

Prosecutions for carers and their bosses – this time its personal

by Andrew Katzen, partner at law firm, Hickman & Rose

Managers and staff at care homes perform an ever more important job in our society but with their vital role comes the intensifying glare of the regulatory spotlight. Two new sets of criminal offences for those working in or operating care homes have been introduced this year and the Care Quality Commission looks set to become a tougher regulator. The industry must learn to understand and navigate this new environment.

Ill treatment and wilful neglect

The first development is a new offence of ill treatment or wilful neglect under the Criminal Justice & Courts Act 2015. This can be committed by individuals, care workers or their managers and by the organisation providing care. For these purposes care workers mean those who are paid (not volunteers) to provide health care to adults or children or social care to adults. In addition, care providers themselves can be criminally responsible if there is a gross breach of the relevant duty of care to the person who is ill treated or neglected and, but for that breach, it would not have occurred or it would have been less likely. The penalties for the care providers on conviction include not just an unlimited fine but also remedial orders requiring them to take specific action and publicity orders forcing them to disclose the conviction, facts of the offence, the fine imposed and the terms of any remedial order.

On the face of it this seems to be a much more straight forward and robust provision than the limited and complex offence of neglect under the Mental Capacity Act 2005. It applies direct corporate criminality avoiding the difficulties of other provisions in proving "attribution" in large and complex organisations.

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A regulatory double whammy

The double whammy comes with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 which came into force this year together with a new enforcement policy from the Care Quality Commission (CQC). They apply across all areas of regulation by the CQC but will be looked at with particular interest by providers and service users of care homes. Under the new regime the CQC has a dual purpose to hold both providers and individuals to account with the aim of protecting service users. While the power to prosecute providers is not new, holding individuals to account (save for those carrying on an unregistered service) is a major development.

From regulator to prosecutor

The new guidance explains that the CQC will use its enforcement powers to hold individuals to account who work for providers including directors, managers, or the secretary of a corporate body, or an officer of an incorporated association. Certain prosecutions will now be allowed without first issuing a warning notice. Criminal proceedings can be started against individuals and corporate entities without prior warning for breaches such as failure to obtain consent, failure to provide safe care and treatment or failure to meet nutritional and hydration needs.



The CQC could also prosecute without delay a breach of the widely reported duty of candour which requires service providers to notify patients or residents and their families when mistakes have been made. It is also an offence to fail to display the new rating system in the establishment.

Historically, the CQC has been seen primarily as a regulator rather than a prosecutor and the number of criminal cases taken has been small and often limited to specific issues such as lack of registration. These new Regulations and Enforcement Policy may signal a change in direction.

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In conclusion, all those working in the care home sector, particularly management, need to be aware of these new offences and how they may affect them. Systems and controls, policies and procedures and how they work in practice should be carefully examined.

This time it's personal.