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Healthcare Briefing

Solicitors

The Care Quality Commission (CQC)

Introduction

From 1 April 2009, a new regulator for health and adult social care services in England, the CQC, comes into being having been established by the Health and Social Care Act (HSCA) 2008. The CQC will perform the functions previously carried out by the Healthcare Commission, the Commission for Social Care Inspection and the Mental Health Act Commission, all of which will be dissolved on its inception.

The CQC will be responsible for registering, reviewing and inspecting services and will have powers of enforcement exercisable in response to failures by providers to meet the legal requirements of registration; including failure to register. The enforcement powers include the existing powers granted by the Care Standards Act (CSA) 2000 namely: imposing, removing or varying conditions on registration; prosecuting for specified offences and cancelling registration as well as three new powers granted by the HSCA 2008, namely: issuing warning notices, issuing financial penalty notices and suspending registration of an organisation.

The new enforcement regime is contrasted with the old in Table 1. below.

Table 1.

Power	CSA 2000	HSCA 2008
Issue a warning notice	X	√
Impose, vary or remove conditions on registration	√	√
Issue a penalty notice in lieu of prosecution	X	√
Suspend Registration	X	√
Cancel Registration	√	√
Prosecute for specified offences	√	√

The new enforcement powers will not apply as against private and voluntary health and social care providers until April 2010 when the HSCA 2008 comes fully into force. With respect to NHS providers, new regulations, which apply to providers covered by the *Code of practice for the prevention and control of healthcare associated infections* (HCAI), are to come into force from April 2009. The regulations require such providers to register with the CQC and to take measures to protect patients, staff and others from identifiable risks of acquiring healthcare associated infections. Once the regulations are enacted, the full range of enforcement measures under the HSCA 2008 will be available as against NHS providers who fail to comply with the new requirements. In respect of any other action taken, the new enforcement powers will not be available as against an NHS provider until April 2010.

Detailed operational guidance on how the CQC intends to utilise its new enforcement powers is to be issued. For the time being, a consultation document containing a draft enforcement policy is available at:

http://www.cqc.org.uk/consultation/enforcement_policy.aspx

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Three New Powers

1 Issuing a statutory warning notice

Any notice given will specify the breach and specify a timescale within which the breach must be rectified. At the end of the specified period, if the breach has not been remedied, the CQC will take such further enforcement action as it deems necessary. This is likely to be used for first-time or minor breaches where the CQC believes the provider can continue to operate whilst they rectify the problem without compromising the safety of service users.

2 Issue a fixed penalty notice

The CQC can issue a penalty notice for a fixed penalty offence instead of prosecution. Regulations are to be made specifying amongst other things the value of the penalty and what will constitute a fixed penalty offence. It is likely to include: failure to comply with a condition of registration, or carrying on a regulated activity without being properly registered.

3 Suspend registration

The CQC are empowered, where they think it necessary, to suspend a provider's registration for a specified period in order to give the provider an opportunity to rectify the problem. The period of extension can be extended and it is an offence for a provider to operate during a period of suspension. This will be used as a response to more serious breaches where the CQC believes the provider cannot continue to operate whilst they rectify the problem without compromising the safety of service users.

Increase to Maximum Court Fines

Arguably the most significant change that will be brought about by the coming into force of the HSCA 2008 and the inception of the CQC, is the increase in the maximum fine that may be awarded by the court where an offence is successfully prosecuted by the regulator. In one instance, the increase is **twentyfold** when compared to the maximum fine that could be levied under provisions of the CSA 2000. The increase applies to NHS providers for offences committed in 2009/2010 and to all other providers and managers from 2010/11 onwards.

The maximum fines under both Acts are set out and contrasted below in Table 2:

Table 2

Offence	CSA 2000 fine	HSCA 2008 fine
Failure to be registered	**£5,000**	**£50,000**
Failure to comply with conditions in relation to registration	**£5,000**	**£50,000**
Offences relating to suspension or cancellation	**N/A**	**£50,000**
Failure to comply with registration requirements	**£2,500**	**£50,000***
False descriptions of concerns	**£5,000**	**£5,000**
False statements in applications	**£2,500**	**£2,500**
Failure to display a certificate of registration	**£500**	**N/A**
Obstructing an Inspector	**£2,500**	**£2,500**
Failure to provide documents or information	**£2,500**	**£2,500**
Failure to provide an explanation of any related matter	**£2,500**	**£2,500**

* Some lesser requirements have a maximum court fine of £2,500 under the HSCA 2008

Other Issues

The following is a non-exhaustive list of additional points to note about how the CQC intends to carry out its regulatory role:

- The CQC may choose to take non-statutory enforcement action in response to a breach by a provider or manager e.g. increasing the frequency of inspections, placing a manager under scrutiny, informally notifying a provider of a breach and requiring it to be rectified within a reasonable period, or requesting an unregistered provider to stop operating (details of any non-statutory action may be published by the CQC but, in contrast to statutory action, they are not required to do so).
- The CQC may issue a simple caution as an alternative to prosecution.
- With respect to statutory enforcement, the CQC may decide to take urgent action in certain situations. This has immediate effect and does not have to allow for the process of representations, though there is a right of appeal. This will usually only occur where the CQC perceive an immediate threat to the safety of service users. If the action reverts to routine

level, the right to make representations is restored.

- The CQC make it clear that they will escalate any enforcement action taken as swiftly as they think necessary to address the problem so, for example, the sanctions for a minor breach, whilst initially modest, could become serious very quickly if the breach occurred on a repeated or continuous basis.

Impact

The very substantial increase to the maximum level of fine that the court can award is intended to act as a powerful deterrent to providers though the extent to which fines will actually be awarded at the upper end of the new scale remains to be seen and ultimately will be for the courts to decide. Given that a recent comprehensive examination of the English care system, undertaken by CSCI, revealed that one third of care homes are judged to be poor or only adequate and one fifth fail to meet all of the national minimum standards, there is clearly a very real financial risk posed to providers, particularly smaller ones, by this very significant penalty increase. The importance of compliance cannot now be overstated. This will represent a cost to the regulated sector. Existing standards and reporting systems should be reviewed to reduce the likelihood of costly action being taken.

A regulatory impact assessment, conducted by the Department of Health, estimates that there will be no net increase or decrease in the costs incurred by the regulated sector following the inception of the new regulator. However, in addition to the point made above regarding compliance costs, the CQC say in their regulatory impact assessment that having a greater range of enforcement options at their disposal is likely to mean that enforcement actions overall will increase. That being the case, there will be costs to be borne in the short term by the regulated sector in responding to any enforcement action taken, although the expectation is that over time this will be negated on the basis that having a better run service will reduce the likelihood of further, more serious, action being taken.

On a positive note, the CQC believe that having more interim enforcement measures available, will make cancelling registration a "last resort" and something which will only be done where the care is considered so unsafe that no other action would be appropriate, for example, in response to persistent and deliberate non-compliance.

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