

CQC is proposing to change the rules on the publication of enforcement information

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CQC has the power to take a range of civil and criminal enforcement action against a provider where breaches of Regulations are identified. Civil action includes issuing warning notices and taking non-urgent action to cancel, suspend or amend conditions of registration (such action can also be taken using urgent procedures depending on the severity of breaches identified).

In 2016/17, CQC took 1,910 enforcement actions, which is a 75% increase on the previous year. Not only has CQC dramatically increased its enforcement action capability, but also, in its latest consultation, “*Our next phase of regulation: consultation 2*”, (the “Second Consultation”) CQC proposes to be tougher on services repeatedly rated as “Requires Improvement” and to take enforcement action at Group level in certain circumstances.

A further proposal, which we concentrate on in this article, concerns the rules on the publication of non-urgent enforcement action.

Current procedure in relation to non-urgent action

Non-urgent enforcement action starts with CQC serving a Notice of Proposal which sets out the action CQC is proposing to take. This could be to suspend, cancel or limit a provider’s registration. At this stage, the provider can make written representations to CQC, within 28 days, about the Notice of Proposal and explain why it should be withdrawn. CQC is required to consider these representations before deciding whether to adopt its proposal. If CQC adopts its Notice of Proposal, a Notice of Decision is then served on the provider. The provider then has the right to appeal against this, within 28 days, to the First-tier Tribunal (the “Tribunal”), which is a Court independent of CQC. Once the appeal is lodged, the Tribunal issues Directions and sets a date for a hearing. In our experience, this process can take several months and the provider has an opportunity to improve its service during that time and negotiate a settlement with CQC. This is because the Tribunal will look at the situation at the date of the hearing, taking into account improvements and considering whether any of the service users are at risk of harm. The Tribunal will also apply principles of proportionality when deciding whether enforcement action is justified. CQC currently only publishes information about enforcement action once any representations and appeals processes are complete.

Current procedure in relation to urgent powers

CQC has the power to impose conditions on or suspend a provider's registration on an urgent basis. The threshold for the use of this power is that unless there is an urgent amendment of conditions or suspension, a person will or may be exposed to harm. Where urgent powers are used, the decision takes immediate effect. A provider has a right of appeal to the Tribunal but this does not prevent the condition or suspension of registration from taking effect immediately. If CQC wishes to cancel a provider's registration using urgent powers, it must apply to a Justice of the Peace for a Court Order. Such an Order should only be granted if it appears that there will be a serious risk to a person's life, health or well-being if the Order is not made. Because urgent enforcement action takes effect immediately, CQC publishes this information straightaway and CQC is not proposing to change this.

Current legal position on the publication of non-urgent enforcement action

The legal position in relation to non-urgent enforcement action is set out in the Health and Social Care Act 2008, as amended by the Care Act 2014. This provides that Regulations may authorise or require CQC to publish information relating to enforcement action. The Care Quality Commission (Registration) Regulations 2009 (the "Regulations") prescribe the time when, and manner in which, any information is to be published. According to the Regulations, CQC must publish information relating to:

- the cancellation or suspension of registration;
- the conviction of any person in respect of certain offences and the penalty imposed;
- the variation or removal of any conditions of registration; and
- the imposition of any additional condition of registration.

In respect of a Notice of Decision to cancel or suspend registration or a Notice of Decision to vary or remove any conditions of registration, where an appeal is brought and the Tribunal has directed that CQC's decision is not, or is to cease, to have effect, CQC must not publish the enforcement information. CQC can only publish this information, within 3 months, after an appeal has been determined or if an appeal has been abandoned. This means that CQC can only publish enforcement information if its enforcement action has been upheld by the Tribunal or if the provider has abandoned its appeal against CQC's action.

In addition, CQC "may" publish information relating to warning notices and penalty notices but is not required to do so. Before publishing details of warning notices and penalty notices, CQC must provide an opportunity to

make representations relating to the matters dealt within the notices and take any such representations into account when determining whether to publish the information.

Implications of the proposal to publish non-urgent enforcement action

Currently, CQC does not have the legal power to publish details of enforcement action before the outcome of an appeal is known. However, this may change in the near future as CQC proposes, in its Second Consultation, to publish details of enforcement action before the outcome of a provider's representations or appeal has been determined. This proposal, if implemented, could have a significant impact on a provider's business and reputation.

Before the proposal can be implemented, CQC would have to be given the legal power to publish information before the determination of an appeal by way of Regulations.

The proposal goes against principles of public law such as procedural fairness, reasonableness and proportionality. Proportionality is of particular importance since the case of *Wellbeing Care Ltd v CQC* [2014] 2344.EA, where the Tribunal confirmed that it must look at the current situation, including any improvements made to determine whether any service users are at risk of harm. The action taken by CQC should be proportionate and consider the impact of closure of a care home upon service users at the time of the hearing. During the months leading up to a Tribunal hearing, providers have an opportunity to make improvements and demonstrate that service users are not at risk of harm. By publishing enforcement action at an early stage, CQC may adversely affect a provider's efforts to comply with the Regulations and improve the service for the benefit of service users.

The premature publication of enforcement information risks generating adverse publicity and CQC has not clarified how it would rectify this position if it transpires that the action is found to have been disproportionate by the Tribunal at a later stage.

The second Consultation closed on 8 August 2017 and we will need to wait for CQC's response to establish whether this proposal will be taken forward. CQC's response is due to be published in the autumn and providers should therefore keep an eye on developments in this area.

We can provide specialist legal advice to providers on all aspects of regulatory enforcement proceedings. If you wish to discuss the implications of the proposed changes and what it means for you, please contact [Laura Guntrip](#).