Key COVID-19 legal developments in the health sector: CQC regulation

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CQC has published a range of guidance designed to ease the burden of regulation at this time and support health and social care providers to respond to the COVID-19 pandemic.

Registration:

• The CQC has announced new measures to support both new and existing health and social care providers to respond to the challenges that COVID-19 presents to the health and social care sector.

• To help ensure that CQC registration does not act as a barrier, CQC has developed a special COVID-19 registration framework to essentially fast track any 'application' from a health or social care provider where they;

(a) intend to deliver services which provide additional health or social care capacity in an area; or
(b) contribute to the control of the outbreak of COVID-19 or the treatment of people who have contracted the illness.

• Existing healthcare providers who want to provide services from additional locations simply need to submit a notification of change and update their Statement of Purpose and CQC will treat these new temporary locations as 'satellite' locations. This approach will enable urgent surge management and the creation of 'Nightingale' facilities linked to existing registered provider NHS Trusts.

• Existing healthcare providers who wish to provide new types of regulated activity (e.g. new diagnostic and screening procedures) must still apply to add a new regulated activity but this will be prioritised by CQC and, in some circumstances, the provider may be able to make the changes to the service at the same time as applying.

• Social care providers already registered with CQC who wish to increase the capacity of their services (e.g. by increasing the number of beds at a location or adding a location) are advised to contact CQC before making this change, and new social care providers looking to register for the first time must apply in the usual way but mark their application 'COVID-19' to ensure that it is prioritised.

• CQC have recently become aware of a number of independent providers who are offering coronavirus swab testing kits for sale to the general public and as such have issued guidance aiming to clarify when such activity will fall within scope of CQC registration, and also its expectations of providers offering this service.

• In summary, if a provider is selling or supplying coronavirus swab testing kits and is involved in either removing the sample from the patient, or using equipment to examine that sample for the purposes of detecting the presence of COVID-19, the provider must register with CQC for the regulated activity, 'Diagnostic & Screening Procedures'. If an organisation is selling or supplying coronavirus swab testing kits and is not in any way involved in either the removal of samples or the analysis (or examination) of those samples, it will not need to register with CQC for this activity. If an organisation sells or supplies coronavirus swab testing kits and is not involved in the removal or analysis (or examination) of samples, it may still require registration for the 'Treatment of Disorder, Disease or Injury' regulated activity if it is involved in communicating test results and offering advice about actions to take or treatment when that result is positive.

Statutory Notifications:

• Providers should notify CQC of events that prevent a provider carrying on its service 'safely and properly' (Regulation 18, CQC (Registration) Regulations 2009). This means letting CQC know if the operation of a service is being negatively affected by COVID-19, whether due to patient flow/volume, or serious resource issues due to staff absences. It does not mean that a provider must notify CQC of every single COVID-19 infection or related issue.

• CQC have updated their Regulation 16 Death Notification Form as a means of identifying the numbers of deaths that are occurring due to COVID-19, whether suspected or confirmed. Providers should now indicate on the form whether the death was a result of coronavirus (either confirmed or suspected). The information which providers submit will help CQC develop a more accurate picture of the number of deaths due to COVID-19, which in turn will help inform the

government response, so it can put in place appropriate measures to support the health and social care system during this time.

Inspections and compliance:

• The CQC has suspended its routine inspections to reduce the pressure on health and social care providers. It has also paused sending requests for the Provider Information Return (PIR) until further notice to relieve the burden on providers. Providers who have already received a PIR request do not have to return this to CQC (although CQC will still review completed PIRs if providers choose to submit them).CQC will still continue to monitor services through data and information, and where there are concerns about service user safety, CQC will carry out focused inspections to investigate.

• If a service has recently been inspected by CQC, on receipt of the draft inspection report, a provider will still only have 10 working days to submit a Factual Accuracy response. CQC has decided not to relax this rule but has advised that if providers are facing difficulties complying with the deadline, they should approach their local CQC inspection team.

• It is important to note that the suspension of CQC's inspection programme does not mean that CQC has relaxed their regulations, and compliance with the provisions of the Health and Social Care Act (Regulated Activities) Regulations 2014, and the CQC (Registration) Regulations 2009 is still mandatory, but CQC has confirmed that the way in which it applies the standards during this difficult time will be proportionate, and that it will consider the burden placed on providers by COVID-19.

• As providers respond to COVID-19, CQC has recognised that there is likely to be an increase in delegated tasks and therefore it has updated its information on delegating medicines administration, setting out the key principles and responsibilities to consider:

  • For registered nurses, this includes only delegating tasks and duties that are within a care worker's competence; ensuring adequate supervision and support; and confirming that the task is carried out to the required standard.

  • For care workers, this includes understanding their limitations; knowing when and how to seek help and escalate concerns; and making sure they are comfortable in carrying out the task safely and correctly.

• CQC have also collated guidance from the MHRA and other agencies regarding medicines administration in social care settings. Alerts have been published in relation to the inappropriate use of sedative medication to enforce social distancing guidelines, care homes carrying stocks of controlled drugs for end of life care, and many other topics. Providers are advised to sign up to the MHRA's alerts to ensure that they keep up to date with developments.

• CQC's Chief Inspectors have issued a joint statement with the National Guardian for the NHS on safety and speaking up during the COVID-19 emergency. They encourage everyone who has a role in providing care, or who receives care in England, to be more vigilant so that the risk of avoidable harm to people can be reduced. Leaders of health and care services are asked to support this by encouraging a supportive culture where people are able to speak up without fear of blame or repercussions; and by listening and acting on information, and providing feedback.

Practising Privileges – NHS COVID 19 Collaboration Contract

• CQC has also introduced a fast-track process for granting interim practicing privileges so that consultants can start work immediately in hospitals party to the NHS COVID-19 Collaboration Contract.

• Any consultant who will be providing services to NHS patients in an independent hospital under the contract, will only be required to provide the Registered Manager at the independent hospital with proof of identity, and a declaration confirming that their NHS employer, or another independent provider with whom they already have practising privileges, has the information available to them required by Regulation 19 and Schedule 3 (Fit and proper persons employed) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. This temporarily replaces the requirement to provide actual evidence of this information, as would normally be the case to evidence compliance with this regulation. This only applies to PPs in this particular setting – the usual rules apply to all other PPs.

DBS checks for pandemic staff

• Interim arrangements are also being implemented in relation to the recruitment of staff needed as a consequence of the pandemic. Provided that the staff are needed to start urgently, waiting for a full DBS check could cause unnecessary delay and that delay could lead to risks to the continuity of service, impacting on the safety and wellbeing of service users, a free, fast track DBS Barred List check can be undertaken.

• The Barred List check will be available by the end of the next working day following receipt of the application, with the full DBS check completed later. Once the Barred List check is completed, staff can commence work.

• Providers remain responsible for ensuring safe recruitment and undertaking risk assessment of their particular requirements but provided that providers take reasonable steps to ensure staff are recruited safely and provided with appropriate supervisions and support, CQC will not take a punitive approach.

• It is essential that Providers record any recruitment decisions made, including risks identified and mitigation measures implemented, but provided this is done this measure is intended to support in the rapid recruitment of frontline health and care staff for the duration of the pandemic. All other appointments and applications for DBC checks that are not linked to coronavirus must be processed according to usual CQC and DBS guidance.

Joint statement on Advanced Care Planning

• In light of the importance of having a personalised care plan in place, especially for older people, people who are frail, or have other serious conditions, during the COVID-19 pandemic, CQC have issued a joint statement with the BMA, the Care Provider Alliance and the Royal College of General Practitioners setting out considerations for providers when undertaking advanced care planning. These include ensuring that the care plan is discussed with the service user directly where they have capacity (and relevant consultees where capacity is absent), and that decisions to complete a Do Not Attempt Resuscitation (DNAR) or ReSPECT form are made on an individual basis with GPs taking a central role for people in community settings.

Data Collection & Sharing

• To enable CQC to understand the impact of COVID-19 on users of social care, the social care workforce and social care providers' ability to deliver services, it needs to collect data to ensure resources are targeted most effectively where they are needed, but in a way which does not create an extra burden. Together with the Care Provider Alliance, Department of Health and Social Care and NHS England and NHS Improvement, CQC has written to all adult social care providers outlining its approach to data collection during the COVID-19 outbreak. These organisations have worked together to ensure that they are only asking for essential information from providers once, which is shared appropriately.

• CQC are asking:-

  • Residential and nursing homes to complete only the NHS Capacity Tracker as set out in Coronavirus (COVID-19): admission and care of people in care homes.
  • Homecare providers to complete CQC's 'Update CQC on the impact of Covid' online form (from Monday 13 April). This will be rolled out to Shared Lives services, Extra Care and Supporting Living services and CQC will be in contact with them directly when the service is available to them.
  • The small number of providers of both homecare and residential and/or nursing homes to complete both data collections.

• CQC have advised that it will update providers regularly on data collection in the coming weeks and months and if a provider feels that its local authority, CCG, LRF or other body is asking for duplicate information, it should contact the relevant body and share CQC's letter with them. The Care Provider Alliance can also support providers with any further queries providers may have.

• Changes are being made to the frequency with which CQC Insight reports (which are routinely shared with NHS acute, community, ambulance and mental health trusts) are published. CQC will continue to share Insight reports, but for NHS acute trusts the next insight report will be shared in May, and every two months thereafter. For other sectors, reports will be shared every two months from April. CQC has confirmed that it appreciates the increased demands being faced by the sector and so while it will continue to share these reports for information, there is no expectation on providers to respond in any way.

• On 16 April 2020, the Department of Health and Social Carey published 'COVID-19: our action plan for adult social care', which details how the government will support the adult social care sector in England throughout the coronavirus outbreak. The plan has four pillars:

  • Reducing the spread of infection in care homes
  • Supporting the workforce both to provide high quality care, and to cope with the practical and emotional demands of caring during the pandemic
  • Supporting independence, end of life care and responding to individual needs
  • Supporting the organisations that provide care

• CQC have contributed to the delivery of this plan by developing a framework of support for health and social care providers to drive action at national, regional and local levels. This new Emergency Support Framework will help deliver across all four pillars of 'COVID-19: our action plan for adult social care'. CQC has advised that it will be sharing more about this work soon, but the headlines are as follows:-

  • CQC's national infrastructure is being used to deliver a new service that enables care staff who are self-isolating due to symptoms of coronavirus to book an appointment at one of 12 testing sites across the UK, and soon they will be able to order a kit for a test at home.
  • CQC have launched a regular data collection on COVID-19 related pressures (see above) from services who provide care for people in their own homes, with the ability to refer staff for testing built in. This information will be combined with information already gathered from residential and nursing homes (via NHS Capacity Tracker) giving

CQC a much more complete picture of how coronavirus is affecting adult social care. This information will be shared across organisations who can help mobilise support, such as the Department of Health and Social Care, Regional Command Centres, and Local Resilience Forums, Local Authorities and Clinical Commissioning Groups, as well as CQC's inspection teams.

• CQC has changed its system of death notifications (as detailed above), which will allow a provider to report whether a death was of a person with suspected or confirmed COVID-19. As well as giving more transparency on the impact of COVID-19 on the care sector, this will provide a regional view which allows an assessment of which areas are most impacted and may need additional support as a result.

• CQQ consider supportive conversations between CQC inspectors and providers to be an important part of the Emergency Support Framework, as is easing the burden on providers during this time. CQC wish to assure providers that inspectors are available to offer support and 'to talk through any tough decisions' providers need to take, and to offer advice where appropriate. Providers are being asked to 'Think of these as a conversation with a colleague, not as one you'd have with a regulator'.

New guidance and updates are being published regularly by CQC as the pandemic evolves, and this page will be regularly updated with all new developments.