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Healthcare Newsletter

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PROVIDING ESSENTIAL LEGAL UPDATES TO THE HEALTHCARE SECTORS

IN THIS ISSUE

HCPC guidance on social media - 'think before you post'

by Alison Marriott, Professional Discipline & Regulatory Associate Solicitor

Earlier this month the Health and Care Professions Council published their guidance on social media, with the intention of assisting registrants to use social media in a way which will meet the regulator's standards. This guidance follows the publication of the Nursing and Midwifery Council's 'Guidance on using social media responsibly' in July of this year and the General Medical Council's 2013 publication of 'Doctors' use of social media'.

Think about the content

Each guidance document follows a similar theme in seeking to encourage registrants to actively think about the content of each post, and the likely audience, before posting. The general guidance set out in the relevant professional codes is reiterated in that there are reminders not to breach professional boundaries in these public forums, not to post confidential information or to identify service users and not to post material that could be considered inappropriate or offensive. This would include 're-tweeting' or 'sharing/liking' the posts of third parties which some could consider controversial or inappropriate.

Unfortunately, the apparent anonymity of using these sites can lead registrants to fall foul of the standards when communicating with others, in a way that that would never happen in face to face communications. The clear message is that whilst social media can be of real benefit and a great resource to medical professionals, offensive posts can be traced back to the individuals concerned and regulatory and/or criminal proceedings may well follow.

Number of referrals increasing

As specialist lawyers dealing with professional misconduct and regulation on a daily basis we have seen an increase in referrals relating to inappropriate social media usage and this is expected to increase in the coming years.

CQC granted power to rate independent healthcare services

by Laura Hannah, Professional Discipline & Regulatory Solicitor

Following a consultation by the Department of Health, it was announced on 12 September 2017 that the CQC will now be permitted to undertake performance assessments and publish ratings of other registered service providers and regulated activities.

The Care Quality Commission (Reviews and Performance Assessments) Regulations 2014 introduced ratings for the first time and at that time, it was decided that only certain sectors would be rated. It was considered that adult social care providers; GP practices; and NHS and independent hospitals would benefit the most from such ratings and therefore ratings have been limited to those sectors since 2014. The ratings given are Outstanding, Good, Requires Improvement and Inadequate.

DEPARTMENT OF HEALTH

The Department of Health has already launched a new consultation in relation to the CQC's ratings powers of other registered providers and this is due to close on 6th November 2017.

However, it has now been confirmed that the CQC will have the power to rate the following independent healthcare providers after an inspection moving forwards:

- Cosmetic Surgery Services;
- Independent Ambulance Services;
- Independent Dialysis Services;
- Refractive Eye Surgery Services;
- Substance Misuse Services; and
- Termination of Pregnancy Services.

Ratings are intended to provide the public or other stakeholders with a clear and reliable overall view of the quality and safety of the services provided, in order to help and inform people's decisions when choosing a particular service.

In the sectors that have been rated over the past few years, there has been a dramatic increase in the level and amount of enforcement action that has been taken by the CQC. More services have been deemed 'inadequate' than ever before and this has therefore encouraged and demanded a higher standard of care from services in an attempt to achieve 'Good' ratings at future inspections. However, this assessment and ratings framework has also enabled the public to make more realistic and meaningful comparisons between similar services.

The CQC confirmed on 13 September 2017 that they will be considering their approach on how to rate these services through a consultation in 2018. In the meantime, it is likely that this decision will lead to even more registered providers being rated in the future. The Department of Health has already launched a new consultation in relation to the CQC's ratings powers for other registered providers, such as independent community health services and independent doctors, and this consultation is due to close on 6 November 2017.

Recent changes to NMC fitness to practise legislation

by Alison Marriott, Professional Discipline & Regulatory Associate Solicitor

On 28th July 2017 changes to the fitness to practise processes came into force which, it is hoped, will enable the NMC to become a more efficient and proportionate regulator. It is anticipated the changes will modernise the NMC processes and reflect those adopted by the GMC in 2003.

The changes will give the NMC new powers to resolve cases more quickly and appropriately, ensuring that only the most serious matters progress to a full committee hearing. The changes include allowing case examiners to advise, issue warnings and recommend undertakings (such as agreeing additional training to address areas of weakness). The power to review these case examiner decisions has also been expanded to incorporate these changes. Further, the Conduct and Competence Committee and Health Committee have now merged into a single Fitness to Practise Committee to avoid the associated delays created by the existence of both committees.

In addition, practise committee panels will now state whether a substantive order review is necessary when a conditions of practise or suspension order is imposed, to avoid unnecessary hearings and associated costs. A review hearing will not be necessary where the registrant's practise does not present a current risk of harm to the public, but the imposition of an order is necessary to uphold

standards of professional conduct or public confidence in the profession.

As specialists dealing with NMC matters on a daily basis, our team hope that these changes will bring about a more inclusive and co-operative process, in which the registrant feels more able to positively affect the course of the investigation through active engagement and focused remediation. Similar to the GMC approach, it is anticipated that the changes will also positively affect the professionals involved who presently feel disenchanted by a long and drawn out fitness to practise investigation which concludes in an inevitable and often stressful panel hearing.

RECENT EVENTS

Great British Care Awards

Our Sean Joyce and Laura Hannah joined the judging panel for the Great British Care Awards, North West Region in October 2017. There were some fantastic candidates on the short list for each category. Winners will be announced at the awards ceremony on 3rd November 2017. Congratulations to everyone who was short listed for an award.

Protection & Performance Seminar

Thank you to everyone who came to our protection and performance for the healthcare and early year's sector seminar on 5th October 2017, in partnership with Christie & Co, Christie Finance and Moore and Smalley. We hope you enjoyed the event and found the topics useful and interesting. If you would like any further information or have ideas for future seminars, please get in touch.

STATISTICS

37%

of registered services inspected by the CQC in the past month were rated 'inadequate' or 'requires improvement' (figures taken from the CQC website on 23rd October 2017 as below)

The past month's ratings

15	☆ Outstanding
775	● Good
353	● Requires improvement
108	● Inadequate

The new CQC assessment frameworks - the changes explained

By Laura Hannah, Professional Discipline & Regulatory Solicitor

The CQC's strategy for 2016 to 2021 sets out its aim to achieve a more "targeted, responsive and collaborative approach" so that more people can receive high quality care in the future. The CQC has therefore radically changed its approach to regulating health and social care services over the last few years. In December 2016, the CQC issued its first consultation, "our next phase of regulation", which proposed a standardised approach across the health and social care sector for the very first time. A response to this consultation was published in June 2017 and this confirmed the changes to be made to the current assessment frameworks. A second consultation was published in June 2017 and a third one is expected for later this year so there is likely to be even more changes proposed in due course.

What has changed?

The CQC have confirmed that they will be moving from their current 11 separate assessment frameworks to just two – one for healthcare, and one for adult social care. It is hoped that by reducing the number of assessment frameworks, this will improve the clarity and transparency of inspections and ratings; help providers to understand how they are being assessed; allow the public to compare services; and ensure that inspectors make assessments in a consistent way. The CQC also think that this will reduce complexity and confusion for providers that deliver more than one type of service.

However, there was some concern expressed in the responses to the first consultation that having only two assessment frameworks may be too simplified and thus, they would not be suitable across the whole of the two sectors. Although, the CQC has set out its plans to continue to develop and publish additional sector and service-specific materials that link to the assessment frameworks and provide more detailed information about how they will apply in the context of a particular service.

Whilst the five key questions will remain as the basis of the assessment frameworks, the Key Lines of Enquiry ('KLOE's') will also be merged to provide one set of questions and prompts for the healthcare sector and one for adult social care. A number of changes have also been made to the KLOE's and these are intended to simplify the process by more closely aligning the five questions and the characteristics that reflect a rating.

New, strengthened themes

The wording of some KLOE's and prompts have been revised to provide clarity; additional prompts have been added; and some have been moved between the key questions. The new KLOE's also include six new, strengthened themes that the CQC have deemed necessary to improve on. These include:

- System leadership, integration and information-sharing;

- Information governance and data security;
- Technology;
- Medicines;
- End of life care: Delivering good quality care at the end of life;
- Personalisation, social action and the use of volunteers.

Whilst this has resulted in more KLOEs overall and some duplication across themes, the majority of the content remains the same or similar to the current frameworks. The CQC have also acknowledged that some KLOEs, prompts and characteristics will not necessarily need to be applied in all settings and will only be applied where they are relevant and proportionate to the type of provider being inspected. It is, however, apparent that the new KLOE's will need to be monitored and reviewed regularly by the CQC moving forwards, in order to measure their success and if necessary, adapt them further to ensure that they continue to reflect the most current methods.It is envisaged by the CQC that these changes to the KLOE's will make them more relevant by bringing them in line with changes and innovations in care and national policy. It is also hoped that the changes will encourage providers to focus on the needs of people using the services as a whole and encourage greater accountability from providers overall.

When will they be introduced?

The CQC have confirmed that the new assessment frameworks for community and residential adult social care services and independent doctor services (primary medical services) will be introduced in November 2017, and primary care dental services from April 2018. The CQC have also indicated that no changes will be made to the assessment frameworks for a further two years whilst they assess the success of these new frameworks.

What will this mean?

The success and effect of such changes will not be clear until the frameworks are introduced and therefore providers need to spend this time between now and their relevant implementation date, ensuring that they are familiar with their respective new assessment framework and updating any internal policies, procedures or quality monitoring systems which are based on the current frameworks.

Laura Hannah (left) and Francesca Snape (right) at the Lancashire Care Conference on 21st September 2017.

Our Legal Services

Stephensons is a full service law firm providing a range of legal services to individuals and businesses across the health and adult social care sector. Our specialist lawyers provide advice and representation in relation to the following:

- CQC compliance and regulation;
- Fitness to practise proceedings;
- Health and Safety / Fire Safety / Food Safety;
-
- HR and Employment advice;
- Commercial advice.

If you require any assistance or would like a confidential, no obligation discussion with one of our specialists, please contact us on 0333 200 9856 or complete our online enquiry form.

The Health and Care Professions Tribunal Service

By Alison Marriott, Professional Discipline & Regulatory Associate Solicitor

In July 2016 the HCPC confirmed the creation of the Health and Care Professions Tribunal Service (HCPTS) to ensure the clear separation between the investigation of fitness to practise allegations and their adjudication

The HCPTS was launched in April 2017 and is the hearings service leg of the regulator. The intention is to reassure registrants involved in fitness to practise investigations that the panels hearing the cases are separate and distinct to those who investigate the case against them. The hope is this will remove the perception that the individuals concerned were being tried by those who bring the cases against them.

The HCPC has followed the lead of the General Medical Council, who established the Medical Practitioners Tribunal Service in 2012, after the government's recommendations suggesting the separation of investigation and tribunal services for regulators. The HCPTS key features are as follows:

1. The new tribunal centre – a dedicated tribunal centre in Kennington, South London with a range of resources, including video conferencing and teleconferencing facilities.

2. The Tribunal Advisory Committee (TAC) – The TAC advises on recruitment, training and assessment of tribunal panellist, chairs and legal assessors in addition to being responsible for issuing guidance on practice and procedure.

3. HCPTS website – the new website explains the role of the tribunal service and provides guidance on practice and procedure.

Healthwatch releases report of findings following two year analysis of home care services in England

By Francesca Snape, Trainee Solicitor, Regulatory department

Healthwatch is an independent organisation who obtain information about health and care services at local levels, which they can then share with the government and services on a national level by spotting trends and patterns, to inform change and help make care better.

Healthwatch's report comes after two years of collecting evidence from home care providers, care staff, care users and their families across the 20 local Healthwatch areas. The report focuses on four key areas to obtain an overview of whether home care services are working well and which areas require improvement.

The report found that home care services (domiciliary care) stood out as an area of concern, with the number of local Healthwatch identifying it as a priority having doubled since 2016. This is unsurprising when considering recent studies carried out by the Lancet, referred to within the report, which found that if dependencies and care home proportions remain consistent, we will require an extra 71,215 care home places by 2025. The report considered four main areas and made the following findings:

Care planning

Many local care staff went beyond the care plans, delivering extra services to their clients in order to ensure they are looked after, but Healthwatch noted that this is likely to mean that the care plan was not comprehensive enough in the first place. The report found that the best care plans were those that looked beyond the immediate physical needs of the client and thought about other challenges the individual client might face, such as social isolation. The issue of realistic timeframes for carrying out care plans was another area picked up on in the report, with staff reporting to Healthwatch Torbay that too often there were unrealistic staff rotas, leading to staff feeling exhausted. Medicines management was a particular area of concern, with one in seven care users reporting to Healthwatch Newcastle having experienced missed medication due to the health care provider. One in six felt the provision of medication was either partly safe or never safe.

Skills & qualifications

Users reported carers lacking even the most basic experience such as making hot food and making the bed. Staff reported that the lack of investment in staff training and development contributed to the high turnover of staff experienced by this sector. The report comments on the significant workforce pressures facing the sector at the moment and highlights that retaining staff has to be a priority.

Choice & consistency

75% of care users who responded to Healthwatch Hampshire stated they did not feel adequately involved in the selection of their care provider. In Staffordshire, care users and their families reported feeling that care packages were designed to meet the needs of care providers, not users. All 20 Healthwatch areas highlighting problems with staff attending clients at different times, varying between two to three hours on some days, or missing appointments altogether. The report highlighted that users felt a better level of care was provided where there was a consistency in staff, but that there were issues in care providers communicating changes in rotas or staff attending to users.

Communication & feedback

The report found that one in four care users in the area of Barnet were reluctant to raise a complaint for fear it may impact their care. In Bexley, care users reported that they did not want to make a complaint as they did not want to get staff, who they felt were under pressure, to get into trouble. The report also found that those who did raise a complaint often did not feel it was taken seriously.

Conclusion

Homecare services are already an important service in the health and care sector and it is likely their importance will only continue to increase. The dependency on these services, which enable people to live independently in their own homes for longer, will be of key importance in taking pressure off care homes and other care services. This in turn will mean that regulation and scrutiny of these services will be magnified and it is important that care providers ensure compliance with the CQC and national guidance to promote the best care for clients. Healthwatch are looking to introduce ways to share intelligence more regularly with national regulators, social care bodies and local governments to provide this crucial insight. It is hoped that in turn this will ensure the future of the care sector and improve equalities throughout.

RECENT CASE

Care Home v CQC

Our specialist lawyers represented a care home provider who had received an urgent notice of decision to vary a condition of their registration. The variation consisted of the removal of the care home in question, being a location from which it could carry on its regulated activities. As this was one of two locations on the provider's registration, the CQC utilised their power under section 31 of the Health and Social Care Act 2008. However, if the provider had only one registered location, the CQC would have had to make an application under section 30 of the Act, requiring judicial oversight over their decision at the Magistrates Court. We appealed this decision on the basis that that the CQC had excerised their power under the wrong section of the Act and in any event, the provider had rectified the issues referred to in the section 31 urgent notice of decision. The CQC carried out a further inspection of the service and as a result, our client was able to retain their registration.

Additional services to be made available by the Disclosure & Barring Service

By Mike Pemberton, Partner & Collette Snape, casework support intern, Civil Liberties department

Beginning in 2018, the DBS will offer a service for a basic DBS check. This is in addition to the standard and enhanced level checks already provided as well as the information relating to the protection of vulnerable groups (barring register). The basic check is currently only available through Disclosure Scotland.

The basic disclosure certificate will show any 'unspent' convictions that an individual may have in the UK. This check will be able to be carried out by individuals or organisations who will then be able to show this certificate to any prospective employers or other organisations that need the information. The information will be obtained through the PNC (Police National Computer).

The introduction of basic check availability was originally due to come in July 2017; however, the Disclosure and Barring Service are now working towards January 2018 for the full introduction of both individual and organisational requests. A transitional period commences in the next couple of months where organisations will be able to request basic level checks.

Under Disclosure Scotland this is the most common and lowest level of disclosure available.

Consolidating all of the checks into one service provided by the DBS will hopefully reduce confusion for employers regarding whether or not they need a standard or enhanced check for their employees. The majority of the time, this is not the case.

Further to the basic check, the DBS is also introducing an online service. From September, employers and organisations will be able to submit barring referrals online, as well as create an account in order to be able to manage their referrals.

What's the difference between types of certificate?

As set out above, a basic check will set out any unspent convictions, but will not include convictions or cautions that are spent under the Rehabilitation of Offenders Act 1974 as amended.

Standard and enhanced certificates are only available for use by regulated bodies or employers in a relevant field, such as those providing care for vulnerable groups including children. Access to the information is restricted because it includes spent convictions and in the case of enhanced certificates may also contain non conviction information.

The information included on a standard certificate can be requested for those undertaking duties or positions, or applying for licences included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. This includes court officers, employment within a prison, and Security Industry Authority (SIA) licences. This will contain details of all 'spent' and 'unspent' convictions, cautions, reprimands, and final warnings, which have not been filtered in line with legislation.

Enhanced certificates can only be required in specific circumstances, for example: those regularly caring for, training, supervising or being solely in charge of children, specified activities with adults in receipt of health care or social care services and applicants for gaming and lottery licences. This certificate contains the same information as the standard certificate, but also includes any discretionary information provided by the police.

Enhanced certificates with a barred list check is available for those carrying out regulated activity and a small number of positions listed in the Police Act 1997 regulations, for example, prospective adoptive parents and taxi and private hire vehicle licences. This contains the same information as the above, as well as information regarding whether the individual is included on either of the adult or child barring lists.

Again, enhanced certificates are subject to the filtering provisions so that minor offences and cautions will be filtered from appearing. Recent challenges to the filtering regime and what is not filtered are ongoing and due to be heard in the Supreme Court sometime in 2018.

The basic check is important in order to ensure that unnecessary information is not disclosed to prospective employers, which may be the case if a standard or enhanced check is used where it is not warranted. A person who has committed an offence which is spent and not relevant to the work they wish to do is still entitled to pursue employment. Where public protection is not an issue, DBS checks should not prevent safe employment.

At Stephensons, the criminal record and disclosure team provides a range of services regarding disclosure and barring issues and disputes. We regularly advise individuals on challenging inappropriate contents in the discretionary information section and have pursued cases to the Supreme Court leading to changes in the law relating to disclosure.

Disclosure & Barring Service

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Regulatorynewenquiries @stephensons.co.uk

Call us on 0333 344 4885