

Health, aged care and retirement living briefing

Federal government statements overlook the South Australian position: South Australia residential aged care staff do need to disclose their COVID-19 vaccinations

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South Australian residential aged care providers and staff¹ are at risk of fines or imprisonment if they follow the federal government's advice regarding the notification by staff of their COVID-19 vaccinations.

The federal government's position

On Friday 4 June 2021, the federal government published a factsheet for aged care staff about COVID-19 vaccinations.² It was written in anticipation of aged care providers needing to provide formal reporting on the vaccination of staff (which will be from 15 June 2021 for residential aged care providers and from a date to be announced for in-home and community aged care providers). The factsheet states that it is a staff member's choice to let the provider know whether they have or have not received a COVID-19 vaccination, and whether to provide evidence of this, although it does encourage staff to share that information.

A second factsheet was published on the same day by the federal government for aged care providers.³ It states that:

- Providers should ensure that staff do not feel coerced or compelled to disclose information about whether they have or have not received a COVID-19 vaccination; and
- Staff should not be required to provide evidence to confirm their vaccination status.

ABC News also published an article on Sunday 6 June 2021 titled "Aged care workers do not have to reveal if they've had COVID vaccination, says Department of Health".⁴ That article refers to both the factsheet for staff and the factsheet for providers.

¹ In this article, staff includes contractors and volunteers for the purposes of both federal and South Australian law.

² <https://www.health.gov.au/sites/default/files/documents/2021/06/covid-19-vaccination-why-is-my-residential-aged-care-employer-asking-me-if-i-have-received-a-covid-19-vaccination.pdf>.

³ <https://www.health.gov.au/sites/default/files/documents/2021/06/covid-19-vaccination-guidance-for-residential-aged-care-providers-on-reporting-of-covid-19-vaccinations-of-the-workforce.pdf>.

⁴ <https://www.abc.net.au/news/2021-06-06/number-of-aged-care-workers-vaccinated-may-not-be-known/100193512>.

The federal law

On Thursday 3 June 2021, Minister Hunt made the *Aged Care Legislation Amendment (Service Staff Vaccination Recording and Reporting) Principles 2021 (Principles)*, which took effect from Saturday 5 June 2021. Those Principles state that residential aged care providers must:

- Record the number of staff who have "voluntarily informed" the provider that they have received either a single dose, or all required doses, of the COVID-19 vaccine; and
- Report to the Department of Health from Tuesday 15 June 2021 (and then every Tuesday after that):
 - The number of staff at the service; and
 - The number staff that have voluntarily informed the provider that they have received a single dose of the COVID-19 vaccine; and
 - The number staff that have voluntarily informed the provider that they have received all required doses of the COVID-19 vaccine.

Minister Hunt recommended⁵ that providers ensure staff understand it is "not a mandatory requirement under Commonwealth or state or territory law" for staff to disclose their vaccination status. Furthermore, he recommended that staff should also understand that they have a "right to decline to provide this information without any recrimination or judgement".

The danger of the federal advice

The danger is that if any South Australian residential aged care provider or staff were to rely upon that information from Minister Hunt and the federal government (or the headline of the ABC News article) then they are at risk of fines or imprisonment under South Australian law.

The position for staff in South Australia

In South Australia, the *Emergency Management (Residential Aged Care Facilities No 36) (COVID-19) Direction 2021 (Direction)* requires all employees, contractors and volunteers of a residential aged care facility to notify the operator of the facility as soon as possible of any COVID-19 vaccination they have received (if the vaccination was not received through a

⁵ Explanatory Statement to the *Aged Care Legislation Amendment (Service Staff Vaccination Recording and Reporting) Principles 2021*.

vaccination clinic at the facility). This obligation includes providing evidence of the COVID-19 vaccination.⁶ This places a direct legal obligation on employees, contractors and volunteers to notify the provider of when they have received the COVID-19 vaccination. If a person does not comply with this obligation, without reasonable excuse, it may be a breach of the Direction carrying a maximum penalty of \$20,000 or imprisonment for two years for an individual person.⁷

The position for providers in South Australia

Residential aged care providers have a related obligation under the Direction to require their employees, contractors and volunteers to notify them of any COVID-19 vaccination they have received and provide evidence of that vaccination (that was not provided through a vaccination clinic at the facility).⁸ A provider must also maintain a record of any COVID-19 vaccinations received by employees, contractors and volunteers (regardless of where the vaccination occurred).⁹ If a provider refuses or fails to comply with the Direction, without reasonable excuse, it may be penalised with a maximum penalty of \$75,000.¹⁰ Furthermore, each manager and director can face a maximum penalty of \$20,000 or imprisonment for two years in the case of a breach (unless such a breach was not preventable through due diligence).¹¹

It is important to note that there is no obligation on a staff member to report that they have not had a COVID-19 vaccination, but once the staff member has received a vaccination then they are required to inform the provider.

The South Australian Government has the power under the Direction to request records (that providers are required to keep) of the vaccination status of staff.¹²

These events demonstrate the importance of understanding all of the legal obligations under both federal and state law as there can be inconsistencies between the laws and policies of federal and state governments.

Complying with federal and South Australian law

The practical challenge for residential aged care providers in South Australia will be complying with the

requirements under state law and federal law simultaneously. The federal law requires that providers only report to the federal Department of Health the number of staff who have “voluntarily informed” the provider that they have received a single dose, or all required doses, of the COVID-19 vaccine. In contrast, under South Australian law disclosure by staff to the provider that they have been vaccinated is mandatory.

We acknowledge that it may appear absurd for a provider to ask a staff member, when the staff member reports to the provider that they have been vaccinated, whether they are reporting this voluntarily (for the purposes of federal law) when they must do so anyhow (involuntarily) because of the threat of a fine or imprisonment under South Australian law.

Regardless, the best approach may be for a provider to ask and record whether the staff member is voluntarily disclosing the information for the purposes of the federal law. The provider would then report to the federal Department of Health only the numbers of staff who have “voluntarily” disclosed their vaccinations for the purposes of the federal law, thus providing the staff member with some right to decline to provide information for the purposes of the federal law (that would be passed on to the federal Department of Health).

The effect of the federal law will be that the federal Department of Health may not be aware of all the numbers of staff who have been vaccinated that the provider is aware of.

Summary

In conclusion, we advise residential aged care providers and staff in South Australia to continue to follow the South Australian law regarding the notification, and recording, of COVID-19 vaccinations.

This briefing provides a high level overview of the law surrounding disclosure by residential aged care staff of their COVID-19 vaccination status. If you require any legal advice in relation to the effect the federal and South Australian legislation has upon you or your organisation we would be happy to assist you.

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Disclaimer

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⁶ *Emergency Management (Residential Aged Care Facilities No 36) (COVID-19) Direction 2021*, clause 7(2)(c).

⁷ *Emergency Management Act 2004* (SA), section 28(1)(b).

⁸ *Emergency Management (Residential Aged Care Facilities No 36) (COVID-19) Direction 2021*, clause 8(1)(c).

⁹ *Emergency Management (Residential Aged Care Facilities No 36) (COVID-19) Direction 2021*, clause 8(2).

¹⁰ *Emergency Management Act 2004* (SA), section 28(1)(a).

¹¹ *Emergency Management Act 2004* (SA), section 28(2).

¹² *Emergency Management (Residential Aged Care Facilities No 36) (COVID-19) Direction 2021*, clause 8(2)(c).

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