

The Duty of Aged Care Providers and their Responsible Persons to Prevent Harm

The Aged Care Act 2024 (Cth) (**The Act**) places many legal obligations on registered aged care providers (**Providers**). This fact sheet focuses on one key part of the law - the duty to prevent harm.

The Act creates **two related duties**:

- A duty on registered Providers to take reasonable steps and put safeguards in place to prevent harm in the delivery of funded aged care services.
- A separate duty on certain ‘**Responsible Persons**’, including directors, executives and other senior decision-makers - to exercise due diligence. This means they must make sure the Provider has appropriate systems, governance, staffing and resources to meet its duty to prevent harm.

If a Provider or a Responsible Person breaches their duty, financial penalties may apply and they may also be required to pay compensation to the aged care recipient.

Registered Providers and Duty to Prevent Harm

Providers have a duty under the Act, to do what is ‘reasonably practicable’ not to cause adverse effects on the health and safety of the person receiving care in the delivery of funded aged care services.

What is ‘Reasonably Practicable’?

The reference to doing what is reasonably practicable imposes an objective standard on Providers to consider a range of matters in delivering care. This is necessary because even in the delivery of best practice aged care services, it may be difficult to prevent injury or harm to an individual.

‘Reasonably practicable’ in relation to the Provider duty, is defined in the Act as follows:

“that which is, or was at a particular time, reasonably able to be done, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the adverse effect concerned occurring; and*
- (b) the likely degree of harm from the adverse effect; and*
- (c) what the person concerned knows, or ought reasonably to know, about ways of preventing the adverse effect; and*
- (d) the availability and suitability of ways to prevent the adverse effect; and*
- (e) the rights of individuals under the Statement of Rights”*

What is reasonably practicable is assessed on a case-by-case basis.

Considerations may include:

- identifying the specific care needs of the individual receiving care,
- relevant regulations imposed on the Provider, wider industry standards related to specific health conditions; the aged care rules and the quality standards; and
- identifying any foreseen risks, documenting mitigation strategies, with input from appropriate experts.

In determining what is ‘reasonably practicable’, the Statement of Rights must be considered, including the rights of the individual to decide not to accept recommendations on care and lifestyle choices.

What happens when the Provider Breaches their duty?

There are significant financial penalties for the Provider, and compensation pathways for the aged care recipient, for breaches of the Provider duty resulting in serious illness and injury. However, financial penalties require a high level of injury, or death as a result of the Provider breach of duty.

The onus is on the person making the allegation of breach of Provider duty to show on the balance of probabilities that all the criteria for the breach as detailed in the Act, have been met.

A breach of the Provider duty must meet all the following criteria as detailed in the Act;

1. The Provider has a duty not to cause adverse effects to the aged care recipients when delivering funded aged care services under the Act; **AND**
2. The Provider has not complied with the duty of care in delivering the funded services; This includes, showing that the delivery of services was not ‘reasonably practicable’ in the circumstances; and that Provider did not have a reasonable excuse for not complying with their duty. Reasonable excuse may include exercise of personal choice or wishes regarding care by the aged care recipient under the Statement of Rights, including taking known ‘risks’, **AND**
3. The conduct by the Provider amounts to a **serious failure** to comply with their duty.

To be a ‘serious failure’ the Act requires that both (a) and (b) below must be met;

(a) The conduct of the Provider exposed the individual to risk of **death or serious injury or illness**, **AND**

(b) The conduct involves a **significant failure** **OR** is part of a **systematic pattern of conduct**. The Act defines ‘significant failure’ as conduct which is a significant departure from conduct expected from a Provider having regard to requirements in the Act.

The term ‘**systematic pattern of conduct**’ is defined in the Act and includes looking at any previous contraventions of the Act, the number of people impacted, the period of time, and how the Provider responded to the contraventions.

In the Act, the term ‘*serious injury or illness*’ of an individual means an injury or illness requiring the individual to have:

- (a) immediate treatment for:
 - (i) the amputation of any part of the individual’s body; or
 - (ii) a serious head injury; or
 - (iii) a serious eye injury; or
 - (iv) a serious burn; or
 - (v) the separation of the individual’s skin from an underlying tissue (such as degloving or scalping); or
 - (vi) a spinal injury; or
 - (vii) the loss of a bodily function; or
 - (viii) serious lacerations; or
 - (ix) a serious wound or pressure injury; or
 - (b) medical treatment within 48 hours of exposure to a substance;
- and includes any other injury or illness prescribed by the Aged Care Rules 2025. The Rules add dehydration and malnutrition.

Financial Penalties for Breach of the Provider Duty

If it has been determined by a relevant Court that the Provider has breached their statutory duty, the Act provides for financial penalties and possible compensation to the individual.

The financial penalties for breach of the Provider duty:

- If the conduct amounts to a serious failure it is 150 penalty units for individuals, and 1000 units for Providers that are not individuals.
- If the conduct amounts to a serious failure that **results in death or serious injury or illness** it is 500 penalty units for individuals, and 4,800 penalty units for Providers that are not individuals.

Compensation

The aged care recipient or the Commissioner, may apply to the Court for compensation if it has been determined by the Court that the Provider has been breached their duty under the Act, and there has been serious injury or illness.

The Responsible Person Duty to Prevent Harm

The Act imposes a duty on Directors/Board Members and Executives actively involved in managing Providers (non-government entities only), to ensure Providers have processes and skills to prevent harm in the delivery of funded aged care services.

The Act defines ‘due diligence’, and it includes taking reasonable steps:

- (a) to acquire and maintain knowledge of requirements applying to Providers under the Act; **and**
- (b) to gain an understanding of the nature of the funded aged care services the Provider delivers and the potential adverse effects that can result to individuals when delivering those services; **and**
- (c) to ensure that the Provider has available for use, and uses, appropriate resources and processes to manage adverse effects to the health and safety of individuals accessing funded aged care services delivered by the Provider; **and**
- (d) to ensure that the Provider has appropriate processes for receiving and considering information regarding incidents and risks and responding in a timely way to that information; **and**
- (e) to ensure that the provider has, and implements, processes for complying with any duty or requirement of the Provider under the Act.

Responsible Persons must show they have taken reasonable steps to understand the Provider regulatory requirements and are actively involved in how the Provider assesses and manages and mitigates risk in the delivery of aged care services. This may include oversight over the Providers’ quality and safety procedures, and workplace culture, resource management and how the Provider responds and monitors breaches and deals with complaints etc.

What happens when a Responsible Person breaches their duty?

If a court determines that a Responsible Person has breached their duty to exercise due diligence under the Act, financial penalties may apply. These penalties are enforced through court proceedings brought by the Commissioner, who also has powers to investigate potential breaches of the Act.

A breach of the Responsible Person duty has to meet all the following criteria as detailed in the Act:

1. It has been determined that the Responsible Person has a duty to ensure the Provider complied with their duty to not cause adverse effects to the aged care recipients when delivering funded aged care services under the Act; **AND**
2. It has been determined that Responsible Person did not comply with their duty without reasonable excuse; **AND**
3. The conduct of the Responsible Person, amounts to a **serious failure** to comply with their duty.

See pages 2 and 3 for what amounts to a serious failure.

Financial Penalties for Breach of the Responsible Person Duty

If a court finds that a Responsible Person has breached their duty to exercise due diligence under the Act, financial penalties may apply. A Provider does not need to have been found in breach of their statutory duty for a Responsible Person to be penalised.

If it is determined that a Responsible Person's conduct amounts to a serious failure to comply with their duty the financial penalty is up to:

- 150 units or
- 500 units if the conduct results in death or serious injury.

Compensation

The aged care recipient or the Commissioner, may apply to the Court for compensation if it has been determined by the Court that the Responsible Person has been breached their duty under the Act, and there has been serious injury or illness.

Other Remedies

Providers have other obligations under the Act in addition to the statutory duty. If the Court determines the statutory duty has not been breached, the Commissioner can pursue other remedies for other breaches under the Act, including enforceable undertaking and to ban, or suspend a Providers' registration.

Responsible Persons have additional obligations under the Act in addition to the statutory duty. The Commissioner may ban a Responsible Person for not meeting their obligations under the Act.

Separate remedies may also arise under general law, including negligence claims. There may be other remedies in common law and the law of the Commonwealth, or State or Territory.

Contact Aged Care Justice if you would like a free legal consultation:

Email: info@agedcarejustice.org.au

Phone: 0417 234 415

Website: www.agedcarejustice.org.au

DISCLAIMER: This fact sheet is for general information purposes only and does not represent legal advice. As it is not intended to be comprehensive in relation to the topic, other inclusions or exemptions may apply. The law and policy referred to in this document was in force on the 11/02/26.