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Healthcare Newsletter

June 2019

Issue 6

PROVIDING ESSENTIAL LEGAL UPDATES TO THE HEALTHCARE SECTORS

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“... As a team i find them to be excellent and dedicated to achieving the best for their clients ...



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CQC publishes new guidance on relationships and sexuality in adult social care services

by Laura Hannah, Senior Associate Solicitor, Regulatory team

The CQC published new guidance on 21st February 2019 which sets out how care providers should consider the relationship and sexuality needs of people using adult social care services. It is intended that this guidance will provide support and guidance to inspection teams and registered adult social care providers so that they are able to sensitively deal with this complex area in order to protect and promote people's wellbeing. The guidance deals with a variety of issues relating to relationships and diversity and was developed with a number of different providers and public representative bodies. It aims to highlight the importance of supporting people to develop and sustain relationships, and reviews the circumstances in which people may be at risk of harm.

What does the guidance say?

The term 'sexuality' is broadly defined within the guidance and incorporates a range of factors including gender identity; body image and sexual expression; and sexual orientation and experiences. It also includes clear definitions for sexual orientation and gender identity, as well as LGBT+. In this regard, the guidance provides a stark reminder for providers of the need to recognise and support these needs, so that they do not risk discriminating against people or breaching their human rights.

The guidance stresses the importance of enabling people to manage their sexuality needs, which includes providing access to education and information to help them develop and maintain relationships and express their sexuality. There is also emphasis on the need for providers to understand and appropriately manage the risks associated with people's sexuality needs. It sets out that an assessment of a person's needs should include their sexual needs and that may include consideration of their previous and current relationships; sexual orientation; their understanding of sexual health; personal dress preferences; and gender identity. Whilst the CQC make clear that such information should be gathered by competent staff, it acknowledges that candid conversations may only take place once people have developed close working relationships with staff.



It also sets out further guidance on how providers can support people living with a physical disability and how they can support people with accessing dating services. For example, providers may need to assist people with arranging to meet new people or with seeking advice about how they might optimise their sex life despite their physical disability.

With regards to incidents which may occur in a service, such as unwanted sexual behaviour, the CQC makes it clear that there should be relevant policies and procedures in place to direct staff as to the appropriate action in response, such as reporting the incident to the police or safeguarding, and it emphasises the requirement for providers to investigate and report on any incident in a timely and appropriate way.

For those services accommodating people with a neurological impairment, such as dementia, the guidance also addresses the definition of and support to be given to people with sexual disinhibition. The CQC suggests that, in these circumstances, providers should ensure that suitable behaviour support plans and risk assessments are in place, and are reviewed regularly, to help protect and support these people, as well as other people using the service and staff. In some cases, a medical assessment may be required where such behaviour is uncharacteristic and may be indicative of an underlying medical issue.

What does this mean for adult social care providers?

This is the first time that the CQC has published guidance on meeting people's sexual needs and

it is therefore likely to receive a lot of focus during inspections moving forwards. A failure to

suitably assess; support; and manage a person's sexual needs could impact on an inspector's findings during an inspection and the resulting ratings, which in the most serious of cases, could lead to breached of regulation and enforcement action.

Providers should ensure that they have considered this guidance carefully to ensure that they understand their requirements in respect of assessing people's sexuality needs. In particular, it may be helpful for providers to review Appendix 1 to the guidance, which sets out how people's sexuality needs fit into the Key Lines of Enquiry (KLOEs) and the evidence which may be sought to assess whether a service is meeting their needs. For example, inspectors may look at care plans; feedback from people and relatives; and staff knowledge when determining whether people's care plans reflect their holistic needs, and whether they are encouraged and supported to make and maintain relationships.

Inspectors are likely to direct specific questions to providers, managers and staff about how a service meets people's equality and diversity needs and supports them in meeting their sexuality needs. The CQC sets out 11 example questions at section 16 of the guidance, which providers should give particular consideration to prior to any inspection. These covers considerations such as whether a care home has a relationship and sexuality policy – this is something which a lot of care homes may never have had in place prior to this guidance. Such guidance will need to be easy to read so that residents can easily digest and understand the

information contained therein. It may be beneficial to seek external professional support or advice in drafting this policy to ensure that it is drafted in line with the definitions and guidance provided by the CQC and covers all relevant considerations, for example, the policy and procedure for allowing people to have overnight guests. It would also be advisable to distribute this policy amongst staff and obtain signatures to confirm that all staff have read and understood the policy, as evidence of the action you have taken at your next inspection.

Staff training is also an important consideration and providers should ensure that staff receive the appropriate ongoing training on sexuality and relationships. This is likely to be a huge challenge for providers and staff, who may never have been faced with having to deal with this complex area before in an adult social care setting and may have pre-existing assumptions or bias about the sexuality needs of older people, or those with a disability.

Any training provided will need to be effective and ensure that staff are able to signpost people to any relevant information or support, such as local organisations, in relation to relationships or sexual health where the care home itself cannot provide this. Most importantly, staff also need to be able to identify any associated risks and be knowledgeable about the appropriate action which must be taken where they may have concerns that someone is at risk of harm; this is likely to be an extension of the safeguarding training they are hopefully already undertaking.

The inspectors will likely be looking to assess whether, and how the care home ensures that, staff recognise and understand that people have different ways of experiencing and expressing sexuality, and how they can support people with their personal relationship needs. In order to demonstrate that this training is effective, it would also be advisable for providers to retain evidence of how they have supported people in their relationships, particularly in the care plans and the information available and accessible to people throughout the care home at all times, including access to sexual health services.

In addition, providers should ensure that such training is covered in detail within a new member of staff's induction to a service. Training on Equality and Diversity is also essential to support staff's understanding of this area and should be regularly updated, as well as training on identifying the risk of exploitation and abuse and how to report such incidents. The absence of such fundamental training is likely to constitute a breach of the Health and Social Care Act 2008 (regulated

Activities) Regulations 2014 and in the most serious cases, could lead to the issuance of a Warning Notice or even a Notice of Proposal to cancel, vary or impose conditions on registration.

Overall, this guidance covers very sensitive topics that are often quite complex and require a substantial degree of sensitivity and understanding. This guidance will hopefully assist adult social care providers in supporting people with their relationships and to appropriately manage and understand the associated risks moving forwards. However, there is potential for providers to fall short of compliance in this area, and face a drop in ratings at their next inspection and potential enforcement action, if this guidance is not followed appropriately and providers cannot demonstrate that all suitable steps have been taken to ensure that staff are able to sensitively support people with their relationships and sexuality moving forwards. It is therefore important that providers spend this time now before their next inspection implementing any necessary measures.

The Acting Chief Inspector of adult social care, Debbie Westhead, has commented: "We know that the best care is person-centred and in supporting relationships and sexuality there can be no one approach that fits all.

"Supporting people to build and maintain relationships in the way they want to is incredibly important, regardless of who they are or what stage of life they are at. This guidance aims to ensure providers are supporting people to form and maintain sexual relationships that meet their needs, while also helping them to understand risks."

Claire Bates of the Supported Loving campaign and Sue Sharples of U-Night Group have also stated, in response to this new guidance: "This is a long-awaited document that will give providers clarity and direction in relation to a sensitive and complex area of need.

"It affirms the link between supporting opportunities for sexual expression and personal wellbeing, within a framework of care services' regulatory responsibilities. Our organisations were pleased to be consulted in the development phase of the guidance, including gaining the perspective of members with a learning disability."



Laura Hannah,
Senior Associate.

RECENT EVENTS



IN ASSOCIATION WITH



Care Home Awards 2019

Our Laura Hannah joined the judging panel for the Care Home Awards earlier this year. The results will be announced on Thursday 27 June 2019 at the awards ceremony at ExCel London. There were some fantastic candidates in each of the categories we judged. Congratulations to everyone who was short listed and those who are successful in winning an award. We look forward to taking part in the judging again next year.



Nursery Agenda North West

Our Francesca Snape attended the Nursery Agenda North West on 23 May 2019 and contributed to the event's 'hot topics' session, discussing the main challenges in the sector. It was an insightful event with providers from across the North West. Stepnsons also sponsored the evening dinner.



First-tier Tribunal (Care Standards) User Group

Our Laura Hannah and Francesca Snape also recently attended the user group meeting for the First-tier Tribunal (Health, Education and Social Care Chamber) on 22 May 2019 with the lead judge and the legal teams from CQC and Ofsted. Stepnsons have now been invited to this yearly user group for the past four years in light of our substantial representation of care homes, nurseries and other health and social care services in this tribunal.

CARE STANDARDS TRIBUNAL

325

Appeals lodged with the First-tier Tribunal (Care Standards) between 1 April 2018 and 31 March 2019

Statistics obtained from the Care Standards User Group meeting on 22 May 2019. This figure includes appeals lodged by all health, education and social care providers including care homes, nursing homes, nurseries and childminders, for example.

This is an increase of:

9.8%

appeals compared to last year's figures: 296 appeals were lodged between 1 April 2017 and 31 March 2018.

INSPECTION STATISTICS

31.2%

of registered services inspected by the CQC in the past month were rated 'inadequate' or 'requires improvement' (figures taken from the CQC website on 17 June 2019 as below)

The past month's ratings

49	☆ Outstanding
877	● Good
328	● Requires improvement
91	● Inadequate

LATEST CARE HOME STATISTICS

18,463

Care homes in the UK

Statistics obtained from Carehome.co.uk in June 2019 show that there are 18,463 care homes in the UK of which 28.65% are nursing homes. The statistics show that, of the total number of care homes, 77% are privately owned.

GMC pilot scheme: a reduction in the number of full investigations into one-off mistakes by doctors

by Emily Hill, Graduate Paralegal, Regulatory team



Following the completion of a successful two year pilot scheme, the General Medical Council (GMC) will now reduce the number of full investigations they carry out in relation to single clinical mistakes. More than 200 single clinical incident cases were closed during the pilot as it has been stated that opening full investigations, unless absolutely necessary, is not in the interests of patients or doctors.

The process within the two year trial period entailed a quick gathering of information further to a complaint or referral. This was done at an early stage and in order to assess any ongoing risk to a patient. The information gathered included medical records, as well as input from independent experts, doctors' responsible officers as well as the doctors themselves. Once additional information was gathered, the GMC then decided whether to open a full investigation or close the complaint following its initial enquiries.

Charlie Massey, Chief Executive of the GMC, commented that getting more information quickly in certain cases clarifies whether there is any ongoing risk to patients and whether they need to take action. He made it clear that protecting patients is a priority and not all complaints are suitable for this process, however, opening full investigations can cause additional stress and delay and is not always in the interests of those involved.

It is suggested that the pilot has been a success as it has allowed the GMC to properly assess the risk without the need for a full investigation. It will now be adopted as a standard practice. Charlie Massey highlighted single clinical incidents, stating that, 'Even where doctors had made a mistake we were

able to check if they understood what had gone wrong and had taken steps to make sure it wouldn't happen again, avoiding the need for action.'

A single instance of treatment to one patient can be considered as a single clinical incident. 309 cases were considered in the two-year pilot and after initial enquiries, 202 of those cases were closed without the need for full investigation. This new practice is a milestone in terms of the GMC's fitness to practise procedures. Charlie Massey comments that a lot of changes have been made to the GMC's fitness to practise processes and this is just the latest example of work which is ongoing. Concerns can be dealt with quicker, the impact on doctors is reduced and patients can be protected in a more timely manner.

He further comments that the GMC are still required by law to investigate any allegation that a doctor's fitness to practise is impaired. The GMC continue to ask the UK government for legislation to give them more flexibility and to further improve the ways that fitness to practise concerns can be resolved.

At Stephenson's our specialist regulatory solicitors have extensive experience in dealing with cases before the GMC and are particularly knowledgeable in dealing with fitness to practise concerns. We are also recommended in the Legal 500 for our professional disciplinary work. If you find yourself being fully investigated by the GMC or even if a complaint has been made about you regarding a one-off mistake, our team of specialist lawyers are available to advise and assist you. For more information, please call us now on **0333 999 7151**.

RECENT TRUSTPILOT REVIEWS



“Excellent service. Friendly, supportive and communicated well at every stage. I would thoroughly recommend ...

★★★★★

by Bryony Bone-Cutts

Rated 9.2 / 10 | 439 reviews ★ Trustpilot



★★★★★

Based on count 500




“... They showed incredible professionalism and kindness in my case even when I felt as though my plight would not end. They were always there when I needed them ...

★★★★★

by Naseer Hussain

Rated 8.8 / 10 | 390 reviews ★ Trustpilot



“I would like to thank Francesca Snape for all her help in a difficult situation. Francesca was not only professional but handled our case with compassion and empathy ...

★★★★★

by Bev & Graeme

Rated 9.1 / 10 | 469 reviews ★ Trustpilot

Stephensons Solicitors LLP is rated **Excellent**

Based on 606 reviews

★★★★★

★ Trustpilot



★★★★★

Based on count 500



“... As a team i find them to be excellent and dedicated to achieving the best for their clients ...

★★★★★

by Mark Heald

Rated 9.2 / 10 | 478 reviews ★ Trustpilot

Recent changes to the regulation of online pharmacies

by Francesca Snape, Associate Solicitor, Regulatory team

The General Pharmaceutical Council (GPhC) has recently issued updated guidance for those providing pharmacy services at a distance, including on the internet. The guidance was issued shortly after the GPhC wrote an open letter to the chief executive of the Care Quality Commission (CQC) in support of their current aim to bring online pharmacies within their regulation in an attempt to close current loopholes for these types of services. It is clear that there is a heavy focus on the regulation of this type of service at present and the regulatory landscape is likely to continue to change moving forwards.

A BBC Panorama expose highlighted concerns relating to the online pharmacy sector in 2018. Since then, tightening the regulation around these services has been high on the agenda for many regulators, particularly the GPhC and the CQC.

The GPhC set out that they considered online research they had commissioned through YouGov which found that 25% of people say they are likely to use online pharmacies in the future, but 50% of those unlikely to do so stated they had concerns about the safety of online pharmacies. After considering feedback from the sector, patients and the public to proposals published in 2018, the GPhC has introduced 'strengthened' guidance and introduced further safeguards to be implemented by those operating online pharmacies.

The updated guidance focuses on strengthening the processes in place to carry out identity checks on those purchasing medicines online and ensuring there are processes in place to identify requests for medicines that are inappropriate and identifying multiple orders to the same address or using the same payment details. Online pharmacies must also change the set-up of their websites, so that it does not allow a patient to choose a prescription-only medicine and its quantity before there has been a consultation with a prescriber. In addition, further safeguards have been implemented relating to certain categories of prescription only medicines, to ensure that they are clinically appropriate. Unsurprisingly, this relates to antibiotics, medicines liable to abuse, overuse or misuse, medicines that require ongoing monitoring or management



and non-surgical cosmetic medicinal products, such as botox.

There is also a focus on transparency and patient choice, meaning that pharmacy owners will be required to supply more details about where the service and health professions involved in prescribing and supplying the medicine are based and how they are regulated. Pharmacy owners working with prescribers or prescribing services operating outside the UK will also be expected to take steps to manage any additional risks this may create, such as ensuring that the prescriber is working within national prescribing guidelines for the UK.

In reality, those operating online pharmacies will already have these safeguards and measures in place to some degree and will simply need to strengthen their safety measures so that they can evidence compliance with the more detailed guidance that has been issued. The biggest change is likely to be the manner in which the websites operate, in that most are currently set-up on the basis that users will go onto the website and select both the medicine and quantity they require, before then proceeding to a consultation. Those operating online pharmacies will need to ensure that their processes are updated as soon as possible to ensure compliance with the new guidelines. As well as the GPhC, the CQC are also looking closely at this sector to ensure that services are not operating unlawfully. If a service is carrying out activities that could be deemed to fall within the legal definition of 'treatment of disease, disorder, or injury' and they are not registered with the CQC, they could

potentially be committing a criminal offence. The CQC are currently in discussions with the government about taking on the regulation of these services, which would require them to be registered and therefore inspected by the CQC.

The CQC's recommendation that they have regulatory oversight of these services is one that is supported by the GPhC and will likely involve an all-round approach from both regulators, plus the MHRA. This is also likely to be seen to be in the public interest by the government when considering the CQC's recommendation. The number of online pharmacies is likely to increase, in an age where the majority of purchases are now made online for various different aspects of day-to-day life. The ease of obtaining prescription medicines online is likely to suit much of the general public in years to come and therefore an increase in regulatory oversight is a natural consequence of a growing sector, especially one that relates to health and wellbeing.

At Stephenson's, we have specialist lawyers with experience of advising on both issues relating to registration and criminal investigations by the CQC. If you require any advice and assistance in relation to registration with, or an investigation by the CQC, please contact our specialist CQC lawyers now on **0333 999 7151**.

New threshold policy for HCPC fitness to practise investigations

by Elizabeth Groom, Graduate Paralegal, Regulatory team

In January 2019, the Health and Care Professions Council (HCPC) launched its new threshold policy. This replaced the HCPC's previous standards of acceptance policy.

The new policy launched on 14th January 2019 and sets out a new approach to how the HCPC investigate fitness to practise concerns. In particular, it addresses how decisions are to be made in the early stages of the investigation process. The policy was effective immediately and applied to existing fitness to practise cases, as well as any new concerns received from 14th January 2019.

The threshold policy aims at supporting the HCPC in identifying the cases that raise fitness to practise concerns and require investigation. The HCPC state within the policy that it upholds their core purpose of maintaining public protection by allowing the HCPC to make fair, transparent and consistent decisions whilst also managing their resources effectively.

The policy makes clear that the HCPC investigate concerns independently and objectively, taking a proportionate risk-based approach. This is with the view to ensuring that any decisions made are correct, consistent, evidence-based and fair.

There are numerous steps to the HCPC fitness to practise process, however, the threshold criteria becomes relevant at the second stage: initial investigation stage and threshold criteria. At the initial triage stage, a simple assessment is undertaken as to whether the concern raised is within the HCPC's remit and if so, it will be referred on for an initial investigation.

Initial investigation stage and threshold criteria

At this stage, the HCPC will carry out an initial investigation in order to obtain all relevant information about the concern. Once all of the relevant information has been gathered, the HCPC will then apply the threshold test. This is whether the concern they have received, and any associated information gathered, amounts to any allegations that the

registrant's fitness to practise may be impaired.

The main criteria that is taken into account to assess whether the information received by the HCPC meets the threshold test, includes:

- The actual or potential risk to public safety
- Whether the matter may undermine public confidence in the profession
- Whether the matters complained of could amount to a breach of HCPC's standards of conduct, performance and ethics, standards of proficiency and other relevant guidance for registrants
- Whether the matter is a serious concern of the type listed below
- Whether the information calls into doubt the registrant's honesty or integrity
- If the registrant has a physical or mental health condition that may present a risk to their ability to practise safely or effectively
- Whether the matter relates to an isolated incident or indicates a wider pattern of behaviour
- If the registrant has taken action to remediate their practise
- Whether there have been previous, similar concerns about the registrant; and
- Any other public interest considerations.

The HCPC will also consider the length of time that has passed since the incidents, as it may call into question the quality and availability of relevant information. This in turn may affect whether the information obtained meets the threshold. For example, concerns from five years ago may not meet the threshold.

If the threshold test is met, the HCPC will draft allegations based on the information obtained. The allegations would then be referred to a panel of the HCPC investigating committee, who decide if there is a case to answer.

However, it should be noted that serious concerns will always meet the threshold criteria and will pass automatically to the HCPC's investigating committee panel. These concerns may include: serious violence,

sexual assault or indecency, any criminal offence relating to a child, an improper sexual, emotional or financial relationship with a service user, any criminal offence resulting in a custodial sentence, dishonesty, and serious or reckless errors in practise which have caused, or have the potential to cause, serious harm to service users. As such, these types of cases cannot be closed until the HCPC's investigating committee make a decision on whether there is a case to answer.

During an investigation, it is also important to note that the HCPC has the power to apply for an interim order suspending or restricting a registrant's practise during the investigation. The HCPC will do this in cases where they consider the concerns are so serious that public safety would be put at risk, or there would be a risk to the public interest or to the registrant themselves, if they were allowed to continue to practise.

At Stephenson's, we have a team of specialist HCPC fitness to practise lawyers, who have extensive experience in representing and advising professionals registered with the HCPC who are subject to HCPC investigations and fitness to practise proceedings. If you find yourself in a situation where your fitness to practise is being investigated, we have a dedicated team who will be able to assist you. For more information, call our specialist HCPC lawyers now on **0333 999 7151**.

(Policy can be found [here](#).)

The CQC's Powers of Prosecution

by Laura Hannah, Senior Associate Solicitor, Regulatory team

In 2015, the CQC was given the power to prosecute registered providers and managers where people using a registered service are harmed or placed at risk of harm, by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The CQC took over this responsibility from local authorities and the Health and Safety Executive, who had previously undertaken this role for all health and safety incidents.

Within the CQC's Enforcement Policy (February 2015), the CQC sets out their two primary purposes when using their enforcement powers, namely: to protect people who use regulated services from harm and the risk of harm, and to hold providers and individuals to account for failures in how the service is provided.

The CQC has a wide range of criminal enforcement powers which include the power to prosecute and issue fixed penalty notices or simple cautions. These powers are, however, limited to registered providers and certain individuals who work for providers such as directors; managers; the secretary of a corporate body, or an officer of an unincorporated association or member of its governing body. This means that a carer working in a registered care home cannot be prosecuted by the CQC, for example, unless they register with the CQC as the manager of the care home.

A simple caution ensures that there is a formal record of an offence when a person has admitted to it, but is not prosecuted. There is no obligation on a provider to accept a caution and, where the offer of a caution is refused, the CQC will likely consider whether to proceed with a prosecution in any event. A fixed penalty notice is also a potential alternative to a criminal prosecution. Whilst there is no obligation on a registered provider or manager to pay the fixed penalty, if they fail to do so, the CQC will then consider whether they should utilise their other powers. In our experience, this is likely to lead to a prosecution. The CQC can publish the issuance of fixed penalty notices and this power is therefore often used by the CQC to set an example to the rest of the sector and signify the importance of compliance.

With both cautions and fixed penalty notices, the CQC can only consider utilising these powers where the evidence is sufficient to bring a prosecution but they consider that this is a realistic alternative and more proportionate to achieving improvements, rather than a lengthy and costly prosecution. This conclusion would also require the provider to demonstrate an ability to put any required improvements into place within a reasonable timescale and that the impact on the residents of the particular offence was not substantial.

Generally, the CQC will only consider issuing criminal proceedings against a registered care provider or manager where the breach in question is assessed to be serious; there are multiple or persistent breaches; there is a realistic prospect of conviction based on the evidence; and it is considered to be in the public interest to use their powers of prosecution.

Before reaching the point of a prosecution, the CQC will carry out a thorough investigation which, in some cases, could take up to a year or more. The CQC will usually look to interview under caution the relevant provider or manager, or both, as part of their investigation. However, in cases where it may be difficult for someone to attend an interview under caution or for just one person to answer all of their questions, the CQC are increasingly writing to providers and/or managers to provide them with an opportunity to make a written response under caution. In these circumstances, the CQC will usually provide a document, known as a 'Disclosure Notice', which sets out the factual basis for their criminal investigation; the questions they require a response to; and a list of any evidence they are relying upon.

Many people will already be aware of the police caution having heard it on police dramas or through past experience or studying. The caution reads: You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence. This means that, you do not have to submit any response to the CQC, but if you do make any representations, they may be used as evidence in any prosecution. If you do not



mention anything in these representations which you wish to rely on, it could harm your defence if you then raise such matters at Court.

There are pros and cons to this approach for providers and managers and whether a response is made in such circumstances can only be decided on a case by case basis after a full review of the disclosure. Whilst a written response provides time to consider the response you are going to make and allows you to structure it in a clear and precise way, it is vital that any responses made at this stage are carefully drafted and thought out, after a full and detailed review of the evidence to support the CQC's allegations and investigation. At this point, it is important that you avoid incriminating yourself unnecessarily and do not make admissions where there is insufficient evidence to support an allegation. However, you must also ensure that you give consideration to any evidence you may want to rely on, as providing it at this stage could help support your defence later on or even provide helpful mitigation.

The response timeframe to these Disclosure Notices can also vary from case to case and it is therefore vital that providers and managers do not feel forced or coerced into making a response. Where insufficient time is provided, it is often possible to agree an extension for any response with the CQC and where this is not possible, it may be in your best interests to make no response at all.

Whilst there are not many reported prosecutions to date, it is apparent that the CQC have taken a more proactive approach to criminal enforcement action in recent years and there is no doubt that they are clamping down on regulatory breaches and particularly those who are carrying out regulated activities without the appropriate registration.

Some of the offences that the CQC can prosecute or issue fixed penalties for include:

1. Failing to comply with regulations about quality and safety;

2. Failing to comply with conditions of registration;
3. Carrying on a regulated activity without being registered;
4. Obstructing entry and inspection;
5. Making false descriptions of concerns or statements in applications.

There have already been some reported prosecutions for breaches of Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, namely a failure to provide safe care and treatment, in the last couple of years. You can defend prosecutions under Regulation 12 if you can establish, on the balance of probabilities, that you took all reasonable steps and exercised all due diligence to ensure safe care and treatment was provided. However, the recently reported prosecutions suggest that most providers have pleaded guilty to this offence.

In April 2017, a care provider was ordered to pay £163,185.15 in fines and costs following the death of a resident, who fractured their hip after falling out of bed. Following this, in October 2017, another care provider pleaded guilty to the Regulation 12 offence and was ordered to pay £59,570.58 in fines and costs by Camberwell Magistrates' Court. This related to the care a 72 year old woman who was burned after sitting on a portable heater.

It is not just the CQC with powers to prosecute registered providers and managers and those involved in the provision of care to vulnerable adults. A recent police prosecution in the Crown Court saw a care home owner sentenced to 21 years' in prison after being found guilty of four counts of conspiracy to defraud; one count of fraud; three counts of theft, false accounting and transferring criminal property, following a year long trial which concluded earlier this year. The care home's bookkeeper was also sentenced to eight months imprisonment, suspended for two years, after they pleaded guilty to conspiracy to defraud and false accounting.

As can be seen from these cases, the fines issued in CQC prosecution cases can be significant and in some cases, could severely affect a provider's ability to continue to invest in and maintain the business for the benefit of the remaining residents. This is because, for some offences, the Magistrates Courts have the power to order unlimited fines. These fines are based on a number of factors including the seriousness of the offence; culpability; the actual harm caused; and the company's annual turnover or an individual's financial circumstances. As such, for a large care organisation with a high annual turnover,

the fine would likely be quite significant. It is also important to note that, if the offence is accepted, credit for an early guilty plea could lead to a deduction of up to a third off the total fine.

This only serves to increase the importance of trying to avoid a prosecution at all costs for care providers and managers, particularly because the fixed penalties that can be issued by the CQC are fixed and much less. For instance, the CQC can only issue a fixed penalty notice in the sum of £4,000 for a provider and £2,000 for a manager, in respect of a Regulation 12 breach, compared to an unlimited fine in the Magistrates Court. For the offence of obstructing entry or an inspection, a fixed penalty notice of £300 can be issued by the CQC, whereas a prosecution could see a maximum fine of £2,500 imposed plus the costs of the prosecution. These prosecutions are often published by the CQC and as such, prosecutions of this nature can not only affect you financially, but could also have a substantial impact on your professional reputation; income; and any future admissions to the care home. Other police investigations and prosecutions can also see providers and managers, as well as other staff involved in the running of a care home, sentenced to lengthy prison terms in the most serious of cases. This would undoubtedly lead the CQC to determine that a registered provider or manager was no longer a fit and proper person to hold a registration and seek cancellation through their civil enforcement powers.

A common query of such prosecutions is the length of time that has passed before a prosecution is instigated and whether the CQC can, in fact, prosecute a registered provider or manager after such a long period of time. We have recently seen registered providers and managers being prosecuted by the CQC for incidents that occurred in 2015/2016, particularly for breaches of Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (safe care and treatment), where a resident has passed away following an accident at a care home. This is what is known as a 'summary only' offence, meaning it can only be prosecuted in the Magistrates Court. The usual time limit for summary only offences is within 6 months from the time when the offence was committed, or the complaint arose. However, Section 90(2) of the Health and Social Care Act 2008 confirms that the CQC may bring a prosecution within a period of 12 months from the date on which sufficient evidence to warrant the prosecution came to their knowledge. However, this is limited to no more than 3 years after the commission of the relevant offence.

It is therefore worrying for those care homes who have had an incident which triggers an investigation by the CQC, with the potential for that investigation to take up to 3 years before any criminal proceedings are even issued. In cases where a resident has passed away, a Coroner's inquest may also take place and in some cases, this could lead to a police investigation; safeguarding investigation; or civil claims for compensation by the family and relatives of the particular resident.

It is therefore vital that anyone facing criminal enforcement action, particularly a CQC prosecution, seeks specialist legal advice as soon as they become aware of a potential criminal investigation. Early action and a measured and careful approach to the investigation, and any response made, can limit the impact of a prosecution; or even prevent it from proceeding to Court at all. In any event, a response should only be made to the CQC, particularly where it is made under caution, after a full consideration of the evidence against you and the consequences of the offence. Where the evidence is stacked against you, an early admission may be the best way forward, with strong mitigation to assist in trying to minimise any fine imposed. In addition, it is vital that anyone subject to a prosecution engages in the proceedings and is appropriately represented at Court in order to protect their interests and long standing reputation in the care sector.



Author: Laura Hannah, Senior Associate

Case Studies: CQC criminal investigations & prosecutions

CONTACT US NOW ON 0333 999 7151 OR REGULATORYENQUIRIES @STEPHENSONS.CO.UK

Allegations of carrying out personal care without registration

Our specialist lawyers represented an individual who was prosecuted by the CQC for carrying out the regulated activity of personal care pursuant to Section 10 of the Health and Social Care Act 2008. Our client was providing domiciliary care to approximately 11 elderly service users in their homes and had employed three care staff to assist in providing this care.

Our client entered a guilty plea at the first opportunity at the Magistrates' Court and our CQC defence lawyers were subsequently instructed to assist with the sentencing hearing. By way of mitigating circumstances, our client had vast experience in the care sector, having worked as a carer for many years as well as a manager of a care home prior to starting this domiciliary care service. Our client had also not experienced any previous complaints or concerns from service users; GPs or the local authority nor was there any evidence that any harm had been caused to any service users throughout their career and evidence was further provided to demonstrate our client's compliance with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. In addition, submissions were made to the fact that our client had been genuinely unaware of the registration requirements and had unknowingly committed this criminal offence.

Whilst our client did initially apply for registration with the CQC during these proceedings, our client later took the decision to cease employing any care staff and began providing the care directly to service users themselves, which brought them outside the scope of CQC registration.

In line with the sentencing guidelines, our client was at risk of receiving an unlimited fine; a term of imprisonment not exceeding 12 months; or both. At the sentencing hearing, taking into account our client's reduction in income and providing maximum credit for an early guilty plea, **the Magistrates' Court imposed a fine of £1,600.00**. The CQC sought to recover costs in excess of £6,200, however, **the court limited these costs to a sum of**

£4,500 and a victim surcharge totalling £160.00 following our submissions on our client's financial circumstances; health; and ability to pay.

Allegations of failing to notify the CQC of specified incidents (DoLS authorisations)

Our specialist lawyers represented a care home provider who had received a letter from the CQC alleging that they had grounds to suspect that our client had committed the offence of failing without delay to notify the commission of incidents specified in Regulation 18(5) of the Care Quality Commission (Registration) Regulations 2009. It was alleged that, during a comprehensive inspection, CQC inspectors found that there were six people who were subject to a DoLS authorisation, which had not been notified to the CQC.

Our specialist lawyers submitted a detailed and robust written response to the CQC on behalf of our client, supported by the appropriate evidence and submissions in respect of the CQC's prosecution criteria. Following the consideration of our submissions, the CQC determined that there was not a realistic prospect of conviction in this case and therefore decided to take **no further action against our client**.

Allegations of failing without delay to notify the CQC (allegations of abuse)

Our specialist lawyers represented an adult social care provider who had been accused of committing the offence of failing without delay to notify the commission of an incident specified in regulation 18(2) of the Care Quality Commission (Registration) Regulations 2009. The CQC alleged that four incidents had occurred at the service, which gave rise to allegations of abuse and the CQC had not received a statutory notification in respect of these incidents.

Our lawyers submitted detailed representations to the CQC, querying the need for a statutory notifications in respect of

some of the incidents and acknowledging the reasons why other notifications were not made. Substantial mitigation was put forward, including evidence of the safeguarding procedures in place at the service; the Registered Manager's substantial experience and training; and the service's positive compliance and inspection history. It was further submitted that there would be no real public interest in pursuing any further action this provider in all the circumstances. After considering these representations, **the CQC confirmed that they would not be taking any further action** as they were satisfied that the provider was complying with Regulation 18(2) and it would therefore not be in the public interest to pursue a prosecution.

Allegations of failing without delay to notify the CQC of specified incidents

Our specialist lawyers represented a care home provider who had received two letters from the CQC alleging that they had grounds to suspect that our client had committed two offences. The first offence was failing without delay to notify the commission of incidents specified in regulation 18(5) of the Care Quality Commission (Registration) Regulations 2009, namely that they had failed to notify the CQC of four separate incidents in which four residents sustained injuries, such as fractured hips and head wounds. The second offence was failing without delay to notify the CQC of the death of a service user under regulation 16 of the 2009 regulations. It was alleged that our client had failed to notify the CQC of nine service user deaths over a period of ten months.

Our specialist lawyers submitted a written response to the CQC on behalf of our clients, admitting the offence and putting forward the appropriate mitigation, together with robust submissions on why a prosecution was not proportionate or in the public interest in this case. Following the consideration of our submissions, the CQC decided not to prosecute our clients and instead, **issued our client with a fixed penalty notice of £1,250 in respect of each offence**.

Employment law update 2019

by Philip Richardson, Partner, Employment team



There have been some key changes regarding the amounts that employees are entitled to from their employers including changes to the minimum wage, statutory payments and compensation limits for cases before the employment tribunal.

It is important that employees are aware of these changes to ensure that they are treated fairly and know their rights regarding their legal entitlements. Likewise, it is important that employers are aware of these changes to ensure that they are compliant with the law and avoid claims being brought against them by their workforce.

The key changes are outlined here:

The national minimum wage

The national minimum wage is not a guideline for employers. It is the legal minimum they can pay their workforce. The increases for this year show a significant change as outlined in the table below:

Age of worker	New minimum wage (from 1 st April)	Previous minimum wage	New annual full-time annual wage*
25 and over	£8.21 per hour	£7.83 per hour	£16,009.50
21-24	£7.70 per hour	£7.38 per hour	£15,015
18-20	£6.15 per hour	£5.90 per hour	£11,992.50
16-17	£4.35 per hour	£4.20 per hour	£8,482.50
Apprentice	£3.90 per hour	£3.70 per hour	£7,605

*based on a 37.5 hour week

Maternity, paternity and adoption payments

The basic rate statutory payment for maternity, adoption and paternity leave has

increased from £145.18 per week to £148.68 per week. The maximum period that these payments can be paid for has remained at 39 weeks and the maximum statutory amount of leave that can be taken is 52 weeks for maternity and adoption leave and two weeks for paternity leave.

Statutory sick pay

There has been a slight increase in the amount of statutory sick pay an employee must be paid if they become unwell and need to take time away from work. The statutory amount has increased to £94.25 per week from £92.05.

Employment tribunals

There has also been an increase in the compensation limits that can be awarded in an employment tribunal. The table below shows the new limits which came into effect on 6th April 2019.

Complaint	Maximum award from 6 April 2019	Previous maximum award
Discrimination	Unlimited	Unlimited
Unfair dismissal:		
Basic award	£15,750	£15,240
Compensatory award	£86,444 (unlimited in some circumstances)	£83,682
Week's pay cap to calculate basic awards and statutory redundancy payments	£525	£508

Statutory redundancy pay	£15,750	£15,240
Dismissal for health and safety reasons:		
Basic	£15,750 (min. £6,408)	£15,240 (min. £6,203)
Compensatory	No limit	No limit
Dismissal for making protected disclosure:		
Basic	£15,750	£15,240
Compensatory	No limit	No limit
Contract claims	£25,000	£25,000
Failure to conduct collective consultation	90 days' gross pay**	90 days' gross pay**
Failure to inform or consult: TUPE transfer	13 weeks' gross pay**	13 weeks' gross pay**
Breach of flexible working regulations	8 weeks' pay (up to £4,200)	8 weeks' pay (up to £4,046)
Failure to provide a written contract of employment	£1,050 or £2,100	£1,016 or £2,032

**per employee

It is best practice for employers to regularly review their policies and procedures but it is particularly important that they are up to date when changes such as these are introduced to ensure that they are compliant with the law and prevent employment tribunal claims.

If you need help in relation to employment law issues call our expert team on **0333 009 5406**.

[Click here to download the latest employment law facts and figures in a pdf.](#)

OUR REGULATORY TEAM



Carl Johnson, Partner & Head of Regulatory Law

Carl specialises in professional discipline and regulation and is recommended in the current edition of the Legal 500. [View his profile here.](#)



Sean Joyce, Head of Regulatory & Criminal Justice

Sean is a Partner and heads our regulatory, serious fraud and business crime teams. Sean is listed in Chambers and Partners 2018 as a leader in his field. [View his profile here.](#)



Alison Marriott, Senior Associate

Alison represents professionals in fitness to practice proceedings. Alison also provides advice to companies facing prosecution by the HSE, Food Standards Agency (FSA) and trading standards. [View her profile here.](#)



Laura Hannah, Senior Associate

Laura represents health and social care providers in relation to proceedings before the Care Quality Commission (CQC) providing advice on compliance; enforcement action; and, appeals to the First-tier Tribunal (Care Standards Chamber). Laura is also recommended in the current edition of the Legal 500. [View her profile here.](#)



Paul Loughlin, Senior Associate

Paul's specialism covers a wide area of regulatory work, alongside a niche specialism in criminal motoring offences. In particular, Paul advises and represents professional clients facing regulatory action in a healthcare setting as well as providing advice and representation to health and social care providers looking to challenge any decisions made by the CQC. [View his profile here.](#)



Francesca Snape, Associate Solicitor

Francesca represents and advises a range of professionals across a number of sectors before their professional regulators. Francesca acts for professionals in the healthcare, education and counselling and psychotherapy sectors. She also represents registered providers and managers facing enforcement action by Ofsted and the CQC. [View her profile here.](#)



Chloe Parish, Trainee Solicitor

Chloe started her training contract in September 2017 and is due to qualify as a Solicitor in September 2019. Chloe specialises in regulatory defence and professional discipline. Chloe often assists with challenging enforcement action and inspections of the CQC and Ofsted. [View her profile here.](#)



Elizabeth Groom, Graduate Paralegal

Elizabeth assists the partners and solicitors in the regulatory team, providing advice and assistance in a number of areas including professional discipline, road traffic offences and trading standards investigations and prosecutions. Elizabeth also assists with cases before the CQC and Ofsted. [View her profile here.](#)



Cameron Stubbs, Graduate Paralegal

Cameron assists the partners and assists in the team in all of the key practice areas, including road traffic offences, professional discipline and regulatory defence. Cameron also has a special interest in sports law. Cameron graduated with a first class honours degree in law in 2018. [View his profile here.](#)



Martin Haisley, Graduate Paralegal

Martin specialises in professional disciplinary work and is recommended in the 2017 edition of the Legal 500. In particular, Martin has assisted a wide range of professionals in the healthcare, legal and teaching sectors before their respective regulators. Having previously qualified as a football agent in 2012, Martin also has a keen interest in sports law and has assisted clients in relation to disciplinary matters before their respective governing bodies. Martin is due to commence his training contract in 2019. [View his profile here.](#)



Emily Hill, Graduate Paralegal

Emily assists clients facing fitness to practise proceedings before the GMC; NMC; and HCPC, as well as other professional bodies. She also assists the specialist solicitors in providing advice and representation to care providers and managers in relation to proceedings before the CQC and Ofsted. In particular, Emily assists in challenging enforcement action; inspections; and appeals before the First-tier Tribunal (Care Standards). Emily is currently studying her legal practice course and masters. [View her profile here.](#)



Jessica Macaulay, Graduate Paralegal

Jessica assists the partners and solicitors in the team with a variety of areas, including professional discipline; health and social care regulation; road traffic offences; and criminal prosecutions. In particular, Jessica assists in cases concerning the CQC and Ofsted, providing representation to registered providers or managers in a range of matters including making a complaint, compliance, enforcement action and appeals. Jessica completed her bar professional training course (BPTC) in 2017. [View her profile here.](#)

CONGRATULATIONS

Congratulations to Paul Loughlin, Francesca Snape & Katy Geoghegan

Huge congratulations to our Paul Loughlin on being promoted to a Senior Associate and our Francesca Snape and Katy Geoghegan on being appointed Associates at Stephensons.

Paul qualified as a solicitor in 2009 and joined the firm in 2017. Paul specialises in road traffic and road transport law and also undertakes a wide range of other regulatory work including professional discipline; CQC regulation; and HMO licencing.

Francesca joined the firm as a paralegal in 2013 following a vacation placement and subsequently obtained a training contract and qualified as a solicitor in March 2018. Francesca specialises in Ofsted regulation, providing advice and representation to registered early years, childcare, education and social care providers.

Katy joined the firm in 2002 and has worked in the regulatory team since its inception. Katy provides invaluable support to the partners and manages the Regulatory's teams administrative staff.



Pictured: Paul Loughlin (left), Francesca Snape (center), and Katy Geoghegan (right).

Healthcare Newsletter

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