Factual Accuracy Process – A Reminder

AUTHOR / KEY CONTACT

Laura Guntrip
Partner

Laura.Guntrip@LA-Law.com
01202 786187

As we see CQC completing increasingly more inspections, against a backdrop of an ongoing increase in the volume of feedback received by CQC, it is perhaps not surprising that the number of Requires Improvement and Inadequate ratings have increased and that enforcement action appears to be rising.

CQC data shows that the use of the 'Give Feedback on Care' function on the CQC website has increased steadily over the past 12 months, with around 7000 pieces of feedback received by CQC each month over the past few months. CQC continues to use its intelligent approach to monitoring by using information received to allocate services to one of three 'bands' and to continue to monitor through both inspection and its Direct Monitoring Approach. CQC continues to undertake inspections where it considers there is a risk or in response to information of concern.

We have also seen an increase in CQC finding breaches of regulations, Inadequate ratings and enforcement action. In particular, we have been instructed to support care home and domiciliary care providers in relation to a string of Inadequate ratings, Warning Notices and Notices of Proposal over recent months.

Enforcement action can obviously have a significant adverse effect on a service, so it is important for providers to try to correct any factually inaccurate statements within a draft inspection report wherever possible.

Factual accuracy process

Many care home owners and domiciliary care providers who have contacted us recently have felt that CQC has been unfair or disproportionate in their inspection reports. Many providers seem to feel that CQC has inspected looking for problems and that CQC has not taken a fair approach to challenges faced by care homes and other care services during the pandemic.

The first, and most common, way to correct an inspection report is through the factual accuracy process. Factual accuracy comments must be submitted to CQC within 10 working days of receipt of the draft inspection report. The factual accuracy process gives the opportunity to do the following:

- Correct any factual inaccuracies in the draft report

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- Challenge any statements on the basis they are disproportionate
- Request corrections or alterations to statements within the report
- Provide further evidence for CQC for completeness
- Where CQC states a regulation has been breached, challenge whether the evidence supports a breach
- The first opportunity to seek a change of rating

As experienced health and social care solicitors, we are often approached by clients for legal advice and representation to challenge a rating through the rating review process or to appeal a Notice of Proposal or Warning Notice and in many cases, we find that they have not taken full advantage or best utilised the factual accuracy process. For example, we often see that owners have not submitted evidence to support any factual inaccuracies they are asking be corrected and have not included arguments about proportionality or if CQC has properly applied its rating characteristics. On other occasions, we hear that providers did not undertake the factual accuracy process or did not include all of their points of challenge, through fear of antagonising the regulator.

These are missed opportunities. It is worth care home and domiciliary care owners and managers investing some time in the factual accuracy process, especially if the report places the service into special measures. This is your opportunity to try to change the report if it is incorrect and do not think it is a fair or accurate reflection of your service.

We still find the factual accuracy process more effective than the rating review process, in which the grounds for challenge are much narrower and care homes are limited to 500 words.

What to include in factual accuracy comments

Suppose a statement in the draft report is factually inaccurate. In that case, you need to tell CQC what you want them to change and why, and also attach evidence to show the statement is inaccurate, clearly signposting CQC to that evidence. Be mindful though of any other concerns which may be caused by any evidence you intend to send to CQC.

Also, consider:

- Whether you can challenge the basis of any alleged breach of regulation;
- Whether CQC has judged specific issues under the correct key question;

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- Whether CQC has correctly interpreted and applied the law;
- Whether arguments can be made about proportionality or whether CQC has followed its guidance and correctly applied rating characteristics;
- Whether there is any other information you would like CQC to include in the report.

Enforcement action

If you find yourself in receipt of an enforcement notice, it is important that action is taken.

The most serious form of civil enforcement action is cancellation of registration of a service. Usually, this process will begin with a Notice of Proposal to cancel registration or to vary a registration to remove a location. Unfortunately, CQC seems to be issuing these notices quite readily at present, often prior to the inspection report being published. We have also seen several occasions when a Notice of Proposal to cancel or vary registration has been received alongside a draft inspection report. In those circumstances, both will need to be robustly challenged.

It is perfectly possible to prevent the cancellation from happening if the correct action is taken. Further information in relation to this process can be found in our recent blog here.

Our lawyers often assist care providers to prepare factual accuracy comments, rating reviews and defend or appeal enforcement action. If you would like to discuss how we can help you, please contact our health and social care solicitors at laura.guntrip@la-law.com or 01202 786187.

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