

URGENT

Ian Trenholm
Chief Executive
Care Quality Commission

By email only to:

[REDACTED]

Email: [REDACTED]

Your Ref:

Our Ref: MVA/00242919/1

Date: 4 May 2020

Dear Mr Trenholm,

CQC inspections

We are instructed by:

1. Challenging Behaviour Foundation
2. Respond
3. Rightful Lives
4. Learning Disability England
5. Bringing Us Together
6. Foundation for People with Learning Disabilities
7. Hourglass
8. Bristol Reclaiming Independent Living
9. People First
10. Inclusion London
11. Reclaiming Our Futures Alliance

Our clients are all civil society organisations, providing advice and services to older people, people with learning disabilities, cognitive disabilities, mental health issues, and/or autism and their families. Many of these people are currently in-patients in mental health units or care homes regulated by the CQC.

Our clients have considerable concerns about the current inspection policy, including there being a lack of clarity, and we write on their behalf to offer some suggestions to enable the CQC, after six weeks of hiatus, to carry out its statutory function to effectively protect and uphold the safety and wellbeing of people in such settings. Our clients invite the CQC to consider these and provide a reasoned response to this letter as soon as possible. Given the seriousness of the matter, should progress not be made judicial review pre-action correspondence may follow.

The concern

On 16 March 2020, the CQC announced a cessation of regular inspections, save for "in a very small number of cases" where there are "concerns of harm, such as

allegations of abuse”. On 30 April 2020, the CQC published a joint statement on its regulatory approach during the pandemic, and on 1 May 2020 limited information in relation to what to expect from the CQC Emergency Framework was made available

Our clients consider that this new policy leaves patients and residents exposed to a high risk of harm. They believe that the policy undercuts one of the fundamental principles of the CQC’s inspectorate function, namely to prevent torture, inhuman and degrading treatment or punishment.

Our clients are concerned that the policy places the CQC in breach of its statutory duties under the Human Rights Act 1998, the Health and Social Care Act 2008 and the Equality Act 2010. Further, the policy renders the UK in breach of its international legal obligations under the Optional Protocol to the UN Convention against Torture and the UN Convention on the Rights of Persons with Disabilities.

Breach of statutory duties

Certain services for people with learning disabilities, cognitive disabilities, mental health issues and/or autism are high risk environments. As countless CQC reports have illustrated, the risk of exploitation, violence, abuse (such as over-medication) and neglect is increased in institutional settings where people are deprived of their liberty and reside ‘behind closed doors’. Residents/patients are vulnerable and at increased use of inappropriate behaviours, over-medication and inappropriate medication, restraint and seclusion. These are issues that the CQC has itself recently highlighted in evidence to its review on restraint, seclusion and segregation as well as the “Identifying and responding to closed cultures” document of October 2019 and hence we trust are accepted.

The Health and Social Care Act 2008 established the CQC to (inter alia) carry out inspections of the provision of NHS care and adult social services. The CQC must prepare an inspection programme which is a document setting out what inspections it proposes to carry out, and an inspection framework which sets out the manner in which it proposes to exercise its functions of inspecting and reporting (para. 5 to Sch 4 of the 2008 Act). The “Emergency Support Framework” released on 30 April 2020 appears to constitute the CQC’s current inspection framework. Whilst limited information in relation to what to expect from the framework was published on 1 May 2020, there is no hyperlink to the Emergency Support Framework document itself, and we seek a copy of this as a matter of urgency.

We note that a key part of the Emergency Support Framework (to the extent it is understood from the information published on 1 May 2020) is for the CQC to contact health and social care providers via telephone or Microsoft Teams “to have open and honest conversations” which are expected to last less than an hour, the outcomes of which will not be reported, and only in exceptional cases will the provider be asked to provide evidence in relation to specific risks. It is clear that the focus of these calls is

to ascertain how prepared the provider is and how the service is managing during the pandemic, rather than for the CQC to maintain its duties of inspecting and reporting.

The framework indicates that if information is received “either from an external source or through our conversation” that results in serious concerns about significant harm, abuse or human rights, this may result in the provision of additional support, a follow up call or the use of inspection and enforcement processes.

The CQC “expect[s] services to continue to do everything in their power to keep people safe” (30 April joint statement). Our clients note that 2,386 care homes have been rated as requiring improvement and 203 have been rated inadequate. Many care homes in both categories have been rated “inadequate” in various domains such as safety and effectiveness. On the specific CQC “safety” rating, 2,735 care homes were rated as “requires improvement” and 228 were rated as “inadequate”. The Emergency Support Framework indicates that higher risk services will have priority, however “more contact” from an inspector is not an appropriate substitute for an inspection in person.

The CQC’s reliance on sources of information from inside facilities may work well for acute hospitals and GP practices, but it is wholly inadequate for facilities that provide services for people with learning disabilities, cognitive disabilities, mental health issues and/or autism, because many of these people are less able to communicate their needs and understand their rights and many of them have become institutionalised and vulnerable to exploitation, violence and abuse. Further, many care homes have no functioning complaints system or any practical means for residents to contact anyone in the outside world including the CQC. These issues are all heightened in the current pandemic. Family and friends are generally prohibited from visiting, and other oversight such as that provided by the Local Government Ombudsman has ceased increasing the risks posed.

The Emergency Support Framework expects the flow of information to CQC from families, friends and other visitors, yet these people currently have no or very restricted access and therefore cannot provide the CQC with information. The staff of hospitals and care homes may be depleted and less skilled and yet it is these people upon whom the Emergency Support Framework relies on to blow the whistle. Our clients are further concerned about the CQC’s capabilities to protect such people, given its mishandling of the Whorlton Hall scandal. Of particular concern given the CQC accepted David Noble’s report in January 2020 is the CQC’s whistleblowing guidance for providers is dated November 2013. The CQC’s expectation that it will experience an upturn of such information is we believe misplaced if the CQC has failed to adjust its policies, procedures and culture to ensure adequate whistleblower protection.

Breach of legal obligations

The CQC's cessation of regular visits has come at a time when hospitals and care homes have banned visits except in exceptional circumstances, and when such institutions have also limited the ability of statutory advocates such as IMHAs and IMCAs to visit. The UN Special Rapporteur on the Rights of Persons with Disabilities has recently observed how limiting contact with visitors such as family and friends risks leaving patients and residents "unprotected from any form of abuse or neglect in institutions".

The CQC is part of the UK's "National Preventive Framework" ("NPM") and as such constitutes part of the UK's compliance with the Optional Protocol to the UN Convention against Torture, which requires states to appoint a body to "establish system of regular visits". The purpose of NPMs, as set out in the Preamble, is "the protection of persons deprived of their liberty against torture and other inhuman or degrading treatment or punishment". This is a non-derogable obligation under international law.

Carrying out its mandate of regular inspections, the CQC fulfils an important aspect of the UK's obligations of this right, set out in domestic legislation under Article 3 of the ECHR which forms part of the Human Rights Act 1998.

The European Committee for the Prevention of Torture is the body established by the Council of Europe to prevent torture and other forms of ill-treatment in places where people may be deprived of their liberty. Responding to the current crisis, the CPT has recommended inspectorates to continue their work, in a modified way:

"Monitoring by independent bodies, including National Preventive Mechanisms (NPMs) and the CPT, remains an essential safeguard against ill-treatment. States should continue to guarantee access for monitoring bodies to all places of detention, including places where persons are kept in quarantine. All monitoring bodies should however take every precaution to observe the 'do no harm' principle, in particular when dealing with older persons and persons with pre-existing medical conditions."

On 14 February 2020, the OPCAT treaty monitoring body, the UN Subcommittee on Prevention of Torture and other Cruel, inhuman or Degrading Treatment or Punishment ("SPT") wrote to the UK's National Preventive Mechanism (of which the CQC is part) about compulsory quarantine for coronavirus. It said:

"adaptations to normal working practises, in the interests of those in quarantine, those undertaking the visit, and the general interest in halting the spread of the illness. For example, the opportunity to interview in private may reasonably be conducted by methods which prevent the transmission of infection, and members of the NPM accessing places of quarantine might legitimately be subject to medical checks and other forms of inspection and

restriction to ensure the integrity of the quarantine, as would be the case for others servicing the needs of those being detained.”

On 25 March 2020, the SPT issued advice to governments and NPMs relating to the coronavirus pandemic. It stated that, “NPMs should continue exercising their visiting mandate during the coronavirus pandemic, albeit the manner in which they do so must take account of legitimate restrictions currently imposed on social contact.” [para. 11]. It further states that, “it is incumbent on NPMs to devise methods of fulfilling their preventive mandate in relation to places of detention which minimise the need for social contact but which nevertheless offer effective opportunities for preventive engagement.” [para. 12].

In parallel to the OPCAT, the UK is under an obligation under Article 16(3) of the UN Convention on the Rights of Persons with Disabilities to “ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities”, with the purposes of preventing the occurrence of all forms of exploitation, violence and abuse. The UK fulfils this obligation by ensuring that the CQC carries out regular inspections of hospitals and care homes.

All of the above support the need for the CQC to **urgently reconsider its approach and if blanket suspension is to remain, we seek clear reasons why the below suggestions cannot be utilised and confirmation of how the CQC considers it is meeting the obligations under both international and national law.**

Suggested solutions

In order to protect those most at risk, and in the absence of a return to regular inspections of all facilities, our clients consider a targeted approach to ensure that those who are known to be particularly vulnerable to exploitation, violence, abuse and neglect is required as a matter of urgency so that services delivered to them are scrutinised.

For example, the CQC could:

- a) Identify and prioritize inspections to services that are known to pose a danger to patients/residents, namely those rated as “inadequate” or “requires improvement” on the basis of overall rating and on specific ratings (particularly safety and effectiveness) and where it is known patients/residents have been infected with Covid-19;
- b) Identify and prioritize inspections to services that are known to pose a danger to patients/residents, namely those rated as “inadequate” or “requires improvement”;
- c) of those services, identify the services where a follow-up visit is most overdue, and those where there is ‘soft’ information about mistreatment;

- d) identify services where virtual means (such as telephone or using a video conferencing platform) for contacting patients/residents is not appropriate because the service has individuals who do not communicate verbally;
- e) provide inspectors with PPE so that they can carry out inspections without risk to themselves or patients, residents and staff;
- f) provide training to inspectors so that visits adhere to social distancing measures wherever possible;
- g) provide accessible information, including easy to read information, to families and those with a legitimate interest regarding whether a particular service has reported cases of Covid-19;
- h) Ask services to confirm to the CQC how they are supporting residents to stay in touch with family members (including frequency and methods), produce good practice guidance and invite feedback from relatives to identify those most at risk of isolation.

We would be grateful to receive a copy of the full Emergency Support Framework. We note that there was no consultation with our clients before its adoption and we would be grateful to receive details of any consultation undertaken.

Response

Given the very serious situation in care homes and the concerns raised above, our clients consider it necessary for the CQC to rapidly reconsider its policy decision, and reply to us **by 1700 Monday 11 May 2020**.

Our clients remain available to assist the CQC in any way they can to save lives and protect residents and patients against harm. However, should the CQC not take steps to properly protect vulnerable people, our clients will, as mentioned above, enter into pre-action correspondence and we put the CQC on notice now of an abridged timeframe given the emergency situation.

Please note we have copied this letter to Rt Hon Matt Hancock MP, Secretary of State for Health and Social Affairs and Rt Hon Jeremy Hunt MP, Chair of the Health and Social Care Select Committee, and Rt Hon Harriet Harman MP, Chair of the Joint Human Rights Committee. In the event the CQC maintains its current position and judicial review proceedings are brought, the Secretary of State for Health and Social Affairs is likely to be named as an Interested Party, and/or a further Defendant.

If you have any questions please contact Merry Varney of this office and we look forward to hearing from you.

Yours sincerely

Leigh Day

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CC by email only:

- Rt Hon Matt Hancock MP, Secretary of State for Health and Social Affairs
[REDACTED]
- Rt Hon Jeremy Hunt MP, Chair of the Health and Social Care Select Committee
[REDACTED]
- Rt Hon Harriet Harman MP, Chair of the Joint Human Rights Committee
[REDACTED]