



Learning Disability Services: An Opportunity for Change?

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With CQC consulting on new guidance and the Equality and Human Rights Commission bringing a legal challenge against the Health Secretary, is this an ideal opportunity for a detailed review of the provision of learning disability services?

In 2017, the Care Quality Commission (CQC) published its 'Registering the Right Support' policy on registrations and variations, aimed at those providing care and support to people with learning disabilities.

Last year, CQC carried out an engagement exercise to discover how the guidance could be improved. Feedback indicated that the guidance should be "*clearer and should better reflect personalised care and outcomes for people*", so CQC has revised the guidance with a view to making it more clear. However, CQC appears to have achieved the exact opposite. There is uncertainty about the status of the updated guidance - is it intended to replace the existing guidance, or act as a supplement? It was our understanding that the new guidance would replace the previous version, but the draft guidance itself casts doubt on that position.

The new, shorter, guidance includes a change of title - '*Right support, right care, right culture*' - and is in two parts. The first document sets out how providers can demonstrate that they are meeting the necessary requirements and the second document provides a number of case studies. CQC has stated that there will be more case studies in the final version. We can see how the new draft guidance might assist providers who wish to make applications to register or vary their services, but if the existing guidance is to be replaced with the draft, it is unclear if this is adequate.

CQC's application of the existing guidance has been strict, with providers often struggling to overcome the criteria. For example, many providers wishing to register services with more than six beds are often refused by CQC, on the basis that the service would be too large. This is despite the guidance explicitly stating that there is no intention to apply a "one size fits all" approach. Several cases have been heard by the Care Standards Tribunal, exploring the merits of CQC's application of the restriction on bed numbers and whether they fall under the meaning of a 'campus' or 'congregate' setting, which are also not permitted under the guidance.

Unfortunately, the new guidance does not appear to provide any real clarity for providers. CQC has stated in the draft guidance, "*Our policy on regulating providers that support autistic people and people with a learning*

disability remains unchanged". We feel that CQC has missed an opportunity to provide clear, detailed guidance for providers.

It also appears that CQC may be adding to the problem. With concerns about thousands of people with learning disabilities remaining in secure hospitals, miles away from their families, there is a real and urgent need to provide those people with the opportunity for independent community living. However, CQC's strict interpretation of the guidance means that many providers who are willing to provide this type of service are being prevented from doing so, often for trivial reasons. For example, applications to extend from six beds to eight beds may be refused because they would be deemed too large, despite the fact that the service is well run, rated 'Good' by CQC and the residents living there are happy.

The recent Panorama exposure of abuse at Whorlton Hall, an independent hospital, has brought into sharp focus the risks associated with such settings.

Interestingly, on 12 February 2020, the Equality and Human Rights Commission (EHRC) initiated a legal challenge against the Secretary of State for Health and Social Care for a repeated failure to move people with learning disabilities and autism in to appropriate accommodation. The EHRC has sent a pre-action letter to the Health Secretary arguing that the Department of Health and Social Care has breached the European Convention of Human Rights for failing to meet targets set out in the [Transforming Care](#) and [Building the Right Support](#) programmes. The EHRC is further concerned that the deadlines set out in the [NHS Long Term Plan](#) and [Planning Guidance](#), will not be met. The Commission is arguing that by missing these deadlines, this *"suggests a systemic failure to protect the right to a private and family life, and right to live free from inhuman or degrading treatment or punishment."*

The Health Secretary has 14 days to respond to the letter. We will be monitoring this legal challenge closely; it will be interesting to see how the Health Secretary responds and what, if any, action will be taken.

If you are making an application to register or vary your registration in respect of a learning disability service, or if you have any questions arising from the matters above, please contact our experienced [healthcare lawyers](#) to see how we can assist. Contact our healthcare solicitors by emailing online.enquiries@la-law.com or telephoning 01202 786161.