsible persons such that its central obligation is being aware and meeting the requirements of the Duty.

We enclose legal advice obtained by leading corporate governance expert, Professor Pamela Hanrahan of Johnson Winter Slattery, which has informed our submission (**Hanrahan Advice**).

2. Responsible Person Duty – Section 180

This section responds to the proposed duty on certain responsible persons (**the Duty**) under section 180 of the Bill.

Liability provisions

The AICD strongly supports refinements made to the liability provisions of the Duty since the Exposure Draft.

We received overwhelming feedback from members who sit on the boards of providers that attaching criminal and civil liability to the Duty, as was the case in the Exposure Draft, would have negatively impacted the ability of providers to recruit and retain skilled directors and management. The end result would have been a likely deterioration in the governance and management capability of providers that could have undermined the provision of high-quality care.

We remain of the view that the Duty is an unnecessary layering of additional, and duplicative, liability on responsible persons, particularly in the context of the Code of Conduct for Aged Care (discussed below). However, the changes since the Exposure Draft have somewhat mitigated the concerns of aged care directors.

In particular, we strongly support the removal of criminal liability and certain strict liability offenses that had previously been contained in the Exposure Draft.

In particular, we recommend that the Committee reject any submissions that call for criminal liability to be reinserted into the Bill. The changes made to the original Exposure Draft represent a sensible and measured reframing of the Duty to reduce the very real concerns of providers and directors of the potential unintended consequences of a punitive duty resulting in a flight of talented people from the sector. It is critical that these changes be retained.

We note that the Royal Commission did *not* recommend a Duty with criminal and civil liability. Further, the significant concerns of AICD members have been shared across the aged care industry and the other stakeholders, including the Law Council of Australia, as reflected in submissions to the Exposure Draft.²

Civil liability – Volunteer directors

The civil penalty amounts for a breach of the Duty are significant (150 – 500 penalty units depending on the breach) in the context of an industry where directors are often serving in a voluntary capacity, or receive modest director fees compared to directors in other industries. Additionally, these directors would still be required to meet the Duty and would be subject to other accountability obligations, including notably the Code. AICD research indicates that in the broader health and aged care sectors, only 37% of directors receive director fees.³

We note recent KPMG research that NFP providers represent 56% of residential places and 54% of home care services.⁴ Importantly in residential care, 41% of NFP residential homes are located outside of metropolitan areas, compared to only 19% of homes of for-profit providers.⁵ Further, of the 413 NFP providers, 64% operate only one residential aged care home.⁶ Based on feedback from AICD members we understand many of the directors of these small NFP providers are volunteers who sit on the board out of a sense of community service, including a connection to a faith-based organisation.

While we strongly support the Duty being confined to civil liability, we remain concerned that the severity of the penalties will be a significant deterrent for volunteer directors, particular directors of small and regionally based NFP providers, including those operating a single site.

² Law Council of Australia submission on Exposure Draft, March 2024, available [here](#); Aged & Community Care Providers Association submission on Exposure Draft, February 2024, available [here](#).

³ AICD Not-for-Profit Governance & Performance Study 2023-24, March 2024, available [here](#).

⁴ KPMG, Aged Care Market Analysis, June 2024, available [here](#).

⁵ *Ibid*, pages 4 and 16.

⁶ *Ibid*, page 16.

We strongly recommend that the Committee consider whether volunteer responsible persons should be excluded from the civil liability penalty provisions. This approach would be consistent with workplace health and safety (**WHS**) obligations under section 34 of *Work Health and Safety Act 2011 (Cth)*, and their state equivalents, where volunteer officers (i.e. directors) of an organisation are excluded from the penalty provisions.

Excluding volunteer directors from the penalty provisions would assist in aligning the requirements with WHS obligations and importantly recognise the fundamental role volunteers play at NFP providers. Volunteer directors would still be obliged to meet the requirements of the duty and would also still be subject to the other requirements on responsible persons under the Bill, including suitability matters and the Code.

Further, as the Hanrahan Advice outlines, the civil penalty regime that applies for breaches of directors' duties under the *Corporations Act 2001 (Cth)* does not apply to directors of ACNC registered charities. We would encourage the Committee to take a similar approach to responsible persons of ACNC registered charities providing aged care services under the Act.

Drafting of section 180 – Due diligence and reasonable steps

The Hanrahan Advice confirms that an obligation to “exercise due diligence to ensure” is not the same as an obligation “to ensure”. There may be situations in which, despite the director having exercised due diligence, the provider nevertheless contravenes its duty under s 179 – this would not attract liability under s 180.

To avoid confusion around the expectations on non-executive directors, in particular any suggestion that they can guarantee compliance with the provider duty, we recommend a simple drafting change to subsection 180(2) where following ‘due diligence includes taking reasonable steps’ the wording ‘consistent with their responsibilities’ is added. This clarification would be an important step that would assist in recognising the distinct roles of non-executive directors and management as responsible persons. It would also be consistent with the drafting approach to obligations on accountable persons of banks, insurers and superannuation trustees in the *Financial Accountability Regime Act 2023*.⁷

We also recommend that the explanatory memorandum confirm a reasonable expectation on responsible persons for meeting the due diligence steps in subsections 180(2)(a) – (e). In particular, we are concerned about s180(2)(a) which requires responsible persons ‘to acquire and maintain knowledge of requirements applying to registered providers under this Act’.

Given the complexity of regulatory obligations on providers proposed in the 574-page Bill, and that exist in subordinate legislation, it is unreasonable to expect an individual to have a comprehensive understanding of all these obligations. However, the explanatory memorandum states that the obligation may “require responsible persons to have knowledge that is technical, situational and strategic to keep up to-date on the conditions and obligations that apply to the registered provider under Part 4 of this Chapter, including any applicable standards or the Code, as well as any relevant guidance materials, training modules or seminars”.

Such an expectation is unreasonable, particularly for non-executive directors, and hence we would recommend adopting the suggestion of the Hanrahan Advice that subsection 180(2)(a) be amended to require responsible persons to take reasonable steps to “acquire and maintain knowledge of material

⁷ *Financial Accountability Regime Act 2023*, sections 21 and 22.

requirements applying to registered providers under this Act that are relevant to the discharge of its duty under s 179".

We urge the Department to support the implementation of the Duty with clear, comprehensive and consistent guidance on regulatory expectations. This is especially important as directors will be required to meet the Duty, other accountability obligations, notably the Code, and likely other regulatory regimes (e.g. ACNC).

Application to nursing managers

The AICD supports the amendment since the Exposure Draft that the Duty does not apply to those responsible persons who have day-to-day responsibility for the provider's operations as per the definition of responsible person under section 12 of the Bill. We consider this approach recognises that the Duty should only apply to the most senior decision-makers at a provider.

We note that the Duty will still apply to nursing managers of providers. We recommend clarification in the explanatory memorandum and guidance from the Department on how this application will work for the large number of providers that operate only one or a small number of residential sites. As noted above, 64% of the 414 NFP residential providers operate only one site (i.e. 264 providers). We expect that for these providers, the nursing manager will have day-to-day responsibilities at the site and would perform roles directly with residents that are not equivalent to a nursing manager at a larger provider where they may oversee nursing services at multiple sites.

In the context of the amendment from the Exposure Draft to exclude managers with day-to-day responsibilities, our view it is not the intent of the Duty to capture nurses at individual sites that perform direct nursing duties and also have some managerial responsibility. We recommend that explanatory memorandum and guidance from the Department detail expectations for interpreting this application. We urge flexibility for small, one site providers that have significant challenges recruiting and retaining nurses. We would be very concerned if this obligation was applied in a narrow way that resulted in nurses not being prepared to work at small providers out of concern for the risk associated with the Duty.

Compensation pathway

The AICD strongly supports the amendments to the compensation pathway under section 186 of the Bill whereby a responsible person cannot be pursued for compensation for a breach of the provider duty.

Limiting compensation to providers only appropriately reflects the legal principle that treats a corporation as a separate legal entity from its owners, shareholders, employees and directors.

Code of Conduct for Aged Care

We are concerned with the potential for there to be significant challenges and complexity in directors meeting the separate obligations under the Duty and the Code. It is important that both the Code and the Duty, as two of the key pillars of accountability on directors in the Bill, are harmonised and avoid duplication to the greatest degree possible.

The Bill will carry over the existing obligations on governing persons (i.e. directors) to comply with the Code under the current *Aged Care Act 1997 (Cth)*. The Code also applies to providers and workers. As the Hanrahan Advice outlines, a breach of the Code is a strict liability offence, does not have a materiality threshold and can result in significant penalties through a banning order or a civil penalty of up to 250 penalty units. In contrast, the Duty has fault-based offences and penalties range from 150 – 500 penalty units.

In particular, the obligations of the Code imply a day-to-day operational role at an aged care provider that is inconsistent with the governance role of a non-executive director. For example, it is required that an individual subject to the Code '**provide care, supports and services in a safe and competent manner, with care and skill**'.

Further, the Code requires 'reasonable steps' to '*prevent and respond to all forms of violence, discrimination, exploitation, neglect and abuse and sexual misconduct*'. As noted above, the new Duty has a due diligence obligation that requires a responsible person to demonstrate 'reasonable steps' in a number of key areas. We are concerned that the Duty and the Code have distinct 'reasonable steps' requirements.

Our view is that it is not good drafting practice for there to be distinct obligations on individuals that are both focused on the standard of care provided to older people located in primary legislation and also subordinate legislation in the Rules. We consider this approach will result in significant confusion and complexity as responsible persons attempt to interpret the different requirements. This complexity and uncertainty is heightened by the different liability and penalty provisions and the potential for a responsible person to face regulatory action under each of these obligations for the same conduct or potential breach.

We recommend that in drafting and developing the Rules to support implementation of the Bill, that the Code be amended in a manner that seeks to harmonise it with the Duty and is consistent with the role of non-executive directors. **In particular, we consider the Code should be simplified for responsible persons such that its central obligation is being aware and meeting the requirements of the Duty.**

Consequential changes should urgently be made to departmental guidance on the Code to reflect the introduction of the Duty.

3. Next Steps

We hope our submission will be of assistance to the Committee. 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 Petschler', with a long horizontal flourish extending to the right.

Louise Petschler GAICD

General Manager, Education & Policy Leadership

Memorandum

Date: 30 September 2024
To: Christian Gergis, Head of Policy and Simon Mitchell, Senior Policy Adviser, AICD
From: Pamela Hanrahan
Subject: Advice on responsible person duty in the Aged Care Bill 2024 (Cth)
Our Ref: D4805
Doc ID: 304892763.1

Summary

- 1 This advice concerns the proposed “responsible person” duty that appears in s 180 of the Aged Care Bill 2024 (Cth) as introduced on 12 September 2024 (the Bill). It can be read with my advice dated 8 May 2024 on the earlier version of the duty in exposure draft legislation released in December 2023.
- 2 You have asked me whether the proposed duty, as it would apply to members of the board of an incorporated aged care provider, is consistent with the broader framework of directors’ legal duties and responsibilities.
- 3 My conclusion is that the content of the proposed duty is broadly consistent with directors’ existing legal duties and responsibilities, including the affirmative due diligence obligations imposed on directors by work health and safety (WHS) laws. However, the consequences of contravening the duty are different. In particular:
 - (a) Contravention of the responsible person duty in the Bill can attract a civil penalty but is not an offence.
 - (b) The civil penalty regime applies to directors of both for-profit providers and providers that are charities registered with the Australian Charities and Not-for-profits Commission (ACNC), unlike the civil penalty regime that applies for breach of directors’ duties under the *Corporations Act 2001* (Cth) which does not apply to directors of ACNC registered entities.
 - (c) The civil penalty regime applies to both volunteer and paid directors, unlike the offence provisions in the WHS laws which do not apply to volunteers.
- 4 The duty requires directors to exercise “due diligence” to ensure compliance by the aged care provider with its statutory duty in s 179. It does not require directors to “ensure” compliance (which would effectively make the directors guarantors of the provider’s performance), only to exercise due diligence to that end.
- 5 The legislation is intended to impose on a responsible person “high, yet attainable, standards of due diligence”.¹ To ensure the standard is attainable, I suggest (in paragraph 28 below) an adjustment to the language of s 180(1)(a).
- 6 My detailed advice follows. Paragraphs 7 – 14 begin by explaining the key difference between the duty in s 180 and the earlier exposure draft and providing some context. Paragraphs 15 – 19 explain how the responsible person duty operates alongside directors’

¹ Explanatory Memorandum to the Aged Care Bill 2024, 198.

existing duty of care and duties under WHS laws. Paragraphs 20 – 29 set out what the responsible person duty requires, and paragraphs 30 – 39 explain the consequences for directors who fail to exercise due diligence. Paragraphs 40 – 43 deal briefly with the other personal obligations (including the obligation to comply with the Aged Care Code of Conduct) imposed on directors by the Bill.

Context

- 7 The responsible person duty in s 180 of the Bill differs from the exposure draft provision discussed in my earlier advice in that a contravention attracts civil penalty, but not criminal, liability.
- 8 It is also worth noting that the “compensation pathway” provision (now in s 186 of the Bill) only applies to contraventions of the provider’s duty in s 179, unlike the earlier version in the exposure draft legislation which extended the pathway to include contraventions of the responsible person duty.
- 9 The proposed responsible person duty is part of an agreed package of reforms intended to protect the health and safety of individuals to whom a provider is delivering funded aged care services. It is designed to send a clear signal to directors of aged care providers (commercial and not-for-profit) to improve their monitoring and oversight of the risks to clients’ health and safety involved in the delivery of those services.
- 10 The duty is contained in s 180 of the Bill. Section 180(1) says that, “A person who is a responsible person of a registered provider ... must exercise due diligence to ensure that the provider complies with the provider’s duty under section 179.”² Section 179 contains the duty of the registered provider to “ensure, so far as is reasonably practicable, that the conduct of the provider does not cause adverse effects to the health and safety of individuals to whom the provider is delivering funded aged care services while the provider is delivering those services”.
- 11 Responsible person is defined in s 12 of the Bill, and because of s 12(1)(a) and (2) includes both executive and non-executive directors.
- 12 Section 180(2) says that due diligence includes taking reasonable steps to achieve the outcomes specified. The section goes on to create two civil penalty provisions (in subs (4) and (6)) that are contravened when a responsible person “without reasonable excuse, engages in conduct that does not comply with duty” and the conduct amounts to a serious failure to comply. Contravention of the responsible person duty is not an offence.
- 13 The proposed responsible person duty is an example of a due diligence provision that imposes an affirmative, non-delegable obligation on a designated individual to take reasonable measures to ensure compliance by an entity with a statutory obligation. As noted in my earlier advice, due diligence provisions operate to enhance directors’ existing duty to carry out their functions with reasonable care and diligence. They create direct (rather than accessorial) liability for a director’s individual failure to exercise due diligence that is conceptually distinct from a breach by their company of its statutory obligation.
- 14 The structure of the proposed duty mirrors ss 27(1) and (5) of the *Work Health and Safety Act 2011* (Cth) (WHS Act), which also appears in WHS laws in most states. However, there are differences (including in the content and the liability regime) between the two.

² Section 180(1) does not apply to a responsible person who is referred to in s 12(1)(c)(ii) of the Bill – that is, any person who is responsible for the day-to-day operations of the registered provider.

Relationship with existing duties

- 15 This part explains the relationship of the responsible person duty to directors' general duty of care and their existing obligations under WHS laws.
- 16 As noted in my earlier advice, all directors have a duty to take reasonable care in carrying out their role as directors. This includes doing what is reasonable, having regard to the corporation's circumstance and the individual director's role in it, to avoid the corporation suffering a harm that is foreseeable. The foreseeable harms *to the corporation* that may result from it providing aged care services in a way that causes adverse effects to the health and safety of a client include regulatory action, exposure to compensation claims, and loss of standing or reputation that in turn damages its relationship with key stakeholders.
- 17 What is "reasonable" is objectively determined. At a minimum, the duty includes a "core, irreducible requirement of directors to be involved in the management of the company and to take all reasonable steps to be in a position to guide and monitor" its management.³ This does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies.⁴ Directors do not have a general duty to prevent their corporation from breaching the law, but as Ball J observed in *DSHE Holding (in liq) v Nicholas Abboud (No 3)* [2021] NSWSC 673 at [477] "they owe a duty to exercise reasonable care and diligence to prevent the harm that a breach of the law may involve". What this requires in practice depends on factors including "the nature of the law, the risk of harm to what a breach will expose the corporation and what steps might reasonably have been taken to avoid the breach".
- 18 The responsible person duty **enhances** the directors' existing duty of care in relation to the health and safety of clients. This type of provision was described by the Australian Law Reform Commission (ALRC) in 2020 in the following terms
- The legislature may also indicate an enhanced duty of care in particular areas by imposing on directors, senior managers, and other identified individuals specific, personal, obligations under statute to 'take reasonable steps' or exercise 'due diligence' to secure corporate compliance with certain statutory obligations.⁵
- 19 The responsible person duty **will operate alongside** directors' existing due diligence obligations under WHS laws, under s 27 of the WHS Act or (in most jurisdictions) its corresponding state equivalent.⁶ Section 27(1) of the WHS Act imposes a duty on an officer of a person conducting a business or undertaking (PCBU) to exercise due diligence to ensure that the PCBU complies with its duties, including the duty in s 19(2) to "ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking".⁷ A contravention of the WHS due diligence duty is an offence unless the officer is a volunteer.

What the duty requires of directors

- 20 The responsible person duty says that a director must exercise due diligence to ensure that the provider complies with the provider's duty in s 179.⁸ This means taking reasonable steps to achieve the outcomes in s 180(2)(a) – (e), discussed in paragraph 26.

³ *ASIC v Healey* [2011] FCA 717.

⁴ *Daniels v Anderson* (1995) 37 NSWLR 483.

⁵ Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Report 136, April 2020) [9.50].

⁶ See <https://www.safeworkaustralia.gov.au/safety-topic/industry-and-business/health-care-and-social-assistance/whs-duties>.

⁷ Other persons in an aged care setting includes clients.

⁸ The provider's duty is to "ensure, so far as is reasonably practicable, that the conduct of the provider does not cause adverse effects to the health and safety of individuals to whom the provider is delivering funded aged care services while the provider is delivering those services".

- 21 An obligation to “exercise due diligence to ensure” is not the same as an obligation “to ensure”. There may be situations in which, despite the director having exercised due diligence, the provider nevertheless contravenes its duty under s 179 – this would not attract liability under s 180.
- 22 Exercising due diligence is not the same as doing everything possible, only that which is reasonable. Section 180(2) requires “reasonable steps”; as with the general duty of care, what is reasonable depends on the circumstances. This is consistent with the commentary to the section provided in the Explanatory Memorandum, which states that
- It is intended that due diligence, in the context of clause 180, should be understood as taking every precaution that is reasonable in the circumstances to protect the health and safety of individuals to whom the provider is delivering funded aged care services. Due diligence is a powerful and proactive management tool that will help to foster the careful and systematic identification and assessment of specific adverse effects and the establishment of measures to prevent them, as much as is reasonably practicable.⁹
- 23 The Explanatory Memorandum goes on to say
- Whether a responsible person has exercised due diligence to ensure their providers (sic) complies with the duty under clause 179 depends on whether they took all reasonable steps in the particular circumstances. A responsible person must have high, yet attainable, standards of due diligence. These standards should relate to the position and influence of the responsible person within the registered provider. Therefore, what steps are considered reasonable will depend on a number of factors, including the role and influence of the responsible person to affect the decisions and allocation of resources required for the registered provider to meet their duty at clause 179. The more control or influence over the matter, the greater the steps that need to be taken by the responsible person to discharge the duty. A high standard requires persistent examination and care, to ensure that the systems of the provider are adequate to comply with the registered provider duty and also that those systems are performing effectively. Where the responsible person relies on the expertise of a manager or other person, that expertise must be verified, and the reliance must be reasonable.¹⁰
- 24 The legislative intention is to create a framework that accommodates the different roles and functions performed by different responsible persons. The Explanatory Memorandum proposes a system under which the standard to which an individual is held
- should relate to the position and influence of the responsible person within the registered provider. Therefore, what steps are considered reasonable will depend on a number of factors, including the role and influence of the responsible person to affect the decisions and allocation of resources required for the registered provider to meet their duty at clause 179. The more control or influence over the matter, the greater the steps that need to be taken by the responsible person to discharge the duty. ... Where the responsible person relies on the expertise of a manager or other person, that expertise must be verified, and the reliance must be reasonable.¹¹
- 25 This is consistent with the approach taken by Courts to the equivalent provision in the WHS laws.

⁹ Explanatory Memorandum to the Aged Care Bill 2024, 198.

¹⁰ Explanatory Memorandum to the Aged Care Bill 2024, 198.

¹¹ Explanatory Memorandum to the Aged Care Bill 2024, 198.

- 26 The non-exhaustive list of matters to which directors should have regard in exercising due diligence appears in s 180(2). This table compares them with the matters to which directors must (already) have regard under the WHS laws.

	Aged Care Bill	WHS laws
(a)	to acquire and maintain knowledge of requirements applying to registered providers under this Act; and	to acquire and keep up-to-date knowledge of work health and safety matters; and
(b)	to gain an understanding of the nature of the funded aged care services the registered provider delivers and the potential adverse effects that can result to individuals when delivering those services; and	to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and
(c)	to ensure that the registered provider has available for use, and uses, appropriate resources and processes to manage adverse effects to the health and safety of individuals accessing funded aged care services delivered by the provider; and	to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
(d)	to ensure that the registered provider has appropriate processes for receiving and considering information regarding incidents and risks and responding in a timely way to that information; and	to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
(e)	to ensure that the registered provider has, and implements, processes for complying with any duty or requirement of the registered provider under this Act.	to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
(f)		to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

- 27 While there are obvious similarities between most of the obligations, the paragraphs (a) are different. The obligation in s 180(1)(a) to take reasonable steps to “acquire and maintain knowledge of requirements applying to registered providers under this Act” is explained in the Explanatory Memorandum in these terms

For example, to acquire and maintain knowledge of the requirements applying to registered providers under the Bill may require responsible persons to have knowledge that is technical, situational and strategic to keep up to-date on the conditions and obligations that apply to the registered provider under Part 4 of this

Chapter, including any applicable standards or the Code, as well as any relevant guidance materials, training modules or seminars.¹²

- 28 Given the extensive nature of the requirements that apply to providers under the Bill, this will be burdensome on non-executive directors. It would be helpful to recast this provision, for example to state that a responsible person is required to take reasonable steps to “acquire and maintain knowledge of material requirements applying to registered providers under this Act that are relevant to the discharge of its duty under s 179”.
- 29 It is also worth noting that, in paragraphs (b) and (c), the Bill is focused on *effects* to health and safety, while the WHS laws focus on *risks* to health and safety.

Consequences of a failure to exercise due diligence

- 30 Unlike the exposure draft provision, a contravention of the responsible entity duty is not an offence. However, it can attract a civil penalty if certain conditions are met.
- 31 Because contravention of the responsible person duty carries a civil penalty, the civil burden of proof (on the balance of probabilities, rather than beyond reasonable doubt) is engaged. In any enforcement proceedings, civil rules of evidence and procedure will apply.
- 32 There is no fault element (such as intention, recklessness or negligence) involved. If the responsible person engages in conduct that meets the condition, the contravention will be made out regardless of their state of mind.¹³
- 33 The conditions that must be met to attract a civil penalty are:
- (a) the person, without reasonable excuse, engages in conduct that does not comply with the duty, and
 - (b) the conduct amounts to a serious failure by the person to comply with the duty. A serious failure is defined in s 180(4) as conduct that exposes “an individual to whom the duty is owed” to a risk of death or serious injury or illness, and either involves a “significant” failure or is party of a “systematic pattern of conduct”.
- 34 “Engage in conduct” is defined in s 7 of the Bill and means to do an act or omit to perform an act.
- 35 It is significant that the civil penalty only applies to conduct (failure to exercise due diligence) that exposes an individual to a risk of death or serious injury or illness.
- 36 The reference to the risk to a person “to whom the duty is owed” is curious. It may be intended to refer to the duty in s 179 owed by the provider (as in s 180(6)(d)); in any event it is likely to be interpreted as meaning the person to whom the funded aged care service is provided.
- 37 If a responsible person wishes to assert reasonable excuse, they must adduce sufficient evidence sufficient to suggest the existence of the excuse, and it is then for the person bringing the enforcement action to prove, on the balance of probability, that it is not available.
- 38 The maximum civil penalty is 500 penalty units (currently \$156,500) for a serious failure that “results in the death of (sic) serious injury to or illness of an individual to whom the duty in section 179 is owed by the registered provider”. If this is not the result of the conduct, the maximum civil penalty is 150 penalty units (currently \$46,000).

¹² Explanatory Memorandum to the Aged Care Bill 2024, 198.

¹³ *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 94.

39 The civil penalty regime applies even if the provider is registered with the ACNC. It applies to all responsible persons including volunteers. As noted in my earlier advice, the civil penalty regime for breach of directors' duties (including the duty of care) does not apply in relation to ACNC registered entities, and the offence provisions in the WHS laws do not apply to volunteers.

Other duties

- 40 The Bill contains other obligations that apply directly to responsible persons and create penalties for the breach.
- 41 Section 169 of the Bill requires a responsible person to notify the provider of a change of circumstance that relates to a suitability matter; it creates a strict liability offence for failure to comply with a maximum fine of 30 penalty units (currently \$9,390).
- 42 Section 174(2) requires that a responsible person of a registered provider comply with the Aged Care Code of Conduct. Failure to comply carries a maximum civil penalty of 250 penalty units (currently \$78,250). I note that:
- (a) As a general principle, it may be undesirable for obligations that carry significant statutory penalties to appear in delegated legislation, for reasons recently explained by the ALRC in its principled consideration of legislative hierarchy.¹⁴
 - (b) The provision is strict liability – there is no fault element (knowledge, intention, recklessness or negligence) and any breach of the Code by the responsible person will potentially trigger the penalty.
 - (c) A civil penalty is potentially available for any contravention, whether material or not.
 - (d) The maximum civil penalty is twice that for a contravention of the responsible person duty that does not result in death, serious injury or illness.
- 43 Section 178(2) carries forward the offence provision relating to misuse of refundable deposits that currently appears in s 52N.2 of the *Aged Care Act 1997* (Cth).

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¹⁴ Australian Law Reform Commission, *Financial Services Legislation – Interim Report B* (ALRC Report 139, 2022), Ch 3 and 4.