

**From:** Martin Pengilly [REDACTED]  
**Sent:** Monday, 29 January 2024 7:10 AM  
**To:** Aged Care Legislative Reform  
**Subject:** Sections 121 and 122 of New Aged Care Act Exposure Draft  
**Attachments:** RE: Sections 121 and 122 of New Aged Care Act Exposure Draft [SEC=OFFICIAL]

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To:

## Department of Health and Aged Care

I write to express my concerns with this part of the exposure draft:

### **Part 5—Statutory duty and compensation** **2 Division 1—Provider and responsible person duties**

I agree with the need for accountability for providers and responsible persons, to ensure they fulfil their duties and there being consequences for not doing so.

However, the penalties for these offences, including a financial penalty and a seven-year prison term under s121 (7), is too harsh and will result in many individuals not wishing to become or remain as responsible persons. The risk of such penalties, or the possibility of them having to go through the significant and exhausting defence processes if accused of an offence, will deter them.

### **My background**

I have many year's experience in the aged care industry in both executive and non-executive roles for aged care providers, most recently being a responsible person for a 200 bed residential aged care provider (as their CFO), a non-executive director for a 65 bed aged care provider and member of a regional governance committee for a provider with 220 beds in one region. I am currently on a career break and not in these roles.

I therefore have been closely involved in both providing data to governance committees and boards and receiving and reviewing such material and believe I experienced best practice for responsible persons undertaking their due diligence.

I recall a number of instances where the death, serious injury and illness of individuals could have occurred despite the providers providing high standards of care and if each of these could result in the responsible persons risking a prison sentence, many individuals would not wish to take that risk. An example is in the provision of medication, where, despite providers having extensive controls, checks and balances in place, incorrect dosages or medicines were given. All incidences were fully reported, investigated and trends monitored as part of the governance of the organisations, including due diligence performed by the responsible persons. Actions taken from lessons learned usually reduced the frequency and severity of such incidents, however, they were not eliminated completely and could have resulted in death, serious injury and illness.

### **Implications for the Aged Care Industry**

The aged care providers that I was associated with were not-for-profit organisations with a strong affiliation to the local community and held in high regard by the residents, their families and friends because of the home like feeling they experienced. Typically, they operated 40-65 bed homes, (a similar size to that preferred by the

Royal Commission into Aged Care Quality and Safety) and strong relationships were formed between staff and residents, because of staff continuity, the smaller numbers of staff needed to run smaller homes and the deliberate policy whereby staff knew the backgrounds and preferences of those they cared for and the residents leaned similar characteristics of the care staff.

In such organisations, the boards of directors, as a responsible persons, often comprise individuals from the local community wishing to deliver the best possible standards of aged and are therefore willing, in a voluntary capacity, to contribute their time and expertise to ensure this is the case.

From speaking with my colleagues, individuals will not wish to become responsible persons if these harsh penalties are retained in the final Aged Care Act and this puts at risk the existence of many of the providers I have described, if they cannot recruit to their Boards. This will concentrate the aged care industry into larger providers, with paid and professional board directors, focused on meeting the due diligence requirements of the act and the section of the aged population that prefer smaller homes, operated by community-based providers, will lose that option.

My regards  
Martin