

# 2024 Aged Care Risk and Insurance Outlook: severe penalties proposed for directors under new federal laws for negligence.

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*This article has been co-produced by Lockton, Kinny Legal and Mirus.*

The new draft revised Aged Care Quality Standards were released by The Department of Health and Aged Care in December 2023.

Board members along with other responsible person(s) of aged care providers may soon face significant penalties including possible imprisonment and large fines under the proposed new laws in a major overhaul of the Aged Care Act 1997 (Cth) ('Aged Care Act') as part of the strengthened Aged Care Quality Standards.

The most serious criminal penalties may include up to five years in prison. These significant changes are intended to make the duty of care to older Australians of the highest priority and prevent deaths and serious injury/illness.

Lockton anticipates that under the reforms, directors and executives of boards will continue to face increasingly significant liability for proper governance of aged care providers and will need to consider a number of measures in order to be properly protected. This includes consideration of insurance and legal risk mitigation which is the focus of this article.

Questions Lockton clients are asking about the legal and insurance implications of the proposed changes:

## **1. What defines a 'responsible person' of a registered provider under the new Act for the purpose of these penalties?**

The Draft Exposure Bill for the New Aged Care Act defines a 'responsible person' of a registered provider under Section 11. A person is considered to be a 'responsible person' of a registered provider if they are responsible for executive decisions, have authority or responsibility (or significant influence over) planning, directing or controlling activities.

When a registered provider delivers or proposes to deliver funded aged care services, the definition includes any person who is a registered nurse who has responsibility for the overall management of nursing services along with anyone who is responsible for the day-to-day operations of the registered provider.

## **2. Are these types of fines/penalties insurable?**

Aged care providers are constantly at risk of breaching a variety of acts of legislation, particularly in the current environment. Whether it is due to the directors' individual actions, the behaviour of employees or organisational failure in meeting compliance obligations, the large civil penalties and the threat of litigation presents real financial risk to providers. Although boards and executives do their best to minimise the risks, they are not immune to incurring fines for breaches of legislation.

From an insurance perspective, a director's governance risk is mainly addressed by D&O Insurance, designed to protect the personal assets of directors and officers of a private or public provider for claims arising from alleged wrongful acts committed by directors and officers in their capacity as governors of the organisation. Some Management Liability and D&O insurance policies can provide cover for legal costs and fines due to breaches of laws. However, it is worth checking to see how much cover is in place and also if there are special exclusions related to pollution or environmental damage that a specialist Statutory Liability policy would seek to cover.

Organisations can purchase Statutory Liability insurance either as part of its Management Liability policy, or on a standalone basis alongside its D&O insurances. Statutory Liability cover is a specialist type of insurance that is designed to help protect organisations from legal expenses if they were to breach an act of legislation. In addition to compensating the insured for the fine, these policies can help cover any reasonable legal and investigative fees that will also be likely to apply.

Statutory Liability policies generally will not provide cover for taxes or workers' compensation premium imposed by way of penalty, superannuation liability, or penalties that are uninsurable at law. Other typical examples of exclusions in a Statutory Liability policy include, gross negligence or recklessness, deliberate or intentional acts.

Insurers are not legally allowed to provide cover for Work Health & Safety breaches in New South Wales, Western Australia and Victoria under an insurance policy. Other states and territories will likely follow suit with similar amendments to their WHS laws. However, it is worth noting that the prohibition of insurance cover is only for the fines and/or penalties themselves. Cover is still available for costs of defending an investigation or prosecution.

## **3. Does a director need their own individual Statutory Liability cover or will the organisation's insurance respond?**

If the organisation purchases Statutory Liability cover, this will apply to both individual directors and officers, as well as the organisation itself. The breadth of who needs access to the cover will need to be defined with your insurance professional, particularly if board members are volunteers, or where the organisation is constituted under an act other than the Corporations Act, so that it applies appropriately.

#### **4. Do these changes mean board members go to jail for any breach by the provider, if this Bill becomes the new Act?**

No. First, while your board and the organisation should seek to fully comply with all provisions, board members only risk jail time if:

- a. they as individuals commit a “serious failure” to conduct due diligence to ensure the provider complies with section 120; and
- b. that serious failure results in the death of, or severe injury to, or illness of, a care recipient.

Under section 120, a provider must ensure, as far as is “reasonably practicable”, that its conduct does not adversely affect the health and safety of care recipients while delivering their aged care services. Section 121 gives a non-exhaustive list of due diligence activities board members (and other responsible persons) must perform.

Second, a board member can be convicted or found guilty of an offence under section 121 regardless of whether the provider has been convicted or found guilty of an offence under section 120. This means there are circumstances where a board member could be convicted and go to jail for breach of their obligations even if the provider is determined to not have breached its obligations in all the circumstances.

#### **5. Does this mean if I commit any due diligence errors, I go to jail?**

No. This risk only arises if the error has caused or contributed to a care recipient’s death, serious injury or illness and the error is serious enough to amount to a “serious failure”. The error may be a single act or failure to act, or a systemic pattern of poor conduct.

A board member can also avoid jail time if they have a reasonable excuse for committing the offence. The board member is responsible for proving this is the case to certain evidentiary standards. A lawyer can advise on the prospects of a board member proving this and prepare evidence in support of raising this defence.

#### **Where to from here?**

Prudent board members should perform a self-audit of their current risk exposure and what actions can be taken now to reduce risk in case these provisions form part of the new Act. When assessing your personal risk exposure and what risk management steps to take in response, consider your answers to the following questions:

- What resourcing, culture, systems, data visibility, and other changes could be made now to improve the organisation’s ability to meet its requirements and obligations under the new legislation, particularly if the new Act is expected to be enacted by 1 July 2024?

- What is my organisation's understanding of the proposed legislation? Do we have a plan for the transition to the new regulatory model?
- Do we have a current business continuity plan in place that aligns with legislative changes? Have we developed a risk management action plan based on our self-assessment? Does our governing board have a sufficient skills mix? What evidence do we have to support this?
- Are our systems, policies and procedures robust and fit for purpose? Have they been reviewed to align with legislative changes? Will they stand up to external scrutiny?
- What data do we report on? Is it relevant? What value does it bring? How does it mitigate organisational, personal and consumer risk? What do I need to understand about my own personal liability as a director or officer, and what aspect of that liability can be indemnified by the organisation to which I am a director or officer? Am I confident that I have the skills, experience, resources and capacity to meet my own personal obligations under section 121 throughout my tenure as a director or officer of an aged care provider?
- Do I know what my organisation's insurances provide cover for particularly with respect to my liabilities as a director or officer of an aged care provider? What is covered? What is excluded?
- Are our insurers introducing any amendments to cover as a result of the changes to legislation? What is their position for the organisation's upcoming insurance renewal?

Penalties and fines for breaching a variety of laws can be severe. It is important that you have policies and procedures in place to ensure that the provider, contractors, volunteers and employees comply with all relevant legislation.

An oversight by an employee or a contractor resulting in a serious near miss or death, is likely to trigger an investigation or inquiry and potentially legal action by a regulator. If you are facing a death investigation and potential imprisonment, you want to make sure you have the right insurance in place, to pay for legal fees to represent you both during the investigation and any trial. As the time between the investigation and final legal decision is likely to be years, legal fees can quickly add up.

Obviously, your risks will be dependent on your business, which state you operate in, and which aspect of care delivery, as not all laws will be relevant to you. It is worth talking to a professional insurance advisor about Statutory Liability insurance to ensure you and your management have the best cover.

Consultation on the draft bill has been extended to Friday 8 March, 2024.



### **For more information**

If you require guidance in navigating the complex legal, insurance, or compliance challenges as a director or officer of an aged care provider, please feel free to contact Lyle, Jessica, or Katie via their respective emails provided below.

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# The new Aged Care Bill 2023: Risk and Insurance Perspectives

As aged care risk management specialists, Lockton is keenly aware of the key potential risk and insurance concerns that may confront aged care providers if the new Aged Care Bill 2023, as currently proposed, passes into legislation.

The proposed legislation, particularly Section 120, outlines substantial increases in penalties, including heightened fines and the possibility of up to five years in prison for individuals convicted of the most severe offences.

Lockton has garnered feedback from clients and partners in the aged care sector, which shows the critical impact these changes may have on their services and organisational viability.

In this paper we outline what we consider to be the key risk and insurance issues that aged care providers may face in relation to the proposed new Aged Care Bill 2023.

## Insurance implications related to increased governance risk exposure

There are the two types of insurance policies that are designed to protect organisations and individuals against the financial consequences of governance-related liabilities:

- Management Liability/D&O Liability insurance provides coverage for claims related to management decisions, wrongful acts, and breaches of duties by directors and officers.
- Statutory Liability insurance offers coverage for fines, penalties, and legal costs arising from breaches of statutory obligations.

Even under existing legislation, the D&O Liability and Statutory Liability insurance markets are already facing significant challenges. These challenges will only be increased by the proposed amendments.

Insurers have experienced the impact of claims arising from legal and response costs incurred in addressing the findings of the Aged Care Royal Commission, with some claims reaching into the millions of dollars.

Lockton has observed annual increases in D&O Liability premiums ranging between 10% to 30%, a trend that starkly contrasts with the stabilisation in premiums for this insurance class across non-care insureds.

The proposed heightened penalties for aged care providers in the new Aged Care Bill 2023 represent a significant disparity compared to penalties in the corporate sector and other care sectors like healthcare and disability care.

This discrepancy suggests that the risk to insurers of governance failure for aged care providers will be notably elevated relative to other sectors given the likely enhanced scrutiny of regulators to monitor compliance to the proposed amendments.

Consequently, this is expected to intensify the strain on the already challenged insurance market, potentially leading insurers to further reduce capacity and impose increases in premiums and deductibles.

### [D&O Insurance - challenges for insurers and the implications for providers attracting board talent](#)

The potential introduction of new legislation and its application poses another challenge for insurers, stemming from the uncertainty regarding their risk exposure.

Based on our experience, when insurers encounter a lack of 'data experience' - meaning insufficient data-based evidence to adequately assess risk exposure - they tend to mitigate risk by imposing conditions of cover related to the risk management practices associated with that specific class of cover.

Insurers are therefore highly likely to impose conditions, such as reviewing the composition of the board and executive, along with their qualifications and experience, as prerequisites for granting cover.

This is likely to pose a further significant challenge for the aged care sector, which is already grappling with difficulties in attracting competent and capable directors to govern.

The imposition of additional severe penalties, combined with increased difficulty in obtaining insurance coverage, could potentially exacerbate the challenge of attracting the directors and officers urgently needed in the aged care sector.

### [Implications for Employment Practices Liability Insurance](#)

As workforce challenges persist as a significant factor for most care providers, the risk of claims against management for issues such as unfair dismissal, discrimination, harassment, undue stress, and similar matters has steadily been on the rise.

Employment Practices Liability is now emerging as a rating pressure point for insurers, driven by the heightened number of Unfair Dismissal claims stemming from the aftermath of Covid-19, the outcomes of Royal Commissions, and escalated staffing pressures.

Insurers have already implemented significant increases in premiums and deductibles for this cover, and are expected to continue doing so, especially as the proposed legislative amendments make it increasingly challenging to adequately support and resource managers in applying best workplace practices aimed at preventing the types of claims covered by this policy.

### [Cover and Cost Implications - Public Liability, Professional Indemnity/Medical Malpractice](#)

On average, General Liability premiums for care providers have continued to increase.

The extent of this increase depends on the mix of care offered by providers and is particularly influenced by the diversity of care services provided across various vulnerable persons' categories.

Additionally, the changes to maintaining adequate staffing levels, has seen many providers rely on the use of agency workers, which has led to increased claims for third party bodily injury recoveries. This has directly resulted in even greater increases in premiums and deductibles for impacted providers.

Notably, the level of exposure to the risk of sexual abuse plays a crucial role in determining premium rates, highlighting the significant impact it has on insurance costs for care providers.

### Insurance Implications for Registered Nurses (RNs) defined as 'Responsible Persons'

The new Aged Care Bill proposes to include RNs within the definition of 'Responsible Persons'. Lockton believes that this will introduce further exposure to the already challenged insurance markets for D&O, Public Liability and Professional Indemnity/Medical Malpractice.

One potential impact of this change is that the blending of governance risk and care risk may result in potential duplication or gaps in coverage among these policies, prompting questions about the responsible insurer for responding and the triggering mechanisms of those policies.

When insurers identify potential multiple triggers to several policies, they often rely on the 'other insurance' clause or may seek to specifically exclude coverage under their policy.

This is because insurers may interpret the proximate cause of the claim differently, leading to disputes over which policy should respond to the claim.

In such cases, insurers may invoke clauses within their policies to limit their liability or exclude coverage altogether.

The consequence of such interpretations and disputes could potentially leave none of the insurance policies responsible for covering the duty of care liability for RNs.

This situation is particularly concerning for sought-after RNs who are willing to assume senior responsibilities within a provider.

In the event of a claim, the absence of adequate insurance coverage could leave these RNs vulnerable to significant financial risk and legal exposure.

When providers' insurances are unable to respond, as per usual commercial practice, providers will typically turn to the professional indemnity insurances of the individual RN, seeking evidence of this insurance in contractual agreements.

RNs generally do not hold their own individual professional indemnity insurance, and labour hire companies do not provide cover where the RN is in full employment and/or under the full supervision of their host employer.

As a general rule, RNs typically do not hold Directors and Officers (D&O) insurance in their individual capacities.

The proposed amendments would mean that the provider's D&O insurance will also need to be extended to include cover for the RNs, with the flow on effect being that boards and executive will need to consider the extension of their definition and training of those RNs so that they understand and can take on the governance responsibilities of the organisation, in addition to their roles as RN's.

It is already a well-established fact that attracting qualified RNs to the sector is extremely challenging.

The ability for providers to comply with the already existing requirements for 24/7 RNs, will be even more challenging if RNs are left with additional governance responsibilities, and no insurance.

#### Workers' Compensation Insurance - increase in costs due to workforce shortages

As workforce shortages increase, the likelihood of errors being made by carers; and increasing claims for allegations of abuse, negligence, or failure to provide compliant care is rising.

Staff who are already stretched are much more likely to make claims against their employer for mental or physical injury, with the associated workers' compensation insurance costs rising exponentially as a result.

#### Property Insurance - potential vicarious impact on viability of providers

While the focus of the proposed amendments relates to liability and governance exposures, there may also be an unintended consequence that providers will not be able to afford to resource the risk measures and insurances necessary to maintain adequate cover to mitigate the risk of an insured property loss.

Without an adequate response plan for major property damage, or measures to mitigate its extent, it is highly probable that a provider will be unable to regain pre-loss viability and may face permanent closure.

#### Cyber risk and insurance – potential vicarious impact on directors and executives

For the past two years, cyber incidents have ranked in the top five risks for businesses in Australia. This is with good reason, as major cyber events have crystallised for the first time during the last couple of years in Australia.

The recent data breaches highlight the significant remediation and reputational costs a high-profile incident can cause. We expect these attacks to end up costing in the hundreds of millions of dollars, but this will take some time to play out.

Health-related data is seen as the most valuable data available due to the unique combination of Personally Identifiable Information (PII) needed by organisations to manage people in their care.

For community services and care providers, predatory access to customer financial and health information can be catastrophic.

PII data also remains under intense scrutiny from a regulatory standpoint, leading to increased attention from the insurance market due to the potential third-party liability coverage provided under cyber policies.

Insurers are placing increased scrutiny on risk mitigation measures which need to be demonstrated by those in high PII industries/environments such as for community services and care providers.

Robust cybersecurity controls remain a prerequisite for insurance coverage, with underwriters also seeking to verify that controls exist. Insurers are carefully reviewing policy applications to determine if representations about controls are accurate. We have seen coverage lost where the representations were incorrect.

Under the proposed amendments, it is unclear whether 'responsible persons' found to have failed to implement correct cyber protocols, or obtain proper cyber insurance, will now be subject to criminal fines and penalties.

### Closing remarks

Lockton believes the proposed amendments pose extensive and far-reaching risk and insurance implications for aged care providers.

While insurers may initially take time to adjust to these amendments, and their impact may not be immediately reflected in the first year of providers' insurance renewals, as insurers become increasingly aware of the risks associated with escalating claims quantum and probability, their response is likely to involve further contraction away from an already high-risk sector.

This could exacerbate the challenges faced by providers in securing adequate insurance coverage, potentially leading to increased premiums, tighter restrictions, and a limited pool of insurers willing to underwrite risks within the sector.

We strongly urge the government to take the time to carefully consider the above potential insurance and risk implications and the impact that they may have on providers, if the draft new Aged Care Bill is passed.

### [Recent related papers from Lockton \(attached to this submission\)](#)

Lockton has recently published several related papers offering more detailed information on the topics discussed above:

- 1. 2024 Aged Care Risk and Insurance Outlook: severe penalties proposed for directors under new federal laws for negligence. (2023)**
- 2. Migration and Workforce shortages in Aged Care: Risk and Insurance Perspectives (2023)**
- 3. Safeguarding Claims Summit. Event recap for the broader community services sector: sharing best practice, lessons learnt and actions to take. (2023)**
- 4. The public liability dilemma facing the aged care sector: Key insights and considerations for aged care providers heading into 2024. (2023)**

### [About Lockton](#)

Lockton is the largest privately owned risk and insurance brokerage in the world, employing over 8000 associates. We employ over 200 associates in Australia. As an international broker we have access to all Australian and global insurance markets. Our Independent and private status means we are not conflicted between the needs of our clients and shareholders – we are a client focused organisation, and all our associates manage clients, we do not employ ‘professional managers’.

### [Lockton’s collective experience in aged care](#)

Our team works exclusively with health and community care organisations, fully immersed in the sector. Each team member made a conscious decision that this was the industry they felt passionate about, and this is demonstrated in both our current and past client experience and key staff profiles. Our team has national experience in all classes of insurance for clients undertaking activities in aged care, retirement living, community care, disability care, health, research and education and training.

### [We are committed to the aged care industry.](#)

Over the last 30 years, Lockton have established an extremely reliable professional service provider with a deep understanding of care providers’ risk and insurance needs, which has resulted in an ever-increasing client base, where we now provide Insurance and Risk management services to in excess of one hundred (100) Aged Care, Community and Disability Care providers across Australia. Some of these clients are listed overleaf.



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# Safeguarding Claims Summit

*Event recap for the broader community services sector:  
sharing best practice, lessons learnt and actions to take.*

—  
2023



**Trigger warning:** this publication contains references to themes of abuse which some individuals may find distressing.





# Key takeaways and what it means for your organisation

In response to the significant impact that historical safeguarding claims are causing within the broader community services sector, Lockton, the world's largest privately owned insurance broker, and Finity, Australia's largest independent actuarial consulting firm, hosted its inaugural Safeguarding Claims Summit in Sydney on 30 November, 2023.

The Summit brought together global thought leaders and experts in the quantification and management of safeguarding claims.

Participant organisations walked away with a better understanding of their exposures, how to quantify risk and prevent abuse. Together, we also explored alternative risk solutions to help secure insurance protection for the future.



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*The half-day Summit served as an avenue for global thought leaders to share insights on how organisations can understand, quantify and prevent abuse risk. Together, we also explored insurance solutions for the future. Here are our event key takeaways so the wider industry can benefit from our conversations.”*

Ian Maybury, General Manager – Health & Community Services, Lockton



## Dive into the key talking points from each session:



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**PROTECTION FOR THE FUTURE:** alternative insurance solutions





# 01

## UNDERSTANDING THE RISK: abuse liability in Australia and legal framework



Words by Chern Tan

MinterEllison

There are three main causes of action relied on by claimants in respect of abuse liability:

NEGLIGENCE

VICARIOUS LIABILITY

NON-DELEGABLE DUTY

**NEGLIGENCE:** are the organisation’s policies and procedures being followed?

Negligence is a breach of the duty of care that the organisation owes to the person who has suffered an injury. This usually turns on the knowledge of the organisation of the past behaviour of the alleged perpetrator. It often also depends on whether the organisation has adequate policies and procedures in place to deal with the risk of abuse. For example, training, complaints, reporting of inappropriate behaviour and equally importantly, whether the organisation is monitoring and supervising staff to ensure compliance with the policies and procedures.

Having policies and procedures alone may not be sufficient to discharge the organisation’s duty of care. Monitoring and checking with staff to ensure that the policies and procedures are followed is also necessary in order to guard against a finding of negligence.

Examples of questions organisations should ask themselves internally:

- What policies and procedures do I have in place?
- Where are historical documents housed?
- What is being done to enforce compliance with policies and procedures?
- How is this compliance check being documented? What is the audit trail?

Lessons learned from the past

Organisations create rules to keep everyone safe. Negligence occurs when these rules aren’t made well, updated or followed properly. To help avoid issues, organisations need to check and update their rules regularly and ensure everyone knows and follows them.







**VICARIOUS LIABILITY:** Employers are responsible for employees, but there are limits. There are also boundaries to consider during the course of employment.

Vicarious liability is a legal concept holding employers responsible for their employees' actions, without any fault on the part of the employer. Understanding employment boundaries and taking proactive measures to train and supervise employees can help mitigate the risk of vicarious liability.

#### Key points:

An organisation is vicariously liable for employees only – not contractors or volunteers.

If an employee does something wrong while working i.e., "during the course of employment", the employer can be responsible. To avoid this, employers should train and oversee their employees.

If the employee did something completely unrelated to work, the employer might not be responsible.

In relation to abuse liability, the High Court of Australia has said whether the abuse was during the course of employment is determined by such things as whether the employer provided the employee with the authority, power, trust, control and the ability to achieve intimacy with the victim.

#### Examples of questions organisations should ask themselves internally:

- What is the course of employment for your people?
- What authority, power or control do your employees have over children?
- Do they have an ability to achieve intimacy with them?



**NON-DELEGABLE DUTY:** There are only a small number of relationships where this is owed, but it may not extend to criminal acts.

A non-delegable duty also imposes liability on organisations for the actions of others but goes beyond employees and extends to any contractors or volunteers. However, it is important to note that a non-delegable duty applies in limited relationships, for example school and student, hospital and patient, employer and employee, prison authority and prisoners (although the categories are not closed).

- The vigilance an organisation takes with respect to employee behaviour should apply to contractors and volunteers wherever possible.
- Policies and procedures, training and monitoring should apply to them too.

On the current state of the law in Australia, non-delegable duties do not extend to hold an organisation responsible for another person's deliberate and criminal acts. We expect the High Court of Australia to clarify the extent of non-delegable duties soon.

Summary:

	Vicarious liability	Non-delegable duty
Organisation is liable for others?	Yes	Yes
Liability for employees?	Yes	Yes
Liability for non-employees?	No	Yes but there are limited relationships where this duty is owed
Extend to intentional and criminal acts?	Yes, if during the course of employment	No



**PERMANENT STAYS:** Sometimes, legal cases can be stopped permanently. There is still a pathway, although it is narrower.

Permanent stays refer to court orders halting legal proceedings permanently. There have been numerous proceedings stayed by the court where the alleged events happened decades ago. The court will stay proceedings if it is determined that the defendant cannot have a fair trial.

In November 2023, the High Court of Australia in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* clarified that permanent stays will be granted as "a last resort". The judges in the majority said that the effluxion of time alone is not a reason to stay proceedings and by extension, nor is the death of the alleged perpetrator or the loss of documents. Those judges emphasised that a fair trial is not a perfect trial. Not having the option to call a particular witness because of their passing is not, without more, a reason the trial is unfair. The query is what effect the effluxion of time has had on the defendant's ability to defend the proceedings. Where much is known about the alleged perpetrator and there are other grounds of defence (besides calling the alleged perpetrator as a witness to rebut the claim), the defendant may still have a fair trial and a permanent stay will not be granted. In *GLJ*, the High Court refused to stay proceedings brought more than 50 years after the alleged events.

Examples of questions organisations should ask themselves internally:

- What is the impact on the defendant to defend themselves?
- What is currently known about the alleged perpetrator even if they are deceased?
- What documents are available?
- What investigations had previously been conducted?

### KEY TAKEAWAY

**Deal with each claim on its merits: going to trial means talking about the facts.**

There is a growing concern that claims farming is leading to unmeritorious claims. While the concern is legitimate, there is still a need to deal with each claim on the merits. When a claim goes to trial, the judge will evaluate the evidence before them in that specific case.

**Key points:**

In court, each problem is looked at on its own. It's important to talk about the facts and not make general assumptions.

Going to court means your organisation has a defence based on the evidence, for example from witnesses. This way, the judge can decide based on the facts.

A strategy of relying only on cross-examination of the claimant to show they are being untruthful is risky.







# 02

## MEASURING UNINSURED RISK: How big is your exposure?



Words by Luke Cassar & Danielle Casamento



Safeguarding claims can arise when an individual is harmed and an organisation has a duty of care with respect to the individual’s safety. Such claims can arise from situations where a child or adult is under care in out of home care, education, aged care and disability care settings.

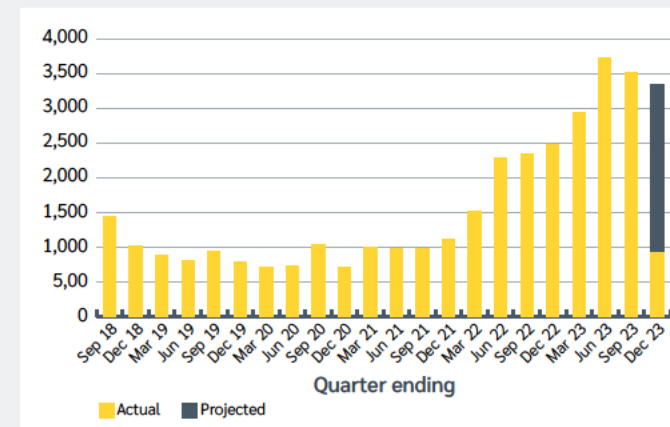
In response to The Royal Commission<sup>1</sup> into Institutional Responses to Child Sexual Abuse in 2015, state and territory governments around Australia removed time limitations on claims for child sexual and physical abuse and the National Redress Scheme (NRS) was established. These changes, combined with an increased awareness of historical cases of institutional abuse, have led to an increase in safeguarding claims being made, through either civil settlements or NRS applications.

Finity’s report for the Royal Commission<sup>2</sup> estimated that the majority of historical claims would arise from residential care, foster care or education settings, and that two-thirds of claims would arise from non-government institutional settings. Therefore, many non-government organisations are facing significant uncertainty surrounding the potential financial impact of safeguarding claims. In order to support budgeting, financial decision-making and the placement or renewal of insurance cover, organisations would benefit from quantifying the financial risks related to safeguarding claims.

### Recent and emerging NRS and civil experience

The NRS commenced on 1 July 2018 and is now more than five years into the anticipated 10-year scheme duration. To 3 November 2023, there have been 32,785 applications to the NRS<sup>3</sup>. Application numbers have increased significantly since early 2022 (see figure below).

#### NRS application numbers by quarter<sup>4</sup>



The scheme has made nearly \$1.2bn in redress payments so far, to around 13,300 applicants at an average payment per application of around \$90,000.

Notwithstanding the significant number of survivors that have applied to the NRS, there has been a concurrent elevation in the volume of civil claims relating to historical abuse due to the removal of the once significant barriers to successful claims, as well as an environment of changing attitudes towards acknowledging the abuse of children.

1 <https://www.royalcommission.gov.au/system/files/2021-01/carc-national-redress-scheme-participant-and-cost-estimates-report.pdf>  
 2 <https://www.royalcommission.gov.au/system/files/2021-01/carc-national-redress-scheme-participant-and-cost-estimates-report.pdf>  
 3 <https://www.nationalredress.gov.au/about/updates/1846>  
 4 Quarterly numbers have been approximately estimated based on intermittent scheme updates published on the NRS website. Actual applications received each month may be different to the approximate estimates shown.



A recent development impacting the number of civil claims is 'claim farming'. Claim farming is the process by which a third-party cold-calls or approaches individuals to pressure them into making a compensation claim for personal injury. In mid-2022, Queensland introduced legislation<sup>1</sup> to outlaw claim farming of victims of child abuse. The practice is yet to be outlawed in other Australian jurisdictions, despite concerns being raised – particularly in the Northern Territory, New South Wales and Western Australia.

At the same time, there has been a substantial uplift in the number of civil claims made. There has also been a material uplift in the civil awards received by survivors of abuse. The Royal Commission claims project indicated that the mean compensation paid for (institutional child sexual abuse) civil claims resolved between 1995 and 2014 was around \$82,000 and the median \$45,000<sup>2</sup>. Based on our discussions with insurers, monitoring of court decisions and our experience working with governments and insurers in this space, we are aware that recent civil settlements have been significantly higher than these amounts.

We expect there to be additional financial pressures arising from the volume and cost of safeguarding claims due to:

- The introduction of new redress schemes by State Governments to recognise historical institutional harm. In Victoria, a redress scheme for people who experienced child abuse and neglect while in institutional care prior to 1990 was announced in 2022.
- The Royal Commission into Aged Care Quality and Safety and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has highlighted some of the experiences of people receiving aged care and disability services.



1 Personal Injuries Proceedings and Other Legislation Amendment Bill 2022

2 [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_redress\\_and\\_civil\\_litigation.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf)



### Quantifying safeguarding claims

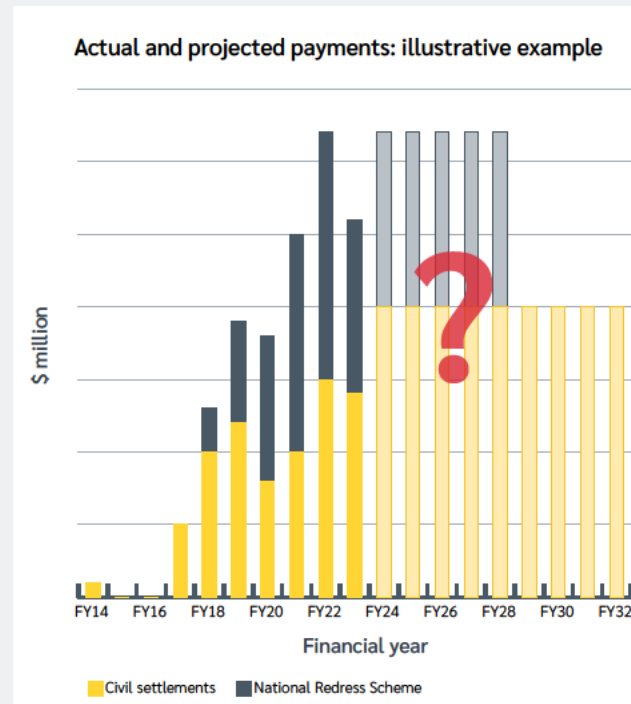
There are many reasons why an organisation would benefit from quantification of future payments in relation to historical safeguarding claims, including:

- Supporting financial decision-making
- Resource allocation and operational planning
- Placing or renewing insurance coverage
- Accounting requirements – organisations can provision for historical safeguarding claims on the balance sheet.

Quantification typically involves estimating the costs of reported but not finalised claims, the volume of future claims reported and the costs of these unreported claims. However, quantifying the risk is more challenging than many other risks due to:

- Limited historical data on incidents and exposures
- The ‘long tail’ associated with some safeguarding claims (i.e. the significant delay between abuse occurring and the survivor bringing a claim in respect of the abuse)
- The impact of legislative changes and the changing legal environment.

### Quantifying the risk



Estimates of an organisation’s financial liabilities with respect to safeguarding claims should consider:

- Exposure over time, for example resident/student population over time
- Survival rates of residents/students with the passage of time
- Publicly known perpetrators
- Plaintiff lawyer activities
- Historical claims and the extent of underreporting
- Historical incidents
- Benchmarks against similar organisations

Quantification requires the collection of consistent and reliable data in relation to the above. Estimation should be a regular exercise, so that emerging experience can be used to assess the adequacy of the previous estimate and revise key assumptions.







# 03

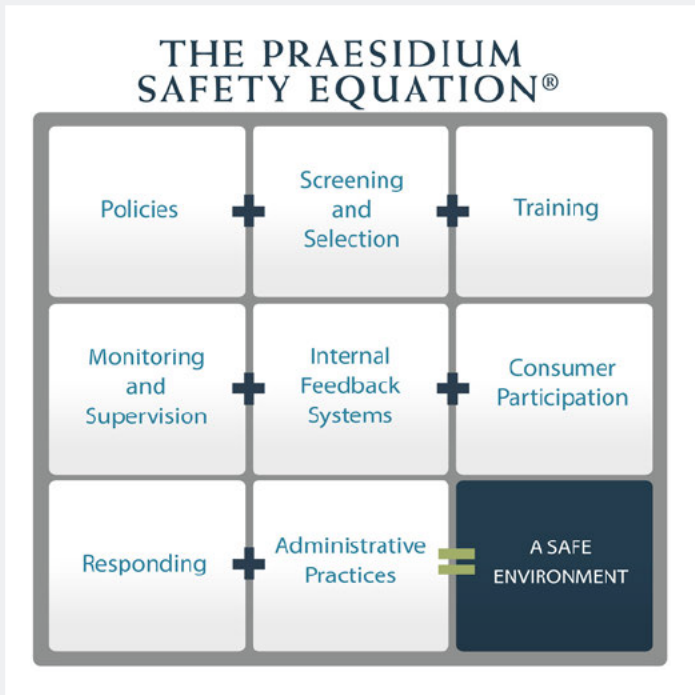
## PREVENTING THE RISK: best practice



Words by Candace Collins



Abuse within organisations often spurs a series of questions about how and why something occurred, while searching for missed signs and opportunities. Despite prevailing myths, organisational sexual abuse rarely manifests simply as one bad actor who infiltrates and preys upon a child, young person, or vulnerable adult.



1 www.praesidiuminc.com

Having analysed thousands of cases of abuse, Praesidium built a scientifically based framework for identifying abuse risk in organisations and methods to mitigate the risk. The Praesidium Safety Equation® methodology identifies eight organisational operations that provide opportunities to decrease the risk of abuse by employees, volunteers, or other program participants.<sup>1</sup>

Using current research; benchmarking and standards propagated by well-established entities, and its own root-cause analysis of thousands of cases of organisational abuse across industries, Praesidium identified best practices in each of these eight operations.



## UNDERSTAND THE SCOPE OF ABUSE AND HOW ABUSE HAPPENS

Research indicates more than 1 in 3 girls and almost 1 in 5 boys experience child sex abuse<sup>1</sup>. Other studies suggest more than half of people with disability aged 18-64 years have experienced physical or sexual violence<sup>2</sup>. And 15% of people aged 65+ living in community dwellings in Australia reported at least one type of elder abuse.<sup>3</sup>

The impacts of abuse can be devastating, affecting the organisation's clients, your team, and the entire community. Survivors face physical, psychological, educational, behavioural, and interpersonal effects. These impacts can last a lifetime and may require professional intervention to facilitate the healing process. Organisations must consider the risks to their mission and teams, including decreased productivity, low morale and increased turnover. Larger implications may affect the ability to continue programming, including reputational damage, fines and other monetary damages and decreased insurability.<sup>4</sup>

Beyond the statistics and sobering reality, there are also emerging trends that continue to shift the national conversation on organisational sexual abuse. More stakeholders are demanding that organisations do more to protect the children, young people and vulnerable adults they serve and are asking questions to ensure best practices are in place. As expectations increase, the national landscape continues to see new and expanded legislation, governing bodies and other mechanisms designed to ensure consistent implementation of prevention measures.<sup>5</sup>

To keep individuals safe and implement prevention strategies, an organisation needs to understand how abuse happens:

**Adult-to-Vulnerable abuse.** Some offenders purposefully enter an organisation with the intent to abuse. Others enter an organisation with well-meaning intentions, but through situational or psychological circumstances, may cross boundaries with individuals. Whether using predatory tactics or unintentionally violating boundaries, sexual abuse can occur when *access*, *privacy* and *control* exist. And although false allegations are rare, similar circumstances apply, which reinforces the need for your organisation to understand its potential abuse risk exposures.

**Vulnerable-to-Vulnerable abuse.** When people think about sexual abuse in organisations, they typically think about an adult harming a child. But abuse can also include a child, young person or vulnerable adult who may engage in inappropriate sexualized behaviours with each other. Regardless of whether an interaction is considered abuse, the interaction may not be appropriate within the program operations of the organisation. And there are prevention measures an organisation should take to ensure adequate supervision of the individuals in care. Vulnerable-to-vulnerable abuse typically occurs when there is: opportunity, a private location, a higher-risk activity, lack of monitoring and/or poor planning.

Although research and experience tell us there is no one-time or quick fix, sexual abuse within organisations is a preventable risk. Prevention requires a robust, systems-based approach and a sustained commitment anchored in empirically based best-practice standards. To better understand these concepts requires a broader and deeper look at an organisation's systems and the surrounding culture.<sup>6</sup>

1 The Australian Child Maltreatment Study (ACMS). Mathews B, et al. The prevalence of child maltreatment in Australia: findings from a national survey. *Med J Aust* 2023; 218 (6 Suppl): S13-S18.

2 <https://disability.royalcommission.gov.au>

3 Elder Abuse in Australia Snapshot, <https://aifs.gov.au/research/research-snapshots/elder-abuse-australia-prevalence>.

4 Praesidium, (2023, April) Insurance Carrier Benchmarking: Sexual Abuse and Molestation Liability, <https://bit.ly/SMLbenchmarking>.

5 Praesidium Report 2023, <http://20935854.hs-sites.com/en/praesidium-report-2023>.

6 [www.praesidiumaccreditation.com](http://www.praesidiumaccreditation.com)



## IMPLEMENT PREVENTION STRATEGIES

So what can your organisation do now to prevent abuse and how do you get started?

### 1. Implement and standardise policies.

Essential to effective abuse risk management, written policies set the stage for safe environments. Policies communicate an organisation's commitment to abuse prevention to its employees, volunteers, children, young people, vulnerable adults, and the community in general. Policies also define the bandwidth of acceptable behaviour between employees, volunteers, and vulnerable individuals and allow us to identify when boundaries may be crossed or violated. When employees and volunteers know and understand policies, they can also report policy violations that may foretell abuse.

To mitigate boundary-crossing behaviours, or the element of control, your organisation's policies should clearly define appropriate and inappropriate expectations surrounding physical, emotional, and behavioural boundaries.

### 2. Screen for abuse risk.

Comprehensive screening and selection requires organisations to discover and consider everything they can about applicants and to use what is known about how offenders operate and how false allegations arise to make thoughtful hiring decisions. Screening and selection processes help

to manage who has access to children, young people and vulnerable adults.

Regardless of their title, individuals with higher levels of access to vulnerable individuals should be screened at a higher level. Remember, the frequency, duration, nature of the relationship and supervision level all influence the individual's level of access.

### 3. Deliver the right training at the right time.

Effective abuse prevention training gives employees and volunteers the information and skills they need to keep those in their care safe. Training must be frequent, specific and immediately useful on the job.

Everyone should receive annual training that addresses the prevention, detection and response to adult-to-vulnerable abuse and vulnerable-to-vulnerable abuse plus the organisation's policies.

### 4. Monitor and supervise for safety.

A critical component in preventing abuse is reducing opportunities for privacy and defining procedures for interactions that inherently include some level of privacy. When schools follow clear structures for supervising employees and volunteers, potential offenders are less likely to act on their impulses or violate policies because they face detection. Developing plans for monitoring higher-risk

situations, the facility, and interactions with children, young people and vulnerable adults further assists organisations in minimising the inherent exposures in such locations and programs.

### 5. Implement systems for responding.

How an organisation responds to reports of suspicious or inappropriate interactions, policy violations or suspected abuse can dramatically affect the impact to all individuals and the organisation.<sup>1</sup> Organisations also need consistent and clear response methods that integrate a continuum of responses.

Most organisations understand the need for, and have written reporting procedures for suspected abuse, meaning that harm may have already occurred. To escalate concerns before an incident of abuse, organisations need (but often lack) defined procedures for reporting red-flag adult behaviours, policy violations, and youth-to-youth sexualised behaviours. Organisations have a tendency to minimize youth-to-youth sexualised behaviours as "normal" or age or developmentally appropriate when there is no standard definition of "normal" sexual curiosity.

<sup>1</sup> *Providing a Compassionate Response: It Starts with an Apology*, <https://20935854.hs-sites.com/en/praesidium-apology-whitepaper>.





## CREATE A CULTURE THAT SUPPORTS PREVENTION

To aspire to real commitment, organisations must take a hard look at their culture and whether it can implement and sustain a culture of safety. So, what does a culture of safety look like? Based on Praesidium's decades of research and field experience, Praesidium points to these seven components:

1. Standards are clear.
2. Standards are enforced.
3. Everyone knows safety is part of their job.
4. Everyone takes warning signs seriously.
5. Everyone reports their concerns.
6. Morale is high.
7. Quality is institutionalised.

Creating this culture of safety will not happen overnight. And even if your organisation is successful in creating this culture, don't assume it will stay. Consider searching your institution's mission for a back-to-basics approach of why managing this risk matters and should remain a priority despite the challenges.

## AVOID THE COMPLIANCE TRAP

When managing abuse risk, organisations tend to fall into one of three categories: **complacency**, **compliance**, or **commitment**. Where do you think your organisation falls?

**Complacency** is seen most often in smaller organisations, especially when lulled into thinking they have all their bases covered, in part because they may not have experienced a serious incident in some time (or ever). Complacent organisations typically:

- Do not systematically identify, inventory and correct potential safety risks.
- Do not assess risk when starting a new program.
- Do not identify individuals or departments as responsible for youth safety.
- Prioritise safety issues lower on the budget.
- Deny that an incident of child abuse could ever happen.

**Compliance** often describes organisations that assume they are "safe" based on their compliance with external standards, requirements, and/or licensing provisions. These external standards may include adult-to-youth ratios, completion of criminal background checks, and mandated reporter training. Compliant organisations typically:

- View abuse risk like a natural disaster. This philosophy often presumes that abuse cannot be prevented. As a result, policies and training may focus on what to do after the suspicion of abuse arises.
- Rely solely (or heavily) on education-related accreditation standards as evidence of good work.
- May establish written policies and procedures but may not consistently provide employees or volunteers with "the why," or the rationale that forms the basis of the policy or procedure.

Organisational sexual abuse rarely manifests simply as one bad actor who infiltrates and preys upon vulnerable individuals. Although research and experience tell us there is no one-time or quick fix, sexual abuse within organisations is a preventable risk. Organisations fall into the compliance trap when they stop identifying and learning from system failures.



**Commitment** rarely exists unless prioritised at a high level from senior leadership, the board members or significant funding sources. An internal tragedy or extreme external pressures sometimes prompt commitment. Committed organisations typically:

- Utilise senior leadership to publicly demonstrate, through words and actions, your organisation's commitment to abuse prevention on an ongoing basis.
- Identify and empower a point person or group to oversee initiatives related to your organisation's safety.
- Have mechanisms to identify, inventory and track programs across locations, departments, and auxiliary programming.
- Establish minimum standards for interactions with people, including appropriate and inappropriate boundaries and how to manage high-risk activities.

- Integrate abuse risk management in the screening process for all new employees and volunteers.
- Train all employees and volunteers on impactful abuse prevention content and have mechanisms to maintain ongoing awareness.
- Have a reporting culture that may over report but not overreact.
- Treat allegations and incidents as an opportunity to strengthen youth protection efforts.
- Have systems in place to hold people accountable for prioritising safety.

Managing abuse risk involves everyone. Use this new year to reflect on these efforts and refresh your approach. Creating a culture of safety is an ongoing journey that takes commitment and continuous improvement.







# 04

## INSURANCE MARKET POSITION AND PATHWAYS TO SEEK COVER

Words by



Lyle Steffensen



Leo Demer



Jessica Schade



Ian Maybury



### There has been an insurance market failure.

Many years after having placed policies, insurers are now paying for safeguarding claims they never allowed for. Insurers were ultimately holding contingent liability for historic abuse-related events as the coverage in place at the time was on an occurrence basis, and no specific exclusions or limitations were applied to remove cover for safeguarding claims. When legislation was passed removing the statute of limitations on these claims, this caused an open-ended risk for having to pay claims related to incidents as far back as the 1950s.

Insurers are unable to collect premiums for past policy coverage, so they reacted by either exiting the market altogether, or offering expensive coverage with tight restrictions (such as steep deductibles, low limits of cover and very limited or no retroactive cover).

### Other influences impacting the current state of the market:

- The market has shrunken considerably with the majority burden of these claims being on Ansvar and Catholic Church Insurance (CCI). After CCI shut its doors in May 2023, catholic organisations started to operate in the general insurance market, placing even more pressure on the market to find cover.
- CCI was one of the few insurers (both locally and abroad) willing to provide sexual abuse and molestation cover.

### The Government's response to this risk

The Federal Government's response has been to leave it to the different State governments to handle and respond to claims for this risk.

### At a glance:

**Victoria:** Victorian Managed Insurance Authority provide cover, however, only for state-funded organisations for operations within Victoria.

**South Australia:** funds for claims built into state treasury fund on a case-by-case basis.

**New South Wales:** short-term indemnity scheme implemented which can be applied for on a case-by-case basis.

**Western Australia:** short-term indemnity scheme implemented which can be applied for on a case-by-case basis.

**Queensland, Northern Territory and Tasmania:** considering their position.

**ACT:** the Federal Government manages the majority of relevant operations in ACT. The majority of relevant ACT-only organisations have NSW risk and will thus be subject to the NSW position.

### Looking ahead

In welcome news for insurance buyers, the market is cautiously starting to open up with new entrants, for example from the London market, but unsurprisingly, insurers are being very considered and careful.



## What are insurers looking for when they assess this risk?

The need to demonstrate strong board and executive commitment to safeguarding risk management, proactive action to resolve current issues, any initiatives organisations are undertaking to prevent abuse risk and 'selling' these messages to potential insurers in direct interviews is key to success in seeking cover.

Examples of questions organisations with abuse risk need to ask internally:

- When there is not a clean history, what actions have we taken to resolve existing or prior safeguarding concerns, allegations, claims?
- Do we have a clear strategy for reducing this risk? Does the board and executive 'own' the strategy?
- Is safeguarding risk management a standing board agenda item and does it have priority attention?
- Does our safeguarding risk management program include implementation, review, and processes for areas such as recruitment, induction, training, communication protocol, notification both to relevant legislators and to insurers, and is it inclusive of staff and volunteers?
- Do we have financial viability to be able to fund high deductibles and pay high premiums?
- Are we willing to have insurers interview us directly?



### KEY TAKEAWAY

It's important to remember that as a key leader (board member or executive) it is your responsibility to ensure the protection of vulnerable people in care. Insurance cannot be the only risk solution to addressing this issue within your organisation.





## PROTECTION FOR THE FUTURE: alternative insurance solutions

The traditional insurance market doesn't have an appetite to cover all risks related to this complex issue, leaving organisations vulnerable.

Alternative risk transfer is a self-insurance vehicle gaining increased attention to help address this issue.

In simple terms, the foundations of alternative risk transfer are to explore ways of funding risk in a different manner that organisations traditionally haven't considered. The industry has traditionally pushed this risk onto others such as insurers. With alternative risk transfer, organisations can still utilise the traditional insurance market, but also have accountability by using their own capital to structure risk in an alternative way. When an organisation has something like this in place, they can then have funds set aside to fund a certain level of accepted risk and then try to open up insurance markets to cover more significant exposures. When organisations have "skin in the game", they also become more invested and accountable.

### When and where to start?

The traditional market is not going to get easier, so planning from today is key. If organisations wait for 5-10 years and then ask, "what do we do now?", this is when organisations may be in crisis mode and it may be too late. Organisations can start to provision and build surpluses/reserves for the future to start gaining control of their risk destiny in this space.

Organisations should start to understand the information they have on file and then pass this information to actuaries to quantify their level of risk which will then inform whether alternative risk transfer is viable.

### What can we learn from other industries?

As a historical case study, in the early 1990s, local governments across Australia were in crisis mode for other insurance lines. It was almost impossible for councils to get cover and prices were escalating out of control (in some cases councils faced a 300% increase in premiums).

In response, Local Government Mutual Schemes in Australia were established which reinvented traditional insurance. The self-insurance model changed the market forever. Mutuals provided an opportunity for local governments to engage and problem solve with their peers at neighbouring councils, creating a collaborative, industry wide approach to risk protection and management practices.

As an example, in New South Wales, councils started to pay into mutual funds such as Statewide Mutual and StateCover Mutual. When these funds built up levels of self-insured

retention, as a group local governments could then take this self-insurance model to the insurance market to cover the remaining exposures. All of a sudden, insurers were now interested in taking on the risk as they viewed it as a safer place to invest their capital.

Fast forward 30 years to today, approximately 15 of these alternative risk transfer schemes now have over \$300m in surplus funds that can be reinvested back into risk management initiatives rather than being paid to the insurance market as premium.

### A group-led industry response is important for alternative risk transfer

Examples of questions organisations need to ask themselves and their peers:

- Does our organisation understand our total cost of risk, for example the cost that we retain and the cost we pay to the insurance market?
- Insurers fill assumption with premium. When insurers have uncertainty, they charge more, so what information can we provide to gain insurer confidence?
- Is there common ground to cover certain risks across our industry?

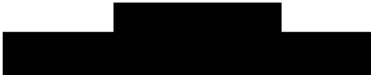


# For more information



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Principal

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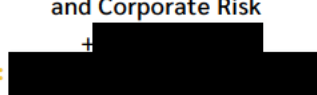
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# About us



Lockton is the world's largest privately-held insurance brokerage. It has 10,750+ professionals in over 100 offices, focused on providing more than 65,000 clients with the best in risk management, insurance, and employee benefits service.

The Lockton team works exclusively with health and community care organisations 24/7, fully immersing themselves in the sector.

With over 30 dedicated industry specialists Australia-wide, each team member made a conscious decision that this was the industry they felt passionate about, and this is demonstrated in both current and past client experience and key staff profiles.

In 2022, Lockton acquired Zenith Insurance Services. Lockton's expanded, dedicated team has national experience in all classes of insurance for clients undertaking activities in disability care, community care, aged care, retirement living, health, research and education and training.



Finity is, by a significant margin, Australia's largest independent actuarial and analytical consulting firm. Powered by over 200 smart, results-oriented people with deep domain knowledge in insurance, finance, climate risk and health care, Finity provides not only world-class technical skills but a unique perspective across a wide range of business challenges.

During 2015, Finity assisted the Royal Commission into Institutional Responses to Child Sexual Abuse by estimating the cost of a proposed scheme to provide redress and support to all past victims of child sexual abuse in Australian institutions.

Our estimates were adopted by the Royal Commission in their final recommendations to government on redress. Since then, Finity has continued to work with private and government clients to understand and estimate the cost of safeguarding claims.



Praesidium is a leading innovator of scientifically-based solutions designed to transform the way organisations approach the prevention of sexual abuse.

For over 30 years, Praesidium's expertise, consulting, and solutions have helped foster safer environments for children, vulnerable adults, staff, volunteers, and all parties involved.

Praesidium has analysed thousands of cases of sexual abuse, the scientific literature, partnered with outside experts and researchers, and worked with organisations across industries throughout the world to help them prevent, assess, and respond to sexual abuse of youth and vulnerable adults.

Praesidium's ever-growing data consistently indicates the root cause of sexual abuse clusters into one or more of eight organisational operations. Collectively, these operations are called the Praesidium Safety Equation.



MinterEllison is an international law firm, headquartered in Australia and regarded as one of the Asia-Pacific's premier law firms. They're known for their legal and consulting expertise, inclusive culture and authentic character.

The firm's teams collaborate across Australia, New Zealand, Asia, and the UK to deliver exceptional outcomes.

MinterEllison has a clear goal – to be its clients' best partner. The firm puts the client at the center of everything they do and partner with them to deliver truly innovative solutions.

MinterEllison specialises in the practice areas of competition and market regulation, construction, corporate, employment, environment and planning, equity capital markets, finance, funds management, insurance, intellectual property, litigation and disputes, mergers and acquisitions, private equity, real estate, reconstruction, tax, and technology.





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# Migration and workforce shortages in aged care

RISK AND INSURANCE PERSPECTIVES



*As aged care risk and insurance specialists, at Lockton we are very present to the evolving changes within aged care, particularly the impact the current workforce challenges are having on our clients' services and mission; and even their viability as an organisation.*

*We are keenly aware from feedback from our clients and partners in the aged care sector what a critical issue workforce and staffing is, particularly in the current post-pandemic environment.*

*In this paper we outline the key risk and insurance issues aged care providers face as a function of the workforce challenges in the sector.*

## WHAT THE WORKFORCE CRISIS MEANS FOR AGED CARE PROVIDERS' LEVEL OF RISK

Staff shortages are having the most significant effect on the quality of care but are also impacting governance and the ability to comply with continually changing legislative requirements. While every aged care provider is different, and many factors will have affected their experience, the issue of employee retention and attraction in the sector is now critical across the industry, and there is a potential for greater reliance on agency staff.

According to a National Skills Commission report published at the end of 2022, the aged care and disability care sectors have more than 74,000 job vacancies, while job vacancies for nurses and aged care workers have doubled in the past three years. The strain on the workforce carries significant risks for aged care providers, particularly in relation to insurance costs.



## IMPACT ON CARE AND COMPLIANCE

Staff shortages create significant risks when care customers don't receive the level of care they need, leading to more serious incidents and potentially fatal accidents.

Insufficient staffing may also result in an increased exposure to acts of violence and aggression from care customers, along with a decrease in the required observations to effectively risk assess their needs and changing presentations, and an inability to keep care plans and risk assessments updated.

In addition, there are increased risks of injury to the staff themselves, when taking on roles and responsibilities with which they are unfamiliar, particularly if they are agency staff with insufficient training in relation to certain equipment.



## IMPACT ON STAFF

Having fewer staff increases the physical and psychosocial risks in the workplace, increasing the likelihood of injury and workers' compensation claims. High job demands and poor support/resources are both recognised psychosocial risk factors that can increase the occurrence of physical and psychological injuries. Burnout and a high turnover rate only compounds these factors creating a host of extra expenses and issues for management and the workforce. With significantly increased workloads it can lead to mistakes, corners being cut and fatigue causing clinical errors.



## IMPACT ON AGED CARE PROVIDERS

To attract new talent, many care providers must face paying higher rates especially for nurses and personal carers; or where there are staff shortages, costs for agency labour hire to meet care needs. Staffing costs are putting a huge strain on organisations with already thin margins. Critical staff shortages can affect the ability of under-resourced facilities to attract new residents or avoid forced shut-downs as a result of imposed sanctions. As a result, organisations are in danger of losing funding or may even have to consider closing down.

In April 2023, Wesley Mission announced closure of three aged care facilities in NSW, estimated to affect nearly 200 residents and over 2,000 staff. Also during April 2023, Perth aged care provider, Brightwater (a current Lockton client) announced it will close three of its 12 residential facilities

during the next 12 months, affecting 75 residents and 160 staff. We anticipate that there will be many more providers, particularly in rural and remote areas who will not be able to continue operating and will follow suit.



## NEW ACQS STANDARDS FURTHER ADDING TO THE TOLL OF WORKFORCE SHORTAGE

The new ACQS standards require that all aged care homes in Australia must have a round-the-clock nurse on duty by 1 July this year. On top of the 24/7 nursing mandate, aged care providers must also provide at least 200 minutes of care per resident per day by 1 October 2023. The impact of reforms on the aged care sector is predicted to create a shortage of 11,800 registered nurses by the next financial year. The workforce would also need close to 10,000 personal care workers after the care minute increase to 215 comes into force by October 2024. Despite the government's initiative to raise the minimum pay standard by 15 per cent from July to attract more staff, the sector is still short of thousands of workers.



## IMPACT ON INSURANCE PREMIUMS AND COVER

These scenarios naturally receive increased scrutiny from insurers, with some exiting the aged care market altogether. For those that remain, they are keen to mitigate the potential for significant losses.

As workforce shortages increase, the likelihood of errors being made by carers; and increasing claims for allegations of abuse, negligence, or failure to provide compliant care is rising. Staff who are already stretched, are much more likely to make claims against their employer for stress, mental or physical injury, with the associated workers' compensation insurance costs rising exponentially as a result. Insurance premiums are now a large expenditure item on most providers' P&L. Tightening of coverage and increased deductibles means providers are now required to hold substantially more of the risk on their balance sheets – often to the point of non-viability.

## SUMMARY STATEMENT

WORKFORCE RESOURCING IS THE SINGLE LARGEST CHALLENGE FACED BY THE AGED CARE SECTOR IN THE CURRENT CLIMATE. WITHOUT SINCERE EFFORT BY PUBLIC STAKEHOLDERS, AUSTRALIA IS AT RISK OF NOT PROTECTING A KEY COMPONENT OF SOCIETY'S MOST VULNERABLE: **THE ELDERLY.**



## References



<https://www.safeworkaustralia.gov.au/doc/model-code-practice-managing-psychosocial-hazards-work>



<https://www.abc.net.au/news/2023-04-13/wesley-mission-to-close-all-aged-care-homes-in-sydney/102216498>



<https://www.agedcareinsite.com.au/2023/03/impossible-rural-homes-struggle-with-24-7-nurses/>



<https://www.health.gov.au/topics/aged-care/about-aged-care/quality-in-aged-care>



<https://www.agedcareinsite.com.au/2023/03/labor-breaks-24-7-nursing-deadline/>



<https://www.health.gov.au/sites/default/files/2023-02/foi-4178-release-of-documents-hot-issues-briefs.pdf>



<https://www.agedcarequality.gov.au/sites/default/files/media/aged-care-reforms-overview-fact-sheet.pdf>



<https://www.health.gov.au/topics/aged-care/providing-aged-care-services/responsibilities/quarterly-financial-report>

## About Lockton

Lockton is the largest privately owned risk and insurance brokerage in the world, employing over 8,000 associates. We employ over 200 associates in Australia. As an international broker we have access to all Australian and global insurance markets. Our independent and private status means we are not conflicted between the needs of our clients and shareholders – we are a client focused organisation, and all our associates manage clients.

### LOCKTON'S COLLECTIVE EXPERIENCE IN AGED CARE

**Our team works exclusively with health and community care organisations, fully immersed in the sector.**

Each team member made a conscious decision that this was the industry they feel passionate about, and this is demonstrated in both our current and past client experience and key staff profiles. Our team has national experience in all classes of insurance for clients undertaking activities in aged care, retirement living, community care, disability care, health, research and education and training.

**We are committed to the aged care industry.**

Over the last 30 years, Lockton has established an extremely reliable professional service provider with a deep understanding of care providers' risk and insurance needs, which has resulted in an ever-increasing client base, where we now provide insurance and risk management services to over one hundred (100) Aged Care, Community and Disability Care providers across Australia.



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### TECHNICAL SPECIALIST – AGED CARE AND RETIREMENT LIVING

Kim has approximately 40 years' experience in the insurance industry. As Founder and Managing Director of Zenith (recently acquired by Lockton in 2022) for the past 21 years, Kim has spent the past 30 plus years in the Risk Management and Insurance Broking profession, specialising in services to the Aged, Disability & Community Service sectors.



Lyle Steffensen (She/Her)

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### EAST COAST MANAGER – HEALTH & COMMUNITY SERVICES

Lyle is highly regarded for her leadership and advocacy in risk management and strategy solutions for the aged and disability care sector. Lyle has recently joined Lockton from Marsh, where she was Care Solutions Practice Leader – a practice she created and developed to focus specifically on the risks and insurance challenges faced by care providers.



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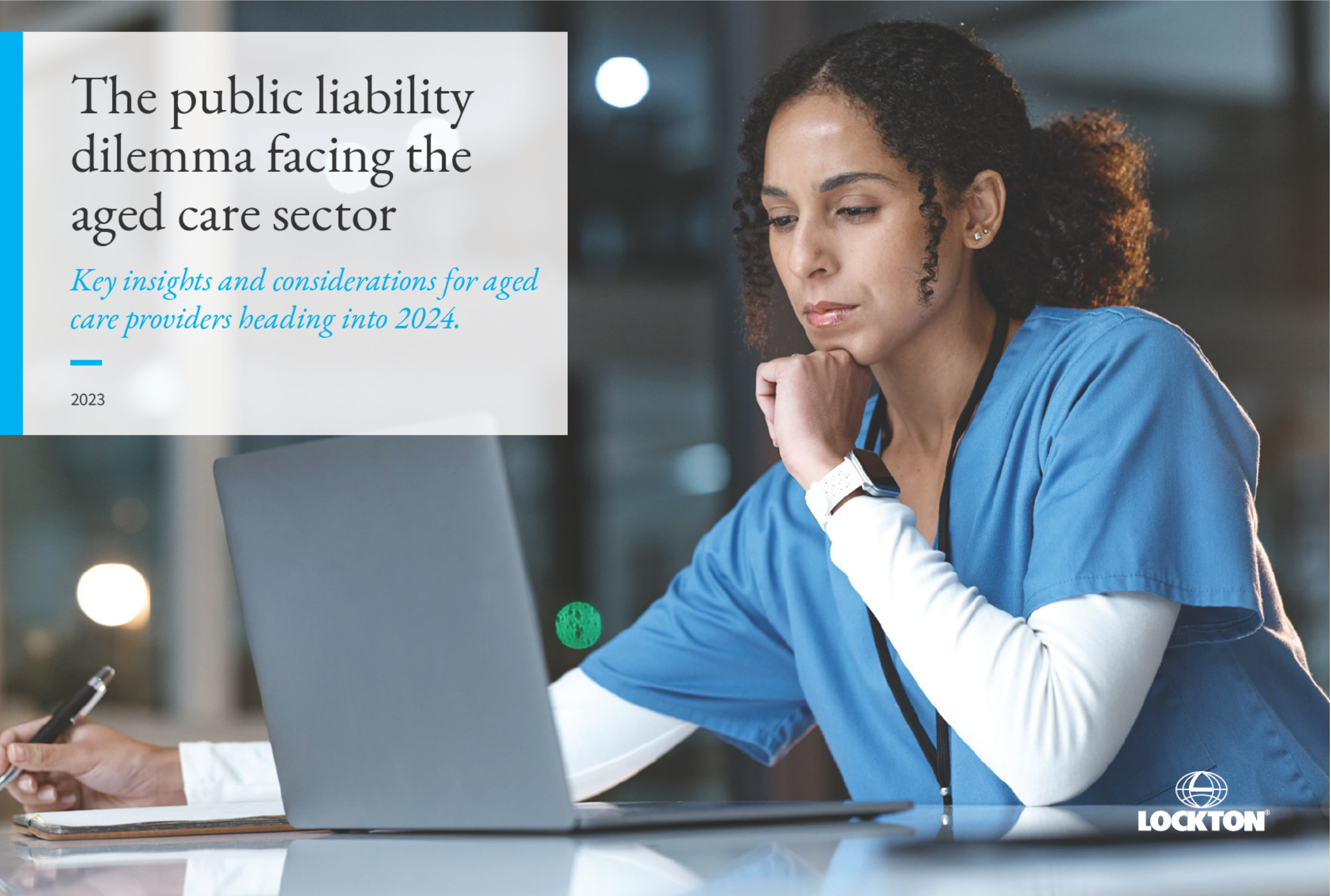
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# The public liability dilemma facing the aged care sector

*Key insights and considerations for aged care providers heading into 2024.*

2023





# Introduction

Aged care providers' public liability insurance policies are increasingly at risk from financial recovery by workers' compensation insurers nationwide. Recovery claims are being made against providers with a particular inter-entity structure that creates a loophole for such claims to be allowed. Recovery claims are also being made against providers as host employers of injured labour hire staff.

These claims are resulting in an unexpected exposure to public liability insurers, increased premiums, contracted cover and significantly higher deductibles for labour hire.

## WHAT IS RECOVERY?

Recovery is an insurance term where an insurer seeks to mitigate their loss by 'recovering' money from other sources. This most commonly happens when there is shared responsibility for a loss and more than one party contributes.

In the examples we are considering in this paper, a workers' compensation insurer pays a claim in the first instance and then seeks to recover funds from other parties, which usually requires negligence to be established.





# Host Employer Liability

## THE ISSUE

Because workforce resourcing is one of the largest challenges faced by the aged care sector, with staff shortages having a significant impact on being able to deliver quality, compliant care to consumers, many providers are now using much higher numbers of labour hire workers.

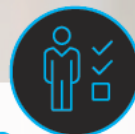
Labour hire staff are employees of the labour hire company, and not that of the 'host employer'. When a labour hire worker is injured while on the host employer's site, as an employee of the labour hire organisation, the worker will make a claim under their employer's workers' compensation policy, and not that of the host employer.

However, the labour hire company's workers' compensation insurer is entitled to seek recovery against the host employer, if they believe that the host employer's negligence has contributed to the injury occurring.

The insurance policy which responds to liability for third party personal injury, which is what a workers' compensation recovery claim is regarded as, is the host employer's public liability insurance policy.

Whilst the ability of a workers' compensation insurer to seek recovery has always existed, in the last five years we are seeing an increasing incidence of recovery being sought, starting initially in Victoria and now spreading to other jurisdictions.

Please note that the implications from a workers' compensation and public liability perspective remain separate to a host employer's WHS responsibilities under the relevant Acts.



## WHAT YOU CAN DO TO REDUCE THIS RISK

At this stage, unless providers can reduce the use of labour hire, this exposure will continue as a significant risk to providers.

We recommend providers:

- Ensure all contracted labour hire are subject to the same training, supervision and support provided to employees.
- Labour hire companies should also provide evidence of adequate workers' compensation insurance, and there should be strong collaboration between the labour hire company and the labour hire person's return to work program following an injury.
- Check that your contract with the labour hire provider ensures that they indemnify the host employer in the event that the workers' compensation insurer seeks recovery against the host employer.



# Inter-Entity Liability

## THE ISSUE

Many provider entities have group business structures that are complex and have been implemented for a variety of business reasons. A common example of how this works is:

- There is one entity which employs all the staff and arranges the workers' compensation policy, as statute legislation requires that the employing entity be named as the insured employer. This is the employing entity.
- There is another entity that receives government funding, earns the income and pays all other expenses associated with the provider's business. This is the earning entity.

Of course, there may be multiples of this, say at a facility or location level, which further complicates matters.

If a worker of the employing entity is injured, the workers' compensation insurer will respond. However, there are increasing instances where the workers' compensation insurer has sought recovery via the earning entity's public liability policy, essentially arguing that the employing entity is acting as labour hire for the earning entity. Workers' compensation insurers view the earning entity as a separate organisation, and therefore are making the recovery against the employing entity's public liability insurer.

A recovery by the workers' compensation insurer of the employing entity against the earning entity's public liability policy is problematic in that both of these entities are often insureds under the same group public liability policy. In most policies, there is an insured versus insured exclusion, which means you can't sue each other where you are covered under the same policy, as this policy is designed to respond to third parties only.

To date, public liability insurers have been responding to these problematic claims, as the workers' compensation insurer is considered under current wordings to be an external party and not an insured.

However, we anticipate that once public liability insurers understand that workers' compensation insurers are seeking recovery on behalf of an injured staff person of the employing entity of the same organisation, that they will introduce exclusions to remove the capacity for these recoveries to continue to take place, or will refuse to provide terms altogether, as is the case with some insurers, as the exposure is too large.



## WHAT YOU CAN DO TO REDUCE THIS RISK

From an insurance perspective, engaging with legal and tax professionals to seek to remove the difference between earning entities and employing entities within your organisation as much as is practicable is a priority.





# Closing

As compliance and duty of care obligations continue to escalate, it can feel overwhelming to have to consider the additional implications that workers' compensation insurer recoveries are creating on providers' public liability policies, coverage, premiums and excesses. Being clear and informed about where these opportunities may arise in your organisation requires consideration as there can be significant financial impact.

The Aged Care specialists in the Lockton Health & Community Services team are able to assist with outlining the potential exposures raised in this paper, and avenues to reduce the impact on insurance policies.



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