



Regulatory Team E-Bulletin: April 2019

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Challenging CQC Inspection Reports: The Third Way

An unfairly critical Care Quality Commission inspection report and ensuing poor ratings may have a disastrous effect on a provider, both financially and reputationally, and deflate staff morale. There are three avenues for challenging an inaccurate inspection report. Two are well-known routes and the third is a rare beast which CQC does not acknowledge the existence of.

Factual Accuracy challenge

The first, well-known, avenue is a challenge to any part of the inspection findings. An amendment to this procedure is anticipated in the near future, but in general terms it is an opportunity for the provider to show that a finding by CQC was either inaccurate, or to put it in context.

Ratings Review

The second route is described on the CQC website as limited in the following way: *'The only grounds for requesting a rating review after the factual accuracy process and publication are that we have failed to follow our process for making ratings decisions.'* This is, therefore, not a challenge to the failings which inspectors found to be evident. The challenge must be made on the basis that even if the inspection findings are correct, the conclusion which CQC has drawn from them in relation to ratings is incorrect. That can be argued with reference to the various policy documents which CQC publishes on its website. As an example, a care home may wish to argue that the overall rating should be 'good' rather than 'requires improvement', with reference to CQC's public document *'How we aggregate ratings using the rating principles: adult social care services'*.

Statistics published by CQC show that this type of challenge is little-used, and rarely successful. CQC's annual report tells us that they carried out more than 17,000 inspections in the year ending July 2018. Many of those, of course, would have been positive and/or plainly accurate, but it is perhaps surprising to find out (from CQC Report on Ratings Reviews) that there were only 770 ratings review request submitted in 2018. Of those Reviews, only 6% resulted in a change advantageous to the provider. In a tiny number of cases the process left the provider worse off, with a lower rating in one or more areas, but the vast majority resulted in no change.

Independent Review

CQC should, following case law, agree to an independent review of disputed findings in an inspection

report, if a factual accuracy challenge is not accepted. Despite repeated confirmation by the High Court, CQC does not acknowledge this route to challenge on its website, or in practice. The path was first opened up in 2016 by the case of *R (SSP Health Ltd) v CQC*^[1] [*'SSP'*], was widened a year later in *R (Babylon Healthcare) v CQC*^[2] [*'Babylon'*] and tarmacked a year after that in *R (on the application of Ideal Carehomes (Number One Ltd)) v CQC*^[3] (*'Ideal Carehomes'*).

In the SSP case, a GP provider was successful in challenging CQC by way of judicial review in relation to factual matters in an inspection report that (it was argued) could be shown on an objective basis to be demonstrably wrong. The Court observed that the factual accuracy process tended to be conducted by the same inspector as had made the original findings and that there was no independent oversight. The judge, Mrs Justice Andrews, stated that *"...if fairness required an amendment and the amendment was not made, there is no reason to shut out the complainant from elaborating on its objections if they were raised at the appropriate stage."* She went on to say that, *"In order to be fair, there ought to be an effective process for resolving such complaints swiftly and fairly. It must be robust enough to ensure that legitimate complaints will be upheld."* The independent reviewer will be an employee of CQC, but not someone linked to the inspection. The court in SSP made plain that the independent review should happen after the factual accuracy challenge, in response to a complaint that the inspector's response to the factual accuracy challenge is misleading: *"...there is an obligation on the CQC to carry out an independent review of a decision made in response to comments in the Factual Accuracy Comments Log, on a request to do so by the inspected entity, if the ground of complaint is that a fact-finding maintained in the draft report is demonstrably wrong or misleading."* The High Court also made clear that the publication of the report need not be held up in most cases.

CQC has amended its factual accuracy processes in response to the High Court rulings. CQC has added an independent review 'layer' to the factual accuracy process, described on the CQC website Factual Accuracy Guidance in this way: *'All factual accuracy responses will be reviewed by another member of the Commission's staff from the relevant Inspection Directorate who is authorised to sign off the related inspection report. This staff member will be independent of the original site visit.'*

Is this enough? There is a strong argument that CQC's current process does not comply with case law because it conflates two steps: the factual accuracy step, and the independent review step. In the case of *Babylon*, the claimant argued that the amended process was not procedurally fair, because it was necessary that the service provider should first see the response of the inspection team about factual accuracy before then asking *'for an independent review, and that review will separately indicate whether any addition [sic] changes should or should not be made. In other words, they say, the two responses should not be conflated.'* (para 82). The court held that the two-stage process was *'what was intended by Andrews J, as set out in unequivocal terms'* (para 83). That case involved the High Court giving permission on a ground of appeal, but there was no subsequent substantive appeal: the case only goes as far as saying that the ground remained 'arguable'. When the High Court looked at SSP for a third time in 2018, in *Ideal Carehomes* it again interpreted SSP as requiring a separate independent review if complaint was raised about the factual accuracy process.

Where next?

It is arguable that CQC's current Factual Accuracy process does not give full effect to judicial decisions. It remains to be seen whether the amended Factual Accuracy process, anticipated shortly, moves any closer to a separate independent factual review stage. In the meantime, providers whose factual accuracy challenges are not accepted by CQC may have the High Court on their side if they push for an independent review after CQC's initial response to the factual accuracy challenge has been received.

[1] [2016] EWHC 2086 (Admin)

[2] [2017] EWHC 3436 (Admin)

[3] [2018] EWHC 886 (Admin)

Practice Areas:

Regulatory

Albion Chambers

Broad Street

Bristol

BS1 1DR

Telephone: 0117 927 2144

www.albionchambers.co.uk
