

## Aged Care Bill 2024 Inquiry – QoN – Request for suggested amendments to address concerns with regulatory powers

23/10/24

Civil penalties should apply to clear wrongdoing, but not reasonable mistakes

Issue	Description	Proposed amendment
<b>Code of conduct offences</b>	<p>The Bill imposes civil penalties of up 250 penalty units (about \$80,000) on aged care workers and responsible persons for breaches of the Aged Care Code of Conduct <a href="#">[clause 173-174]</a>.</p> <p>The Code of Conduct is very general and open to interpretation. There is no fault element for these offences. And many of the legal protections that apply for criminal charges are absent for civil offences.</p> <p>There are other more suitable responses to employee misconduct. These include: disciplinary action from an employer, banning orders by the ACQSC Commissioner, action under State Codes of Conduct for Healthcare Workers and action by APHRA (for registered workers) provide adequate mechanisms for enforcing the Code of Conduct. A breach of many of the provisions of the Code of Conduct open the door for criminal prosecution.</p> <p>Civil penalties were initially introduced to make it easier for regulators to take action against businesses with significant resources to defend themselves. This was the justification for discarding the protections that apply in relation to criminal actions. In most cases, the individuals subject to the Code of Conduct have little capacity to defend themselves. Most workers are low income, and many directors are volunteers.</p>	Remove clauses 173 and 174.

<b>Breaches of registration conditions</b>	<p>The Bill imposes civil penalties of up to 250 penalty units (about \$80,000) on aged care providers for any breach of Conditions on Provider Registration [<a href="#">clause 142(3)</a>].</p> <p>A finding of non-compliance with a Condition and a consequent penalty can apply in circumstances beyond an organisation's control. Or for the sort of reasonable mistakes that inevitably occur when delivering a complex human service that requires considerable judgement and immediate responses to circumstances.</p> <p>This is inappropriate. More serious breaches involving a significant departure from reasonably expected conduct or systematic pattern of conduct can be dealt with under <a href="#">clause 142(4)</a>.</p> <p>Breaches that do not involve this sort of serious misconduct should be dealt with through administrative powers (required action or compliance notices).</p>	<p>Preferred option: Remove clause 142(3).</p> <p>Option 2: Add after 142(2)(c): <i>(d) the conduct was intentional, reckless, or negligent</i></p>
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## Regulatory powers must avoid impinging basic legal rights

Issue	Description	Proposed amendment
<b>Discretionary conditions of registration</b>	<p>The Bill gives the Commissioner unfettered power to create a condition of registration for a provider [<a href="#">clauses 123, 124 and 143</a>] with no justification required beyond that the Commissioner considers it appropriate.</p> <p>Notwithstanding the Parliament saw fit to determine a number of conditions of registration, the Act extends that same power to an unelected official and with no Parliamentary scrutiny of additional conditions the Commissioner may impose on the sector.</p> <p>The language that purports to limit the Commissions scope is ineffectual when considered in the context of the breadth of the Commissioners</p>	<p>Preferred option: Remove section 143.</p> <p>Option 2: Insert after subsection 143(3): <i>(4) A condition can only be applied if it is reasonably necessary to ensure compliance with the Act.</i></p>

	<p>functions and cl 143 (3) which says ‘The conditions may include, but are not limited to’</p> <p>The Commissioner’s role should be to enforce the laws created through the Parliamentary system. They should not have the power to create conditions and potentially circumvent the authority of the Parliament,</p> <p>The creation of a condition of registration brings with it financial penalties for non-compliance and in so doing creates a situation where an unelected official is creating a penalty regime.</p>	
<b>Possible non-compliance</b>	<p>The Bill authorises the Commissioner or System Governor to issue Compliance Notices where they are satisfied that a provider has not complied or is not complying with the Act. This is perfectly reasonable because it is based on evidence.</p> <p>However, the Bill [<a href="#">clauses 481(a)(ii) and 482(a)(ii)</a>] also authorises the Commissioner or System Governor to issue a Compliance Notice if the Commissioner or System Governor is no more than ‘aware of information that <b>suggests</b> the provider may not have complied, or may not be complying’.</p> <p>A Notice to comply sets out the failure and the action required. Such a scenario is impossible where the Notice pertains to a suspicion. Information, of itself, is not evidence. It informs the decision maker and may create suspicion (only). At best it requires the provider to prove they did not do, or did not omit to do something. This is not consistent with established legal principles.</p> <p>Failure to abide by Compliance Notices attracts a civil penalty, so allowing them to be issued without the decision maker being satisfied that non-compliance has occurred is unfair and unreasonable.</p> <p>The provision as drafted does not reflect natural justice.</p>	Remove clauses 481(a)(ii) and 482(a)(ii)

<p><b>Information gathering</b></p>	<p>The Bill creates broad powers for the Commissioner, Complaints Commissioner, or System Governor to compel people (not just registered providers or aged care employees) to produce information or answer questions, including compelling them to take an oath or affirmation [<a href="#">Ch6 Part 10 Div 3</a>].</p> <p>The threshold for applying this power is very low; the Commissioner just needs to believe the person has information relevant to whether a provider is complying, not that there is non-compliance; the Complaints Commissioner and System Governor just need to believe the person has information relevant to their functions [<a href="#">clause 488-489</a>].</p> <p>Standard legal protections are narrowed in relation to this power to exclude protection from a person making themselves liable for a penalty and legal professional privilege.</p> <p>The Bill already provides substantial monitoring and investigation powers under <a href="#">Ch 6 Part 2 – Part 5</a>, which are broadly consistent with the Reg Powers Act but also allow warrantless entry where the Commissioner believes there is immediate and severe risk of harm to an older person [<a href="#">Ch6 Part 5</a>].</p>	<p>Preferred Option:</p> <p>Remove Chapter 6 Part 10 Division 3</p> <p>Option 2:</p> <p>Replace clause 496 with:</p> <p><u><i>Self-incrimination</i></u></p> <p><i>(1) Nothing in this Part affects the right of a person to refuse to answer a question, give information, or produce a document, on the ground that the answer to the question, the information, or the production of the document, might tend to incriminate him or her or make him or her liable to a penalty.</i></p> <p><u><i>Legal professional privilege</i></u></p> <p><i>(2) Nothing in this Part affects the right of a person to refuse to answer a question, give information, or produce a document, on the ground that:</i></p> <p><i>(a) the answer to the question or the information would be privileged from being given on the ground of legal professional privilege; or</i></p> <p><i>(b) the document would be privileged from being produced on the ground of legal professional privilege.</i></p> <p><u><i>Other legislation not affected</i></u></p>
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		<i>(3) The fact that this section is included in this Part does not imply that the privilege against self-incrimination or legal professional privilege is abrogated in any other Act.</i>
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