

CQC ENFORCEMENT UPDATE

Financial penalties on the increase

A recent prosecution by CQC of a care home provider represents the 'final piece of the jigsaw' in terms of CQC's enforcement powers for the health and social care sector. The case provides a severe warning to providers of the sorts of financial penalties which can flow from non-compliance in the new enforcement environment.

Ever since the implementation of CQC's 'A new start' consultation in the wake of the Mid Staffs Inquiry, providers have got used to dealing with a tougher regulator. Initially, this was in the form of the new, more robust, inspection regime and published Quality Ratings. However, as services are inspected, and non-compliance identified, the most significant sign of the regulator 'bearing its teeth' has come with the exercise of its enforcement powers.

CQC has a range of enforcement options, both civil powers (impacting upon providers' registrations) and criminal powers. The sector is getting well used to the exercise of civil enforcement powers with 449 services in Special Measures at the end of 2015/16 (across the Adult Social Care, Hospitals, and Primary Medical Services Directorates). However, in terms of CQC's criminal enforcement powers, it has taken somewhat longer for these to be exercised.

This year the care sector has experienced its first successful Corporate Manslaughter prosecution, with the conviction of Sherwood Rise Limited in February 2016 resulting in a £300,000 fine for the company and a custodial sentence for gross negligence manslaughter for one of the directors. Such prosecutions are pursued by the CPS. However, CQC has now brought the first of its own prosecutions under the new regime.

The case, in which Bevan Brittan represented the provider, concerned the conviction of St Anne's Community Services as a result of the death of a resident at a care home (46 Smithies Moor Lane) following a fall from a shower chair on 30 April 2015. After pleading guilty, St Anne's was ordered to pay a fine of £190,000, together with CQC's costs of £16,000. This case is significant for a number of reasons:

- **'Closing the regulatory gap'** – At the time of the Mid Staffs Inquiry, Robert Francis QC commented on the 'regulatory gap' which had emerged between CQC, the Health and Safety Executive, and local authorities in terms of a reluctance to prosecute Health and Safety failings in care settings. Following this, a memorandum between CQC, the HSE and the local authorities confirmed that, with effect from 1 April 2015, CQC would be the lead enforcement body for Health and Safety issues involving patients and service users in CQC regulated services. The facts of this case arose only a month after CQC assumed this responsibility and the case represents the first concluded prosecution since this gap has been closed.
- **New Regulations** – This prosecution was brought for non-compliance with regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Regulation 12 is one of the Fundamental Standards, relating to 'Safe care and treatment'. The significance of the new Regulations, compared to the previous regime in place before April 2015, is that, under the new Regulations, CQC is not required to (although they usually do) serve a Warning Notice giving the provider an opportunity to comply, before commencing a prosecution.
- **Maximum fines** – The new Regulations also introduce higher maximum penalties upon conviction. Under the previous (2010) Regulations, the maximum fine upon conviction for non-compliance with the regulations was £50,000. However, under the 2014 Regulations, the maximum fine is now unlimited, with the courts applying guidance from the Sentencing Council.
- **New Sentencing Guidelines** – in relation to all cases sentenced since February 2016, the courts have to have regard to the new "Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences - Definitive Guideline" issued by the Sentencing Council. This Guideline, in broad terms, recommends a sentencing range and, within that, a 'starting point' for the court to consider based on:
 - **The level of culpability of the provider.**
 - **The seriousness, and likelihood, of the harm risked** – note it is not necessary for harm to have actually occurred
 - **The offender's turnover.**

The Guidelines for courts to determine the level of 'culpability' make interesting reading. Whilst 'Very High' culpability is defined as a "deliberate breach of, or flagrant disregard for, the law" and 'High' culpability involves an offender falling "far short of the appropriate standard", it is the definition of 'Medium' culpability which is perhaps of greatest concern to providers. The Guidelines confirm that 'Medium' culpability applies when the offender falls "short of the appropriate standard in a manner that falls between descriptions between descriptions in 'High' and 'Low' culpability", for instance where "systems were in place but these were not subsequently adhered to or implemented". Where things go wrong in care settings, this is, perhaps, the level of culpability which is most likely to be applicable.

As an example, if one assumes a case of a 'Medium' level of culpability, resulting in a risk of the most serious harm category (i.e. issues which result in a high likelihood of death, lifelong dependency due to physical or mental impairment or a significantly reduced life expectancy), it can be seen that the guidance to the courts will result in fines which are substantially higher than in previous cases which CQC used to prosecute:

	Medium organisation (turnover £10m and £50m)		Large organisation (turnover £50m and over)	
Medium Culpability	Starting Point	Category Range	Starting Point	Category Range
Harm category 1	£540,000	£300,000 – £1,300,000	£1,300,000	£800,000 – £3,250,000

For a 'medium' sized organisation with a turnover of between £10m and £50m, the Guidelines show the courts should consider a category of between £300,000 and £1.3m, with a starting point of £540,000. For large organisations, the starting point in such circumstances is £1.3m.

Having decided on the appropriate level of fine using these factors (and taking into account the particular aggravating and mitigating factors of the individual case), the Guidelines do then require the court to take a step back and check whether the proposed fine is proportionate to the offender's overall means or otherwise requires some adjustment, before making any further reductions to reflect any assistance provided to the prosecution and/or for guilty pleas.

Conclusion

For many years, the low level of fines in regulatory prosecutions meant the associated reputational damage was of greater impact to providers. Now, though, whilst reputational damage is still a major concern, the new sentencing regime means the financial penalties will also have real punitive effect on providers.

Even with substantial mitigation it can be seen the new regime will result in substantial fines for organisations. It should also be noted, as CQC are at pains to point out, that at its most recent CQC inspection, the care home at 46 Smithies Moor Lane received a 'Good' overall rating.

As such, it is clear that such drastic enforcement action is not just a risk for the poorest performing services but can be taken, following serious incidents, even in relation to services which continue to operate and go on to achieve 'Good' ratings. This means that, more than ever, providers need to be extra vigilant to matters of safety within their care settings. If they face enforcement action, providers should seek advice at an early stage with a view to making representations either that a prosecution should not be brought at all, or, in the event that one is, mitigating the level of fine payable as far as possible.

For more information please get in touch



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