Level 2, 99 Frome Street
Adelaide SA 5000

Telephone: +61 8 8111 4000
email: admin@oloughlins.com.au

O' Loughlins LAWYERS

Health, aged care and retirement living briefing

Serious Incident Response Scheme: Overview

April 2021

Rebecca Barr, Peter Myhill and Helena Errey-White

The Serious Incident Response Scheme makes substantial changes to the incident reporting obligations of residential aged care providers.

Background

On 1 April 2021 the Serious Incident Response Scheme (**Scheme** or **SIRS**) commenced. This Scheme expands considerably the previous reporting obligations of residential aged care providers under the *Aged Care Act 1997*, including the categories of harm that are reportable. It also requires the conduct of a resident with dementia to be reported (which was previously exempt).

Commencement

The SIRS commenced on 1 April 2021 but has a phased introduction as follows:

- from 1 April 2021 providers are required to:
  - have in place an effective incident management system; and
  - report all priority 1 reportable incidents to the Commission.
- from 1 October 2021 providers will be required to report priority 2 reportable incidents.

From 1 April 2021 only priority 1 reportable incidents that occur, or are alleged or suspected to occur, **on or after** 1 April 2021 need to be reported under the SIRS. The SIRS does not cover reportable incidents prior to 1 April 2021.

For priority 2 reportable incidents, it is incidents that the provider **becomes aware of on or after 1 October 2021** that need to be reported from that date. Therefore, if an incident occurs prior to 1 October 2021 it will be reportable if the provider **becomes aware of it** on or after 1 October 2021.

Incident management system

The SIRS requires providers to have an incident management system. The incident management system captures a broad range of incidents including those not reportable to the Commission. The system should record all incidents, including near misses.

An incident is an act, omission, event or circumstance that has occurred, or is suspected or alleged to have occurred, in connection with the provision of care in a residential care setting that either causes harm or could reasonably have caused harm to a resident or another person. Importantly, this goes beyond incidents that only affect residents and includes incidents that affect any other person such as a staff member or visitor, for example, if a visitor slips on water on the floor.

A near miss is when an occurrence, event or omission happens that does not result in harm (such as injury, illness or danger to health) to a resident or another person but had potential to do so.

The record in the incident management system needs to be kept for a period of at least seven years from the date the incident was identified. For incidents of a criminal nature, providers should consider keeping the records for longer as they may need to be relied upon for criminal prosecution.

Reportable incidents

The incidents that are reportable under the SIRS are considerably expanded from those previously reportable as a 'reportable assault'.

The categories of reportable incidents that have, or are alleged or suspected to have, been perpetrated against a resident in connection with the provision of care are:

- unreasonable use of force;
- unlawful sexual contact or inappropriate sexual conduct;
- psychological or emotional abuse;
- unexpected death;
- stealing or financial coercion by a staff member of the provider;

- neglect (includes a breach of duty of care or a gross breach of professional standards);
- unauthorised and unlawful use of physical or chemical restraints; and
- unexplained absences from the facility.

Reportable incidents include the above incidents even where they have been perpetrated by a person who is not a staff member of the provider, such as a visitor, family member or other resident (except for the reportable incident type 'stealing or financial coercion'). The incidents are also reportable where perpetrated by or against a resident who has a mental or cognitive impairment.

In our view, for an incident to be reportable to the Commission, the incident needs to have caused harm or could reasonably have been expected to have caused harm. Therefore, if a reportable incident occurs but it does not cause harm, or could not reasonably have been expected to cause harm, the incident will not be reportable to the Commission. However, providers may wish to err on the side of caution and report such incidents.

Assessing harm

Harm needs to be understood broadly to include:

- physical, mental, psychological or emotional;
- short-term or long-term;
- low level (for example, momentarily shaken or temporary redness or marks that do not bruise) or high level.

For each reportable incident there needs to be a careful assessment of:

- whether harm has been caused and, if so, what level of harm has been caused; and
- if it appears no actual harm has been caused, whether harm could reasonably have been expected to have been caused.

In assessing whether any actual harm has been caused, in our view, the provider needs to make the assessment based on the subjective experience of the resident. This includes taking into account the resident's history and preferences, and using the staff knowledge of the resident. Where a resident lacks capacity to communicate if they have experienced harm, the assessment may require monitoring the resident's behaviour for any noticeable, but subtle, changes that may indicate harm from an incident. For example, a resident may become withdrawn or avoid certain people. Family members and other residents may also be able to assist in identifying this harm if they raise a concern with the provider about changes to the resident whether behavioural or physical.

In assessing whether any harm could reasonably have been expected to have been caused, the provider needs to consider from an objective perspective whether a reasonable person would have experienced harm. The intention of this is to capture harm that may have been caused to residents who have a mental or cognitive impairment and may not display the effects of harm in a manner ordinarily expected.

Priority of reportable incidents

Reportable incidents are divided into two types: priority 1 and priority 2.

Priority 1

A priority 1 reportable incident is a reportable incident:

- that causes, or could reasonably have caused, a resident physical or psychological injury or discomfort that requires medical or psychological treatment to resolve; or
- where there are reasonable grounds to report the incident to police; or
- that is a resident's unexpected death or a resident's unexplained absence from the service.

Whether medical or psychological treatment is required should be interpreted broadly. This can include treatment as minor as an ice pack on a bruise or the elevation of a limb to reduce swelling.

A reportable incident needs to be reported as a priority 1 if the provider has reasonable grounds to believe the incident constitutes a priority 1 reportable incident.

Priority 2

A priority 2 reportable incident is any reportable incident that is not reportable as a priority 1 incident (ie the level of harm caused, or that could have reasonably been caused, does not require treatment to resolve and it is not an unexplained absence or death or an incident of a criminal nature).

A priority 2 reportable incident, similar to a priority 1, includes where harm was caused and where harm was not caused but could reasonably have been expected to be caused.

The guidance from the Commission advises that if in doubt about the impact of the incident and therefore its categorisation as a either a priority 1 or priority 2 incident, err on the side of caution and report the incident as a priority 1.

We note, as mentioned above, that priority 2 incidents will not be required to be reported until 1 October 2021.

Reporting requirements to the Commission

The reporting requirements for a reportable incident depend on its classification as either priority 1 or priority 2.

Priority 1

The reporting requirements for a priority 1 reportable incident are as follows:

1. Initial notice – provide an initial notice to the Commission of the reportable incident within 24 hours of becoming aware of the incident;

2. Notification to police – notify the police if the reportable incident is of a criminal nature within 24 hours of becoming aware of the incident;

3. Significant new information – after the initial notice if you become aware of significant new information (eg the level of harm is more significant than previously thought or the incident has evolved into another reportable incident such as neglect that later results in unexpected death) provide this information to the Commission as soon as reasonably practicable;

4. Second notice – provide a second notice within 5 days after the start of the 24 hour period when initial notice was required, or within such other period prescribed by the Commission, if:

   - information required to be included in the initial notice was not available at the time of providing the initial notice; or
   - the Commission requires further specified information;

5. Final report – if the Commission requires an internal or external investigation, provide a final report within 84 days (12 weeks) of submitting the initial notice or by the date required by the Commission.

Priority 2

The reporting requirements for priority 2 reportable incidents are significantly less onerous than that for priority 1 reportable incidents. If a priority 2 reportable incident occurs, or is alleged or suspected to occur, the provider must notify the Commission within 30 days of becoming aware of the reportable incident.

Once the report is made, the only obligations the provider has are responding to requests from the Commission and providing any new significant information as soon as possible.

Incidents that occur outside of the provision of care

Providers also have obligations where a resident has suffered harm not in connection with the provision of care but that the provider is aware of.

Examples of this are:

- where a family member is stealing from a resident by accessing the resident's bank account through online banking and the resident is emotionally distressed; and
- where a resident has been harmed by a family member while on an outing with family away from the facility.

In our view, such an incident is not a 'reportable incident' for the purposes of the Commission but is an 'incident' which needs to be recorded in the incident management system. We understand that in the Commission's series of webinars on the SIRS it expressed the view that such incidents are reportable. Providers may wish to err on the side of caution and report such incidents to the Commission given the Commission appears to have an expectation this will be done.

Although such an incident may not be reportable to the Commission, it may be reportable through other avenues. For example, if the provider has reasonable grounds to report the incident to the police, it must do so within 24 hours of becoming aware of the reasonable grounds to report the incident (ie the provider is aware of (alleged or known) facts or circumstances that makes the incident likely to be of a criminal nature).

If in South Australia, we suggest a provider also consider if it is appropriate to report such an incident to the Adult Safeguarding Unit. This arises from the provider's obligation to consider whether other persons or bodies should be notified of the incident and, if so, the provider must notify those persons and bodies it has identified. The purpose of the Adult Safeguarding Unit is to address reports of suspected or actual abuse of vulnerable adults and provide support to those adults.

Summary

This briefing provides a high level overview of the SIRS. It is the first in a series that will follow this one. If you require any legal advice in relation to the effect the legislation has upon you or your organisation or if you need assistance in responding to an incident we would be happy to assist you.

The Serious Incident Response Scheme substantially expands the reporting obligations of residential aged care providers.

Disclaimer

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If you require any further information, please contact one of the authors of this Briefing:

Rebecca Barr
Partner
rebecca.barr@oloughlins.com.au

Peter Myhill
Consultant
peter.myhill@oloughlins.com.au

Helena Errey-White
Solicitor
helena.errey-white@oloughlins.com.au

Other O'Loughlins' Health, Aged Care and Retirement Living Team members:

Alf Macolino
Partner
alf.macolino@oloughlins.com.au

Hamish Archibald
Partner
hamish.archibald@oloughlins.com.au

Josh Abbott
Partner
josh.abbott@oloughlins.com.au

Michael Spencer
Special Counsel
michael.spencer@oloughlins.com.au

Melanie Fuss
Senior Associate
melanie.fuss@oloughlins.com.au

Julie-Ann Sparkes
Associate
julie-ann.sparkes@oloughlins.com.au

www.oloughlins.com.au