

# The New Aged Care Act

## Regulatory Powers

Series update – Feb 2024

The new Aged Care Act (New Act) empowers the Regulator (the Aged Care Quality and Safety Commissioner) and System Governor (Secretary of the Department of Health and Aged Care) (together, the Regulators) to ensure provider compliance with the rights-based approach of the New Act.

Chapters 3, 5 and 6 of the New Act expand the Regulators' ability to oversee and investigate instances of non-compliance in an effort to 'rebuild trust and confidence in the aged care sector'.

The revised complaints procedure also embodies a more 'open door' approach towards consumer experience by referring investigations and complaints to the person, organisation or agency that is most capable of addressing the concerns to ensure complaints are addressed in a way that is meaningful to the individual. Complaints information will be used to promote transparency by providers and identify systemic trends.

### Regulatory Powers

The New Act introduces several regulatory provisions that will affect providers:

Enhanced process for notices to address non-compliance.



Capability for authorised ACQSC officers to enter and search residential care homes without consent or with a warrant where there is 'severe risk to the safety, health or wellbeing of an individual to whom funded aged care services are being delivered.'



Expanded oversight, monitoring and compliance powers for the Aged Care Quality and Safety Commission (ACQSC), specifically regarding the economic viability and sustainability of aged care providers.



Mirroring powers for the System Governor regarding system integrity to ensure funds are utilised for approved purposes and to allow recovery of overpayments to providers



The New Act provides flexibility for the Regulators to use these powers to ensure an appropriate and proportionate enforcement approach.

### Notices



The types of notices that may be issued by the Regulators have been streamlined in the New Act to ensure the delivery of safe care to older people. The notices may require a registered provider to do, or not to do, specific things.

Three notices are introduced in the New Act:

- 1 Required Action notice:** may be issued to a registered provider by the Regulators to address non-compliance, or where concerns about the provider's financial position exist. This notice may also be issued to require a registered provider to take action in a matter affecting the interests of an individual to whom the provider is delivering funded aged care services. The provider must then report to either the Commissioner or System Governor on the subsequent action taken in response. Civil penalties (financial penalties that do not result in jail time) apply where the notice is not complied with.
- 2 Compliance notice:** can be issued to rectify non-adherence by a registered provider and will also affect a provider's Star Rating. The Commissioner may specifically indicate the notice relates to a substantial instance or systemic pattern of non-compliance. Failure to comply with this notice can result in civil penalties.
- 3 Adverse Action Warning notice:** requires providers to take action to address non-compliance and specifies the action a registered provider must agree in order to address the non-compliance. The notice will also detail the action that may be taken if the provider fails to comply with the notice (such as the appointment of an adviser to assist the provider to meet their obligations).

The Regulators also have the power to issue notices to individual persons to provide facts, supply documents or answer questions where relevant.

Providers are afforded procedural fairness by having the opportunity to respond to a notice which the Regulators must consider and may alter or withdraw the notice.

## Critical failures powers

The New Act introduces a critical failures power which applies only to residential aged care services and permits the Commissioner to appoint an external manager to a provider where there are significant or sustained failures resulting in:

- Either an immediate risk to the health and safety of individuals accessing residential aged care services or the provider becoming insolvent; and
- The Commissioner not having assurance the provider will be able to remedy the situation.



## Enforcement powers under the Regulatory Powers Act

The enforcement mechanisms available to the Regulators are expanded by implementing the standard enforcement powers in the Regulatory Powers Act to:

- Apply to court for civil penalty orders for breach of a statutory duty;
- Issue an infringement notice for contravention of a civil penalty provision or strict liability offence (an offence that does not require the Regulators to prove fault);
- Apply to court for an injunction against a registered provider; and
- Enforce undertakings by registered providers (including a written undertaking given by a provider that they will pay compensation).

Additionally, the Regulatory Powers Act enables the Regulators, with the consent of the occupier of the premises or with a warrant, to enter, search, and seize in order to monitor compliance and collect evidence concerning potential violations of the new civil penalty provisions and offences.

This also applies to accessing electronic equipment where applicable for monitoring and investigation purposes.

## Banning orders

The Commissioner may make banning orders to prohibit or restrict a registered provider from delivering funded aged care services. This will apply where the provider has breached the New Act, where they pose a severe risk to those accessing services or where they are deemed not suitable to deliver services.

A banning order may also apply to an individual to restrict or prohibit them from being an aged care worker or responsible person.



## Registration requirements and breaches

**Chapter 3** of the **New Act** introduces stringent registration requirements and a range of obligations that providers must maintain.

Where a provider has not met their obligations, civil penalties and registration conditions may apply.

Additionally, the Commissioner can revoke or suspend registration of a provider, or vary registration in certain situations. With an aim to target serious, poor quality or unsafe care, criminal penalties may be imposed where registered providers or responsible persons breach the statutory duties introduced in the new Act. Where a breach has occurred and serious illness or injury results from the breach, a compensation pathway is available.



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