



JOINT ANF & VHIA STATEMENT

Introduction of Police Checks in the Victorian public aged care sector

The contents of this joint statement by VHIA and ANF reflects their common understanding of the Commonwealth's requirements and guidelines regarding police checks for existing and future employees in public aged care facilities. The statement attempts to provide a convenient summary of the key considerations and requirements and is not itself a binding industrial agreement.

Approved providers should ensure they have read and understood all relevant material issued by the relevant authorities.

These particularly include the Commonwealth Department of Health and Ageing guidelines in relation to mandatory Police checks for staff and volunteers employed in residential aged care homes and community aged care services funded under The Aged Care Act 1997. Fact sheets and guidelines have been forwarded to aged care employers by the Commonwealth Department of Health and Ageing and further copies can be obtained from its website www.health.gov.au

The key points in relation to time frames are:

1. From 1 March 2007 – approved providers must from this date have a police certificate, and a statutory declaration where applicable, for all new staff members and volunteers (including contracted and agency staff) not more than three years old before the day on which the person first becomes a staff member or volunteer.
2. By 1 June 2007 – approved providers must have a police certificate, and a statutory declaration where applicable, not more than three years old, for all relevant staff or an application for a police certificate must have been made. All contracts, under which staff are supplied, must also be amended by 1 June to ensure compliance with the police certificate requirements.
3. By 1 September 2007 – approved providers must have a police certificate (and a statutory declaration where applicable), not more than three years old, for all relevant volunteers or an application for a police certificate must have been made. All contracts, under which volunteers are supplied, must also be amended by 1 September 2007 to ensure compliance with police certificate requirements.
4. By 30 September 2007 – approved providers are required to provide a one-off declaration to the Department of Health and Ageing, in relation to each service operated, about which services have complied with the requirements in relation to police certificates. The declaration form will be distributed to all providers in adequate time for the implementation of this measure.

The Guidelines deal with a number of matters including:

- convictions that preclude a person from employment
- other convictions
- record keeping – privacy considerations
- assessing a police certificate
- natural justice considerations
- informing existing and prospective employees or requirements for police certificate

Who Pays?

In relation to payment for police check certificates the Commonwealth guidelines state "The question of who pays for the police check will be a matter for the employer and/or the employee, to be negotiated as part of the employment arrangements." The Victorian State Government provided a one-off state wide allocation of funding to assist public sector residential aged care service providers to process police checks for existing staff. Accordingly DHS and the relevant Minister expect approved providers to meet the cost of police checks for current employees in this first round.

Subsequent police checks for both existing and future employees are the subject of a claim by the ANF on public sector employers to be negotiated in the 2007 enterprise bargaining round.

What are the employee's obligations?

An Employee meets their obligations where they provide the following to their employer within 14 calendar days of a request from their Employer, or in the case of a prospective employee, within 2 business days following the pre-employment interview (where requested):

- Full name, including spelling; and
- Correct date of birth; and
- Consent to undertake a police check

As an alternative, the Employee meets their obligation where they provide the Employer with a police certificate that is not more than 3 years old, prior to 1 June 2007.

When individuals undertake to obtain their own police certificate, the Employer must sight an original or a certified copy of the police certificate and will need to record this information for compliance purposes. The original or certified copy is to be returned to the Employee within 2 business days.

What to do if a police check contains an adverse report.

As in any situation that may result in some form of disciplinary action it is important that the employer adopts an approach that is consistent with the principles of natural justice and procedural fairness.

Employers should refer to the Human Rights and Equal Opportunity Commission's (HREOC) prepared guidelines: On the Record – Guidelines for the prevention of discrimination in employment on the basis of criminal record. The Guidelines outline the key points that approved providers should consider when assessing a person's police certificate, including that:

- written consent from the person to obtain a police certificate is required;
- a police certificate can only be used for the purpose for which it was obtained;
- the relevance of a person's criminal record should be assessed on a case-by-case basis against the inherent requirements of the job; and
- information about a person's criminal record should be stored in a private and confidential manner.

These Guidelines are available on the HREOC website at: http://www.humanrights.gov.au/human_rights/criminalrecord/on_the_record/index.html

Guiding principles for assessing a police certificate

Two important factors should guide Employers in the assessment of a police certificate that indicates past convictions, other than those convictions described in the legislation that would automatically preclude them: relevance and proportionality.

- Is the offence relevant to the position or task the person is being considered for?
- Would denying the person employment because of the past conviction be a disproportionate response to the particular offence?

The following principles are contained in the Commonwealth Guidelines to assist approved providers to assess a person's police certificate for suitability to provide aged care services:

Access: the degree of direct and unsupervised access to care recipients, their belongings, and information about care recipients. Considerations include:

- whether the individual will work alone or as part of a team,
- the level and quality of direct supervision,
- the location of the work i.e. residential, community or home based settings.

Relevance: the type of conviction in relation to the duties a person is, or may be, undertaking; an approved provider should only have regard to criminal record information indicating that the person is unable to perform the inherent requirements of the particular job.

The burden is on the employer to determine the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked. An inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental.

Justice Gaudron of the High Court has stated that

[A] practical method of determining whether or not a requirement is an inherent requirement ... is to ask whether the position would essentially be the same if that requirement were dispensed with.

Significance: of the type of conviction in relation to the duties a person is, or may be, undertaking the seriousness of the offence (eg whether it involved serious harm to persons, serious fraud or theft, or substantial property damage);

- the circumstances surrounding the commission of the offence;
- whether the offence was part of a pattern of offending, or a one-off.
- the penalties imposed;

Proportionality: whether excluding a person from employment is an outcome proportional to the type of conviction.

Timing: how long ago the conviction occurred.

- whether the offence has since been decriminalised (eg prostitution), or the penalty reduced in severity (eg possession of small quantities of marijuana for personal use);
- the length of time that has passed since the offence was committed, and the individual's conduct in the intervening period;
- Given the absence of a spent convictions scheme in Victoria, non-serious offences that occurred 10 years or more previously should be disregarded, as if the employee had lived in another State it is likely that this would not be recorded on their record.
- whether a change in circumstances makes re-offending less likely;
- an assessment of the individual's character.
- the employee's explanation;
- the employee's performance record in the job and in previous jobs; and
- any references provided and past work history.

The critical issues are:

1. that any decisions about the employee/applicant must be made objectively, based on sound reasoning and free from arbitrary prejudice against their criminal record; and
2. the concerns of the employer must relate directly to the inherent requirements of the position, not simply broad concepts such as trust.

3. the employee must have a right to a fair process and right of review
4. termination must only occur after all alternatives have been considered and all processes concluded.

Procedural Fairness

Where, in the opinion of the Employer a police check identifies a conviction of the types identified in the Commonwealth Guidelines, or the police check contains information that reflects negatively on the employee's capacity to meet the inherent requirements of their contracted position, the Employer, should initiate the following procedure:

- If action to remove an Employee from their contracted position is being considered, the Employer must consult with the affected Employee (and their representative if requested) prior to any action being taken with respect to the Employee's right to continue in that position.
- In order to ensure fair process is followed, the Employer shall notify the affected Employee in writing of the time, date and reasons for the meeting, their right to bring a representative of their choice, and provide to the Employee the information that the employer intends to rely upon.
- At the meeting the employee (and their representative if requested) shall have an opportunity to present verbal and written evidence in support of his/her position and in response to the reasons for the Employer considering removing the Employee from their position. The Employer shall also have the right to bring a representative should they desire.
- After the above meeting, if the Employer believes that the Employee no longer meets the inherent requirements of the position, the Employer shall notify the Employee in writing, including reasons. If the Employer is satisfied that the Employee can continue in their position, this will also be notified in writing to the Employee.
- Alternative actions, such as an undertaking, a warning, suspension with pay, alternate positions, etc., should be considered by the Employer, following consultation with the Employee and their representative (if any). The institution of any of these sanctions must be communicated in writing by the Employer, accompanied by the reason(s) why the particular sanction was invoked.
- If termination action (including removing the Employee from their current position to an alternate position, or making changes to their current position) is warranted, the Employer must provide a written termination notice to the Employee including the reasons for termination/changes and inform the employee of the right to file a grievance under the applicable Enterprise Agreement Grievance Procedure.
- The Commonwealth's guidelines require a right of independent review for an employee where their police check could prejudice their ongoing employment. This must occur prior to termination of employment. The VHIA recognises that the employer must accord the employee a right to independent review. The ANF has foreshadowed that in the event the person proposed by the employer to undertake the independent review is not acceptable to their member, the ANF will initiate the Multi Employer Certified Agreement grievance procedure, with the Australian Industrial Relations Commission potentially exercising the right of review pursuant to s.170LW of the pre-reform legislation. Any independent review is to have regard to this statement, the Human Rights and Equal Opportunity Commissions Guidelines, the nature of the aged care industry, and the Commonwealth Department of Health and Ageing Guidelines.

In any situation where an employer is unsure of what action to take the employer should contact VHIA for advice and assistance.

Any ANF member seeking advice or assistance should contact the ANF Information Line.