

## Enforcement Policy

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## **1.0**

### **Foreword**

This policy relates to the provision of care services registered under the Public Services Reform (Scotland) Act 2010 (“the Act”).

## **2.0**

### **Introduction**

Social Care and Social Work Improvement Scotland (“the Care Inspectorate”) as the national scrutiny body for social services in Scotland, has a clear vision. We believe that people in Scotland should experience a better quality of life as a result of accessible, excellent services that are designed and delivered to reflect their individual needs and promote their rights.

We are keen to work closely with care service providers to help improve the quality of care. Responsibility for the quality of services lies with those who provide them. However, the Care Inspectorate believes that by working with providers we can encourage and influence such improvements. When standards of care fall short and/or are not improving, or where people who use care services are endangered, we will move decisively to make sure services improve and to ensure the safety of those who use services.

Regulation is an essential core part of the Care Inspectorate’s responsibilities under the Act. Enforcement is a powerful and necessary element of regulation. It is central to our aim of protecting people who use services and bringing about improvement in the quality of care services.

This enforcement policy links with the Care Inspectorate’s scheme of delegation, staff procedural guidance on enforcement, complaints procedure and memoranda of understanding with government and other scrutiny bodies.

## **3.0**

### **Principles**

As a regulator the Care Inspectorate has key principles as set out in Section 45 of the Public Services Reform (Scotland) Act 2010.

- The safety and wellbeing of all persons who use, or are eligible to use, any social service are to be protected and enhanced.
- The independence of those persons is to be promoted.
- Diversity in the provision of social services is to be promoted with a view to those persons being afforded choice.
- Good practice in the provision of social services is to be identified, promulgated and promoted.

We take into account the five principles of better regulation and our duties under the Regulators Strategic Code of practice<sup>i</sup>, as well as taking account of the SSSC Codes of Practice. A cornerstone of better regulation is the five principles of better regulation<sup>ii</sup>. The principles state that any regulation should be:

- Transparent
- Accountable

- Proportionate
- Consistent
- Targeted

## **Transparent**

External scrutiny must be transparent in all its activities, its focus, decision making criteria, business processes, assessments and reporting.

There should be a transparent decision making framework for regulatory intervention. It is essential that the processes and mechanisms which support the use of external scrutiny are transparent, so that all parties understand the particular purpose for which it is being used at any given time. For external scrutiny to be credible, its reports must be clear, independent and consistent.

## **Accountable**

Regulators should be able to justify decisions and be subject to public scrutiny.

Regulators should be able to explain how and why final decisions have been reached. Regulators and enforcers should establish clear standards and criteria. There should be well-publicised, accessible, fair and effective complaints and appeals procedures, underpinned by clear lines of accountability to Ministers, Parliaments and assemblies, and the public.

## **Proportionate**

Regulators should intervene only when necessary. Remedies should be appropriate to the risk posed and costs identified and minimised.

Policy solutions must be proportionate to the perceived problem or risk and justify the compliance costs imposed. Enforcement regimes should be proportionate to the risk posed; and regulators should consider an empowering and educational, rather than a punitive approach where possible.

**Consistent** - rules and standards must be joined up and implemented fairly.

Regulators should be consistent with each other, and work together in a joined-up way. Regulation should be predictable in order to give reasonable stability and certainty to those being regulated.

## **Targeted**

Regulation should be focused on the problem and minimise side effects.

Where appropriate, regulators should adopt an outcomes approach, with enforcers and those being regulated given flexibility in deciding how to meet clear, unambiguous targets. Regulators should focus primarily on those whose activities give rise to the most serious risks.

## **4.0**

### **Graduated Approach to Enforcement**

In keeping with the principles set out above, a graduated approach to enforcement is usually

taken. The first step in this approach will be discussion with the provider to secure a resolution.

This would not rule out the option to move directly to legal sanctions, where circumstances deem this necessary in the interests of people who use services. In most cases, however, a graduated approach should be taken, adopting the least restrictive action that is likely to address the identified issues and bring about the necessary improvement/outcomes.

### **Informal Enforcement - Requirements**

The Care Inspectorate policy on making requirements must be followed.

#### **Requirement:**

A requirement is a statement which sets out what a care service must do to improve outcomes for people who use services and must be linked to a breach in the Act, Regulations or orders made under the Act, or a condition of registration.

Where there are breaches of the legislation or conditions of registration which lead to actual or potential unsatisfactory outcomes for people who use services, we may make a requirement. The Health and Social Care Standards will be taken into account when considering the use of requirements. The evidencing of poor outcomes should be the basis of a requirement. When a requirement is made it must be linked to a regulation or part of the Act and refer to any relevant Health and Social Care Standards. Requirements are legally enforceable.

The wording of requirements must be 'SMART' i.e.

- Specific
- Measurable
- Achievable
- Relevant
- Time framed

Requirements can be made in inspection reports following inspection. There may also be circumstances when providers are notified of requirements by letter, such as when an urgent matter cannot wait until the inspection report or complaint letter is issued.

The service provider will be asked to provide an action plan detailing how they will meet the requirement(s) within the timescales. The lead inspector has to assess the action plan from the provider and be satisfied that the provider has understood the reasons for requirements and has identified suitable actions to bring about necessary improvement/change. Where the provider seeks to adjust the timescales set, the lead inspector has to assess and agree or reject on the basis that these changes are not reasonable or justifiable.

The service provider's action plan will be taken into account by the Care Inspectorate in assessing risk and deciding on follow-up regulatory activity.

The Care Inspectorate will ensure the service provider's response to requirements is monitored and recorded. In relation to those services evaluated as weak or unsatisfactory or assessed as high risk, the Chronology and Regulatory Plan should be updated and matters reviewed, as appropriate/necessary. The Care Inspectorate through the Regulatory plan will identify and set out improvement activity and monitoring practices that the Care Inspectorate will lead on or be involved in.

Where the necessary level of improvement has not been made, and there remains poor or unsatisfactory outcomes for people experiencing care, consideration should be given to using our formal powers of enforcement.

The failure to meet a requirement in itself will not necessarily lead to formal enforcement action – it will depend on the circumstances in each case.

The Chronology and Regulatory Plan will aid in identifying trends of non-sustainability of good outcomes for those experiencing care and repeated requirements over protected periods of time – these circumstances may also lead to enforcement.

The enforcement procedure must be followed when consideration is being given to the use of our powers of enforcement.

### **Formal Enforcement**

Formal enforcement refers to formal legal actions set out in the Act which the Care Inspectorate can use to change conditions of registration, require improvements or to close a service. The Care Inspectorate has been given statutory powers to take formal legal enforcement action and service providers have legal rights of review and appeal against such action.

Where informal enforcement has not succeeded in bringing about improvement or where the circumstances suggest that formal enforcement is a necessary first step, consideration can be given to using our powers of enforcement under the Act. There are a number of options available: -

#### **Section 66, Condition Notice**

The service provider may be served with a section 66 notice of proposal to impose an additional condition or to vary an existing condition of registration. Conditions provide a way to set parameters around the operation of the care service. Conditions imposed on the registration of a service will be designed to ensure that the service is safe or to ensure the service complies with the Act and relevant Regulations. Details of the service provider's right to make representations against the imposition of the condition will be provided. In most cases the Care Inspectorate will meet to discuss with the service provider prior to the written notice being issued.

#### **Section 62, Improvement Notice**

Where there is a serious breach of Regulation(s) or conditions of registration, which is leading to poor outcomes for service users, such as to justify cancellation of registration, the service provider may be served with an improvement notice, under section 62 of the Act. This will detail the nature of the improvement required, the legal basis for this action, and the timescale for implementation.

Conditions may be imposed at the same time as improvement notices.

#### **Section 64, Cancellation Notice**

Where the timescale for meeting the terms of the Section 62 improvement notice has expired without compliance, the Care Inspectorate may move to giving notice of proposal to cancel registration under section 64 of the Act. The service provider will be informed of the legal basis of the action and details of the service provider's right to make written representations against

cancellation will be included.

### **Please note**

**Cancellation under section 64 is not available in respect of Local Authority care services which are registered under Chapter 4 of the Act – if such a service has failed to comply with an Improvement Notice see section 6 of policy for further details.**

## **5.0**

### **Emergency Procedures**

Emergency procedures provide important safeguards but they will not be required routinely. They can only be used where it can be evidenced that, without them, there would be a serious risk to life, health or wellbeing of persons. For that reason, they do not form part of the normal graduated system of enforcement as outlined in the approach above. In each case where emergency enforcement is being considered, operational staff must seek legal advice without delay.

### **Emergency Condition Notice – Section 67**

The Care Inspectorate may impose an emergency condition notice at any time if it believes not to do so would pose a serious risk to the life, health or wellbeing of people. In issuing such a notice, the Care Inspectorate must be in a position to evidence that the absence of the condition would result in continued serious risk to life, health or wellbeing of persons.

An emergency condition comes into effect immediately on receipt of the notice by the service provider. The notice must give the reason for it and explain the rights of the provider to make written representations concerning any matter which it wishes to dispute and the provider's right of appeal.

The Care Inspectorate will take account of any written representations received and decide whether to leave the condition in place, vary or remove it. The Care Inspectorate will notify the provider of its decision. If the condition remains in place, the notice will again explain the provider's right of appeal to the sheriff.

### **Emergency Cancellation of Registration – Section 65**

The Care Inspectorate may apply to the sheriff at any time seeking an order to cancel a care service's registration where it believes there is a serious risk to the life, health or wellbeing of people.

The sheriff may grant such an order where it appears to him or her that unless the registration is cancelled there would be such a serious risk to people.

The Sheriff may also make such interim order as the sheriff thinks fit. When raising a section 65 application, the Care Inspectorate will usually also seek an interim order suspending the registration of the care service while the matter is under determination. This will be on the basis that we believe there would be a serious risk to the life, health or wellbeing of persons should the service continue in operation.

Solicitors will draft the application to court and all court documents and formal pleadings

required in any court proceedings.

## **6.0**

### **Services Registered Under Part 5 Chapter 4 of the Act**

Scottish Ministers must be informed of any formal enforcement action taken against local authority services registered under Part 5 Chapter 4 of the Act.

Under section 91(1) of the Act, where the Care Inspectorate issues an Improvement Notice to a Local Authority (in relation to a service registered under Chapter 4), it must notify the Scottish Ministers and provide them with a copy of the Improvement Notice.

Within 14 days after expiry of the timescale for compliance with the Improvement Notice, we must report to the Scottish Ministers on whether the Improvement Notice has been complied with or not; where it has not been complied with, those matters which have not been complied with; and must give to the Scottish Ministers such other information as they may reasonably require in relation to the compliance or failure to comply. Non-compliance with an Improvement Notice should be reported to Scottish Ministers by a senior manager.

At the point of informing Scottish Ministers of the issuing of an Improvement Notice, we will consider if we should also provide Scottish Ministers with such other relevant information as may be helpful. This could include Inspection reports, complaint resolution letters and any associated documentation or notices.

## **7.0**

### **Notifying Others of Enforcement Action**

Notice of any formal enforcement action taken will be given to local authorities, health boards and other scrutiny bodies as appropriate. This should be done in accordance with statutory reporting obligations set out in the Act and Regulations, and within any memoranda of understanding that exists between these organisations and the Care Inspectorate or otherwise as may be set out within Care Inspectorate policy.

Details of formal enforcement action taken are posted on the Care Inspectorate website, under individual care service entries held on the public register of services. Inspection reports are publicly available and will contain information on areas for improvement, recommendations or requirements made and any formal enforcement action taken. Emergency Condition Notices and the fact of the raising of any section 65 application will ordinarily be published under the enforcement section of the care service entry.

The Care Inspectorate has an expectation that providers will inform people who use services of any enforcement action taken. The Care Inspectorate will make this information publicly accessible as set out above. In addition the Care Inspectorate may, where there is an actual or potential risk of significant harm to people who use services, inform people who are experiencing care and/or their carers direct of formal enforcement action being taken. Each case will be treated on its own merits and, exceptionally, senior operational staff may take this step. Part of the assessment will be a consideration of the level of cooperation from the service provider in accurately informing people who use care services of the measures being taken and reasons.



Where the Care Inspectorate is to directly inform people who use care services and their carers of formal enforcement action being taken this should form part of the communications strategy.

Where there is a possibility of a crime having been committed the Care Inspectorate will liaise with the police and the local authority before making a decision to inform people who use services or carers.

The Care Inspectorate will provide the Scottish Social Services Council with a copy of any enforcement notices where fitness of the manager or staff of registered care services is an issue. The same practice will be followed where such individuals are registered with other bodies, such as the Nursing and Midwifery Council. Any referrals should be made in accordance with any relevant legislative provisions and any MoU that exists between relevant regulatory bodies.

## **8.0 Professional Judgement and Consistency**

This policy requires the Care Inspectorate to act fairly and proportionately, taking account of all relevant factors. It requires each situation to be carefully considered on its own merits. This will mean that in implementing this framework professional judgement will be required and evidence based assessments will need to be made to try to ascertain the most appropriate method to bring about improvement and to protect people who use care services.

The Care Inspectorate staff should be conversant with and refer to 'Right First Time', Scottish Government, March 2010 (see links below), prior to taking any formal enforcement action. It sets out four essential steps in any such decision making process; prepare, investigate, decide and notify. They sit well with the Care Inspectorate policy and procedures.

<http://www.scotland.gov.uk/publications/2010/03/18110419/0>  
<http://www.scotland.gov.uk/publications/2010/02/23134246/0>

When assessing whether to take enforcement action, and what type to take, consideration will be given to current circumstances and to the relevant regulatory history of the service. The service's capacity for improvement will be a key consideration. This will include consideration of, for example, the quality of management and leadership of the service, the quality of the service's self-evaluation and development processes and the extent to which the service has addressed any previous areas for improvements, recommendations, requirements and formal legal enforcement notices.

An internal enforcement report must be prepared and considered prior to formal enforcement action being taken. This internal report will set out the background to and basis of the proposed action, the reasons for the proposed enforcement action and analysis of relevant factors to be considered. The service's regulatory plan will inform the enforcement report. The enforcement report will usually form the basis for discussion between operational staff and legal advisors when formal legal action is being considered and prior to formal enforcement notices being issued.

In the case of emergency procedures, this internal enforcement report will inform the content of the application to the Sheriff which will be drafted by legal advisors.

The internal enforcement report must also be updated, at relevant stages, to assess the service provider's progress in complying with enforcement action and whether any further action is necessary.

Where there are differing professional views expressed these must be resolved and recorded. This will ensure a clear audit of decision making.

When planning for inspections, the Care Inspectorate will consider the monitoring arrangements and evidence needed to ensure the service provider has addressed any outstanding issues, particularly those which form the basis of requirements or improvements in an improvement notice, or otherwise formed the basis of enforcement action that has been taken. The Care Inspectorate will review the Risk Assessment Document (RAD) for the service and the Quality Assessment Grades where formal enforcement action has been taken since the last inspection.

The Care Inspectorate will make provision for "reflective practice" opportunities for all staff involved in enforcement activity. This will allow an overview of the scrutiny and improvement activity and support staff development.

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<sup>i</sup> [http://intranet/index.php?option=com\\_content&view=article&id=8534:scottish-regulators-strategic-code-of-practice&catid=17&Itemid=10](http://intranet/index.php?option=com_content&view=article&id=8534:scottish-regulators-strategic-code-of-practice&catid=17&Itemid=10)

<sup>ii</sup> <http://www.gov.scot/Topics/Business-Industry/support/better-regulation/5principlesofBetterRegulation>