



**Independent Age response to the Department of Health consultation
'Introducing fundamental standards' – proposals to change CQC
registration requirements**

April 2014



About Independent Age

Founded 150 years ago, Independent Age is a growing charity helping older people across the UK and Ireland through the 'A, B, C' of advice, befriending and campaigning. We offer a national telephone and email advice service focusing on social care, welfare benefits and befriending services, which is supported by a wide range of printed guides and factsheets. This is integrated with on-the-ground, local support, provided by a network of over 1,500 volunteers offering one-to-one and group befriending.

For more information, visit our website www.independentage.org

Speak to one of our advisers for free and confidential advice and information. Lines are open Monday to Friday between 10am - 4pm. Call 0800 319 6789 or email advice@independentage.org

Independent Age is also a member of the Care and Support Alliance: a consortium of over 65 organisations that represent and support older and disabled people campaigning to keep adult care funding and reform on the political agenda.

Summary

- Independent Age welcomes the development of a single set of Fundamental Standards
- To continue building trust and public support, the Care Quality Commission (CQC) must clearly communicate its planned approach to prosecuting breaches of fundamental standards and the exceptions it will make in terms of issuing pre-prosecution notices
- In accompanying guidance, the CQC should consider whether provider compliance with the National Minimum Wage Regulations (NMWR) could be taken into account in forming judgements about providers' ability to meet their duties under clause 13 (staffing).

Consultation questions

1. *Do the Fundamental Standards (regulations 4-14) make clear the kinds of outcomes we expect providers to meet/avoid?*

The Fundamental Standards helpfully clarify what kinds of outcomes providers are expected to meet and avoid. However, the Department of Health (DH) should consider whether to include the need to pay staff the National Minimum Wage within the section on staffing (clause 13).

The DH should also consider whether Clause 13 (1) as written ("the registered person must deploy sufficient numbers of suitably qualified, skilled and experienced persons to meet the requirements of this Part") adequately accounts for the potential impact of low, or inadequate pay on the quality of care a provider can deliver.

Concerns about the quality of care people receive sometimes relate to the amount of time care professionals can spend with people in their care. We want fair pay for care workers that reflects the actual care they provide, but where professionals provide domiciliary care, their staff should also get paid to cover their travel time between care appointments.

In recent months, HM Revenue and Customs have analysed compliance with the National Minimum Wage regulations (NMWR) in the social care sector, finding that nearly half of 183 employers had breached NMWR on at least one occasion¹.

The Labour Party's Kingsmill Review has also looked at the issue of low pay in the care sector and is expected to report soon, and the United Kingdom Homecare Association² have done their own analysis of what constitutes a fair minimum price for home care. It would be a big opportunity missed were the CQC not to factor in these concerns about systematic non-compliance with NMWR in its new approach to regulation.

We recommend that in accompanying guidance, the CQC looks at whether providers are meeting existing duties on payment of the NMWR: where there is evidence that providers are not meeting NMWR, the CQC might want to use this information to help form judgements about likely fulfilment of the standards in clause 13 on staffing.

We also ask the DH to clarify the use of the word 'deploy' in Clause 13(1) and whether the clause has been written in this way to cover skilled volunteers. We encourage the use of volunteers in care settings and welcome any commitment therefore to ensure Clause 13 (1) covers volunteers.

2. Do you think the Fundamental Standards (regulations 4-14) reflect the policy aims we have set out for the Fundamental Standards in Chapter 4?

We agree that the Fundamental Standards reflect the DH's intended policy aims. In particular we are pleased that the DH and CQC have accepted feedback that the proposal to split standards into 'fundamental' and 'expected' standards was potentially confusing and now plan to only implement 'fundamental' standards.

The DH and CQC need to be clear how the fundamental standards and plans for prosecution reflect the policy aim to deliver a proportionate approach to regulation. The consultation talks in turn about 'individual failings', 'multiple

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262269/131125_Social_Care_Evaluation_2013_ReportNov2013PDF.PDF

² UKHCA. [A minimum price for home care](#), Feb 2014

breaches' or 'persistent breaches' and the circumstances in which 'breaches' would lead to prosecution. However, given there will be different thresholds before the CQC can take prosecution action, the CQC needs to clearly communicate to providers and public alike that some failures in care won't always provide grounds for immediate prosecution.

The DH and CQC also need to be clear about what constitutes a serious breach, and how it will prosecute, and how this differs from the CQC's previous approaches. In the same way, breaches not deemed to be serious enough to trigger prosecution need to be clearly and sensitively explained to counter accusations that the CQC is not adequately responding to failings.

We look forward to responding to the planned consultation that will determine the criteria the CQC will use when deciding whether to prosecute.

3. Are the Fundamental Standards clear enough that they could be used as a basis for enforcement action?

On balance we believe the proposed Fundamental Standards are clear enough to be used as the basis for enforcement action. However, given that previous criticism of the CQC has based upon a perceived lack of clarity as to when it would take enforcement action, we have some concern about the proposals for two separate 'levels' at which enforcement can proceed.

The exceptions around Regulation 17 could be interpreted to come into conflict with a single set of fundamental standards. For Independent Age, the guiding principle in this area is that there should be clear and predictable criteria for enforcement. There is a reputational risk to the CQC should it fail to communicate its approach and why some, but not necessarily all breaches, will result in enforcement action.

On the issue of clarity, the DH could clarify section 25 in the Schedule relating to Regulation 14 (on Information Required in Respect of Persons Employed for the Purposes of a Regulated Activity). This might be a drafting issue, but at present the subclause might wrongly be interpreted so a person has to demonstrate previous employment in the provision of services relating to health or social

care. We trust this is a mistake and what is really intended here is that where an adult has any previous employment in health and social care, they have to show satisfactory evidence of conduct; but they don't need to have worked in the field previously to now take on regulated activities.

4. *Regulation 17 sets out which of the regulations are offences for which CQC will still need to issue a pre-prosecution notice, alongside those that could be prosecuted immediately.*

Do you think this split reflects our intention (see chapter 4) that only breaches related to a harmful outcome can be prosecuted without a pre-prosecution notice being issued in advance?

Given the CQC has produced a single set of fundamental standards, we question why there need to be such different levels of prosecution, as this may cause confusion.

We also disagree with the proposed standards that would only result in a pre-prosecution notice. From our perspective both 4(3)(f) on providing sufficient medication and 7(2) on safe and appropriate care and treatment are of more immediate concern than 11(2),(3) on complaints systems and regulations 12-14 on governance. We therefore recommend that the draft regulations should be amended to give the CQC the power to undertake immediate enforcement action without a pre-prosecution notice first being put in place in both of these instances.

We recommend that the DH looks again at whether any of these 'risks' combined would mean an offence had been committed, or whether 4(3)(f) and 7(2) are in themselves serious enough to trigger specific responses.

There is little logic in our view placing breaches concerning safe and appropriate treatment, and indeed sufficient quantities of equipment or medicines, on the same footing as breaches relating to the handling of complaints.

The other concern we have with regards two different thresholds for prosecution levels is that the difference between the two will need to be clearly explained so they don't conflict with messaging about a single set of fundamental standards.

5. Do you agree that CQC's guidance about complying with these regulations should set out criteria for cases in which it would consider bringing a prosecution?

We are supportive of criteria, or indeed case studies to help providers, the public and the CQC's own staff reach a common understanding about the instances in which the CQC would consider bringing a prosecution.

For the purpose of the newly implemented regulations, the CQC should consider hypothetical examples until an evidence base can be established to provide real-world (anonymised) examples.

6. Do you agree that the health and adult social care system should always seek to meet the standards outlined in chapter 4?

Overall, we agree the standards should always be representative of the entire system in order to ensure a consistent approach to regulation, regardless of setting.

7. Do you think any changes are needed to the draft regulations to ensure they reflect the policy aims we have set out in chapter 4?

As a whole, we feel the draft regulations reflect the policy aims as set out in chapter 4. However the DH should be careful how it explains the differences in applying prosecutions in order not to imply that the aim some fundamental standards are more important than others.

8. Do you have any other comments about the draft regulations?

On the whole we are pleased with the proposals for Fundamental Standards and welcome the draft regulations as a tangible sign that the DH and the CQC are serious about moving to a more effective system of regulation. We are pleased the CQC has undertaken a realistic and well-evidenced approach to making improvements in its redefined approach to regulation and enforcement action.

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