



Aged & Community Services
Association of NSW & ACT

Police Checks & Compulsory Reporting

Position Paper

An Outcome of an Industry Think Tank

May 2010

ACS Profile

Aged & Community Services Association of NSW & ACT Inc (ACS) is the leading peak organisation for not-for-profit aged care services including residential care, community care and retirement villages in NSW and ACT. ACS represents 277 organisations providing 1,862 services to more than 100,000 people. ACS members range from very large multi-site organisations to very small rural and remote stand alone facilities.

Background

Approved providers of residential aged care are subject to a strong regulatory framework. In recent years, three key initiatives designed to improve the protection for residents of residential aged care facilities have been introduced. The three initiatives in question are:

- From March 2007, police checks for all direct contact residential aged care staff extended, in 2009, to include all non-contact staff.
- From July 2007, the compulsory reporting within 24 hours to the Police and the Department of Health and Ageing of suspicions of allegations of sexual assaults, physical assaults and unreasonable use of force on residents by staff, residents or others.
- From January 2009, the compulsory reporting of missing residents to the Department of Health and Ageing within 24 hours of a report being made to Police.

These initiatives and their reporting and other requirements have added to the regulatory burden of approved providers. In response to concerns expressed by its members, ACS convened a *Think Tank* of stakeholders (attached) in 2009 to further explore these concerns.

The *Think Tank* comprised representatives from ACS staff and Board, approved providers, consumer bodies, unions and the NSW Police. Its objectives were to:

- discuss the legislative framework around police checks and compulsory reporting
- identify the key issues arising from the three initiatives
- identify opportunities for improvement of the current system/legislation
- develop a position paper that identifies the most effective means to protect older people from abuse.

Presentations at the *Think Tank* included an overview of the relevant legislation and consequent requirements for approved providers; a summary of identified issues; feedback on the recent Aged & Community Services Australia (ACSA) survey on the effectiveness of compulsory reporting on abuse; and case studies on police checks and compulsory reporting. The presentations were followed with small and large group work to further explore the emerging issues, identify priorities and reach agreement on preferred options for change.

This Position Paper is the major outcome of the day. It summarises the challenges experienced by approved providers and other stakeholders to date in meeting the requirements of compulsory reporting and police checks and suggests pathways forward to effectively address these challenges without compromising the safety and protection of people living in residential aged care.

Police Checks

Identified Issues

While the industry does not deny police checks are a useful tool in recruitment of suitable staff, there are several issues and inappropriate consequences of the present system.

Expansion of the requirements to include both direct contact and non-contact residential care staff has also created considerable challenges for approved providers.

The overall effectiveness of police checks is debatable for a number of reasons:

1) The majority of perpetrators of abuse of older people do not have criminal records and, so, would escape detection if seeking employment in the industry. The reliability of overseas documentation regarding criminal records is variable. In cases where overseas documentation cannot be provided, the system becomes reliant on the honesty of the potential employee completing a statutory declaration. In addition, there is no provision for alerting the approved provider should an employee be convicted of a serious offence during the term of employment.

2) Some potential and actual employees are disadvantaged by the lack of discretion afforded by the legislation. For example, a middle aged person who had an assault conviction as a teenager and an exemplary record since cannot be employed in the industry even though there may be every indication this person may otherwise have been or have the potential to be a valuable employee. There is no consideration whether the conviction is relevant to employment in the aged care sector.

This, in itself, may be contrary to the protection of the person's basic human rights and access to equal opportunity.

3) The industry believes the current requirements have a disproportionate effect on Aboriginal and Torres Strait Islander people who have higher rates of criminal convictions than the rest of the Australian population. Cultural disadvantage can be reinforced by further restricting employment opportunities in the industry, particularly in regional and rural areas.

4) It is costly to comply with police check requirements. Where the approved provider pays, this becomes a significant cost especially during a period of high staff turnover. When responsibility for payment of the checking fee is passed on to the employee, it can be prohibitive and a deterrent to seeking employment in the industry.

Recommended Pathways Forward

ACS supports the following strategies to improve the current system of police checks:

1. The development, through consultation and stakeholder collaboration, of a standardised risk assessment process to be applied to all applicants for direct contact and non-contact positions in the residential and community aged care industry.
2. The provision of some discretion to the approved provider to allow for consideration of the time lapsed since and the circumstances of an offence and an applicant's subsequent behaviour.
3. The establishment of a national police check register for people working or volunteering in the aged care industry. Currently a person with a nursing registration could move across employers without incurring the need for further checks as details of all criminal convictions, findings and charges in NSW or elsewhere, with the exception of parking tickets and minor traffic offences, are required to be provided to the Nurses Registration Board annually. There is however a need for the approved provider to confirm that nurses are not prohibited under the exclusions of the Aged Care Act.

ACS, however, would not support further cost to industry should a national police check register be established.

4. Ameliorating the compliance cost by transferring payment responsibility to government.

Compulsory Reporting of Assaults

Identified Issues

It has now been more than two years since compulsory reporting of physical or sexual assaults on residents was introduced in the residential aged care industry. The impact of the legislation on reducing and responding to alleged assaults is unknown.

There has been little feedback to the industry on:

1. the number and type of alleged assaults reported;
2. the outcomes of investigations by the Police and Department of Health and Ageing;
3. the proportion of reported assaults proceeding to trial; and
4. the number of convictions.

In the absence of reliable data, the cost effectiveness of compulsory reporting to Department of Health and Ageing, the Police and the industry cannot be gauged.

Evidence from a national online member survey on elder abuse reporting, conducted by ACSA during August 2009, identified that between July 2007 to June 2009 75% of reportable assaults were incidents between residents rather than staff on residents, and that initiation or review of behaviour management plans was the most common action taken by providers.¹

Survey respondents also reported that half of the reportable assaults were unlikely to actually be assaults or are vexatious in nature. Anecdotal feedback from survey respondents indicated some staff experienced very negative personal outcomes, sometimes accentuated by the original allegation being unsubstantiated or vexatious.

It is clear the number of assaults reported is significantly higher than anticipated, with the Office of Aged Care Quality and Compliance recruiting approximately 50% more investigative staff than planned, to meet demand for responses.

Industry feedback points to a lack of clarity and consistency about what must be reported. Approved providers are thus prone to err on the side of caution and, so, report all incidents including those of a minor nature and outside the scope of the legislation.

The industry has requested advice on what constitutes a reportable assault, particularly when between residents, and guidance on how to proceed if the allegation is likely to be of a vexatious or fictional nature.

The legislation also provides considerable procedural challenges, particularly the necessity for approved providers to report allegations of assault to both the Police and the Office of Aged Care Quality and Compliance within 24 hours of becoming aware of the allegation. The ACSA *Elder Abuse* survey responses identified that whilst in the majority of cases they met the required timeframe, the mandatory reporting system was six times more likely to result in legal action (such as formal breaches or notices of non-compliance under the Aged Care Act) against aged care providers than against the alleged abuser.

NSW Police have received no specific training on the legislation nor the sensitivities of Police responses in residential aged care settings. They are often at a loss to understand why an

¹ Sadler, P. (2009) *Elder Abuse: One report too many? – Results of the ACSA online survey on compulsory reporting of assaults*.

alleged incident has had to be reported. Responding to such allegations may not be treated as a priority by Police, leading to delays in investigating, provision of an event number and resolving reported incidents.

The industry believes the treatment by the Office of Aged Care Quality and Compliance of anonymous complaints, specifically related to abuse, needs further consideration. The current system enables anyone to make a complaint openly, anonymously or with the request to have personal information remain confidential. Whilst ACS supports open access to a complaints system, where complainant confidentiality can be maintained upon request, it does not support the acceptance of anonymous complaints. Anonymous complaints do not allow for the principles of natural justice to prevail, and have been known to have a significant impact upon aged care providers, individual staff, family members and care recipients.

Where complaints are reported anonymously the process is restricted, as there is no opportunity for open dialogue and discussion of the real issues between the key parties involved, nor is there the ability for follow through to resolution with the individual complainant.

ACS supports the need for a complaint to be raised confidentially. However where this occurs sufficient information must be provided to the other key parties (whilst protecting identity) to ensure an opportunity to respond to and/or refute the information in order to protect procedural fairness.

The effectiveness of responses by the Office of Aged Care Quality and Compliance is also questionable. The necessity of the Office of Aged Care Quality and Compliance conducting a separate visit after each report has resulted in a considerable increase in administration and staff time in meeting the Office of Aged Care Quality and Compliance's expectations.

The industry does have concerns about the consistency and timeliness of responses. Interpretation of the legislative requirements and identification of resulting compliance issues can depend on the visiting officer. While the approved provider is bound to report within strict timeframes, there are no set timeframes for the Police or the Office of Aged Care Quality and Compliance response. This can often leave the situation, those affected and the approved provider in limbo, adversely affect staff morale within facilities and prolong the distress of residents and their families.

The legislation denies people the basic right of choice, as it does not give the subject person the right to decide not to proceed with a report. This is contrary to the *Resident Charter of Resident Rights*. This can be particularly difficult for the older person, above all when reports must be made over minor incidents involving other residents. The industry can provide numerous examples of intervention from compulsory reporting that has resulted in unnecessary distress for both victim and alleged offender. It is believed many of these incidents could be more effectively and efficiently resolved through lower level interventions, often involving behaviour management strategies. It is noted there is no requirement at present to check either the outcome or the effect of compulsory reporting of assaults on the alleged victim.

It is acknowledged, and further supported by the findings of the ACSA *Elder Abuse* survey and international research, such as that of the Canadian Network for the Prevention of Elder Abuse, that the legislation has raised residential aged care staff awareness of abuse of older people and also improved procedures for responding to abuse. This has been achieved in the absence of government funding for education campaigns as responsibility for funding and conducting training has fallen to the industry. This however comes at a cost with half of all reported cases unsubstantiated, costly administration and minimal evidence of criminal convictions made where actual assaults have occurred.

Feedback from ACS elder abuse training has consistently identified financial and material abuse as being the most prevalent form of abuse identified by residential care staff, which is in line with Australian research findings. Approved providers have systems in place to respond to these types of abuse without the need for legislation.

Recommended Pathways Forward

ACS supports the following strategies to address the industry's concerns about the compulsory reporting of assaults:

1. Conduct a legislative review to identify the impact of compulsory reporting of assault on:
 - preventing and responding to allegations of abuse
 - alleged victims and perpetrators of assault
 - the resources and workload of approved providers, the Police and the Department of Health and Ageing.
2. Provision of feedback to the industry by the Department of Health and Ageing at least annually on the number and nature of reported assaults; the proportion of reports determined by the Police to warrant further investigation; the number and nature of breaches identified by the Office of Aged Care Quality and Compliance and the number and proportion of reports proceeding to trial and conviction. It would be valuable for the Department to also identify and publish risk factors contributing significantly to verified assaults.
3. Resolution of duplication in roles and responsibilities (in relation to responding to allegations of assault) between the Office of Aged Care Quality and Compliance and the Aged Care Standards and Accreditation Agency through:
 - a) The inclusion of protection of residents from abuse and neglect into an existing or new industry standard which can then be assessed by the Aged Care Standards and Accreditation Agency, thus replacing the necessity of reporting all individual allegations of assault to the Office of Aged Care Quality and Compliance.
 - b) Removal of the requirement to notify the Office of Aged Care Quality and Compliance of all incidents reported to Police and replacement with a requirement to notify the Office of Aged Care Quality and Compliance only when the Police have determined there is a case for further investigation and potential court action.
 - c) The Office of Aged Care Quality and Compliance record reported allegations of assault being investigated by Police and refer these cases to the Agency for further investigation.
 - d) Timeframes to be set for the Departmental response to these reports.
6. Removal of the requirement for compulsory reporting of assaults when a resident chooses/requests that the incident not be reported after appropriate consultation with parties involved and a documented report as evidence of consultation occurring. Thus upholding the *Charter of Resident Rights and Responsibilities*.
7. Education of the Police through induction training, on-going professional development and internal publications on abuse of older people and any legislative requirements.
8. Creation of key referral and contact points between the industry and local Police commands for information and reporting of allegations of abuse of residents, such as through the Domestic Violence Officer.
9. Actions taken take into account the impact on the safety and wellbeing of the alleged victim.

Compulsory Reporting of Missing Persons

Identified Issues

Since January 2009, approved providers have been required to notify the Office of Aged Care Quality and Compliance of unexplained absences of residents reported to the Police. The extent of missing persons reports is unclear as there has been no feedback to the industry on the number of reports made.

The intent and effect of this legislative change is unclear to the industry. The new requirement includes no measures to either prevent residents from unexplained absences nor measures to assist locating missing residents. It also ignores the right of residents to make their own decisions and act as they wish.

The necessity of notifying the Office of Aged Care Quality and Compliance of reports made to Police has created additional administrative procedures for approved providers that appear to have no benefit to the resident, the industry or the Department.

The Office of Aged Care Quality and Compliance follow-up of reports adds additional scrutiny and stress for the provider, further stretches the resources of the Office of Aged Care Quality and Compliance, adds no value to Police procedures, the care of residents and provides no comfort to families.

Recommended Pathways Forward

ACS support the repeal of the legislative amendment requiring approved providers to notify the Department of all missing persons' reports made to Police.