

Will the Care Quality Commission Care Enough?

by Louise Crook, Head of Healthcare, Rickerbys LLP

The Government decided three years ago to merge CSCI with the Mental Health Act Commission and the Healthcare Commission. The New body, known as the Care Quality Commission (CQC) came into being this week.

On the 3rd October, the Chairman of the new body, Baroness Young was reported in "the Times" as saying; "Hardly any regulators work across both the private and public sectors. There is Ofsted...and now us. We think of ourselves as the people's regulator, with a working strapline of "making care better for you"

The new Commission will take over the regulation and inspection of care homes with effect from the 1 April 2009.

The CQC's responsibilities will include everything from the standard of care home meals to detention of patients under the Mental Health Act. This extraordinarily broad remit was frequently commented on as the Health and Social Care Bill made its way through Parliament. The Chair of CSCI, Dame Denise Platt, felt that the new Commission would reduce the Voice of the care home regulator to a whisper and that the generic service would not address the specifics of care for one particular group.

Baroness Young does not consider this to be a problem. She comments "The great joy is that we will have a single registration system, which can adapt to what is appropriate..."

Can this really be the case?

Let's look at the example of a home which stayed open for nine months after failing to meet seven out of 10 essential requirements set by CSCI. Several residents of Southfields Care Home, Brackley, Northamptonshire were taken into hospital after the care and nursing home was forced to close in August 2008 for failing to provide decent care.

The home had been under a regime of random checks for many months due to ongoing concerns about safety and quality of care in the home. It had failed to meet

key standards over six years, as shown by records from CSCI.

Gordon Lishman, Director General for Age Concern England, blames the fall in the number of inspections for such poor standards. The Commission for Social Care Inspection's annual report shows the number of inspections of care services carried out has dramatically declined – from 48,062 in 2004-5 to 19,059 in 2007-8.

This case highlights the trend in cost cutting which has reduced the number of CSCI Inspectors by 37% since 2005. In the South West alone the Commission plans to close offices in St Austell, Bristol, Chippenham, Poole and Gloucester. Many Inspectors are now expected to work from home under more pressure for resources.

The creation of the CQC is yet another cost cutting exercise which will lead to the further watering down of services. It will inevitably lead to less training for Inspectors and less consistency in their approach to the regulation and inspection of care homes.

In the CSCI annual staff survey undertaken in 2007 over 80% of respondents to the union survey said CSCI needed to inspect services more frequently, while almost three-quarters said CSCI needed more capacity to respond to complaints and concerns about providers.

Unison's national officer for social care, Helga Pile, said job cuts had meant that CSCI lacked the capacity to respond effectively to intelligence – the kernel of the new inspection system. She said: "CSCI feels that with that level of staff you can deliver a safe and effective inspection service. Our members feel that you can't."

One inspector said: "The whole system is being overloaded. We have a high number of people suffering from stress."

This is a worrying trend which has not been addressed by the creation of the new commission. The emphasis on cost cutting does not take into account the ageing population and the need to put in more money for the care home sector and not less.

It remains to be seen whether the CQC will be able to operate at even the reduced level of CSCI and take into account the specific needs of the care home sector.

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Dispute Resolution

Dealing with the Commissioners of Care Homes, *By Derek Jones, Rickerbys LLP*

Care Home owners often find themselves in the position of having to deal not only with the Regulator (CSCI in England or CSSIW in Wales) but also, where they have contracts to provide services for Local Authorities and Primary Care Trusts (Local Health Boards in Wales) with the commissioners of those services as well.

As the commissioners of such services, in local authority speak, seek to pursue the “goal of partnership” with service providers we are increasingly finding that this is interpreted by those commissioners meaning that there should be a regular meeting between the Council, the Local Health Authority and the service provider - often at the commissioner’s whim and at very short notice.

Whilst such meetings are generally welcome so as to ensure that misunderstandings do not arise, or to put right any that have arisen, the fact remains that it is unfortunate that such commissioners, who operate in the public sector, have no apparent understanding of the time pressures under which the private sector Care Home owner operates.

One of our clients was recently faced with the situation where it was necessary to suspend a registered nurse on a Friday as a result of a medication error whilst investigations were carried out into that nurse’s competence.

The manager of the home immediately notified the regulator by telephone that this had happened and gave the statutory notice.

There was no need for her to contact the commissioners of the service as a contingency plan was in place to ensure that staffing levels were maintained and there would be no interruption to the service.

The regulator took it upon itself to

contact the Local Health Authority who insisted upon a meeting taking place the next working day.

It was simply not possible for the Care Home owner to rearrange her diary to attend that meeting at such short notice. Her manager made arrangements to enable her to go instead.

Because the manager was not able to answer in depth questions in respect of the operation of Head Office, of which he had no knowledge and of which no prior notice had been given, the commissioners took it upon themselves to impose an immediate embargo upon the referral of residents to the home in question.

We attended a meeting with the owner and the

commissioners, all seven of them (four from the Local Authority and three from the Local Health Authority) as soon as it was practically possible to do so.

During the course of that meeting it became clear that the commissioners had failed to appreciate, despite having the Local Authority’s solicitor at the meeting, the contractual framework which regulated their relationship with the Care Home owner, notwithstanding the fact that the contractual documentation had been produced by them and was in their own standard form.

Indeed, the Chair of the meeting, a member of the Local Health Authority, made it clear that she did not

consider the contract to be relevant. What was relevant was the concept of “partnership”. As a result of the representations made by our client and ourselves at that meeting it was acknowledged by the commissioners, three days later, that our client had continued to operate the Home entirely within the framework of the contract, that no breach of contract had occurred and that the embargo would immediately be lifted.

No apology was forthcoming for the disruption which had been caused. Whilst the concept of “partnership” is generally to be welcomed this does, of course, mean that there should be a full and free flow of information between all of the relevant parties and not just, as in this case and in many others which we have seen, between the regulator and the Local Health Authority – especially when, as here, that “sharing of information” is less than complete. Communication goes both ways.

Or at least it should.

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Employment

ACAS Code of Practice Update, *By Simon Collingridge, Rickerbys LLP*

ACAS have recently published their revised code of practice on discipline and grievance procedures which is intended to re-vamp existing procedures once the current dispute resolution 'three step' process has been repealed, expected in April 2009.

The ACAS code of practice is to replace the statutory process following the findings of the Gibbons Review. At first glance it would appear that the code does not differ from the current 'three step' statutory process but there are still some significant, albeit subtle, changes.

The code follows the same processes that are currently in place with the 'three step' procedure including putting allegations into writing, holding a meeting to discuss the allegations, giving the employee the opportunity to appeal against the decision and completing all of this within a reasonable timeframe. The revised code has attempted to simplify the processes that both the employer and employee go through when dealing with a dispute, however, it fails to give employers clear guidelines on what is expected of them by using ambiguous terms such as 'reasonable time' and 'promptly'. This is likely to cause confusion for employers and employees alike.

One of the major differences between the revised code and the existing 'three step' process is that the code is not legally binding and the failure of employers to follow the code will not automatically constitute unfair dismissal. However, an employment tribunal will take into account whether the code has been followed and could uplift any award by up to 25% if there has been what the tribunal considers to be an unreasonable failure to follow the code by either party.



Interestingly, employment tribunals will also have the power to consider various different factors including the size of the employer and the resources available to the company when deciding if the employer has acted reasonably in terms of process.

Disciplinary and grievance issues should be handled consistently and promptly, ensuring appropriate investigations are done and also ensuring that any meeting is held by a manager who has had no previous involvement with the case. Employees should also be given the opportunity to put their case forward, be accompanied at any meeting and be given the right to appeal.

When an initial investigation reveals that there is a disciplinary case to answer the employee should be

notified in writing and a meeting held promptly, whilst still allowing them time to prepare. Once appropriate action has been decided and communicated by the employer, the employee should have the right to appeal.

Employees should let their employer know the exact nature of their grievance and employers should arrange a meeting to allow the employee to explain their

grievance. Once appropriate action has been decided and communicated by the employer, the employee should have the right to appeal.

Employers and Employees should do all they can to resolve disciplinary and grievance issues in the workplace and where this is not possible

consideration should be given to use a third party to help resolve the problem. Recourse to an employment tribunal should be a last resort. The spur to use a third party to assist in achieving a resolution will no doubt be welcome news to mediators, who may well see an increase in the demand for their services.

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Care in the Community

We are constantly on the lookout for new stories and views to feature in future issues of the Healthcare Matters series. If you have any ideas that you would like to discuss, please contact Rickerbys' Head of Healthcare and Healthcare Matters editor, Louise Crook on 01242 246484 or Email: louise.crook@rickerbys.com. We look forward to hearing from you.

Private Client

Lasting Powers of Attorney - One Year On *By Deborah Underhill, Rickerbys LLP*

A year on, what can we say about Lasting Powers of Attorney (LPA's)? My view is that they are like the Curate's Egg – good in parts.

The general public may have been aware of the odd headline regarding the delays at the Office of the Public Guardian (OPG).

Those members of the public who have tried to use the LPA's and the new regime will probably view the arrangements as being confused and delayed. A care home owner/manager may find their fee income drying up from the point when their resident starts to lose capacity until the LPA has been registered at the OPG. Registration can take 2 to 3 months and so families often have to struggle along in a kind of limbo during this time, as do the care homes.

Practitioners such as solicitors and doctors find it has brought new problems, processes and lots of grey areas which the OPG is only just starting to clarify. This will see a knock on effect for care home managers. I know of one elderly client whose capacity to make an LPA was questionable, but her

GP indicated it was now outside his area of expertise to provide a report. He advised contacting the geriatric consultant who in turn declined to be involved and directed us to the psychogeriatric consultant.

For attorneys (where acting under EPA's or LPA's) it has brought a very different decision making process to manage financial affairs. This in itself is not all bad. Decisions must be made now in the donor's best interests, and they must be assisted to make all decisions where it is possible for them to do so. This is a good thing in principle, but the practical aspects such as the need for detailed record keeping and a working knowledge of the Code of Practice (296 pages) introduced under the Mental Capacity Act, can be a minefield. Care home managers will be reliant upon the attorneys following this procedure and hopefully judging the situation correctly to conclude who is

making decisions and why.

It is also interesting to note that proportionately few of the LPA's for personal and welfare matters (as opposed to property and affairs) have been made – these are the documents which can contain authority for the attorney(s) to withhold life sustaining treatment. They also deal with what a resident might wear, eat and where they should live. Again, care home managers need to be mindful of who they are consulting on day to day matters such as these.

Overall, there is a long way to go before the system is up and running. For the time being, proper advice on the processes, documents and their implications to the resident is even more important than it was under the old EPA arrangements.

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The Team Profile: Louise Crook

Louise Crook, Head of Rickerbys' Healthcare team, originally from Staffordshire, joined Rickerbys' Commercial Property team in 2006 after spending seven years at a firm in Gloucester.

She carried out her training contract with Cartwrights Solicitors in Bristol.

Louise has a depth of knowledge in Commercial Property transactions having worked on all aspects of development and landlord and tenant work within the sector. She has worked with developers and landowners, landlords and tenants enabling her to have a broad appreciation of all the issues involved. Louise has a no-nonsense approach to getting the deal done, tackling issues head on to achieve the best result.

Louise has worked with a broad range of local and national clients from local charities to national house builders to offshore trusts. Her experience and knowledge combine to offer a comprehensive service to the client.



Rickerbys' Guide to Credit Control

Rickerbys partner Derek Jones, one of Gloucestershire's only two Solicitor Insolvency Practitioners (the other being fellow Rickerbys partner Colin Gibson) provides a comprehensive guide for any business in today's troubled economic climate.

Whether operating a credit system or using one, this manual covers all essential aspects of credit control, from basic best practice advice on operating an in-house credit system to Court procedures and legal enforcements.

If you wish to receive a PDF copy of this document please contact:

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