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Health and Care Regulation – The Present and the Future

In this article, we discuss some of the themes we have seen in recent CQC regulation as well as providing an update on the development of their new assessment framework. I will also highlight other key developments in the sector that all providers should be aware of.

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The last few years have seen substantial changes in how health and care is regulated. The pandemic forced the CQC to move away from routine inspections. Hastily-prepared alternative models of regulation have come and gone, seeking to identify providers of greatest concern at the expense of broader scrutiny and an up-to-date view of the quality of services across the sector.

In 2021, the CQC set out its new strategy. It aims for a more dynamic, data-led method of assessment with a much greater emphasis on people's experiences of care, care integration and cultures of safety, learning and improvement.

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Current trends in CQC inspections

One of the headlines in the CQC's strategy for 2021 and beyond was a desire to increase the standards expected for care to be classed as 'Good'. From our recent experiences, this direction of travel has already begun to affect provider ratings. Inspection reports that would have produced overall 'Good' ratings previously are not attracting ratings of 'Requires Improvement'. 44% of the overall ratings given in the last month were 'Requires Improvement' or below, compared to 14% of the most recent ratings over all services. This is something that lenders, insurers and investors will need to bear in mind when comparing more recent ratings with previous expectations.

Are there other factors driving the increased proportion of lower ratings? One key factor is almost certainly the way that the CQC is prioritising inspection activities. It is focusing those activities predominantly on services where there are concerns. This not only means that they are more likely to be inspecting lower-quality services, but also that inspectors' initial approach is likely to be a sceptical one. Services where there are no concerns, even those with lower ratings that may deserve improved ones, are waiting a very long time for inspections despite the CQC's aim to address the issue.

Other factors may include the fact that relatively little allowance appears to be being given by the CQC for challenges that arose during more intense periods of the pandemic, particularly where providers are still in the process of addressing staffing shortages, backlogs or the reintroduction of services.

There is also a need for providers to adapt to the CQC's new priorities. Greater emphasis on people's experiences of care has not yet been matched with a broader or more methodical approach to collecting feedback. The result is that one negative account can have a disproportionate effect on inspection outcomes. Providers can protect themselves form this by being proactive in collecting feedback from people using the services and their families.

The management of COVID risks has moved on from some of the more detailed national guidance to a period where decisions around management are expected to be much more service-specific. The CQC may identify an additional risk within a service and challenge providers to show that it has been addressed, even where that means considering going beyond the requirements of any national guidance.

Services have innovated, adapting to changes in the care environment and staffing shortages, along with other challenges. Where successful, this has been achieved without any detriment to outcomes. However, the CQC's aspiration to benchmark providers against other similar services remains just that. For the time being services will still be measured against their own internal aspirations. Where adaptations have been necessary, it is vital that is reflected in written policies and procedures.

CQC's new inspection framework

So when will the CQC's new approach be finalised and their ambitions of a more dynamic inspection framework realised? It now appears that for most providers, that will be in January 2023. The CQC is developing a new inspection framework targeting implementation then, following on from various trials with early adopters starting in August 2022.

What is being prepared is a single inspection framework covering heath and care providers and the integration and commissioning roles of Integrated Care Systems and local authorities. The CQC are being given new powers to assess the latter two categories of organisation. It is hoped that this may address previous provider concerns that they were punished by the CQC for issues that, in fact, arose from commissioning errors or inadequacies.

Point-in-time ratings stemming from set-piece inspections are to be replaced by ongoing multi-point assessments, delivering on the aim for more responsive service ratings. As a result, ratings may change much more often.

Additional sources of information will be utilised, particularly in relation to feedback from people experiencing care, care workers and partners in care pathways. Internal CQC 'dynamic dashboards' will inform regulatory action. More detailed, easier-to-digest information will be made available to the public and even more given to providers to allow them to prioritise areas for improvement.

Long narrative inspection reports are to be replaced with scores, short statements and benchmarking of provision and outcomes against other comparable providers. The latter, if implemented well, could be one of the most significant positive impacts of these reforms; with ambitious providers no longer being criticised for failing to meet their own ambitious targets despite matching or exceeding the levels achieved by their competitors.

The five key CQC questions, Safe, Effective, Caring, Responsive and Well-Led, will remain but will now be complemented by 'I statements' describing how people should experience care, such as "When I move between services, there is a plan for what happens next."

Below that, the current 300+ 'Key Lines of Enquiry' will be replaced by 34 'Quality Statements' focusing on how care is provided. Each Statement will sit under a Key Question and be scored from one to four. The aggregate scores will determine the rating for that Key Question. In this way ratings can be changed without reassessment of the service as a whole. Where the CQC receives information relating to one or a small number of Quality Statements, it can update those scores and then reassess the aggregate and therefore the rating.

As well as the feedback describes above, observation of care (or inspection) will remain an important part of assessing most services. However, processes, policies and procedures will no longer be assessed on-site, but through remote collection of information from providers. Outcomes will also be given a much greater emphasis under the new framework.

If you want to get some insight into how this framework has been developed, visit www.thinklocalactpersonal.org.uk/makingitreal. The CQC has itself stated that it has borrowed heavily from this approach to ensure that the framework does all it can to promote personalisation.

Choice, control and personalisation are said to be a golden thread throughout the new approach, with closed cultures remaining a key focus. This is alongside greater emphasis on safety culture, learning & improvement, listening to people's voices, workforce wellbeing, equity of access, experience & outcomes and sustainability of services and the environment.

Overall, I am enthused by the CQC's ambition. It offers a clearer way for providers to see how their rating is reached and can be improved. There will be greater transparency for the public. Benchmarking and dynamic re-rating offer real rewards for high quality and improving services.

As ever the key will be implementation. If my descriptions of how feedback will be collected, what data will be compiled and how or how benchmarking will work seem vague, that is because there is much to come in the detail of this approach. However, for now, I remain positive.

CQC prosecutions

Although anecdotal, it appears to us that there is a further increase in CQC prosecution activity. Many of the prosecutions on 2021 and early 2022 have focused on NHS Trusts, but it is inevitable that any such trend will also affect independent providers.

One factor that may be driving an increase in criminal investigations is an apparent focus on inquest outcomes. Providers should be prepared to face an investigation where a coroner finds that neglect played a part in a death or where a report to prevent further deaths is issued.

Fines for these offences are increasing too. Two NHS Trusts have recently been fined £1.3m, in relation to two patient deaths, and £700,000, in relation to one death, respectively. These fine took account of the fines reduction of up to 50% available to public bodies. In June 2022 an independent care home provider was fined £1.5m following a CQC prosecution relating to a resident's death in May 2018.

Providers and investors also need to be aware of how long CQC criminal investigations go on. It remains that case that the vast majority, if not all, CQC prosecution decisions are made nearly three years after the events they relate to. In our experience there are often long periods during investigations, sometimes well over a year, where providers hear nothing and may assume that the risk of prosecution has gone away.

Social Care Funding Reforms

Away from the CQC, another key development coming in 2023 are social care funding reforms. The greatest impact is likely to be seen in the care home sector and I wanted to highlight one element for providers of such services – the 'fair cost of care' reforms.

The Government has promised that, from October 2023, there will be an end to the cross-subsidisation of local authority funded care home places by the charging of much higher rates by self-funding residents. In doing so they have acknowledged what many providers have said for years, which is that local authority rates are often below the cost of providing care.

The Government intend to achieve this by allowing self-funding care home residents to arrange their care through their local authority, and therefore at the lower rate. The intention behind the reforms is to see everyone paying an even rate for the same care home, sitting somewhere between the current local authority rate and the current self-funded rate.

So far, I have not heard any of the candidates to be the next Prime Minister cast doubt on these reforms, even if some disapprove of the national insurance increase to fund it. Therefore, we would encourage all providers to engage in the 'cost of care exercises' that their local authorities are being required to carry out in the coming months to ensure that a realistic picture of those costs, including a fair return on assets and operation, is produced.

Other things to talk to us about

Other developments to be aware of in 2022 and 2023 include mental health reforms, which may see a push for increased community provision for learning disability and autism, the initial stages of Integrated Care Systems and he much-delayed Liberty Protection Safeguards. Feel free to get in touch to discuss these or any other health and care issues with us.

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