Fundamental Standards:
Proposals to change CQC registration regulations

A response from Care England

1 Introduction

1.1 Care England is the leading representative body for independent care services in England. Our membership includes organisations of varying types and sizes; among them single care homes, small local groups, national providers and charitable organisations and associations. Between them, they provide a variety of services for older people and those with long-term conditions, learning disabilities or mental health problems.

1.2 We welcome the opportunity to comment on the proposals for changes to CQC regulation, before which we make some general observations. We would like it to be noted that we are fully supportive of the general thrust of the regulations. None of our comments, however critical, should be interpreted to in any way conflict with this statement.

1.3 We welcome the decision not to include a separate set of expected standards, something we argued for in response to previous consultations.

1.4 We note that, during consideration of the Care Bill, the Health Minister recognised the pivotal role of commissioning in determining the quality of care and the level of service provided. He stated that the Government is working with ADASS "to design best practice commissioning"[1].

1.5 The Minister made clear that CQC should launch thematic reviews of commissioning "where commissioning practices put the quality of care at risk. That might apply in a whole range of different circumstances". He went on to emphasise the duty of local authorities to "have regard to the importance of ensuring sustainability in the market as part of their market-shaping function under the Bill", explaining that the duty "means, for instance, that local authorities should not set prices that risk undercutting the stability of the market as a whole."[2]

1.6 We note also the reference in the consultation document to the part CQC inspections

[1] www.publications.parliament.uk/pa/cm201314/cmpublic/care/140114/am/140114s01.pdf
[2] Ibid.

– which we take to mean routine inspections – will play in "highlighting commissioning issues at national, regional and local level" (Page 14).

1.7 We are not yet persuaded that these methods will achieve the desired ends. We would want much more detail, first, on how precisely the need for special reviews of commissioning will be identified and, second, on the process(es) by which routine inspections can contribute to highlighting commissioning issues. Should "best practice commissioning" be set out in statutory guidance, we would welcome an indication of how the Government intends it should be monitored. Based on current knowledge, we believe the proposals for CQC involvement to be inadequate.

1.8 We consider it essential that, in conducting reviews and inspections which focus either in part or in whole on commissioning, inspection/review teams include experts on commissioning.

1.9 Furthermore, we believe that "the whole range of different circumstances" that the minister referred to as prompts for CQC action must include those that have the effect of masking poor commissioning practices. We refer to circumstances where commissioning practices could have put the quality of care at risk were it not for the impact of one or more of the following factors: the payment of top ups; premiums charged to self-funders to offset shortfalls between local authority rates and homes' "fair prices"; and the willingness and capacity of home operators to absorb these shortfalls.

1.10 We would argue that the presence of these factors could be indicative of poor quality commissioning and should be investigated to establish if they indeed constitute "clear evidence". For the avoidance of doubt, we believe these factors must also be central to the process by which routine CQC inspections identify and "highlight commissioning issues".

2 Consultation questions – Annex B

2.1 Question i

Do the Fundamental Standards (regulations 4-14) make clear the kinds of outcomes we expect providers to meet/avoid?

2.1.1 The document itself makes the point on the relationship between regulations and guidance that "to understand either in isolation of the other is difficult." We agree. We look forward to the publication of the narrative of detailed guidance (see also 2.5 below). Following which we would be happy to respond in more detail.

2.2 Question ii

Do you think the Fundamental Standards (regulations 4-14) reflect the policy aims we have set out for the Fundamental Standards in Chapter 4?

2.2.1 There are many places where that reflection is less than clear (see responses to Questions iv and viii below).

2.3 Question iii

Are the Fundamental Standards clear enough that they could be used as a basis for enforcement action?

2.3.1 Not in their current form. They should be sufficiently precise to enable a provider to decide what must be done to avoid committing an offence. We do not believe that to be the case in all their aspects.

2.4 Question iv

Regulation 17 sets out which of the regulations are offences for which CQC will still need to issue a pre-prosecution notice, alongside those that could be prosecuted immediately. Do you think this split reflects our intention (see chapter 4) that only breaches related to a harmful outcome can be prosecuted without a pre-prosecution notice being issued in advance?

2.4.1 According to the consultation document, breaches of the fundamental standards should only be prosecuted immediately where that breach "has an outcome which could directly result in a person or group of people being harmed". We are concerned that there is no reference in regulation 17 to the reason for the split; it is implied only by exception. While we accept that guidance might be more expansive in this regard, we believe it should be made explicit in this regulation itself. Indeed, it might have been better had the regulation been framed to spell out which regulations *would* prompt immediate prosecutions.

2.4.2 The examples of "serious" given in the document (Page 16) include, inter alia, "individual failings in care which fall far below any acceptable standard". "Far below" begs the question: how far do they need to fall before they become unacceptable? It also implies there are degrees of non-compliance. In our view, neither that nor "any acceptable standard" are sufficiently precise. In addition, the earlier identification of failings that are "most serious" as triggers for immediate prosecution is not at all helpful. We trust that the guidance will be couched in more appropriate, non-rhetorical language.

2.4.3 Further, in relation to "persistent breaches over time", which also qualify as "serious", it would be helpful were an indication to be given of the time period over which the breaches would have to be repeated to be categorised as "persistent".

2.4.4 The reference in the document to the standards in respect of which prosecution cannot proceed without the issue of a pre-prosecution notice (final paragraph of Page 16) is incomplete; it does not correspond to regulation 17(2). Indeed the role of additional conditions in the context of the regulations they support is unclear throughout the document, the regulations and the Impact Assessment.

2.4.5 The first paragraph on Page 17 adds to the confusion over breaches of which additional supporting conditions in which regulations will trigger prosecution and which would be dealt with by way of alternative enforcement action.

2.4.6 The second paragraph on that page is also unhelpful insofar as it suggests that supporting conditions are not actually central to the regulations in question, but are included as a means of assisting CQC enforcement when lapses in meeting standards – if this is, in fact, what "slipping" means – do not result in harm.

2.4.7 The Impact Assessment further confuses the issue with its description of "additional things" – does this refer to supporting conditions? – that providers "may" need to consider when meeting relevant requirements (Para. 24). It is clear by the use in the regulations of expressions like "must" do and "is required" to do that there is no such discretion.

2.4.8 More confusing still is the status of these "additional things", described in the same paragraph as not in themselves carrying a legal duty to be carried out, which, it is said, is why they are not specified in the regulations. But they – if they are supporting conditions – are in fact so specified. Instead, it is said, each requirement will be accompanied by "a simple clause" that requires providers to take appropriate steps and will enable CQC to act where care is "slipping". We do not believe there are any "simple clauses".

2.4.9 Paragraph 66 of the Impact Assessment states: "The removal of the specification of any specific actions that providers need to achieve will make the regulations less prescriptive [than the 2010 Regulations]." In our view, first, as set out above in 2.4.7, the use of "must" and "is required" is not "less prescriptive", it is clearly the exact opposite. Second, if the list of things providers must/are required to do is not a specification of specific actions that providers need to achieve – prescriptions – we would welcome an explanation as to what they really are, and what qualifies as a "simple clause".

2.4.10 We are confused by statements that appear to contradict the regulations – and sometimes each other. Clarification is necessary. Are "additional things" the same as supporting conditions? If they are, why has it been stated that are not specified in the regulations when they clearly are? And if they are something else entirely, what are they?

2.4.11 It is our understanding that, in each regulation, the outcome and the supporting conditions are intended to constitute a coherent whole. In our view, that intention is not being achieved.

2.4.12 Overall, as currently drafted, we do not believe the regulations are at all clear. It is essential that providers understand not only where the offence threshold is, but also the status of the supporting conditions. It would be helpful were the guidance to provide, among other things, a list of the regulations and the conditions in respect of which breaches could result in immediate prosecution and which must be preceded by a warning notice.

2.5 Question v

Do you agree that CQC's guidance about complying with these regulations should set out criteria for cases in which it would consider bringing a prosecution?

2.5.1 Undoubtedly, yes.

2.6 Question vi

Do you agree that the health and adult social care system should always seek to meet the standards outlined in chapter 4?

2.6.1 Yes.

2.7 Question vii

Do you think any changes are needed to the draft regulations to ensure they reflect the policy aims we have set out in chapter 4?

2.7.1 See responses given to Questions iv and viii.

2.8 Question viii

Do you have any other comments about the draft regulations?

2.8.1 We take issue with the statement in the consultation document that the regulations focus "more closely on outcomes, rather than on the steps that must be taken to achieve that outcome" (Page 18). Similarly, we question the contrast that is drawn between the respective formats of the 2010 Regulations and the new draft Regulations. In many of the latter, a statement of the required outcome features only in the first line, followed by a list of actions that registered providers must take. It is true that "some" of the detailed requirements in the 2010 Regulations have been removed; but many remain. We believe the degree of contrast has been significantly overstated.

2.8.2 The language can be impenetrable, for example "reasonable adjustments" that are required to be made by regulations 4 and 14. Current requirements are criticised for having a wealth of detail that does not always make clear the overall intended effect; neither does it make obvious what a breach of the overall requirement would entail. We are not convinced that the redrafted requirements remedy these defects.

2.8.3 Certainly, statements of expected outcomes are prominently sited at the head of each of the relevant regulations. But that does not, in itself, make for clarity nor does it change the entire orientation of the regulations. In many of the new regulations, the initial statement is followed by a proliferation of required actions – supporting conditions – each of which could, we fear, be perceived as boxes that demand to be ticked and regulated as such.

2.8.4 In most of the regulations to which supporting conditions are attached, these conditions are introduced using the qualifying word "include(s)", implying that the listed conditions are not exhaustive. If that is the case, we suggest it should be made explicit.

2.8.5 We suggest that in regulation 4(3), requirement (f) is in fact integral to requirement (b), which in turn calls into question the different ways in which these requirements are treated for the purposes of legal proceedings in regulation 17(2).

2.8.6 We are concerned by the subjectivity – and, therefore, uncertainty – that will be introduced by the distinction between actually meeting an outcome and doing so "technically" (Page 15) or "through accident or luck" (Impact Assessment, Para. 24). We fear it will not be fully understood, either by providers, members of the public, or, critically, regulators. While a degree of clarity might be brought by the guidance – particularly in respect of "risk" and "compromise" – we question the need for such a supplementary interpretation, one that reads very much like an afterthought.

2.8.7 There must be no doubt. It is imperative that all parties share a common meaning of the regulations. That should be provided at the outset by the drafting Department; it should not be left to the courts to decide subsequently.

2.8.8 In regulation 20(2) of the draft Regulations, regulation 1 (of the 2010 Regulations) should read regulation 2.

2.9 Question ix

Do you have any concerns about the impact of the proposed regulations on people sharing protected characteristics as listed in the Equality Act 2010? (The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.)

2.9.1 No.

2.10 Question x

Do you have any comments about the estimated costs and benefits of these regulations, as set out in the draft impact assessment (published alongside this consultation)? See Annex C for more detailed questions on impact.

2.10.1 An important objective of the new regulations, where providers are concerned, is to make it easier for them "to understand what is required of them by the regulations and to judge whether or not they are compliant with the requirements." In consequence, it is said, the burden on providers would be reduced (Impact Assessment, Para. 16). We do not believe the regulations are sufficiently clear to do so. Such is the lack of precision in the current draft, indeed, that the burden is likely to be greater. Equally, forecast cost savings which are predicated on "simpler regulations" are unlikely to be realised.

2.10.2 No matter how often ministers deplore the practice of local authorities duplicating CQC regulation, it still continues. This is a long-running issue, and we are extremely disappointed by the lack of action from the Department.

Care England

1st April 2014

For more information contact
Ann Mackay
Director of Policy
amackay@careengland.org.uk