



■ KENNEDY STRANG LEGAL GROUP

FREQUENTLY ASKED QUESTIONS
POLICE CERTIFICATE AND CRIMINAL CERTIFICATE OBLIGATIONS

The attached advice was prepared by the Kennedy Strang Legal Group – an ACSA National Partner.

This document relates to requirements for approved providers referred to throughout as providers.

1. If a nursing agency says they undertake police checks and assess their staff's suitability does the provider need to sight the police certificate?

The obligations of the legislation are imposed on a provider. If a provider does not undertake the check or determine suitability itself, it is placing in the hands of a third party the responsibility of discharging its obligations.

Where a provider relies on the undertakings of a third party there is an element of legal risk. However, the provider may consider implementing a process of requiring a contractor to provide a statutory declaration to the effect that the service providers have a current satisfactory police certificate and have been assessed as suitable to provide care for the elderly.

Therefore, the provider must not allow a person to become a staff member or volunteer unless satisfied that the person has a police certificate, dated not more than 3 years.

The provider then has continuing responsibilities to ensure, except for a period where a statutory declaration may be appropriate, that there is for each person, who is a staff member or volunteer, a police certificate that is at all times whilst that person remains a staff member or volunteer not more than 3 years old.

Further, the provider must ensure that a person, who is a staff member or volunteer, must not be allowed to continue as a staff member or volunteer if there is a record that that person has been convicted of murder or sexual assault or convicted of and sentenced to imprisonment for any other form of assault.

ACSA Comments:

The Department of Health and Ageing (DHA) has advised ACSA verbally that a provider's obligation on contract staff – including those who provide care to clients, ancillary services (e.g. trades people) and volunteers provided through an agency (such as the Red Cross), can be discharged by the insertion of an appropriate clause into their contracts with labour hire agencies requiring them to certify that

- *any staff they supply have a police certificate that is not more than 3 years old;*
- *they do not have a conviction for any one of the three non discretionary offences, being murder, sexual assault and any other form of assault with a conviction and a sentence to imprisonment will preclude that person from providing a service to a recipient of aged care services.*

ACSA has also been advised that the Department will only be interested in contractors being assessed against the offences designated in the legislation. This means that providers will not have to undertake a suitability for employment check on any contractor.

As this advice has only been provided verbally to ACSA, written confirmation is being sought from the DHA to ensure there are no consequences against providers, who elect to implement this requirement through use of contracts.

ACSA is also following up with the DHA that validation of police certificates may be a record of original certificates presented or electronic records in a Secure IT System from an Authorised Service Provider and therefore, holding the actual certificate will not be necessary. However, the legislation states that the approved provider must be satisfied that there is for each person a police certificate that does not record the three non discretionary offences.

2. Can the provider accept a police check summary or must they see the police certificate?

The responsibilities on the provider have been mentioned in response to the first question.

The best way for a provider to demonstrate their compliance with the *Records Principles* and the *Accountability Principles* is to sight an original police certificate. Reliance on summaries or on information from a third party exposes the provider to some legal risk.

3. If a person has a suspended sentence or had an Intensive Correction Order does that count as a sentence of imprisonment?

Where a police certificate indicates that a person has been sentenced to a term of imprisonment, how the sentence of imprisonment was served is not relevant. Therefore where a sentence of imprisonment has been suspended or an intensive correction order has been made, this should still be regarded as a sentence of imprisonment.

4. A staff member has a criminal conviction for assault with a sentence of imprisonment but that was years ago and they are a really good worker, can't I keep them?

The legislation clearly states that a staff member or volunteer must not be allowed to continue as a staff member or volunteer if a criminal record shows that a person has been convicted of and sentenced to imprisonment for any other form of assault.

There are three classes of offences for which a provider has no discretion, those being:

- a conviction of murder
- a conviction for sexual assault;
- or a conviction and a sentence to imprisonment for any other form of assault.

5. Must I destroy the police certificate?

There is no legal obligation to destroy a police certificate or a copy of a police certificate. Indeed, its retention is contemplated by the *Records Principles*. Where the police certificate is retained, the provider must comply with the *Privacy Act 1988* (Cth). In general this requires you to destroy the Certificate after the 3 year period. If you keep a copy there should be a record that the original has been sighted.

6. Can I keep a copy of the police certificate?

A copy of an original police certificate may be retained by the provider in accordance with the *Privacy Act 1988*. Retention of a copy is sufficient to meet an approved provider's obligations. From a forensic perspective, if you keep a copy, there should be some record that the original was sighted.

7. Can I ask staff if they are a citizen or a permanent resident of a country other than Australia?

A provider has an obligation in relation to staff members who at any time after turning 16 years old were a citizen or permanent resident of a country other than Australia. This requires that in addition to undergoing a police check, the provider obtains a statutory declaration from the staff member or volunteer stating that they have never been convicted of one of the three categories of non discretionary offences.

The provider may wish to consider the process of requesting a statutory declaration and not expose themselves to a claim of discrimination on the basis of racial or ethnic origin.

8. If an electrician attends the rooms of the facility do they need a police certificate?

Where a tradesperson such as an electrician is employed, hired, retained or contracted by the provider and has or is reasonably likely to have unsupervised access to care recipients, the provider is obliged to ensure that for that person there is a current police certificate.

In the absence of such a certificate, a statutory declaration or application for certificate, we recommend direct supervision of the contractor.

9. If a care recipient calls a tradesperson themselves, but we as the provider pay for their services through a community package what are our obligations?

Where the tradesperson receives a payment for work done from the provider as part of a Commonwealth Government subsidy payment for the care recipient, the relationship between the tradesperson and the provider may meet the definition of staff member. As such, the provider would be bound by the requirements of the legislation and would require a police certificate or be supervised.

ACSA Comment: Refer to question 1

10. Are students of universities or TAFE colleges defined as staff or volunteers?

Students undertaking clinical placement at residential aged care facilities or in the community who are over 16 and have or are reasonably likely to have unsupervised access to care recipients are required to have a current police certificate in order for the provider to meet their statutory obligations.

11. What process of appeal is available to staff who have an old conviction that precludes them from working with the elderly?

The amended legislation does not mention an appeal process for dissatisfied employees. Staff may be able to make an application to the Human Rights and Equal Opportunity Commission on the grounds of discrimination on the basis of criminal record. Staff may also consider making application to the Department of Health & Ageing, however, there is no formal appeal process mentioned in the legislation.

12. Do the directors of the corporation have to undergo a police check?

Where a person is a director of a corporation that is a provider, each director must be suitable to provide aged care. Where a director or any other person is concerned in or takes part in, the management of aged care, that person must be police checked to ensure they are not a disqualified individual. There is no 3 year requirement for a police check, however, for best practice, it would be best to do 3 year checks.

A disqualified individual includes among other things, an individual who has been convicted of an indictable offence. Where such a person ceases to be suitable for approval, that information must be notified to the Secretary of the Department of Health & Ageing.

13. What are Key Personnel?

Key Personnel pursuant to the Aged Care Act are described pursuant to section 8-3(3):

(a) a member of the group of people who are responsible for the executive decisions of the provider;

- (b) any other person who is concerned in or takes part in the management of the provider;
- (c) any person who is responsible for the nursing services provided or to be provided by the aged care service conducted or to be conducted by the provider;
- (d) any person who is responsible for the day to day operations of an aged care service conducted by a provider whether or not the person is employed by the provider; and

14. Should we have a list of offences that we consider unsuitable to provide aged care?

In our opinion listing offences not considered suitable by the organisation exposes the provider to a claim for discrimination on the basis of criminal record.

Providers should consider the Human Rights and Equal Opportunity Commission (HREOC) Guidelines in relation to the assessment of staff with convictions other than those for which they have no discretion.

15. Is the Blue Card sufficient evidence of a satisfactory police check?

The Blue Card is issued by the Commission for Children & Young People and Child Guardian in Queensland. The Blue Card considers offences relative to child related activities and other serious offences. The Department of Health & Ageing Queensland has indicated their acceptance of the Blue Card as evidence of a satisfactory police check in Queensland. The Queensland Blue Card may not be acceptable in other Australian states.

16. What do I do if a staff member or volunteer refuses to consent to a police check?

The provider has an obligation to ensure that for each staff member or volunteer there is a current police certificate, which is not more than 3 years old. Where a staff member or volunteer refuses to consent to a police check, the provider is unable to meet their legislative obligations exposing themselves to a claim of non compliance by the Department, which may result in sanctions being imposed.

17. Do we have to keep a register of the police certificates?

A provider must keep records that enable the provider to demonstrate its compliance in relation to the *Accountability Principles*. The process by which this is done is at the discretion of the provider.

18. What do I do with a staff member who tells me they have been charged with an offence after the police checks?

A provider has an obligation to ensure that there is a current police certificate for each staff member and volunteer. There is also an obligation to ensure that the staff member or volunteer is suitable to provide care for the elderly.

Having been charged with an offence may not result in a guilty verdict or a conviction and as such is not addressed in the legislation.

Providers may consider inserting a clause in the employment agreements that require the employee to disclose any conviction of murder, sexual assault or other assault resulting in a sentence to imprisonment during their employment.

19. If we are paying for the police checks do I have to give the staff member a copy?

A police certificate is personal information that relates to an individual staff member or volunteer.

As such, that staff member or volunteer is entitled to access their personal information. We recommend that the staff member be responsible for their own original police certificate.

20. Do staff or directors of a provider who do not have unsupervised access to care recipients have to have a police check every three years?

A staff member is defined as being over the age of 16 and being employed, hired, retained or contracted by the provider to provide care services and has or is reasonably likely to have unsupervised access to care recipients.

The legislation provides examples of people who are not staff members including tradespeople and management consultants, who do not have unsupervised access to care recipients.

It is reasonably likely that a staff member has access to care recipients by virtue of their access to all areas of the facility. Unless there is a demonstrable process in place which ensures that access is not reasonably likely, we recommend providers consider staff within a facility and directors with access to a facility as staff members or volunteers and therefore requiring a police check.