

VODG Briefing

When is a Care Home not a Care Home?

1. Synopsis

This briefing looks at the issue of how the Care Quality Commission (“CQC”) determines whether a service should be registered as a care home or not. The question is of particular relevance to any provider developing supported living or extra care facilities whether as a new development or by re-engineering a registered care home service and seeking cancellation of the registration. The briefing aims to answer the following questions raised by providers in this context.

- *What are the risks if we develop a supported living scheme only to discover it is being treated by CQC as a care home?*
- *What do we do if faced with a difficult CQC officer when we want to deregister a care home and establish the scheme as a supported living scheme?*
- *Are there any risks around housing benefit entitlement which might leave us worse off if we do the wrong thing?*
- *How do we arrange tenancy agreements for our service users who have capacity issues?*

CQC’s starting point is that a supported living scheme will rarely have to be regulated as a care home, but the lack of clarity on certain key points leaves providers with several significant problems:

- there is no means of CQC certifying that a service, once built, will not be a care home;

- the obligation to give residents a free choice of care provider leads to a position where providers cannot guarantee that the financial model they have developed for a service will work;
- a scheme's status can have a profound effect on the tenant's entitlement to Housing Benefit, as can the issue of the capacity of the service user; and
- operating a care home without being registered is a criminal offence.

These issues create real uncertainty for providers who want to develop new services but are left in the invidious position of having to take a gamble or being at the mercy of CQC if they chose to be difficult about a particular facility. Given the application of CQC policy and guidance by individual inspectors is notoriously inconsistent, the problem will remain unless there is new legislation, further challenges to CQC are taken through the courts or new, comprehensive and unequivocal guidance is issued.

2. The Legal Analysis

This section looks at:

- *the Statutory definition of a care home;*
- *the CQC Guidance on how the statutory definition should be interpreted; and*
- *the risks to providers arising from the lack of clarity in the law.*

It is our view that the approach to the legal definition of a care home taken by the current guidance issued by CQC '*Supported Living Schemes: Regulated activities for which the provider may need to register*' ("the Guidance") is not beyond challenge.

The statutory definition of a care home is based on the existence of a regulated activity which is described as:

**“the provision of residential accommodation, together with
nursing or personal care.”**

Most providers are familiar with the definition of personal care services and the extension of the definition to cover “prompting”, made under the Health & Social Care Act 2008 (“HSCA”). The problematic aspect of the definition is the link between the “provision of the accommodation” and “the nursing or care services” elements. It is this nexus which triggers the requirement for registration of a service as a care home or results in the refusal of an application for de-registration.

The definition of a care home has only been explored once by the Appellate Courts, in the ‘Alternative Futures’ case. The decision of the Court of Appeal in that case (properly known as *R (on the application of Moore and others) v. Care Standards Tribunal and another*) remains a key influence on how CQC (and inferior Courts) make decisions on this issue.

Central to the Court of Appeal’s decision was the reference, in the Care Standards Act 2000 (“CSA”), to a care home registration being in respect of an ‘establishment’. The Court said that the word could be given a wide definition which might cover: “*a partnership of two organisations providing accommodation and care; or the provision of accommodation in the form of leasehold property where care was also provided*”. The Court stated that whether there was an ‘establishment’ was a matter of fact, to be determined on a case by case basis.

The replacement wording in HSCA does not include the word ‘establishment’ but despite this the Guidance appears to carry forward the concept. For example, the indicative factors set out at section 8 of the Guidance reflect much of the Judge’s analysis in the Alternative Futures case. As the Court of Appeal decided that

'establishment' had no technical meaning its omission from HSCA means that the concept should now have no part to play in how registration decisions are determined.

A key finding of the Court of Appeal was that "accommodation" in the context of the definition of a care home can be provided by way of a lease of a self contained residential property. Unfortunately this point was not examined in detail. Therefore we remain unsure about why the Court interpreted "accommodation" in this way and whether such an interpretation could now be successfully challenged. What seems clear is that having done away with the phrase 'establishment' it would be open to a Court to revisit the definition in light of developments in supported living over the past 6 years.

The Guidance sets out a definition of what CQC considers to be a 'Supported Living Service' in rather bland terms:

"Where people live in their own homes and receive care and/or support in order to promote their independence."

CQC confirms that it is "highly unlikely" that supported living (and extra-care housing) would need to be regulated as a care home but then qualifies this by stating:

"A provider of a supported living service can only register for the regulated activity of 'personal care' rather than 'accommodation for persons who require nursing or personal care" if there is a clear and sufficient separation between the provision of the accommodation and the provision of the care. The occupier must have genuine choice concerning the provision of the care" (*their emphasis*).

CQC have added their own gloss to the statutory definition which merely refers to "accommodation together with nursing or personal care" (*our emphasis*).

The phrase 'together with' was also used in the CSA and although it was identified as a key point the Court of Appeal it did not analyse what 'together with' actually meant in this context, in the Alternative Futures case.

It is a semantic argument whether, by making self contained accommodation available, a provider is engaging in "the provision of" accommodation. The distinction between hotels, hostels and care homes which provide accommodation and landlords which let property for the exclusive use of a tenant does not appear to have been properly explored by the Court. The current uncertainty surrounding the ability of a person without the necessary capacity, to enter into a tenancy is a further complication. The Guidance identifies the absence of a "genuine and valid tenancy agreement" as an indicator that accommodation and care are being provided together. This means providers should take care to ensure that proper steps are taken to ensure legally enforceable tenancy agreements are entered into. Our view is that where there are genuine tenancies it ought to be very much harder for CQC to argue that there is a care home.

It is also arguable that CQC should apply the Guidance in light of their statutory duties. Section 4(i)(d) of HSCA states that CQC is obliged to have regard to:

"the need to promote the rights ofvulnerable adults"

which gives them a positive reason not to use their regulatory powers to frustrate the legitimate desire of individuals to live independently in their own home.

It is clear that CQC's primary concern is to ensure people have freedom over their choice of care provider but it is debatable whether it has a legitimate foundation in law for the stance it has taken to achieve that outcome. Providers are left unable to link any 'care' services to the location of the person which prevents them from being able to plan the totality of services required in an economically viable way. This does not help to deliver this type of accommodation in the volume people need.

Having considered the legal position, it is a valid question to ask whether the registration status of a service really matters? The move away from the CSA's National Minimum Standards to the Essential Outcomes under HSCA means that there is far less emphasis on the need for any particular care setting to meet distinct physical standards as to space and facilities. If CQC accepts the point that the care setting should influence the physical standards to be maintained, does it matter how that service is registered? Although the problem of supported living accommodation not being built to the same space requirements as a care home under the National Minimum Standards has gone, there are still anomalies. Trying to force a supported living scheme to operate within the care home registration regime would create problems (as well as leaving open the risk of a criminal prosecution for failure to register if the approach adopted is wrong). This conclusion suggests that more explicit guidance on the issue, should be given. It is probably too much to ask that HSCA be changed to permit an intermediate form of registered provision which reflects the reality of many supported living schemes but CQC could help providers significantly by doing more to remove the threat of prosecution.

3. The Practical Response

This section looks at the practical response to the following:

- *the risks of investing in developments in an uncertain world;*
- *the possible response to CQC if you are challenged;*
- *the consequences of the risk of having tenants without requisite capacity; and*
- *the consequences of the distinction for Housing Benefit.*

The essential commercial problem providers face is that the law has failed to keep up with practice and the models of supported living currently in use do not fit neatly into

the regulatory framework. Significant tensions exist between the rights of the individual to self determination and choice, the financial constraints on the cost of care and the regulatory framework.

The current practice of most providers is to rely on the general statement that CQC does not view supported living generally as a 'care home'. Our advice is always to seek written assurances from CQC that they will not seek to register the scheme as a care home before any expenditure is incurred. Such confirmation would not be binding but would give a degree of protection from arbitrary behaviour by CQC. A better system would be one equivalent to obtaining planning permission prior to carrying out any building development.

We are aware that most providers design their contracts with service users in ways that meet CQC's requirements by giving the service user choice over the provision of care. In reality the need for economies of scale means that such choice may only be theoretical. Local authorities tend to go along with the choice being more apparent than real, particularly at this time of significant cost pressures. This is unsatisfactory and a clearer policy from government, which recognised the economic reality of supported care settings, would be welcome.

The threat of prosecution or the refusal of a de-registration application by CQC ought to be met with a robust defence of the provider's position. The legal position is by no means settled, despite the Court of Appeal's decision in *Alternative Futures*, because the law has subsequently changed, as has policy and best practice in this area. It is possible that a different decision would now be reached on the same facts as *Alternative Futures*.

More recently the Courts' attention has been drawn to the impact that the capacity of the service user has on the issue of registration. The case of *G v (1) E and (2) A Local Authority* concerned a dispute over where a person without mental capacity should live. The point was made that if a person has no capacity to contract for a tenancy there could be no tenancy with the result that the scheme in question could only have been a care home. The Judge failed to reach a conclusive view on the issue but

stated that the consequences for the provider of the accommodation were serious because, if there was no tenancy, the provider was running an unregistered care home and was at risk of prosecution.

Housing benefit is not payable in respect of a care home although we are aware that this rule is not universally applied and there are also a few minor exceptions in the Housing Benefit regulations. Much of the accommodation provided by housing associations and charities for people in need of support remains 'exempt' accommodation for the purposes of the Housing Benefit regime. This means the rate of Housing Benefit recoverable is not limited by the general rules, which were significantly tightened with effect from April 2011. This may result in more attention being given by Housing Benefit Officers to the distinction between a care home and supported living. If Housing Benefit is withdrawn this will result in premises which have been treated as a supported living service having to be re-registered to avoid the risk of criminal charges.

It is apparent both from the Guidance and anecdotal evidence that CQC does not wish to make registration an issue for most providers but we envisage that if faced with what is perceived to be a poor provider it would not hesitate to use the registration argument. Providers cannot always control the circumstances in which the issue comes to light. The case of *G v (1) E and (2) A Local Authority* was concerned with a 'best interests' application and the issue of registration was not a relevant concern until the Judge made it one.

The absence of legal clarity has a negative impact on the appetite for providers to offer much needed supported living opportunities. This is a pity as the regulatory framework ought to encourage innovation and promote wider social policy around choice and self determination.

4. So what are the answers?

The questions posed at the beginning of this briefing are not capable of simple answers, if they were the briefing would be unnecessary! The following are only short summaries of our advice on each point.

1. *What are the risks if we develop a supported living scheme only to discover it is being treated by CQC as a care home?*

There is only a significant risk if, due to commercial considerations, the care package being offered is tied too closely to the tenancy. If such arrangements are necessary for the commercial viability of the scheme the terms upon which the care is supplied should, at the very least, be in a separate contract. Essentially this is not a risk that can be overcome, it can only be managed.

2. *What do we do if faced with a difficult CQC officer when we want to deregister a care home and establish the scheme as a supported living scheme?*

Providers ought to consider appealing in such cases. Changes in CQC practice and policy are unlikely to come about voluntarily, given the pressure the organisation is under. It is possible to appeal to higher authorities within CQC on an informal basis but a formal appeal is more likely to bring about a shift in attitude or at the least an acknowledgement by CQC that the current situation is unsatisfactory.

3. *Are there any risks around housing benefit entitlement which might leave us worse off if we do the wrong thing?*

There are clearly risks of supported living being redefined as a care home with the consequent loss of Housing Benefit. This risk is small and should be manageable as the funding obligation would shift back to the local authority social services budget (or possibly the NHS). Bridging the gap while the issue is

sorted out and the risk of payments of Housing Benefit being recouped, both add to the level of risk.

4. *How do we arrange tenancy agreements for our service users who have capacity issues?*

This question has been clouded by the recent case of *Wychavon DC v EM* which ruled that a person without capacity cannot enter into a tenancy agreement. Currently this leaves only one option, unless the person has given a suitable power of attorney). An application has to be made to the Court of Protection for authority to have the tenancy signed on behalf of the person concerned. The Court of Protection has recently issued guidance on this issue to help clarify the process.

If you would like to discuss this further, please contact John Wearing at john.wearing@anthonycollins.com or on 0121 212 7402.

All efforts have been made to ensure the accuracy of this information. Please note that this advice is intended to be general advice only and was correct at the time of publication. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of this briefing. Remember, each case is different, and accurate advice must be tailored to the individual case.

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