



Counsel and Care and Independent Age consultation response

Department of Health

Consultation on proposed changes to regulations for Care Quality Commission registration

7th October 2011

Counsel and Care and Independent Age

This is joint response from Counsel and Care and Independent Age. The two charities have merged to develop a broader range of services for older people than either could provide separately.

About Counsel and Care

Counsel and Care is a national charity working with older people, their families and carers to get the best care and support for older people. We provide advice and information for older people and their carers to ensure they are aware of and receive their rights and entitlements, specifically related to care and we promote choice and control in later life.

About Independent Age

Independent Age is a unique and growing charity: a support community for thousands of older people across the UK and the Republic of Ireland. We offer a 'helping hand from a trusted friend', tackling older people's poverty and loneliness by offering information, advice and friendship. Our help varies according to the type and extent of the individual's need. All the older people we help receive:

- Information about benefits and other issues affecting older people
- Ongoing support from our helpline and newsletters
- Membership of the Independent Age community, with the opportunity to participate in events and build friendships with other people.

For those in the very greatest need it can include even more: regular befriending and support from an Independent Age volunteer, detailed assessment and casework, practical support and even financial help in emergencies.

Counsel and Care and Independent Age's response

Counsel and Care and Independent Age have considered the consultation document released by the Care Quality Commission on 18 July 2011. We have a number of comments to make on its proposals.

Q16. Do you agree with the proposal to allow CQC to specify a standard format for statutory notifications?

Counsel and Care and Independent Age agree with the proposal to allow the CQC to specify a standard format for statutory notifications. This will make the process more straight-forward for providers and reduce CQC's processing time of notifications.

Q17. Do you agree with the proposal that providers should be required to notify CQC of these additional incidents?

These incidents will be dealt with separately:

- **That registered persons are required to notify CQC of an address for service of documents, including an e-mail address where the provider consents to this, and any change of this address**

Counsel and Care and Independent Age agree with this proposal. This will prevent miscommunication between the CQC and providers. This provision means that the onus is on the provider to keep the CQC informed of a current address/email address and any changes to that information, rather than the CQC finding out the information they hold for a provider is incorrect after they have sent documentation or through third parties, as the case may be at present. This means that the CQC will hold up-to date information on where to send documentation so providers can be made aware of any new developments or legislation affecting them. An incorrect address will not be a valid excuse for providers in the future.

- **To make it explicit in the regulations that adult social care providers are required to notify CQC of the death of a service user wherever that death occurs.**

Counsel and Care and Independent Age agree with this proposal. It is essential that the CQC is notified of all deaths of service users of registered providers, whatever the location, so that any anomalies can be identified and the CQC can investigate if there has been poor practice and/or a failure to comply with CQC regulations. The CQC can then take immediate enforcement action against such providers to prevent any risk to service users.

- **To amend the regulations so that providers notify CQC of an application for the Deprivation of Liberty Safeguards to apply at the same time as giving notification of the outcome of such an application. This would include whether the application has been preceded by an urgent self-authorisation, and the outcome of an application would include the withdrawal of an application.**

We strongly disagree with this proposal. The CQC needs to be notified when someone applies for a DOLS, not just the outcome of a DOLS application. This is because it is the role of the CQC to ensure that older peoples' rights are protected under the Mental Capacity Act 2005 and associated guidance, such as the Code of Practice to the Act. It is the sole body to regulate DOLS applications at a national level and ensure they are functioning as they should be. As soon as a DOLS application is made, the CQC should be scrutinising applications to ensure that someone will not be unlawfully or unnecessarily deprived of their liberty. The CQC should be looking at: Why a DOLS has been applied for; Who has applied for a DOLS; Whether the code of practice is being followed correctly. The CQC should be using the time between notification of intention to apply a DOLS and notification of outcome (which can take up to 21 days) to examine and ask questions about applications. Recent evidence from a study in *The Psychiatrist*¹ suggests that there should be more scrutiny and training of DOLS legislation, not less.

Notification at the outcome stage is too late for the CQC to ask further questions about an application or stop a DOLS authorisation from going ahead. People will be deprived of their liberty at the same time the CQC is made aware of the application to deprive someone of their liberty. This does not leave room for scrutiny or action, making it a fairly perfunctory process.

Monitoring of DOLS at both the process and outcome stages is not bureaucratic but essential if the CQC is to have any meaningful role in regulating DOLS and protecting the rights of vulnerable people.

¹ Cairns, R. et al (2011). Judgements about deprivation of liberty by various professional: comparison study. *The Psychiatrist*. No 35: 344-349.

Q18. Do you agree with the proposal to exclude providers directly arranged by an IUT, parent or carer from the requirement to register?

The legislation, as it stands, prevents carers from choosing unregulated providers for the person they care for. This amendment would allow carers the *option* of choosing an unregulated provider; it is not a recommendation to choose an unregulated provider. We support this proposal, subject to regular review of how the amendment was working in practice.

Although our advice workers would not recommend choosing an unregistered provider to our service users, as this would mean the care recipients would not be guaranteed CQC standards of safety and quality, we can see there may be individual situations where an unregistered provider could be the best option for the cared-for person. For example, a carer employing a trusted neighbour, relative or friend (which would count as an unregulated provider under the current legislation) to look after the cared-for person. This person may be trusted by the family, have a long standing relationship with the cared-for person and may provide care above and beyond that provided by an equivalent careworker from a registered provider such as a care agency.

Carers, IUTs or parents will be overseeing the care of the unregistered provider and can easily change to a different, registered provider, if they are not happy with the care given. Often carers, IUTs and parents take responsibility for organising the care of a vulnerable person. The same people should be permitted to choose between a registered provider and an unregistered provider, in which ever way they see fit, to best meet the needs of the person they care for. Saying this, we recognise that not all carers, IUTs and parents do act in the interests of the cared-for person so it is important that where applicable, standard adult safeguarding measures are applied. We would propose that, at the assessment stage for social services support, a risk assessment with regard to these arrangements is undertaken as part of the assessment process. This would be a more reasonable and appropriate response than registering all carers, IUTs and parents.

The only way of getting around the legislation currently, is if the relative, friend or neighbour is not paid for caring for the cared-for person, as unpaid carers are exempt from this regulation. However this unfairly penalises carers, encouraging carers to go unrecognised and financially unrewarded for their work. As many relatives and friends will go on caring for the cared-for person, regardless of whether they are paid or not, either because they want to or because there is a lack of alternative support, paying and formally recognising this type of carer would add status to their role and go some way to alleviating low income levels amongst carers as a whole.

Lastly, we agree with this proposal because people who need someone to organise their care for them, such as people without mental capacity, should be

allowed the same option of care providers as people with capacity. The law permits people organising their own care to choose an unregulated provider, those unable to organise their own care should not be penalised.

Q19. Do you agree with the proposal to amend the regulations to make it clear that IUTs, parents and carers should not be regulated as providers of care when they directly employ an individual or individuals to provide care to one person?

Counsel and Care and Independent Age agree with the proposal to amend legislation so it is clear that IUTs, parents and carers should not be regulated as providers of care if they employ an individual(s) to provide care for the cared-for person. This will prevent different local authorities interpreting the law differently, so no local authority applies practices that require individuals to register with the CQC.

To regulate individuals who organise care on behalf of another would be too bureaucratic and costly both for the CQC and the individual. It places an unfair burden on individuals to keep up to date with, and comply with copious amounts of regulation. Individuals could then be held accountable for a failure to comply with a regulation. This is simply unworkable; if large organisations struggle to comply with CQC regulations, it cannot be expected that individual carers, IUTs and parents, who may already be employed and/or in a caring role, to find the time to comply with such regulations. For these reasons many individuals would be put off registering with the CQC and/or employing an individual to provide care for the cared-for person.

Discouraging people from employing an individual to care for someone would be at odds with the government's personalisation agenda which aims to promote choice and control over care options. Leaving the legislation open to interpreting carers, parents and IUTs as providers would simply deter people from taking out direct payments/personal budgets as they would be worried about the subsequent paperwork and enforcement measures for failing to comply. This could lead to individuals feeling coerced into accepting local authority organised care thus restricting the care options available for people unable to organise their own care.

If the person with care needs was able to organise their own care, they would not be required to register with the CQC, but because they are not able to, and require the help of another person, they are being penalised in terms of the choices available to them. Carers should not be prevented from supporting the people they care for to get the best possible care for them that meets their individual needs.

Q20. Do you agree with the proposal to establish a minimum threshold of four weeks of annual activity beneath which providers of personal care will not need to register?

We strongly disagree with the proposal to no longer require providers to register with the CQC if they provide less than 4 weeks of care a year. Providers can still carry out unsafe practices, provide poor quality care or commit misconduct whether a provider provides care for 3 weeks or 52 weeks. Abuse only takes minutes to occur. Therefore it is essential that the CQC is aware of, and regulates *all* providers of care.

The consultation document states the CQC is not currently aware of how many providers this proposal will affect, however this is not a valid reason for the CQC not to regulate them. There is a need to understand the type of care being provided and who is providing this care before deciding to exclude certain types of provider from registration requirements. By the CQC including these providers in registration requirements, they will have a better understanding of care provision in England and so will be a more effective regulator overall.

If this proposal goes ahead, it will create an unknown number of unregistered providers acting independently of the CQC, without regard to CQC regulations. These regulations are there for a reason: to protect the welfare of service users, many of whom are incredibly vulnerable. If these providers do not fall under the CQC's jurisdiction, it could leave the users of such services open to poor quality care (or worse) with no recourse to complain to the CQC as service users of similar services (who provide care for more than 4 weeks) can. Whether someone receives care from a provider which is active for 3 weeks of the year or a provider which is active throughout the year, each service user should be able to expect the same high standards of care and safety.

The administration involved in registering these providers is fairly minimal and as the official regulator of social care in England, the CQC should be focusing on the outcomes for the people it is tasked to protect regardless of the need for efficiency savings.

Q33. Do you agree with the proposal that a new statutory requirement notice arrangement should be put in place before CQC is able to bring a prosecution that would allow the possibility for CQC to prosecute a provider or manager for a major one-off failure to comply with the registration requirements?

We agree with the proposal to introduce a new section 29 notice arrangement which would allow the CQC to prosecute a provider or manager for a major one-off failure. Currently, providers are able to side-step this sanction as long as,

once serviced with a section 29 notice, they comply with its terms within the time set by the CQC. This proposal will increase the CQC's ability to prosecute providers failing to comply with registration requirements, will focus providers on ensuring quality care provision and will act as a strong deterrent for providers failing to meet registration requirements and care standards.

Q34. Do you agree that the defence against the offence of failing to comply with registration requirements should be changed to apply where a provider or manager took all reasonable steps and exercised all due diligence?

We agree with the proposal to change the wording of the registration requirements to 'took all reasonable steps *and* exercised all due diligence'. In its current form, the wording gives providers a loophole which they can exploit in their defence to whether they failed to comply with registration requirements. Tightening the wording of the legislation will ensure providers are more proactive and vigilant in ensuring their compliance with registration requirements. This will have a beneficial impact on care quality standards and safety for service users.

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