

# CARE ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 2 – Care standards

#### Quality of Services

##### *Section 81 – Duty of candour*

483. **Section 81** amends section 20 of the 2008 Act (regulation of regulated activities), by inserting a new subsection (5A). This new subsection provides that regulations made by the Secretary of State under section 20 must include a duty of candour on providers of health care and adult social care services registered with the CQC.
484. This duty will mean that such providers will be required to ensure that patients and service users are told when something unexpected or unintended occurs in the course of their care or treatment, helping to ensure that honesty and transparency are the norm in every organisation overseen by the CQC. The details of the duty, including when it will apply and what information is to be given to patients or service users, will be included in the regulations.

##### *Section 82 – Warning notice*

485. This section makes amendments to the powers of the Care Quality Commission (CQC) to issue warning notices to NHS trusts and NHS foundation trusts.
486. Warning notices under section 29 of the 2008 Act will no longer be able to be issued to NHS Trusts and NHS foundation trusts (*subsection (1)*). Instead, where it appears to the CQC that the quality of health care services provided by a trust requires significant improvement, the CQC will be able to highlight these areas in a new form of warning notice. This notice will be given under a new section 29A of the 2008 Act (*subsection (3)*).
487. The new warning notice will state the reasons for the CQC's view that significant improvement is needed and require that improvements in the quality of services are delivered within a specified time. If the notice deals with multiple failings, the CQC will be able to specify a different time period for improvement in relation to each failing. The CQC will not prescribe the action that is to be taken to address significant failures in the quality of health care services.
488. At the end of the time period specified in the notice (or, where the notice specifies more than one time period, the latest of the specified periods) the CQC must review whether the requirements specified in the notice have been met. Where the CQC is not satisfied that the requirements have been complied with it must review what, if any, further action to take in respect of the trust. In the case of an NHS foundation trust, the CQC's review must include use of its power to require Monitor to put the trust into special administration under section 65D(2) of the National Health Service Act 2006.

***Section 83 – Imposition of licence conditions on NHS foundation trusts***

489. This section amends section 111 of the Health and Social Care Act 2012 (imposition of licence conditions on NHS foundation trusts) (the 2012 Act) to extend Monitor’s powers to be able to impose additional licence conditions on foundation trusts. Monitor will be able to impose additional licence conditions on a foundation trust when the CQC has issued a warning notice to that trust requiring it to make a significant improvement to the quality of the health care provided by it (*subsection (2)*). At present Monitor can only make use of these powers if there is a failure in governance of a foundation trust.
490. Where there was a breach of any such additional licence conditions by the NHS foundation trust concerned, Monitor’s powers to suspend or remove directors or governors under section 111(5) of the 2012 Act would also apply (*subsection (3)*). In the event of health care services provided by the trust requiring significant improvement, Monitor will, as a result, be able to take timely action to make changes to leadership or governance with the intention of securing improvements to those services.

***Section 84 – Trust special administration: appointment of administrator***

491. This section amends section 65D of the National Health Service Act 2006 (NHS foundation trusts: appointment of trust special administrator). The amendment will enable Monitor to make an order to authorise the appointment of a trust special administrator where it, or the CQC, is satisfied that there is a serious failure by an NHS foundation trust to provide health care services of sufficient quality and it is appropriate to make the order (*subsections (2) and (3)*). At present Monitor is only able to authorise the appointment of a trust special administrator in cases of insolvency.
492. Monitor may make an order when it is so satisfied, but must make the order when required to do so by the CQC.
493. Before requiring Monitor to make an order for the appointment of an administrator, the CQC will need to consult first the Secretary of State and Monitor, and then the foundation trust, the NHS Commissioning Board (known as NHS England) and any other person, for example a clinical commissioning group, to which the foundation trust provides services (*subsection (4)*).

***Section 85 – Trust special administration: objective, consultation and reports***

494. This section amends provisions in Chapter 5A of Part 2 of the National Health Service Act 2006 (in relation to trust special administrators for NHS foundation trusts) to bring within coverage the quality and safety of health care services. To achieve this, the objective of trust special administration, as laid down in section 65DA, has been broadened to include an additional requirement for the services, whose continuous provision is to be secured through special administration, to be of sufficient safety and quality (*subsection (1)*). The objective will apply to any foundation trust in special administration regardless of whether the order was made to resolve a financial failure or a serious failure to provide services of sufficient quality.
495. In particular, *subsection (2)* provides for the CQC to be added to the list in section 65F of persons that must be consulted before the trust special administrator provides a draft report to Monitor recommending the action to be taken by Monitor in relation to the trust. Also, the administrator may not provide a draft report to Monitor, under section 65F or 65G, unless the administrator has first obtained a statement from the CQC that the part of the objective relating to the quality of services has been met (*subsections (3) and (5)*). The intention is to ensure that the CQC is satisfied that the services which are to be continued to be provided by the foundation trust are of sufficient safety and quality.
496. Additionally, when considering the final report from the trust special administrator under section 65KB (or the re-submitted report under section 65KD), the Secretary of

State must also be satisfied that the CQC has discharged its functions for the purposes of Chapter 5A (*subsection (8)*). If, on considering a re-submitted final report, the Secretary of State is not satisfied that the CQC has discharged its functions, the Secretary of State is able to use his powers under section 82 of the 2008 Act (failure by the CQC in discharge of functions) to intervene, which includes power to direct the CQC as to the carrying out of its functions (*subsection (14)*). *Subsection (15)* ensures that these provisions apply correctly once all NHS trusts have been abolished.

## **Care Quality Commission**

### ***Section 86 – Restriction on applications for variation or removal of conditions***

497. This section makes an amendment to section 19 of the 2008 Act. The amendment will have the effect of prohibiting providers registered with the CQC from making an application to vary or remove a condition on their registration if the CQC has already served a notice of proposal or a notice of decision to change the conditions of registration in the same way.
498. This addresses an inconsistency in the way that the CQC is able to use its enforcement powers in respect of facilities that do not meet the essential levels of safety and quality set out in the regulations under section 20 of the 2008 Act.
499. Where the CQC has commenced enforcement action to close down a single location of a provider that operates from several sites, the provider may be able to avoid this enforcement action by making an application under section 19 to vary the conditions of its registration to remove the location.
500. This is not possible in cases where the registered provider only carries on a regulated activity from a single location. In these instances, the CQC would cancel the provider's registration. Under section 19(2) and (3) of the 2008 Act the provider is prohibited from making an application to cancel its registration where the CQC has commenced proceedings to cancel the registration.

### ***Section 87 – Rights of appeal***

501. This section creates a right of appeal for individuals against whom the CQC requires action to be taken. This is in anticipation of a new registration requirement for providers of health or adult social care services, to be set in secondary legislation, that their directors (or persons of equivalent position) must be fit and proper persons. Where CQC decides to impose a condition on a registered provider requiring removal of an individual director who was not considered to be a fit and proper person to fulfil their role, this section gives the individual a right of appeal against CQC's decision.

### ***Section 88 – Unitary board***

502. *Section 88* amends provisions relating to the membership of the CQC. Under paragraph 3 of Schedule 1 to the 2008 Act all members of the CQC must be appointed by the Secretary of State. *Subsection (1)* amends paragraph 3 of Schedule 1 so that the Secretary of State only appoints the Chair and other non-executive members whilst the CQC appoints its own executive members (including the Chief Executive) without the involvement of the Secretary of State. *Subsection (2)* defines "non-executive members" and "executive members" and provides that the number of non-executive members must exceed the number of executive members.
503. *Subsections (3) to (8)* make further amendments to Schedule 1 to the 2008 Act to clarify where necessary which provisions apply to non-executive members only, executive members only, or both. For example, *subsections (4) and (5)* make amendments to the Secretary of State's regulation-making powers in paragraph 3 of Schedule 1 to the 2008 Act so that any regulations relating to the appointment, suspension and termination relate only to non-executive members, whilst the power to make regulations to limit

the number of members may apply to both executive and non-executive members. This is intended to ensure that the CQC's Board remains at an appropriate size as set in regulations and to ensure that the non-executive members appointed have the requisite skills and knowledge.

504. *Subsections (7) and (8)* make amendments to paragraph 5 of Schedule 1 to the 2008 Act to clarify that since executive members are employees and the CQC appoints its employees on such terms and conditions as it considers appropriate, it will accordingly also determine the terms and conditions of its appointment of executive members.

## **Increasing the independence of the Care Quality Commission**

### ***Section 89 – Chief Inspectors***

505. This section inserts a new paragraph 3A of Schedule 1 to the 2008 Act which places a duty on the non-executive members of CQC to appoint a Chief Inspector of Hospitals, a Chief Inspector of Adult Social Care and a Chief Inspector of General Practice as executive members of the CQC Board.
506. *Subsection (2)* makes provision for CQC to determine the functions each Chief Inspector will exercise on its behalf.
507. *Subsection (3)* places a requirement on the Chief Inspectors to perform their roles in a way that safeguards and promotes CQC's independence.

### ***Section 90 – Independence of the Care Quality Commission***

508. This section repeals or amends several of the Secretary of State's powers in the 2008 Act that could constrain CQC's operational autonomy.
509. This section, and section 91 in part, repeal:
- powers to prescribe, by regulations, CQC's inspection programme and methodology;
  - powers (inserted by the Health and Social Care Act 2012) to approve reviews, investigations and studies CQC wish to undertake into the provision of care;
  - powers to prescribe, by regulations, CQC publication procedures for compliance and investigation reports, reviews and studies; and
  - a power to direct CQC regarding the content of its annual report on the state of health and adult social care services.
510. Powers to set the legal framework for CQC, to appoint the non-executive members of the CQC Board, to approve CQC's remuneration policy and to intervene if CQC fails to properly discharge any of its function will remain.

## **Performance ratings**

### ***Section 91– Reviews and performance assessments***

511. *Section 91* substitutes section 46 (periodic reviews) and amends section 48 (special reviews and investigations) of the 2008 Act. The CQC's duty to conduct periodic reviews, assess performance and publish reports of such assessments (henceforth known as ratings) is to apply in respect of any regulated activities and any registered service providers as may be prescribed in regulations.
512. The substituted section 46 replaces and consolidates the CQC's existing periodic review duty in respect of the provision of healthcare by English NHS providers, the provision of adult social services by English local authorities and the Secretary of State's power to extend the scope of periodic reviews by way of regulations in section 49 of the 2008

Act, which is to be repealed by section 91(3). The new powers in section 46 will allow the Secretary of State to prescribe the particular types of services or providers in relation to whom the CQC should publish performance information so as to enable the public to make informed choices about the quality of services being provided.

513. The CQC is given the responsibility for determining the quality indicators against which services and providers will be assessed (section 46(5)). This may include measures of financial performance and governance in its assessments if the CQC deem this appropriate. The CQC will also prepare a statement setting out the method it will use to assess and evaluate performance and the frequency and period of any reviews (section 46(6)). Different quality indicators, methods and frequency and periods may be used for different types of cases. The CQC may also review the indicators of quality and method statement from time to time as it sees fit (section 46(7) and (8)).
514. The CQC will be required to consult the Secretary of State and any other persons as may be prescribed or CQC considers appropriate before publishing the indicators of quality and the statement on method and frequency and before publishing any subsequent revisions to them which are significant (section 46(9)). Consultation undertaken by CQC on the development of its new performance methodologies before section 91 comes into force is to be as effective as consultation carried out after it comes into force (section 46(11)).
515. The changes to section 48 (special reviews and investigations) make clear that CQC can, subject to the approval of the Secretary of State, undertake special reviews and investigations of the commissioning of adult social services by local authorities as well as the commissioning of NHS services by clinical commissioning groups or the NHS Commissioning Board (known as NHS England). The effect is to retain the requirement to gain relevant Secretary of State approval before CQC undertakes a special review or investigation into the commissioning of services.
516. In parallel, the requirement for CQC to obtain Secretary of State's approval before conducting special reviews or investigations relating to the direct provision of NHS care and adult social services is being repealed (in line with section 90). The regulation of provision is part of CQC's core business and therefore does not need to be subject to ministerial approval.

## **False or misleading information**

### ***Section 92 – Offence***

517. This section creates a new offence so that providers of health services and adult social care in England, which supply, publish or otherwise make available information that is false or misleading, could be subject to criminal sanctions. The offence applies to a care provider as a corporate body. Section 94 sets out the circumstances in which a director, manager, secretary or similar officer of a care provider is also liable to be prosecuted for the offence.
518. [Section 92](#) outlines the scope of the offence, including which care providers are potentially subject to it and the type of information to which it relates (further detail will be specified in regulations as appropriate). It provides that the information must be required under a statutory provision or other legal obligation.
519. *Subsection (1)* enables the offence to apply to information that is supplied, published or otherwise made available by a care provider, and which is materially false or misleading. The offence will only be applicable, in practice, to those care providers set out in regulations, and in relation to such information as is described in regulations. Section 125(4)(m) states that such regulations will be subject to the scrutiny of both Houses of Parliament under the affirmative procedure.

520. Subsection (1)(b) states that this offence will relate only to information that care providers are legally obliged to supply, either by a statutory provision or by another legal requirement such as a contractual requirement. An example of information required by a contract, rather than by a statutory provision, might be information required to be supplied by the provider of health services in accordance with a term in its “commissioning contract”<sup>1</sup> with a clinical commissioning group. Subsections (1) and (6) provide that, in practice, the offence will only be applicable to information of a type that is described in regulations. It is envisaged that the offence will typically apply in cases involving the supply of information to the Secretary of State, the Health and Social Care Information Centre, regulators and commissioners, in accordance with those persons’ and bodies’ statutory powers to require information.
521. *Subsection (2)* provides a defence for care providers that can demonstrate that they “took all reasonable steps and exercised all due diligence”. This defence will be available to those care providers that have made a genuine mistake or administrative error, provided that they can demonstrate that they had adequate procedures in place to ensure that false and misleading information was not provided.
522. The care providers that fall within the scope of the offence are described generically at *subsection (3)*. The offence thus applies to public bodies that provide health services or adult social care in England, such as NHS Trusts, NHS Foundation Trusts and local authorities; and to all types of GP practice, whether sole practitioners or partnerships (and whether they have entered into personal medical service or general medical service contracts with NHS England). It also applies to providers who are not public bodies, but who provide health services or adult social care on behalf of a public body, such as independent providers of hospital services and independent care homes, in relation to the publicly-funded care that they provide. Further, it applies to those who provide health services or adult social care for which they are paid, in full or in part, by a direct payment made to a patient or service user to procure services directly. “Adult social care” is further defined at *subsection (5)* and covers all necessary forms of personal care and other practical assistance. Subsection (5)(b) introduces a caveat in that any social care provided by an establishment or agency registered with Her Majesty’s Chief Inspector of Education, Children’s Services and Skills will not be subject to this offence. Subsections (1) and (6) provide that, in practice, the offence will only apply to care providers that are specified in regulations.
523. *Subsections (7) to (9)* ensure that that there is no overlap or duplication between this false or misleading information offence and certain offences under the Competition Act 1998, the Enterprise Act 2002 and the Health and Social Care Act 2008.

### ***Section 93 – Penalties***

524. This section provides for the penalties applicable when a court decides that a care provider, or subject to section 94, a director, manager, secretary or similar officer of a care provider, has committed the offence of providing false or misleading information. When the care provider is a local authority, the penalties are applicable to a member of the authority (see section 94).
525. *Subsection (1)* states that a person convicted of providing false and misleading information could be subject to an unlimited fine or up to two years imprisonment, or both.
526. *Subsection (2)* states that as well as, or instead of, a fine the court may also impose a remedial or publicity order by way of penalty on the care provider. Section 94(2) and (8) respectively provide that remedial or publicity orders are not applicable penalties in relation to a director, manager, secretary or similar officer of a body corporate and in relation to an officer of an incorporated association or a member of its governing body.

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<sup>1</sup> “Commissioning contract” is defined in section 6E of the National Health Service Act 2006 (as inserted by section 20 of the Health and Social Care Act 2012).

527. *Subsection (3)* states that a remedial order will permit the court to require the convicted care provider to take certain steps to remedy the breach that led to the conviction; this includes correcting any deficiencies in conduct, management of information, policies, systems or practices. *Subsection (5)* outlines the procedures to be followed in obtaining a remedial order. The prosecution must apply to the court and suggest the terms of the proposed order, and the court must consider the representations made on behalf of both the prosecution and the convicted care provider and any evidence presented by either party.
528. *Subsection (4)* concerns publicity orders, which require a convicted care provider to publicise information about the offence, including the particulars of that offence, and details of any fines or remedial orders made.
529. For both remedial orders and publicity orders, a time period must be stated within which the required actions must have been completed (*subsections (6) and (7)*).
530. Breach of either a remedial order or a publicity order would result in a further offence and further punishment on conviction by an unlimited fine.

### ***Section 94 – Offences by bodies***

531. This section provides for the offence of providing false or misleading information to apply to directors, managers, secretaries or similar officers of care providers in certain circumstances.
532. *Subsections (1), (2) and (3)* state that where the offence is committed by a corporate body and it is committed by, or with the consent and connivance of, or is attributable to neglect on the part of a director, manager, secretary or similar officer (or a member, in the case of a local authority), they too are guilty of the offence and liable to be prosecuted and punished. The court could impose an unlimited fine or custodial sentence of up to two years imprisonment, or both, on such an individual (section 93(1)). A remedial order or publicity order (section 93(2)) could not be made in respect of an individual.
533. *Subsections (4) to (8)* make provision where the offence is committed by a care provider that is an unincorporated association. Subsection (4) provides that where proceedings are brought against an unincorporated association they are to be brought in the name of the association not in the name of the members of the association.
534. *Subsections (7) and (8)* provide that an officer of an unincorporated association, or a member of its governing body, is also guilty of the offence, where an offence committed by the unincorporated association has been committed by, or with the consent or connivance of, or is attributable to neglect on the part of, an officer or a member of the governing body of the association. Subsection (8) provides that a remedial order or publicity order cannot be made in respect of an officer or member who is convicted of the offence. The maximum penalty available to the court is an unlimited fine or up to two years imprisonment, or both (section 93(1)).

### **Regulated activities**

#### ***Section 95 – Training for persons working in regulated activity***

535. This section amends section 20 of the 2008 Act to enable the Secretary of State, through regulations, to specify the people or organisations that can set training standards for specific groups of workers. In this context, this section will allow the Government to specify in regulations: the person who sets the training standards and to whom those standards apply. Groups to whom these standards could apply include healthcare assistants and social care support workers.