



# Regulatory Bulletin

## Spotlight on serious risk

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**This bulletin covers the Aged Care Quality and Safety Commission (Commission) process and responsibilities relating to findings of serious risk.**

### Key points

- The Commissioner must consider whether failure to comply with the standards has placed or may place the safety, health or wellbeing of a consumer at serious risk.
- Serious risk may be in respect of an individual consumer, individual consumers, previous consumers or a class of consumers.
- Serious risk is not an ongoing state; it is a separate statutory decision based on evidence at a point in time.
- A provider has an opportunity to respond to a notification of serious risk prior to a decision being made.

- The Commission publishes information relating to serious risk decisions on the Commission website.
- The Commissioner does not have the power to reconsider a serious risk decision.
- There is no further statutory decision that finds that there is no serious risk or that serious risk to consumers has been revised or resolved.
- The Department of Health is notified when a serious risk decision is made.



## When a provider of a service fails to meet the expected outcomes of the aged care standards what impact does this have on a consumer's safety, health or wellbeing?

The Aged Care Quality and Safety Commissioner (Commissioner) must consider this question when a provider of a relevant service is found not to comply with the standards. Serious risk is a statutory decision made by the Commission.

### In this Bulletin:

- Accredited service means both residential aged care services and flexible care services through which short-term restorative care is provided in a residential care setting.
- Home services means home care services, Commonwealth Home Support Program services and flexible care services delivering short-term restorative care in a home care setting.
- Provider refers to an approved provider of accredited services and a home service provider of home services.

## Aged Care Quality and Safety Commission Rules 2018

**The Aged Care Quality and Safety Commission Rules 2018 (Rules) require that, if the Commissioner identifies a failure by a provider of a service to meet one or more expected outcomes of the applicable Standards, the Commissioner must decide whether there is evidence that the failure has placed, or may place the safety, health or wellbeing of a consumer of the service at serious risk.**

The Commissioner must act as soon as reasonably practicable to consider the impact of the failure on the safety, health or wellbeing and whether consumers have been or may be placed at serious risk.

When the Commissioner makes a finding of serious risk the Commission gives the provider of the service a written notice outlining the reasons for and evidence of the risk and also notifies the Department of Health. This ensures that prompt attention by the provider of the service is given to rectifying the risk to consumers.

You can find out more about serious risk on the Commission's website.



## Frequently asked questions

### 1. What is the definition of serious risk?

This definition of serious risk is used by the Commission and is based on the ordinary meaning of the words when used both individually and together.

**Serious:** Important, significant

**Risk:** Exposure to danger, injury or loss

### 2. What is the definition of safety, health or wellbeing?

The definition of the terms 'health', 'safety' and 'wellbeing', is used by the Commission and is based on the relevant definitions of those terms as provided by the Macquarie Dictionary (2nd ed):

**Health:** the general condition of the body or mind with reference to soundness and vigour

**Safety:** the state of being safe; freedom from injury or danger

**Wellbeing:** a good or satisfactory condition of existence; welfare

### 3. Is there a relationship between serious risk and failure to meet an expected outcome?

Yes, a finding of serious risk is made in relation to a failure to meet an expected outcome of the Accreditation Standards, Home Care Standards or Flexible Care Standards.

When there is a finding that a provider of a service has failed to meet one or more expected outcomes of the applicable standards the Commissioner must consider whether this failure has placed or may place the safety, health or wellbeing of a consumer at serious risk.

The provider has an opportunity to respond to a notification of serious risk prior to a decision being made.

### 4. Does a finding of serious risk need to relate to an individual consumer?

The Rules is concerned with whether a failure against the applicable standards carries serious risk in respect of the safety, health or wellbeing of an individual aged care consumer. Therefore, the evidence and the subsequent decision about serious risk must show evidence of serious risk in respect of an individual aged care consumer or consumers. The finding can also relate to risk to previous consumers of the service during the period being considered in the assessment of the provider's performance against the applicable standards (This could include consumers that have been transferred to hospital, to another aged care facility, or to live in the community, either living or deceased).

A finding of serious risk may also be made in relation to a class of aged care consumers who have been placed, or may be placed, at serious risk because of a systemic failure which affected the class. For example:

- failure to provide a safe living environment that impacts on the safety, health and wellbeing of those consumers residing within a particular section of a residential care service
- failure to ensure an effective infection control program that placed the safety, health and wellbeing of consumers with immunodeficiency.



## 5. Is serious risk a finding of non-compliance?

No, serious risk is a separate statutory decision that the Commissioner must make when there has been evidence of failure to comply with the standards. There needs to be failure in one or more expected outcomes of the applicable standards (non-compliance) to consider serious risk. This could be a consequence of failure in **one** expected outcome. Conversely multiple not met expected outcomes do not necessarily lead to a decision of serious risk.

## 6. Do serious risk decisions apply to all services?

Under the Rules, a finding of serious risk may be made in relation to an approved provider of an accredited service or the home service provider of a home service.

Serious risk decisions are not made in relation to National Aboriginal and Torres Strait Islander Flexible Aged Care Program services.

## 7. Can a finding of serious risk be revised or resolved? Does the Commission consider serious risk an ongoing state?

Serious risk is a statutory decision based on evidence at a point in time about the risk to consumer(s) arising from a failure in the standard of care. Serious risk is not ongoing and does not represent the ongoing performance of a provider. For example, it would not be correct to state that there is serious risk at a service; it would be appropriate to state that a serious risk decision was made by the Commissioner on 1 January 2019.

Once a decision is made about a finding of serious risk this decision is not revised or resolved. There is also no further statutory decision by the Commissioner that there is no serious risk or that serious risk to consumers has been sufficiently addressed or resolved by the provider. Published information on a serious risk decision may indicate when the necessary improvement for the relevant expected outcomes of the standard has been made.



## 8. Are providers notified if serious risk is being considered and do they have an opportunity to respond to the notification?

Yes, the Commission will notify the provider of the service that serious risk is under consideration. The notification to the provider will detail specific information about the reasons for consideration of serious risk including evidence in relation to the identified consumer(s). The notification also includes information that may be published on the Commission website if there is a subsequent decision of serious risk.

The provider has an opportunity to respond to the notification of serious risk. Because of the nature of serious risk impacting on consumer(s) the provider is given a short period to respond to evidence of serious risk.

The provider's response to the notification of serious risk should address:

- the specific evidence relating to the failure in one or more expected outcomes of the applicable standards
- the risk to the identified consumer(s)
- information regarding the publication of the serious risk decision.

The response provided by the provider is considered when determining whether the failure to meet the applicable standards has placed, or may place, the safety, health or wellbeing of consumers at serious risk.

In making a decision as to whether the failure has placed or may place a consumer at serious risk the Commissioner may decide that the failure has placed a consumer at serious risk even if the failure has subsequently been addressed by the provider.

## 9. Is the Department of Health notified of serious risk findings?

The Commissioner is required to notify the Department of Health when a serious risk finding is made.

The Commissioner may provide early information to the Department of Health where there are concerns about immediacy of serious risk to consumers. This information may be provided to the Department of Health at any time including during a performance assessment and may be before a decision of failure against the applicable standards is made.

Upon receipt of information from the Commission, the Department of Health will consider if applicable whether the approved provider is non-compliant with any of their responsibilities under the *Aged Care Act 1997*. The Department of Health will also consider whether there is an immediate and severe risk to the safety, health or wellbeing of consumers, and if so may impose Sanctions.

If it is determined that the service is non-compliant however immediate and severe risk is not identified the Department of Health will follow alternative regulatory pathways such as issuing a Notice of Non-Compliance.

Information regarding Sanctions and Notice of Non-Compliance enhance the Commission's regulatory intelligence and risk-based approaches to monitoring compliance.



## 10. What is the role of the assessment team in relation to serious risk?

The assessment team does not make decisions about serious risk to consumers. When an assessment team identifies that a provider of a service may not meet one or more expected outcomes of the standards (a failure to meet the standards), they provide a report to the relevant Regional Office of the Commission.

The assessment teams collect information or evidence for the purpose of assessing the performance of a provider of an aged care service in relation to expected outcomes of the applicable aged care standards. While undertaking a performance assessment against the applicable standards, the assessment team is required to gather sufficient evidence about the care and circumstances of consumers. The assessment team may seek clarification from the service about any matters that require more information related to the circumstances of individual consumers in relation to the expected outcomes of the standards.

## 11. What is the Regional Office's role in relation to serious risk?

The Regional Director and Assistant Director act as delegates of the Commissioner. When the delegates make a finding that a provider of a service has not complied with one or more expected outcomes of the applicable standards they are required to consider the evidence for the purposes of understanding whether the failure has placed or may place a consumer at serious risk. The delegates will communicate with the provider of the service in relation to consideration of serious risk and serious risks decisions.

The delegates will notify the provider of the service in writing, that they are considering serious risk in relation to an individual consumer. The provider is given a short period to respond to evidence of serious risk (typically hours to one or two days). A serious risk decision is then made by the delegates once they have considered the response (if any) from the provider to a serious risk notification. The provider of the service is then notified in writing of a serious risk decision and provided with a detailed serious risk report.



## 12. At what point can a finding be made that a failure has placed a consumer of a service at serious risk?

A serious risk decision can be made at any time the Commissioner finds that there is a failure to meet an expected outcome of the applicable standards. This could be arising from an assessment contact or performance assessment such as a site audit. A decision can also be made at any other time where the delegate considers evidence and makes a finding of failure such as consideration of a Coroners' Report; note that in these situations an assessment contact is likely first to be conducted. Once a finding of failure has been made the Commissioner must consider the evidence as to whether the failure "has placed" or "may place" a consumer at serious risk.

The finding of serious risk may relate to circumstances that have since been addressed by the provider of the service. This is because in making a decision as to whether the failure has placed or may place a consumer at serious risk the delegate may decide that the failure has placed a consumer at serious risk even if the service has returned to compliance.

The finding may also relate to consumers that are no longer receiving care from the services during the period being considered in the assessment of the provider's performance against the applicable standards.

## 13. Can a decision regarding serious risk be made prior to a decision regarding an assessment process?

Yes. A decision as to whether there is serious risk to the safety, health or wellbeing of consumer(s) is made as soon as practicable after a finding of non-compliance by the Commissioner. This means that the decision does not have to wait for the completion of the assessment process. For example, a site audit may be underway and a serious risk decision is not contingent on completion of the process or a decision on re-accreditation. This ensures that prompt attention by the provider is given to rectifying the risk to consumers of the service.

## 14. Why does the Commission publish information regarding serious risk decisions?

The Commission publishes information relating to serious risk decisions under sections 59 and 59A of the *Aged Care Quality and Safety Commission Act 2018* which allows the Commissioner to make publicly available:

- information about the approved provider's performance in relation to responsibilities and standards under this Act or the *Aged Care Act 1997*
- information about the service provider's performance in relation to the provider's responsibilities under the funding agreement that relates to a Commonwealth Home Support Program service.



Publishing serious risk information on the Commission website enables visibility of statutory decisions to assist current and potential aged consumers to make informed decisions about service providers and their care; and ensures that the public interest in such decisions is met. Published information on a serious risk decision will indicate when the necessary improvement for the relevant expected outcomes of the standard has been made.

### **15. What information does the Commission publish regarding serious risk decisions?**

The Commission does not publish personal information relating to the serious risk decision such as consumer details. The published information will include the date(s) of the assessment activity, information about the failure to meet an expected outcome of the applicable standards, information about the failure(s) resulting in serious risk and the date that the serious risk decision was made in relation to the provider of the service. Following completion of a timetable for improvement, the published information on a serious risk decision will also indicate when the necessary improvement for the relevant expected outcomes of the standard has been made.

### **Example of serious risk publication**

#### **Serious risk decision**

Following a review audit conducted on 1 January 2019 to 10 January 2019, a delegate of the Aged Care Quality and Safety Commissioner made a decision that ABC Provider failed to meet 6 expected outcomes in the Accreditation Standards in relation to XYZ Service.

On 20 January 2019 a decision was made that the failure to meet two of these expected outcomes has placed the safety, health or wellbeing of consumers of the service at serious risk. The Department of Health has been notified of the risk.

Serious risk is not an ongoing state; it is a statutory decision based on evidence at a point in time.

The Commission will continue to monitor the performance of the service including through unannounced visits.

### **16. Are providers given an opportunity to respond to the publication of serious risk information?**

Yes, the notification of consideration of serious risk outlines the Commission's intention to publish information following a serious risk decision. In their response to the notice, providers are able to respond to the publication information including in respect to the wording of the content to be published. The Commission will consider any provider's response prior to making a decision to publish.



## 17. For what timeframe is serious risk information published on the Commission website?

There is no set length of time that serious risk decisions are published on the Commission website. Published serious risk information may be reviewed to ensure that it reflects currency of the provider's performance in relation to the service.

For the example, at the conclusion of a timetable for improvement if the Commissioner is satisfied that a service has returned to compliance with the standards the Commission may update the published information to advise that the provider complies.

### Example of revised serious risk publication

#### Serious risk decision

On 1 January 2019 a delegate of the Aged Care Quality and Safety Commissioner made a decision that failure by ABC Provider to meet two expected outcomes in the Accreditation Standards in relation to XYZ Service placed the safety, health or wellbeing of consumers of the service at serious risk.

Serious risk is not an ongoing state; it is a statutory decision based on evidence at a point in time.

An assessment contact was conducted by the Commission on 1 April 2019 at XYZ Service to monitor the service's progress. The Commissioner found the service complies with all Accreditation Standards.

## 18. Can a provider apply for reconsideration of a serious risk decision?

Under the Rules, serious risk decisions are not reviewable decisions that can be reconsidered by the Commissioner. The Administrative Appeals Tribunal review process does not include serious risk decisions.

The Federal Court has statutory jurisdiction to undertake judicial review pursuant to the *Administrative Decisions (Judicial Review) Act.1977*.



## Need to know more?

If you have any questions contact our policy helpdesk by email on:

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