

## 1 Instructions

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Under the *Aged Care Act 1997* (Cth) (**Act**) Approved Providers must report “*reportable assaults*” to the CIS *and* to the police within 24 hours. We are instructed to clarify for Aged Care Association Australia (**ACAA**) these obligations, specifically in practical terms when the 24 hour time period begins.

## 2 Reporting

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The Approved Provider must report “*reportable assaults*”. A “*reportable assault*” is unlawful sexual contact, unreasonable use of force or any assault on a resident.

An Approved Provider must report:

- **Every allegation<sup>1</sup> that a reportable assault has occurred**, that is when a person claims to have witnessed a reportable assault or asserts that one has occurred (see paragraph 4).
- AND**
- **On each occasion the Approved Provider starts to suspect on reasonable grounds that a reportable assault has occurred.** In our view in order for an Approved Provider to *start to suspect on reasonable grounds* that a reportable assault has occurred, some level of inquiry or investigation needs to have been undertaken (see paragraph 5).

It is also our view that an ‘Approved Provider’ for the purposes of compulsory reporting means ‘Key Personnel’ and does not include junior staff members. Thus the 24 hour time period for reporting to the police and the CIS would commence when the Approved Provider (or specifically, its Key Personnel) has received the allegation or starts to suspect on reasonable grounds that a reportable assault has occurred (see paragraph 3).

## 3 The Approved Provider in the context of reportable assaults

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The Act defines an Approved Provider to mean a person or body in respect of which an approval is in force.<sup>2</sup> Approval under the Act is a precondition to a provider of aged care receiving a subsidy<sup>3</sup>. The Approved Provider of aged care under the Act is the person or entity formally “approved to provide the care” or the aged care service through which a specific type of aged care is provided, at the time it is provided. That is the person who, or entity which has applied for and been approved under the *Approved Provider Principles* to be an Approved Provider.

In short, the Approved Provider contemplated under the Act is the person or entity approved or responsible for provision of care. It is in our view implicit in and consistent with the intent of the Act that the ‘Approved Provider’ is not junior or unskilled staff (orderlies, nurse aids or cleaners) but a person with authority or responsibility for the service; or a representative of the entity such as care managers, facility management or the executive, that is, Key Personnel.

## 4 Allegation

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When an *allegation* of a reportable assault is made to the Approved Provider (meaning in our view Key Personnel - see paragraph 3) the Approved Provider must report the allegation to the CIS *and* to the police as soon as possible and in any event within 24 hours of the allegation being made to the Key Personnel of the Approved Provider.

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<sup>1</sup> Section 63-1AA(2) Act

<sup>2</sup> Section 1.3 and Schedule 1 Act

<sup>3</sup> Section 6.1, Part 2 Act

An allegation is a direct statement of fact or perceived fact. For example, “My mother has been abused”; or “My mother was slapped across the face by a staff member”; or “My mother was sexually abused by a visitor” etc.

If an allegation is made to a staff member (other than Key Personnel), in our view the 24 hour period would reasonably and practically commence when the allegation is reported to the Key Personnel. Internal policies and procedures around staff reporting allegations to Key Personnel must be demonstrably clear and robust.

## **5 Suspicion on reasonable grounds**

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### **5.1 Reasonable grounds**

When an Approved Provider (meaning in our view Key Personnel - see paragraph 3) “*starts to suspect on reasonable grounds*” that a reportable assault has occurred, the Approved Provider must report the suspicion to CIS and the police within 24 hours.

We understand that some Approved Providers have, in the past, been found non-compliant for not reporting a suspicion within 24 hours. Which raises the question, what does it mean to “*start to suspect on reasonable grounds*”?

If for example a family member or staff member who did not witness an assault is concerned one may have occurred, internal policies and procedures must ensure the issue is raised with Key Personnel as soon as possible. Once raised, Key Personnel have a positive obligation in terms of due diligence to inquire as to the truth of the matter.

If on investigation (which must be carried out without undue delay), the circumstances or evidence lead the Key Personnel to start to suspect that there is substance to the suspicion, at that point, he or she has 24 hours to report it to the CIS and police.

Clearly the report of the suspicion, the investigation and the objective facts which lead the Key Personnel to “*start to suspect on reasonable grounds*” that a reportable assault has occurred must be formally documented.

We stress again that internal policies and procedures around staff reporting suspicions to Key Personnel and the manner in which Key Personnel investigate; must be written and demonstrably clear and robust.

Common sense dictates that investigations should be carried out without delay and with all due diligence. Key Personnel should be appropriately trained in this regard. The more serious the possible assault, the greater the diligence required.

### **5.2 Investigations – the legal position**

Neither the Act or the Guidelines explicitly provide that an investigation needs to be conducted to substantiate a suspicion. However, our view that Approved Providers need to investigate an incident in order to “*start to suspect on reasonable grounds*” that a reportable assault has occurred is consistent with the position taken by the Administrative Appeals Tribunal, the High Court and the New South Wales Worker’s Compensation Commission.

- **Administrative Appeals Tribunal (AAT)**

In *Thompson and Minister for Foreign Affairs and Trade* the AAT considered the *Australian Passports Act 2005* (Cth) which contains a similar provision to the Act regarding the need to “*suspect on reasonable grounds*”. The AAT explained that “what is required [for someone to suspect on reasonable grounds] is the existence of *facts* which are sufficient to induce in a reasonable person the requisite state of mind”.<sup>4</sup>

Given the AAT is the same Tribunal where reviewable decisions under the Act are heard, it is reasonable to expect that the AAT would apply a similar test to the one used in the Australian Passport matter, for determining what is required for an Approved Provider to “*suspect on reasonable grounds*”. That is in our view facts (as a result of

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<sup>4</sup> *Thompson and Minister for Foreign Affairs and Trade* [2007] AATA 1244, confirmed in *Lang and Minister for Foreign Affairs* [2011] AATA 279

appropriate inquiry) sufficient to lead Key Personnel to start to suspect on reasonable grounds that a reportable assault has occurred.

- High Court

In *George v Rockett* the High Court confirmed that although ‘suspicion’ generally means proof is lacking, some factual basis for the suspicion must be shown.<sup>5</sup> That is in our view a factual basis (as a result of appropriate inquiry) sufficient to lead Key Personnel to start to suspect on reasonable grounds that a reportable assault has occurred.

- The New South Wales Workers Compensation Commission

In *The Greater Southern Area Health Service v Walsh*<sup>6</sup> the NSW Workers Compensation Commission was asked to consider whether an Approved Provider acted reasonably by reporting a suspicion that a reportable assault had occurred and suspending a staff member’s employment, without having undertaken any investigation.

Consistent with our view that an investigation into an incident is required first, the Commission relevantly held:

- (i) A staff member (the alleged perpetrator of a reportable assault) was denied natural justice and procedural fairness by the Approved Provider who reported, (after another staff member notified the Approved Provider that she suspected a reportable assault had occurred) to the CIS and police.
- (ii) Reporting the suspicion of a reportable assault and suspending the staff member’s employment was an “*unreasonable action*” on the part of the Approved Provider.
- (iii) The Approved Provider’s argument that its actions had been mandated by law and policy was rejected.
- (iv) The fact that legislation and guidelines may require and/or authorise certain acts does not, alone, render the action reasonable. Proper exercise of judgment and assessment of facts and circumstances must be made to determine the threshold question as to whether the action (making a report or suspending employment) is required. Any subsequent action must, if a defence is to be made out, be reasonable.

We stress that to “*suspect on reasonable grounds*” does not mean the Approved Provider must be able to prove that the reportable assault occurred. However, it is our view that it would be unreasonable (and not consistent with the intention of the Act) to suggest that the obligation to report to the CIS and the police exists where an Approved Provider merely suspects in the absence of reasonable grounds that an assault has occurred. To establish reasonable grounds we recommend a diligent and reasonable inquiry to determine if there is substance to the suspicion.

Key Personnel must of course exercise common sense and good judgement. Diligent documentation is essential.

## 6 Exceptions to obligations to report

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If a resident physically or sexually assaults another resident, an Approved Provider does not need to report the incident provided:

- the resident who committed the assault has a previously diagnosed cognitive or mental impairment;
- a behaviour management strategy is implemented within 24 hours of the assault; **and**
- the diagnosis and plan are noted in the resident’s care plan.

<sup>5</sup> *George v Rockett* [1990] HCA 26 citing, Lord Devlin in *Hussein v Chong Fook Kam* [1970] AC 942 at 948

<sup>6</sup> *The Greater Southern Area Health Service v Walsh* [2010] NSWCCPD 98

Approved Providers do not need to report an incident if a similar incident involving the same resident has already been reported.

In this situation there are obvious obligations in terms of duty of care to protect the parties concerned. Note there is nothing to prevent the victim or family reporting such an incident to police should they wish to do so.